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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

PETE CHEROTI, Plaintiff and Appellant, v. HARVEY & MADDING, INC., Defendant and Appellant.	A135553 (Alameda County Super. Ct. No. HG10500986)

Plaintiff Pete Cheroti sued defendant Harvey & Madding, Inc. (H&M), which operates a car dealership, after it repossessed two new cars he had purchased. Cheroti initially brought only individual claims against H&M, but nearly a year after filing his complaint he amended it to add two class claims. The class claims were soon after stayed, and the individual claims were sent to trial. Prior to trial, H&M petitioned to compel arbitration of the individual claims under the sales contracts, but the petition was denied on grounds of waiver. H&M then prevailed at trial.

After the stay of the class claims was lifted, H&M petitioned to compel their arbitration. Cheroti again asserted waiver, as well as contending the matter had been decided in the court's prior ruling. He also argued the arbitration clause, contained on the back of a complex, one-page, preprinted document, was procedurally and substantively unconscionable. The trial court rejected Cheroti's procedural arguments, but it agreed the clause was unconscionable and denied the petition to compel on that ground.

We agree with the trial court that Cheroti's procedural arguments are without merit. We also agree with the trial court that the transaction was procedurally

unconscionable, since the arbitration agreement was imposed on Cheroti without the opportunity for negotiation. In light of the minimal level of procedural unconscionability and the absence of significant substantive unconscionability, however, we find no basis to decline to enforce the parties' agreement and reverse the trial court's denial of the petition to compel.

I. BACKGROUND

In February 2010, Cheroti filed an action for breach of contract, conversion, and various statutory violations against H&M, which operates a car dealership under the name "Dublin Honda." The complaint alleged Cheroti purchased two new cars from H&M on representations H&M could find financing for the purchases. Nearly two months later, H&M contacted Cheroti and told him it intended to rescind the sales because it had been unable to secure financing, although the sales contracts granted H&M only 10 days to rescind for this reason. H&M later repossessed the cars. The caption of the complaint indicated the action was filed on behalf of a class, but the complaint contained no class allegations and did not seek class relief. The sales contracts contained identical arbitration clauses, but H&M answered the complaint without seeking to compel arbitration. A trial date was set for June 24, 2011.

In January 2011, Cheroti filed a second amended complaint adding three new claims. Among them were two claims designated as class claims, one under the federal Equal Credit Opportunity Act (15 U.S.C. § 1691 et seq.) and a second under Business and Professions Code section 17200. Class allegations were also added. H&M answered the second amended complaint, again without mentioning the issue of arbitration.

In March 2011, Cheroti sought complex designation for the action. In the motion, Cheroti explained that, at a case management conference held in February, "the parties discussed the recent amendments to the Complaint adding Class action allegations. The parties agreed, and [the court] ordered, that Plaintiff . . . move to have the case deemed Complex and transferred to the Complex Department." H&M filed a nonopposition to the motion. In April, the complex case department entered an order denying the motion,

but it stayed litigation on the class claims and ordered "that the trial . . . go forward on the original, individual claims."

In early June 2011, H&M was granted leave to file a petition to compel arbitration on shortened time. H&M's long-delayed request to arbitrate was purportedly premised on the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 536 U.S. ___ [131 S.Ct. 1740] (*Concepcion*), which had been issued a month earlier. As H&M explained, *Concepcion* expressly overruled existing California Supreme Court authority that had held class action waivers, like the one in the arbitration clause of the sales contracts, to be unenforceable. The relief sought by H&M was not entirely clear. The petition sought "an order compelling [Cheroti] to submit the dispute" to arbitration, but H&M's memorandum of points and authorities interpreted this phrase as seeking only arbitration of the individual claims. Cheroti opposed the motion, arguing H&M had waived arbitration by failing to plead it as an affirmative defense, conducting discovery and otherwise participating in litigation, and failing to seek arbitration in a timely manner. Cheroti also contended the arbitration clause in the sales contracts was unenforceable under the doctrine of unconscionability.

At oral argument on the petition, the trial court opened by stating its view that *Concepcion* was irrelevant to "the individual claim[s] and the issue of whether or not the arbitration clause was good as to the individual claim[s]." Argument then focused on the issues relating to waiver, with the trial court concluding, "I think you could have asked for the arbitration of these individual claims before the class claims were made, and I think there has been enough discovery . . . that there is a waiver." The court's extensive written order, issued on June 10, 2011, denied the petition on grounds of waiver, holding *Concepcion* did not change the law "in any way relevant to Plaintiff's right to pursue his individual claims in this Court."

H&M prevailed at the trial of Cheroti's individual claims in September 2011, but the court reserved entry of judgment pending resolution of the class claims. The stay of the class claims was lifted at a case management conference in November 2011.

In December 2011, H&M filed a petition to compel arbitration of the class claims, again invoking *Concepcion*. Cheroti opposed the petition, again arguing H&M had waived arbitration by failing to raise the issue earlier in the litigation and the arbitration clause in the sales contracts was unenforceable under the doctrine of unconscionability. In addition, Cheroti argued the petition was an improper motion for reconsideration of the earlier, denied petition and contended H&M had yet to provide a proper evidentiary foundation for the sales contracts.

The sales contracts are a preprinted form that is commonly used by vehicle sellers in California.[1] It is a single piece of paper, 26 inches long, with dense printing on both sides. On the upper half of the front page, contained in a series of boxes, are provisions relating largely to the financial terms of sale, credit, and insurance. Many contain blank spaces filled in by the seller for the particular transaction. The buyer is required to sign the form in 10 different places. Four signed provisions concern the purchase (or declining) of optional items, such as insurance and a service contract. The remaining signed provisions are acknowledgments of various legal matters: the contract can be amended in writing only, the buyer must obtain liability insurance, the seller is relying on the buyer's representations, the seller may cancel if the agreement cannot be assigned, and the buyer has certain legal remedies. Some of these signatures are required by law. (See Civ. Code, §§ 2982, subd. (h), 2984.1.) Above the final signature line, on the right-hand side, is a statement in all capital letters acknowledging the buyer was given an opportunity to "TAKE . . . AND REVIEW" the contract and has read "BOTH SIDES" of it and noting the presence of an arbitration clause "ON THE REVERSE SIDE."

