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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARIA GONZALEZ et al., Plaintiffs and Respondents, v. METRO NISSAN OF REDLANDS et al., Defendants and Appellants.	E056160 (Super.Ct.No. CIVDS1105056) OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Reversed.

Manning Leaver Bruder & Berberich, Robert D. Daniels, and Crystal S. Yagoobian for Defendants and Appellants Metro Nissan of Redlands and Federated Mutual Insurance Company.

Severson & Werson, Jan T. Chilton, Duane M. Geck, and Kerry W. Franich for Defendant and Appellant Nissan Motor Acceptance Corporation.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry, and Angela J. Patrick for Plaintiffs and Respondents.

Apparently many new car dealers in California use a form purchase and sale contract, which includes a form arbitration clause. The question of whether this form arbitration clause is unconscionable or not has produced no fewer than five published appellate opinions so far: *Vargas v. SAI Monrovia B, Inc.* (2013) 216 Cal.App.4th 1269 (unconscionable), review granted, August 21, 2013, S212033; *Vasquez v. Greene Motors, Inc.* (2013) 214 Cal.App.4th 1172 (not unconscionable), review granted June 26, 2013, S210439; *Natalini v. Import Motors, Inc.* (2013) 213 Cal.App.4th 587 (unconscionable), review granted, May 1, 2013, S209324; *Flores v. West Covina Auto Group* (2013) 212 Cal.App.4th 895 (not unconscionable), review granted, April 10, 2013, S208716; *Goodridge v. KDF Automotive Group, Inc.* (2012) 209 Cal.App.4th 325 (unconscionable), review granted, December 19, 2012, S206153; *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74 (unconscionable), review granted, March 21, 2012, S199119. As noted, the California Supreme Court has granted review in all these cases; however, it has not yet decided any.

Because we have no guidance from the Supreme Court, and because we cannot rely on the decisions of our sister courts, we are forced to analyze the issue independently. Obviously, no matter which side we come down on, reasonable minds could differ; the Supreme Court will have the final word. Nevertheless, we explain our

reasons, as we are constitutionally required to do (Cal. Const., art. VI, § 14), in the hope of contributing to the grand dialectical process of the common law.

Ultimately, we conclude that the arbitration clause is enforceable and not unconscionable.

I

FACTUAL BACKGROUND[1]

On July 25, 2010, Maria Gonzalez and her adult son Jesus Gonzalez bought a new Sentra from Metro Nissan of Redlands (Metro).

Metro prepared a written contract. It consisted of a seven-page preprinted form with blanks for matters such as price and payment terms. The preprinted terms were nonnegotiable — if the Gonzalezes wanted to buy the car, they had to sign the form contract.

After filling in the blanks, Metro printed out a "review copy." It gave the Gonzalezes an opportunity to read the review copy, then asked them if they had any questions. They did not. They then executed the contract by signing an electronic signature pad.

The contract included the following arbitration clause:

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[1] This appeal is from the order denying the renewed motion to compel arbitration. (See part II, *post*.) Accordingly, the following facts are taken from the evidence offered in support of and in opposition to that motion.

"**ARBITRATION CLAUSE**

"**PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**

"1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.

"2. IF A DISPUTE IS ARBITRATED, *YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US* INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.

"3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

"Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors, or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration clause shall not

apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis *and not as a class action. You expressly waive any right you may have to arbitrate a class action*. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

"Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. 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. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. 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. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration.

"*You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court* for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help or filing suit. . . . If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable." (Italics added.)

The arbitration clause took up the entire last page of the contract. The Gonzalezes did not separately sign that page. However, they did separately sign the preceding page, underneath the following wording:

"YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU

ACKNOWLEDGE THAT YOU HAVE READ ALL PAGES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON PAGE 7, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT."

The Gonzalezes testified that they were not subjectively aware of the arbitration clause when they signed the contract. They were not provided with a copy of the relevant arbitration rules or with access to a computer so they could review the rules online.

II

PROCEDURAL BACKGROUND

The Gonzalezes filed this action in April 2011. The defendants included Metro; Nissan Motor Acceptance Corporation (Acceptance), to which Metro allegedly assigned the contract; and Federated Mutual Insurance Company (Federated), which allegedly bonded Metro against fraud. (See Veh. Code, § 17710.)[2]

The operative complaint asserted five causes of action — the first four asserted against Metro and Acceptance, and the fifth asserted solely against Federated:

1. Violation of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.).

2. Violation of the Magnuson-Moss Warranty Act (15 U.S.C. § 2301 et seq.).

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[2] A fourth defendant, Nissan North America, Inc., is not involved in this appeal.

