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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ISABELL CERNEKA et al., Plaintiffs and Respondents, v. RUSSELL No. 8 SANTA MONICA PROPERTIES, LLC, et al., Defendants and Appellants.	B288972 (Los Angeles County Super. Ct. No. BC616624)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed and remanded.

Scali Rasmussen, Christian J. Scali, John P. Swenson and Jasmine B. Bhandari; Legal Aid Foundation of Los Angeles, Denise McGranahan, Fernando Gaytan and Brenton Inouye, for Plaintiffs and Respondents. Scali Rasmussen for plaintiff and respondent Louis Mifsud only.

Buchalter, Jason E. Goldstein, Anne Marie Ellis and Efrat M. Cogan, for Defendants and Appellants.

Appellants Russell No. 8 Santa Monica, LLC, Martin Mink, Florette Mink, Terry Mink and Rebecca Rakes (appellants or landlord) appeal from an order denying their petition to compel arbitration of an action filed against them by former tenants of an apartment building located at 1605 Ocean Front Walk in Santa Monica, California. Appellants contend that the delegation and arbitration clauses in the rental agreements are both clear and unmistakable, that they are not procedurally or substantively unconscionable, and that the claims brought here fall within the scope of those agreements and should be arbitrated. We affirm the trial court.

FACTUAL BACKGROUND

The Parties

Appellant Russell No. 8 Santa Monica, LLC (Russell No. 8) owns the apartment building located at 1605 Ocean Front Walk in Santa Monica, California. Russell No. 8's managing members are appellants Martin Mink, Florette Mink, and Terry Mink. Appellant Rebecca Rakes is the property manager for the building.

Respondents Isabell Cerneka, Dennis Doherty, Jere Hawkins, Christopher McGrath, Louis Mifsud, Erik Peña, Lennox Varnedoe, Susan Weinberg and Stephen Weinberg (respondents or tenants), were tenants in the building before a fire of December 2015 rendered their respective units uninhabitable. They generally are poor, unsophisticated people.

Some are elderly, some are disabled and most lack advanced education.

In December 2014, approximately a year before the fire, the appellants required each of the tenants to sign a 14-page, pre-printed rental agreement (the 2014 Rental Agreement), even though many of the tenants had been living in the building for years. It includes an arbitration provision and a delegation provision within the arbitration provision which provides the arbitrator shall decide the gateway question of arbitrability.

Most of the respondents signed the 2014 Rental Agreement,[1] although they generally did not have much experience with contracts and did not know what the terms "arbitration clause" and "delegation clause" meant. Appellant Rakes simply handed them the document and told them where to sign. They were not told they could take their time, that the contracts were negotiable or that agreeing to the arbitration and delegation clauses was optional. Some signed because they were afraid they would lose their homes if they refused, having heard the landlord threaten to evict people who had not paid their rent in the past.

The 2014 Rental Agreement and its Arbitration Provision

The arbitration provision is paragraph 46 of the 2014 Rental Agreement and is, by two full pages, the longest

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[1] Susan Weinberg, and her son, Stephen Weinberg, did not sign the 2014 Rental Agreement because appellant Rakes had not gotten around to asking them to do so before the fire occurred. However, in 1977, Susan Weinberg signed a commercial lease for her space which contained an arbitration provision at the end of the paragraph entitled "Destruction of Premises."

numbered paragraph of the document.[2] It is single-spaced, covers two whole pages and two partial pages, and is composed of over 125 lines of text. Unlike all of the other paragraphs of the document which capitalize all letters of the words in the headings but not in the text, this provision capitalizes every letter in every word of its heading *and* its text, with the exception of only 15 out of over 1200 words.

Its heading, "**ARBITRATION OF DISPUTES**," is in bold type. Immediately after the heading in a smaller italicized lower case font are the words "(*this paragraph is applicable only if agreed to by the parties by their initialing below*)." Subparagraph A then provides: "THE PARTIES AGREE THAT ALL DISPUTES THEY HAVE WITH EACH OTHER (INCLUDING ALL FACTUAL, LEGAL, AND EQUITABLE ISSUES) WHICH ARISE BETWEEN THEM: (I) UNDER THIS AGREEMENT OR (II) BASED ON TENANT's TENANCY AT THE PREMISES, (III) OUT OF THEIR LANDLORD TENANT RELATIONSHIP (AS DESCRIBED MORE FULLY BELOW) SHALL BE SUBMITTED TO BINDING ARBITRATION, AND SHALL BE DECIDED BY ARBITRATION WITHOUT THE RIGHT TO APPEAL. THIS INCLUDES THE INITAL [sic] DETERMINATION WHETHER ANY SPECIFIC DISPUTE BETWEEN THE PARTIES IS SUBJECT TO ARBITRATION (HEREIN REFERRED TO AS THE 'GATEWAY QUESTION'). THE ARBITRATOR SHALL APPLY THE FEDERAL ARBITRATION ACT (9 U.S.C. § 1 ET SEQ) TO DETERMINE IF ANY SPECIFIC DISPUTE IS SUBJECT TO ARBITRATION, AND ALSO TO DETERMINE

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[2] In the text of the provision itself, the drafter incorrectly and confusingly refers multiple times to this paragraph as number 48.

