Filed 11/23/11 Opinion following rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GIL SANCHEZ, Plaintiff and Respondent, v. VALENCIA HOLDING COMPANY, LLC, Defendant and Appellant.	B228027 (Los Angeles County Super. Ct. No. BC433634)

APPEAL from an order of the Superior Court of Los Angeles County, Rex Heeseman, Judge. Affirmed.

Tharpe & Howell, Christopher S. Maile, Soojin Kang; Greines, Martin, Stein & Richland and Robert A. Olson for Defendant and Appellant.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Angela J. Smith for Plaintiff and Respondent.

Plaintiff, a car buyer, filed this class action against a car dealer, alleging violations of the Consumers Legal Remedies Act (CLRA) (Civ. Code, §§ 1750–1784), the Automobile Sales Finance Act (ASFA) (Civ. Code, §§ 2981–2984.6), the unfair competition law (UCL) (Bus. & Prof. Code, §§ 17200–17210), the Song-Beverly Consumer Warranty Act (Song-Beverly Act) (Civ. Code, §§ 1790–1795.8), and the California Tire Recycling Act (Tire Recycling Act) (Pub. Resources Code, §§ 42860–42895).[1]

The car dealer filed a motion to compel arbitration pursuant to a provision in the sales contract, which also contained a class action waiver. The trial court determined that the class action waiver was unenforceable on the ground that a consumer is statutorily entitled to maintain a CLRA suit as a class action. (See Civ. Code, § 1781.) The arbitration provision in the sales contract stated that if the class action waiver was declared unenforceable, the entire arbitration provision was not to be enforced. Pursuant to this "poison pill" clause, the trial court denied the petition to compel arbitration. The car dealer appealed.

We affirm but for a different reason. We conclude that the arbitration provision is unconscionable: The provision is adhesive — involving oppression and surprise — and contains harsh one-sided terms that favor the car dealer to the detriment of the buyer. Because the provision contains multiple invalid clauses, it is permeated by unconscionability and unenforceable. We cannot sever all of the offending language. Thus, regardless of the validity of the class action waiver, the trial court properly declined to compel arbitration.

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[1] The Tire Recycling Act requires a person buying a *new* tire to pay a California tire fee of $1.75. If the seller of the tire knowingly makes a false statement that the tire is new, it is liable for a civil penalty not to exceed $25,000. (Pub. Resources Code, § 42885, subds. (b), (e).)

I

BACKGROUND

The allegations and facts in this appeal are taken from the pleadings and the exhibits submitted in connection with the petition to compel arbitration.

A. Complaint

Plaintiff, Gil Sanchez, filed this class action in March 2010. Two months later, Sanchez filed a first amended complaint (complaint). It alleged as follows.

On August 8, 2008, Sanchez went to a car dealer, Mercedes-Benz of Valencia — a fictitious business name for defendant Valencia Holding Company, LLC (Valencia) — and expressed an interest in buying a certified pre-owned Mercedes. A salesman showed him a 2006 Mercedes-Benz S500V with an advertised price of around $48,000. Sanchez said he wanted to trade in his 2004 Cadillac Deville because he was "upside down" on it — he owed more than the car was worth. The salesman told Sanchez they could probably "make the deal work," depending on how much Sanchez could afford as a down payment.

After a test drive, the salesman told Sanchez that Valencia would give him $6,000 for his Cadillac, on which Sanchez still owed approximately $20,800, creating a negative equity of $14,800. Sanchez made a down payment of $10,000. The salesman said Sanchez might be required to make a higher down payment, but it could be paid over time.

Valencia informed Sanchez that he had to pay $3,700 to have the Mercedes-Benz "certified" to qualify for an interest rate of 4.99 percent. That statement was false. The $3,700 payment was actually for an extended limited warranty, which was optional and unrelated to the interest rate. Sanchez agreed to the additional payment, believing it was a certification fee required to obtain the offered rate.

Sanchez met with Valencia's finance manager, who completed all of the financial information on the sales documents, including a preprinted "Retail Installment

Sale Contract" (Sale Contract).[2] The total sales price was $53,498.60. The amount financed was $47,032.99, with a monthly payment of $888.31. The Sale Contract listed a charge of $347 for "license fees" and "N/A" for registration, transfer, and titling fees. It included a $28 "Optional DMV Electronic Filing Fee," but Valencia never discussed the fee with Sanchez or asked if he wanted to opt out of it. The Sale Contract also charged Sanchez new tire fees of $8.75 — a new tire fee of $1.75 for each new tire, including the spare. But not all of the tires were new. Last, the contract showed a down payment of $15,000 instead of the $10,000 Sanchez had just paid.

Valencia represented that the vehicle was "certified," meaning it had been through a "rigorous inspection and certification process" in which any deficiencies were "repaired, replaced, or reconditioned." A certified vehicle comes with a 12-month limited warranty. As alleged, the "certified" classification and the certification program were "intentionally fraudulent." Nothing was done to improve the condition or operation of a certified vehicle. A CARFAX vehicle history report — which would have disclosed prior accidents and damage — is supposed to accompany every certified vehicle, but Sanchez did not receive one.

Sanchez executed the Sale Contract and took possession of the vehicle on August 8, 2008. A few days later, Valencia called him and said he owed more toward the down payment. On August 15, 2008, Sanchez went to the dealership and wrote a check for $3,000. Sometime thereafter, Sanchez received another call, telling him he owed still more on the down payment. He went to the dealership and wrote a check for $2,000, bringing the total down payment to $15,000.

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[2] The Reynolds and Reynolds Company (<http://www.reyrey.com/solutions/document_solutions/index.asp>) [as of Nov. 23, 2011]) produces and sells the preprinted contract, which in this case was designated Form No. 553-CA-ARB, effective May 2008.

Sanchez soon experienced problems with the vehicle, including malfunctions with various electrical systems, water leaks inside the passenger cabin and the trunk, engine failures, and errors with the warning and indicator lights. Sanchez took the vehicle to authorized repair facilities on several occasions, including Valencia, but they were unable to repair the vehicle. Eventually, Valencia accused Sanchez of having tampered with or wrecked the vehicle, told him it would cost $14,000 to make the repairs, and said the warranties would not apply. The accusation against Sanchez was false. Sanchez then had the vehicle inspected elsewhere and learned it had been in an accident or had been inadequately repaired before he bought it.

