

No. 42747-8-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MHN GOVERNMENT SERVICES, INC.; HEALTHNET, INC., and
MHN SERVICES dba MHN SERVICES CORPORATION, a Washington
corporation,

Appellant,

v.

BARBARA BROWN and CINDY HIETT,

Respondents.

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DIVISION II
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BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellants wrote a one-sided arbitration agreement designed to deter claims against it and stack the deck against any person who dared to mount a challenge. The agreement allows Appellant to choose the arbitrator, pick the forum, limit the remedies and force individuals to face crushing exposure for attorney's fees. The arbitration agreement is unconscionable under general contract principles, as the trial court found.

II. STATEMENT OF THE CASE

Respondents Barbara Brown and Cindy Hiatt ("Plaintiffs") commenced this action in Pierce County Superior Court on behalf of themselves and a putative class to enforce Washington's wage and hour laws. CP 1-10. Plaintiffs allege that that class members were at all times employees of Appellants (collectively referred to as "MHNGS") but were misclassified as independent contractors. *Id.* MHNGS has conceded that the class consists of at least 317 individuals, many of whom reside in Washington. CP 215, 226. MHNGS argues that this matter must be resolved through individual arbitration.

In mid-2008, Plaintiffs signed a Provider Services Task Order Agreement ("PSTOA"). CP 89. Neither named plaintiff was provided with a copy of the PSTOA signed by any MHNGS representative. CP 34, 54. The PSTOA is a nine-page, single-spaced form document with 23

distinct clauses and more than 50 subparagraphs. CP 43-51, 63-71. The PSTOA was presented to Plaintiffs as a condition to working for MHNGS and was not subject to any negotiation. CP 34, 54. These facts were not disputed by MHNGS.

The single longest paragraph in the PSTOA is a densely-worded arbitration clause,¹ which provides in its entirety:

Mandatory Arbitration. The parties agree to meet and confer in good faith to resolve any problems or disputes that may arise under this Agreement. Such negotiation shall be a condition precedent to the filing of any arbitration demand by either party. The parties agree that any controversy or claim arising out of or relating to this Agreement (and any previous agreement between the parties if this Agreement supersedes such prior agreement) or the breach thereof, whether involving a claim in tort, contract or otherwise, shall be settled by final and binding arbitration in accordance with the provisions of the American Arbitration Association. The parties waive their right to a jury or court trial. The arbitration shall be conducted in San Francisco, California. A single, neutral arbitrator who is licensed to practice law shall conduct the arbitration. The complaining party serving a written demand for arbitration upon the other party initiates these arbitration proceedings. The written demand shall contain a detailed statement of the matter and facts supporting the demand and include copies of all related documents. MHN shall provide Provider^[2] with a list

¹ For clarity, Respondent will refer to the Provider Services Task Order Agreement in its entirety as the “PSTOA.” The sub-section titled “Mandatory Arbitration,” found at ¶ 19 of the PSTOA will be referred to as the arbitration “**clause.**” Individual elements found within the arbitration clause (e.g., San Francisco forum, arbitrator selection method) will be referred to as “**provisions.**”

² “Provider” is defined in the PSTOA as the individual “named on the signature page of this Agreement[.]” CP 43, 63.

of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration. Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. At least thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts (one of each for MHN and Provider), and copies of all exhibits to be used at the arbitration. Arbitration must be initiated within 6 months after the alleged controversy or claim occurred by submitting a written demand to the other party. The failure to initiate arbitration within that period constitutes an absolute bar to the institution of any proceedings. Judgment upon the award rendered by the arbitrator shall be final and binding. The arbitrator shall have no authority to make material errors of law or to award punitive damages or to add to, modify, or refuse to enforce any agreements between the parties. The arbitrator shall make findings of fact and conclusions of law and shall have no authority to make any award that could not have been made by a court of law. The prevailing party, or substantially prevailing party's costs of arbitration are to be borne by the other party, including reasonable attorney's fees.

CP 49, 69.

Even MHNGS has struggled to decipher its own arbitration clause, including *which* of the dozens of potentially applicable AAA rule sets the clause is actually referencing. Following a full hearing, the trial court found this arbitration clause unconscionable.

III. ARGUMENT

A. The Parties Agree that California Law Applies to the Interpretation of the PSTOA.

The PSTOA contains a California choice of law provision. CP 49, 69. While Plaintiffs' substantive claims are based on Washington wage and hour law, the parties agree that interpretation of the PSTOA is governed by California law. *E.g.*, CP 139. Therefore, whether the PSTOA is unconscionable is decided under California law.

B. The California Court of Appeals Recently Held that a Substantially Similar Arbitration Clause was Unconscionable.

In a published decision dated April 5, 2012, the California Court of Appeals addressed questions of unconscionability substantially similar to those before this Court, affirming the trial court's decision to strike down an arbitration agreement as unconscionable. *Samaniego v. Empire Today LLC*, No. A132297, 2012 WL 1591847 (Cal. Ct. App., Apr. 5, 2012). As here, the agreement imposed an artificial six-month statute of limitations on workers and contained a fee-shifting provision requiring employees to pay the prevailing employer's attorney fees. *Id.* at *2. As here, the defendant advocated for the same expansive reading of the U.S. Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct 1740, 1745, 179 L. Ed. 2d 742 (2011). *Id.* at *7. And as here,

the defendant implored the court to sever unconscionable provisions to render the unlawful agreement enforceable. *Id.*

Samaniego is addressed in greater detail below, but it bears early mention as the most current authoritative statement on California law rejecting the same propositions MHNGS asserts before this Court.

C. Standard of Review

Although plaintiffs do not dispute that questions of arbitrability are generally reviewed de novo, there are two subsidiary questions presented here, each with a separate standard of review.

First, the trial court's decision that the PSOTA contained unconscionable provisions is reviewed under the following hybrid standard:

On appeal from the denial of a motion to compel arbitration, [u]nconscionability findings are reviewed de novo if they are based on declarations that raise no meaningful factual disputes. 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.**

Samaniego, 2012 WL 1591847, at *2 (internal quotation marks and citations omitted, emphasis added).

Washington law is similar³. While the issue of unconscionability of a contract or clause of a contract is a question of law for the court, the decision is one based on the factual circumstances surrounding the transaction in question. *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 898, 28 P.3d 823 (2001).

In this case, the trial court did weigh the evidence making conclusions and inferences as to the facts supporting procedural and substantive unconscionability. Those determinations are reviewed for substantial evidence.

Second the trial court's decision to not sever the unconscionable provisions from the PSOTA is discretionary. As such, it is reviewed for an abuse of discretion. *Samaniego*, 2012 WL 1591847, at *2; *see also Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 787-88 (9th Cir. 2002).

Under Washington law, the decision to not sever unenforceable provisions is likewise discretionary and thus reviewed for abuse of discretion. *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1262 (9th

³ Given the California choice of law provision in the PSOTA, MHNGS has cited both California and Washington cases as to the standard of review. Plaintiffs follow the same approach, starting with California law pursuant to the choice of law provision, although the standard of review appears similar under both state's laws.

Cir. 2005) (“Like California law, Washington law grants courts discretion to sever unconscionable contract provisions or refuse to enforce the entire contract.”); *Schroeder v. Fageol Motors, Inc.*, 86 Wn. 2d 256, 262, 544 P. 2d 20 (1975) (if the court finds unconscionable provisions in a contract, the court **may** refuse to enforce the contract, may enforce the remainder of the contract or may limit any unconscionable clause).