THE ENFORCEABILITY, VALIDITY, INTERPRETATION, OR APPLICATION OF THIS PARAGRAPH IN DETERMINING WHETHER ANY SPECIFIC DISPUTE IS SUBJECT TO ARBITRATION. ONCE THE ARBITRATOR HAS DETERMINED THAT A DISPUTE IS SUBJECT TO ARBITRATION, THEN THE RELEVANT FEDERAL, STATE AND LOCAL LAWS SHALL BE APPLIED TO RESOLVE THE DISPUTE IN THE PROCEDURE SET FORTH BELOW."

Subparagraph B lists seven types of disputes that are subject to arbitration, including "(3) ANY DISPUTE WHETHER ALL OR ANY PART OF THIS AGREEMENT IS VOID, VOIDABLE, UNCONSCIONABLE, OR A CONTRACT OF ADHESION," and "(4) ANY DISPUTE CONCERNING WHETHER ANY PARTICULAR DISPUTE BETWEEN THE PARTIES IS SUBJECT TO ARBITRATION (I.E., 'THE GATEWAY QUESTION')."

Under the heading "NOTICE," the parties are informed that by initialing the space below the party is agreeing to arbitration of "ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THIS 'ARBITRATION OF DISPUTES' PARAGRAPH 48 [sic]" and further that "ALL QUESTIONS CONCERNING WHETHER THIS "ARBITRATION OF DISPUTES" PARAGRAPH 48 [sic] APPLIES TO THE PARTIES' DISPUTES, SHALL BE DECIDED PURSUANT TO THE PROVISIONS OF THE FEDERAL ARBITRATION ACT (9 U.S.C. SECTION 1 ET SEQ (HEREINAFTER REFERRED TO AS 'FEDERAL LAW') AND NOT PURSUANT TO CALIFORNIA LAW."

The next two paragraphs reiterate the delegation of the gateway question to the arbitrator: "FURTHERMORE, IT IS

AGREED THAT THE ARBITRATOR (AND NOT A COURT OF LAW) SHALL DECIDE ALL DISPUTED FACTUAL, LEGAL, AND EQUITABLE ISSUES DEALING WITH THE ENFORCEABILITY, VALIDITY, INTERPRETATION, OR APPLICATION OF THIS 'ARBITRATION OF DISPUTES' PARAGRAPH 48 [sic] (AND ALL OTHER PARAGRAPHS OF THIS RENTAL AGREEMENT WHICH RELATED TO THE ENFORCEABILITY OF THIS ARBITRATION PARAGRAPH 48 [sic]). THIS INCLUDES, BUT IS NOT LIMITED TO, ALL DISPUTES CONCERNING ISSUES SUCH AS ANY ALLEGED FRAUD OR DURESS USED IN OBTAINING THE PARTIES INITIALS TO THIS PARAGRAPH 48 [sic], OR THE UNCONSCIONABILITY OF THIS ARBITRATION PARAGRAPH 48 [sic], OR WHETHER THIS PARAGRAPH 48 [sic] (OR ANY PART OF THIS AGREEMENT) IS A CONTRACT OF ADHESION. THIS INCLUDES THE ARBITRATOR'S ABILITY TO REVIEW AND INTERPRET ALL OTHER PARAGRAPHS (OR PARTS THEREOF) OF THIS AGREEMENT TO DECIDE WHETHER ANY SPECIFIC DISPUTE BETWEEN THE PARTIES SHOULD BE ARBITRATED. [¶] THE ARBITRATOR SHALL HAVE EXCLUSIVE JURISDICTION TO RESOLVE ANY DISPUTE AS TO WHETHER ALL OR ANY PART OF THIS AGREEMENT IS VOID OR VOIDABLE, IS UNCONSCIONABLE, OR IS A CONTRACT OF ADHESION."

