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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ISRAEL FLORES et al., Plaintiffs and Appellants, v. WEST COVINA AUTO GROUP, Defendant and Respondent.	B238265 (Los Angeles County Super. Ct. No. BC 441761)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Angela J. Smith for Plaintiffs and Appellants.

Callahan, Thompson, Sherman & Caudill, Robert W. Thompson, Charles S. Russell and George N. Koumbis for Defendant and Respondent.

* * * * * *

Israel Flores and Andrea Naasz appeal from the trial court's order compelling arbitration. This lawsuit arises from their purchase of a previously owned vehicle from West Covina Auto Group, LLC, doing business as West Covina Toyota (WCT), and alleges both individual and class action claims. WCT moved to compel arbitration based on an arbitration clause in the sales contract between the parties. Appellants contend that the trial court erred in compelling arbitration because (1) a "poison pill" provision in the arbitration clause prohibits arbitration; (2) WCT waived its right to arbitration; (3) the arbitration clause is unconscionable; (4) there was no meeting of the minds or mutual consent regarding the arbitration clause; and (5) as an unexpected term in an contract of adhesion, the arbitration clause is unenforceable. We hold the trial court did not err and affirm.

FACTS AND PROCEDURAL HISTORY

1. Allegations of the First Amended Complaint

Naasz was looking to replace her 2004 Chrysler Pacifica in February 2010. She telephoned WCT and spoke to a salesman. She told him she was "upside down" on her current vehicle but wanted to trade it in and purchase a new one. He invited her to WCT and told her WCT could help her purchase another vehicle.

On or about February 19, 2010, Naasz and her husband went to WCT and met with the salesman. She told him she still owed approximately $13,675 on her current vehicle and wanted her monthly payments for her new vehicle to be no more than $500 to $600 a month. Naasz and her husband met with the WCT fleet manager, who explained that WCT could not work her negative equity in her trade-in vehicle into a contract for a brand new vehicle. He explained that she had a choice between two previously owned vehicles -- a Nissan Titan or a Toyota Sequoia. WCT told Naasz and her husband that the Sequoia was a "certified" vehicle. Naasz and her husband test drove the Sequoia. Once back at the dealership, WCT told her that the monthly payments would be well over what she wanted, in light of the negative equity in her trade-in vehicle. If she found a cosigner for the purchase, however, her payments would be lower. Naasz and her husband left WCT and returned the same day with Naasz's father, Israel Flores, who agreed to be a cosigner.

A WCT finance manager prepared the retail installment sale contract for the Sequoia. WCT instructed Naasz and Flores where to sign and initial the documents. It was late at night by the time they signed the contract, so Naasz left the vehicle at the dealership to be washed and detailed and decided to retrieve it the following day. Naasz's husband returned to pick up the vehicle the following day.

On or about March 4, 2010, a salesperson from WCT called Naasz and Flores and told them that WCT had lowered the price of the vehicle, and they needed to return to WCT to sign a new contract. WCT told them that the lender required more money as a down payment, but knowing that Naasz had no more to put down, WCT had decided to lower the price of the vehicle. Naasz and Flores went to WCT and met with a different finance manager, who presented them with an "Acknowledgement of Rewritten Contract" stating that the original contract between WCT and appellants had been mutually rescinded. They signed that and also a new retail installment sale contract that was backdated to February 19, 2010.

After the purchase, Naasz experienced a number of problems with her vehicle. Naasz took the vehicle to Toyota Motor Sales authorized repair facilities on numerous occasions, but Toyota Motor Sales had been unable to repair it or conform it to the express and implied warranties. She also requested that Toyota Motor Sales buy the vehicle back from her, which it refused to do.

Naasz and Flores filed a complaint against WCT and Toyota Motor Sales alleging both individual and class claims. They alleged class claims for violations of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), the Automobile Sales Finance Act (ASFA) (Civ. Code, § 2981 et seq.), and the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). They alleged individual claims for violations of the CLRA and UCL, violations of Vehicle Code sections 11713.18, 11713, and 24007, subdivision (b), fraudulent misrepresentation, negligent misrepresentation, and violations of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.).

2. First 11 Months of Litigation

Appellants filed their complaint in July 2010 and the first amended complaint (FAC) in September 2010. WCT filed a case management statement in October 2010 stating that it was willing to participate in mediation but not arbitration, was requesting a jury trial, expected to file a motion for summary judgment or summary adjudication, and intended to complete the depositions of appellants and written discovery by January 2011. In November 2010, WCT demurred to all five of the class action causes of action. It also filed a motion to strike the portions of the FAC requesting classwide rescission of any sales contracts signed by putative class members. The court overruled the demurrers but granted the motion to strike. Appellants filed a writ petition seeking review of the court's ruling granting the motion to strike, and WCT filed a response to the petition.

WCT filed another case management statement in January 2011 requesting a jury trial, stating that it was willing to engage in mediation but not arbitration, and anticipating the same motions and discovery it identified in the prior case management statement. In February 2011, WCT filed an answer to the FAC asserting 46 affirmative defenses, none of which referenced a right to arbitrate.

In March 2011, WCT filed a third case management statement in which it again requested a jury trial, stated that it was willing to do mediation but not arbitration, anticipated the same motion practice, and anticipated written discovery and a vehicle inspection.

WCT noticed the depositions of Naasz and Flores in March 2011 and served them both with 25 requests for production of documents. It deposed them both on March 22, 2011, at which time both produced documents. Appellants served interrogatories, requests for documents, and requests for admission on WCT, to which WCT responded. Appellants also noticed the deposition of WCT's person most knowledgeable on certain topics and requested documents to be produced at the deposition. WCT objected to appellants' notice. Appellants deposed WCT's person most knowledgeable in May 2011.

3. WCT's Motion to Compel Arbitration

WCT filed a motion to compel arbitration and stay the action on or around June 10, 2011. The sales contract between appellants and WCT is a preprinted form contract produced by the Reynolds Company. The contract contains an arbitration clause with a waiver of the right to classwide arbitration. The clause reads in part:

> **"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.
>
> ". . . 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. . . . [¶] . . . [¶]
>
> ". . . 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."

The sales contract provides in another part, separate from the arbitration clause, that "[f]ederal law and California law apply to this contract." In the arbitration clause, it states: "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."

WCT asserted that it was precluded from moving to compel arbitration earlier in light of the decision in *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601 (*Fisher*), which was decided on August 13, 2010, just after appellants filed their original

complaint. In *Fisher*, also a putative class action, the plaintiff had purchased a used car and signed a sales contract containing an arbitration clause identical to the one in appellants' contract. (*Id.* at p. 607.) In particular, the arbitration clause contained the same "poison pill" provision stating that if the waiver of class action rights was found to be unenforceable, the entire arbitration clause would be unenforceable. (*Ibid.*) The *Fisher* plaintiff had also alleged class claims under the CLRA. (*Fisher*, at p. 606.) The court held that the right to a class action lawsuit or classwide arbitration was an unwaivable statutory right under the CLRA. (*Fisher*, at p. 613.) The waiver of the class action rights in the arbitration clause was thus unenforceable, which, according to the poison pill provision, meant that the entire arbitration clause was unenforceable. (*Id.* at pp. 617-618.) The *Fisher* court therefore affirmed the trial court's denial of the petition to compel arbitration.

