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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM GOODRIDGE, Plaintiff and Respondent, v. KDF AUTOMOTIVE GROUP, INC., Defendant and Appellant.	D060269 (Super. Ct. No. 37-2010-00105355-CU-CO-CTL)

APPEAL from an order of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Defendant KDF Automotive Group, Inc. (KDF) appeals an order denying its petition to compel arbitration of the action filed against it by plaintiff William Goodridge arising out of his purchase of a used automobile from KDF. On appeal, KDF contends the trial court erred by concluding the arbitration clause in the purchase contract was unconscionable and therefore unenforceable.[1]

1 We note the circumstances (e.g., preprinted contract and arbitration clause) and issues in this case are virtually identical to those in *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, review granted Mar. 21, 2012, S199119 (*Sanchez*). The

FACTUAL AND PROCEDURAL BACKGROUND

On May 16, 2010, Goodridge attended an automobile "tent sale" and signed a retail installment sale contract (Contract) to purchase a 2008 Hyundai Elantra from KDF, an automobile dealership doing business as El Cajon Mitsubishi. Goodridge was presented with a stack of preprinted form documents and was told by a KDF employee where to sign and/or initial each document. He was not given an opportunity to read all of the documents in full or to negotiate any of the documents' preprinted terms. The documents were presented to Goodridge on a "take-it-or-leave-it" basis. KDF did not ask him whether he was willing to arbitrate any disputes or inform him there was an arbitration clause on the back side of the Contract. He did not see the arbitration clause before signing the Contract.

On or about May 21, having concerns about the documents, Goodridge went to KDF and was informed he needed to re-sign the sale documents. He was given and signed both an acknowledgement of rewritten contract and a second Contract.[2] Although it was May 21, the second Contract was dated May 16. As before, Goodridge was not given an opportunity to read the documents in full or to negotiate any of the documents' preprinted terms. The documents were again presented to Goodridge on a "take-it-or-

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California Supreme Court will likely make the ultimate determination of the issues discussed in this case.

[2] For purposes of this opinion, the two purchase contracts are virtually identical and therefore we use the term "Contract" to refer to both contracts.

leave-it" basis. He was unaware there was an arbitration clause on the Contract's back side.

The Contract document consists of one piece of paper (i.e., preprinted Reynolds & Reynolds Form No. 553-CA-ARB 1/10). It apparently is about 26 inches long and has provisions on its front and back sides. Goodridge signed or initialed the front of the Contract in nine places. There are no signatures, initials, or other handwriting on its back side. An arbitration provision, entitled "ARBITRATION CLAUSE," is located near the bottom of the back page and is outlined (like many other preceding provisions) by black lines. The arbitration clause provides:

"ARBITRATION CLAUSE

"PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS

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

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

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

"Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or

relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum . . . (www.arbforum.com), the American Arbitration Association . . . (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

"Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside . . . . 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.)

On December 2, 2010, Goodridge, individually and on behalf of others similarly situated, filed the instant complaint against KDF and Mission Federal Services LLC, alleging 11 causes of action, including causes of action for violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), violation of the Automobile Sales Finance Act (Civ. Code, § 2981 et seq.), unlawful and/or unfair business practices (Bus. & Prof. Code, § 17200 et seq.), fraudulent misrepresentation, and negligent misrepresentation.

On January 10, 2011, KDF answered the complaint, denying each and every allegation and asserting 25 affirmative defenses. The answer did not assert any right to arbitrate the dispute as an affirmative defense.

During the period of February through May 2011, KDF responded to multiple sets of Goodridge's discovery requests. None of those responses mentioned any right to arbitrate the dispute or an intent to require arbitration.

In May 2011, KDF filed a case management statement, requesting a jury trial and estimating the trial would take 10 days. KDF did not check any of the boxes indicating a

willingness to participate in mediation, arbitration, or other alternative dispute resolution method. However, KDF indicated it was willing to participate in an early settlement conference three to four weeks before the trial date. KDF also indicated it expected to file a "motion to compel (if needed) [and] motions in limine." It also indicated its intent to take Goodridge's deposition and engage in written discovery.