After these two paragraphs is the heading "**GATEWAY QUESTION OF ARBITRABILITY.**" The paragraph underneath the heading explains that "IF THERE IS A DISPUTE BETWEEN THE PARTIES AS TO WHETHER A DISPUTE IS SUBJECT TO ARBITRATION (AND THAT DISPUTE IS TO BE DECIDED BY AN ARBITRATOR BASED

ON THE PROVISIONS OF THIS ARBITRATION OF DISPUTES PARAGRAPH 48 [sic])" then the parties shall select a JAMS arbitrator to decide the sole question of arbitrability. If the JAMS arbitrator decides the dispute is subject to arbitration, the rest of the dispute then is arbitrated at ADR Services, Inc. The paragraph finishes with a method for picking the arbitrator who will decide the gateway question in the event the parties cannot agree on the particular JAMS arbitrator.

This arbitration provision also describes the allocation of arbitrator's and attorneys' fees under the heading "**NO ATTORNEY'S FEES**." It states neither party shall be awarded their attorney's fees, but it requires the losing party to reimburse the prevailing party its share of the arbitrator's fees.[3]

Under the next paragraph called "**WAIVER OF COURT AND JURY TRIAL,**" the agreement reminds the signatory that he or she is giving up the right to court and jury trials, along with the right to appeal. It finishes with the sentence "YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

The "**EXCLUSION OF CERTAIN MATTERS FROM ARBITRATION**" paragraph that comes next indicates that cases falling within limited civil case jurisdiction are excepted from arbitration and that any dispute as to whether an action is a

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[3] In pertinent part, it states: ". . . THE PREVAILING PARTY SHALL BE ENTITLED TO AN AWARD OF THE FEES PAID TO THE ARBITRATOR FOR SERVICES RENDERED AS WELL AS THE ADMINISTRATIVE FEES PAID TO THE ARBITRATION COMPANY. PRIOR TO THE DECISION BY THE ARBITRATOR, ALL ARBITRATION FEES SHALL BE EQUALLY PAID FOR BY THE PARTIES."

limited civil case is to be decided by the court, not an arbitrator. Once again, the document then confirms that "ALL OTHER DISPUTES ABOUT WHETHER A PARTICULAR CLAIM IS SUBJECT TO ARBITRATION FOR ANY OTHER REASON, SHALL BE DECIDED BY THE ARBITRATOR."

The last paragraph of this provision, called "**ELECTION OF THIS 'ARBITRATION OF DISPUTES' PARAGRAPH 48** [sic]," states in full that "WE HAVE READ AND UNDERSTAND THE FOREGOING 'ARBITRATION OF DISPUTES' PARAGRAPH 48 [sic] IN ITS ENTIRETY AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THIS 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL BINDING ARBITRATION, WITHOUT THE RIGHT TO APPEAL." Following immediately after that text are signature lines for both the tenant and the "Housing Provider."

The Weinberg Arbitration Provision

The Weinbergs[4] did not sign the 2014 Rental Agreement. Susan Weinberg signed a commercial lease in October 1977, when she first moved into the building. Paragraph 17 of that commercial lease, entitled "Destruction of Premises," contains two sentences comprising the arbitration agreement: "(d) In the event of any dispute between Lessor and Lessee relative to the terms of Paragraph 17 each party shall select a Realtor as an arbitrator and the two so selected shall choose a Realtor as the third arbitrator; and said three arbitrators shall hear and determine the controversy and their majority decision shall be

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[4] Stephen Weinberg lived at the premises with his mother, Susan Weinberg, and was her caretaker at the time of the fire.

final and binding upon both parties. Lessor and Lessee shall bear the expense of such arbitration in equal shares."

PROCEDURAL HISTORY

On April 12, 2016, respondents Isabell Cerneka, Dennis Doherty, Jere Hawkins, Christopher McGrath, Louis Mifsud, Erik Peña, Lennox Varnedoe, Susan Weinberg and Stephen Weinberg, filed suit against appellants. The First Amended Complaint for Injunctive Relief, Declaratory Relief and Damages (FAC) alleges that in December 2015, there was a fire at the building which rendered respondents' units uninhabitable. Respondents generally complain that appellants failed to comply with the provisions of the Santa Monica Relocation Ordinance requiring Russell No. 8 to provide temporary relocation assistance to the displaced tenants within 24 hours of the fire, or at all. They also complain of the condition of their units before the fire, including the lack of adequate heating and operable smoke detectors, and the presence of faulty electrical wiring and outlets, persistent water leaks, mold, cockroaches, bedbugs, and rodents. And they contend respondents committed fraud by illegally and permanently terminating their tenancies after the fire.[5]

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[5] Respondents assert 14 causes of action in the FAC, including declaratory relief, failure to provide temporary relocation, failure to provide permanent relocation, tenant harassment in violation of the Santa Monica City Code, Tenant Harassment in violation of the Civil Code, Termination of Tenancies Without Just Cause, Contractual Breach of Warranty of Habitability, Tortious Breach of Warranty of Habitability, Negligence, Unfair Business Practices, Intentional Infliction of Emotional Distress, Fraud, Illegal Lock-Out and elder abuse.