WCT argued that *Fisher* precluded it from moving to compel arbitration until the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 (*Concepcion*). The court decided *Concepcion* on April 27, 2011, and WCT filed its motion to compel arbitration on or about June 10, 2011. According to WCT, *Concepcion* held that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) preempted California law and that courts must uphold the terms of an arbitration clause even when it contains a class action waiver. At a status conference on May 11, 2011, WCT informed the court and appellants of its intent to compel arbitration in light of *Concepcion*. WCT requested that appellants stipulate to arbitration pursuant to *Concepcion*, and when they declined to stipulate, WCT filed its motion seeking to compel arbitration. WCT asserted that it should be an individual arbitration, not a class arbitration, in light of the waiver of classwide arbitration in the sales contract.

Appellants argued that the court should decline to compel arbitration for several reasons. First, they asserted WCT had waived its right to compel arbitration by substantially invoking the litigation process for almost a year, which delay prejudiced appellants. Second, they argued that the parties did not consent to arbitration because there was no meeting of the minds on the issue. Third, they argued that the arbitration clause was unconscionable and thus unenforceable. Fourth, they argued that *Fisher* was still

applicable, the poison pill provision made the arbitration clause unenforceable, and *Concepcion* did not overrule *Fisher*.

The trial court heard argument and granted the motion to compel arbitration on July 15, 2011. In a minute order issued the same date, the court cited *Concepcion* and explained that *Concepcion* determined the courts must uphold an arbitration provision even if there is a class action waiver. Further, the court stated that there was no waiver of the right to arbitration because WCT did not have the right to invoke the arbitration clause until April. The court also found "no substantive unconscionability."

DISCUSSION

1. Appealability

Ordinarily, an order compelling arbitration is not appealable and may be reviewed only after the parties complete arbitration and appeal from the judgment. (*Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1089.) But appellants contend that the trial court's order is appealable under the so-called death knell doctrine. We agree.

The death knell doctrine holds that an order effectively terminating class claims while allowing individual claims to proceed is immediately appealable. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757.) What matters is not the form of the order but its impact. An order that effectively rings the death knell for class claims is in essence a final judgment on those claims. (*Ibid.*) In *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 (*Franco*), the court applied the death knell doctrine to an order compelling arbitration. The *Franco* plaintiff filed a putative class action alleging Labor Code violations against his former employer. (*Id.* at p. 1282.) The employer filed a petition to compel arbitration based on a written arbitration agreement, which contained a waiver of class arbitrations. (*Ibid.*) The trial court granted the petition, "effectively limiting the arbitration to *plaintiff's* claims." (*Ibid.*) The *Franco* court held that the order compelling arbitration and enforcing the class arbitration waiver was the "'death knell' of class litigation through arbitration." (*Id.* at p. 1288.) The order was thus appealable.

Here, the court's order granting the motion to compel arbitration had the same effect. The sales contract's arbitration clause contains an express waiver of class arbitrations. The

court's order did not state that it was compelling only certain claims to arbitration or that it was severing the class claims and staying litigation on those. It simply granted WCT's motion. In light of the class arbitration waiver, the order compelling arbitration effectively rang the death knell for the class claims. (*Franco, supra,* 171 Cal.App.4th at pp. 1282, 1288.)

WCT contends that *Franco* "is no longer the law" and we should follow a more recent case, *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825. *Arguelles-Romero* does not assist WCT. *Arguelles-Romero* reviewed a trial court order compelling arbitration, but the case contained no analysis of *Franco* or appealability. As part of the factual and procedural background section, the court recited the following history. The plaintiffs filed a notice of appeal from the order compelling arbitration. (*Arguelles-Romero, supra,* at p. 835.) The defendant moved to dismiss the appeal as taken from a nonappealable order. (*Ibid.*) The plaintiffs thereafter filed a petition for writ of mandate, challenging the same order. (*Ibid.*) The court granted the motion to dismiss the appeal and issued an order to show cause in the writ proceeding. (*Ibid.*) The court did not analyze the appealability issue beyond this recitation of procedural history. To say that the case rendered *Franco* bad law or determined that the death knell doctrine does not apply in this circumstance is inaccurate. It is axiomatic that a "decision . . . does not stand for a proposition not considered by the court." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343.)

Having determined that we have jurisdiction over this appeal, we now turn to the merits of appellants' claims.

2. The Poison Pill Provision Does Not Prohibit Arbitration

Appellants contend that the sales contract itself prohibits arbitration by way of the poison pill provision -- that is, the provision stating that if a waiver of class action rights is deemed unenforceable for any reason, the remainder of the arbitration cause shall also be unenforceable. Here, they contend, a waiver of class action rights is unenforceable under the CLRA, thus triggering the poison pill provision.

The parties dispute whether state law or federal law, and specifically the FAA, applies to our interpretation and application of the arbitration clause. The sales contract

contains a general choice of law provision stating that *both* federal law and California law apply to the contract. To the extent the two conflict, the supremacy clause of the United States Constitution mandates that federal law preempts state law. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612.) Moreover, section 2 of the FAA provides that state laws inconsistent with the FAA's provisions and objectives are preempted. (*Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 498, citing *Perry v. Thomas* (1987) 482 U.S. 483, 489.) As we discuss below, *Concepcion* reveals a conflict between the FAA and the state law on which appellants rely. The FAA and *Concepcion* thus control here.[1] (*Baker v. Aubry* (1989) 216 Cal.App.3d 1259, 1263 [when an arbitration agreement is subject to the FAA, "questions concerning the construction and scope of the arbitration clause are determined by federal law"].)

The effect of the FAA, *Concepcion*, and the poison pill provision is a legal question we review de novo. (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406; *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1567.) Applying this standard, we conclude that the arbitration clause is enforceable despite the waiver of classwide arbitration rights.

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[1] WCT contends that the FAA indisputably applies because the arbitration clause expressly states that "[a]ny Arbitration under this Arbitration Clause shall be governed by" the FAA, and this specific choice of law provision controls over the more general choice of law provision elsewhere in the contract. Appellants argue this provision means only that the FAA will govern the arbitration proceeding itself, but not necessarily our construction and interpretation of the arbitration clause. Regardless of which choice of law provision applies, the FAA governs our determination in this instance. Either the FAA preempts California law for the reasons discussed above, or the arbitration clause specifically states that the FAA governs.

We note that the FAA covers only contracts involving interstate commerce or maritime affairs. (9 U.S.C. § 2.) Because neither party disputes that the sales contract in this case involves interstate commerce, we assume that it does so.

a. The CLRA and *Fisher*

Our analysis begins with the state law on which appellants rely, the CLRA and *Fisher*. Like appellants, the *Fisher* plaintiff was a consumer who had purchased a previously owned vehicle and alleged CLRA class claims, among others, against the dealership. (*Fisher, supra,* 187 Cal.App.4th at p. 606.) Also like appellants, the *Fisher* plaintiff had signed a sales contract with an arbitration clause expressly waiving the right to classwide arbitration. (*Id.* at p. 607.) Finally, the sales contract also contained a poison pill provision stating that "if the waiver of class action lawsuits or classwide arbitration was found unenforceable, the entire arbitration clause was unenforceable." (*Ibid.*)

The CLRA provides that any consumer entitled to bring an action under the CLRA may also bring his or her claims as a class action suit. (Civ. Code, § 1781.) It also provides that "[a]ny waiver by a consumer of the provisions of [the CLRA] is contrary to public policy and shall be unenforceable and void." (Civ. Code, § 1751.)

