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6 U.S. DISTRICT COURT

7 NORTHERN DISTRICT OF CALIFORNIA

9  
 10 SHAWN L. ROSEMAN, an individual,

11 Plaintiff,

12 vs.

13 CIRCUIT CITY STORES, INC., SCOTT P.  
 14 LINN, AND DOES 1–20, inclusive,

15 Defendants.

Case No. CV-04849-SBA

**[PROPOSED] ORDER DENYING  
 CIRCUIT CITY STORES, INC.'S  
 PETITION TO COMPEL  
 ARBITRATION AND STAY LAWSUIT  
 PENDING ARBITRATION**

Date: May 10, 2005

Time: 1:00 p.m.

Judge: Hon. Sandra B. Armstrong

17 This Petition to Compel Arbitration and Stay Lawsuit came before the Court on May 10,  
 18 2005. Defendant Circuit City Stores, Inc. (“Circuit City”) was represented by Rex Darrell Berry,  
 19 Esq. Plaintiff Shawn Roseman (“Roseman”) was represented by David Scott Secrest, Esq.

20 The Court has considered all moving and responding papers,<sup>1</sup> and exhibits thereto,  
 21 including: Notice of Petition to Compel Arbitration and Dismiss or Stay Lawsuit Pending  
 22 Arbitration; Petition to Compel Arbitration and Stay Lawsuit Pending Arbitration; Declaration of

23  
 24 <sup>1</sup> On March 9, 2005, the Court issued its Order that “No additional memoranda or any other papers may be filed in  
 25 connection with Circuit City’s petition to Compel Arbitration and Stay lawsuit without prior leave of Court. In  
 26 violation of the Court’s Order, on March 31, 2005, Circuit City filed its “Supplemental Authority in Support of  
 FRAP 28(J) Submission.” That document will no be considered by the Court. Circuit City argues that Roseman’s  
 opposition papers should be disregarded because they were untimely filed. The Court declines to do so.

27 **[PROPOSED] ORDER DENYING CIRCUIT CITY STORES, INC.'S PETITION TO COMPEL  
 ARBITRATION AND STAY LAWSUIT PENDING ARBITRATION**

*Roseman v. Circuit City Stores, Inc., et al.*; U.S. Dist. Ct. No. Cal. CV-04849-SBA

1 Teri C. Miles in Support of Petition to Compel Arbitration and Stay Lawsuit Pending  
2 Arbitration; Amended Re-Noticing of Notice of Petition to Compel Arbitration and Stay Lawsuit  
3 Pending Arbitration; Memorandum of Points and Authorities in Support of Plaintiff’s Opposition  
4 to Circuit City Stores, Inc.’s Petition to Compel Arbitration and Stay Lawsuit Pending  
5 Arbitration; Objections to Evidence; Declaration of Shawn L. Roseman in Support of Plaintiff’s  
6 Opposition to Circuit City Stores, Inc.’s Petition to Compel Arbitration and Stay Lawsuit  
7 Pending Arbitration; Reply Memorandum of Circuit City Stores, Inc. in Support of Petition to  
8 Compel Arbitration and Stay Lawsuit Pending Arbitration; and Supplemental Declaration of Teri  
9 C. Miles in Support of Petition to Compel Arbitration and Stay Lawsuit Pending Arbitration.

10 In its moving papers, Circuit City submits the Declaration of Teri C. Miles, which  
11 incorporates: (1) **Ex. “A,”** Miles Declaration; Employment Application, which Plaintiff  
12 signed and initialed on January 30, 2001 (and which makes reference to, but does not  
13 include, Circuit City’s “Dispute Resolution Rules and Procedures;” and (2) Circuit City’s  
14 2003 “Dispute Resolution Rules and Procedures”) (“DRRP”), **Ex. “B,”** Miles Declaration.  
15 Circuit City declined to proffer the DRRP in effect at the time of Roseman’s hiring, and  
16 during which most of the claims made in this case arose- Circuit City’s 1998 “Dispute  
17 Resolution Rules and Procedures.”

18 In *Mohammed Al-Safin, v. Circuit City Stores, Inc.*, 394 F.3d 1254, January 14,  
19 2005, the court clearly held that Circuit City’s 1998 DRRP was substantively  
20 unconscionable under California and Washington law. *Al-Safin, v. Circuit City Stores, Inc.*,  
21 *supra*, at 1260-1261.

