

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 JOHN TROMPETER, on behalf of
5 himself and all others similarly
6 situated,

7 Plaintiff,

8 v.

9 ALLY FINANCIAL, INC., a Delaware
10 corporation and DOES 1 to 20,
11 inclusive,

12 Defendants.
13 _____/

No. C 12-00392 CW

ORDER DENYING
DEFENDANT'S MOTION
TO COMPEL
ARBITRATION AND
MOTION FOR STAY
(Docket Nos. 10
and 17)

14 Plaintiff John Trompeter has filed a putative class action
15 against Defendant Ally Financial, Inc., alleging that Ally had a
16 policy and practice of secretly recording telephone calls with
17 persons located in California without their consent. Trompeter
18 alleges in his First Amended Complaint two causes of action under
19 this state's Invasion of Privacy Act, California Penal Code § 632,
20 and the state Unfair Competition Law (UCL), California Business
21 and Professions Code section 17200 et seq. Trompeter seeks to
22 represent all consumers who received a telephone call in which at
23 least one party was in California and that telephone call was
24 recorded or monitored without prior warning or consent.

25 Ally has moved to compel arbitration based on an arbitration
26 agreement contained in the consumer contract to which Trompeter is
27 a signatory and which was assigned to Ally. Docket No. 10.
28 Trompeter opposes the motion. In addition, Ally has moved to stay

1 the Court's resolution of the motion, pending the California
2 Supreme Court's decision on the appeal of Sanchez v. Valencia
3 Holding Company, LLC, 201 Cal. App. 4th 74 (2011), petition for
4 review granted, 272 P.3d 976 (2012). Docket No. 17. Trompeter
5 opposes the motion to stay. The Court held a hearing on Ally's
6 motion to compel arbitration, but took the motion for a stay under
7 consideration on the papers. Having considered all of the
8 parties' submissions and oral argument, the Court denies Ally's
9 motion to compel arbitration and its motion to stay the
10 proceedings pending the state Supreme Court's resolution of
11 Sanchez.

12
13 BACKGROUND

14 On May 11, 2007, Trompeter purchased a new Chevrolet
15 Silverado truck from a dealership in Colma, California. Trompeter
16 secured financing through the dealership. Soon after Trompeter
17 executed the retail installment sales contract, the dealership
18 assigned the contract to Ally. When Trompeter later defaulted on
19 the contract by failing to make the required payments, Ally
20 repossessed the truck in or about October 2010. After Trompeter
21 failed to reinstate the contract or redeem the vehicle, Ally sold
22 the truck at an auction and applied the sale proceeds to
23 Trompeter's account balance, leaving a deficiency in the amount of
24 \$12,246.85. Lynda Zitka, a Vice President for Ally, attested that
25 any telephone calls on behalf of the company to Trompeter would
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1 have related to Trompeter's default or the debt that he owed Ally
2 pursuant to the contract.

3 Trompeter's contract contained an arbitration clause on the
4 reverse-side of a two page agreement. The clause stated the
5 following,

6 **ARBITRATION CLAUSE**

7 **PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS**

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

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

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

20 Any claim or dispute, whether in contract, tort,
21 statute or otherwise (including the interpretation and
22 scope of this clause, and the arbitrability of the
23 claim or dispute), between you and us or our
24 employees, agents, successors or assigns, which arise
25 out of or relate to your credit application, purchase
26 or condition of this vehicle, this contract or any
27 resulting transaction or relationship (including any
28 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. 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