The reverse side, also dense with text, contains a number of provisions in separate boxes, many dealing with typical "boilerplate" legal matters, such as warranties, applicable law, and buyer and seller remedies. None of the provisions on the back page requires a buyer's signature. Toward the bottom of the page is the arbitration clause.

[1] The form, No. 553-CA-ARB, printed by the Reynolds and Reynolds Company, is discussed in a number of other appellate decisions involving vehicle sales disputes.

The entire text of the clause is outlined in a black border. In all capital letters and bold type at the top is written, "**ARBITRATION CLAUSE** [¶] **PLEASE REVIEW—IMPORTANT—AFFECTS YOUR LEGAL RIGHTS**." Immediately below, three numbered provisions, also in all capital letters, inform the buyer either party may request arbitration, this would prevent a court or class-wide proceeding, and it might limit discovery. Below these, in smaller type, are the actual terms of the clause. Pursuant to these terms, the arbitration may be conducted under the auspices of the National Arbitration Forum or the American Arbitration Association (AAA), at the election of the buyer, or by any other mutually agreeable organization; the initial arbitration will be conducted by a single arbitrator; it will occur in the federal district of the buyer's residence; the seller must advance up to $2,500 of the buyer's arbitration costs; the award is binding unless it is $0 or more than $100,000 or includes injunctive relief, in which case either party can request a second arbitration before three arbitrators; and the use of self-help remedies and small claims court is exempted.[2]

In support of his claim of unconscionability, Cheroti submitted a declaration describing the sales transaction. He was not provided a copy of the sales contracts to review prior to their execution, and the H&M salesperson spent "no more than a few seconds" explaining them. No mention was made of the arbitration clause.
On the contrary, H&M did not call Cheroti's attention to the back side of the sales contracts or turn the contracts over. During execution of the sales contracts, Cheroti was given no opportunity to negotiate their terms and was merely instructed where to sign. Cheroti also claimed he "was not allowed to read the back of the contract[s]," although he did not explain how H&M prevented him from doing so. In addressing the possibility of arbitration, Cheroti said he and his wife were both small business owners of "limited means." Although he provided no specific information about their financial status, he did

[2] For reasons of concision we have not quoted the entire clause, but we quote specific challenged provisions when discussed in the next section.

state, "We would never be able to afford thousands of dollars of expenses for an arbitration."

The trial court denied the petition to compel in two orders. In the initial order, the court found the petition was not an improper motion for reconsideration and held there had been no waiver of the right to petition to compel arbitration of the class claims. The court concluded it could address the petition on its merits and sought additional briefing on certain issues.

Following entry of this order, Cheroti filed a motion to strike the petition to compel, repeating his arguments that the petition was an improper motion for reconsideration of the earlier petition and had been waived.

In an extensive subsequent order, filed after the submission of additional briefing, the trial court confirmed its initial rulings and concluded it was "not [i]nfeasible" for Cheroti to pursue his claims individually. It denied the petition, however, finding the arbitration clause was both procedurally and substantively unconscionable. In a separate order filed the same day, the court summarily denied Cheroti's motion to strike the petition.

II. DISCUSSION

The parties have cross-appealed. H&M contends the trial court erred in denying its petition to compel, while Cheroti contends the trial court erred in denying his motion to strike the petition to compel. We begin with Cheroti's arguments.[3]

[3] H&M argues Cheroti's appeal was improper because an order denying a motion to strike a petition to compel is not an appealable order. We decline to rule on the issue because there is no practical consequence to H&M's argument. The sole argument Cheroti raises in his appeal, that the petition to compel was an improper motion for reconsideration and therefore nonappealable, could have been raised in opposition to H&M's appeal as an alternative ground for affirming the trial court's denial of the petition to compel. The issues remain the same regardless of the validity of Cheroti's notice of appeal.

A. *Evidence of the Arbitration Agreement*

Cheroti argues the petition to compel should have been denied because a properly authenticated copy of the sales contracts was never submitted to the trial court.

Petitions to compel arbitration are resolved in a summary proceeding, in the manner of a motion, and need not "follow the normal procedures of document authentication." (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218; Code Civ. Proc., § 1290.2.) A petition to compel must attach a copy of the alleged written arbitration agreement or quote the relevant arbitration provision. (Cal. Rules of Court, rule 3.1330.) The burden then shifts to the opposing party to submit evidence of the falsity of the allegation of a written agreement to arbitrate. (*Condee*, at p. 219.) In the absence of such evidence, the petitioner is deemed to have carried its burden of proof regarding the existence of the agreement. (*Ibid.*) Submission of an authenticated copy of the alleged written agreement is therefore unnecessary, at least in the absence of the opposing party's submission of evidence suggesting the alleged agreement is not authentic.

Cheroti did not contend the copies of the sales contracts submitted by H&M are not accurate copies of the original sales contracts signed by him and attached as exhibits to each of his complaints, and he provided no evidence to suggest he had not executed a valid arbitration agreement.[4] He merely contended the copies submitted by H&M had not been properly authenticated. Because Cheroti provided no evidence contesting the authenticity of the arbitration provision submitted by H&M, the trial court properly found that a written agreement to arbitrate existed.

B. *Waiver*

Cheroti next contends H&M waived its right to seek arbitration by participating in the litigation for over a year before petitioning to compel arbitration of the class claims.

[4] Cheroti actually attached only the face page of the sales contracts to his complaints, but he provided no evidence suggesting that the reverse sides submitted by H&M were not genuine.