On June 14, 2011, KDF filed a petition to compel arbitration of the instant action based on the arbitration clause in the Contract. It subsequently filed an application for a stay of proceedings in the action pending a ruling on its petition to compel arbitration. The trial court granted the application and stayed the proceedings pending its ruling on the petition to compel. Goodridge opposed the petition to compel arbitration, arguing the arbitration clause was unconscionable and unenforceable and that by delay KDF waived any right it had to arbitrate the dispute. In support of his opposition, Goodridge filed his declaration confirming the transactional facts described above. His declaration further stated: "The documents (including the purchase contract) were given to me and I was just told 'sign here' in various places. There was no question of choice on my part or of our being able to 'negotiate' anything. I had no reason to suspect that hidden on the back of the contract that told me how much the vehicle cost and how much my monthly payments would be was a section that prohibited me from being able to sue in court if I had a problem." It further stated: "When I signed both of the purchase contracts and related documents, [KDF] did not ask me if I was willing to arbitrate any disputes with it or its assignees, [KDF] did not tell me 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. . . . I

was not given any opportunity at any time during my transaction with [KDF] to negotiate whether or not I would agree to arbitrate any potential disputes, or any of the terms by which I would agree to arbitrate any disputes. I was never given an option whether to sign a contract with an arbitration clause or one without. . . ." It further stated: "No one at [KDF] ever turned over either sale contract to show me the writing on the back or asked me to sign any sections on the back of the contract where [KDF] claims the arbitration clause is located."

Finally, his declaration addressed the financial burden of arbitration costs, stating: "[I]f the Court were to enforce the arbitration clause, it would create a financial burden on me and my family that we simply could not afford. . . . [I]f the defendants lose they may be allowed (without my consent) to request a new arbitration with a three arbitrator panel—which would likely result in three arbitrators simultaneously charging us for their time—and that we could potentially be responsible for all of these costs if I do not win that new arbitration. I am not financially able to pay such potential arbitration fees." KDF replied to the opposition, arguing the Contract was not unconscionable and that it had not waived its right to arbitrate the dispute. KDF argued: "The United States Supreme Court in [*AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*AT&T*)] makes it clear that unconscionability is no longer a valid objection to an arbitration agreement."

On July 15, the trial court issued a tentative ruling denying the petition to compel arbitration based on KDF's waiver of any right to arbitrate. Following oral argument by

counsel (including KDF's argument that it had not waived its right to arbitrate), the court took the matter under submission.

On July 22, the trial court issued a minute order denying the petition to compel arbitration on grounds of unconscionability of the arbitration clause. The court stated in part:

> "Unconscionability is a method in which courts can refuse to enforce the contract. California cases analyze unconscionability as having two separate elements—procedural and substantive. [Citations.] Substantive unconscionability focuses on the actual terms of the agreement, while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties. California courts generally require a showing of both procedural and substantive unconscionability at the time the contract was made. [Citations.]
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> "The arbitration clause is procedurally unconscionable. The clause was on the backside of a two-sided document. [Citation.] [Goodridge] was not advised of the arbitration clause nor was arbitration referenced on the front of the contract, the only side where [Goodridge] was required to sign. [Citation.] The arbitration clause is also substantively unconscionable since the clause is unfairly one-sided. The clause permits [KDF] to avoid arbitration as to some claims but forces [Goodridge] to arbitrate all claims. [KDF] argues the right to repossession or 'self-help' applies to both parties, but as a realistic matter, only [KDF] would pursue repossession. No self-help options are available to [Goodridge]. Further, if the claim is forced into arbitration, [KDF] does not give up any rights but, for example, [Goodridge] cannot appeal losing a claim for injunctive relief. [Goodridge] can only appeal an award of damages if he receives nothing.
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> "[KDF] argues [Goodridge's] argument regarding unconscionability has been preempted by the US Supreme Court's ruling in *AT&T*. This is not the case. While *AT&T* clearly abrogates the California Supreme Court's ruling on the unconscionability of class action waivers in arbitration clauses as discussed in *Discover Bank* [*v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*)], it does not go so far as to preempt all decisional law on unconscionability."

On the issue of waiver, the court stated: "[T]he court does not find [KDF] waived its right to arbitrate. . . . [KDF's] right to enforce the arbitration clause was confirmed as of April 27, 2011[,] when the US Supreme Court issued its opinion in [*AT&T*], which overruled the California Supreme Court's decision in [*Discover Bank*]. [¶] Accordingly, although the conduct of [KDF] may be characterized as disingenuous, the court simply cannot conclude [KDF] waived its right to compel arbitration, having filed it[s] petition some two months after the change in the law." KDF timely filed a notice of appeal.