1 Arbitrators shall be attorneys or retired judges and
2 shall be selected pursuant to the applicable rules.
3 The arbitrator shall apply governing substantive law
4 in making an award. The arbitration hearing shall be
5 conducted in the federal district in which you
6 reside We will advance your filing,
7 administration, service or case management fee and
8 your arbitrator or hearing fee all up to a maximum of
9 \$1500, which may be reimbursed by decision of the
10 arbitrator at the arbitrator's discretion. Each party
11 shall be responsible for its own attorney, expert and
12 other fees, unless awarded by the arbitrator under
13 applicable law. If the chosen arbitration
14 organization's rules conflict with this Arbitration
15 Clause, then the provisions of this Arbitration Clause
16 shall control. The arbitrator's award shall be final
17 and binding on all parties, except that in the event
18 the arbitrator's award for a party is \$0 or against a
19 party is in excess of \$100,000, or includes an award
20 of injunctive relief against a party, that party may
21 request a new arbitration under the rules of the
22 arbitration organization by a three-arbitrator panel.
23 The appealing party requesting new arbitration shall
24 be responsible for the filing fee and other
25 arbitration costs subject to a final determination by
26 the arbitrators of a fair apportionment of costs. Any
27 arbitration under this Arbitration Clause shall be
28 governed by the Federal Arbitration Act (9 U.S.C. § 1
et seq.) and not by any state law concerning
arbitration.

19 You and we retain any rights to self-help remedies,
20 such as repossession. You and we retain the right to
21 seek remedies in small claims court for disputes or
22 claims within that court's jurisdiction, unless such
23 action is transferred, removed or appealed to a
24 different court. Neither you nor we waive the right
25 to arbitrate by using self-help remedies or filing
26 suit. Any court having jurisdiction may enter
27 judgment on the arbitrator's award. This clause shall
28 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

1 action allegations have been made, the remainder of
2 this arbitration clause shall be unenforceable.

3 DISCUSSION

4 I. Motion to Compel Arbitration

5 A. Legal Standard

6 Under the FAA, 9 U.S.C. § 1 et seq., written agreements that
7 controversies between the parties shall be settled by arbitration
8 are valid, irrevocable, and enforceable. 9 U.S.C. § 2. A party
9 aggrieved by the refusal of another to arbitrate under a written
10 arbitration agreement may petition the district court which would,
11 save for the arbitration agreement, have jurisdiction over that
12 action, for an order directing that arbitration proceed as
13 provided for in the agreement. 9 U.S.C. § 4. A district court
14 must compel arbitration under the FAA if it determines that:
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16 1) there exists a valid agreement to arbitrate; and 2) the dispute
17 falls within its terms. Stern v. Cingular Wireless Corp., 453 F.
18 Supp. 2d 1138, 1143 (C.D. Cal. 2006) (citing Chiron Corp. v. Ortho
19 Diagnostic Sys., 207 F.3d 1126, 1130 (9th Cir. 2000)).

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21 The FAA reflects a "liberal federal policy favoring
22 arbitration agreements." Gilmer v. Interstate/Johnson Lane Corp.,
23 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Mem. Hosp. v.
24 Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). However, the FAA
25 "permits agreements to arbitrate to be invalidated by 'generally
26 applicable contract defenses, such as fraud, duress, or
27 unconscionability,' but not by defenses that apply only to
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1 arbitration or that derive their meaning from the fact that an
2 agreement to arbitrate is at issue." AT&T Mobility v. Concepcion,
3 131 S. Ct. 1740, 1746 (2011).

4 B. Analysis

5 Trompeter does not argue that his claims against Ally fall
6 outside of the arbitration clause. Rather, he contends the
7 arbitration agreement is unconscionable and unenforceable under
8 California law.

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10 The party opposing arbitration bears the burden of proving
11 that the arbitration provision is unconscionable. Arguelles-
12 Romero v. Superior Court, 184 Cal. App. 4th 825, 836 (2010).
13 Unconscionability under California law is comprised of two
14 elements, procedural and substantive. Id. at 837. Both must be
15 present for a contract term to be considered unconscionable. Id.
16 "[T]he more substantively oppressive the contract term, the less
17 evidence of procedural unconscionability is required to come to
18 the conclusion that the term is unenforceable, and vice versa."
19 Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th
20 83, 114 (2000).

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22 1. Procedural Unconscionability

23 Procedural unconscionability focuses on the existence of
24 oppression or surprise. Newton v. American Debit Services, 2012
25 WL 581318, *6 (N.D. Cal.). "Oppression arises from an inequality
26 of bargaining power that results in no real negotiation and an
27 absence of meaningful choice." Flores v. Transamerica Homefirst,

1 Inc., 93 Cal. App. 4th 846, 853 (2001). "Surprise involves the
2 extent to which the supposedly agreed-upon terms are hidden in a
3 prolix printed form drafted by the party seeking to enforce them."