Sanchez alleges that Valencia violated several California laws by: (1) failing to separately itemize the amount of the down payment that is deferred to a date after the execution of the Sale Contract; (2) failing to distinguish registration, transfer, and titling fees, on the one hand, from license fees, on the other hand; (3) charging buyers the Optional DMV Electronic Filing Fee without discussing it or asking the buyer if he or she wanted to pay it; (4) charging new tire fees for used tires; and (5) telling Sanchez to pay $3,700 to have the vehicle certified so he could qualify for the 4.99 percent interest rate when that payment was actually for an optional extended warranty unrelated to the rate.

The complaint alleged that a class action was appropriate based on the numerosity of putative class members, the predominance of common questions of law and fact, the typicality of the claims, and the superiority and benefits of class litigation. Four distinct classes were proposed based on the particular violations committed by Valencia.

Fifteen causes of action were alleged. The first one, for violation of the CLRA, was premised on Valencia's false representations and sought injunctive relief and damages, including punitive damages. Of the remaining 14 causes of action — alleging violations of the CLRA, ASFA, UCL, Song-Beverly Act, or Tire Recycling Act — 12 sought injunctive relief, rescission of the Sale Contract, restitution, or some combination thereof, but no damages. The other two, alleging violations of the Tire

Recycling Act and the Song-Beverly Act, sought civil penalties or damages. Under the Tire Recycling Act, Sanchez sought a civil penalty not exceeding $25,000 for new tire fees charged for used tires. (See Pub. Resources Code, § 42885, subds. (b). (e).) As provided in the Song-Beverly Act, he sought general and consequential damages plus a civil penalty up to two times actual damages. (See Civ. Code, § 1794.) The complaint also prayed for an award of attorney fees.

B. Motion to Compel Arbitration

On June 7, 2010, Valencia filed a motion to compel arbitration pursuant to an arbitration provision in the Sale Contract. The provision stated: "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 . . . shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. . . . 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* . . . (www.arbforum.com), the *American Arbitration Association* . . . (www.adr.org), or any other organization that you may choose subject to our approval. . . .

"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 . . . . 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 remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. 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, some capitalization omitted.)[3]

In anticipation of Sanchez's contentions, Valencia asserted in its moving papers that: (1) the arbitration provision was not procedurally or substantively unconscionable under the principles set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 at page 114 (*Armendariz*); and (2) the class action waiver was not invalid under *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, which was later overruled in *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740] (*Concepcion*). This second point was of special importance because the arbitration provision contained a "poison pill" clause — if the class action waiver was found to be unenforceable, the entire arbitration provision was unenforceable, and the case would be adjudicated in a court of law.

The Sale Contract is a preprinted document consisting of *one page*, 8½ inches wide and 26 inches long. There are provisions on *both* sides that occupy the entire document, leaving little in the way of margins. Sanchez signed or initialed the *front* in eight places, each related to a different provision. No signatures, initials, or other handwriting appears on the *back*. The arbitration provision, entitled "**ARBITRATION CLAUSE**," is on the *back* at the bottom of the page, outlined by a black box. It is the *last* provision of the Sale Contract concerning the purchase transaction; a provision related to the assignment of the contract appears below it. The buyer's *final* signature appears near the bottom on the *front* side.

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3 The National Arbitration Forum (NAF), one of the two arbitration organizations named in the Sale Contract, no longer handles consumer disputes. (See NAF, File A Claim <http://www.arbforum.com/main.aspx?itemID=1529&hideBar=False&navID=175&news=3> [as of Nov. 23, 2011].) The NAF stopped accepting new consumer claims in July 2009. (See American Bar Association, Litigation News, Future of Mandatory Arbitration of Consumer Disputes in Doubt (Aug. 19, 2009) <http://apps.americanbar.org/litigation/litigationnews/top_stories/arbitration-consumer-disputes.html> [as of Nov. 23, 2011].)

In his opposition papers, Sanchez disagreed with Valencia's legal points. He also submitted a declaration, stating: ". . . When I signed the documents related to my purchase of the Subject Vehicle, I was presented with a stack of documents, and was simply told by the Dealership's employee where to sign and/or initial each one. All of the documents (including the purchase contracts) were pre-printed form documents. When I signed the documents, I was not given an opportunity to read any of the documents, nor was I given an opportunity to negotiate any of the pre-printed terms. The documents were presented to me on a take-it-or-leave-it basis, to either sign them or not buy the car. . . . There was no question of choice on my part or of my being able to 'negotiate' anything. And I had no reason to suspect that hidden on the back of the contracts . . . was a section that prohibited me from being able to sue the Dealership in court if I had a problem.

". . . When I signed the purchase contract and related documents, the Dealership did not ask me if I was willing to arbitrate any disputes with it, did not tell me that there was an 'arbitration clause' on the back side of the purchase contract, and I did not see any such clause before I signed the documents. The Dealership did not explain to me what an arbitration clause was. I was not given any opportunity at any time during my transaction with [the] Dealership to negotiate whether or not I would agree to arbitrate any potential disputes. I was not given an option whether to sign a contract with an arbitration clause or one without.

". . . Prior to the filing of [Valencia's motion to compel arbitration], I had never heard of the National Arbitration Forum or American Arbitration Association. Nor was I aware that there was a clause in my contract with the Dealership supposedly requiring me to go to arbitration if I had a dispute with the Dealership and that I had to read the rules of those organizations before signing my purchase contracts. No one at the Dealership turned my purchase contract over and showed me the writing on the back or asked me to sign any sections on the back of the contract where I have now learned the arbitration clause is located.

". . . At no point during my transaction with the Dealership was I presented with a separate arbitration agreement to review and sign.

". . . On both occasions when I was at the Dealership and signed purchase contracts, I did not have, nor was I given, an opportunity to use a computer to download any information about arbitration organizations, including their procedures or rules, nor was I aware that I could or should have done this."

The motion to compel was heard on August 19 and September 13, 2010. At the September 13 hearing, the trial court stated it was denying the motion and would issue a written order within a week. On September 14, the trial court issued an order denying the motion. The court explained that the CLRA expressly provides for class actions and declares the right to a class action to be unwaivable. (See Civ. Code, §§ 1781, 1751.) As a consequence, the class action waiver in the arbitration provision was unenforceable. Further, in accordance with the poison pill clause, the unenforceability of the class action waiver made the entire arbitration provision unenforceable. The trial court therefore denied the motion. Valencia appealed.

