UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SHARON BAHRY, et al.,

Plaintiffs,

v.

MONTAGE MARKETING, LLC, a Delaware limited liability company, et al.,

Defendants.

3:09-CV-00690-RCJ-(VPC)

ORDER

This is an action by purchasers of real estate against the sellers. Presently before the Court is Defendants'[1] Motion to Dismiss and Compel Arbitration (#13). Plaintiffs[2] opposed the motion (#15) and Defendants replied (#16). The Court held oral argument on September 27, 2010. The Court now issues the following order. IT IS HEREBY ORDERED that Defendants' Motion to Dismiss and Compel Arbitration (#13) is DENIED.

I. BACKGROUND

[1] Defendants are Montage Marketing, LLC, Montage Marketing Corp., 255 North Sierra Street, LLC, and Fernando Leal.

[2] Plaintiffs are Sharon Bahry, Jeffrey Clark, Harold Cohn, Diane Cohn, Jeffrey Houk, Caroline Houk, David Lee, Marlies Lee, Pensco Trust Co., Michael Postma, Charles Randall, Zeina Randall, Stephen Raps, Larry Schuelke, Jaturong Bob Swangnete, Toni Nang Swangnete, Kirk Vandermark, Amy Vandermark, Christine Wicks, Jim Williamson, and Lisa Young.

This is a real estate sales dispute. Plaintiffs agreed to purchase condominiums from Defendants. They had deposited down payments with Defendants. Plaintiffs now wish to rescind the agreements to purchase and to have their down payments returned, alleging that Defendants committed fraud and misrepresentation, breached the contract, breached their fiduciary duties, violated federal and Nevada statutes, and that the consideration in support of the contracts was illusory.

All Plaintiffs signed essentially the same purchase agreements (the "Purchase Agreement"). (*See* Defs.'s Mot. to Dismiss (#13) 4:17; Pls.' Opp'n (#15) 4:20–21). The core of the Purchase Agreement is 34 pages. On page one, the Purchase Agreement states:

> THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES AND SHOULD BE READ THOROUGHLY PRIOR TO SIGNING. IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS OR OBLIGATIONS UNDER THIS DOCUMENT YOU MAY WISH TO CONSULT AN ATTORNEY.

(The Purchase Agreement at 2, attached as Ex. 1 to 1st Am. Complaint (#8)). Also on the first page, the Purchase Agreement provides a right to cancel:

> RIGHT TO CANCEL: YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF SALE BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE 7TH DAY FOLLOWING THE SIGNING OF THE CONTRACT OR AGREEMENT.

(*Id.*).

Section 11 of the agreement reads:

> Arbitration of Disputes. All claims and disputes between Seller and Buyer arising out of or relating in any way to the Property or the Project shall be resolved in accordance with the Agreement to Arbitrate attached hereto as **Exhibit "F".**

(The Purchase Agreement § 11, at 12).

In an addendum to the agreements, Plaintiffs initialed acknowledgment of receipt of

the Agreement to Arbitrate.[3]

The Agreement to Arbitrate contains the following language:

> PRE-CLOSING DISPUTES. IT IS AGREED THAT ANY CLAIM, CONTROVERSY, CAUSE OF ACTION, CLAIM FOR RELIEF, LIABILITY OR DISPUTE BETWEEN BUYER AND SELLER ARISING OUT OF THE PURCHASE AGREEMENT OR RELATING IN ANY WAY TO THE PROPERTY OR THE PROJECT WHERE THE PROPERTY IS LOCATED WHICH ARISES PRIOR TO THE CLOSING HEREUNDER ("**PRE-CLOSING CLAIMS**") SHALL BE RESOLVED BY BINDING ARBITRATION PURSUANT TO THIS SECTION 1.