On July 28, 2016, the trial court heard and denied appellants' first Motion to Compel Arbitration. The trial court found the lawsuit fell within the scope of the disputes covered by the arbitration provision, but also found "there is no question that the subject Agreements are completely unenforceable under California law." The court relied on Civil Code section 1953, subdivision (a),[6] and the interpretation of that section in *Jaramillo v. JH Real Estate Partners, Inc.* (2003) 111 Cal.App.4th 394, 404, that in California "a tenant . . . cannot validly agree, *in a residential lease agreement*, to binding arbitration to resolve disputes regarding his or her rights and obligations as a tenant." (fn. omitted.) The trial court ruled that section 1953 was not preempted by the FAA because, in its opinion, the 2014 Rental Agreements did "not involve interstate commerce." The court also rejected the contention the choice of law provision required the application of the FAA because subdivision (b) of Civil Code section 1953 provides that the contractual modification or waiver of any statutory right in a lease agreement is "'void . . . unless the lease or rental agreement is presented to the lessee before he takes actual possession of the premises.'"

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6 Civil Code section 1953, subdivision (a) provides "Any provision of a lease or rental agreement of a dwelling by which the lessee agrees to modify or waive any of the following rights shall be void as contrary to public policy: [¶] (1) His rights or remedies under Section 1950.5 or 1954. [¶] (2) His right to assert a cause of action against the lessor which may arise in the future. [¶] (3) His right to a notice or hearing required by law. [¶] (4) His procedural rights in litigation in any action involving his rights and obligations as a tenant. [¶] (5) His right to have the landlord exercise a duty of care to prevent personal injury or personal property damage where that duty is imposed by law."

On appeal from the denial of that motion, this court reversed the ruling and returned the matter to the trial court for further proceedings to clarify the nature of respondents' challenge, stating, "It is unclear in the present case, however, whether respondents' challenge is to the arbitration clause only, or to the entirety of the 2014 Rental Agreements. If the former, resolution of the issues may be for the court; if the latter (or both) resolution is for the arbitrator unless the party challenging the entirety of the agreement alleges that the agreement is 'wholly void.' (*Buckeye Check Cashing, Inc. v. Cardegna* [(2006)] 546 U.S. [440,] at pp. 444-446; *Rosenthal* [*v. Great Western Fin. Securities Corp.*,] [(1990)] 14 Cal.4th [394,] at pp. 416-417; see *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126 [duress may render an agreement void].) Neither the briefs of the parties nor the trial court's written ruling denying the motion to compel arbitration provides any clarity on this point."

Upon remand, appellants filed their second Motion to Compel Arbitration, arguing again that the 2014 Rental Agreements contain valid and binding arbitration provisions which delegate to the arbitrator all disputes, including the gateway issue, arising from the rental relationship.[7]

Respondents' opposition clarified that they challenged the delegation and arbitration clauses, not the entire 2014 Rental Agreement. Each respondent submitted a declaration detailing the facts giving rise to his or her claims the delegation and

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[7] As to the Weinbergs, the motion to compel them to arbitrate was based upon the language in paragraph 17 of the 1997 lease described above, not upon the 2014 Rental Agreement that they never signed.

arbitration clauses are unconscionable, both procedurally and substantively, and therefore, unenforceable.

The Second Trial Court Order Denying Arbitration

The trial court denied the renewed motion to compel arbitration. It did not rely upon Civil Code section 1953, as it had in connection with the first motion, recognizing instead that case law "suggests that these residential leases are within the coverage of the FAA." However, it found that "[e]ven if the state law prohibition on arbitration clauses in rental agreements is preempted, . . . the arbitration provision is still subject to examination for unconscionability."

The order specifically mentions the delegation clause only twice in its 10 pages: once on page two to state, "The court understands that plaintiffs' challenge is to the arbitration clause, as well as to the subpart constituting what is referred to as the delegation clause, rather than to the entirety of the 2014 Rental Agreement" and again at page eight to remark that the 2014 Rental Agreement provides that a dispute as to whether an issue is subject to arbitration must itself be decided in a separate, preliminary arbitration. However, the court makes no findings as to whether the delegation provision is clear and unmistakable or whether it, as opposed to the arbitration provision in which it is included, is unconscionable.