II

DISCUSSION

"'"'Whether an arbitration provision is unconscionable is ultimately a question of law.'" . . . 'On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability.'" (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1511–1512, citations omitted; accord, *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.) Because this appeal presents a question of law, we may resolve it in the first instance, without remand to the trial court. "'We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.'" (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.)

The parties disagree as to whether the class action waiver is unenforceable under the CLRA, thereby making the entire arbitration provision unenforceable under the poison pill clause. They also dispute whether the arbitration provision is procedurally

and substantively unconscionable and whether the provision is permeated by unconscionability, rendering it unenforceable.

We do not address whether the class action waiver is unenforceable. Rather, we conclude the arbitration provision as a whole is unconscionable: The provision is procedurally unconscionable because it is adhesive and satisfies the elements of oppression and surprise; it is substantively unconscionable because it contains harsh terms that are one-sided in favor of the car dealer to the detriment of the buyer. Because the provision contains multiple invalid terms, it is permeated by unconscionability and unenforceable. Severance of the offending language is not appropriate. It follows that the case should be heard in a court of law.

A. General Principles of Unconscionability

As explained in *Armendariz, supra,* 24 Cal.4th 83: "In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. . . . As section 1670.5, subdivision (a) states: '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, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which . . . provides that arbitration agreements are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (9 U.S.C. § 2), recognized that 'generally applicable contract defenses, such as fraud, duress, or *unconscionability,* may be applied to invalidate arbitration agreements . . . .' . . .

". . . '[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided"' results. . . . 'The prevailing view is that

[procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' . . . But 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." (*Armendariz*, *supra*, 24 Cal.4th at p. 114, citations omitted; accord, *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1288–1289.)

Before applying *Armendariz* to the present case, we note that *Concepcion*, *supra*, 131 S.Ct. 1740, does not preclude the application of the unconscionability doctrine to determine whether an arbitration provision is unenforceable. *Concepcion* disapproved the "*Discover Bank* rule," stating: "In *Discover Bank*, the California Supreme Court applied [the doctrine of unconscionability] to *class-action waivers* in arbitration agreements and held as follows: [¶] '[W]hen the [class action] 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 . . . 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." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.'" (*Concepcion*, at p. 1746, italics added.) The court in *Concepcion* ultimately concluded that "[r]equiring the availability of *classwide arbitration* interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Id.* at p. 1748, italics added.)

With the exception of the *Discover Bank* rule, the court acknowledged in *Concepcion* that the doctrine of unconscionability remains a basis for invalidating arbitration provisions: "The final phrase of [title 9, United States Codes, section 2] . . . permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits

agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion, supra,* 131 S.Ct. at p. 1746, italics added; accord, *Kanbar v. O'Melveny & Myers* (N.D.Cal. 2011) 2011 U.S. Dist. Lexis 79447, pp. *15–*16, *23–*24, 2011 WL 2940690, pp. *6, *9; see *In re Checking Account Overdraft Litigation* (S.D.Fla. 2011) 2011 U.S. Dist. Lexis 118462, p. *46, 2011 WL 4454913, p. *4 ["*Concepcion* did not completely do away with unconscionability as a defense to the enforcement of arbitration agreements under the FAA"].) Significantly, in *Rent-A-Center, West, Inc. v. Jackson* (2010) ___ U.S. ___ [130 S.Ct. 2772], an employment case decided less than a year before *Concepcion*, the question before the court was whether an arbitrator or a court should decide whether the doctrine of unconscionability — where the arbitration agreement was allegedly too one-sided and overly favorable to the employer — precluded arbitration. (*Id.* at pp. 2780–2781.) Given the clear and unmistakable language authorizing the arbitrator to decide the "enforceability" of the arbitration agreement, the court held that the arbitrator should decide whether the agreement was unconscionable and therefore unenforceable.

Thus, *Concepcion* is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1–16). (See *Concepcion, supra,*131 S.Ct. at pp. 1748–1753.) *Concepcion* "concerns the preemption of unconscionability determinations for *class action waivers* in consumer cases[,] . . . specifically . . . with the rule enunciated in *Discover Bank . . . .*" (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 499, italics added.) The unconscionability principles on which we rely govern *all* contracts, are not unique to arbitration agreements, and do not disfavor arbitration. (See *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1158–1159 & fn. 4; see also *Concepcion*, at p. 1747 [unconscionability is "a doctrine normally thought to be generally applicable" to all

contracts but cannot be invoked to disfavor arbitration or applied based on uniqueness of arbitration]; *id.* at p. 1748 [FAA "preserves generally applicable contract defenses" to arbitration].)

Our conclusion today does not undermine the purpose of the FAA: "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, italics added) or, as otherwise phrased, the "'enforcement of private agreements and *encouragement of efficient and speedy dispute resolution*'" (*id.* at p. 1749, italics added). On the contrary, as we discuss below (see pt. II.C., *post*), the arbitration provision itself sacrifices efficient and speedy resolution through the adoption of harsh, one-sided terms in an effort to ensure that the car dealer will be the prevailing party.

B. Procedural Unconscionability

"'The procedural element of unconscionability focuses on two factors: oppression and surprise. . . . "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'" . . . "'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." . . .'" (*Bruni v. Didion*, *supra*, 160 Cal.App.4th at p. 1288.)

In *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77 (*Gutierrez*), the plaintiff leased a vehicle pursuant to a contract virtually identical to the one here and signed it under similar circumstances. The Court of Appeal had no difficulty concluding the arbitration provision was procedurally unconscionable, saying: "The trial court's implicit conclusion that the arbitration clause in the automobile lease is adhesive is supported by substantial evidence. The lease was presented to plaintiffs for signature on a 'take it or leave it' basis. Plaintiffs were given no opportunity to negotiate any of the preprinted terms in the lease. The arbitration clause was particularly inconspicuous, printed in eight-point typeface on the opposite side of the signature page of the lease. [The plaintiff] was never informed that the lease contained an arbitration clause, much less offered an opportunity to negotiate its inclusion within

the lease or to agree upon its specific terms. He was not required to initial the arbitration clause. . . . He either had to accept the arbitration clause and the other preprinted terms, or reject the lease entirely. Under these circumstances, the arbitration clause was procedurally unconscionable." (*Id.* at p. 89, citation omitted; accord, *Fittante v. Palm Springs Motors, Inc*. (2003) 105 Cal.App.4th 708, 722–723.)