DISCUSSION

I

Standard of Review

On appeal from an order denying a motion to compel arbitration, "[u]nconscionability findings are reviewed de novo if they are based on declarations that raise 'no meaningful factual disputes.' [Citation.] However, where an unconscionability determination 'is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence.' [Citation.] The ruling on severance is reviewed for abuse of discretion." (*Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144.) Considering all disputed factual findings supported by substantial evidence favorably to the trial court's determination, the question of whether, based on those facts, a contract's arbitration provision is unconscionable is a question of law we

determine de novo or independently. (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892.) To the extent the extrinsic evidence is undisputed, we independently review the contract to determine whether it is unconscionable. (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 579.)

II

California Law on Unconscionability

Federal and state law reflect a strong public policy favoring arbitration as a speedy and relatively inexpensive means of dispute resolution. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204; *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443.) "Nonetheless, federal and California courts may refuse to enforce an arbitration agreement 'upon such grounds as exist at law or in equity for the revocation of any contract,' including waiver [and unconscionability]. (9 U.S.C. § 2; see also Code Civ. Proc., § 1281; *St. Agnes*, at pp. 1194-1195.)" (*Lewis*, at pp. 443-444.) Section 2 of the Federal Arbitration Act (FAA) provides that agreements to arbitrate disputes are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) That provision allows a court to revoke an arbitration agreement if generally applicable contract defenses, such as fraud, duress, or unconscionability apply. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2012) 206 Cal.App.4th 949, 956; *AT&T*, *supra*, ___ U.S. at pp. ___ - ___ [131 S.Ct. at p. 1746].) Code of Civil Procedure section 1281 provides: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such

grounds as exist for the revocation of any contract." Civil Code section 1670.5, subdivision (a), provides: "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." Accordingly, "California law . . . favors enforcement of arbitration agreements, save upon grounds that exist at law or in equity for the revocation of any contract, such as unconscionability." (*Iskanian*, at p. 956.)

AT&T "did not overthrow the common law contract defense of unconscionability whenever an arbitration clause is involved. Rather, [*AT&T*] reaffirmed that the savings clause preserves generally applicable contract defenses such as unconscionability, so long as those doctrines are not 'applied in a fashion that disfavors arbitration.' " (*Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, 963, quoting *AT&T*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at p. 1747].) In overruling the *Discover Bank* rule,[3] *AT&T* stated: "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the

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3 In *Discover Bank*, the California Supreme Court held: "[A]t least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." (*Discover Bank*, *supra*, 36 Cal.4th at p. 153.) The court found class action waivers in certain circumstances would be unconscionable and therefore unenforceable. (*Id*. at pp. 162-163.) *AT&T* concluded: "[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*AT&T*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at p. 1751].)

accomplishment of the FAA's objectives." (*AT&T*, ___ U.S. at p. ___ [131 S.Ct. at p. 1748.) *AT&T* held, in effect, that the FAA preempts any California or other state law or rule that disfavors, or stands as an obstacle to, arbitration by deeming unconscionable an arbitration agreement that waives, explicitly or implicitly, class arbitration. Based on *AT&T*'s reasoning, we conclude the FAA likewise precludes a state law that disfavors arbitration of a particular type of claim (e.g., consumer contract dispute) when arbitration of other types of disputes is not so disfavored. To the extent California's doctrine of unconscionability is applied to the consumer contract dispute in this case in the same manner as it would be applied to contract disputes in general, neither *AT&T* nor the FAA bars a court from applying the doctrine of unconscionability to an arbitration agreement and, based on a finding of unconscionability, refusing to enforce that arbitration agreement (or, in appropriate circumstances, severing the unconscionable and unenforceable portion(s) and enforcing the remainder of the arbitration agreement).

We are unpersuaded by KDF's argument that California courts have generally disfavored arbitration agreements by applying the doctrine of unconscionability differently, or more stringently, to arbitration agreements than to contracts in general. In any event, in deciding this case, we apply controlling California case law regarding the doctrine of unconscionability as it applies to contracts in general and therefore comply with *AT&T*'s mandate.