4 Id.

5 Trompeter first argues that the adhesive nature of the
6 contract renders it procedurally unconscionable. "The term
7 [contract of adhesion] signifies a standardized contract, which,
8 imposed and drafted by the party of superior bargaining strength,
9 relegates to the subscribing party only the opportunity to adhere
10 to the contract or reject it." Armendariz, 24 Cal. 4th at 113.

11 Under California law applicable to all contracts generally, the
12 adhesive nature of a contract is a consideration in determining
13 whether the agreement is unconscionable, and such an agreement
14 will not be enforced if it defies "the reasonable expectations of
15 the weaker or 'adhering' party" or is "unduly oppressive." Id.

16 While the Supreme Court has overturned California law requiring
17 the availability of class-wide relief in arbitration agreements,
18 the Court has indicated that state law bearing on contracts of
19 adhesion remains good law. Concepcion, 131 S. Ct. at 1750 n.6.

20 Although Ally argues that it accepts assignments of contracts
21 without arbitration clauses, this assertion is irrelevant because
22 Trompeter entered into the contract with the dealership. The
23 standardized nature of the contract and its presentation on a
24 "take it or leave it" basis establish a limited degree of
25 procedural unconscionability in the present case.
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1 Trompeter also argues that the arbitration agreement is
2 procedurally unconscionable because the relevant clause was placed
3 at the bottom of the back page of the contract. Although
4 Trompeter signed the agreement in eight different locations on the
5 front page of the agreement, the only signature on the back of the
6 agreement is one belonging to a representative of the dealership.
7 An arbitration agreement placed in an inconspicuous location on
8 the opposite side of a signature page adds to the procedurally
9 unconscionable nature of the agreement. See e.g., Gutierrez v.
10 Autowest, Inc., 114 Cal. App. 4th 77, 89 (2003). On the other
11 hand, in signing the contract, Trompeter agreed to language
12 acknowledging that he read both sides of the agreement, including
13 the arbitration clause on the reverse side. Trompeter has not
14 attested that he was actually surprised by the arbitration
15 agreement.
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18 Finally, Trompeter argues that Ally failed to provide a copy
19 of the applicable arbitration rules. See Trivedi v. Curexo
20 Technology Corp., 189 Cal. App. 4th 387, 393 (2010) (noting that
21 numerous cases have held that the failure to provide a copy of the
22 arbitration rules to which an employee would be bound supports a
23 finding of procedural unconscionability). Ally does not dispute
24 that it never provided arbitration rules to Trompeter. However,
25 it is clear from the agreement itself that the applicable
26 arbitration rules were not determined at the time the contract was
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1 signed because Trompeter was given the option of choosing the
2 arbitration provider that he preferred.¹

3 Trompeter has established a minimal degree of procedural
4 unconscionability based on the adhesive nature of the form
5 arbitration agreement and the lack of opportunity for him to
6 negotiate its terms.

7 2. Substantive Unconscionability

8 "Substantively unconscionable terms may take various forms,
9 but may generally be described as unfairly one-sided." Little v.
10 Auto Stiegler Inc., 29 Cal. 4th 1064, 1071 (2003). "One such
11 form . . . is the arbitration agreement's lack of a modicum of
12 bilaterality." Id. at 1072 (internal quotation marks omitted).
13 "Another kind of substantively unconscionable provision occurs
14 when the party imposing arbitration mandates a post-arbitration
15 proceeding, either judicial or arbitral, wholly or largely to its
16 benefit at the expense of the party on which the arbitration is
17 imposed." Id.

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22 ¹Trompeter also argues that the arbitration agreement is
23 procedurally unconscionable because it provided him with an
24 illusory choice of arbitration services. Because this argument
25 relates to the one-sided nature of the agreement and whether Ally
26 sought to use the arbitration agreement to gain leverage in the
27 dispute, the Court considers this issue below, in context of its
28 substantive unconscionability analysis. See e.g., Newton, 2012 WL
581318 at *9-10 (addressing the selection of the arbitrator in
connection with substantive, rather than procedural
unconscionability).