The court found the 2014 Rental Agreement "is significantly procedurally unconscionable," stating " . . . although a couple of tenants did hold on to the rental agreements for a greater or lesser period, that the circumstances led each who did sign to believe that they were required to do so. These same circumstances, plus the lack of any explanation of the opportunity to negotiate or to opt out of any of the provisions, and

the tenants' educational levels and degree of sophistication, persuades the court that the tenants simply initialed or signed wherever there was a blank in the belief that they were required to do so. The court is not persuaded that any of the tenants understood that they had a choice to refuse to sign the arbitration provisions. . . . [¶] . . . The conclusion that the tenants did not understand what they were being required to sign is inescapable." (fn. omitted.)

It stated there are "a number of provisions of the 2014 Rental Agreement which raise substantive unconscionability concerns." Although it listed several paragraphs outside the arbitration provision as raising such concerns, it remarked the most significant is found in paragraph 51[8] denying both parties the right to recover any attorneys' fees, which has the practical effect of presenting a "formidable obstacle" to the tenants' ability to obtain legal representation in the event of a dispute. It also found "substantial merit" in the argument that the costs the tenant would be expected to bear in arbitration are excessive.

It concluded that "[t]he procedural unconscionability found by the court, and the substantive unconscionability arising from the supposed waiver of the right to recover attorneys' fees under any circumstances or for whatever reasons awarded, are sufficient to persuade the court that the arbitration provision is unenforceable as unconscionable. When combined with the other provisions substantively impacting a tenants' rights to bring claims, the substantive unconscionability becomes overwhelming."

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[8] Paragraph 46, the arbitration clause, also states "there shall be no attorney's fees awarded to either party in any arbitration . . . ."

DISCUSSION

Standard of Review

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration." (*Robertson v. Health Net of California, Inc.* (2015) 132 Cal.App.4th 1419, 1425.) Although "[u]nconscionability is ultimately a question of law for the court[]" (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851, citing Civ. Code, § 1670.5), factual issues may bear on that determination. "Where the trial court's determination of unconscionability 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." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89; *Bunker Hill Park Limited v. U.S. Bank National Association* (2014) 231 Cal.App.4th 1315, 1324.) ""'Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" [Citation.]'" (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2015) 234 Cal.App.4th 459, 467, quoting *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.)

The Delegation Provision is not Enforceable

Respondents do not dispute the application of the Federal Arbitration Act (FAA) to the instant dispute. Under section 2 of the FAA, written arbitration provisions in any contract involving commerce are "valid, irrevocable, and enforceable," unless the terms are unenforceable under general applicable contract law doctrines such as fraud, duress, or unconscionability. (9 U.S.C.

§ 2; *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687.)

The parties may assign the threshold determination of the validity and enforceability of the arbitration agreement to the arbitrator in a "delegation" clause. (*Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1559 (*Malone*).) This provision is treated as a separate, antecedent agreement to arbitrate solely the issue of enforceability. (*Id.; Zorilla v. Uber Technologies, Inc.* (2017) U.S. LEXIS 150487 *9.) If a party does not challenge the delegation clause specifically (that is, offer evidence and argument as to *its* lack of clarity or *its* unconscionability in particular), the Court "must treat it as valid under § 2 [of the FAA], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." (*Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63, 72.)

The appellants argue the delegation provision is enforceable. To be enforceable, a delegation clause must be (1) clear and unmistakable and (2) not unconscionable. (*Malone, supra,* 226 Cal.App.4th at p. 1560.) Appellants contend that the first prong is satisfied, as a matter of law, by the language within the delegation provision that the arbitrator has ""exclusive authority to resolve any dispute relating to [its] interpretation, applicability, enforceability, or formation"' because the same language has been found clear and unmistakable in *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242 (*Tiri*), and *Malone, supra,* at p. 1560. Respondents contend the language is neither clear nor unmistakable because it is "discontinuously and illogically splayed" out over several pages and is "not in its own paragraph or under its own heading, but rather [is] intertwined

in numerous paragraphs concerning other matters." They point to the trial court's comment that it had "read the 2014 Rental Agreement through at least three times, and still does not feel it fully understands it" as purported proof the delegation clause is not clear. This court finds, however, that the repetition of the concept in several places actually serves to clearly set forth and reinforce the delegation.