3. Violation of the Consumers Legal Remedies Act (Civ. Code, § 1770, subd. (a)).

4. Violation of the Automobile Sales Finance Act (Civ. Code, § 2981 et seq.).

5. Liability on a statutorily required surety bond (Veh. Code, § 11710).

In June 2011, Metro and Federated filed a motion to compel arbitration. In August 2011, the trial court granted the motion; at the time, it specifically found that the arbitration clause was not unconscionable.

In October 2011, however, *Sanchez v. Valencia Holding Co., LLC, supra*, 201 Cal.App.4th 74 held that an arbitration clause identical to the one in this case was unconscionable. In November 2011, the Gonzalezes asked the trial court to reconsider its ruling in light of *Sanchez*. Based on *Sanchez*, the trial court reversed itself and denied the motion to compel arbitration. However, it specified that the denial was without prejudice to a renewed motion to compel arbitration if the publication status of *Sanchez* changed.

In March 2012, the California Supreme Court granted a petition for review in *Sanchez*. One week later, all three defendants filed a renewed motion to compel arbitration.

Meanwhile, in April 2012, the Gonzalezes moved to file an amended complaint and to vacate the trial date (then set for June 11). The proposed amended complaint would have added various class causes of action. The motion was set for hearing on May 2, 2012.

On April 23, 2012, the trial court denied the renewed motion to compel arbitration. This time, it specified that the denial was without prejudice to a renewed motion to compel arbitration in the event that it granted the motion to amend the complaint.[3]

On April 27, 2012, Acceptance filed a notice of appeal from the order denying the renewed motion to compel arbitration. As the trial court recognized, this automatically stayed further proceedings in the action. (Code Civ. Proc., § 916; *Prudential-Bache Securities, Inc. v. Superior Court* (1988) 201 Cal.App.3d 924, 925.) Accordingly, the motion to file an amended complaint was taken off calendar, and so was the trial. On June 11, 2012, Metro and Federated also filed a notice of appeal.

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[3] The basis of the trial court's ruling is not entirely clear. It seems to have found that defendants had waived arbitration by litigating. For example, it stated, "This has been pending in this court for months. You have been litigating this case." However, it may have found that the arbitration agreement was unconscionable. It also stated, "I think [*Sanchez*]'s right on point. It addresses this particular arbitration provision and holds it's unconscionable."

What seems to have been crucial to its decision was that, if the Supreme Court affirmed *Sanchez* after the arbitration had already begun, that would be unfair to the Gonzalezes. Metro's counsel (perhaps unwisely) took the position that "if you're in arbitration and the law changes, [so] that arbitration is no longer proper, you stay in arbitration. But if you're in court and the law changes and you're no longer proper in court, then you go to arbitration." The trial court responded, "Seems like the defendant always wins and the plaintiff always loses in the possible scenarios." This is fairness reasoning, but it is not exactly orthodox waiver reasoning.

Finally, if its ruling was truly based on waiver, it seems odd that it would agree to consider a renewed motion in the event that the Gonzalezes amended the complaint.

III

APPEALABILITY

Preliminarily, defendants contend that the denial of their motion to compel arbitration is appealable, despite the fact that it was expressly "without prejudice" to reconsideration if the pending motion to amend the complaint was granted. The Gonzalezes do not argue otherwise. Nevertheless, because this issue goes to our jurisdiction, we begin by explaining why we agree with defendants.

An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) However, "appealable arbitration orders require finality." (*Vivid Video, Inc. v. Playboy Entertainment Group, Inc.* (2007) 147 Cal.App.4th 434, 442; accord, *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 803.)

An order that is made "without prejudice" may lack the necessary finality. (See *Gibson v. Savings & Loan Commissioner* (1970) 6 Cal.App.3d 269, 272.) The mere fact that an order uses the words "without prejudice," however, is not determinative; we must look at its actual effect. In *Sanders v. Kinko's Inc.* (2002) 99 Cal.App.4th 1106, when the defendant moved to compel arbitration (*id.* at pp. 1108-1109), the plaintiff responded that compelling arbitration would be "'premature'" unless and until the trial court decided whether the action should be certified as a class action. The trial court agreed; it therefore denied the motion "'without prejudice.'" (*Id.* at p. 1109.)