The *Fisher* court held that, under the CLRA, the plaintiff could not be asked to waive her right to file a class action or request classwide arbitration. (*Fisher, supra*, 187 Cal.App.4th at p. 613.) The waiver of class rights in the plaintiff's contract was unenforceable, triggering the poison pill provision such that the entire arbitration clause was unenforceable. (*Id.* at p. 619.) The court recognized that the FAA incorporated a basic policy objective favoring arbitration, but it noted that the FAA also made arbitration agreements subject to the same "grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; see also *Fisher, supra*, at p. 613.) In other words, arbitration agreements were to be placed on the same footing as other contracts and could not be singled out for suspect status. (*Fisher*, at p. 614.) The court thus phrased the issue as whether the waiver of unwaivable statutory rights under the CLRA constituted a "ground that exists at law or in equity for the revocation of any contract" (*id.* at p. 613), and concluded the answer was "yes." The waiver of the unwaivable right under the CLRA to bring a classwide arbitration violated the public policy underlying that right and constituted a private agreement in contravention of public rights. (*Id.* at p. 617.) The court held the

notion that a private contract violated public policy was a generally applicable contract defense not preempted by the FAA. (*Ibid.*)

Since *Fisher*, the United States Supreme Court's decision in *Concepcion* has altered the legal landscape substantially.

b. FAA Preemption and *Concepcion*

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable," except, as discussed above, on "such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) This last phrase is referred to as the "saving clause" of the FAA. (*Concepcion, supra,* 131 S.Ct. at p. 1746.)

The FAA reflects "both a 'liberal federal policy favoring arbitration,' [citation], and the 'fundamental principle that arbitration is a matter of contract.'" (*Concepcion, supra,* 131 S.Ct. at p. 1745.) While the saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' . . . defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are preempted by the FAA. (*Concepcion,* at p. 1746.)

Concepcion dealt with consumers' waiver of class arbitration rights and the "*Discover Bank* rule." (*Concepcion, supra,* 131 S.Ct. at pp. 1744-1745.) In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162 (*Discover Bank*), the California Supreme Court announced a rule that classified arbitration provisions in certain consumer contracts of adhesion as unconscionable because they included a waiver of the consumer's right to classwide arbitration. (*Concepcion,* at p. 1746.) Specifically, the court held in *Discover Bank*:

> "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its]

> own fraud, or willful injury to the person or property of another.' [Citation.] Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163.)

Concepcion held that the FAA preempted the *Discover Bank* rule. (*Concepcion, supra*, 131 S.Ct. at p. 1753.) This was because the *Discover Bank* rule stood "'as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FAA].'" (*Ibid.*) The court reasoned that the FAA's purpose is to ensure that private arbitration agreements are enforced according to their terms so as to facilitate streamlined proceedings, and it noted that, in the past, the court had "held that parties may agree to limit the issues subject to arbitration, [citation], to arbitrate according to specific rules, [citation], and to limit *with whom* a party will arbitrate its disputes." (*Concepcion,* at pp. 1748-1749.) The point of allowing parties to design arbitration processes was to allow for "efficient, streamlined procedures." (*Id.* at p. 1749.) The court described one prior case in which it held preempted by the FAA a state law rule requiring exhaustion of administrative remedies before arbitration, because the rule conflicted with a prime objective of arbitration -- achieving streamlined proceedings and expeditious results. (*Concepcion,* at p. 1749.)

The *Discover Bank* rule similarly interfered with arbitration, the court held. (*Concepcion, supra*, 131 S.Ct. at p. 1750.) The rule essentially permitted consumers to demand classwide arbitration ex post, when the parties did not agree to that. (*Ibid.*) As such, the rule prevented parties from realizing the principal benefit of their agreed-to bilateral arbitration agreements, namely a more informal, less costly, and more expeditious resolution to disputes, less likely "to generate procedural morass." (*Id.* at p. 1751.) "Requiring the availability of classwide arbitration interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." (*Id.* at p. 1748; see also *id.* at p. 1751 ["[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."].)

The *Concepcion* court rejected the argument that the *Discover Bank* rule fell within the FAA's saving clause -- that is, that it was grounded in California's unconscionability doctrine and was therefore a "ground that 'exist[ed] at law or in equity for the revocation of

any contract.'" (*Concepcion, supra*, 131 S.Ct. at pp. 1746-1747.) The court explained that even generally applicable contract defenses may be preempted by the FAA when they are "applied in a fashion that disfavors arbitration." (*Id.* at p. 1747.)

After the high court's decision, the consumers' waiver of classwide arbitration rights in *Concepcion* was no longer unenforceable as unconscionable under the *Discover Bank* rule. (*Laster v. T-Mobile USA, Inc.* (S.D.Cal., May 9, 2012, No. 06-CV-675) 2012 WL 1681762 [remand to trial court in *Concepcion* case].)

c. The Case at Bar

To review, the CLRA expressly authorizes consumers to bring class actions. (Civ. Code, § 1781.) It also declares that any waiver by a consumer of its provisions is contrary to public policy and unenforceable. (Civ. Code, § 1751.) Thus, ordinarily, the CLRA's antiwaiver provision renders waivers of class action rights unenforceable.

We deal here with the CLRA's antiwaiver provision, not the *Discover Bank* rule of unconscionability. But, for our purposes, no meaningful distinction exists between the CLRA's prohibition against class action waivers and the *Discover Bank* rule. Both are state law rules that stand as an obstacle to the accomplishment and execution of the full objectives of the FAA by effectively requiring the availability of classwide arbitration. *Concepcion* makes clear that FAA preemption extends to state laws standing "'as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the FAA. (*Concepcion*, *supra*, 131 S.Ct. at p. 1753)

As in *Concepcion*, appellants and WCT agreed to arbitrate their disputes on a bilateral basis and agreed that appellants could not assert class claims in arbitration. Designing the arbitration in this manner made it more likely the parties would obtain the prime benefits of arbitration, streamlined proceedings and expeditious results. But enforcing the CLRA's provision against a class arbitration waiver would essentially allow consumers to demand classwide arbitration ex post, when the parties never agreed to that. And as we have just discussed, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Concepcion, supra,* 131 S.Ct. at p. 1748.) Just as the *Discover Bank* rule

was inconsistent with the FAA because it manufactured class arbitration rather than making it consensual (*id.* at p. 1751), so is the CLRA's antiwaiver provision. Applying *Concepcion*, we hold that the CLRA's prohibition against class waiver is preempted by the FAA because it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the FAA. (*Concepcion*, *supra*, at p. 1753.)

Appellants contend that the CLRA's antiwaiver provision does not mean that parties will be forced into class arbitration when they never agreed to it. Instead, they say, when a waiver of class arbitration is unenforceable, parties must forego arbitration and go on to class action litigation. Even when this is the result, however, the parties' arbitration agreement is not being enforced according to its terms, because the parties agreed to individual arbitration (streamlined proceedings relative to litigation, especially relative to class action litigation) and are instead in class action litigation. Thus, this result is still inconsistent with the "overarching purpose of the FAA, [which] is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." (*Concepcion*, *supra*, 131 S.Ct. at p. 1748.)