The delegation language is repeated in several places. Under the heading, "**ARBITRATION OF DISPUTES,"** it is specifically stated that the arbitrator will decide the "gateway" question, defined to be whether any particular dispute is subject to arbitration.[9] This concept is repeated again in the next paragraph, subparagraph B, by including in the list of disputes to be decided by the arbitrator whether the agreement "is void, voidable, unconscionable, or a contract of adhesion" and whether "any dispute . . . is subject to arbitration (i.e., 'The Gateway Question')." As if it was not clear enough already, the next two

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[9] It provides: "THE PARTIES AGREE THAT ALL DISPUTES THEY HAVE WITH EACH OTHER . . . SHALL BE SUBMITTED TO BINDING ARBITRATION, . . . WITHOUT THE RIGHT TO APPEAL. THIS INCLUDES THE INITAL [sic] DETERMINATION WHETHER ANY SPECIFIC DISPUTE BETWEEN THE PARTIES IS SUBJECT TO ARBITRATION (HEREIN REFERRED TO AS THE 'GATEWAY QUESTION'). THE ARBITRATOR SHALL APPLY THE FEDERAL ARBITRATION ACT (9 U.S.C. § 1 ET SEQ) TO DETERMINE IF ANY SPECIFIC DISPUTE IS SUBJECT TO ARBITRATION, AND ALSO TO DETERMINE THE ENFORCEABILITY, VALIDITY, INTERPRETATION, OR APPLICATION OF THIS PARAGRAPH IN DETERMINING WHETHER ANY SPECIFIC DISPUTE IS SUBJECT TO ARBITRATION. . . ."

paragraphs reiterate the delegation to the arbitrator of the issues of the validity, enforceability, and interpretation of the arbitration clause (which includes the delegation language), along with disputes as to whether there was fraud or duress in obtaining the tenants' agreement to arbitration and whether the arbitration paragraph is unconscionable.[10] Then, yet again, under the heading "**GATEWAY QUESTION OF**

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[10] It provides: "FURTHERMORE, IT IS AGREED THAT THE ARBITRATOR (AND NOT A COURT OF LAW) SHALL DECIDE ALL DISPUTED FACTUAL, LEGAL, AND EQUITABLE ISSUES DEALING WITH THE ENFORCEABILITY, VALIDITY, INTERPRETATION, OR APPLICATION OF THIS 'ARBITRATION OF DISPUTES' PARAGRAPH 48 [sic] (AND ALL OTHER PARAGRAPHS OF THIS RENTAL AGREEMENT WHICH RELATED TO THE ENFORCEABILITY OF THIS ARBITRATION PARAGRAPH 48 [sic]). THIS INCLUDES, BUT IS NOT LIMITED TO, ALL DISPUTES CONCERNING ISSUES SUCH AS ANY ALLEGED FRAUD OR DURESS USED IN OBTAINING THE PARTIES INITIALS TO THIS PARAGRAPH 48 [sic], OR THE UNCONSCIONABILITY OF THIS ARBITRATION PARAGRAPH 48 [sic], OR WHETHER THIS PARAGRAPH 48 [sic] (OR ANY PART OF THIS AGREEMENT) IS A CONTRACT OF ADHESION. THIS INCLUDES THE ARBITRATOR'S ABILITY TO REVIEW AND INTERPRET ALL OTHER PARAGRAPHS (OR PARTS THEREOF) OF THIS AGREEMENT TO DECIDE WHETHER ANY SPECIFIC DISPUTE BETWEEN THE PARTIES SHOULD BE ARBITRATED." [¶] THE ARBITRATOR SHALL HAVE EXCLUSIVE JURISDICTION TO RESOLVE ANY DISPUTE AS TO WHETHER ALL OR ANY PART OF THIS AGREEMENT IS VOID OR VOIDABLE, IS UNCONSCIONABLE, OR IS A CONTRACT OF ADHESION."

ARBITRABILITY," the document explains that if there is a dispute as to whether the claim is subject to arbitration, one arbitration service will decide that issue and then another arbitration service shall decide the rest of the parties' dispute in the event the first arbitrator decides arbitration is appropriate.

While the terms "arbitration," "arbitrability," "unconscionability" and "contract of adhesion" might be foreign to most people, the language of this paragraph explains in clear laymen's language that the arbitrator, and not a court of law, will decide whether any particular dispute is subject to arbitration. It is difficult to imagine any clearer way of communicating this concept. Although the paragraph contains a pervasive typographical error concerning its own paragraph number, it is clear from the context that the paragraph referenced is the only paragraph in the document regarding arbitration. The delegation is explained in slightly different language each time the concept is raised which increases the possibility that it will be understood. Although respondents argue it is unclear simply because it is not "under its own heading" inside the arbitration provision or "in bold or otherwise unique font," respondents do not cite any authority requiring a separate heading for the delegation language. While the font used might be the same as used in the rest of the document, every word in the delegation and arbitration provision is capitalized, setting paragraph 46 apart from every other paragraph of the contract and drawing the reader's eye to it. We find the delegation language clearly and unmistakably conveys to the parties that they are agreeing that the arbitrator will decide whether their dispute is subject to arbitration.