The law governing waiver of a contractual right to arbitrate was summarized in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*): "State law, like the [Federal Arbitration Act (9. U.S.C. § 1 et seq.)], reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. [Citation.] Although a court may deny a petition to compel arbitration on the ground of waiver [citation], waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Id.* at p. 1195.)

"Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. [Citations.] ' "In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the 'bad faith' or 'wilful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]" ' [Citation.] [¶] . . . 'In determining waiver, a court can consider "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." ' " (*St. Agnes, supra,* 31 Cal.4th at pp. 1195–1196.)

The latter point is critical. " ' "The moving party's mere participation in litigation is not enough [to support a finding of waiver]; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration." [Citation.]' [Citations.] [¶] . . . [¶] . . . '[C]ourts will not find prejudice

where the party opposing arbitration shows *only* that it incurred court costs and legal expenses.' [Citation.] . . . '[T]he critical factor in demonstrating prejudice is whether the party opposing arbitration has been substantially deprived of the advantages of arbitration as a " ' "speedy and relatively inexpensive" ' " means of dispute resolution.' " (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 451–452 (*Lewis*), italics added by *Lewis*.)

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. [Citations.] 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' " (*St. Agnes, supra*, 31 Cal.4th at p. 1196.) Here, the material facts are not disputed.

In reviewing Cheroti's claim of waiver, a brief time-line is helpful. The complaint was filed in February 2010. While the caption of the complaint referred to class status, no class claims were actually pleaded until January 2011. Litigation of those claims was stayed three months later in an order that effectively severed litigation of the class claims from litigation of the individual claims. Two months later, June 2011, H&M sought and was denied arbitration of the individual claims on grounds of waiver. After those claims were tried in September, stay of the class claims was lifted in November. The next month, H&M filed its petition for arbitration of the class claims.

On that record, we agree with the trial court that Cheroti failed to make the case for waiver of arbitration of the class claims. Litigation on the class claims was stayed within three months of their pleading, and H&M petitioned for arbitration of the claims within a month of the lifting of the stay. As a result of the stay, the effective delay between the filing of the class claims and the petition to compel arbitration of them, while not short, was not as long as it might otherwise appear. Very little litigation activity occurred during the time period outside the stay; the only motion practice, for example, was Cheroti's uncontested motion for complex status.

Ordinarily, greater participation in litigation by the petitioning party is required before a waiver will be found from what is effectively a four-month delay in asserting the right to arbitrate. *Lewis* is a typical case. The defendant delayed for four months in petitioning for arbitration. In the interim, however, it had filed two demurrers and a motion to strike the complaint. While it did not serve any discovery, it responded to the plaintiff's discovery and declined to extend the deadline for moving to compel discovery, thereby forcing the plaintiff to file three motions to compel discovery. (*Lewis*, *supra*, 205 Cal.App.4th at pp. 440–441, 446.) Based on this conduct, the court concluded the defendant had unreasonably delayed in asserting the right to arbitration and engaged in conduct inconsistent with an intent to arbitrate. (*Id.* at pp. 446–450; see also *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1205 [waiver found where defendant did not assert right to arbitration for a year and engaged in discovery and motion practice].) H&M, in contrast, did little with respect to the class claims other than answering the second amended complaint and consenting to the denied motion for complex designation. Most importantly, unlike the defendants in *Lewis* and *Hoover*, H&M did not invoke the machinery of litigation in an attempt to defeat the class claims prior to asserting its right to arbitrate. H&M's conduct was also considerably different from that of the petitioning party in the primary case cited by Cheroti, *Roberts v. El Cajon Motors, Inc.* (2011) 200 Cal.App.4th 832 (*Roberts*). Prior to asserting the right to arbitration, the defendant in *Roberts* used the discovery process to gain information with which it made sub rosa settlement offers to class members in an effort to undercut the plaintiff's litigation of his class claims. (*Id.* at pp. 846–847.) Nothing of the sort occurred here.

It is true, as Cheroti notes, that H&M made no mention of arbitration in its answer to the second amended complaint and even requested a jury trial in the case management statement filed soon thereafter. In light of the strong policy favoring arbitration in California, however, more than a mere failure to invoke is required to waive a contractual right to arbitrate. (*St. Agnes*, *supra*, 31 Cal.4th at p. 1195; *Lewis*, *supra*, 205 Cal.App.4th at pp. 452–453.)

Cheroti's argument for waiver focuses almost exclusively on actions taken, or not taken, by H&M with respect to the individual claims. His assertion that H&M litigated "for [o]ver 600 days" before petitioning to compel arbitration, for example, is presumably measured from the filing of the initial complaint, which did not include class claims, and includes the period during which litigation of the class claims was ordered in abeyance by the court. Similarly, the depositions of Cheroti and his wife, cited by Cheroti as evidence of waiver, occurred in preparation for trial of the individual claims, after stay of the class claims. No depositions occurred prior to the stay. While it is likely true, as Cheroti argues, that information gained through discovery in litigating the individual claims will be relevant to the class claims, the conduct of discovery on the individual claims does not support a finding of waiver with respect to the class claims merely because the relevant facts overlap. Cheroti provides little evidence that H&M used discovery during litigation of the individual claims to gain information related solely to the class claims, or otherwise attempted during the stay to advance its position with respect to the class claims.[5] (Compare *Roberts*, *supra*, 200 Cal.App.4th at pp. 836–838 [defendant obtained class-based discovery prior to invoking the right to arbitrate].)

If Cheroti had asserted his class claims from the outset of the litigation or if litigation of the class claims had not been stayed in favor of the individual claims, it might make sense to consider the litigation efforts taken by H&M with respect to the individual claims in evaluating class claim waiver. As it was, however, Cheroti's class claims were litigated virtually independently of his individual claims, making it appropriate to consider waiver with respect to the class and individual claims separately. This is particularly true because the independent litigation of the class and individual

[5] H&M acknowledges questioning the Cherotis at their depositions on issues relating to one of the class claims. H&M says the questioning was "very, *very*" limited," while Cheroti calls it extensive. Because the deposition transcripts are not in the record, we cannot resolve the issue. We accept H&M's explanation that it felt compelled to ask the questions because of its uncertainty over the potential application of the "one deposition" rule. (Code Civ. Proc., § 2025.610, subd. (a).)

claims was not attributable to H&M's conduct. Rather, it was a direct result of Cheroti's decision to delay asserting his class claims until nearly a year after filing the litigation.