The appellate court held that the denial of the motion to compel arbitration was nevertheless appealable. It explained: "The trial court's ruling, while not foreclosing the possibility of arbitration altogether, did have the effect of staying any arbitration until after the class certification issues are resolved." (*Sanders v. Kinko's Inc.*, *supra*, 99 Cal.App.4th at pp. 1109-1110.) "If defendant is correct in asserting the trial court erred by not immediately ordering . . . arbitrat[ion] while staying the remainder of the lawsuit, then its ruling, even if without prejudice until after completion of the class certification process, effectively defeated the benefits provided by the arbitration agreement. Thus, the order is appealable." (*Id*. at p. 1110.) Here, identically, if the trial court erred by allowing the action to proceed, then its ruling effectively denied defendants the benefits of the arbitration clause.

Incidentally, we also note that the motion to amend the complaint was unlikely to affect the outcome of the motion to compel arbitration. The trial court refused to compel arbitration because it concluded that, under *Sanchez*, the arbitration clause was unconscionable. The amendment, if allowed, would have added class action claims. We see no reason why this would have changed the trial court's unconscionability ruling. If anything, it would have highlighted one of the arguments that the Gonzalezes were already making — that the arbitration clause was unconscionable precisely because it included a purported class action waiver.

We conclude that the order denying the motion to compel arbitration was sufficiently final to be appealable.

IV

AUTHENTICATION OF THE CONTRACT

Preliminarily, the Gonzalezes contend that the trial court could properly deny the motion to compel arbitration because defendants failed to properly authenticate the contract containing the arbitration clause.

Kay Gamboa, Nissan's finance manager, stated that Exhibit A to her declaration was a "true" copy of the contract. She also stated, "I was present when [the Gonzalezes] signed their names on the designated spaces on the contract," and "I personally witnessed the [Gonzalezes] sign the original of Exhibit A in the spaces provided therein for their signatures." (Boldface omitted.) The Gonzalezes argue that this testimony was "demonstrably false" because they actually signed an electronic signature pad.

One problem with this argument is that the Gonzalezes' own complaint and amended complaint attached an identical copy of the contract, including the arbitration clause.[4] Thus, they made a judicial admission that that was, in fact, the contract. (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126-1127.)

The more fundamental problem is that this argument does not really go to authentication. A writing can be authenticated by "evidence sufficient to sustain a

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[4] The copy attached to the complaint was missing one page, but that was clearly just a clerical error. In any event, the missing page is not material to the arbitration issue.

finding that it is the writing that the proponent of the evidence claims it is . . . ." (Evid. Code, § 1400.) Here, Gamboa testified that Exhibit A was a true copy of the contract. The Gonzalezes did not dispute that; they merely testified that they signed the contract electronically, rather than physically.[5] Thus, Gamboa was misleading, at best, when she said that she saw them sign "on the contract." Nevertheless, this did not undermine her testimony that Exhibit A was a true copy.

Finally, the Gonzalezes themselves essentially testified that the contract did include an arbitration clause when they stated, "Enforcement of *the arbitration clause on the back of the contract* would cause financial hardship for me . . . ." (Italics added.)

We therefore conclude that the contract was adequately authenticated.

V

UNCONSCIONABILITY

Defendants contend that the Arbitration Clause was not unconscionable.

"Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation,

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[5] The contract itself defined the "Authoritative Copy" as an electronic copy of the contract, then provided: "[I]f the Authoritative Copy is converted by printing a paper copy which is marked by us as the original (the 'Paper Contract'), then you acknowledge and agree that (1) your signing of this contract with your electronic signature also constitutes issuance and delivery of such Paper Contract, (2) your electronic signature associated with this contract, when affixed to the Paper Contract, constitutes your legally valid and binding signature on the Paper Contract, and (3) subsequent to such conversion, your obligations will be evidenced by the Paper Contract alone."

focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."' [Citation.]

"The party resisting arbitration bears the burden of proving unconscionability. [Citations.] Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' [Citation.] '[T]he 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.' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 246-247.)

A. *Procedural Unconscionability*.

"[P]rocedural unconscionability requires oppression or surprise. '"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, *supra*, 55 Cal.4th at p. 247.)

A contract of adhesion — defined as "'a standardized contract, which, imposed and drafted by a party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it'" (*Armendariz v. Foundation*

Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113) — is usually considered to be procedurally unconscionable, albeit only minimally. (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796.)

The Gonzalezes testified that, aside from the price and financing terms, the contract was presented on a take-it-or-leave-it basis; in other words, their only choice was to accept the arbitration clause or leave without a car. Defendants argue that the Gonzalezes had the option of going to another dealer.[6] However, this would not prevent the contract from being adhesive. "[A]bsent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives." (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 585, fn. omitted.)