Appellants also contend that *Fisher*'s analysis relied on the FAA's saving clause and held that the CLRA's antiwaiver provision was a generally available contract defense not preempted by the FAA. They assert that, as a generally available contract defense, the CLRA's antiwaiver provision survives *Concepcion*. We disagree. *Concepcion* considered and rejected the same argument with respect to the *Discover Bank* rule. The *Discover Bank* rule held that certain class action waivers by consumers were unconscionable, whether they were waivers of class action litigation or waivers of class arbitration. (*Discover Bank*, *supra*, 36 Cal.4th at pp. 162-163.) The rule did not apply especially to arbitration but was generally applicable to any class action waiver. Still, the court held that it was preempted by the FAA because of the obstacle it posed to the accomplishment of the FAA's objectives. (*Concepcion*, *supra*, 131 S.Ct. at pp. 1748, 1753.) Similarly, our holding does not invalidate the CLRA's antiwaiver provision altogether, but holds that it is preempted by the FAA for the same reasons as the *Discover Bank* rule.

Appellants additionally contend that our holding would mean any number of illegal terms placed in arbitration clauses could be enforceable because the state laws making them illegal would be preempted by the FAA. They cite, for example, a hypothetical term forcing plaintiffs to hand over their first-born children at the beginning of the arbitration, or a term permitting the defendant to take a free punch at the plaintiff to commence the arbitration.

Our holding does not lead to such absurd results. As we discuss in part 4, *post*, the defense of unconscionability to terms other than class arbitration waivers survives *Concepcion*. Terms requiring parties to hand over children or submit themselves to violence in order to arbitrate are surely so overly harsh as to "'"shock the conscience."'" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246-250 (*Pinnacle*).) We cannot imagine how such terms would survive an unconscionability challenge.

* * *

In sum, the CLRA's prohibition against class waivers is preempted by the FAA. The waiver of class arbitration rights in appellants' sales contract is *not* unenforceable under the CLRA. The poison pill provision -- which makes the arbitration clause unenforceable if the class arbitration waiver is unenforceable -- is thus not triggered.

3. WCT Did Not Waive Its Right to Arbitrate

Appellants next contend that WCT waived its right to compel arbitration by acting inconsistently with the right to arbitrate, substantially invoking the litigation process, and prejudicing appellants. "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 Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196 (*St. Agnes Medical Center*).) In the case at bar, the essential facts are not disputed. Whether we engage in de novo review or substantial evidence review, we agree with the trial court that WCT did not waive its right to arbitration. The trial court did not err under either standard.

Both the FAA and California state law reflect a strong policy favoring agreements to arbitrate and require close judicial scrutiny of waiver claims. (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1195.) The party seeking to establish waiver bears a heavy burden of proof. We do not lightly infer waiver, and any doubts regarding waiver should be resolved in favor of arbitration. (*Ibid.*)

Both state and federal law also hold that no single test delineates the conduct that will constitute a waiver of arbitration, though "'[i]n 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 Medical Center, supra*, 31 Cal.4th at pp. 1195-1196.) Appellants focus on the first, second, and sixth factors.

a. WCT Did Not Act Inconsistently With a Right to Arbitrate

WCT contends that it did not act inconsistently with the right to arbitrate because it could not enforce arbitration prior to *Concepcion*, when *Fisher* established that the arbitration clause was unenforceable. We agree.

Appellants filed their complaint in July 2010 and their first amended complaint in September 2010. *Fisher* was filed just after the original complaint, on August 13, 2010. Under *Fisher*, WCT could not enforce the arbitration clause; the CLRA antiwaiver provision made the class arbitration waiver unenforceable, which triggered the poison pill provision and made the whole arbitration clause unenforceable. The trial court would have been bound to apply *Fisher* and deny any motion to compel arbitration. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising

superior jurisdiction. . . . Decisions of every division of the District Courts of Appeal are binding upon all the . . . superior courts of this state . . . ."].) It was not until April 27, 2011, that *Concepcion* substantially changed the legal landscape and gave WCT strong support for the argument that the class arbitration waiver was enforceable, despite *Fisher*. On May 11, 2011, two weeks after *Concepcion* was filed, WCT informed the court and appellants that it intended to compel arbitration. It then filed its motion on or around June 10. WCT moved shortly after it reasonably determined that it would no longer be futile to move to compel arbitration. In other words, it acted consistently with a right to arbitrate, once that right was reasonably established. Although the safest and strongest course may have been for WCT to mention arbitration in a case management statement or answer, with the caveat that it was not moving to compel arbitration because it believed such a move was futile in light of *Fisher*, we do not think its failure to do so was an intentional waiver, under these circumstances.

The Ninth Circuit considered this issue in *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691 (*A.G. Becker*) and held that a party does not act inconsistently with a right to arbitrate when it would have been futile to move for arbitration under existing law. Similar to California law, in the Ninth Circuit, a party seeking to prove waiver must demonstrate an existing right to compel arbitration and acts inconsistent with that right. (*Id.* at p. 694.) The *A.G. Becker* defendant moved to compel arbitration after failing to raise arbitration as an affirmative defense and litigating the case for three and a half years, during which time the parties filed pretrial motions and engaged in extensive discovery. (*Id.* at p. 693.) The defendant moved only after the United States Supreme Court rejected the "intertwining doctrine," which held that "'when it is impractical if not impossible to separate out nonarbitrable from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over federal securities claims.'" (*Id*. at pp. 693, 695.) Prior to the high court's rejection of the intertwining doctrine, the Ninth Circuit had indicated its approval of the doctrine in a case filed two months before the plaintiffs filed suit against the defendant (*De Lancie v. Birr, Wilson & Co.* (9th Cir. 1981) 648 F.2d 1255, 1259, fn. 4). (*A.G. Becker*, at pp. 693, 695.) The court concluded that the defendant had

"properly perceived that it was futile to file a motion to compel arbitration until" the Supreme Court had rejected the intertwining doctrine. (*Id.* at p. 695.) Therefore, the fact that the defendant did not file its motion to compel arbitration until then was not inconsistent with its agreement to arbitrate disputes. (*Id.* at p. 697.)

Considering the change in law *Concepcion* wrought, at least two federal district courts in California have concluded that class defendants did not act inconsistently with the right to arbitrate when they did not move to compel arbitration until after *Concepcion*. (See *Quevedo v. Macy's, Inc.* (C.D.Cal. 2011) 798 F.Supp.2d 1122, 1131 [only after *Concepcion* "did it become clear that [the defendant] had the right to enforce its arbitration agreement as written and to defend against [the plaintiff's] claims in arbitration on an individual basis. . . . Because [the defendant] promptly moved to enforce its arbitration agreement as soon as it became clear that the agreement could be enforced as written, its earlier failure to seek to enforce its partially-unenforceable agreement did not reflect an intent to forego the right to seek arbitration"]; *In re Cal. Title Ins. Antitrust Litigation* (N.D.Cal., June 27, 2011, No. 08-01341JSW) 2011 WL 2566449 ["[P]rior to the ruling in *Concepcion*, in the absence of [a] class-wide arbitration provision, class arbitration would not have been available. It therefore would indeed have been futile for Defendants in this matter to have moved to compel arbitration prior to the decision in *Concepcion*. Accordingly, the Court finds that Plaintiffs have failed to meet their burden to demonstrate that Defendants had an existing -- and therefore waivable -- right to compel arbitration."].)