(Agreement to Arbitrate § 1, at 1, attached as Ex. B to Edge Aff., attached as Ex. 1 to Defs.' Mot. to Dismiss (#13)). Above the signature block, the Agreement to Arbitrate states:

> NOTICE. BY SIGNING BELOW, BUYER IS AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THIS "AGREEMENT TO ARBITRATE" DECIDED BY ARBITRATION AS PROVIDED BY NEVADA LAW AND THIS ARBITRATION AGREEMENT; AND BUYER IS GIVING UP ANY RIGHTS BUYER MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT, INCLUDING A JURY TRIAL. . . . IF BUYER REFUSES TO SUBMIT TO ARBITRATION AFTER ENTERING INTO THIS ARBITRATION AGREEMENT. BUYER MAY BE COMPELLED TO ARBITRATE UNDER APPLICABLE LAW.

(*Id.* at 4). Each of the Plaintiffs signed the Agreement to Arbitrate.[4] (Edge Aff. ¶¶ 10–11, Ex. B, Ex. C).

The Agreement to Arbitrate allows for the prevailing party to recover attorney's fees:

> THE PREVAILING PARTY OR PARTIES IN SUCH ARBITRATION SHALL BE ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES FROM THE LOSING PARTY OR PARTIES IN SUCH AMOUNTS AS THE ARBITRATOR SHALL DETERMINE.

(Agreement to Arbitrate § 1(H), at 2). It also contains a confidentiality provision:

> EXCEPT AS MAY BE REQUIRED BY LAW OR FOR CONFIRMATION OF THE AWARD, NEITHER OF THE PARTIES NOR THE ARBITRATOR MAY

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[3] Defendants provide an affidavit to show that every Plaintiff initialed acknowledgment of receipt of the Agreement to Arbitrate. (Edge Aff. ¶¶ 8–9 and Ex. A, attached as Ex. 1 to Defs.' Mot. to Dismiss (#13)). Plaintiffs do not dispute this.

[4] Defendants rely on an affidavit to show that Plaintiffs signed the Agreement to Arbitrate. (Edge Aff. ¶¶ 10–11, Ex. B, Ex. C). Plaintiffs do not dispute this.

DISCLOSE THE EXISTENCE, CONTENT OR RESULTS OF THE ARBITRATION HEARING WITHOUT PRIOR WRITTEN CONSENT OF BOTH PARTIES AND SUCH CONTENT AND RESULTS ARE STRICTLY CONFIDENTIAL.

(*Id.* at § 1(G), at 2).

II. LEGAL STANDARD

If an enforceable arbitration clause requires claims to be arbitrated, the plaintiff can prove no set of facts that support his claim that the federal courts are the proper forum for resolution of his claims. *Germaine Music v. Universal Songs of Polygram*, 275 F. Supp. 2d 1288, 1299 (D. Nev 2003). In such a case, dismissal is appropriate under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. *See id.* at 1294 n.12. The Court may stay the proceedings in lieu of dismissal while arbitration proceeds. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1276–77 (9th Cir. 2006). The Court may sever an unenforceable arbitration provision. *Id.* at 1276.

III. ANALYSIS

The parties clearly agreed to arbitrate their disputes. But, Plaintiffs argue the arbitration provisions are unenforceable because they are unconscionable. In Nevada, a provision must be both substantively and procedurally unconscionable for courts to decline to enforce it. The arbitration provisions are one-sided in Defendants' favor and thus substantively unconscionable. However, there is a factual question as to whether the Purchase Agreements were contracts of adhesion and thus procedurally unconscionable. Because Defendants bear the burden of persuasion, the Court must rule against them and allow this lawsuit to move forward.

A. Defendants have failed to show that the Agreement to Arbitrate is not unconscionable.

Under the Federal Arbitration Act, an arbitration clause in a contract evidencing a transaction involving commerce is valid and enforceable "save upon such grounds as exist

at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[U]nconscionability is a generally applicable contract defense that may render an agreement to arbitrate unenforceable." *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009). Unconscionability is governed by state law. *Id.* The party moving to enforce the arbitration clause has the burden of persuading the Court that it is valid. *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004). Under Nevada law, for a clause to be unenforceable as unconscionable it must be both procedurally and substantively unconscionable. *Id.*[5]

1. Because Defendants bear the burden of establishing that the arbitration clause is valid and the record is unclear as to the clause's conscionability, the Court must treat the Agreement to Arbitrate as procedurally unconscionable.