C. *Motion for Renewal/Reconsideration*

Cheroti contends H&M's second petition to compel was improper because the ruling on the first petition to compel settled the issue of the availability of arbitration of the class claims. As a result, H&M's second petition was, in effect, an untimely motion to reconsider the court's ruling on the first petition. Because the scope of the first petition to compel and the trial court's ruling on it constitute issues of fact, we review the trial court's conclusion the ruling did not reach the class claims for substantial evidence. (*Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1127 ["To the extent that the lower court's order is based on a finding of material fact, we adopt a substantial evidence standard."].)

We find substantial evidence in the record to support the trial court's conclusion that H&M's first petition was not directed at the class claims and the trial court's order denying the petition did not resolve the issue of arbitration of the class claims. Although at oral argument in this court H&M's counsel stated the first petition was intended to reach all claims, the petition itself was not specific about the relief sought, and H&M's memorandum of points and authorities stated it sought only "an order compelling [Cheroti] to arbitrate his individual claims . . . ."[6] Even if, as counsel suggested, H&M *intended* to seek arbitration of the class claims, the trial court could reasonably have inferred the petition was directed solely to the individual claims, since that is how H&M's memorandum characterized its scope.

Further, there is little question the trial court's order denying the petition was addressed only to the individual claims. The court mentioned only the individual claims at oral argument on the petition and in its order, and its rationale for denying the petition

[6] The petition was not necessarily inconsistent with the memorandum, since the petition stated only that H&M sought "an order compelling [Cheroti] to submit the dispute" to arbitration. Because the class claims were stayed at the time, the trial court could reasonably have understood the "dispute" to refer to the individual claims.

applied only to the individual claims.[7] When discussing waiver in its order, the trial court noted that trial was scheduled to begin in two weeks and H&M "has taken significant advantage of 'litigation machinery' and other judicial discovery procedures not available in arbitration to determine and assess [Cheroti's] legal theories and the factual support for his claims." Because no trial was scheduled for the class claims, which were stayed, and H&M had done virtually no discovery regarding the class claims, as discussed above, this rationale applied only to the individual claims. In addition, H&M argued its delay was justified by the issuance of *Concepcion*, but, as the trial court reasoned in the order denying the petition, *Concepcion* was not "in any way relevant to [Cheroti's] right to pursue his individual claims." Not only did the trial court not mention the class claims, its treatment of *Concepcion* would undoubtedly have been different had it believed it was ruling on the class claims.[8]

Contrary to Cheroti's claim, the legal and factual issues relating to the two petitions were not the same. Because, as discussed in the preceding section, the individual and class claims had arisen separately and been treated differently by the court, the considerations relating to waiver were similarly different. Further, as noted, the applicability of *Concepcion* to the individual and class claims was quite different.

It is also significant that litigation of the class claims was stayed at the time of the first petition, and, because the individual claims were ordered to trial in the interim, the class claims had been effectively severed from the individual claims. It is not clear H&M could have sought an order compelling arbitration of the class claims without first obtaining an order lifting the stay, and no such order was sought.

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[7] At oral argument before this court, Cheroti's counsel suggested that the trial court's order denying the petition was summary and did not clearly refer to the individual claims. In fact, the order was one and a half single-spaced pages long, clearly and fully explained the court's reasoning, and expressly mentioned only the individual claims.

[8] Cheroti argues H&M must have intended for its petition to cover arbitration of the class claims because its cited explanation for its delay, *Concepcion*, had no relevance other than as an excuse for delay with respect to the class claims. The argument certainly illustrates the lack of substance in H&M's first petition to compel, but it does not change the fact that the trial court found waiver only as to the individual claims.

D. *Unconscionability*

The Supreme Court has accepted review of a series of published decisions ruling on the unconscionability of the arbitration clause in the preprinted sales contract used by H&M, each of which addressed variations of the arguments raised by Cheroti. To date, however, the Supreme Court has not yet rendered its own opinion, and there does not appear to be a remaining published Court of Appeal decision.[9]

1. *Legal Background*

Through enactment of a comprehensive statutory scheme regulating private arbitration, the Legislature "has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) "The policy of [California's] law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." (*Utah Const. Co. v. Western Pac. Ry. Co.* (1916) 174 Cal. 156, 159, disapproved on other grounds in *Moncharsh v. Heily & Blase*, at p. 27.) Thus, California law establishes "a presumption in favor of arbitrability." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 971.)

Notwithstanding the "highly favored" status of arbitration (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189), an agreement to arbitrate may be avoided on the same "grounds as exist for the revocation of any contract" (Code Civ. Proc., § 1281). When seeking to compel arbitration, the petitioner bears the burden of proving that an

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[9] The cases accepted for review include *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, review granted March 21, 2012, S199119; *Goodridge v. KDF Automotive Group, Inc.* (2012) 209 Cal.App.4th 325, review granted and briefing deferred December 19, 2012, S206153; *Flores v. West Covina Auto Group, LLC* (2013) 212 Cal.App.4th 895, review granted and briefing deferred April 10, 2013, S208716; *Natalini v. Import Motors, Inc.* (2013) 213 Cal.App.4th 587, review granted and briefing deferred May 1, 2013, S209324; and *Vargas v. SAI Monrovia B, Inc.* (2013) 216 Cal.App.4th 1269, review granted and briefing deferred August 21, 2013, S212033, in addition to our own decision in *Vasquez v. Greene Motors, Inc.* (2013) 214 Cal.App.4th 1172, review granted and briefing deferred June 26, 2013, S210439.

agreement to arbitrate exists, while the opponent has the burden of proving the facts underlying any defense to enforceability. (*Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708.) The most commonly asserted ground for refusing to enforce an arbitration agreement is the one asserted here, unconscionability. "Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence." (*Chin,* at p. 708; see § 1670.5.)