Under California's doctrine of unconscionability, a court may refuse to enforce a contract it determines to be unconscionable. (Civ. Code, § 1670.5, subd. (a); *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114

(*Armendariz*).) Unconscionability generally includes an absence of meaningful choice by one party together with contract terms that are unreasonably favorable to the other party. (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821.) Alternatively stated, unconscionability has both procedural and substantive elements. (*Armendariz*, at pp. 113-114; *A & M Produce Co.* (1982) 135 Cal.App.3d 473, 486.) To refuse to enforce a contract for unconscionability, a court generally must find the contract is both procedurally and substantively unconscionable. (*Armendariz*, at p. 114; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 87 (*Gutierrez*).)

Procedural unconscionability. "The procedural element [of unconscionability] focuses on 'oppression' or 'surprise.' [Citations.] Where the parties to a contract have unequal bargaining power and the contract is not the result of real negotiation or meaningful choice, it is oppressive. 'Surprise' is defined as 'the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.' [Citations.] 'The procedural element of an unconscionable contract generally takes the form of a contract of adhesion.' [Citations.] An adhesive contract is defined as ' "a standardized contract, 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." [Citation.]' " (*Gutierrez*, *supra*, 114 Cal.App.4th at pp. 87-88.)

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. [Citation.] 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.' [Citations.] Some courts have imposed a higher standard: the terms must be ' "so one-sided as to *shock the conscience*." [Citation.]' [Citation.] 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.)

"Though courts refuse to enforce only those agreements that are both procedurally and substantively unconscionable, the two factors need not each exist to 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.)" (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 88.) Alternatively stated, a sliding scale is applied so that the more substantively unconscionable a contract is, the less procedural unconscionability is required for it to be unenforceable as unconscionable. (*Armendariz*, at p. 114; *Morris v. Redwood Empire Bancorp.* (2005) 128 Cal.App.4th 1305, 1317.) In turn, the more procedurally unconscionable a contract is, the less substantive unconscionability is required for it to be unenforceable as unconscionable. (*Armendariz*, at p. 114; *Morris*, at p. 1317.)

III

Unconscionability of Contract's Arbitration Clause

KDF contends the trial court erred by concluding the Contract's arbitration clause was unconscionable and therefore unenforceable. Because KDF did not submit any evidence disputing the evidence submitted by Goodridge, we decide the question of unconscionability of the Contract's arbitration clause de novo, or independently, based on the undisputed facts in this case.

A

Procedural unconscionability. Procedural unconscionability focuses on two factors: oppression and surprise. Based on our independent review of the undisputed facts in this case, we, like the trial court, conclude the Contract's arbitration clause is procedurally unconscionable. First, the evidence shows there was *oppression* (i.e., an inequality of bargaining power that resulted in no real negotiation and an absence of meaningful choice for Goodridge regarding the arbitration clause). (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 87.) The facts in this case are similar to those in *Gutierrez*, which involved a vehicle lease contract. (*Id*. at pp. 83-84.) *Gutierrez* found substantial evidence to support the trial court's finding the lease was adhesive. (*Id*. at p. 89.) *Gutierrez* stated:

> "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. [Citation.] 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." (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 89.)

In this case, Goodridge submitted a declaration describing the circumstances of his execution of the Contract. Because KDF did not submit any declaration or other evidence disputing Goodridge's description, we accept his version of events. Goodridge stated: "The documents (including the purchase contract) were given to me and I was just told 'sign here' in various places. There was no question of choice on my part or of our being able to 'negotiate' anything." He further stated: "When I signed both of the purchase contracts and related documents, [KDF] did not ask me if I was willing to arbitrate any disputes with it or its assignees, [KDF] did not tell me 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. . . . I was not given any opportunity at any time during my transaction with [KDF] to negotiate whether or not I would agree to arbitrate any potential disputes, or any of the terms by which I would agree to arbitrate any disputes. I was never given an option whether to sign a contract with an arbitration clause or one without. . . ." He further stated: "No one at [KDF] ever turned over either sale contract to show me the writing on the back or asked me to sign any sections on the back of the contract where [KDF] claims the arbitration clause is located." Because the Contract was presented to Goodridge for signature on a "take it or leave it" basis and he had no meaningful opportunity to negotiate any of its preprinted terms (including the arbitration clause on its back side), the evidence shows KDF used its superior bargaining

power such that there was no real negotiation and an absence of meaningful choice by Goodridge regarding the arbitration clause and the other preprinted terms of the Contract. We conclude there was oppression of Goodridge in this transaction.