"A clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract." *Id.* "Procedural unconscionability often involves the use of fine print or complicated, incomplete or misleading language that fails to inform a reasonable person of the contractual language's consequences." *Id.* "An adhesion contract has been defined as a standardized contract form offered to consumers of goods and services essentially on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Wixted v. Pepper*, 693 P.2d 1259, 1260 (Nev. 1985) (per curiam).

Plaintiffs argue that the Purchase Agreement was a contract of adhesion—that they had no meaningful opportunity to negotiate its terms. Defendants argue that Plaintiffs have provided no evidence of their inability to negotiate terms of the Purchase Agreements and

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[5] Defendants also cite three Nevada district court cases in which the courts enforced the Agreement to Arbitrate against other plaintiffs. These cases are non-binding and do not clearly address the issues raised before this Court.

that some of Plaintiffs were sophisticated investors, not consumers purchasing basic goods and services.[6]

Defendants argue that the Purchase Agreements were not contracts of adhesion under *D.R. Horton*. Defendants are wrong when they suggest that *D.R. Horton* holds that home purchase agreements can never be contracts of adhesion. In *D.R. Horton*, a Nevada district court held that a contract between home buyers and a property developer was a contract of adhesion after an evidentiary hearing. 549 P.3d at 1162. On appeal, the Supreme Court of Nevada held that the district court's finding in this regard was not supported by substantial evidence. *Id.* at 1163. The Supreme Court of Nevada noted that the record showed "that it was possible to negotiate for deletion of the arbitration provision." *Id.*

In this case, the Court lacks the benefit of an evidentiary hearing with a developed record on the issue of adhesion. Plaintiffs have argued that the Purchase Agreements were contracts of adhesion. Defendants argue otherwise and provide an affidavit stating that "[p]urchasers had the opportunity to negotiate terms of their [Purchase] Agreements, the most common being price and upgrades. In addition, purchasers had the ability to negotiate, and not sign the Exhibit 'J,' Owner Occupancy Addendum, especially those who were purchasing solely as an investment." (Edge Aff. ¶ 12). Four of Plaintiffs did not sign the Owner Occupancy Addendum. (*Id.* at Ex. A). This evidence is not entirely persuasive. Defendants have no evidence of Plaintiffs negotiating any term of the Purchase Agreements. That some Plaintiffs were not required to sign the Owner Occupancy Addendum only shows that Defendants used form addendums to their form contract to create different form combinations. Furthermore, this is a motion to dismiss. Plaintiffs have not had the opportunity to submit evidence or conduct discovery.

The factual question of whether or not this was a contract of adhesion simply cannot

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[6] Defendants spend many pages arguing that the terms were conspicuous. Plaintiffs do not argue that the arbitration provisions are unconscionable because they were not readily ascertainable. Therefore, the Court need not address these arguments.

be clearly answered at this stage. Under Nevada law, the burden of proving a valid arbitration clause rests on Defendants. *See D.R. Horton, Inc.*, 96 P.3d at 1162. Therefore, the Court must treat the contract as one of adhesion for the purposes of this motion.

2. The Agreement to Arbitrate is substantively unconscionable.

"'[S]ubstantive unconscionability focuses on the one-sidedness of the contract terms.'" *D.R. Horton, Inc.*, 96 P.3d at 1162–63 (quoting *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003)). Plaintiffs argue that the Agreement to Arbitrate was one-sided because it included a clause allowing the prevailing party in arbitration to recover attorney's fees and costs and a clause requiring arbitration proceedings to be confidential.

a. The attorney's fees provision is one-sided in Defendants' favor.