Appellants argue that WCT had a right to challenge the correctness of existing law in good faith, and WCT was thus required to challenge *Fisher* immediately if it thought the case was wrongly decided. This argument is unavailing. *Fisher* was directly on point. It involved the same type of claims and a nearly identical arbitration clause. As we have already noted, the trial court would have been bound to apply *Fisher*. In appellants' hypothetical, WCT would have had to convince an appellate court that *Fisher* was wrongly decided or distinguishable for some reason, and *if* it were successful, it likely would have had to defend against a petition for review in our Supreme Court. We decline to establish a

rule that WCT should have done everything possible to compel arbitration, no matter how futile, expensive, or protracted the process.

Even if there was room for WCT to challenge *Fisher*, the futility doctrine may apply even when the authority barring enforcement of an arbitration agreement is not entirely clear or uncontradicted. In *A.G. Becker, supra,* 791 F.2d at page 695, at the time the plaintiffs initiated the lawsuit, the Ninth Circuit had only indicated its approval of the intertwining doctrine in dicta. At the time, two other federal circuits had acknowledged the intertwining doctrine. (*Id.* at pp. 695-696.) It was not until three years into the *A.G. Becker* lawsuit that the Ninth Circuit squarely held the intertwining doctrine was applicable in the circuit. (*Id.* at p. 697.) Still, the court did not hold that the defendant should have immediately challenged the intertwining doctrine, even though there was arguably room for a good faith challenge. Rather, the court held the defendant properly perceived it was futile to move to compel arbitration until the high court rejected the intertwining doctrine. (*Ibid.*)

In sum, WCT did not act inconsistently with the right to arbitrate by waiting until after *Concepcion* to compel arbitration. Moreover, it did not unreasonably delay moving. It informed the court and the parties of its intention to move, and did so move, shortly after *Concepcion*.

b. WCT's Participation in the Litigation Process Did Not Result in Waiver

Appellants argue that WCT waived its right to arbitration by engaging in discovery and pretrial motions without any mention of arbitration for months. They rely on cases holding that defendants had waived their right to arbitration with similar conduct. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446 (*Lewis*) [five-month delay during which time the parties litigated multiple demurrers and motions to strike and engaged in discovery]; *Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1451-1452 (*Adolph*) [six-month delay during which time defendant filed two demurrers, contested discovery requests, and engaged in efforts to schedule discovery]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557-558 (*Guess?*) [four-month delay during which time defendant moved for a stay, objected to written discovery, and participated in third-party depositions]; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 994

(*Sobremonte*) [10-month delay during which time defendant filed two demurrers, cross-complaint, and motion to transfer case to municipal court, participated in five hearings, and engaged in extensive discovery].)

The critical distinction between those cases and this case is that there was no serious question regarding the enforceability of the arbitration agreements in those cases. (*Lewis*, *supra*, 205 Cal.App.4th at pp. 447-448; *Adolph*, *supra*, 184 Cal.App.4th at p. 1452; *Guess?*, *supra*, 79 Cal.App.4th at p. 557; *Sobremonte*, *supra*, 61 Cal.App.4th at p. 997.) The defendants thus did not have a reasonable justification for their delay in moving, and their unexcused delay suggested an attempt to game the system. (See, e.g., *Guess?*, *supra*, at p. 558 ["Simply put, '"[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration."'"].) It was the combination of that unjustified delay and the use of the litigation process that prompted these courts to find waiver. By contrast, here, WCT had a reasonable justification for not moving immediately. It had no choice but to engage in the litigation process when its arbitration clause was unenforceable. (See *Quevedo v. Macy's, Inc.*, *supra*, 798 F.Supp.2d at p. 1132 ["[The defendant] participated in the litigation and allowed 'important . . . steps' to take place only because it reasonably believed that it had no meaningful alternative given that its arbitration agreement was not enforceable as written. The Court accordingly concludes that this factor also does not support a finding of waiver."].)

c. Appellants Have Not Shown Prejudice

Mere participation in litigation and discovery without prejudice does not necessarily compel a finding of waiver. (*Sobremonte*, *supra*, 61 Cal.App.4th at p. 995.) With this in mind, we turn to whether WCT's delay prejudiced appellants. Under both California and federal law, the prejudice factor is critical in waiver determinations. (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1203.)

California's arbitration laws reflect a public policy in favor of arbitration as a speedy and inexpensive means of dispute resolution. (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1204.) "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. [¶] For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration [citations]; where a party unduly delayed and waited until the eve of trial to seek arbitration [citation]; or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence . . . ." (*Ibid.*)

But "[b]ecause merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1203.)

Here, we have already determined that WCT did not "unduly" delay seeking arbitration, in light of the law holding that its arbitration clause was unenforceable. And there is certainly no evidence in the record that WCT waited until the "eve of trial" to seek arbitration. Further, appellants make no argument that the length of the delay in seeking arbitration resulted in lost evidence.

Appellants instead argue that WCT used the discovery process to gain information it could not have gained in arbitration. We are not persuaded. WCT deposed both appellants, at which time the deponents also produced documents in response to WCT's 25 documents requests. Appellants contend the arbitration clause at issue does not provide for discovery and thus there is no guarantee of discovery.

Although there is no guarantee of discovery in arbitration, neither have appellants shown that this discovery would not have happened in arbitration. It appears likely at least some of it would have occurred. The arbitration clause provides that appellants may choose the National Arbitration Forum (NAF), the American Arbitration Association (AAA), or any other organization, subject to WCT's approval. The NAF no longer arbitrates consumer disputes and we therefore do not consider its rules. (*Carideo v. Dell, Inc.* (W.D.Wash., Oct. 26, 2009, No. C06-1772-JLR) 2009 WL 3485933.) At the very least, though, the AAA rules permit discovery of documents. (*Madrigal v. New Cingular Wireless Services, Inc.*

(E.D.Cal., Aug. 17, 2009, No. 09-CV-00033-OWW-SMS) 2009 WL 2513478 ["The [AAA] commercial arbitration rules specifically provide that the arbitrator, '[a]t the request of any party or at the discretion of the arbitrator,' 'may direct' 'the production of documents and other information.'"].) Moreover, if the parties were to agree on another forum of appellants' choosing, such as JAMS, depositions could also be possible. (*Cronin v. Monex Deposit Co.* (C.D.Cal., Feb. 17, 2009, No. SACV 08-1297 DOC) 2009 WL 412023 [JAMS rules require parties to exchange all relevant, nonprivileged documents, allow each side one deposition as of right, and permit either party to request additional depositions].)

Additionally, insofar as WCT learned information in appellants' depositions that it could not have gleaned in arbitration, appellants had an equal opportunity when they deposed WCT's person most knowledgeable. We hesitate to declare that this discovery was prejudicial or used for an unfair advantage when it was reciprocal.