1 Trompeter does not challenge the class action waiver in the
2 arbitration agreement, but asserts that the agreement is
3 substantively unconscionable based on the following provisions:
4 (1) a party does not waive the right to arbitrate by using self-
5 help remedies or filing suit; (2) if the arbitrator's award
6 against a party is in excess of \$100,000, that party may request a
7 new arbitration by a three-arbitrator panel under the rules of the
8 arbitration organization; (3) if the arbitration award includes
9 injunctive relief, the enjoined party may demand a re-arbitration
10 by the three-arbitrator panel; and (4) the appealing party
11 requesting a new arbitration shall be responsible for the filing
12 fee and other arbitration costs subject to a final determination
13 by the arbitrators of a fair apportionment of costs. The Court
14 considers each of these provisions, as well Trompeter's contention
15 that the agreement provided an illusory choice as to the type of
16 arbitration available.
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19 The arbitration agreement provides that a party does not
20 waive the right to arbitrate by using self-help remedies or filing
21 suit in small claims court. Thus, a creditor could repossess a
22 vehicle or file suit to collect a debt owed by a defaulting car
23 buyer, but still reserve the right to seek arbitration of a
24 dispute in which it was named as a defendant. As a practical
25 matter, a debtor has no corresponding remedy. If the consumer
26 stops paying on the debt, his or her vehicle will likely be
27 repossessed and the consumer could be held liable for any
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1 deficiency after disposition of the repossessed vehicle, pursuant
2 to California Civil Code section 2983.2(a). As noted earlier,
3 Trompeter purchased a new truck. The provision of the Song-
4 Beverly Consumer Warranty Act that pertains to defective new motor
5 vehicles, commonly known as the state's "Lemon Law," does not
6 provide for a consumer to discontinue payment on a contract for
7 purchase of the defective new vehicle. See Cal. Civ. Code
8 § 1793.2(d)(2). Rather, if the manufacturer or its representative
9 is unable to repair the vehicle to conform with applicable express
10 warranties after a reasonable number of attempts, the manufacturer
11 must either promptly replace the vehicle with a substantially
12 identical one that functions properly or make restitution in an
13 amount equal to the actual price paid or payable by the buyer,
14 including and excluding certain specified charges. Id. The
15 remedy of total restitution or a replacement of a new vehicle,
16 generally, would not be available in small claims court in light
17 of the limited value of claims permitted there. Thus, it appears
18 that this threshold provision favors Ally at the expense of
19 Trompeter and contributes to a finding of substantive
20 unconscionability.
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23 Trompeter is also correct that the provision that allows a
24 party to seek a re-arbitration by panel if the arbitrator issues
25 an award against that party in an amount exceeding \$100,000 favors
26 creditors, such as Ally, over car buyers. Trompeter contends that
27 a defect in the vehicle could give rise to a claim exceeding
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1 \$100,000. A claim by Ally against the purchaser of a single
2 vehicle is unlikely to exceed \$100,000. Ally, however, asserts
3 that by contract and statute a creditor that prevails in an action
4 against a defaulting car buyer is entitled to attorneys' fees and
5 costs and, thus, could obtain an award exceeding \$100,000.
6 Trompeter financed \$27,931.43 of his truck's purchase price and
7 the litigation necessary to collect on a consumer debt, in
8 general, is not highly complex and, thus, is unlikely to give rise
9 to disproportionately high attorneys' fees and costs, such as an
10 amount that exceeds the value of the debt.
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12 The California Supreme Court's decision in Little supports a
13 finding of substantive unconscionability. There, the party that
14 imposed an arbitration agreement on a plaintiff employee argued
15 that the \$50,000 threshold amount for a right to an arbitral
16 appeal applied even-handedly to both parties. 29 Cal. 4th at
17 1072-74. However, the court rejected the argument, finding that
18 the party imposing the arbitration agreement did not adequately
19 explain to the court why the right of appeal should turn on an
20 award threshold. The court observed that from a plaintiff's
21 perspective the decision to resort to an arbitral appeal is made
22 based on the potential value of the arbitration claim compared to
23 the cost of the appeal, not based on the amount of the arbitration
24 award. Id. at 1073. The court determined that, given the absence
25 of a commercially legitimate reason for the threshold requirement
26 and the fact that the party that imposed the arbitration agreement
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1 was the party that set the threshold, it was reasonable to
2 conclude that the party that imposed the threshold did so with the
3 knowledge or belief that it would generally be a defendant who
4 could benefit from a right to appeal limited to high value awards.