The Gonzalezes also showed that Metro did not provide them with a copy of the rules of the American Arbitration Association or the National Arbitration Forum before they signed. " . . . 'Numerous cases have held that the failure to provide a copy of the arbitration rules to which the [plaintiff] would be bound supported a finding of procedural unconscionability. [Citations.]'" (*Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1523.) Again, however, the failure to provide

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[6] Defendants assert that "[t]here are at least five other Nissan dealers located within a relatively short driving distance of Metro . . . ." However, they introduced no evidence of this below; they have not asked us to take judicial notice of it, and they have not supplied any material from which we could take such judicial notice. Accordingly, we disregard this assertion.

such rules "is of minor significance to our analysis." (*Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 737.)

The Gonzalezes failed to prove more than this minimal amount of procedural unconscionability. In particular, they failed to prove surprise. The evidence showed that, in every instance, Metro prints out a review copy of the proposed contract and gives the buyer an opportunity to read it. Once the buyer is done, a Metro representative asks if he or she has any questions. That procedure was followed in this case.

Moreover, the arbitration clause was hardly hidden or inconspicuous. The contract was only seven pages long; the arbitration clause took up the entire seventh page. The top of the page is headed, "**ARBITRATION CLAUSE**," in bold capitals. Below that, also in bold capitals, are the words, "**PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**."

The Gonzalezes point out that the arbitration clause came after the last signature line. However, above the last signature line that the Gonzalezes did sign were the words, "YOU ACKNOWLEDGE THAT YOU HAVE READ ALL PAGES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON PAGE 7, BEFORE SIGNING BELOW." This was actually quite conspicuous.

The Gonzalezes also point out that they did not sign a hard copy of the contract; they signed via an electronic pad. The record is somewhat vague about exactly how much of the wording of the contract also showed up on the pad. However, this is beside

the point, as, again, the Gonzalezes had an opportunity to read and review a hard copy before signing.

Finally, both of the Gonzalezes testified that they were subjectively unaware of the arbitration clause. However, the failure to read a contract provision that is otherwise clear and conspicuous falls short of establishing surprise. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 443 ["failing to read the contract is no excuse, otherwise all contracts of adhesion would be unenforceable at the whim of the adhering party"].)[7]

B. *Substantive Unconscionability*.

So far, the Gonzalezes have shown sufficient procedural unconscionability for us to at least consider substantive unconscionability. However, because the degree of procedural unconscionability they have shown is minimal, they have the burden of showing a relatively greater degree of substantive unconscionability. They assert that the arbitration clause is substantively unconscionable for four main reasons. We will address these seriatim.

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[7] The Gonzalezes also argue that, even aside from unconscionability, the arbitration clause is unenforceable because it was not within their reasonable expectations, and terms in an adhesion contract that are outside the weaker party's reasonable expectations are unenforceable. That is true, however, only "if the weaker party is not given plain and clear notice of the contract term. [Citations.]" (*Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1057; see also *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820, fn. 18.) Here, the Gonzalezes were given notice, and there was no surprise. Hence, they have not shown that the arbitration clause did not meet their *reasonable* expectations.

1. *Second arbitration by a three-arbitrator panel.*

The arbitration clause provides that, after an arbitration before a single arbitrator, either party can request a new arbitration before a three-arbitrator panel, but only if (1) the award is $0, is over $100,000, or includes injunctive relief, and (2) the requesting party advances all arbitration costs. The Gonzalezes argue that these conditions are one-sided and therefore substantively unconscionable.

Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064 held that a provision for appealing arbitration awards to a second arbitrator only if they were over $50,000 was so one-sided as to be unconscionable. (*Id*. at pp. 1071-1074.) The provision in this case is distinguishable, because it gives both sides a reasonable opportunity to challenge an extreme award. In a dispute over the sale of a motor vehicle for personal use, from $1 to $100,000 is a reasonable range to establish for likely awards; an award outside this range raises a suspicion of bias or error. Moreover, both sides could reasonably seek to limit their risk. The lower limit of $1 protects plaintiffs; the upper limit of $100,000 protects defendants. Even assuming that sellers are most likely to be defendants and buyers are most likely to be plaintiffs, this double-tailed range does not favor sellers.

The exclusion of injunctive relief does, to some extent, favor defendant-sellers. Significantly, however, injunctive relief can be sweeping, intrusive, and unpredictable, particularly as compared to a damages award of not more than $100,000. Even in an arm's-length transaction, a seller might well insist on such a provision limiting its risk;

moreover, a buyer might well agree to it, in exchange for a provision limiting its risk of a $0 award. Our conscience is unshocked.