Appellants also contend that they were prejudiced because they lost an important remedy in the trial court, rescission, when the court granted WCT's motion to strike. Appellants assert that, by waiting until after the ruling on rescission to compel arbitration, WCT insulated the ruling from review, and they will forever lose any chance to regain their claim to rescission. We do not agree that this constituted prejudice. When parties have litigated the merits of *arbitrable* issues to judgment, that may constitute prejudice. (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1201.) Here, however, WCT's motion and the court's ruling did not concern an arbitrable issue. WCT moved to strike the portions of the complaint alleging classwide rescission. It based its argument entirely on the notion that rescission is unavailable as a classwide remedy. And as we have discussed, the arbitration is to be on an individual basis, not a classwide basis. The availability of classwide rescission is accordingly not an arbitrable issue.

In short, appellants carry the heavy burden of proving waiver. They have not done so. The cases on which appellants rely find prejudice and waiver when the defendants unduly delayed moving for arbitration without justification. WCT had a reasonable justification for not moving immediately, and when that justification no longer existed, it moved almost without delay. WCT cannot be said to have intentionally undermined the

speedy and efficient nature of arbitration when it reasonably determined arbitration was unavailable because the clause was unenforceable. Moreover, appellants have not shown prejudice, a critical factor weighing against waiver in this case.

4. The Arbitration Clause Is Not Unconscionable

Appellants maintain that the arbitration clause is unenforceable as unconscionable. (See Civ. Code, § 1670.5, subd. (a) ["If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . ."].) As a preliminary matter, WCT urges a broad reading of *Concepcion* and argues that the case precludes any unconscionability defense to the enforcement of an arbitration agreement, whether based on a waiver of class rights or not. We decline to hold that *Concepcion* stands for this broad a proposition. *Concepcion* itself recognizes that the FAA's saving clause preserves generally applicable contract defenses such as "'fraud, duress, or unconscionability.'" (*Concepcion*, *supra*, 131 S.Ct. at pp. 1746, 1748, quoting 9 U.S.C. § 2.) Further, the California Supreme Court has not held that unconscionability is no longer a viable defense to enforcement of an arbitration agreement. Rather, since *Concepcion*, the court has found the FAA applied in a construction defect dispute and proceeded to analyze whether the arbitration clause was unconscionable under California law, all without reference to *Concepcion*. (*Pinnacle*, *supra*, 55 Cal.4th at pp. 246-250.) We therefore consider the merits of appellants' unconscionability defense.

"Unconscionability has both procedural and substantive elements. [Citations.] Although both must appear for a court to invalidate a contract or one of its individual terms [citations], they need not be present in the same degree: '[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.'" (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1469.)

Unconscionability is a question of law we review de novo. (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892.) But to the extent the trial court's determination on the issue turned on the resolution of contested facts, we consider the evidence in the light most favorable to the trial court's ruling and review the court's factual

determinations for substantial evidence. (*Ibid.*) The trial court held that the arbitration clause was not substantively unconscionable and therefore rejected appellants' unconscionability defense. We hold that the trial court did not err.

a. Procedural Unconscionability

"The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (*Pinnacle, supra*, 55 Cal.4th at p. 246.) "'"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."'" (*Id.* at p. 247.)

"The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, '"which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."'" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.) The lack of negotiating and bargaining power is only one factor we consider, however, surprise being the other. Even in adhesion contracts, courts will enforce provisions that are conspicuous, plain, and clear, and that do not "operate to defeat the reasonable expectations of the parties." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710.)

i. Evidence Regarding Circumstances of Execution

WCT did not submit any declarations relating to the circumstances under which appellants executed the sales contract. Appellants both submitted declarations stating as follows. When they signed the sales contract on both occasions, WCT presented them with a stack of documents and told them where to sign or initial each one. All of the documents were preprinted forms. WCT did not give them the opportunity to negotiate any of the terms, and it presented them to appellants on a take-it-or-leave-it basis. They felt rushed into signing the documents. Neither appellants realized the sales contract had a second, back side with additional terms, which is where the arbitration clause appeared. When they signed the sales contract, WCT did not ask them if they were willing to arbitrate any disputes, it did not tell them there was an arbitration clause on the back of the contract, and appellants did not see the arbitration clause before they signed. WCT did not give them the

option to sign a contract without an arbitration clause. At no point did WCT give them the opportunity to use a computer to download any information about arbitration organizations, including their procedures or rules. Prior to the filing of WCT's motion to compel arbitration, they did not understand the effect of the arbitration clause.

Still, at deposition, Naasz, the primary buyer, acknowledged that she had the opportunity to thoroughly read the sales contract before signing it. Flores, the cobuyer and Naasz's father, said he "signed everything with [his] daughter's authorization," and she guided him through the contract and told him where to sign. The contract contains a provision directly above their signature lines and on the right portion of the page that states in all capital letters: "YOU AGREE TO THE TERMS OF THIS CONTRACT. 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 BOTH SIDES OF THE CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT."[2]

The contract is a single page, eight and a half inches wide and approximately 26 inches long. The appellants signed or initialed the sales contract in eight places on the front. They did not sign or initial the contract on the back. The arbitration clause itself is on the backside of the contract. It appears in a boxed-in area, centered on the page, and as noted in a foregoing part, contains the following heading in boldface, all capital letters: "**ARBITRATION CLAUSE [¶] PLEASE REVIEW -- IMPORTANT -- AFFECTS YOUR LEGAL RIGHTS**." There are two other provisions on the back page that are boxed-in, though these provisions appear in much smaller boxes than the arbitration clause.

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[2] The left portion of the page directly above the signature lines contains a boxed-in provision regarding "cooling-off" periods.

ii. Analysis

The sales contract represented a degree of procedural unconscionability at the low end of the spectrum. It is undisputed that appellants did not have the opportunity to negotiate the terms of the contract and it was presented to them as a take-it-or-leave-it proposition. That it was a contract of adhesion establishes this low degree of procedural unconscionability.

But the degree is no higher than the low end of the spectrum because surprise is not present. First, arbitration is a common means of dispute resolution in this day and age and cannot fairly be said to defeat the reasonable expectations of consumers. (*Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1665 [recognizing arbitration is within the reasonable expectation of most consumers].) Second, the clause cannot fairly be described as hidden or inconspicuous within a prolix form. The contract itself is only one page with two sides. The form points out the existence of the arbitration clause on the front side in all capital letters, directly above the signature lines for the buyer and cobuyer. The arbitration clause is highlighted on the back in that it is outlined with a large box, by far the largest box of the three boxed-in provisions on the page. The provision's boldface, all capital heading further highlights it. And third, Naasz admitted that she had a thorough opportunity to read the contract before signing it. Her "actual surprise" did not render the arbitration clause procedurally unconscionable when she failed to take advantage of this opportunity. The general rule that a party cannot avoid the terms of a contract because the party failed to read it before signing it applies even to adhesion contracts, when the provisions are conspicuous and clear and do not defeat the reasonable expectations of the parties. (*Madden v. Kaiser Foundation Hospitals*, *supra*, 17 Cal.3d at p. 710.)

b. Substantive Unconscionability

Given the low degree of procedural unconscionability, appellants were required to show a high degree of substantive unconscionability to render the clause unconscionable. Appellants have not made this showing. The arbitration clause was not substantively unconscionable.

"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."'" (*Pinnacle, supra,* 55 Cal.4th at p. 246.)