D. Unconscionable Agreements to Arbitrate are Unenforceable, Just Like Any Other Unconscionable Contract.

By their express terms, neither the Federal Arbitration Act (“FAA”), the California Arbitration Act (“CAA”), nor Washington’s Uniform Arbitration Act compel arbitration where the purported agreement to arbitrate is unenforceable under general contract principles, including unconscionability. 9 U.S.C. § 2; CAL. CIV. CODE § 1281 (enforceable “save upon such grounds as exist for the revocation of any contract”); RCW 7.04A.060(1) (enforceable “except upon a ground that exists at law or in equity for the revocation of contract”). The FAA provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be 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 (emphasis added). “Thus, under the FAA, the validity and enforceability of an arbitration agreement is governed by state law applicable to contracts generally.” *Sanchez v. W. Pizza Enters., Inc.*, 172 Cal. App. 4th 154, 165, 90 Cal. Rptr. 3d 154 (Cal. Ct. App. 2009) (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87, 116 S. Ct. 1652, 134 L. Ed. 2d 902, (1996)).

As recently explained by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, the “saving clause” at the end of 9 U.S.C. § 2 reflects the “fundamental principle that arbitration is a matter of contract[.]” 131 S. Ct at 1745 (internal quotation marks omitted). Courts must therefore “place arbitration agreements on equal footing with other contracts[.]” *Id.* (internal quotation marks omitted). As expressly recognized in *Concepcion*, the saving clause thus “permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability[.]” 131 S. Ct. at 1746 (internal quotation marks omitted) (emphasis added).

E. The Arbitration Provision is Unconscionable.

The California Civil Code explicitly provides that unconscionable contract provisions need not be enforced. CAL. CIV. CODE § 1670.5. “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with

contract terms which are unreasonably favorable to the other party.” *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486-87, 186 Cal. Rptr. 114 (Cal. Ct. App. 1982) (internal quotation marks omitted).

“[U]nconscionability has both a ‘procedural’ and a ‘substantive’ element. *Id.* (citations omitted). Although “the prevailing view is that these two elements must both be present” for a contract to be held unenforceable, (*Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1533, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997));⁴ unconscionability is determined by a “sliding scale;” the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to find that the term is unconscionable, and vice versa. 15 WILLISTON ON CONTRACTS § 1763A, pp. 226-27 (3d ed. 1972); *see also A&M Produce Co.*, 135 Cal. App. 3d at 487.

1. The PSTOA is Procedurally Unconscionable Because it is a Contract of Adhesion Replete with “Surprise” and “Oppression” are Abundant.

In determining procedural unconscionability, courts first consider whether the contract is one of adhesion. *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 817-19, 171 Cal. Rptr. 604, 623 P.2d 165 (Cal. Sup. Ct. 1981). This is because “[o]rdinary contracts of adhesion . . . contain a

⁴ But see *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346-47, 103 P.3d 773 (2004) (“we now hold that substantive unconscionability alone can support a finding of unconscionability”).

degree of procedural unconscionability even without any notable surprises, and ‘bear within them the clear danger of oppression and overreaching.’” *Gentry v. Superior Court*, 42 Cal. 4th 443, 469, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (Cal. Sup. Ct. 2007) (quoting *Graham*, 28 Cal. 3d at 818).

The procedural element also focuses on two additional factors: “oppression” and “surprise.” *A&M Produce Co.*, 135 Cal. App. 3d at 486. Only one factor need be present. *See id.* at 491 (“Even if we ignore any suggestion of unfair surprise, there is ample evidence of unequal bargaining power . . . and a lack of any real negotiation”).

Here, the arbitration clause is procedurally unconscionable because the PSTOA is a contract of adhesion and because both surprise and oppression are present.

a. The PTSOA is a Contract of Adhesion, Subjecting it to Additional Scrutiny.

The term “contract of adhesion” “signifies 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.” *Graham*, 28 Cal. 3d at 817 (internal quotation marks omitted). The fact that a contract is adhesive in nature requires the court to determine whether “certain other factors are present which, under

established legal rules—legislative or judicial—operate to render it [unenforceable].” *Id.* at 820.

Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such **a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him.** [Citations.] The second—a principle of equity **applicable to all contracts** generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or “unconscionable.”

Id. (emphasis added).

The trial court properly concluded that the PSTOA was an adhesive contract, noting:

In this case, the plaintiffs, if they wanted to work for the defendant had to accept the contract. There’s no indication or evidence of any negotiation that was set forth. . . . [T]he contract was presented to them as basically, if you’re going to work for us . . . this is what you have to sign.”

RP 40. Nonetheless, MHNGS now argues that this finding is erroneous, claiming there is “no evidence to that effect.” App. Br. at 23. MHNGS is wrong for three reasons: (1) it ignores the applicable standard of review; (2) it ignores the substantial evidence supporting the trial court’s finding; and (3) MHNGS acknowledges in its opening brief that the facts demonstrate a contract of adhesion.

First, under both California and Washington law, appellate courts review the trial court's factual findings supporting unconscionability for substantial evidence. *Samaniego*, 2012 WL 159, 1847 at *2; *see, Adler*, 153 Wn.2d at 350 (remanding to trial court "to make additional findings" regarding procedural unconscionability); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959) (factual findings by the trial court may not be overturned if supported by substantial evidence.).

Second, there is substantial evidence (as opposed to "no evidence") supporting the trial court's finding. Most notably, both named plaintiffs declared: "There was no discussion or negotiation of the terms of this contract between MHNGS and me and no such communications were ever invited by MHNGS. The contract was offered on a take-it-or-leave it basis." CP 34, 54. Importantly, MHNGS offered no rebutting declarations claiming that it was open to negotiation of its form contract. *See Adler*, 153 Wn.2d at 348 ("Presumably, employees were not free to negotiate the terms of the agreement with [their employer]"). The trial court's finding drawn from this and other evidence (including the respective size of the parties and the labor pool available to MHNGS) is amply supported.

Finally, MHNGS acknowledges that the evidence before the trial court “suggests that Respondents could have simply chosen to reject MHNGS’s solicitation altogether.” App. Br. at 24. Confusingly, MHNGS argues that “[t]his is a far cry from a ‘take-it-or-leave-it’ proposition.” *Id.*; *but see Monex Deposit Co. v. Gilliam*, 671 F. Supp. 2d 1137, 1143 (“the agreement is a ‘take-it-or-leave-it’ adhesion contract.”). How the PSTOA is anything other than a contract that “relegates to the subscribing party only the opportunity to adhere to the contract or reject it” is unclear.

b. MHNGS’s Ever-Changing Interpretation of its Own Arbitration Clause is “Surprising.”

MHNGS’s shifting explanations of its own arbitration clause satisfies the “surprise” element. While the trial court concluded that the arbitration clause was not “hidden,” it went on to note that “there’s also language in it that is less than clear.” RP 40. The trial court was referring, in part, to the moving target that is MHNGS’s explanation of the procedures by which arbitration would be governed. MHNGS’s arbitration clause fails to identify *which* AAA rule set would apply to the instant dispute or how those rules can be reconciled with the plain language of the lopsided arbitration clause.

A cursory review of the AAA website reveals separate procedures for dozens of classes of disputes. These include distinct rules for

“commercial” arbitration, “labor” arbitration, and “Government Programs.” <http://www.adr.org> (last visited May 16, 2012) (navigate to “Areas of Expertise”). Moreover, the AAA has numerous industry-specific rules,⁵ including rules expressly designed for the healthcare industry. *Id.* Interestingly, among the healthcare industry rules are the “AAA Healthcare Payor Provider Arbitration Rules” which govern “claims by healthcare Payors for healthcare services rendered by healthcare Providers.” *Id.* How Plaintiffs—employees, misclassified as contractors, providing healthcare services, via a government program—were to know *which* AAA rules applied to the PSTOA is unclear.