Because the right to request a second arbitration is not one-sided, the requirement that the requesting party advance all costs likewise is not one-sided. As discussed, there is a realistic possibility that the requesting party may be either the buyer or the seller. Moreover, this requirement serves as a check on frivolous or harassing requests. It is significant that the final allocation of costs remains up to the three-arbitrator panel; thus, while the requesting party must advance costs, if the request is meritorious, he or she most likely will be able to recover them from the nonrequesting party.

Indeed, to the extent that this provision is one-sided at all, it is one-sided in *favor* of the *buyer*, as a result of Code of Civil Procedure section 1284.3. That statute provides that, in a private "consumer arbitration,"[8] the consumer cannot be required to bear the other party's fees and costs if the consumer does not prevail. (Code Civ. Proc., § 1284.3, subd. (a).) It is arguable that this invalidates the advance fee provision here outright, at least when applied to a consumer. At a minimum, however, even assuming a consumer must advance all costs, the arbitrator ultimately could not require the consumer to pay his or her adversary's costs. On the other hand, if the seller requests a second arbitration, it

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[8] There is no statutory definition of "consumer arbitration." It would seem, however, that under any reasonable definition, the arbitration of the dispute in this case would qualify. (See Cal. Rules of Court, Ethics Stds. for Neutral Arbitrators in Contractual Arbitration, std. 2(d), (e) [defining "consumer arbitration" as one conducted under arbitration provision that a person who acquires goods for family or household purposes is required to accept].)

must advance all costs, and it may be required to bear its adversary's costs, as well. In addition, an indigent consumer is entitled to a waiver of fees and costs. (Code Civ. Proc., § 1284.3, subd. (b).)

The Gonzalezes argue that the costs requirement is one-sided in practice because the seller is likely to have deeper pockets than the buyer. It has been held that "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." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89, fn. omitted.) Here, however, the buyer does not have to pay fees for the initial arbitration. Ordinarily, the award in the initial arbitration — including a $0 award — would be final and binding. Thus, the provision for a second arbitration is a significant benefit to the buyer, as well as to the seller. Conditioning access to this additional, optional level of review on the ability to pay the associated costs is not unconscionable.[9]

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[9] The Gonzalezes also argue that the requirement that the dealer advance the costs of the initial arbitration is illusory and one-sided, because this obligation is subject to a $2,500 cap. "[N]ot much of an arbitration can be had for only $2,500," they grumble.

Defendants respond (in part) that the dealer must advance *its own* half of the costs, *plus* up to $2,500 of the buyer's half of the costs, for a total of $5,000.

We need not decide which interpretation of the $2,500 cap is correct. Even though the Gonzalezes had the burden of proof, they did not introduce any *evidence* that $2,500 was an inadequate amount. The only relevant evidence they offered was that, in three similar arbitrations, two before JAMS and one before the National Arbitration Forum, the arbitrators charged $400-600 an hour. There was no evidence as to how long the arbitrations took or that the total costs exceeded $2,500. Moreover, there was no evidence regarding the cost of an arbitration before the American Arbitration Association.

2. *Self-help and small claims exceptions.*

Next, the Gonzalezes argue that the self-help and small claims exceptions make the arbitration clause one-sided because they effectively exempt most of a dealer's claims from arbitration.

The self-help exception makes sense in light of the basic purpose of arbitration. "Arbitration has become highly favored as an economical, efficient alternative to traditional litigation in law courts. [Citations.]" (*Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1076.) Self-help, by definition, does not involve litigation. Requiring the parties to forego self-help in favor of arbitration would only make the resolution of disputes slower and more expensive, rather than the converse. Indeed, if the arbitration clause did not expressly allow self-help, we would construe it as allowing self-help implicitly; when one party resorts to self-help, just as when one party files a lawsuit, it is then up to the other party to demand arbitration of any remaining dispute. The only risk that the party exercising self-help might face would be a subsequent claim that it had waived its own right to demand arbitration.

Admittedly, when a dealer[10] has a claim against a buyer, it is likely to resort to self-help, namely repossession. However, the dealer's right to repossession is not necessarily the end of the story. The buyer may frustrate repossession by keeping the

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[10] If the dealer has assigned the contract to a lender, it would be the lender who would have a claim against the buyer; in that case, however, the lender would step into the shoes of the dealer and would be subject to the arbitration clause.

vehicle in a locked garage. (See *Henderson v. Security Nat. Bank* (1977) 72 Cal.App.3d 764, 768.) Even if the dealer manages to repossess the vehicle, the buyer may owe a deficiency. Thus, there is still a meaningful likelihood that the dealer will assert an arbitrable claim against the buyer. (See *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 845, fn. 21 [arbitration clause not unconscionable just because it includes exceptions for self-help and small claims].)