Though bilateral on their face, clauses that increase the costs of arbitration may be one-sided as applied because of the disparities in economic resources between the parties. *See D.R. Horton, Inc.*, 96 P.3d at 1165 ("Ordinary consumers may not always have the financial means to pursue their legal remedies, and significant arbitration costs greatly increase that danger. In such a circumstance, the contract would lack the 'modicum of bilaterality' . . . ."). For example, an agreement requiring an employer and employee to split arbitration costs and authorizing the arbitrator to, at his discretion, require the employee to pay the employer's share of the costs has been found substantially unconscionable. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1177–78 (9th Cir. 2003) (applying California law).

Plaintiffs admit that the attorney's fees provisions are bilateral on their face, but argue that they are meant to intimidate purchasers away from litigation through threatened financial ruin. Furthermore, Plaintiffs note that the attorney's fees clause is not bilateral in these circumstances because under the Interstate Land Sales Act, plaintiffs may recover attorney's fees without the threat of a successful defendant recovering attorney's fees. *See* 15 U.S.C. § 1709(c). Thus, at least under the Interstate Land Sales Act, the seemingly bilateral attorney's fees provision solely benefits Defendants. *See In re Lucas*, 312 B.R. 407, 412 (Bankr. D. Nev. 2004) (holding that an arbitration provision is

unconscionable when it fails to provide a scheme that allows a successful plaintiff to recover his costs and attorney's fees since the Interstate Land Sales Act provides this protection in the courts); *see also Ontiveros v. DHL (USA), Inc.*, 79 Cal. Rptr. 3d 471, 484–85 (Cal. Ct. App. 2008) (noting that an employment contract of adhesion may not require the employee to bear any expenses that he would not bear if bringing the action in court).

Defendants argue that the Truth In Lending Act and the Interstate Land Sales Act already allow successful litigants to recover attorney's fees. Defendants do not support this claim. Both acts appear to limit recovery of attorney's fees to plaintiffs. The Truth In Lending Act allows a person to recover attorney's fees and costs from a creditor who violates its provisions in an action for rescission. 15 U.S.C. § 1640(a)(3). It does not suggest that the creditor may recover attorney's fees if he successfully defends the suit. The Interstate Land Sales Act allows a purchaser or lessee to recover attorney's fees and costs from developers or agents who violate its provisions. 15 U.S.C. § 1709. It does not suggest that the developer or agent may recover attorney's fees if he successfully defends the suit. Neither act explicitly awards attorney's fees to the "prevailing party." *Compare* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) ("[T]he court, in its discretion, may allow *the prevailing party* . . . a reasonable attorney's fee as part of the costs . . . .") (emphasis added).

Defendants argue, based on *Jones v. General Motors Corp.*, 640 F. Supp. 2d 1124 (D. Ariz. 2009), that an arbitration agreement's alteration of remedies under the Truth In Lending Act does not render the arbitration provisions substantively unconscionable. *Jones*, however, does not really apply. First, it is non-binding and applies Arizona law. Arizona, unlike Nevada, allows a finding of unconscionability to be based on substantive unconscionability alone. *Id.* at 1129. Nevada, on the other hand, requires the presence of both procedural and substantive unconscionability and allows the abundance of procedural unconscionability to compensate for the dearth of substantive unconscionability. *See D.R. Horton, Inc.*, 96 P.3d at 1162. Second, the court in *Jones* addressed the issue of whether

the Truth In Lending Act forecloses recovery of attorney's fees by defendants in arbitration. 640 F. Supp. 2d at 1144–45. The court did not squarely confront the issue of whether the Truth In Lending's base-line of allowing the prevailing plaintiff attorney's fees but not the prevailing defendant renders a facially neutral clause allowing recovery of attorney's fees to the prevailing party one-sided.