The delegation provision is unconscionable

Although it is clear, the delegation provision fails to satisfy the second requirement for enforceability that it be conscionable. Appellants argue in a mere eight lines of the opening brief that the delegation clause here is valid and bilateral and therefore not unconscionable as a matter of law because clauses providing that an arbitrator decides all issues of interpretation, applicability and enforceability of the agreement have been approved by the courts in *Tiri, supra*, 226 Cal.App.4th at page 246 and *Malone, supra.* That argument is far too superficial.

"An evaluation of unconscionability is highly dependent on context. (See *Williams v. Walker-Thomas Furniture Co.* (D.C. Cir. 1965) 121 U.S. App.D.C. 315 [350 F.2d 445, 450] ["'The test is not simple, nor can it be mechanically applied"'].) The doctrine often requires inquiry into the 'commercial setting, purpose, and effect' of the contract or contract provision. (Civ. Code, § 1670.5, subd. (b); accord, [*Sonic-Calabasas A, Inc. v. Moreno*] *Sonic II* [(2013)], 57 Cal.4th [1109,] at pp. 1147-1148. . . .)" (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911.)

Unconscionability has both a procedural and a substantive element. While both must be present, they need not be present in the same degree and are evaluated on a sliding scale. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 247 (*Pinnacle*).) "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

Procedural unconscionability concerns the process of contract formation and exists where there is oppression or surprise due to unequal bargaining power. (*Pinnacle, supra,* 55 Cal.4th at p. 246.) "Oppression" stems from a lack of negotiation in contract formation and "surprise" occurs where the allegedly unconscionable provision is hidden within a prolix printed form. (*Id*. at p. 247.) When the contract is drafted by the party with superior bargaining power, its adhesive nature is some evidence of procedural unconscionability. (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 403.)

The 2014 Rental Agreement is a standardized contract, imposed by the party with superior bargaining strength in circumstances that gave the subscribing party only the opportunity to adhere to the contract or reject it. (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817 [defining adhesion contracts].) It is entitled "Santa Monica Rent Control Residential Rent Agreement" and is not specific to these premises. Blank lines have to be filled in with, among other things, the names of the parties and the address of the premises to be let. Seven of the respondents were asked to sign the very same form document. The respondents were low income tenants with little bargaining power who had no idea the appellants were going to ask them to execute these agreements until the documents were presented to them years into their tenancies. (See *Jaramillo v. JH Real Estate Partners, Inc., supra,* 111 Cal.App.4th at p. 403 [noting landlords have more bargaining power than their tenants]; see also *Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 656; *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1089.) Respondents also felt they had to sign or they would be evicted. Given the respondents'

distressed financial circumstances, finding alternative housing in the area would be a daunting task.

Although the 2014 Rental Agreement provides in paragraph 53[11] that all of its terms are negotiable, the evidence shows that for the most part, the respondents were not given an opportunity to read the document to learn it purportedly was negotiable. To the contrary, substantial evidence supports the trial court's findings that appellant Rakes told each respondent variously that "everyone has to sign," "the owners want you to sign," or "the owners needed to have these back right away," while "hover[ing] at their apartment door with clipboard in hand, waiting for them to sign." The court concluded that, "in effect, . . . they were pressured to sign immediately" without an opportunity to read or digest the 14 pages. Paragraph 53 requires the new negotiated provisions to be included in the 2014 Rental Agreement before it is signed, which was impossible considering the evidence that the respondents were pressured to sign immediately upon presentment.

"'Where the contract is one of adhesion, conspicuousness and clarity of language alone may not be enough to satisfy the requirement of awareness. Where a contractual provision would defeat the "strong" expectation of the weaker party, it may also be necessary to call his attention to the language of the

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[11] Paragraph 53 states: "NEGOTIATION: HP [Housing Provider] is willing to negotiate the modification, change, or deletion of any part of this Agreement, in conjunction with the setting of the amount of rent for the Premises. All negotiations which result in agreement must be completed and reduced to writing hereon, prior to the signing of this Agreement. HP is willing to consider any request by TENANT and TENANT is welcomed to request any modifications with HP."

provision.' [Citation omitted.]" (*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 217 (*Penilla*).) Appellant Rakes rushed the respondents to sign and failed to draw their attention to the delegation, arbitration or negotiation provisions in circumstances where there is no evidence these pre-existing tenants had agreed to arbitrate disputes when they first entered into their tenancies and had no reason to expect they were being asked to do so years later in this document. Even where arbitration is "within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not." (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at p. 90.) Here, the document provided each side would pay half of the fees and costs of arbitration, but respondents were not provided any information concerning the nature and amount of the fees and costs they would be required to pay for arbitration.