Moreover, as defendants point out, a buyer who has a claim against a dealer may be entitled to self-help, too, namely setoff. Under the California Uniform Commercial Code, "[t]he buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." (Cal. U. Com. Code, § 2717.) More generally, even if the buyer has a claim for a tort or for a statutory violation, rather than for breach of contract, he or she could still offset it against the purchase price. (See *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 743-744.) Then, if the dealer sued to recover the setoff amount, it could be required to submit to arbitration. Thus, the self-help exception is not so one-sided as to be unconscionable.

The small claims exception likewise makes sense, as a small claims action is relatively cheap and efficient — closer to arbitration rather than to an ordinary civil action. Moreover, it is not particularly one-sided, as both a dealer and a buyer's claims are likely to be below the basic $5,000 small claims limit. (See Code Civ. Proc., § 116.220, subd. (a)(1).) In fact, in two respects — a natural person can bring a small

claims action for up to $10,000 (Code Civ. Proc., § 116.221), and nobody can bring more than two small claims actions per year for more than $2,500 (Code Civ. Proc., § 116.231, subd. (a)) — this exception actually tilts toward the buyer.

3. *Class action waiver.*

The Gonzalezes also argue that the class action waiver is illegal and one-sided.

The Gonzalezes' third cause of action was brought under the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) (the CLRA). The CLRA provides that any waiver of the right to bring a class action under its provisions is void. (Civ. Code, §§ 1751, 1781.) Defendants respond that this portion of the CLRA, when applied to claims that are subject to arbitration, is preempted by the Federal Arbitration Act (9 U.S.C. § 1 et seq. (the FAA)).

In *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601, 617-619 (Fourth Dist., Div. Two), this court held that the FAA does not preempt the CLRA's ban on class action waivers. Thereafter, the United States Supreme Court held that the FAA *does* preempt a state rule that a class action waiver in an arbitration agreement is unconscionable. (*AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___, ___ [131 S.Ct. 1740, 1746-1753, 179 L.Ed.2d 742].) However, it is not at all clear from *Concepcion* that the FAA also preempts the CLRA's ban on class action waivers, because this ban is not limited to waivers in arbitration agreements.

We need not decide this question. Even assuming the class action waiver is illegal and/or unconscionable, it is severable. (See *Little v. Auto Stiegler, Inc.*, *supra*, 29 Cal.4th

at p. 1074-1076.) Admittedly, the "poison pill" provision of the arbitration clause states, "If a waiver of class action rights is deemed or found to be unenforceable for any reason *in a case in which class action allegations have been made*, the remainder of this Arbitration Clause shall be unenforceable." (Italics added.) Here, however, there are no class action allegations.[11] Hence, the arbitration clause is enforceable regardless of whether the class action waiver is valid.

4. *Misleading choice of arbitrators.*

The arbitration clause purportedly allows the Gonzalezes to choose arbitration by the National Arbitration Forum (the NAF) or by the American Arbitration Association (the AAA), or by any other organization that Metro approves. The parties appear to agree, however, that the NAF stopped doing consumer arbitrations in July 2009. (See *Carideo v. Dell, Inc.* (2009) 2009 U.S. Dist. LEXIS 104600 at p. *11.) The Gonzalezes argue that this means that the arbitration clause is misleading, and they effectively have no choice of arbitral forum.

If a contractual promise is misleading, the remedy is in the law of fraud; the Gonzalezes have not asserted that the arbitration clause is fraudulent. Likewise, if a contracting party's assumptions turn out to be incorrect, the remedy lies in the law of

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[11] To be precise, when the trial court ruled on the motion to compel arbitration, there were no class action allegations. Admittedly, after the trial court refused to compel arbitration, the Gonzalezes filed a motion to amend their complaint by adding class action allegations. However, because we are holding that the motion to compel arbitration should have been granted, the motion to amend is moot.

mistake and impossibility, which the Gonzalezes likewise have not asserted. For purposes of unconscionability, the question is whether a contract that effectively requires arbitration before the AAA is unduly one-sided. The Gonzalezes have not shown that the AAA is biased or otherwise more favorable arbitral forum for dealers than for buyers. Accordingly, we must reject this contention.

In sum, then, the Gonzalezes have not shown that the arbitration clause is unconscionable in any relevant respect.

VI

WAIVER OF ARBITRATION

The Gonzalezes contend that defendants waived the right to arbitration.

"[N]o single test delineates the nature of the conduct that will constitute a waiver of arbitration. [Citations.] '" . . . 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.] . . . .'" [Citation.]" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195-1196.)