Even though a provision is unduly one-sided, it may not be unconscionable when the party who is imposing the provision offers a legitimate business justification for it. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117-118.) "'[A] contract can provide a "margin of safety" that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable.'" (*Id.* at p. 117.) "'[U]nless the "business realities" that create the special need for such an advantage are explained in the contract itself,'" they "'must be factually established.'" (*Ibid*.)

Appellants maintain that several individual provisions of the arbitration clause are substantively unconscionable. We address them seriatim.

i. Requesting a New Arbitration When Outlier Results Occur or Injunctive Relief Awarded

The arbitration clause provides that "[t]he 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."

Appellants assert that this provision is unconscionable because the buyer will rarely benefit from it -- the dealership is the party more likely to be liable for an award over $100,000, and the dealership will be the primary party against whom injunctions are sought. In either of those cases, the dealership will be able to initiate a second round of arbitration. To begin with, appellants have not convinced us that WCT is likely to often suffer an award of $100,000 against it, given that classwide arbitration is not possible under the agreement. That is especially true in this case, when the amount being financed for appellants through the sales contract was only $31,558.30. Even were appellants to recover the amount they

paid for their alleged "lemon," it is far from $100,000. It is thus not at all clear that WCT would be able to frequently seek a new arbitration for awards over $100,000. Assuming an award did exceed this amount, it is not so harsh as to shock the conscience that the dealership would be entitled to some review of exaggerated damages. (See *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 713 [requirement of three-arbitrator panel when damages claims exceeded $150,000 was "reasonably justifie[d] . . . as providing a measure of protection against exaggerated damage claims"].)

Additionally, appellants' argument ignores the fact that a party who recovers nothing has the same right to a new arbitration. The party who recovers nothing could just as easily be the buyer as the dealership. Permitting buyers to initiate a new arbitration when they lose, instead of making any such ruling final and binding, is a boon to buyers. Generally parties do not, as a matter of right, get another shot at arbitration just because they lost. Moreover, both parties will benefit from the finality of awards in their favor over $0 and under $100,000. The provision for a new arbitration applies to extreme, outlier results on both ends of the spectrum that might adversely affect both buyer and dealership.

As for the right to a new arbitration when injunctive relief is awarded, assuming arguendo appellants are correct that the dealership is more likely to suffer an injunction than buyers, the dealership would be required to pay all the costs for the second arbitration (as we discuss in the following subpart) if it wanted to rearbitrate. Appellants' concern that this would lead to higher costs for buyers is relevant only to the extent that the arbitrators decided to reallocate costs for this second arbitration after a final determination, which is entirely speculative. Appellants are also concerned that this right to a new arbitration would lead to delay in the arbitration process. But to the extent buyers win a prohibitory injunction against the dealership, such an injunction would not be delayed or stayed pending a new arbitration. (*Food & Grocery Bureau v. Garfield* (1941) 18 Cal.2d 174, 177 [prohibitory injunction, versus mandatory one, is self-executing and operation not stayed by appeal].)

On the whole, this provision is facially neutral and gives each side the boon of a new arbitration when they suffer outlier results against them. Even if we assume the provision favors the dealership because of the injunctive relief term, our Supreme Court has made

clear that mere benefit to one side over the other is insufficient. Rather, the provision must "'"shock the conscience."'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.) We cannot say that is the case here, especially when the dealership would have to pay all costs for any second arbitration it wanted.

ii. Costs for Arbitration

The arbitration clause provides that WCT will advance "your [the buyer's] filing, administration, service or case management fee and your [the buyer's] 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 is responsible for its own attorney, expert, and other fees, unless awarded by the arbitrator under applicable law.

Appellants contend that this cost provision is unconscionable because it makes buyers front all costs above $2,500. Moreover, they contend, it is possible that buyers could be responsible for all costs of the arbitration at the end of the day because the arbitrator has the discretion to determine buyers must reimburse the dealership for the $2,500 it advanced. Appellants argue this is illegal under Code of Civil Procedure section 1284.3, subdivision (a), which holds that no neutral arbitrator or private arbitration company shall require consumers who do not prevail to pay the arbitration costs of the opposing party.

We do not agree that the provision is unduly harsh and one-sided. In shifting the first $2,500 of costs to WCT, the provision helps buyers. That buyers may be responsible for their own costs above that amount does not seem particularly unfair. Appellants rely heavily on *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 90 (*Gutierrez*), which held that an arbitration agreement was substantively unconscionable because it "require[d] a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that [were] prohibitively high." *Gutierrez* is distinguishable. There, the plaintiffs had presented substantial evidence in the trial court that the arbitration administrative fees they would be required to pay exceeded their ability to pay. (*Id.* at pp. 90-91.) They provided the court with a copy of the AAA rules in effect at the time the defendant moved to compel arbitration and a declaration from a AAA administrator describing how costs were to be calculated under those rules. In addition, the plaintiffs submitted a declaration setting forth

their income, expenses, and savings to show that the required fees exceeded their ability to pay. (*Ibid.*) The plaintiffs' arbitration agreement provided no effective procedure for them to obtain a fee waiver or reduction. (*Id.* at p. 91.)

Here, the only evidence presented on this point was appellants' statements in their declarations that they are "informed and believe that many arbitrators typically charge hundreds of dollars per hour" and that, if the arbitration clause were enforced, "it would create a financial burden" on them that they "simply could not afford." This was not substantial evidence that any arbitration fees would be "prohibitively high." *Gutierrez* itself held that a "determination that arbitral fees in consumer cases are unreasonable should be made on a case-by-case basis, with the consumer carrying the burden of proof." (*Gutierrez, supra*, 114 Cal.App.4th at p. 97.) Appellants have not carried that burden here.

We note also that the provision for initial round costs does not on its face violate Code of Civil Procedure section 1284.3, as appellants contend. Section 1284.3 prohibits nonprevailing consumers from being responsible for the opposing party's costs. (Code Civ. Proc., § 1284.3, subd. (a).) The contractual provision does not say that buyers will be responsible for WCT's costs, only the buyers' own costs.

Moving to second round arbitration costs, the arbitration clause provides that when a party requests a new arbitration (due to either an outlier award or injunctive relief), that party "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." We do not find this provision to be unconscionable either. The contract does not mandate that buyers initiate a second round. They therefore have a choice regarding whether to pursue a process that requires them to front costs. If WCT initiates the second round, it will be responsible for fronting the costs. To the extent a party requests a second bite at the apple, it seems only fair that the requesting party would be responsible for fronting the costs of it.

We are not persuaded by appellants' argument that this clause is unconscionable because the arbitrators, after a final determination, could force appellants to pay for WCT's second round costs in violation of California law (Code Civ. Proc., § 1284.3, subd. (a)). The contract simply permits the arbitrators to exercise their discretion in making a final

apportionment, and they are bound by the agreement to make "a fair apportionment of costs." At the time the arbitrators make their final determination, they should know the magnitude of the costs, the size of any award, and whether the consumers have resources to pay. To assume that the arbitrators will determine it is "fair" to apportion WCT's costs to nonprevailing consumers who truly have no ability to pay is purely speculative.

iii. Choice of Arbitrators

The arbitration clause provides that buyers may choose either the NAF, the AAA, or any other arbitration organization subject to WCT's approval. Appellants contend this provision is unconscionable because it offers them a false choice in arbitrators. Because the NAF no longer conducts consumer arbitrations, and because WCT can veto any choice but the AAA, they argue they essentially have no choice but the AAA.