As a federal court explained in finding the arbitration provision in a Sale Contract to be procedurally unconscionable: "[The buyer] asserts the Contract was presented to him on a 'take-it-or-leave-it' basis, . . . and he did not have an opportunity for meaningful negotiation. [The lender] disputes this assertion . . . . [The buyer] has submitted a declaration describing the circumstances under which he signed the Contract. According to [him], he was not provided an opportunity to read the Contract prior to signing it. . . . Instead, the finance person simply 'held the contract flat on the desk with one hand and with the other pointed to the various places on the front of the contract for [the buyer] to sign that [were] marked in yellow.' . . . [The buyer] 'was not allowed to read the back of the contract [where the Arbitration Clause is located], or asked to sign anywhere on the back of the contract. The finance person did not turn the contract over at all during the signing.' . . . No one pointed out the Arbitration Clause or discussed it with [the buyer] at any time. . . . These circumstances are sufficient to . . . support a finding of oppression. [¶] . . . [¶]

"Oppression, however, is only one factor in the procedural unconscionability analysis. The other factor is surprise, and on this factor, [the buyer] asserts the Arbitration Clause was hidden in the lengthy form contract. [The lender] disputes this assertion, and points out that the Arbitration Clause is located within a box entitled '**ARBITRATION CLAUSE,'** under which reads '**PLEASE REVIEW — IMPORTANT — AFFECTS YOUR LEGAL RIGHTS.'** However, the border and heading typeface do not change the location of the Arbitration Clause, which is found at the end of the Contract. [The lender does] not dispute [the buyer's] assertion that he 'did not know there was any arbitration clause until [his] attorney told [him that the lender] is trying to force arbitration.' . . . Based on this evidence, the Court finds [that

the buyer] has demonstrated surprise. Combined with the finding of oppression, [the buyer] has shown the Arbitration Clause is procedurally unconscionable." (*Smith v. Americredit Financial Services, Inc.* (S.D.Cal. 2009) 2009 U.S. Dist. Lexis 115767, pp. *13–*16, 2009 WL 4895280, pp. *5–*6.)

Even the California Attorney General has commented that the lengthy one-page Sale Contract is problematic, describing it as "an unwieldy size for a business document, and incompatible with standard office printing and reproduction machines. This incompatibility leads to significant trouble and expense for automobile dealers, as well as for those consumers who need to make or transmit copies of their sales contracts." (92 Ops.Cal.Atty.Gen. 97, 98 (2009).) The Attorney General has advised that a Sale Contract need not be a single page but may consist of multiple pages fastened together and sequentially numbered. (*Id.* at pp. 100–101.) As the Attorney General explained, the use of multiple pages, as opposed to a single page, will "facilitat[e] . . . the consumer's review of all of the parties' agreements before the consumer signs the sale or lease contract, so that the consumer has complete and accurate information. The [multiple-page] rule also helps to avert later disputes about the terms of the parties' final agreement." (*Id.* at p. 100.)

For its part, Valencia argues procedural unconscionability is lacking because Sanchez could have gone elsewhere to buy a Mercedes-Benz from a dealer who did not require arbitration. But "absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives. . . . [C]ourts are not obligated to enforce highly unfair provisions that undermine important public policies simply because there is some degree of consumer choice in the market." (*Gatton v. T-Mobile USA, Inc*. (2007) 152 Cal.App.4th 571, 585, fn. omitted; see *id.* at pp. 583–585 [discussing cases].) "The California Court of Appeal has rejected the notion that the availability in the marketplace of substitute employment, goods, or services *alone* can defeat a claim of procedural unconscionability." (*Nagrampa v. MailCoups, Inc*. (9th Cir. 2006) 469 F.3d 1257, 1283 (en banc).) And here, there is no evidence Sanchez could have purchased a

Mercedes-Benz from a dealer who did not mandate arbitration. Far from it, in arguing the arbitration provision involved no surprise, Valencia relies on case authority for the proposition "arbitration per se may be within the reasonable expectation of most consumers." (*Patterson v. ITT Consumer Financial Corp*. (1993) 14 Cal.App.4th 1659, 1665; accord, *Gutierrez, supra,* 114 Cal.App.4th at p. 90.) If that is true, a potential buyer would reasonably believe that *all* Mercedes-Benz dealers insist on arbitration and that there are no market alternatives. But a buyer would not expect to be bound by a provision as harsh and one-sided as the one here.

Valencia also contends that, on the front page of the Sale Contract, Sanchez signed off on a provision stating: "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 this 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." (Capitalization omitted.) This provision is located 22 inches from the top of the front page and flush to the *right margin* in a space measuring about 2¼ inches wide and 1⅛ inches high. To the immediate left of the provision is boxed text discussing the lack of a cooling-off period; it is approximately 5⅞ inches wide and 1⅛ inches high. A signature line for the *buyer* appears flush to the *left margin* directly below the *boxed text about cooling off*; that is the last signature line for the buyer in the contract. The only signature directly below the provision that mentions the "arbitration clause" is that of the car dealer's manager — the last signature on the front page and in the contract.

Spacing aside, Sanchez stated in his declaration he was not given an opportunity to read the contract. Rather, the finance manager simply told him where to sign or initial and did not turn the contract over, which would have revealed a full page of additional provisions. Sanchez did not know the contract contained an arbitration provision by way of either the two-word reference on the front side or the full arbitration provision on the reverse side. As one court has explained in similar circumstances: "[P]laintiffs are claiming that they never knowingly agreed to the

arbitration provision[]. As in most, if not all, adhesion contract cases, they deny ever reading [it]. The general rule '"that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it"' applies only in the absence of '"overreaching"' . . . or '"'imposition'"' . . . . Thus, it does not apply to an adhesion contract. . . . Indeed, failure to read the contract helps 'establish actual surprise . . . .'" (*Bruni v. Didion*, *supra*, 160 Cal.App.4th at pp. 1290–1291, citations omitted.) And even if Sanchez had read the pertinent provision on the *front* and seen the words "arbitration clause" buried therein, he still would have been surprised almost two years later, when he first learned that the arbitration provision, located on the *back*, was overly harsh and one-sided in favor of the car dealer.

In short, the arbitration provision satisfies the two elements of procedural unconscionability: oppression and surprise. Its location at the bottom on the back of the Sale Contract made it unnoticeable to a buyer who was not given time to read the contract.