" . . . '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."' [Citation.]" (*St. Agnes Medical Center v. PacifiCare of California*, *supra*, 31 Cal.4th at p. 1196 [brackets in original].) "[A]ny doubts regarding a waiver allegation should be resolved in favor of arbitration [citation]." (*Id*. at p. 1195.)

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.' [Citation.]" (*Saint Agnes Medical Center v. PacifiCare of California*, *supra*, 31 Cal.4th at p. 1196.) Here, "[w]e apply the de novo standard of review . . . , because the facts pertaining to the issue of waiver are undisputed. [Citation.]" (*Pulli v. Pony Internat., LLC* (2012) 206 Cal.App.4th 1507, 1514.)

A. *Waiver by Metro and Federated*.

As already mentioned, Metro and Federated brought the original motion to compel arbitration. Initially, the trial court granted the motion, but then, after *Sanchez* was decided, it reversed itself and denied the motion. Metro and Federated did not appeal that ruling.

Metro and Federated proceeded to file an answer to the complaint. They took the Gonzalezes' depositions. They also filed a motion for summary judgment. As soon as the Supreme Court granted review in *Sanchez*, however, Metro and Federated promptly renewed their motion to compel arbitration.

"'[P]arties do *not* waive error by "acquiescence" when they object to trial court error and then take "defensive" action to lessen the impact.' [Citations.]" (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1129-1130.) " . . . '"An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."' [Citation.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213.)

Here, Metro and Federated acted reasonably in submitting to the trial court's ruling, particularly as it was supported, at the time, by *Sanchez*. Because the action was proceeding to trial, they had to take defensive action, including answering the complaint, taking discovery, and filing potentially dispositive motions. As soon as the Supreme Court granted review in *Sanchez*, however, they reopened the issue, just as the trial court had said they could. This conduct was not inconsistent with a belief that they had a right to arbitrate. Nor could it have misled the Gonzalezes in any way.

Moreover, the Gonzalezes cannot show prejudice. "[W]hether or not litigation results in prejudice also is critical in waiver determinations. [Citations.]" (*Saint Agnes*

Medical Center v. PacifiCare of California, *supra*, 31 Cal.4th at p. 1203.) "[C]ourts assess prejudice with the recognition that California's arbitration statutes reflect '"a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution"' and are intended '"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."' [Citation.] Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id*. at p. 1204.) "[C]ourts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses. [Citations.]" (*Id*. at p. 1203.)

The Gonzalezes argue that, to avoid a waiver, Metro and Federated had to either (1) appeal immediately or (2) request a stay of the proceedings until the publication status of *Sanchez* was resolved. Metro and Federated could reasonably conclude, however, that as long as *Sanchez* remained on the books, an appeal faced unduly long odds, and a stay would only delay the inevitable. (See *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 773 [failure to appeal denial of original motion to compel arbitration in 2006 did not waive renewed motion in 2011 where "appeal would have been futile given the state of law at the time"].) Thus, their conduct constituted mere submission to authority; it did not indicate an intent to forego arbitration.

B. *Waiver by Acceptance*.

The Gonzalezes also contend that Acceptance waived arbitration by failing to assert a right to arbitration as an affirmative defense in its answer. They cite *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553. There, however, the court actually acknowledged that a failure to plead arbitration as an affirmative defense, standing alone, does *not* constitute waiver. (*Id*. at p. 558.) Rather, the law is that a party seeking arbitration must *either* raise the right to arbitrate in its answer *or* file a petition to compel arbitration. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795-1796.)

The Gonzalezes also contend that Acceptance waived arbitration by failing to join in Metro and Federated's original motion to compel arbitration. We disagree, because the Gonzalezes cannot show prejudice. "[W]hether or not litigation results in prejudice . . . is critical in waiver determinations. [Citations.]" (*St. Agnes Medical Center v. PacifiCare of California*, *supra*, 31 Cal.4th at p. 1203.) "[C]ourts assess prejudice with the recognition that California's arbitration statutes reflect '"a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution"' and are intended '"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."' [Citation.] Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other

side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id*. at p. 1204.)

The Gonzalezes argue that "[Acceptance] stayed silent while [the Gonzalezes] and their counsel strategized based on the assumption the case would be litigated. This caused prejudice to [the Gonzalezes]." However, as long as Metro and Federated were asserting a right to arbitrate, the Gonzalezes had no right to assume that the case would be litigated. Moreover, even when the trial court denied Metro and Federated's original motion to compel arbitration, it did so without prejudice to a renewed motion if the publication status of *Sanchez* changed. Thus, the Gonzalezes still had no right to assume the case would be litigated. Finally, within a week after the Supreme Court granted review in *Sanchez*, Acceptance joined in the renewed motion to compel arbitration.