22 Circuit City urges that the modification provision of Rule 19 of the 1998 DRRP  
23 allows the Court to consider Circuit City’s 2003 DRRP. However, the Court in *Al-Safin, v.*  
24 *Circuit City Stores, Inc.*, 394 F.3d 1254, *supra*, clearly held that “the modification provision  
25 of Rule 19 of the 1998 DRRP is unenforceable under California law.” *Al-Safin, v. Circuit*  
26 *City, supra*, 394 F.3d at 1259.

27 Moreover, Roseman’s assertion that he was never did not provide with, nor given  
28 proper notice of, *either* Circuit City’s 1998 DRRP *or* Circuit City’s 2003 DRRP is  
unrebutted from an evidentiary standpoint. Roseman alleges he “has never seen” Circuit

1 City's 2003 DRRP. Roseman Declaration, ¶7. "In fact, I have never seen, nor was I shown,  
2 or directed to, any Circuit City "Dispute Resolution Rules and Procedures" at any time  
3 during, before or after my employment." *Id.* [Emphasis added.]

4 In its reply, Circuit City asserts "during Roseman's employment from February 8,  
5 2001 to December 11, 2003, the DRRP was modified once, in 2003. Suppl. Miles Decl.,  
6 ¶13. On that occasion, Circuit City followed the procedures set forth in the DRRP for  
7 modifying the rules. *Id.* Memos describing the changes were distributed by the corporate  
8 office to be posted in each store. *Id.*, Ex. B. Copies of the actual rules were made available  
9 in each Circuit City location. *Id.*" [Emphasis added.]

10 It should be noted an evidentiary assertion that the claimed distribution process for  
11 the relevant material, from a corporate policy or procedural standpoint, need not be  
12 accepted, *ipso facto*, as conclusive evidence that the process was actually followed in every  
13 store in the nation, much less the Circuit City location in question herein (Redding, CA).  
14 Roseman's sworn statement is clearly sufficient to raise a question as to whether the policy  
15 was simply ignored in Redding. Circuit City was therefore obliged to establish this fact, by  
16 (for example) a Declaration by the Redding Store Manager or Human Resources  
17 Representative- someone with personal knowledge. That such evidence was not proffered is  
18 telling. In any event, neither Circuit City's moving papers, nor its reply papers, are  
19 sufficient to counter Roseman's sworn statement.

20 Moreover, Reply papers should be limited to matters raised in the opposition papers. It is  
21 improper for the moving party to "shift gears" and introduce new facts or different legal  
22 arguments in the reply brief than presented in the moving papers. *See Lujan v. National Wildlife*  
23 *Federation* (1990) 497 U.S. 871, 894-895, 110 S.Ct. 3177, 3192 [court has discretion to  
24 disregard late-filed factual matters].

25 A reply brief may properly address new matters raised in the opposition brief if the issues  
26 *reasonably* were unforeseen at the time of the opening brief. *Litton Industries, Inc. v. Lehman*  
27 *Bros. Kuhn Loeb, Inc.* (SD NY 1991) 767 F.Supp. 1220, 1235, rev'd on other grounds (2nd Cir.  
28

1 1992) 967 F.2d 742.2

2 Here, it was reasonable that Circuit City should have foreseen the issues of (1) which  
3 DRRP applied to the controversy; (2) the manner in which Roseman was made aware of the  
4 terms of the applicable DRRP; and (3) the potentially dispositive effect of the *Mohammed Al-*  
5 *Safin, v. Circuit City Stores, Inc.* decision each would be at issue at the time of its opening brief.  
6 Yet, Circuit City chose not to address any of these matters until the filing of its reply papers.

7 With regard to Circuit City’s assertion that the acknowledgment by Roseman that he has  
8 agreed that he has read the terms of the DRRP renders the issue moot, it is not. By its very  
9 verbiage, the application for employment puts the onus on the unsophisticated employee to read  
10 the boilerplate language within a stack of documents he was instructed to “sign,” and then *ask*  
11 for the DRRP if it is not “included in this booklet.” **Ex. “A,”** Miles Declaration; Employment  
12 Application, p. 3. If he does not do so, or if he does not withdraw his “consent” to the terms  
13 thereof within three days, he is bound. *Id.*

14 Even if this patently one-sided process applies and is not deemed procedurally  
15 unconscionable (*see* discussion below), it applied to the 1998 DRRP, not the exclusively 2003  
16 DRRP proffered by Circuit City in its moving papers.