C. Substantive Unconscionability

"Of course, simply because a provision within a contract of adhesion is not read or understood by the nondrafting party does not justify a refusal to enforce it. The unbargained-for term may only be denied enforcement if it is also *substantively* unreasonable. . . . Substantive unconscionability focuses on whether the provision is overly harsh or one-sided and is shown if the disputed provision of the contract falls outside the 'reasonable expectations' of the nondrafting party or is 'unduly oppressive.' . . . Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 88, citations omitted.)

We conclude that four clauses in the arbitration provision are unconscionable. First, a party who loses before the single arbitrator may appeal to a panel of three arbitrators if the award exceeds $100,000. Second, an appeal is permitted if the award includes injunctive relief. Third, the appealing party must pay, in advance, "the filing

fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs." Fourth, the provision exempts repossession from arbitration while requiring that a request for injunctive relief be submitted to arbitration. Although these provisions may appear neutral on their face, they have the effect of placing an unduly oppressive burden on the buyer. In assessing unconscionability, we focus on the practical effect of a provision, not a facial interpretation. (*Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1079–1080 (*Saika*).)

1. Award Exceeding $100,000

Either party may appeal an initial decision exceeding $100,000. As courts have recognized, this type of provision, though seemingly neutral, has the effect of benefiting the party with superior bargaining power, here, the car dealer.

In *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 (*Little*), an employment case, the arbitration provision allowed either party to appeal an initial award to a second arbitrator if it exceeded $50,000. The Supreme Court found the provision unconscionable, stating: "[The employer] and its amici curiae . . . claim that the arbitration appeal provision applied evenhandedly to both parties and that . . . there is at least the possibility that an employer may be the plaintiff, for example in cases of misappropriation of trade secrets. . . . But if that is the case, they fail to explain adequately the reasons for the $50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants. Given the fact that [the employer] was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant.

"Although parties may justify an asymmetrical arbitration agreement when there is a 'legitimate commercial need' . . . , that need must be 'other than the employer's desire to maximize its advantage' in the arbitration process. . . . There is no such justification for the $50,000 threshold." (*Little v. Auto Stiegler, Inc*., *supra,* 29 Cal.4th at p. 1073, citations omitted; accord, *Gibson v. Nye Frontier Ford, Inc*. (Alaska 2009) 205 P.3d 1091, 1098 & fn. 26.)

Little relied in part on *Saika*, *supra,* 49 Cal.App.4th 1074. In *Saika,* a patient signed a "Patient-Physician Arbitration Agreement" before undergoing a chemical skin peel of her face. The agreement provided that if an award exceeded $25,000, either party could request a trial de novo in superior court, and the arbitration award would be null and void. (*Id.* at p. 1077.) After the medical procedure, the patient filed a civil suit against the physician, alleging medical malpractice based on severe burns. The physician successfully moved to compel arbitration. The arbitrators awarded $325,000. The patient sought to strike the trial de novo clause and confirm the award; the physician countered with a request for a trial de novo. The trial court ruled in favor of the physician.

The Court of Appeal reversed, stating: "A trial de novo clause within the arbitration agreement purportedly allows either party to disregard the results of the arbitration and litigate in the courts when the arbitration award *exceeds* $25,000, but . . . the practical effect of the clause is to tilt the playing field in favor of the doctor. By making arbitration virtually illusory as far as one side is concerned, the clause contravenes the strong public policy favoring arbitration." (*Saika*, *supra*, 49 Cal.App.4th at pp. 1076–1077.)

The court realized that an arbitration award in favor of a patient in a malpractice case typically exceeds $25,000 by such a substantial amount that only the *physician* would invoke the trial de novo clause. In contrast, a claim by a physician against a patient, most likely a billing matter, would rarely result in an award exceeding $25,000, especially if the patient had private health insurance or was covered by some type of governmental assistance program. As the court explained: "True, there is a theoretical

class of cases where the trial de novo clause could arguably benefit a patient — namely, situations where the initial arbitration award *exceeds* $25,000 but is *still so low* that it represents an injustice. . . . For example, the case before us appears to involve facial disfigurement. The arbitrators handed down what appears, at least insofar as the record discloses, an appropriately large award. Had they only given [the patient] $25,001, the trial de novo clause would . . . have been of some benefit to her.

"But . . . [a]s a practical matter, the benefit which the trial de novo clause confers on patients is nothing more than a chimera. The odds that an award will *both* (a) clear the $25,000 threshold but (b) *still* be so low that the *patient* would *want* to have a trial de novo are so small as to be negligible. . . . [T]he cases where the trial de novo clause could possibly benefit the patient are going to be rare indeed.

". . . [W]hile the trial de novo clause in the present case purports to apply to both parties, it is the same 'heads I win, tails you lose' proposition that the court condemned in [prior case law.] [¶] . . . [¶]

". . . [P]ublic confidence in arbitration in large part depends on the idea that arbitration provides a *fair* alternative to the courts. That confidence is manifestly undermined when provisions in arbitration clauses provide that when one side wins the game doesn't count. . . . Alternative dispute resolution must be a genuine *alternative* to litigation in the courts, not a sham process by which one party to an agreement can increase the total costs of making a claim against it." (*Saika*, *supra*, 49 Cal.App.4th at pp. 1080–1081, citation omitted.)

The same analysis applies here. The buyer will rarely benefit from the clause permitting an appeal of an award exceeding $100,000 because the buyer, not the dealer, is more likely to recover an award of that size and be satisfied with it; the car dealer would appeal it. Under the Sale Contract, Sanchez is obligated to make monthly payments totaling less than $50,000. In comparison, Valencia's obligations under the Sale Contract and California law are to sell a vehicle in working condition, to avoid making misleading or false representations, and to comply with various consumer laws, the violation of which could result in substantial damages, including punitive damages.

If Sanchez succeeds in obtaining rescission, he is almost half way to a $100,000 award. And given the allegations concerning Valencia's violations of the consumer laws and the way in which Valencia responded to the reported defects in the vehicle, an award in Sanchez's favor could easily exceed $100,000.[4] In short, there is no justification for the $100,000 threshold, other than to relieve the car dealer of liability it deems excessive.