It was certainly “surprising” to Plaintiffs when MHNGS declared before the trial court that its arbitration clause was referring to the AAA **Employment** arbitration rules, CP 134; RP 6, despite MHNGS’s staunch position that Plaintiffs were **NOT** employees. Plaintiffs are equally “surprised” by MHNGS’s latest reinterpretation of its vaguely drafted clause that “it is evident that the **Commercial** Rules would apply.” App. Br. at 7, n.1 (emphasis added). The applicable arbitration rules are not merely hidden in a prolix printed form. They are concealed in the fickle minds of MHNGS and its attorneys.

⁵ See <http://www.adr.org/sp.asp?id=28751> (noting that “AAA arbitrations and mediations address a variety of industry-specific situations through general commercial and industry-specific rules” and listing over a dozen industry specific rule sets).

But the greatest “surprise” is MHNGS’s unilateral and mystifying redrafting of the plain language of its own arbitration agreement. As explained below, MHNGS has rewritten and reinterpreted its own arbitration clause in a transparent effort to dull the impact of the one-sided “agreement.” While Respondents may possess healthcare related professional licenses,⁶ they are neither clairvoyant nor telepathists and were therefore “surprised” by the unexpressed (and recently contrived) intentions of MHNGS.

c. The Lack of Information, Negotiation, or Meaningful Choice Renders the PSTOA Oppressive.

“‘Oppression’ arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.” *A&M Produce*, 135 Cal. App. 3d at 486. Here, MHNGS’s arbitration clause is oppressive because (1) Plaintiffs were not provided with a copy of the AAA rules that would govern their disputes (a tall order given MHNGS’s continually shifting position on which rules would apply), and (2) there is substantial evidence that the PSTOA was non-negotiable. Finally, the “market alternatives” defense is inapplicable to employment contracts of adhesion. Even if it was, MHNGS has not met its burden of establishing reasonable market alternatives.

⁶ As it did below, MHNGS ignores California’s recognition that even “‘experienced but unsophisticated businessmen may be unfairly surprised by unconscionable contract terms.’” CP 18 (quoting *A&M Produce Co.*, 135 Cal. App. 3d at 486).

i. MHNGS's Failure to Provide Plaintiffs with a Copy of Any AAA Rules Supports a Finding of Oppression.

Under California law, “[n]umerous cases have held that the failure to provide a copy of the arbitration rules to which the employees would be bound, supported a finding of procedural unconscionability.” *Samaniego*, 2012 WL 1591847, at *4. This is because the weaker party “is forced to go to another source to find out the full import of what he or she is about to sign and must go to that effort *prior* to signing.” *Id.* (quoting *Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418 (2003)) (italics in original).

In *Samaniego*, the arbitration clause provided that disputes would be decided “pursuant to the Commercial Arbitration Rules of the [AAA].” *Id.* at *1. “[T]hose rules were not attached to [the agreement] or otherwise provided to the plaintiffs.” *Id.* at *2. The California Court of Appeals found this “significant” in affirming a finding of unconscionability. *Id.* at *4.

Here, not only did MHNGS not provide Plaintiffs a copy of the *applicable* AAA rules, but Plaintiffs had no way to know which of the dozens of potentially applicable AAA rules might govern their disputes. Instead, MHNGS drafted a clause leaving it the ability to pick which arbitration rules best served its interest (to a plaintiff's corresponding

detriment) based on MHNGS's views at the time. MHNGS's switch from the "Employment" rules to the "Commercial" rules on appeal is just one example of this phenomenon. But, under California law, the failure to provide the arbitration rules (or in this case to even state what they are) meets the "oppression" element of procedural unconscionability.

ii. The "Market Alternatives" Defense is Inapplicable to Employment Adhesion Contracts and Has Not Been Established Regardless.

Below, MHNGS inaccurately argued that the "oppression" element requires Plaintiffs to prove a lack of market alternatives. CP 137. It does not. In fact, this defense does not even apply to employment contracts of adhesion. Even if it did, MHNGS has not met its burden to prove the defense.

MHNGS refers the Court to *Monex Deposit Co. v. Gilliam*, 617 F. Supp. 2d 1137, 1144 (C.D. Cal. 2009), which in turn cites *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1572, 98 Cal. Rptr. 3d 743 (Cal. Ct. App. 2009), for the proposition that "oppression" also refers "to the absence of reasonable market alternatives." App. Br. at 22; *see also* CP 137. Both cases concerned arbitration agreements drafted by Monex, a precious metals dealer. *See, e.g., Parada*, 176 Cal. App. 4th at 1560. But that theory is inapplicable to employment contracts of adhesion.

Of course, not every opportunity to seek an alternative source of supply is “realistic.” Courts have recognized a variety of situations where adhesion contracts are oppressive, despite the availability of alternatives. For example, a sick patient seeking admittance to a hospital is not expected to shop around to find better terms on the admittance form. Similarly, **few employees are in a position to refuse a job because of an arbitration agreement in an employment contract.**

Morris v. Redwood Empire Bankcorp, 128 Cal. App. 4th 1305, 1320, 27 Cal. Rptr. 3d 797 (Cal. Ct. App. 2005) (emphasis added). Both *Parada* and *Monex* follow this approach. *Parada*, 176 Cal. App. 4th at 1572 (“This is not a situation such as admittance to a hospital . . . or employment in which an adhesion contract might be oppressive despite the availability of alternatives”); *Monex*, 671 F. Supp. 2d at 1144 (same).

But even if the defense was applicable here, and it is not, the absence of market alternatives pertains to a potential defense to be raised by the party seeking to enforce a contract. *Parada*, 176 Cal. App. 4th at 1572 (“the oppression factor of the procedural element of unconscionability **may be defeated**, if the complaining party has a meaningful choice of reasonably available alternative”). *Parada* placed the burden on *Monex* (not the plaintiffs arguing unconscionability) to demonstrate that the plaintiffs had alternatives. *See id.* at 1572 (“**Monex argues**, Petitioners’ ability to invest in things other than precious metals . . .”). *MHNGS* produced no evidence to meet this defense; at a minimum,

a determination that the defense had not been established is well supported by the record.

Finally, even if market alternatives could be established, this is just one factor considered in determining procedural unconscionability. The *Parada* court rejected the very argument now advanced by MHNGS:

Monex is incorrect in arguing the existence of reasonable alternatives is dispositive of the issue of oppression. In *Nagrampa v. MailCoups, Inc.*, (9th Cir. 2006) 469 F.3d 1257, 1283, an en banc panel of the Ninth Circuit Court of Appeals correctly stated, “[t]he California Court of Appeal has rejected the notion that the availability in the marketplace of substitute employment, goods, or services alone can defeat a claim of procedural unconscionability.” The availability of reasonable alternatives is **but one factor** (along with absence of power to negotiate terms) used in considering oppression.

176 Cal. App. 4th at 1573 (italics in opinion) (emphasis added). Weighing the market alternatives to investing in precious metals, the *Parada* court concluded that there was “a low to medium degree of procedural unconscionability” in those agreements. *Id.*

Here, there was substantial evidence before the trial court of both “surprise” and “oppression” to a far greater magnitude than that imposed by the precious metal traders in *Parada*.

2. The Arbitration Clause is Substantively Unconscionable as Written

A substantively unconscionable contract is one characterized by “overly harsh” or “one-sided” results. *A&M Produce Co.*, 135 Cal. App. 3d at 487. “[U]nconscionability turns not only on a one-sided result, but also on an absence of justification for it.” *Id.* (internal quotation marks omitted). “[A] . . . a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner.” *Id.* Contracts that are so inequitable as to “shock the conscience” are unconscionable. *Cal. Grocers Assn. v. Bank of Am.*, 22 Cal. App. 4th 205, 27 Cal. Rptr. 2d 396 (Cal. Ct. App. 1994).

a. The Arbitrator Selection Provision is Unconscionable as Written.