17 Turning to the merits, Federal courts in diversity cases apply state rules governing  
18 interpretation of contracts. Such rules are deemed “substantive” for Erie purposes. *State of*  
19 *New York v. Blank* (2nd Cir. 1994) 27 F.3d 783, 788; *Allen v. Cedar Real Estate Group* (7th  
20 Cir. 2001) 236 F.3d 374, 376; *Harris v. Parker College of Chiropractic* (5th Cir. 2002) 286  
21 F.3d 790, 793.

22 State law applicable to contracts generally governs whether a valid agreement to  
23 arbitrate exists. *Perry v. Thomas* (1987) 482 U.S. 483, 492, 107 S.Ct. 2520, 2527, fn. 9;  
24 *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 638-639, 223 Cal.Rptr.  
25 838, 843.

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29 2 If the court relies on new material contained in a reply brief, it *must* afford the opposing party a reasonable

1           Procedural Unconscionability:

2           “If the court finds as a matter of law the contract or any clause of the contract to have  
3 been unconscionable at the time it was made the court may refuse to enforce the contract, or it  
4 may enforce the remainder of the contract without the unconscionable clause, or it may so limit  
5 the application of any unconscionable clause as to avoid any unconscionable result.” Cal. Civil  
6 Code §1670.5; *see Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 655, 9  
7 Cal.Rptr.3d 422, 435.

8           Cal. Civil Code §1670.5 embodies both procedural and substantive elements:

9           “Procedural unconscionability” concerns the manner in which the contract was negotiated and  
10 the parties' circumstances at that time. It focuses on the factors of oppression *or* surprise.  
11 *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d  
12 348, 352-353; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1281, 16  
13 Cal.Rptr.3d 296, 306.

14           This element is generally satisfied if the agreement constitutes a contract of adhesion.

15 *Nyulassy v. Lockheed Martin Corp., supra*, 120 Cal.App.4th at 1280, 16 Cal.Rptr.3d at 305, fn.  
16 11. But in some cases, procedural unconscionability is “obvious without the need to establish  
17 that the contract is one of adhesion.” *Nyulassy v. Lockheed Martin Corp., supra*, 120  
18 Cal.App.4th at 1280, 16 Cal.Rptr.3d at 305, fn. 11; *see Harper v. Ultimo* (2003) 113 Cal.App.4th  
19 1402, 1408-1410, 7 Cal.Rptr.3d 418, 423-425.

20           “The oppression component arises from an inequality of bargaining power . . . and an  
21 absence of real negotiation or a meaningful choice on the part of the weaker party.” *Kinney v.*  
22 *United HealthCare Services, Inc., supra*, 70 Cal.App.4th at 1329, 83 Cal.Rptr.2d at 353;  
23 *Nyulassy v. Lockheed Martin Corp., supra*, 120 Cal.App.4th at 1281, 16 Cal.Rptr.3d at 306.

24           The surprise component usually involves the extent to which supposedly agreed-upon  
25 terms are buried in an overly complex printed form. *See Armendariz v. Foundation Health*  
26 *Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 767; *Little v. Auto*  
27 *Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 897; *Patterson v. ITT*

28           opportunity to respond. *Beaird v. Seagate Tech., Inc.* (10th Cir. 1998) 145 F.3d 1159, 1164-1165.

1 *Consumer Fin'l Corp.* (1993) 14 Cal.App.4th 1659, 1664, 18 Cal.Rptr.2d 563, 565. Surprise is  
2 “a function of the disappointed reasonable expectations of the weaker party.” *Harper v. Ultimo*,  
3 *supra*, 113 Cal.App.4th at 1406, 7 Cal.Rptr.3d at 422.

4 “When the weaker party is presented the clause and told to 'take it or leave it' without the  
5 opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability,  
6 are present.” *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100, 118 Cal.Rptr.2d 862,  
7 867; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 114, 12 Cal.Rptr.3d 663,  
8 669; *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1171-1172 (applying Calif.  
9 law) [job applicant required to sign arbitration agreement before being considered for  
employment with no meaningful opportunity to opt out (“take it or leave it”).]