Valencia emphasizes that an appeal of the initial award is permitted if *either party* brings a claim and recovers nothing. By providing an appeal where the arbitrator awards nothing, one party is not favored over the other. We cannot say that one of the parties is more likely to lose regardless of which party is the claimant or the respondent in the arbitration. Nevertheless, under the appeal clauses, if the buyer prevails but believes the award is too low, the arbitration is at an end unless the buyer recovers nothing; if the buyer prevails and recovers a substantial sum, the car dealer can start anew before a three-member panel if the award exceeds what the dealer considers too high. A truly bilateral clause would allow a *buyer* to appeal an award *below $100,000*.

2. Appeal of Award that Includes Injunctive Relief

The arbitration provision allows an appeal by either party if an award against it contains injunctive relief. This type of appeal unduly burdens the buyer because the buyer, not the car dealer, would be the party obtaining an injunction.

"[I]mmediate injunctive relief [is often] essential to protect consumers against further illegal acts of the defendant." (*People v. Pacific Land Research Co*. (1977) 20 Cal.3d 10, 20.) In litigation by consumers, "the importance of providing an

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[4] This potential recovery does not include any civil penalties under the Tire Recycling Act ($25,000 per violation). It is not evident the act may be privately — as opposed to administratively — enforced. The parties did not brief that issue, and we express no view on the subject.

effective injunctive remedy becomes manifest." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 107.)

Preliminary injunctive relief is appropriate only if two interrelated factors are present: (1) the plaintiff is likely to prevail on the merits at trial; and (2) the interim harm the plaintiff is likely to sustain in the absence of an injunction is greater than the harm the defendant will probably suffer if an injunction is issued. (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 433.) A consideration of interim harm includes the inadequacy of other remedies, including damages, and the degree of irreparable injury the denial of the injunction would cause. (*Id.* at p. 435; *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352; 5 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 337, p. 282.)

Preliminary injunctions are of particular importance in protecting the interests of consumers. (See, e.g., *Regents of University of California v. ABC* (9th Cir. 1984) 747 F.2d 511, 521; *Sanderson Farms, Inc. v. Tyson Foods, Inc*. (D.Md. 2008) 547 F.Supp.2d 491, 508–509; *R.L. Polk & Co. v. INFOUSA, Inc*. (E.D.Mich. 2002) 230 F.Supp.2d 780, 796–797; *F.T.C. v. Staples, Inc*. (D.D.C. 1997) 970 F.Supp. 1066, 1091–1092; see also *Vo v. City of Garden Grove*, *supra*, 115 Cal.App.4th at p. 435 [one factor weighing against issuance of preliminary injunction is any adverse effect it would have on public interest].)[5]

Not surprisingly, it is the buyer, not the car dealer, who would be seeking preliminary or permanent injunctive relief, primarily to enforce consumer laws like the

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[5] Our Supreme Court has held that, because injunctive relief sought under the CLRA and the UCL prevents future deceptive practices on behalf of the general public, a request for an injunction under those acts is not arbitrable. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079–1080 [CLRA]; *Cruz v. PacifiCare Health Systems, Inc*. (2003) 30 Cal.4th 303, 315–316 [UCL].) Valencia contends *Broughton* and *Cruz* were implicitly overruled by *Concepcion*, *supra*, 131 S.Ct. 1740, but does not address how the injunction exception, if still valid, would affect the alleged unconscionability of the arbitration provision.

CLRA. If an interim award (preliminary injunction) or final award (permanent injunction) is issued against the car dealer, the arbitrator has favorably reviewed the merits of the buyer's claims and determined that the interests of consumers will be irreparably injured without injunctive relief.

Nevertheless, here, the arbitration provision's appeal clauses allow the car dealer to delay the effect of an injunction by way of appellate review before a three-member arbitration panel. By subjecting injunctive relief to an appeal process, only the car dealer is benefited, making the clause one-sided and undermining the purpose of the CLRA to protect consumer rights.

In addition, the arbitration provision is silent as to the procedure for taking an appeal. Presumably, if the arbitrator issues a *preliminary* injunction in the form of an *interim* award, the car dealer may appeal at that time, putting the entire case, including the injunction, on hold pending a decision by the three-member appellate panel. This delay is inconsistent with the enforcement of consumer rights laws and the expediency of the arbitration process.

Thus, when it serves the car dealer's interests — if an award against it is *less than* $100,000 — the buyer cannot appeal, and the car dealer touts the benefits of mandatory arbitration: "efficient, streamlined procedures[,] . . . the informality of arbitral proceedings . . . , reducing the cost and increasing the speed of dispute resolution." (*Concepcion*, *supra*, 131 S.Ct. at p. 1749.) But when those factors do not benefit the car dealer — if injunctive relief is issued against it — then delay, complexity, and higher costs take precedence, and the buyer is subjected to another level of arbitral review — by three arbitrators this time — denying the weaker party of the benefits of arbitration.

3. Advance Payment of Fees and Costs on Appeal

As provided in the arbitration provision, if either party recovers nothing, it "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." (Italics added.)

Yet the AAA rules do not mention arbitration costs where a consumer appeals an initial award to a three-member panel. Nor do they permit any kind of appeal, to a three-member panel or otherwise. (See AAA, Consumer Procedures <http://www.adr.org/sp.asp?id=29466> [as of Nov. 23, 2011]; Consumer-Related Disputes Supplementary Procedures <http://www.adr.org/sp.asp?id=22014> [as of Nov. 23, 2011]; see also AAA, Commercial Arbitration Rules and Mediation Procedures (eff. June 1, 2009) <http://www.adr.org/sp.asp?id=36905> [as of Nov. 23, 2011].) And the appeal clauses in the Sale Contract require the appealing party to advance the fees and costs for *both* parties.

The CLRA confers unwaivable statutory rights on consumers and accords them some of the rights set forth in *Armendariz, supra,* 24 Cal.4th at pages 103–113. (See *Gutierrez, supra,* 114 Cal.App.4th at p. 95 & fn. 14; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 854–855 [discussing *Gutierrez*].) One of those rights limits the payment of arbitral expenses by the consumer.