First, the arbitration clause gives MHNGS the right to control who arbitrates its disputes. The relevant provision states: “MHN shall provide Provider with a list of three neutral arbitrators from which Provider shall select its choice of arbitrator for the arbitration.” CP 49, 69.⁷ Under this language, MHNGS may select the three most pro-employer arbitrators in the country who have no connection to MHNGS (and thus are “neutral”)

⁷ *Compare Concepcion*, 131 S. Ct. at 1744 (“either party may bring a claim in small claims court in lieu of arbitration”).

and Plaintiffs are forced to choose one of these three hand-selected arbitrators to decide the case.

MHNGS quickly backpedaled from this biased process before the trial court, asserting that this unfair provision must somehow be read in the “context” of the AAA rules. CP 141. Even now, MHNGS deceptively suggests that this clause is somehow limited to “potential arbitrators to be selected from the AAA’s roster.” App. Br. at 32. **But this is not what the arbitration clause says!** By its plain terms, the selection provision states that “**MHN shall provide**” a list. There is no “express term” (as argued by MHNGS below) that “AAA [will] propose neutral arbitrators from which the parties may choose.” CP 141.

Though it relies heavily on the fairness of AAA arbitrations generally, MHNGS fails to inform the Court that the AAA Employment Arbitration Rules⁸ do not apply to an agreement that contains an arbitrator selection method.

If the parties have not appointed an arbitrator and have not provided any method of appointment, the arbitrator shall be appointed in the following manner: . . .

⁸ Although MHNGS *now* claims that the AAA **Commercial** Arbitration Rules apply, Plaintiffs will continue to analyze unconscionability under the AAA **Employment** Arbitration Rules first asserted by MHNGS below. *See Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002) (arguments not raised at the trial level are generally not considered on appeal).

AAA Employment Arbitration Rules, 12(c) (emphasis added). The AAA rules further provide:

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method **shall be followed.**”

Id., Rule 13a (emphasis added). MHNGS fails to explain how its inclusion of an arbitrator selection method in its arbitration clause can be reconciled (or read in “context”) with the AAA requirement that MHNGS’s chosen method “shall be followed.”⁹

MHNGS’s dramatic and strained reinterpretation is revealing of its recognition that the arbitrator selection provision is unconscionable. When read as written, there is absolutely no justification for MHNGS to retain complete control over selecting the arbitrator. Indeed, one could easily imagine the vociferous objections of MHNGS if Plaintiffs hand-selected a pool of three “neutral” arbitrators from which MHNGS could choose one, having “the final say.” App. Br. at 33.

⁹ Moreover, the AAA selection provisions are wholly distinct from those in MHNGS’s arbitration clause. *See Id.* Rule 12(b). Most notably, the AAA rules contemplate **agreement** as to an acceptable arbitrator:

[T]he AAA shall send simultaneously to each party a letter containing an identical list of names of persons chosen from the Employment Dispute Resolution Roster. The parties are encouraged to **agree** to an arbitrator from the submitted list and to advise the AAA of their **agreement.** . . .

Id. (emphasis added). Again, it has never been explained how reading the MHNGS provision in “context” changes anything. The only thing that is clear is that the AAA selection method is inapplicable here, where the clause has provided a method of appointment—albeit an unfair one.

b. The Arbitration Clause's Six-Month Limitation on Wage Claims is Unconscionable.

MHNGS's arbitration clause imposes a six-month limitation on all disputes. Under Washington law, employees have up to three years to commence an action under Washington's wage and hour laws. RCW 4.16.080. Washington courts have repeatedly recognized the state's "long and proud history of being a pioneer in the protection of employee rights." *E.g., Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (internal quotes omitted). "The Legislature 'evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive [statutory] scheme to ensure payments of wages.'" *Id.* (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157, 961 P.2d 371 (1998)). The right to be paid for all hours worked may not be waived by an employee as "[a]ny agreement between [an] employee and [an] employer to work for less than [minimum] wage shall be no defense" to an action to recover unpaid wages. RCW 49.46.090.

MHNGS wrote the arbitration clause to limit its legal obligation to pay its employees minimum wage to the most recent six months. Such "agreements" are expressly forbidden by statute and by including such a limitation the arbitration clause becomes substantively unconscionable. In *Samaniego*, the California Court of Appeals held that a six-month

limitation on wage claims by misclassified employees was substantively unconscionable. 2012 WL 1591847, at *5. *See, also, Lind*, 153 Wn.2d at 357 (six month time limitation in arbitration agreement substantively unconscionable.).

Once again, MHNGS's position has shifted on appeal. Below, MHNGS argued that "Plaintiffs misinterpret [the six-month] provision." CP 139. At that time, MHNGS argued that "**nothing would prevent** Plaintiffs from trying to recover damages beyond six months."¹⁰ CP 140 (emphasis added); *see also* CP 153. MHNGS now argues that "such limitations are not *per se* unlawful, much less unconscionable." App. Br. at 36. Despite MHNGS' shifts, the simple fact is that such a limitation is unconscionable.

While MHNGS's new position should be rejected outright on appeal, it should be noted that the cases it now relies upon (also for the first time) do not advance its position. *Moreno v. Sanchez*, stands for the proposition that agreements for limitations periods shorter than provided by statute will only be enforced if they are reasonable. 106 Cal. App. 4th 1415, 1430, 131 Cal. Rptr. 2d 584 (Cal. Ct. App. 2003). "'Reasonable' in this context means the shortened period nevertheless provides sufficient

¹⁰ Of course, in an arbitration setting, MHNGS would argue that the six month limitation applied.

time to effectively pursue a judicial remedy.” *Id.* Limitations will only be enforced “provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way.” *Id.*

California authority is clear that a six-month limitation on the right to recover wages is not “reasonable.” *Samaniago*, 2012 WL 1591847, at *5; *Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267, 1283 16 Cal. Rptr. 3d (Cal. Ct. App. 2004). For instance, the *Nyulassy* court was troubled by a “unilateral arbitration clause . . . limiting the time to assert a claim to a maximum of 180 days [or 6 months]” which shortened the statute of limitations “by a period of more *than three and one-half years.*” 120 Cal. App. 4th at 1283 (italics in original). It said: “We have little trouble concluding that, taken together, these three aspects of the mandatory employment arbitration agreement render it substantively unconscionable.” *Id.*

MHNGS’s reliance on *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038 (9th Cir. 2001) was easily distinguished in *Samaniago*. 2012 WL 1591847, at *5. Like MHNGS, the defendant cited *Soltani* to suggest that six-month limitations are broadly upheld. *Id.*; see App. Br. at 36-37.

But [defendant] supports its argument only with authority for the general proposition that a contractual provision that unilaterally shortens a limitations period to six months, taken alone, does not necessarily render an adhesion contract substantively unconscionable.

[referencing *Soltani*]. **The import of such a clause is quite different in the context of the statutory wage and hour claims asserted here. The Labor Code provides the bases for the class claims, and it affords employees three or four years to assert them.** Where, as in this case, arbitration provisions undermine statutory protections, courts have readily found unconscionability. [*Nyulassy*] [string citation].

Samaniego, 2012 WL 1591847, at *5 (emphasis added).

MHNGS's six-month limitation on employee wage and hour actions is unconscionable.

c. The Limitation on Statutorily Available Punitive Damages is Unconscionable.

Another statutory right purged by MHNGS's arbitration clause is the right to recover exemplary damages. *See* RCW 49.52.070 (double damages). The MHNGS arbitration clause provides in relevant part: "The arbitrator shall have **no authority** . . . to award punitive damages" CP 49, 69 (emphasis added).¹¹ The provision is unconscionable as written.