5 Id.

6 In the present case it is likewise reasonable to conclude
7 that the \$100,000 threshold was imposed because the drafter
8 believed that such a requirement would serve the creditor, such as
9 Ally, in that it would typically be the defendant in a dispute
10 exceeding the threshold amount. Although the re-arbitration
11 provision in question also allows a party to appeal an
12 arbitrator's determination if the award is zero, even assuming
13 that a consumer and creditor are equally likely to benefit from
14 this threshold amount, the neutrality of that aspect of the appeal
15 provision does not diminish the one-sided nature of the \$100,000
16 threshold. This facet of the arbitration agreement supports a
17 finding of its one-sidedness favoring creditors.
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19 Another aspect of the arbitration agreement identified by
20 Trompeter, the provision that when an arbitrator has awarded
21 injunctive relief an enjoined party may seek re-arbitration by the
22 three-arbitrator panel, also benefits creditors over consumers.
23 If a creditor seeks to block a car buyer's use of the vehicle, the
24 creditor is authorized under the arbitration agreement to
25 repossess the vehicle without proceeding through arbitration or
26 waiving its right to the arbitral forum. Injunctive relief, on
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1 the other hand, is a remedy often sought in consumer actions to
2 protect the public from further unlawful actions by a defendant.
3 Thus, compared to creditors, consumers are more likely to seek
4 injunctive relief in a dispute subject to the arbitration
5 agreement.

6 Furthermore, the arbitration agreement's provision for an
7 appeal when injunctive relief is awarded offers an additional
8 opportunity for delay for the benefit of creditors at the expense
9 of consumers. Although Ally cites Food & Grocery Bureau of
10 Southern California v. Garfield, 18 Cal. 2d 174, 176-77 (1941),
11 for the proposition that an appeal does not normally stay the
12 effectiveness of an injunction, the case states that a mandatory
13 injunction is automatically stayed by an appeal under California
14 law, whereas a self-executing, prohibitory injunction, in general,
15 is not stayed by an appeal. A creditor could nevertheless seek a
16 stay of an injunction pending appeal to a three-arbitrator panel.

17 On balance, the provision allowing an appeal of an award
18 granting injunctive relief is designed to benefit the creditor
19 and, thus, contributes to a finding of substantive
20 unconscionability.
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22 Further, a finding of substantive unconscionability is
23 supported by the provision that a party requesting re-arbitration
24 shall be responsible for the filing fee and other re-arbitration
25 costs, subject to a final determination by the arbitrators of a
26 fair apportionment of costs. See Little, 29 Cal. 4th at 1080
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1 ("Nothing in the FAA prevents states from controlling arbitration
2 costs imposed by adhesive contracts so that the remedy of
3 prosecuting the state statutory or common law public rights
4 through arbitration is not rendered illusory.").

5 Ally argues that under Green Tree Financial Corp.-Alabama v.
6 Randolph, 531 U.S. 79 (2000), it is of no significance that the
7 party seeking an appeal must advance arbitration filing fees and
8 costs for an appeal. However, in Green Tree the arbitration
9 agreement was silent with respect to costs and fees. Id. at 90.
10 Thus, the Court determined that the plaintiff had not carried her
11 burden to establish the likelihood that she would be required to
12 bear prohibitive arbitration costs if she pursued her claims. Id.
13 at 90-92. Notably, the Court expressly declined to resolve how
14 detailed the showing of prohibitive expense must be by a party
15 seeking to avoid arbitration. Id. at 92.