Defendants also argue that Plaintiffs have failed to establish any threatened financial ruin. "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree Fin. Corp.—Alabama v. Randolph*, 531 U.S. 79, 92 (2000) (5-3 on this issue). Defendants are correct that Plaintiffs have provided no evidence or argument showing that financial ruin is likely if they pursue arbitration. Indeed, if they prevail, they will recover their attorney's fees. However, the Court need not find that the attorney's fees provision creates a likely threat of financial ruin to Plaintiffs; the Court only need find that the provision is one-sided in Defendants' favor. In the context of the schemes allowing consumers to recover attorney's fees but not lenders or developers, the attorney's fees provision of the Agreement to Arbitrate is one-sided and substantively unconscionable. Defendants receive a potentially substantial benefit while Plaintiffs do not.

b. The confidentiality provision is minimally one-sided in Defendants' favor.

"[E]ven facially mutual confidentiality provisions can effectively lack mutuality and therefore be unconscionable." *Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1078 (9th Cir. 2007) (applying California law). "Although facially neutral, confidentiality provisions usually favor companies over individuals." *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) (applying California law). This is because large companies are usually repeat players in arbitration. If arbitration is open, then plaintiffs' counsel and arbitration appointing agencies may scrutinize awards and gain knowledge from prior arbitrations and the advantage to companies for being repeat players is mitigated. But, "if the company

succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player." *Id.* at 1152.

Plaintiffs argue that, though it is bilateral on its face, the confidentiality clause unilaterally favors Defendants as repeat players to arbitration of their unilaterally crafted contracts. Defendants assert that any "repeat player" advantage they have is vastly overstated.

Merely asserting a "repeat player" advantage without more particularized evidence demonstrating impartiality will not support a finding of unconscionability. *Nagrampa*, 469 F.3d at 1285 (applying California law). Unlike the situation in *Ting* where the contracts were sent to 60 million customers, 319 F.3d at 1134, only 145 buyers executed the Purchase Agreements, (Hsu Aff. ¶ 2, attached as Ex. 1 to Defs.' Reply (#16)). The specter of a "repeat player" advantage is not readily apparent in this case. The buyers are few enough in number to work together and share knowledge. Defendants will not be given the unfair opportunity to hone their skills and knowledge on a great number of cases that potential plaintiffs will not have access to. The one-sidedness of the confidentiality provision is minimal.

B. The Agreement to Arbitrate covers Plaintiffs' claims sounding in tort and claims for rescission.

Plaintiffs summarily argue that the Agreement to Arbitrate does not cover their claims for rescission and their tort claims. Plaintiffs do not provide argument or authority on this point.

Though specific challenges to an arbitration clause may be heard by the courts first, challenges to the validity of a contract as a whole must first be heard by an arbitrator. *Nagrampa*, 469 F.3d at 1268 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1209 (2006)). Thus, even claims of fraud in the inducement and that a contract is void ab initio must first be hear by an arbitrator. *Nagrampa*, 469 F.3d at 1268–69 (citing *Buckeye*, 126 S. Ct. at 1208–09 and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398–400 (1967)). Therefore, the Agreement to Arbitrate, if enforceable, governs

all Plaintiffs' claims.

C. Certification for Immediate Appeal

The issue of whether the Agreement to Arbitrate is unconscionable is a controlling issue and there is substantial ground for difference of opinion regarding the correct conclusion. An immediate appeal will materially advance this litigation. The Court will certify this decision for immediate appeal under 28 U.S.C. § 1292(b).

D. Plaintiff's request to have their deposits placed with Court

Plaintiffs ask the Court to order their deposits placed with the Court because the status of the deposits is not clearly known. Plaintiffs fear that the condominium project may fail and their funds may be lost. Defendants have not addressed this request.

Plaintiffs should argue this request as a separate motion for a preliminary mandatory injunction. Furthermore, Plaintiffs have provided no reason why the Court should elevate them above the status of general creditors. Therefore, the Court denies Plaintiff's request to order their deposits placed with the Court.

IV. Conclusion

Accordingly, IT IS ORDERED that Defendants' Motion to Dismiss and Compel Arbitration (#13) is DENIED.

IT IS FURTHER ORDERED that this order is certified for immediate interlocutory appeal under 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

DATED: This 14th of January, 2011.

Robert C. Jones
UNITED STATES DISTRICT JUDGE