Once again, MHNGS's position shifts on appeal. Below, MHNGS argued that double damages were unavailable because Washington law did not apply to Washington workers, asserting violations of Washington wage and hour law, in a Washington superior court. CP 143. Alternatively, MHNGS drew a distinction between statutory and common

¹¹ *Compare Concepcion*, 131 S. Ct. at 1744 ("the arbitrator may award any form of individual relief, including injunctions, and presumably punitive damages"). MHNGS's provision is unconscionable as written.

law punitive damages. It argued: “insofar as the punitive damages limitation precludes Plaintiffs from recovering *common law* punitive damages, such a provision is enforceable.” *Id.* (italics in original). But according to MHNGS, the “punitive damages limitation would not prevent Plaintiffs from recovering any statutory damages or penalties.” *Id.* (emphasis added). Again, **this is not what the contract says!**

Despite acknowledging that the double damages contemplated by RCW 49.52.070 constitute recoverable “statutory . . . penalties,” MHNGS now argues that those “penalties” are “not ‘expressly’ punitive.” App. Br. at 35. In doing so, it ignores substantial authority directly to the contrary—recognizing that double damages under RCW 49.52.070 are punitive. *See, e.g., Schilling*, 136 Wn.2d at 157 (double damages under RCW 49.52.070 are a “punitive award” distinct from remedial award of attorney fees and costs); *Morgan v. Kingen*, 141 Wn. App. 143, at 161-62, 169 P.3d 487 (2007) (citing *Schilling*, 136 Wn.2d at 158) (“As exemplary damages, [RCW 49.52.070’s double damages] are intended to punish and deter blameworthy conduct.”). *Kammerer v. W. Gear Corp.*, 27 Wn. App. 512, 522, 618 P.2d 1330 (1981), *overruled on other grounds*, *Barr v. Interbay Citizens Bank of Tampa*, 96 Wn.2d 692, 699-700, 635 P.2d 441 (1981) (“Washington statutes allowing punitive damages generally

provide for amounts double and treble actual damages.” [citing RCW 49.52.070)].

Furthermore, Webster’s defines “punitive” as “inflicting, awarding, or involving punishment or **penalties**.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1981) (emphasis added). “Penalty,” in turn, is defined as “**punishment** for a crime or offense.” *Id.* at 1668 (emphasis added). And “punishment” is the infliction of a **penalty**.” *Id.* at 1843 (emphasis added). Whatever ambiguity MHNGS now seeks to manufacture, it is in conflict with both Washington law and the dictionary.

Below, MHNGS did little to develop its reliance on *PacifiCare Health Sys. Inc. v. Book*, 538 U.S. 401, 406-07, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003), CP 153, a case that is now the centerpiece of its punitive damages analysis. But the ambiguity in that case—whether RICO treble damages are compensatory or punitive—involved uncertainties of federal statutory interpretation not present here. Nothing in *PacifiCare* is comparable to the consistent recognition by Washington’s legislature and courts that double damages under RCW 49.52.070 (as opposed to remedial fee and cost awards) are punitive.

Finally, MHNGS’s continued reliance on *Monex* is misleading. While that court concluded that a limitation on actual contract and tort damages was not unconscionable, MHNGS fails to mention that the court

expressly distinguished its ruling from cases, like this one, in which **statutory punitive damages** were limited. 671 F. Supp. 2d at 1147 (“The Court agrees with Monex that central to the *Armendariz* decision was the fact that the plaintiff was seeking **statutorily mandated punitive damages** and attorney fees. In contrast, [plaintiff’s] counterclaims are primarily common law contract and tort actions.”).

Because the arbitration clause, as written, strips the arbitrator of any authority to award statutorily available exemplary (a.k.a. punitive) damages, it is unconscionable. MHNGS has never argued to the contrary.

d. MHNGS’s Fee Shifting Provision is Unconscionable.

MHNGS’s arbitration clause impermissibly shifts the risk of payment of MHNGS’s massive legal expenses to Plaintiffs, stating: “The prevailing party, or substantially prevailing party’s costs of arbitration are to be borne by the other party, including reasonable attorney’s fees.” CP 49, 69.¹² Fee shifting provisions that only benefit the employer are unlawful under the California Labor Code and substantively unconscionable. *Samaniego*, 2012 WL 1591847, at *5.

All of Plaintiffs’ causes of action are based on Washington’s wage and hour laws, RCW 49.46 *et seq.*, 49.48 *et seq.*, and 49.52 *et seq.*, under

¹² *Compare Concepcion*, 131 S. Ct. at 1744 (“The agreement . . . denies AT&T the ability to seek reimbursement of its attorney’s fees, and [may] require[] AT&T to pay a \$7,500 minimum recovery and twice the amount of the claimant’s attorney’s fees”).

which Plaintiffs' have a statutory right to recover their fees and costs. A prevailing employer enjoys no similar right. MHNGS's attempt to contract around these statutory protections is unconscionable under Washington law as well. *See, Lind*, 153 Wn.2d 354-55 (attorney fee provision changing the statutory allocation of attorney's fees is unconscionable).

One reason why a "loser pays" attorney's fee provision in an employment arbitration agreement is unconscionable is the "enormous deterrent to an employee contemplating a suit to vindicate his right to overtime pay." *Walters*, 151 Wn. App. at 324-25. Here, plaintiff would incur the risk of paying a national law firm for hundreds of thousands of hours at very high hourly rates if MHNGS's hand-selected arbitrator did not rule in their favor. The reason MHNGS included the provision is solely to deter the MFLC's from mounting any challenge. No person would reasonably accept a risk likely to mean personal bankruptcy to pursue a modest wage claim.

MHNGS erroneously claims that this "deterrence" rationale "has already been rejected by the U.S. Supreme Court." App. Br. at 38. It has not. The language quoted by MHNGS concerns whether "class proceedings are necessary to prosecute small-dollar claims." *Concepcion*, 131 S. Ct. at 1753. What this has to do with whether employers can

require Washington workers to contract away the protections of Washington's wage and hour laws is lost on Plaintiffs.

Tellingly, MHNGS does not point to a single case in which a court has upheld a contractual waiver of a statutory fee-shifting provision like the one at issue here. MHNGS's fee shifting clause would be unconscionable under any contract, not just an arbitration contract. There is thus no basis for the Court to conclude that the fee-shifting clause is anything but unconscionable.

e. Requiring a Global Workforce to Travel to San Francisco to Have Individual Grievances Heard is Egregiously Inequitable and Without Justification.

MHNGS's arbitration clause requires that "[t]he arbitration shall be conducted in San Francisco, California."¹³ CP 49, 69. There is no business justification for this requirement other than the pure convenience of MHNGS and the sole disadvantage of aggrieved persons.

As an enormous multinational corporation, MHNGS has a presence in, and the resources to pursue or defend any claim, in any state, including Washington.¹⁴ MHNGS employees have no similar luxury. To bring any challenge against MHNGS, a non-California employee would be

¹³ *Compare Concepcion*, 131 S. Ct. at 1744 (arbitration "in the county in which the customer is billed").

¹⁴ In this case alone, MHNGS has flown its California counsel, whose firm has offices in Seattle, to Washington on numerous occasions to present oral argument.

forced to locate counsel in California (specifically in Northern California) or counsel willing to travel there at great cost, sustain a long-distance relationship with that counsel, incur related travel expenses each time a deposition or hearing was held, and so on. The practical effect of this San Francisco forum provision is to ensure that only the most well-heeled could even bring a claim against MHNGS.