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18 In this case, because the National Arbitration Forum refuses
19 to hear consumer disputes, the American Arbitration Association
20 rules are the best indicator of the costs that Trompeter would
21 incur if he were to pursue an appeal. Ally does not dispute that,
22 under the AAA's fee schedule, the minimum fees for any case having
23 three or more arbitrators includes a \$2,800 initial filing fee and
24 a \$1,250 final fee, as well as the hourly rate for three
25 arbitrators. The arbitration agreement provides that Ally will
26 advance up to a maximum of \$1,500 for a party's filing,
27 administration, service or case management fee and the
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1 arbitrator's fee or hearing fee. However, this provision for an
2 advance appears to relate to the initial arbitration and not the
3 appeal. Thus, it is not clear that an advance is available for
4 fees associated with pursuing an appeal. Nor does the arbitration
5 agreement provide for any other procedure or criteria for
6 determining how much a consumer can afford. Gutierrez, 114 Cal.
7 App. 4th at 91-92 (holding that the absence of a provision for the
8 consumer to obtain a cost waiver or reduction, when the judicial
9 system provides an opportunity to make such requests, contributes
10 to a finding of substantive unconscionability). Trompeter has
11 established that the imposition of substantial fees and costs in
12 pursuit of an appeal under the arbitration agreement contributes
13 to a finding of substantive unconscionability.

14
15 Finally, as noted earlier, Trompeter argues that the
16 arbitration agreement is unconscionable because it provided him
17 with an illusory choice of arbitration services. "A single
18 arbitrator unilaterally selected by a contracting party adverse to
19 the other is presumed to be biased." Sehulster Tunnels/Pre-Con v.
20 Traylor Bros., Inc./Obayashi Corp., 111 Cal. App. 4th 1328, 1341
21 (2003). As previously noted, the NAF does not handle consumer
22 disputes, leaving the AAA as the only arbitral forum specifically
23 identified in the arbitration agreement. However, the agreement
24 also allows Trompeter to select any other organization to handle
25 the arbitration, subject to Ally's approval. Trompeter has not
26 established that there are no other suitable organizations and,
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1 therefore, it is not clear that the choice presented is actually
2 illusory.

3 Nonetheless, Trompeter has demonstrated that the arbitration
4 agreement is substantively unconscionable based on the other
5 factors discussed above. Multiple elements render the agreement
6 procedurally and substantively unconscionable, such that the
7 arbitration agreement is void under California law.
8

9 3. Severability

10 Although Ally asserts that the unconscionable aspects of the
11 agreement may be severed, as in Armendariz, 24 Cal. 4th at 124,
12 there are multiple unconscionable provision in the agreement. As
13 such, the agreement is "tainted with illegality," and to enforce
14 it would encourage overreaching by creditors drafting consumer
15 contracts. Id. at 124 n.13. In addition, because two of the
16 unconscionable provisions in the arbitration agreement relate
17 directly to circumstances in which the right of appeal attaches
18 following an arbitration award, they are not collateral to the
19 agreement and extirpating them by means of severance would amount
20 to a reformation of the agreement. Id. at 124-25. Severance is
21 unwarranted.
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23 4. Concepcion and Kilgore

24 Ally argues that the Supreme Court's decision in Concepcion
25 and the Ninth Circuit's ruling in Kilgore v. KeyBank, National
26 Association, 673 F.3d 947 (2012), compel this Court to enforce the
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1 arbitration agreement because invalidating the agreement offends
2 the principles underlying the FAA.