" '[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. [Citation.] '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.' [Citation.] 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.' [Citations.] 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 v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).)

"Procedural unconscionability focuses on the elements of oppression and surprise. [Citation.] Oppression occurs where there is an inequality of bargaining power which results in a lack of real negotiation and an absence of meaningful choice." (*Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035 (*Lanigan*).) The classic example of oppression is the use of a contract of adhesion—a contract presented without the option of negotiation, on a take-it-or-leave-it basis. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 (*Little*).) Surprise is " 'a function of the disappointed reasonable expectations of the weaker party' " (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252) and "results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice" (*Dotson v. Amgen, Inc.*

(2010) 181 Cal.App.4th 975, 980). Most often, "[s]urprise involves the extent to which the terms of the bargain are hidden in a verbose printed form drafted by the party in a superior bargaining position." (*Lanigan*, at p. 1035.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*).) As our Supreme Court characterized the analysis in its most recent decision addressing the unconscionability doctrine, "Unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as ' " 'overly harsh' " ' [citation], ' "unduly oppressive" ' [citation], ' "so one-sided as to 'shock the conscience' " ' [citation], or 'unfairly one-sided' [citation]. All of these formulations point to the central idea that [substantive] unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party' [citation]. These include 'terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.' " (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145 (*Sonic-Calabasas*).)

2. *Procedural Unconscionability*

There is little question the sales contracts were subject to a degree of procedural unconscionability, as determined under California law. Absent unusual circumstances, a contract offered on a take-it-or-leave-it basis is deemed adhesive, and a commercial transaction conditioned on a party's acceptance of such a contract is deemed procedurally unconscionable. (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 469 (*Gentry*).) As the Supreme Court noted in *Gentry*, "Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced [citation], contain a degree

of procedural unconscionability *even without any notable surprises*, and 'bear within them the clear danger of oppression and overreaching.' " (*Ibid.*, italics added.) H&M's use of a preprinted contract, without offering Cheroti the opportunity to negotiate its terms, qualified the transaction as procedurally unconscionable.[10]

H&M argues that adhesion alone has been found insufficient to support a finding of procedural unconscionability outside the context of arbitration, citing *Robison v. City of Manteca* (2000) 78 Cal.App.4th 452, 454, and *Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, 345, disapproved on other grounds in *Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 545 and footnote 5. Regardless, the rule is well-established when an adhesive contract imposes a requirement of arbitration, it is found to be procedurally unconscionable, as the cases cited above and in footnote 10, *ante*, demonstrate.[11]

3. *Degree of Procedural Unconscionability*

A finding of procedural unconscionability through adhesion is only the beginning of the enforceability analysis. As we recently noted, " 'this adhesive aspect of an agreement is not dispositive.' [Citation.] Courts have observed that '[w]hen, as here,

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[10] A number of other decisions have also held the use of a nonnegotiable contract, standing alone, to be sufficient to support a finding of procedural unconscionability. (See *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1470 (*Peng*); *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 704; *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 843; *Dotson v. Amgen, Inc.*, *supra*, 181 Cal.App.4th 975, 981; *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100; *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 585.)

[11] We have found only a small number of decisions in which a nonnegotiable contract imposing arbitration was found *not* to involve procedural unconscionability, generally involving unusual circumstances. In *Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634 (*Walnut Producers*), for example, not only were the parties sophisticated businesspeople—walnut growers and a walnut processor—but the growers were found, in effect, to have imposed the nonnegotiable contract on themselves through their prior dealings with the processor. (*Id.* at p. 646.) Similarly unusual is *Pinnacle, supra*, 55 Cal.4th 223. Although the Supreme Court found the use of a contract of adhesion in the purchase of a condominium unit not procedurally unconscionable, it relied on the unique nature of condominium sales, in which a contract of adhesion is, as a practical matter, required by law. (*Id.* at pp. 247–248.)

there is no other indication of oppression or surprise, "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." ' " (*Peng*, *supra*, 219 Cal.App.4th at p. 1470; see similarly *Armendariz*, *supra*, 24 Cal.4th at p. 114 ["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"].)

Although we conclude a sufficient degree of procedural unconscionability is present to require our examination of the circumstances and substantive terms of the sales contracts, we do not agree with Cheroti that H&M's conduct demonstrated a high degree of procedural unconscionability.

a. *Oppression*

We begin with the recognition that H&M's use of a preprinted, nonnegotiable contract is common in the modern commercial world. As noted in *Gentry*, such contracts are "indispensable facts of modern life." (*Gentry*, *supra*, 42 Cal.4th at p. 469.) They have long been a feature of the purchase of insurance and high value goods, such as vehicles and homes, but they have become ubiquitous as commerce has moved to the Internet. It is virtually impossible to purchase or use software or acquire cellular telephone and other telecommunications services without being required to execute nonnegotiable licenses or other terms of purchase or use. Despite the negative connotations of the legal terms applied to the use of take-it-or-leave-it contracts—"oppression," "adhesion," and "unconscionability"—the very ubiquity of the practice precludes a conclusion that the use of a nonnegotiable contract, on its own, is unethical.