MHNGS first applies the wrong legal standard by analyzing this case under “general contract law,” CP 138, rather than the doctrine of unconscionability. Moreover, on appeal, MHNGS seeks to distinguish *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 909, 104 Cal. Rptr. 2d 888 (2001), case authority **that MHNGS first cited as binding precedent to the trial court(!)**, CP 138, now incorrectly referring to *Bolter* as “authority cited by Respondents below.” App. Br. at 30.

Bolter holds that a forum selection provision requiring California-based “Chem-Dry” franchisees to arbitrate their claims against franchisor Harris, before the AAA, in Salt Lake City, Utah, was “unduly oppressive” and thus, unconscionable. *Id.* at 909. In doing so, the court wrote:

In order to assess the reasonableness of Harris’s “place and manner” restrictions, the respective circumstances of the parties become relevant. As explained above, **Harris is a large international corporation and petitioners are small “Mom and Pop” franchisees located in California. . . .**

Under the circumstances, the “place and manner” TERMS ARE UNDULY OPPRESSIVE: The agreement requires franchisees wishing to resolve any dispute to close down their shops, pay for airfare and accommodations in Utah, and absorb the increased costs associated in having counsel familiar with Utah law. To rub salt in the wound, the agreement provides franchisees are precluded from consolidating arbitrations to share these increased costs among themselves. And the potential to recoup expenses with a favorable verdict is limited by the restriction against exemplary or punitive damages.

Because Dry-Chem franchises are by nature small businesses, it is simply not a reasonable or affordable option for franchisees to abandon their offices for any length of time to litigate a dispute several thousand miles away. . . .

Id. (emphasis added). The court expressed further concern with the financial hardship that litigating in an outside jurisdiction would impose.

Id. at 909-10. Finally, and particularly relevant here, the court stated:

Harris’s prohibition against consolidation, limitation on damages and forum selection provisions have no justification other than as a means of maximizing an advantage over the petitioners. Arguably, Harris understood those terms would effectively preclude its franchisees from ever raising any claims against it, knowing the increased costs and burden on their small businesses would be prohibitive. . . . Arbitration was not intended for this purpose.

Id. at 910 (emphasis added) (internal quotation marks and citation omitted). MHNGS could not have cited a more ringing endorsement of Plaintiffs' position or a more pointed rebuke of its own.¹⁵

All MHNGS can do to distinguish *Bolter* is contend that every mundane detail of the hardships faced by individual putative class members must be set out in declarations. This is silly. The core of the unconscionability analysis in *Bolter* requires little understanding of specific individual hardships. Indeed, the trial court in *Bolter* expressly "refused petitioners' request for an evidentiary hearing." *Id.* at 905. "Mom and Pop" shops are akin to MFLC's: they are "by nature small businesses;" MFLC's are individuals. *See* App. Br. at 3 ("To meet DOD's growing demand for Consultants, MHNGS recruits licensed **individual practitioners** and invites them to join its Consultant network."). Airfare, accommodations, financial hardships, and increased costs of out-of-state counsel are all practical limitations that require no declaration.

Focusing on one of the named plaintiffs is similarly unpersuasive.¹⁶ This is a putative class action brought on behalf of at least 317 MHNGS employees, "many [who] had or have residences **in Washington.**" CP 226 (emphasis added). The relevant question is not

¹⁵ *See, Walters*, 151 Wn. App. at 3325-329 (arbitration agreement requires hearing in Denver, Colorado was substantively unconscionable).

¹⁶ In fact, Ms. Hiatt now lives in Alaska.

whether some putative class members could have conceivably litigated in San Francisco, but whether requiring individual members of a global workforce to travel to San Francisco to assert relatively small wage claims is unduly oppressive.

In light of the clear import of *Bolter*, it is perhaps understandable that MHNGS would attempt to steer this Court towards the higher, albeit inapplicable burdens imposed by *Intershop Communications AG v. Superior Court*, 104 Cal. App. 4th 191, 198, 127 Cal. Rptr. 2d 847 (Cal. Ct. App. 2002) and *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal.3d 491, 131 Cal.Rptr. 374, 551 P.2d 1209 (Cal. Sup. Ct. 1976). But those cases are inapposite as neither applies the “unduly oppressive” standard, which MHNGS concedes is applicable in determining the unconscionability of “restrictions in arbitration agreements.” CP 138. Two additional cases, cited for the first time on appeal, are similarly devoid of any analysis under the applicable unconscionability standard.¹⁷

¹⁷ See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (“forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.” [T]here is no indication that petitioner set Florida as the forum . . . as a means of discouraging cruise passengers from pursuing legitimate claims.”); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) (“There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect.”); see also *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007) (forum selection clause that seriously impairs plaintiff’s ability to enforce a private action for the protection of Washington citizens violates the public policy of this state).

Nonetheless, Plaintiffs have even established unenforceability under the standard erroneously announced by MHNGS—that “the party must ‘demonstrate that the contractually selected forum would be unavailable or unable to accomplish substantial justice or that no rational basis exists for the choice of forum.’” App. Br. at 28 (quoting *Intershop*, 104 Cal. App. 4th at 199) (emphasis added). While the term “substantial justice” is undefined, it presumably does not contemplate the drafting of a forum selection clause to “preclude [plaintiffs] from ever raising any claims . . . knowing the increased costs and burden . . . would be prohibitive.” *Bolter*, 87 Cal. App. 4th at 910. It is difficult to conceive how substantial justice can be obtained where aggrieved parties are priced out of pursuing their claims at all.

F. The Trial Court Properly Rejected MHNGS’s Expansive and Untenable Reading of *AT&T Mobility, LLC v. Concepcion*.

The Supreme Court’s holding in *Concepcion* did nothing to rewrite the plain language of the FAA or displace the long held and unremarkable proposition that unconscionable arbitration agreements are unenforceable, just like any other unconscionable contract. Rather, *Concepcion* merely reiterates that arbitration agreements may not be rendered unenforceable “by defenses that apply only to arbitration or that derive their meaning

from the fact that an agreement to arbitrate is at issue.” 131 S. Ct. at 1746 (quoting *Doctor’s Assocs., Inc.*, 517 U.S. at 687) (emphasis added).

Nonetheless, just as it did before the trial court, MHNGS manufactures a “holding” found nowhere in *Concepcion*. It does so by taking fragments of sentences, appearing several paragraphs apart, to assert that generally applicable contract defenses (*e.g.*, unconscionability) “**cannot be raised**” where they “‘interfere[] with [the] fundamental attributes of arbitration’ such as its informality or speed.” App. Br. at 18 (quoting fragments of *Concepcion*, 131 S. Ct. at 1746, 1748-49) (brackets by MHNGS) (emphasis added). But if this was the holding of *Concepcion*, then the FAA’s saving clause, 9 U.S.C. § 2; *see also* Cal. Civ. Code § 1281, would be rendered meaningless as enforcement of even the most draconian contracts would still be “informal[] and speed[y].” Indeed a slew of courts reviewing *Concepcion* have already rejected MHNGS’s assertions—most recently, the California Court of Appeals’ April 5, 2012, ruling in *Samaniego*.

1. *Concepcion* Holds that a Judicially Created Rule Prohibiting Waiver of Class Arbitration Violates the FAA.

In *Concepcion*, the plaintiffs and a putative class alleged, among other things, that AT&T had engaged in false advertising by charging fees for mobile phones it had advertised as free. 131 S. Ct. at 1744. Both the

trial court and the Ninth Circuit refused to compel arbitration, relying on *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005). *Id.* at 1744-45. The so-called “*Discover Bank* rule” was judicially developed and serves to automatically invalidate class arbitration waivers in consumer contracts of adhesion involving predictably small amounts of damages. *Id.* at 1746.