3 Ally's reading of Concepcion is overbroad. Concepcion
4 overturned the rule established by the California Supreme Court in
5 Discover Bank v. Superior Court, 34 Cal. 4th 148 (2005), which
6 deemed unconscionable under California law consumer arbitration
7 agreements containing a provision waiving the right to class-wide
8 arbitration. The Court held that the FAA preempted the Discover
9 Bank rule, reasoning that mandatory class arbitration sacrificed
10 the key advantages associated with dispute resolution through
11 arbitration. 131 S. Ct. at 1750-52. Specifically, class
12 arbitration is longer and more expensive, requires greater
13 formality, and increases the stakes for defendants, as compared to
14 bilateral arbitration. Id. at 1751-52. Although the Court stated
15 that nothing in § 2 of the FAA "suggests an intent to preserve
16 state-law rules that stand as an obstacle to the accomplishment of
17 the FAA's objective," it also acknowledged that "§ 2 preserves
18 generally applicable contract defenses." Id. at 1748. Concepcion
19 does not preclude this Court's finding that the arbitration
20 agreement in the present case is unconscionable because the
21 finding does not undermine the fundamental attributes of
22 arbitration as an alternative form of dispute resolution that is
23 neutral, speedy, economical and informal. The Court's review of
24 the arbitration agreement applies the generally applicable
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1 contract principle of unconscionability and, thus, does not offend
2 the FAA's policy objective favoring arbitration.

3 Nor does the Ninth Circuit's decision in Kilgore change the
4 outcome of this Court's determination to deny enforcement of the
5 arbitration agreement. Kilgore held that the FAA, in light of the
6 Supreme Court's decision in Concepcion, preempted the California
7 state law principles announced in Broughton v. Cigna Healthplans
8 of California, 21 Cal. 4th 1066 (1999), and Cruz v. PacifiCare
9 Health Systems, Inc., 30 Cal. 4th 303 (2003). The Broughton-Cruz
10 rule prohibited the arbitration of claims for public injunctive
11 relief. Kilgore, 673 F.3d at 959. The Ninth Circuit reasoned
12 that, although Concepcion did not address the question of the
13 arbitrability of a public injunction remedy, under the Supreme
14 Court's decision, state public policy interests do not trump the
15 FAA when the state policy prohibits arbitration of a particular
16 type of claim. Id. at 963. Thus, the Ninth Circuit rejected the
17 state public policy rationales that supported the Broughton-Cruz
18 rule, namely that adjudication, rather than arbitration, better
19 served the state's interest in enforcing laws, such as the Unfair
20 Competition Law, designed to protect the public interest at large,
21 rather than to redress or prevent injury to a particular
22 plaintiff. See id. at 960-63.

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26 The present case is distinguishable from Kilgore because it
27 does not involve a categorical rule barring arbitration of a
28 specific type of claim or remedy and the Court's ruling does not

1 rest on an independent state public policy disfavoring
2 arbitration. The Court has not determined that the arbitration
3 agreement is unenforceable because Trompeter has sued for
4 injunctive relief under the UCL or California's Privacy Act. As
5 noted earlier, the Court's unconscionability analysis does not
6 disfavor arbitration as a forum for dispute resolution generally.

7
8 Neither Concepcion nor Kilgore precludes a finding that the
9 arbitration agreement here is unconscionable.

10 II. Motion for a Stay

11 Ally has moved to stay this action pending the California
12 Supreme Court's disposition of the appeal in Sanchez, 201 Cal.
13 App. 4th at 74. In Sanchez, the California Court of Appeal found
14 unconscionable and unenforceable the same arbitration clause in
15 the same form contract for a car purchase at issue in this case.
16 On March 21, 2012, the California Supreme Court granted the
17 petition for review in Sanchez. Because Sanchez is no longer
18 citable, the Court has not relied on it to resolve the motion to
19 compel.
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21 "A stay is not a matter of right, even if irreparable injury
22 might otherwise result." Nken v. Holder, 556 U.S. 418, 433 (2009)
23 (citation and internal quotation marks omitted). Instead, it is
24 "an exercise of judicial discretion," and "the propriety of its
25 issue is dependent upon the circumstances of the particular case."
26 Id. (citation and internal quotation and alteration marks
27 omitted). The party seeking a stay bears the burden of justifying
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1 the exercise of that discretion. Id. at 433-34. "A party seeking
2 a stay must establish that he is likely to succeed on the merits,
3 that he is likely to suffer irreparable harm in the absence of
4 relief, that the balance of equities tip in his favor, and that a
5 stay is in the public interest." Humane Soc. of U.S. v.
6 Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009). The first two
7 factors of this standard "are the most critical." Nken, 556 U.S.
8 at 434. Once these factors are satisfied, courts then assess "the
9 harm to the opposing party" and weigh the public interest. Id. at
10 435.