Under the CLRA, a consumer does not have to pay arbitration costs or arbitrator fees (arbitral expenses) that he or she cannot afford or that are prohibitively high. (See *Gutierrez, supra,* 114 Cal.App.4th at pp. 82–83, 89–90, applying *Armendariz, supra,* 24 Cal.4th at pp. 110–111, and *Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90 [121 S.Ct. 513].) Yet the appeal clauses mandate that the appealing party bear the arbitral expenses for *both* parties in advance, subject to reallocation between the parties at the end of the proceeding. But reapportionment *at the conclusion* of the arbitration is inadequate. (*Gutierrez*, at p. 90.) "[That] possibility . . . provides little comfort to consumers . . . who cannot afford to initiate the [appeal] process in the first place." (*Ibid.*) Items covered by an advance payment on appeal include, as stated in the Sale Contract, "the filing fee and other arbitration costs." Arbitrator fees in Los Angeles average around $450 per hour. (See ADR Services, Inc., Southern California Mediation & Arbitration Panel <http://www.adrservices.org/

pdf/JAMP%20(SOCAL)%20fees%208.07.pdf> [as of Nov. 23, 2011].) Hearing room rental costs and the arbitrator's travel expenses may also be included. (See *D.C. v. Harvard Westlake School*, *supra*, 176 Cal.App.4th at p. 849, fn. 4.)

Because the arbitration provision leaves the buyer in the dark as to the amount to be paid in advance, creating the possibility that the buyer may have to advance unaffordable expenses, the provision discourages buyers from pursuing an appeal and enforcing their rights under the CLRA. Although the AAA consumer rules ensure that a consumer does not have to advance an exorbitant sum at the beginning of the *single-arbitrator* process, the rules, as noted, do not address or permit an appeal. (See AAA, Consumer Arbitration Costs <http://www.adr.org/sp.asp? id=22039> [as of Nov. 23, 2011]; AAA, Administrative Fee Waivers and Pro Bono Arbitrators <http://www.adr.org/sp.asp?id=22040> [as of Nov. 23, 2011.) The requirement that the appealing party pay the filing fee and arbitration costs of *both* parties *in advance* puts an unduly harsh burden on a consumer.

That is not to say a consumer must be allowed to pursue an appeal without paying anything up front. But the arbitration provision in this case provides no procedure or criteria for determining how much the consumer can afford. As the court explained in *Gutierrez*: "Unconscionability is determined as of the time the contract is made. . . . The flaw in this arbitration agreement is readily apparent. Despite the potential for the imposition of a substantial [advance of appellate costs], there is no effective procedure for a consumer to obtain a [cost] waiver or reduction. A comparison with the judicial system is striking. . . . [T]he judicial system provides parties with the opportunity to obtain a judicial waiver of some or all required court fees.

"The Government Code prescribes a tripartite means test for litigants seeking such a waiver. . . . The first two tests automatically exempt a party who receives certain designated governmental benefits . . . or who falls below a designated poverty limit . . . . Under the third test, courts have discretion to exempt litigants 'unable to proceed without using money which is necessary for the use of the litigant or the litigant's

family to provide for the common necessaries of life.' . . . The Judicial Council, at the Legislature's direction, has provided a set of forms and rules that supplement the Government Code statute. . . . These rules detail the application form . . . , the procedure for determining the application . . . , and when a hearing is required . . . . Denial of the application, in whole or in part, 'shall include a statement of reasons.' . . .

"In contrast, the [arbitration provision here does not indicate] . . . how this process is begun, or who makes the determination, or what criteria are utilized to decide if [costs] should be reduced or deferred. . . .

"We do not mean to suggest that an arbitration agreement requiring the posting of [costs] to initiate the [appeal] process must provide a cost-waiver procedure that duplicates the judicial waiver procedure. But the agreement must provide some effective avenue of relief from unaffordable fees. This one does not." (*Gutierrez, supra*, 114 Cal.App.4th at pp. 91–92, citations omitted.) Nor does the arbitration agreement in this case.

4. Remedies Exempt from Arbitration

The arbitration provision expressly exempts self-help remedies including repossession, which is perhaps the most significant remedy from the car dealer's perspective. The buyer has no effective self-help remedies against a car dealer, and none of the buyer's remedies is exempt. Yet one of the most important remedies to a consumer — injunctive relief — is subject to arbitration. While a buyer is likely to seek an injunction against a car dealer — 10 of the 15 causes of action in this case do — we cannot conceive of a situation where the dealer would be requesting that type of relief against a buyer.

In *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, the plaintiffs obtained a reverse mortgage on their home. The loan agreement contained an arbitration clause requiring the arbitration of all controversies with the exception of self-help remedies, stating: "'[T]his Section does not limit [the lender's] right to foreclose against the Property (whether judicially or non-judicially by exercising [its] right of sale or otherwise), to exercise self-help remedies such as set-off, or to obtain

. . . appointment of a receiver from any appropriate court, whether before, during or after any arbitration.'" (*Id.* at p. 850.) The plaintiffs filed suit against the lender, alleging fraud, unfair business practices, and violation of the CLRA. The lender moved to arbitrate the case. The trial court denied the motion. The Court of Appeal affirmed, stating that "[a]s a practical matter, by reserving to itself the remedy of foreclosure, [the lender] has assured the availability of the only remedy it is likely to need. . . . The clear implication is that [the lender] has attempted to maximize its advantage by avoiding arbitration of its own claims." (*Id.* at p. 855; see also *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 845, fn. 21 [car buyer misinterpreted arbitration provision to allow car dealer to seek deficiency judgment in court instead of arbitration].)

By exempting repossession — to which only the car dealer would resort — from arbitration, while subjecting a request for injunctive relief — the buyer's comparable remedy — to arbitration, the Sale Contract creates an unduly oppressive distinction in remedies. This is especially so given that the California Arbitration Act (Code Civ. Proc., §§ 1280–1294.2) exempts preliminary injunctions from arbitration, allowing an application for "provisional" remedies to be filed directly in court (*id.*, § 1281.8). Nevertheless, the Sale Contract dictates otherwise. As several courts have held, arbitration provisions are unconscionable if they provide for the arbitration of claims most likely to be brought by the weaker party but exempt from arbitration claims most likely to be filed by the stronger party. (See, e.g., *Armendariz, supra*, 24 Cal.4th at p. 119; *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 896; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 724–725.)

Finally, the requirement that the buyer seek injunctive relief from the arbitrator is inconsistent with the CLRA. As our Supreme Court has explained: "[T]he purpose of arbitration is to voluntarily resolve private disputes in an expeditious and efficient manner. . . . Parties to arbitration voluntarily trade the formal procedures and the opportunity for greater discovery and appellate review for '"the simplicity, informality, and expedition of arbitration."' . . .

"On the other hand, the evident purpose of the injunctive relief provision of the CLRA is not to resolve a private dispute but to remedy a public wrong. Whatever the individual motive of the party requesting injunctive relief, the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered. . . . In other words, the plaintiff in a CLRA damages action is playing the role of a bona fide private attorney general. . . .