Second, we further conclude there also was *surprise* regarding the arbitration provision. The arbitration clause was hidden within the lengthy prolix of the printed form presented by KDF to Goodridge. That clause is found on the back side of the two-sided, preprinted Contract near the end of the page. All nine signatures and/or initials of Goodridge appear on the front side of the Contract. There are no provisions for any signatures or initials by Goodridge (or for any buyer) on the back side of the preprinted Contract, much less under or adjacent to the arbitration clause. The fact the arbitration clause was contained within a black-lined box does not show it was not hidden. Because it was on the back side of the Contract, did not require Goodridge's signature or initials, and there were many other "boxed-in" provisions on the front and back sides of the Contract, we conclude the arbitration clause was not prominent or otherwise generally noticeable by a typical buyer, but was instead "hidden" within the meaning of procedural unconscionability. Furthermore, Goodridge's declaration shows KDF made no attempt to bring the hidden arbitration clause to his attention. He stated he "was just told 'sign here' in various places. . . . [KDF] did not tell me 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." He further stated: "No one at [KDF] ever turned over either sale contract to show me the writing on the back or asked me to sign any sections on the back of the contract where [KDF] claims the arbitration clause is located." Therefore, not only was

the arbitration clause hidden on the back side of the preprinted Contract, but KDF made no attempt to inform Goodridge of its existence (or of any of the terms on the back side of the Contract).

We conclude the brief mention of the arbitration clause on the front side of the preprinted Contract was, in the circumstances of this case, insufficient to bring that clause to Goodridge's attention. The following language appears adjacent to the right margin of the Contract's front side in an area limited to one-third of page's width and is near the bottom of that front page:

> "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."

However, there is no provision for Goodridge's signature or initials under or adjacent to that language. Rather, his signature appears on the opposite side of the page under a larger, "boxed-in" provision regarding the lack of a "cooling-off" period (unless otherwise agreed) that appears to the left of above-quoted language in the two-thirds width of the page adjacent to the left margin. In the circumstances of this case, we conclude that front-side reference to the back-side arbitration clause was hidden within the prolix of the Contract in such a manner as to not reasonably notify Goodridge of the existence of the arbitration clause. Based on the above factors, we conclude the element of surprise existed regarding the Contract's arbitration clause. Because both oppression

and surprise existed, the Contract's arbitration clause is procedurally unconscionable. (*Gutierrez*, *supra*, 114 Cal.App.4th at pp. 87-88.) Furthermore, based on the circumstances discussed above, we conclude there is a high degree of procedural unconscionability.

B

Substantive unconscionability. Substantive unconscionability focuses on whether the arbitration provision is overly harsh or one-sided and is outside the reasonable expectations of Goodridge (the nondrafting party) or is unduly oppressive.[4] (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 88.) Based on our independent review of the undisputed facts in this case, we, like the trial court, conclude the Contract's arbitration clause is also substantively unconscionable.

There are four provisions in the arbitration clause that fall outside the reasonable expectations of Goodridge as the nondrafting party and are unduly oppressive. First, the arbitration clause provides that either party may appeal an arbitrator's award against it if the award is in excess of $100,000 against that party. Although that provision is ostensibly bilateral and applies to both parties, its practical effect is to favor KDF as the only party that realistically could suffer an award against it in excess of $100,000.

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4 We choose not to apply the higher standard applied by some courts that would require the provision to be so one-sided as to "*shock the conscience*." (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 88.)

Awards against vehicle buyers (e.g., Goodridge) in excess of $100,000 are highly unlikely given the current values of most vehicles and/or financing costs.[5]

In *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, the California Supreme Court found a similar provision unconscionable, stating: "[T]he $50,000 [appeal] 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." (*Id*. at p. 1073.) In this case it is reasonable to conclude KDF imposed arbitration and its $100,000 appeal threshold with the knowledge or belief it would generally be the defendant or party that would suffer imposition of an award in excess of that amount. (*Ibid*.; see also *Saika v. Gold* (1996) 49 Cal.App.4th 1074, 1080 [$25,000 trial de novo threshold favors physician/defendant and "the benefit which the trial de novo clause confers on patients is nothing more than a chimera"].) A reasonable or fair provision would allow a buyer (e.g., Goodridge) to appeal an arbitration award less than $100,000. Furthermore, KDF does not present any reasonable justification for imposing the $100,000 appeal threshold. Rather, the clause merely works to relieve KDF of liability it deems excessive. The arbitration clause's $100,000 appeal threshold has "the same 'heads I win, tails you lose' " effect condemned by other courts. (*Saika*, at p. 1080; *Beynon v. Garden Grove Medical Group* (1980) 100 Cal.App.3d 698, 706.) "[P]ublic confidence in arbitration in large part depends on the idea that arbitration provides a *fair*

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5 The total sale price, including finance charges, in this case was less than $20,000.