Given this background, we do not view H&M's conduct during the process of contract execution, described by Cheroti in his declaration, as contributing to the procedural unconscionability of the transaction. While Cheroti contends he was not given the opportunity to read the sales contracts, he does not claim H&M actively interfered with its review. Cheroti does not, for example, state that he attempted to read the contracts and was prevented from doing so, or asked to take the contracts to an

attorney for review and was refused the opportunity, or was presented with a contract in a language he did not understand, or was told the sale was conditioned on his acceptance of the contracts without review. (See *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1145 [finding procedural unconscionability on these grounds].) Nor did H&M attempt to coerce him into signing the sales contracts by suggesting he could get no better terms elsewhere. (See *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 822, 824.) Similarly, he does not claim any affirmative misrepresentations about the terms of the sales contracts. (See *Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 622.) Rather, it appears the salesperson guided Cheroti through the preprinted contracts, seeking his signature in appropriate places, without, on the salesperson's own initiative, pausing or encouraging Cheroti to read. It has never been held that merchants have an obligation to "sit beside" a customer "and force them to read (and ask if they understand) every provision" in a contract. (*Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1156 (*Mission Viejo*) [insurance policy not unconscionable]; see also *O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 259–260 [no duty to explain terms of contract]; *Robison v. City of Manteca*, *supra*, 78 Cal.App.4th 452, 459 [no procedural unconscionability where plaintiff presented with contract open to signature page but not prevented from reading it].)

Importantly, these were consumer contracts, not an employment contract. Although it is sometimes said the same unconscionability standards apply to all contracts (*Walnut Producers, supra,* 187 Cal.App.4th 634, 644), an exception must be made for employment contracts. The Supreme Court has recognized that adhesion contracts of employment are particularly likely to be found to feature procedural unconscionability because of the critical importance of the employment relationship. (E.g., *Sonic-Calabasas, supra,* 57 Cal.4th at p. 1134 [" 'contract terms imposed as a condition of employment are particularly prone to procedural unconscionability' "]; *Armendariz, supra,* 24 Cal.4th at p. 115; *Ajamian v. CantorCO2E, L.P.* (2012) 203 Cal.App.4th 771, 796.) Because of the importance of the employment relationship, burdens of disclosure

and informed consent are placed on employers seeking to impose arbitration agreements that have not been imposed outside that relationship. Conversely, conduct found objectionable in the employment context does not carry the same stigma in an ordinary consumer transaction.

b. *Surprise*

Nor do we agree with Cheroti that the arbitration clause was tainted by "surprise." Cheroti argues surprise largely on the placement of the arbitration provision on the reverse side of the form contract from the signature page, although he also discusses the failure to require him to sign or initial the arbitration provision, H&M's failure to bring the clause to his attention or turn the contracts over during the course of their execution, and the failure to provide him a copy of the AAA rules.

We decline to find surprise merely because the arbitration clause was found on the reverse side of the document. The use of a single, unusually long page with writing on both sides was, arguably, dictated by state law, which requires a vehicle installment sale contract to "be printed in type no smaller than 6-point" and "contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle." (Civ. Code, § 2981.9.) The vehicle sales industry has traditionally interpreted "single document" to mean "single sheet of paper." (See 92 Ops.Cal.Atty.Gen. 97, 100 (2009).)[12] While this is not conclusive, H&M's intent to comply with a specific state statute on the format of the agreement certainly argues against a finding of procedural unconscionability on that ground. (*Pinnacle*, *supra*, 55 Cal.4th at pp. 247–248.)

[12] In an opinion issued at the end of 2009, the Attorney General took issue with this requirement. Although noting the industry's long-standing interpretation of the statute as requiring a single-sheet document, the Attorney General opined, "While a single-sheet document, which forecloses the possibility of pages becoming detached, may serve these objectives [of the statute] well, the single document rule does not require that the document consist of only one sheet of paper." (92 Ops.Cal.Atty.Gen. *supra*, at p. 100.) We need not rule on the requirements of the statute and note only that H&M's interpretation is plausible and consistent with industry practice.

More important, in a contract containing only two pages, a provision does not become hidden merely by being placed on the back side. A consumer can be expected to turn the contract over, particularly when, as here, a legend on the front refers to the terms on the back. Cheroti's argument cannot differentiate between the validity of the arbitration clause and the remaining provisions on the reverse side, and we are reluctant to cast all provisions on the back into the shadow of unconscionability, particularly because, as discussed above, state law arguably requires all provisions of the document to be contained in a single sheet. (Civ. Code, § 2981.9.) In the current format, placing all provisions on the front would have required a single, 52-inch sheet of paper.

Further, as suggested, the fact of the writing on the reverse side is hardly hidden. The face page of the document contains an acknowledgment above the signature line that the purchaser has read "BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW." Cheroti argues that this provision is not obvious because it is located on the right-hand side of the page, above the signature line for a "Co-Buyer," rather than being placed directly above the signature line for the buyer. We are not persuaded the provision is significantly less visible to a buyer merely because it is placed a couple inches to the right of center.

When the document is flipped, the arbitration clause occupies the bottom third of the page, in a box outlined in black. In all capitals and bold, at the top, it states: "**ARBITRATION CLAUSE [¶] PLEASE REVIEW—IMPORTANT—AFFECTS YOUR LEGAL RIGHTS**." Directly underneath, again in all capitals, it states, "EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL." There is no attempt to hide or disguise the clause, and the most important legal element of the clause, the waiver of court proceedings, is plainly and prominently stated. Many decisions have found no surprise when an arbitration clause is captioned in large, bold type and presented in type no smaller than the remainder of the contract. In *Pinnacle*, the Supreme Court found no surprise when "the arbitration provisions . . . appear in a

separate article under a bold, capitalized, and underlined caption titled 'ARTICLE XVIII CONSTRUCTION DISPUTES,' and within a separate section with the bold and underlined title, 'Section 18.3. Resolution of Construction Disputes by Arbitration.' The provision . . . describing the waivers of jury trial and right to appeal, are set forth in separate subsections of section 18.3, with the latter appearing in bold and capital letters. . . . Additionally, the recitals on page 2 . . . state, in capital letters, that article XVIII of the declaration 'refers to mandatory procedures for the resolution of construction defect disputes, including the waiver of the right to a jury trial for such disputes.' " (*Pinnacle, supra,* 55 Cal.4th at p. 247, fn. 12.) The presentation of the arbitration clause in the sales contracts is not materially different from this.