10 A “meaningful opportunity” to negotiate or reject the terms of a contract requires, at  
11 a minimum, that a party have “reasonable notice of (the) opportunity to negotiate or reject  
12 the terms of a contract, and . . . an actual, meaningful, and reasonable choice to exercise that  
13 discretion.” *Circuit City Stores, Inc. v. Mantor, supra*, 335 F.3d at 1106 (emphasis and  
14 parentheses added); *see Circuit City Stores, Inc. v. Ahmed* (9th Cir. 2002) 283 F.3d 1198,  
15 1199-1200 (applying Calif. law) [arbitration agreement not procedurally unconscionable  
because employee given meaningful opportunity to opt out].

16 Substantive Unconscionability of the 1998 DRRP:

17 This question is decided.

18 In *Mantor, Ingle*, and *Adams*, we held that Circuit City's arbitration  
19 agreement is substantively unconscionable under California law and rejected contract  
20 provisions: (1) forcing employees to arbitrate claims against Circuit City, but not  
21 requiring Circuit City to arbitrate claims against employees, *Ingle*, 328 F.3d at 1173;  
22 *Adams*, 279 F.3d at 893-94; (2) limiting remedies, *Ingle*, 328 F.3d at 1178-79;  
23 *Adams*, 279 F.3d at 894; (3) splitting costs and fees, *Mantor*, 335 F.3d at 1107; *Ingle*,  
24 328 F.3d at 1177-78; *Adams*, 279 F.3d at 894; (4) imposing a one-year statute of  
25 limitations, *Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1175; *Adams*, 279 F.3d at  
26 894; (5) prohibiting class actions, *Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1175-  
27 76; (6) regarding the filing fee and waiver of the fee, *Mantor*, 335 F.3d at 1107-08;  
28 *Ingle*, 328 F.3d at 1177; and (7) giving Circuit City the unilateral right to terminate or  
modify the agreement, *Mantor*, 335 F.3d at 1107; *Ingle*, 328 F.3d at 1179.

*Al-Safin, v. Circuit City Stores, Inc., supra*, at 1260-1261.

[PROPOSED] ORDER DENYING CIRCUIT CITY STORES, INC.'S PETITION TO COMPEL  
ARBITRATION AND STAY LAWSUIT PENDING ARBITRATION  
*Roseman v. Circuit City Stores, Inc., et al.*; U.S. Dist. Ct. No. Cal. CV-04849-SBA

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Severability:

This question is decided, too. *Al-Safin, v. Circuit City Stores, Inc., supra*, at 1260-1262.

Thus, the petition is denied.

IT IS SO ORDERED.

Date:

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Hon. Sandra B. Armstrong

1 **PROOF OF SERVICE**

2 I, David S. Secrest, declare:

3 I am over the age of 18 years and not a party to the within action. I am employed in  
4 the County of San Mateo, State of California and my business address and place of business  
5 is 504 Plaza Alhambra, El Granada, CA 94018. On the date entered below, I served the  
6 following document: **PROPOSED ORDER DENYING CIRCUIT CITY STORES,  
7 INC.'S PETITION TO COMPEL ARBITRATION AND STAY LAWSUIT PENDING  
8 ARBITRATION**, by:

9 **XX** **By electronic filing with the Clerk of the Court using the CM/ECF system:** The  
10 undersigned certifies that the above and foregoing instrument was electronically  
11 filed with the Clerk of the Court using the CM/ECF system, which will send  
12 notification of such filing to the following:

|  |   |
|--|---|
| <p><b>Attorneys for Plaintiff</b><br/>David S. Secrest<br/>Law Offices of David S. Secrest<br/>P.O. Box 1029<br/>504 Plaza Alhambra, Suite 201<br/>El Granada, CA 94018-1029<br/>(650) 726-7461<br/>(650) 726-7471 FAX</p> | <p><b>Attorneys for Defendant</b><br/>Rex Darrell Berry<br/>Scott M. Plamondon<br/>BERRY &amp; BLOCK LLP<br/>2180 Harvard Street, Suite 560<br/>Sacramento, CA 95815-3326<br/>(916) 564-2000<br/>(916) 564-2024 FAX</p> |
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18 I declare under penalty of perjury in accordance with the laws of the State of  
19 California that the foregoing is true and correct, and that this document was executed at El  
20 Granada, California, on May 4, 2005.

21 By:

22 /s/

23 \_\_\_\_\_  
24 David S. Secrest