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." (*Saika*, at p. 1081.) We conclude the arbitration provision in the Contract is unduly harsh and oppressive and was beyond Goodridge's reasonable expectations.

Second, the arbitration clause provides that either party may appeal an arbitrator's award of injunctive relief against it. Although that provision is ostensibly bilateral and applies to both parties, its practical effect is to favor KDF as the only party that realistically could suffer an award of injunctive relief against it. Preliminary and permanent injunctive relief is often essential to protect consumers. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 20.) In cases involving new and used car sales and financing, buyers are the parties likely to seek injunctive relief (e.g., to enforce consumer laws such as the CLRA). Therefore, an arbitration provision allowing a party to appeal an award of injunctive relief against it has the effect of unduly benefitting a car dealer, and not a buyer, as the party likely to invoke that special appeal right. That one-sided provision allows the car dealer to delay the effect of an injunction while it appeals the initial award to a three-arbitrator panel. Furthermore, because the appeal provision does not limit its application to permanent injunctions in final arbitration awards, it is possible an arbitrator could award preliminary injunctive relief as an interim award against the car dealer and then the car dealer could immediately invoke its appeal right, placing the arbitration proceeding on hold while the car dealer appeals the injunctive relief award to a three-arbitrator panel. Such a delay in arbitration proceedings is inconsistent with the objective of arbitration to quickly and inexpensively decide disputes

and the goals of consumer protection statutes to protect consumer rights. (*AT&T*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at p. 1749] [benefits of mandatory arbitration include efficient, streamlined, informal proceedings that reduce the cost and increase the speed of dispute resolution].) Because the injunctive relief appeal provision unfairly favors KDF and denies Goodridge the benefits of arbitration, that provision is unduly harsh and oppressive and was beyond his reasonable expectations.

Third, the arbitration clause provides that an appealing party must pay the filing fees and other arbitration costs for appeal, subject to a final determination by the three-arbitrator panel of a fair apportionment of costs. Therefore, in the event Goodridge were to appeal an arbitration award (e.g., an award of $0), he would be responsible for advancing the costs and fees of that appeal for *both* parties. Given the common hourly rates of private arbitrators (in the hundreds of dollars), it is within the realm of possibility that Goodridge could face the prospect of paying $10,000 or more up front to appeal an arbitration award. Furthermore, the arbitration provision does not inform Goodridge of the exact amount required to file an appeal and therefore may have the effect of discouraging him from appealing. In his declaration, Goodridge stated he was "not financially able to pay such potential arbitration fees." Because KDF presumably has the financial ability to advance appeal costs and Goodridge does not, the provision requiring the appealing party to pay the appeal filing fees and costs up front on behalf of both

parties benefits KDF and is unduly harsh and oppressive to Goodridge.[6] (*Gutierrez*, *supra*, 114 Cal.App.4th at p. 89, fn. omitted ["[W]here a consumer enters into an adhesive contract that mandates arbitration, it is unconscionable to condition that process on the consumer posting fees he or she cannot pay."].) Any reapportionment of those costs on conclusion of an appeal is inadequate. (*Id*. at p. 90.) Furthermore, the arbitration clause does not provide any mechanism providing Goodridge with relief from unaffordable appeal fees. (*Id*. at pp. 91-92.)

Finally, the arbitration clause excludes applicability to self-help remedies, including repossession, from arbitration. Although that provision is ostensibly bilateral and applies to both parties, its practical effect is to favor KDF as the only party that realistically would resort to self-help remedies such as repossession. Repossession is one of the most important remedies from a car dealer's perspective. In turn, a buyer has no self-help remedies against a car dealer. Accordingly, by exempting self-help remedies from arbitration, KDF has attempted to maximize its advantage over Goodridge by avoiding arbitration of its claims. (Cf. *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 855.) While exempting KDF's repossession from arbitration and requiring Goodridge to seek injunctive relief from an arbitrator, the Contract creates an unduly oppressive disparity in remedies. (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th

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6 We note that similar reasoning can be applied to conclude the requirement that a party advance that party's share of fees and costs for the initial arbitration is unduly harsh and oppressive to Goodridge, despite KDF's agreement to advance the first $2,500 of his share of those fees and costs.