Nor do we find surprise in Cheroti's failure to read the sales contracts and his consequent ignorance of the presence of the arbitration clause. While we realize there is authority to the contrary (see *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1290–1291 (*Bruni*) and cases cited therein), we find ourselves in disagreement with the reasoning of these cases. The ordinary rule of contract law is, " 'in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.' " (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1588; see also *Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 93 [law presumes everyone who signs a contract has read it thoroughly].) This principle has been applied by the Supreme Court in the context of at least one contract of adhesion. (*Casey v. Proctor* (1963) 59 Cal.2d 97, 104–105 [plaintiff's failure to read preprinted release does not excuse enforcement]; see also *Pinnacle, supra,* 55 Cal.4th at p. 236 ["An arbitration clause within a contract may be binding on a party even if the party never actually read the clause."].)[13]

[13] For similar reasons, we reach the same conclusion with respect to Cheroti's claim it was unconscionable for the H&M employee who supervised the signing not to bring the arbitration clause to his attention. (See *Mission Viejo, supra,* 197 Cal.App.4th at p. 1154.)

Finally, Cheroti contends H&M acted unconscionably in failing to present him with a copy of the AAA rules. The arbitration clause does not, however, require the use of AAA or any other specific alternative dispute resolution provider. It proposes two default organizations at the choice of the buyer, including AAA, and permits any other organization by agreement of the parties. Accordingly, presentation of the rules of any particular organization would be premature and could be viewed as coercive. In any event, Cheroti cites us to no decisions in which this requirement has been applied outside the context of employment contracts, which, as noted, are subject to more stringent requirements of procedural unconscionability. On the contrary, as we recently held in *Peng*, the failure to attach the rules of an adjudicating body contribute to surprise only if they are found to contain unexpected provisions that limit the scope of the plaintiff's claims or otherwise affect the relief available. (*Peng, supra*, 219 Cal.App.4th at p. 1471.) Cheroti points to no such limits in the AAA rules.

4. *Substantive Unconscionability*

Cheroti contends the arbitration clause is substantively unconscionable because the likely arbitration fees are excessive and the restriction on appeal rights disproportionately benefits H&M.

As noted above, the Supreme Court has held that substantive unconscionability "is concerned not with 'a simple old-fashioned bad bargain' [citation], but with terms that are 'unreasonably favorable to the more powerful party' [citation]." (*Sonic-Calabasas, supra*, 57 Cal.4th at p. 1145.) While *Sonic-Calabasas* provides little useful guidance in determining when a favorable provision is "unreasonably" favorable (see *id.* at p. 1172 (conc. opn. of Corrigan, J.)), the court's seminal decision in *Armendariz* is helpful in giving a functional meaning to that inherently subjective standard. Discussing prior authority, *Armendariz* noted: "We conclude that *Stirlen* [*v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519] and *Kinney* [*v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322] are correct in requiring [a] 'modicum of bilaterality' in an arbitration agreement. Given the disadvantages that may exist for plaintiffs arbitrating disputes, 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 based on 'business realities.' As has been recognized ' "unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." ' [Citation.] If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose." (*Armendariz, supra,* 24 Cal.4th at pp. 117–118.) The court returned to the "justification" issue later in the decision, noting in its holding: "We emphasize that if an employer does have reasonable justification for the arrangement—i.e., a justification grounded in something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum—such an agreement would not be unconscionable." (*Id.* at p. 120.) In other words, substantive unconscionability adheres only if a one-sided provision has no objective justification other than to tilt the arbitration scales in the favor of the clause's author. It is the attempt to make the arbitration proceeding something other than a fair forum that makes an arbitration clause "unreasonably favorable" to the drafting party.

From that perspective, we review the aspects of the clause cited by Cheroti as unfair.[14]

[14] We consider only the grounds for substantive unconscionability argued in the opposition portion of Cheroti's opening brief, entitled "Brief of Respondent and Cross-appellant." He alludes to other grounds for substantive unconscionability in his cross-appellant's reply brief, but these were forfeited when he failed to assert them in his opening brief. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1426.) In any event, these arguments were beyond the proper scope of the cross-appellant's reply brief, which should have addressed only matters relevant to the "reconsideration" issue raised in Cheroti's cross-appeal.

a. *Costs of Arbitration*

Cheroti contends the arbitration clause is substantively unconscionable because he will be unable to afford the costs of arbitration. The sales contracts provide that H&M must advance the first $2,500 of the buyer's arbitration costs, but the buyer is responsible for costs above this amount. Further, the advance may be recovered by H&M in the arbitrator's award.[15] While in certain circumstances expense of arbitration is a proper ground for finding substantive unconscionability, Cheroti has failed to create the factual record necessary to prevail under this theory.

The court in *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, found that "based on the American Arbitration Association rules in effect at the time the defendant moved to compel arbitration, the plaintiff would have had to pay $ 8,000 in administrative fees to initiate the arbitration. [Citation.] It was undisputed that such fees exceeded the plaintiff's ability to pay." (*Sonic-Calabasas, supra*, 57 Cal.4th at p. 1144, citing *Gutierrez* with approval.) As a result, *Gutierrez* found the clause substantively unconscionable, concluding, "where a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay." (*Id.* at p. 89, fn. omitted.) Outside of employment claims, however, neither *Gutierrez* nor any other California decision has found that an arbitration clause requiring a plaintiff to pay arbitration costs is per se unconscionable.[16] Instead, in *Gutierrez* and *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, the courts held that the substantive unconscionability of provisions in consumer (*Gutierrez*)

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[15] The agreement provides: "We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law."

[16] In *Armendariz, supra*, 24 Cal.4th 83 and *Little, supra*, 29 Cal.4th 1064, the Supreme Court required employers to pay the costs of arbitration in certain statutory employment cases. The court declined to extend that rule outside the employment context in *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 507–508.

and financial (*Parada*) agreements requiring the claimant to pay his or her own arbitration costs must be evaluated on a "case-by-case basis," with the outcome dependent on the ability of the claimant to pay, the anticipated costs of the arbitration, and the amount at issue in the arbitration. (*Gutierrez*, at pp. 97–98; *Parada*, at pp. 1580–1581; see also *Sonic-Calabasas*, at p. 1144.) The consumer has the burden of demonstrating the clause unconscionable on these grounds, necessarily by submitting evidence on the relevant issues.[17] (*Gutierrez*, at pp. 96–97.)