The holding of *Concepcion* was quite narrow: “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” 131 S. Ct. at 1748; *see id.* at 1751 (mandatory class arbitration “to the extent it is manufactured by *Discover Bank*, rather than consensual, is inconsistent with the FAA”). At its most expansive, *Concepcion* merely reiterates that courts “may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable[.]’” *Id.* at 1747 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9, 107 S. Ct. 2520, 96 L. Ed. 2d 246 (1987)).

2. *Concepcion* Does Not Bar Defenses based on State Law Principles of Unconscionability.

Concepcion certainly does not hold that general defenses, including unconscionability, “**cannot be raised**” if they interfere with the informality and speed of arbitration. App. Br. at 18 (emphasis added).

Indeed, the Court repeatedly reiterated that its ruling did not displace Section 2's saving clause. *See id.* at 1746 (“The FAA permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as . . . unconscionability”); 1748 (“§ 2's saving clause preserves generally applicable contract defenses”). Such defenses stand as important safeguards to ensure that the FAA's goals of efficiency do not overrun basic notions of fairness.

MHNGS oversteps in arguing that the narrow analysis of *Concepcion*, or even the hypotheticals offered by the majority—waiver of judicially monitored discovery, the Federal Rules of Evidence, or disposition by a jury—have somehow, *sub silentio*, eclipsed the power of state courts to refuse enforcement of unconscionable agreements. Those illustrative examples apply equally to both parties to an arbitration agreement. Both sides would waive judicially monitored discovery, application of strict evidentiary rules, or the right to a jury trial. None of these waivers, applied equally, serves to stack the deck against one party—a concern specifically addressed by the *Concepcion* majority. *See, e.g., id.* at 1752 (“class arbitration greatly increases risks to defendants”). Plaintiffs have never asserted that MHNGS's arbitration clause is unconscionable due to a waiver of class arbitration, monitored discovery, rules of evidence, or trial by jury. Rather, generally applicable contract

law renders MHNGS's arbitration clause unenforceable, not because it concerns arbitration, but because it is both procedurally and substantively unconscionable.

In fact, the *Concepcion* decision is devoid of any analysis of whether AT&T's arbitration agreement is unconscionable under general contract principles—that is, state unconscionability law not derived from, or unique to arbitration cases. This is undoubtedly due to the fact that AT&T's arbitration agreement is remarkably evenhanded and reasonable—far more than can be said for MHNGS's arbitration clause.

While an analysis of AT&T's equitable arbitration agreement under general unconscionability doctrine is understandably absent in *Concepcion*, the same omission is not appropriate here. MHNGS's arbitration clause stands in stark contrast to that of AT&T. As discussed above, generally applicable contract law renders it unconscionable. *Concepcion* simply does not touch upon these questions.

3. If MHNGS's Interpretation is Correct, then No Arbitration Agreement, Regardless of How Unfair, Could Be Invalidated.

If MHNGS's interpretation of *Concepcion* was the holding, the results that would follow would not only be completely ludicrous, they would devour Section 2's saving clause entirely. This is best

demonstrated by considering how MHNGS's rationale might apply to other unconscionable contracts.

For example, an employer could impose an arbitration agreement upon its employees under which: (1) the aggrieved party would be permitted one minute to state its grievance; (2) to the employer's on-staff arbitrator; (3) with damages limited to one dollar. Such a dispute resolution procedure would undoubtedly be "informal and speedy." Moreover, enforcement would satisfy the "principal purpose" of the FAA as claimed by MHNGS: "to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (internal quotation marks omitted). But no matter how reprehensible the agreement may be, the hapless employee would be powerless to compel a fairer forum, lest she be met with the same argument now made by MHNGS: "State laws that interfere with these efficient procedures are in conflict with the FAA and its goal of promoting arbitrations." CP 141.

Of course, the avoidance of such absurd results is precisely why Congress empowered state courts to vacate unconscionable arbitration agreements. And it is why the Supreme Court never disturbed Section 2's saving clause, expressly stating that it "permits agreements to arbitrate to be invalidated by generally applicable contract defenses such as . . . unconscionability." *Id.* at 1746.

MHNGS disfavors this analogy because it does not comport with its manufactured “holding.” In a footnote, MHNGS concedes that the result would be absurd, but contends that “[s]uch an extreme example would not survive, even under *Concepcion*[.]” App. Br. at 20-21 n.2. MHNGS’s explanation of why is both selective and perplexing.

MHNGS writes: “As explained above, the fundamental purpose of the FAA is to provide for an expedited and fair resolution of disputes.” *Id.* (emphasis added). But, throughout its argument, MHNGS never accepts that “fair[ness]” is a “fundamental attribute” of arbitration. Rather, MHNGS argues that the “principal purpose” of the FAA is only to “ensure that private arbitration agreements are enforced according to their terms” so that parties can “realize the benefits of private dispute resolution: lower costs, greater efficiency and speed.” *Id.* at 13 (internal quotation marks omitted); *see also id.* at 20. *Concepcion* also does not discuss “fairness” as a “fundamental purpose” of the FAA, because fairness (unconscionability) was never at issue. *Concepcion*, however, addressed the “fairness” element of arbitration through its repeated references to the FAA’s savings clause, which expressly preserves the unconscionability defense.

Congress was clearly concerned with fairness when it enacted the FAA. That is the reason for the savings clause. What MHNGS fails to

accept is that the reason “such an extreme example” would not survive under *Concepcion* is **because** the FAA’s saving clause empowers state courts to find **unfair** (*i.e.* unconscionable) agreements unenforceable—**even if** this would interfere with the informality and speed of arbitration. *Concepcion* specifically preserved fairness (unconscionability) as an attribute under the savings clause. Simply put, Section 2’s saving clause—the very clause MHNGS is trying so desperately to avoid—**is** the mechanism for ensuring fairness. Yet MHNGS claims that the arguments of the hypothetical employee, above, “cannot [even] be raised” because they would “interfere[] with informality or speed.”¹⁸ App. Br. at 18.

4. Not One Court has Adopted MHNGS’s Novel Interpretation of *Concepcion*; Several Have Rejected Similarly Expansive Readings.

Numerous corporate defendants have sought to wield *Concepcion* as an absolute bar to unconscionability defenses, to no avail. Most recently, the California Court of Appeals flatly rejected the defendant’s argument that *Concepcion* “extends the [FAA] so broadly as to preempt each ‘unconscionability-based rationale’ that supported the trial court’s

¹⁸ MHNGS’s position was no less extreme below. For instance, in one of its briefs, MHNGS argued “The law is clear that unconscionability defenses are not protected from preemption by the FAA if they interfere with the federal goal of promoting arbitration.” CP 150. In another brief, MHNGS described *Concepcion* as “specifically recognizing that state requirements that do not favor arbitration are contrary to the FAA, and therefore are preempted.” CP 81.

refusal to compel arbitration” *Samaniego*, 2012 WL 1591847, at *7.

The court wrote:

[A]t the same time as the Court repudiated the categorical rule in *Discover Bank*, **it explicitly reaffirmed that the FAA permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’** [although] not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. [Citations]. **In short, arbitration agreements remain subject, post-*Concepcion*, to the unconscionability analysis employed by the trial court in this case.**

Id. at *8 (emphasis added).