"In addition to the fact that the injunction is for the public benefit, we are cognizant of the evident institutional shortcomings of private arbitration in the field of such public injunctions. . . . [C]ourts that have generally affirmed the ability of arbitrators to issue injunctions acknowledge that the modification or vacation of such injunctions involves the cumbersome process of initiating a new arbitration proceeding. . . . While these procedures may be acceptable when all that is at stake is a private dispute by parties who voluntarily embarked on arbitration aware of the trade-offs to be made, in the case of a public injunction, the situation is far more problematic. The continuing jurisdiction of the superior court over public injunctions, and its ongoing capacity to reassess the balance between the public interest and private rights as changing circumstances dictate, are important to ensuring the efficacy of such injunctions. In some cases, the continuing supervision of an injunction is a matter of considerable complexity. . . . Indeed, in such cases, judges may assume quasi-executive functions of public administration that expand far beyond the resolution of private disputes. . . . Arbitrators, on the other hand, in addition to being unconstrained by judicial review, are not necessarily bound by earlier decisions of other arbitrators in the same case. Thus, a superior court that retains its jurisdiction over a public injunction until it is dissolved provides a necessary continuity and consistency for which a series of arbitrators is an inadequate substitute. [¶] . . . [¶]

"In short, there are two factors taken in combination that make for an 'inherent conflict' between arbitration and the underlying purpose of the CLRA's injunctive relief remedy. First, that relief is for the benefit of the general public rather than the

party bringing the action. . . . Second, the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators." (*Broughton v. Cigna Healthplans*, *supra*, 21 Cal.4th at pp. 1080–1082, citations & fn. omitted.)[6]

D. Severance or Nonenforcement

"'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, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' [(Civ. Code, § 1670.5, subd. (a).)] The trial court has discretion under this statute to refuse to enforce an entire agreement if the agreement is 'permeated' by unconscionability. . . . An arbitration agreement can be considered permeated by unconscionability if it 'contains more than one unlawful provision. . . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage.' . . . 'The overarching inquiry is whether "'the interests of justice . . . would be furthered'" by severance.'" (*Lhotka v. Geographic Expeditions, Inc*. (2010) 181 Cal.App.4th 816, 826.)

The arbitration provision in the Sale Contract suffers from four defects, all of which tilt the arbitration decidedly in favor of the car dealer. First, the dealer may appeal to a three-member panel an adverse *monetary* award that only the buyer is likely to receive — an award exceeding $100,000. While the car dealer, when sued, may appeal an adverse award it considers too high, the buyer, when the claimant, cannot

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[6] Assuming that, as Valencia contends, the FAA preempts *Broughton*'s holding (see fn. 5, *ante*), the court's observations about arbitral injunctions under the CLRA remain accurate.

appeal a monetary award it considers too low, other than a total loss. Second, the car dealer may appeal an award of injunctive relief — a remedy only the buyer would seek — to a three-member panel, undermining the urgency of that type of remedy and the goals of arbitration itself: speedy, inexpensive relief to enjoin unlawful conduct affecting numerous consumers. Third, the advance payment of arbitral expenses on appeal requires the buyer, when appealing, to pay the expenses of both parties even though he or she may not be able to afford them, discouraging enforcement of the CLRA and violating the buyer's right to avoid paying exorbitant arbitral expenses. Fourth, the remedy of most importance to the dealer — repossession — is exempt from arbitration, but one of the buyer's most significant remedies —injunctive relief — is not exempt. These defects lead us to conclude that the arbitration provision is permeated by unconscionability.

In addition, not all of the offending clauses can be cured by striking them. The unconscionable taint of the clause requiring an advance payment of both parties' arbitral expenses in the event of an appeal cannot be cleansed by some type of judicial restriction or deletion. The vice of the clause is not that the buyer, when the appellant, has to pay *some* of the costs of appeal in advance. Rather, the clause fails because it does not establish a procedure or criteria for determining how much the buyer can afford. (See *Gutierrez, supra,* 114 Cal.App.4th at pp. 91–92.) "[T]here is no *single* [clause] a court can strike or restrict in order to remove the unconscionable taint from the [arbitration provision]. Rather, the court would have to, in effect, reform the [provision], not through severance or restriction, but by augmenting it with additional terms. Civil Code section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute. Code of Civil Procedure section 1281.2 authorizes the court to refuse arbitration if grounds for revocation exist, not to reform the [arbitration provision] to make it lawful. Nor do courts have any such power under their inherent limited authority to reform contracts. . . . Because a court is unable to cure this unconscionability through severance or restriction and is not permitted to cure it through reformation and augmentation, it must void the entire [arbitration

provision]." (*Armendariz, supra*, 24 Cal.4th at pp. 124–125, citations omitted, italics added.)

Having found that the arbitration provision is permeated by unconscionability, we typically would remand the case to the trial court, allowing it, as a discretionary matter, to decide whether the doctrine of severability should apply. (See *Armendariz, supra*, 24 Cal.4th at pp. 122, 124.) Valencia argues we have no choice but to do so. Yet "an arbitration agreement permeated by unconscionability, or one that contains unconscionable aspects that cannot be cured by severance, restriction, or duly authorized reformation, should not be enforced." (*Armendariz, supra*, 24 Cal.4th at p. 126.) That is precisely what the record establishes here. Thus, it would be pointless to remand the case when only one outcome is proper. Under these circumstances, a remand is unnecessary. (See *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 122; *First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1575–1576; *Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 390; *John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1536, fn. 13.)

Accordingly, we conclude the arbitration provision is procedurally and substantively unconscionable. The provision is permeated by unconscionability that cannot be removed through severance or restriction. The trial court properly denied the motion to compel arbitration.

III

DISPOSITION

The order is affirmed.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

I concur:

JOHNSON, J.

ROTHSCHILD, J., Concurring.

I agree that the arbitration agreement is unconscionable for the following reasons: First, it is procedurally unconscionable because it is a contract of adhesion. (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1280 & fn. 11.) Second, it is substantively unconscionable because (1) the provision making monetary awards of exactly $0 or more than $100,000 appealable is unfairly one-sided; and (2) the provision requiring the appealing party to advance all costs of the appeal is unfairly one-sided. Third, the unconscionable aspects of the agreement are not severable or susceptible of reformation. I therefore concur in the judgment.

ROTHSCHILD, J.