We do not agree that they have no choice but the AAA. Appellants have not provided any reason to believe that WCT would definitely reject any other choice out of hand. More importantly, assuming arguendo that they have no choice but the AAA, appellants have not demonstrated why using the AAA is so harsh and one-sided as to shock the conscience. For instance, they make no argument that the rules and procedures of the AAA are unduly harsh on consumers. They have given us no reason to suspect that the AAA will not be as effective as any other arbitral forum for vindicating their rights. And they have not cited any authorities demonstrating that an arbitration clause is unconscionable merely because a consumer may not choose from among multiple arbitration organizations.

iv. Exclusion of Self-help and Small Claims Court Remedies

The arbitration clause provides: "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 remedies or filing suit."

Appellants contend that this provision is unconscionable because, in practical effect, it results in a lack of mutuality. That is, the provision exempts from arbitration WCT's most

likely claims -- repossession of vehicles for nonpayment of vehicle loans and small claims suits for nonpayment -- while buyers' claims are always going to fall within the arbitration clause. We disagree with appellants.

To say this provision is unduly harsh and one-sided because it exempts the self-help remedy of repossession is unpersuasive. Self-help remedies are, by definition, outside the judicial system. WCT's right to repossess derives from the sales contract, which provides that it may repossess a vehicle if the buyer defaults. Repossession does not require court action. It would defy logic to require the dealership to invoke the quasi-judicial process of arbitration to accomplish something that does not normally require the judicial process. In other words, there is nothing harsh or one-sided about exempting repossession from arbitration when it is exempt from the judicial process as part of the status quo. Moreover, the notion that the buyer has no corresponding self-help remedies that would be exempt is not a consequence of the arbitration agreement. If there is a disparity in remedies, this is true whether the buyer is compelled to arbitration or is free to file suit in court.[3]

The lack of mutuality cases on which appellants rely are distinguishable and thus do not assist appellants. The cases involved agreements that exempted from arbitration certain types of legal disputes requiring the judicial process, not extra-judicial, self-help remedies. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at p. 116 [agreement exempted disputes relating to protection of employer's intellectual property and enforcement of postemployment covenants not to compete]; *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1147 [agreement exempted claims

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[3] We note a respectful disagreement with the federal district court in *Trompeter v. Ally Financial, Inc.* (N.D.Cal., June 1, 2012, No. C 12-00392 CW) 2012 WL 1980894, which found this provision in the same form contract to be substantively unconscionable. (*Trompeter, supra*, 2012 WL 1980894 [noting that creditor could repossess vehicle but buyer had no corresponding remedies exempt from arbitration, and therefore finding this provision favors the creditor].)

"seeking declaratory and preliminary injunctive relief to protect [employer's] proprietary information and noncompetition/nonsolicitation provisions"].)

The exemption of small claims court disputes likewise does not seem unduly harsh or one-sided. The provision is neutral and applies to any party's small claims dispute. Buyers could have a small claims dispute against the dealership -- for example, for the cost to repair a defective condition of the vehicle -- and it would be exempt from arbitration. They benefit from this provision just as much as the dealership.

v. Buyers' Waiver of Class Action Rights

Appellants contend the arbitration clause is unconscionable because the buyers waive class rights while WCT gives up nothing in return. But, as we discussed in part 2 of the Discussion, *Concepcion* held that the *Discover Bank* rule finding certain class action waivers unconscionable was preempted by the FAA. *Concepcion* precludes this argument.

* * *

To sum up, the procedural unconscionability here is at the low end of the spectrum, and the arbitration clause is not substantively unconscionable in any of the respects urged by appellants. We therefore reject their unconscionability defense.

5. The Arbitration Clause Was Not an Unexpected Term in an Adhesion Contract

Appellants argue that, quite apart from the defense of unconscionability, when an unexpected term is found in a contract of adhesion, it will not be enforced against the weaker party. (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 820.) They assert that we could ignore the rest of their arguments and reverse the trial court's ruling on this ground alone.

Assuming this defense is distinct from unconscionability, it is nonetheless related, and we have already determined in part 4 of the Discussion that there was no surprise here. Appellants cannot reasonably say the clause was unexpected when the primary buyer had the opportunity to thoroughly read the sales contract and the clause was not hidden. We note, moreover, that if this is a defense distinct from unconscionability, appellants did not raise it as such in the trial court, thereby depriving the court of the opportunity to rule on it. Appellants have effectively forfeited the issue on appeal. (*Hepner v. Franchise Tax Bd.*

(1997) 52 Cal.App.4th 1475, 1486 ["Points not raised in the trial court will not be considered on appeal."].)

6. The Arbitration Clause Was Not Unenforceable for Lack of Mutual Consent

Appellants last defense is that there was no mutual consent to the arbitration clause and instead what occurred was a mutual mistake -- neither party intended to agree to formal, binding arbitration of this dispute. This contention fails to persuade. While appellants argued in the trial court that there was no mutual consent to the arbitration clause, the court did not make specific findings on the issue either at the motion hearing or in its minute order. Nevertheless, the court enforced the arbitration clause. We infer the trial court determined the clause was not invalid for lack of mutual consent. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 ["The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment."].) As the determination of mutual consent is a question of fact, we review the determination under the substantial evidence standard. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269.)

One of the essential elements for the formation of a contract is the consent of the parties to the contract. (Civ. Code, § 1550.) Consent must be free, mutual and communicated by each party to the other. (Civ. Code, § 1565.) "Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141, disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524.) In other words, mutual consent is based on the reasonable meaning of the words and actions of the parties. (*Ibid*.)

Here, appellants assert that WCT did not consent to the arbitration clause and there was a mistake as to its meaning because WCT's person most knowledgeable, who was the finance manager, testified to the following understanding of the clause:

"Q. Do you know what the arbitration clause does?

"A. Yes.

"Q. What does it do?

"A. If the customer has any complaint regarding the sales contract or the purchase of that vehicle, come to the dealership and try to work it directly with the dealership, so prevent the dealership from any lawsuits."

Assuming arguendo that this explanation is inconsistent with what the arbitration clause does, this was nothing but an unexpressed understanding of the clause. There is no evidence that the finance manager expressed this statement to appellants. This was his testimony after the fact, during his deposition in this matter.

Appellants also assert that they could not have consented to the clause because they were ignorant of it. The general rule is that "'ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms.'" (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1124.) And, as we have discussed in the foregoing, the rule that a party cannot avoid a contract term because the party failed to read it before signing applies even to adhesion contracts, when the term is conspicuous and does not defeat the reasonable expectations of the parties (as was the case here). (*Madden v. Kaiser Foundation Hospitals*, *supra*, 17 Cal.3d at p. 710.) WCT presented appellants with the sales contract. There is no dispute that the sales contract appeared on its face to be a contract, or that appellants knew they were given a contract. The evidence showed that they had an opportunity to read the contract and then signed it. WCT's representative also signed it. Accordingly, substantial evidence established that the parties mutually consented to the terms of the contract through their objective, outward manifestations.

DISPOSITION

The order is affirmed. Respondent to recover costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.