Federal courts have uniformly reached identical holdings. *See Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940MEJ, 2012 WL 370557, at *7 (N.D. Cal. Jan. 31, 2012) (“Defendant’s argument that *Concepcion* rejected an unconscionability defense to arbitral agreements as conflicting with a federal purpose is misplaced.”); *Newton v. Clearwire Corp.*, No. 2:11-CV-00783-WBS-DAD, 2011 WL 4458971, at *4 (E.D. Cal. Sept. 23, 2011) (“Even in the wake of the decision in *Concepcion*, however, arbitration agreements are still subject to unconscionability analysis.”); *Kanbar v. O’Melveny & Myers*, No. C-11-0892 EMC, 2011 WL 2940690, at *6 (N.D. Cal. July 21, 2011) (“To the extent OMM asserts that *Concepcion* precludes a challenge to an arbitration agreement on the basis of unconscionability, the Court disagrees.”); *Hamby v. Power Toyota*

Irvine, 798 F. Supp. 2d 1163, 1165 (S.D. Cal. July 18, 2011) (“[*Concepcion*] does not stand for the proposition that a party can never oppose arbitration on the ground that the arbitration clause is unconscionable.”); *Williams v. Securitas Sec. Services USA, Inc.*, No. 10–7181, 2011 WL 2713741, at *3 (E.D. Pa. July 13, 2011) (“Securitas contends that any interference by this court with its efforts to compel arbitration of disputes with its employees will be contrary to [*Concepcion*]. We disagree.”).

MHNGS is unable to point to a single case, state or federal, endorsing the expansive “holding” it has extrapolated from *Concepcion*.

G. The Unconscionable Provisions are Not Severable Because Courts Cannot Rewrite Unenforceable Contracts to Make them Enforceable, Nor Should They, as this Type of Legal Gamesmanship Should be Deterred.

“As a general rule, if the central purpose of the contract is ‘permeated’ or ‘tainted’ with unconscionability or illegality then the contract as a whole cannot be enforced.” *Mercurio v. Superior Court*, 96 Cal. App. 4th 167, 184, 116 Cal. Rptr. 2d 671, 684 (2002).

We cannot save the contract by simply hacking off the provisions governing what claims are arbitrable, how fees and costs will be allocated and what organization will conduct the arbitrations. If we did so there would be virtually nothing of substance left to the contract. Instead, we would need to rewrite those provisions according to what we believed was fair and equitable. This, of course, we cannot do.

Id. at 185-86; *see also McKee v. AT&T Corp.*, 164 Wn.2d 372, 403, 191 P.3d 845 (2008) (“such a severance would essentially require us to rewrite the dispute resolution agreement”).

“An arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision.” *Samaniego*, 2012 WL 1591847, at *7. “[M]ultiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer’s advantage. . . .” *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1075, 130 Cal. Rptr. 2d. 892, 63 P.3d 979 (Cal. Sup.Ct. 2003) (cited by MHNGS below, CP 144).

The trial court’s decision to not sever the unconscionable provisions in the arbitration clause is reviewed for abuse of discretion. *Samaniego, supra*. Given MHNGS’s pervasive efforts to write a one-sided arbitration clause “as an inferior forum that works to the employer’s advantage,” the trial court did not abuse its discretion in not re-writing MHNGS’s work product. The overarching unlawful purpose of the arbitration clause cannot and should not be repaired by “fill[ing] in the blanks,” App. Br. at 41-42, with rules that were not identified, provided, or agreed to. This would only encourage similar conduct by others.

1. The Trial Court's Severance Decision May Not Be Overturned Absent a Manifest Abuse of Discretion.

MHNGS provides no analysis of how the trial court abused its discretion in deciding to rewrite MHNGS's intentionally one-sided arbitration clause. Even MHNGS's own proposed modifications, App. Br. at 43-44, strike five separate provisions of the arbitration clause. Each of those provisions was intentionally written to deter and disadvantage anyone who challenged MHNGS. Judge Murphy was well within his discretion to conclude that "the central purpose" of the arbitration clause (as opposed to the entire PSTOA) was "tainted with illegality," and thus refuse to re-write the arbitration clause.

2. Repairing MHNGS's Unconscionable Arbitration Agreement Does Not Further the Interests of Justice; It Impedes Justice.

MHNGS argues that either the trial court or this Court should sever the lopsided terms of an arbitration agreement its lawyers wrote for the purpose of drastically limiting employee remedies. Why should this Court, after a year of costly litigation, draft for MHNGS's lawyers the arbitration agreement they could and *should have* written at the outset? California courts, concerned with temptations of stronger parties to impose unreasonable terms upon weaker counterparts, have recognized deterrence as an additional basis for denying severance of unconscionable clauses.

“[I]n the analogous case of overly broad covenants not to compete, courts have tended to invalidate rather than restrict such covenants when it appears they were drafted in bad faith, *i.e.*, with a knowledge of their illegality.” *Armendariz*, 24 Cal. 4th at 124 n.13,¹⁹ (citing *Data Mgmt., Inc. v. Greene*, 757 P.2d 62, 64-65 (Alaska 1988)). “The reason for this rule is that if such bad faith restrictive covenants are enforced, then ‘employers are encouraged to overreach; if the covenant they draft is overbroad then the court will redraft it for them.’” *Id.* (quoting *Greene*, 757 P.2d at 65).

This reasoning applies with equal force to arbitration agreements that limit damages to be obtained from challenging the violation of unwaivable statutory rights. **An employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter.** In that sense, the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme, and severance would be disfavored unless it were for some other reason in the interests of justice.

Id. (emphasis added).

¹⁹ MHNGS inaccurately argued below that “the U.S. Supreme Court has effectively overruled *Armendariz*[.]” CP 81. On appeal, it maintains that *Concepcion* calls into doubt the continued precedential value of any pre-*Concepcion* California decision” App. Br. at 19. Both state and federal courts in California have confirmed that this is not the case. See *Lau*, 2012 WL 370557 at *7 (quoting *Sanchez v. Valencia Holding Co., LLC*, No. B228027, 2011 WL 5027488, at *7 (Cal. Ct. App. Oct.24, 2011) (“We note that *Concepcion* does not preclude the application of the *Armendariz* principles to determine whether an arbitration provision is unconscionable.”)).

These principles are consistent with Washington law. As the Washington Supreme Court recently stated:

Permitting severability . . . in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions.

McKee, 164 Wn.2d at 403; *see also Adler*, 153 Wn.2d at 359 (“where an employer engages in an ‘insidious pattern’ of seeking to tip the scales in its favor in employment disputes by inserting numerous unconscionable provisions in an arbitration agreement, courts may decline to sever the unconscionable provisions”).

If the Court were to re-write MHNGS’s arbitration clause, plaintiffs would then be bound by yet another agreement that they never saw and never had a chance to discuss. If, for example, the Court were to re-write the arbitration clause to incorporate one of the many AAA Arbitration rules, plaintiffs would then be subject to those rules, even though they never saw those rules, had no reason to believe those rules applied and never agreed to follow those rules. This would, in turn, obligate plaintiffs to something they never accepted, something *Concepcion* itself forbids.

Here, MHNGS's arbitration clause was deliberately drafted with unconscionable terms so as to strongly discourage, if not completely defeat challenges to MHNGS. Severing unlawful provisions of the clause would only reward MHNGS for its behavior and encourage similar misconduct. This Court should not allow MHNGS to benefit from its improper conduct.

IV. CONCLUSION

Plaintiffs respectfully request that this Court affirm the trial court's denial of arbitration, which is supported by substantial evidence and consistent with the reasoning of every court that has been called upon to address nearly identical issues.

Dated this 18 day of May, 2012.

Respectfully submitted,

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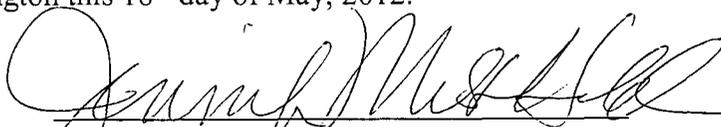
CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2012, I filed via ABC/LMI Legal Messenger an original and one copy of the **BRIEF OF RESPONDENTS** with the Court of Appeals, Division II and caused to be delivered as shown below a copy of the same to:

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Jennifer Milsten Holder, Secretary

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