12 Ally contends that a stay is warranted to protect it from
13 burdensome expenses and procedures in litigating this action, and
14 to prevent the unnecessary waste of resources, including the
15 Court's time. Ally asserts that a stay will prevent prejudice of
16 its contractual rights under the arbitration agreement.

18 With respect to the first factor, Ally has not established
19 that it is likely to succeed on the merits. The California
20 Supreme Court's decision to grant review does not indicate whether
21 it will affirm or reverse the decision in full or in part, or
22 remand the action for further proceedings. Having reviewed
23 Sanchez and considered the arbitration agreement independently
24 from that decision, the Court has found that the contention that
25 the arbitration clause is unconscionable is well-supported by
26 long-standing case law. Moreover, the finding of
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1 unconscionability is not foreclosed by the recent decisions in
2 Concepcion and Kilgore.

3 Although allowing the case to proceed will require Ally to
4 incur some costs of litigation, Ally has not established that it
5 is likely to suffer irreparable harm in the absence of a stay of
6 the Court's ruling on its motion to compel arbitration. Most
7 likely, the next steps in the litigation will require the exchange
8 of initial discovery and perhaps motion practice. Ally has not
9 demonstrated that the procedures in arbitration provide for less
10 costly discovery and motion practice. It is Ally's burden to show
11 that a stay is warranted, and it has not made a clear showing of
12 irreparable harm.
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14 On the other hand, there is evidence that a delay in
15 resolving the action could cause harm to Trompeter and the
16 putative class. This case involves allegations that Ally or its
17 agents surreptitiously recorded telephone calls made to numerous
18 consumers, including out-of-state consumers to whom Ally or its
19 agent placed a call from within California. Critical information
20 and records regarding the phone calls and related policies and
21 practices could be lost if the proceedings are stayed. Sanchez is
22 likely to remain before the California Supreme Court for at least
23 a year, and in Brinker Restaurant Corp. v. Superior Court of San
24 Diego County, 165 Cal. App. 4th 25 (2008), aff'd in part and
25 reversed in part, 53 Cal. 4th 1004 (2012), the court required
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27 approximately three and a half years to resolve the dispute. A
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1 stay in this action is likely to prejudice Trompeter in pursuing
2 his putative class claims. Nor has Ally demonstrated that a stay
3 serves the public interest. The Court declines to stay this
4 action.

5 Pursuant to 9 U.S.C. § 16(a)(1)(B), Ally has a right to an
6 interlocutory appeal of an order denying a petition to compel
7 arbitration. See Green Tree, 531 U.S. at 86 (noting that "§ 16
8 generally permits immediate appeals of orders hostile to
9 arbitration, whether the orders are final or interlocutory, but
10 bars appeals of interlocutory orders favorable to arbitration.").
11 Thus, Ally may appeal this Court's order and request a stay of the
12 litigation pending the Ninth Circuit's resolution of the appeal.
13 See Britton v. Co-Op Banking Grp., 916 F.2d 1405, 1409-10 (9th
14 Cir. 1990) ("[A]n appeal of an interlocutory order does not
15 ordinarily deprive the district court of jurisdiction except with
16 regard to the matters that are the subject of the appeal."). If
17 the case is not stayed, discovery and motions may proceed
18 concurrently with the California Supreme Court's consideration of
19 Sanchez and the Ninth Circuit's consideration of this order. If
20 trial approaches, Ally may again request a stay. If Sanchez bars
21 this litigation and requires arbitration, the arbitration could be
22 held promptly, with discovery having been completed.
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CONCLUSION

Ally's motion to compel arbitration or, in the alternative, dismiss the complaint, and its motion for a stay of the proceedings are denied. The parties shall appear for a case management conference on June 6, 2012 at 2:00 pm.

IT IS SO ORDERED.

Dated: 6/1/2012



CLAUDIA WILKEN
United States District Judge

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