702, 725 ["The [arbitration agreement] is unfairly one-sided because it compels arbitration of the claims more likely to be brought by [the employee], the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by [the employer], the stronger party."].)

Because the above four provisions in the arbitration clause fall outside the reasonable expectations of Goodridge and are unduly harsh and oppressive, the Contract's arbitration clause is substantively unconscionable. Furthermore, we conclude there is a moderate to high degree of substantive unconscionability.

C

Unconscionability. Applying a sliding scale for procedural and substantive unconscionability, we conclude the Contract's arbitration clause is unconscionable under California's doctrine of unconscionability that generally applies to all contracts. (*Armendariz*, *supra*, 24 Cal.4th at pp. 113-114; *Gutierrez*, *supra*, 114 Cal.App.4th at pp. 87-88.) Because there is a high degree of procedural unconscionability, less evidence of substantive unconscionability is required. (*Armendariz*, at p. 114.) However, as discussed above, there is ample evidence of substantive unconscionability, resulting in our conclusion there is a moderate to high degree of substantive unconscionability. We conclude the arbitration provision is unconscionable and therefore unenforceable under California law.

Severance. In denying KDF's petition to compel arbitration based on the unconscionability of the arbitration clause, the trial court implicitly exercised its discretion and concluded severance of the unconscionable provisions would not be an

appropriate remedy and the entire arbitration clause must be stricken. We conclude the court properly concluded severance was not appropriate.

A trial court has discretion under Civil Code section 1670.5, subdivision (a), to refuse to enforce an entire agreement if it is "permeated" by unconscionability. (*Armendariz*, *supra*, 24 Cal.4th at p. 122; *Lhotka v. Geographic Expeditions, Inc.*, *supra*, 181 Cal.App.4th at p. 826.) "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.' [Citations.] 'The overarching inquiry is whether " 'the interests of justice . . . would be furthered' " by severance.' " (*Lhotka*, at p. 826.)

In the circumstances of this case, we, like the trial court, identified multiple elements of the arbitration agreement that indicate KDF designed its arbitration clause to impose arbitration not simply as an alternative to litigation, but as an inferior forum that would give it an advantage over its buyers. Accordingly, the trial court acted within its discretion by implicitly concluding the arbitration clause was so permeated by unconscionability that the interests of justice would not be furthered by severing the unconscionable elements from that clause and enforcing the remainder. (*Armendariz*, *supra*, 24 Cal.4th at p. 124; *Lhotka v. Geographic Expeditions, Inc.*, *supra*, 181 Cal.App.4th at p. 826.) *Had* the trial court concluded the unconscionable elements should be severed from the arbitration clause and the remainder enforced, we would have concluded the court abused its discretion because those unconscionable elements so

permeate the arbitration clause that it is both impractical and unjust to sever only those portions and enforce the remainder. Because the arbitration clause is "permeated by unconscionability, or . . . contains unconscionable aspects that cannot be cured by severance, restriction, or duly authorized reformation," we conclude it should not be enforced.[7] (*Armendariz, supra*, 24 Cal.4th at p. 126.)

IV

Remaining Contentions

Because we decide this case based on the unconscionability of the Contract's arbitration clause, we do not address the parties' remaining arguments.

DISPOSITION

The order is affirmed. Goodridge is entitled to costs on appeal.

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

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[7] To the extent KDF argues the matter should be remanded to the trial court for it to expressly exercise its discretion regarding severance, we conclude remand is unnecessary.

Filed 9/13/12

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM GOODRIDGE, Plaintiff and Respondent, v. KDF AUTOMOTIVE GROUP, INC., Defendant and Appellant.	D060269 (Super. Ct. No. 37-2010-00105355-CU-CO-CTL) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion filed August 24, 2012, is ordered certified for publication.

The attorneys of record are:

Toschi, Sidran, Collins & Doyle, David R. Sidran, Thomas M. Crowell and Christine Y. Lee for Defendant and Appellant.

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

McDONALD, Acting P. J.