Accordingly, to demonstrate substantive unconscionability on grounds of affordability, Cheroti was required to submit evidence of his own financial resources, the reasonably anticipated cost of this particular arbitration, and the amount of the potential award. The record contains no concrete evidence of Cheroti's financial circumstances. Although Cheroti characterized them as having "limited means," both he and his wife were employed as small business owners, and he presumably felt sufficiently confident of their financial circumstances to purchase two new cars that together cost nearly $50,000. Beyond that, there is no evidence, other than his conclusory statement that "[w]e would never be able to afford thousands of dollars of expenses for an arbitration."[18] Because the arbitration clause allows the parties to select an arbitration provider, the likely cost of the arbitration was also uncertain. Cheroti submitted evidence of the filing fees required by AAA, which vary with the nature of the relief sought, beginning with a fee of $775 for a claim under $10,000. The filing fee for a "nonmonetary" claim is $3,350. Because Cheroti's class claims sought both unspecified damages and injunctive relief, he argued the nonmonetary rates would apply. Regardless, neither of these approaches the $8,000

[17] The trial court found the arbitration clause substantively unconscionable in part because the costs of arbitration "may exceed those he would be obligated to pay in court." This has never been held to be the legal standard for unconscionability on account of expense. Because arbitration is a privately funded means of dispute resolution, the trial court's rationale would have the effect of making all arbitration clauses voidable.

[18] H&M asserts in its opening brief that Cheroti "owns two homes," but we found no evidence to support this assertion in the appellate record.

filing fee found unconscionable in *Gutierrez.* Given the lack of concrete information about Cheroti's means, we cannot say that the cost of the arbitration necessarily exceeded his means.

b. *"Appeal" Rights*

Cheroti also challenges the "appeal" provision of the arbitration clause, which permits either party to request a second arbitration before three arbitrators if the first arbitration, conducted before a single arbitrator, results in injunctive relief or an award of $0 or more than $100,000.[19]

Cheroti first argues the $100,000 threshold is one-sided because a plaintiff is unable to appeal an excessively small judgment, while a defendant is permitted to appeal an excessively large judgment. Characterized in this manner, the clause appears asymmetric, but this impression does not survive a careful consideration of the practical impact of the appeal limits. The clause contains two thresholds for an appeal. The first is an award of $0—the equivalent of a defense verdict. The plaintiff, ordinarily a buyer, can appeal any time his or her claim is entirely denied. The second is an award in excess of $100,000. The value of this appeal right is presumably limited, since only the most expensive vehicles have a replacement cost in excess of $100,000. Since the net effect of the restrictions is to preclude nearly all appeals, except those by a buyer denied any recovery at all and a seller subjected to an extraordinarily large award, both buyers and sellers disappointed by the size of an arbitration award will generally find themselves without recourse.

This balance distinguishes the clause from the provision found unconscionable in *Little, supra,* 29 Cal.4th 1064, which permitted only the appeal of an award in excess of

[19] The precise language of the clause is as follows: "The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs."

$50,000. (*Id.* at p. 1070.) *Little* struck down the provision because it was "asymmetrical," allowing appeals of awards against the employer but rarely allowing an appeal to the employee. (*Id.* at p. 1073.) Because they deny appeal to both parties of all but the most extreme awards, the sales contracts here are not similarly asymmetrical.

Cheroti also argues the appeal provisions are unfair because they permit a second arbitration if injunctive relief is granted but not if such relief is requested but denied. We agree with Cheroti this provision will be of primary benefit to the seller, which seems more likely to be the subject of injunctive relief. Yet we find the allowance of an appeal in the event of injunctive relief to be justified by " 'business realities.' " (*Armendariz, supra*, 24 Cal.4th at p. 117.) Depending on its nature, injunctive relief could have a substantial, continuing effect on a business. Given the potential significance of this result for a seller's business, it is proper to preserve the right to challenge such an award.

While it is true the clause does not allow an equivalent appeal to a claimant denied injunctive relief, the one-sided impact of the provision is mitigated by the claimant's right to appeal a $0 award. In many cases in which injunctive relief is requested and denied, a monetary award will also be denied, triggering the right to request a second arbitration. As discussed above, a provision is not substantively unconscionable merely because it is "one-sided"; it must be "unreasonably" one-sided. Because a claimant denied injunctive relief will, as a practical matter, ordinarily be entitled to request a second arbitration, the actual one-sidedness of this aspect of the appeal provision is sufficiently minimal that it cannot be said to be unreasonable.

5. *Enforcement of the Arbitration Clause*

As discussed above, "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.) While we find the sales contracts to be procedurally unconscionable, we also conclude they were only minimally so, given the absence of evidence of "surprise or other sharp practices." (*Gentry, supra*, 42 Cal.4th 443, 469.) As a result, a substantial degree of substantive unconscionability would be required to defeat enforcement of the clause. In

the above discussion, the only suggestion of substantive unconscionability we found was the failure of the clause to permit an "appeal" arbitration in the event a buyer sought and was denied injunctive relief. Because this asymmetry is mitigated by the provision permitting a second arbitration if a buyer is denied a monetary recovery, we conclude it did not rise to the level of substantive unconscionability. Accordingly, there is no basis for declining to enforce the parties' agreement to arbitrate.

III. DISPOSITION

The trial court's order denying the petition to compel arbitration is reversed. The matter is remanded to the trial court for entry of an appropriate order directing arbitration under the terms of the sales contracts.

_____
Margulies, Acting P.J.

We concur:

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Dondero, J.

_____
Banke, J.