We therefore conclude that defendants did not waive arbitration.

VII

FEDERATED'S STANDING, AS A NONSIGNATORY, TO ENFORCE THE ARBITRATION CLAUSE

The Gonzalezes contend that their claims against Federated are not within the scope of the arbitration clause.

The arbitration clause, by its terms, applied only to disputes between the Gonzalezes and "us or our employees, agents, successors, or assigns . . . ." "Us" was defined as Metro. Federated is not Metro's employee, agent, successor, or assign; it is Metro's surety.

"Because arbitration is a matter of contract, generally '"one must be a party to an arbitration agreement to be bound by it or invoke it."' [Citations.] However, both California and federal courts have recognized limited exceptions to this rule, allowing nonsignatories to an agreement containing an arbitration clause to compel arbitration of, or be compelled to arbitrate, a dispute arising within the scope of that agreement. [Citations.]" (*DMS Services, Inc. v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352-1353.)

"One pertinent exception is based on the doctrine of equitable estoppel. [Citations.] Under that doctrine, as applied in 'both federal and California decisional authority, a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are "intimately founded in and intertwined" with the underlying contract obligations.' [Citations.] 'By relying on contract terms in a claim against a nonsignatory defendant, even if not exclusively, a plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement.' [Citations.]" (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1237.)[12]

The Gonzalezes' claims against Federated, however, are founded in and intertwined with their claims against Metro. They assert only one cause of action against

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[12] In the trial court, Federated argued that it could enforce the arbitration clause as a matter of equitable estoppel. Nevertheless, the Gonzalezes do *not* argue that equitable estoppel does *not* apply.

Federated: the fifth cause of action. It alleges that under Vehicle Code section 11710, a vehicle dealer is required to post a $50,000 bond payable to a "purchaser" in case of fraud; Federated issued such a bond to Metro; the Gonzalezes are "purchasers"; and hence Federated is liable to the Gonzalezes for Metro's fraud.

The fifth cause of action does not allege precisely how Metro committed fraud. However, it incorporates the allegations of the previous causes of action. These include allegations that the contract itself was false and misleading. For example, the third cause of action alleges that Metro "switch[ed] the buyer and co-signer on the Retail Installment Sales Contract for the 2010 Sentra contrary to the Plaintiffs' wishes" and "provid[ed] false disclosures on Lines 2A or 2B of the Retail Installment Sales Contract for the 2010 Sentra . . . ." Likewise, the fourth cause of action alleges that Metro "concealed the cost of the redundant car alarm it sold to the Plaintiff[s] by not itemizing it on the appropriate line for theft-deterrent devices on the Retail Installment Sales Contract for the 2010 Sentra."

The fraudulent *nondisclosure* allegations also arise out of the purchase and sale contract. For example, the third cause of action alleges that Metro "fail[ed] to disclose Plaintiffs' credit scores which Metro obtained and used to arrange financing for the sale of the 2010 Sentra, as well as the name of the credit reporting agency that provided Metro . . . with the credit scores"; "'pack[ed]' optional, unnecessary, duplicative and over-priced products into the sale of the 2010 Sentra without meaningfully explaining the products to Plaintiffs and without the proper disclosures"; and "fail[ed] to disclose the

costs of the optional products and the effect of their cost on the Plaintiffs' monthly payments . . . ."

Separately and alternatively, the Gonzalezes' very standing to make a claim on the bond depends on them being "purchasers" within the meaning of Vehicle Code section 11710. Their claim that they are purchasers, in turn, presumes the existence of the contract. "[A] signatory to a[n] agreement containing an arbitration clause may be compelled to arbitrate its claims against a nonsignatory when the relevant causes of action rely on and presume the existence of the contract. [Citations.]" (*Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 269.)

It is irrelevant that the fraud claim against Metro sounds in tort rather than in contract. "'[C]laims framed in tort are subject to contractual arbitration provisions when they arise out of the contractual relationship between the parties.' [Citation.] The same principle applies in cases involving nonsignatories: 'That the claims are cast in tort rather than contract does not avoid the arbitration clause.' [Citation.]" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 715-716.)

We therefore conclude that the Gonzalezes are equitably estopped to refuse to arbitrate their claim against Federated.

VIII

DISPOSITION

The order appealed from is reversed. The matter is remanded to the trial court with directions to grant defendants' renewed motion to compel arbitration. Defendants are awarded costs on appeal against the Gonzalezes.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.