The record demonstrates that the delegation provision, contained within an apparently standard form lease, was presented to respondents on what they believed was akin to a "take it or leave it" basis by a landlord with unquestionably superior bargaining power under circumstances that did not offer sufficient time to review the agreement or to negotiate its terms. This is substantial evidence the delegation clause is oppressive and part of an adhesion contract. (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252 [noting that the stronger party "made no effort to highlight the presence of the arbitration provision in the agreement," even though that party knew the other party was unsophisticated].)

"Substantive" unconscionability exists where the agreement's terms are so overly harsh or one-sided as to "'"shock the conscience."'" (*Pinnacle, supra,* 55 Cal.4th at p. 246; *Malone,*

supra, 226 Cal.App.4th at p. 1561.) "[I]t is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high." (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at p. 90 [holding, a mandatory arbitration agreement is substantively unconscionable if it requires the payment of unaffordable fees to initiate the process].) The determination of affordability is a case-by-case analysis. (*Id.* at p. 96.) This delegation provision requires the respondents to pay one-half of the fees charged by the arbitrator simply to determine whether the arbitration clause is enforceable. The court took judicial notice of the rules of JAMS, the service designated to decide the delegation's arbitrability issue, which charge a fee which must be paid in advance by the party initiating the arbitration of either $1,200 (for two-party arbitrations) or $2,000 (for multiple party arbitrations).

Respondents submitted evidence they could not afford to pay the initiation fee to arbitrate the delegation issues. Respondent Cerneka, an 80-year-old disabled woman suffering from multiple pulmonary diseases, testified she lives on a fixed income of $540 per month from Social Security and is in substantial credit card debt because her income is insufficient to provide for her monthly expenses. Respondent Doherty, a 63-year-old man who has not worked since the age of 50 due to medical problems, lives on a fixed income that leaves him with less than $100 a month after he pays for rent, food, clothing and basic needs. Respondent McGrath, a 56-year-old disabled man, receives General Relief in the amount of $221 along with food stamps and there is no money left over at the end of the month to pay arbitration fees. Respondent Mifsud is 39 years old and

seasonally employed at an amusement park. His income is sufficient to cover his basic expenses, with "very little income left over each month." Respondent Peña, a 53-year-old man, receives $221 per month in General Relief funds and food stamps and is in debt due to expenses he had from replacing clothes and paying for temporary housing following the fire. Respondent Varnedoe earns between $700 and $900 per month, can barely afford to live day-to-day and is in debt for money borrowed to pay for temporary housing following the fire. All of these parties stated they could not afford to pay the cost of initiating arbitration.

Here, as in *Penilla*, ". . . the arbitration provision does not limit the amount of arbitration fees and contains no term that could reduce them. It has no provision for waiver of arbitration fees or for the allocation of such fees at the discretion of the arbitrator." (*Penilla, supra*, 3 Cal.App.5th at p. 219.) Moreover, the agreement provides that the prevailing party is entitled to an award of the professional fees paid to the arbitrator as well as the administrative fees paid to the arbitration company, an award the respondents could never hope to pay in the event of a loss.

Appellants' argument that section 1284.3 of the Code of Civil Procedure would provide respondents' relief from high arbitration costs is unavailing. Under this section, "[a]ll fees and costs charged to or assessed upon a consumer party by a private arbitration company in a consumer arbitration, *exclusive of arbitrator fees,* shall be waived for an indigent consumer." (*Id.*, subd. (b)(1), italics added.) This might operate to waive the filing or initiation fee, assuming respondents meet the definition of a consumer, but it does not provide for waiver of the professional fees arbitrators charge for their services. (See *Penilla*, *supra*, 3 Cal.App.5th at p. 220 [". . . while the $400 JAMS filing fee may be

waived for indigent consumers [pursuant to this section], the statute does not affect the prohibitively high cost of arbitrator fees"].) The delegation clause effectively operates to deny the respondents access to any forum for their claims. In short, the delegation provision is substantively unconscionable.

The Arbitration Clause is Unconscionable

Because the delegation provision is unconscionable and therefore unenforceable, the trial court has jurisdiction to rule on the enforceability of the arbitration clause. It is procedurally and substantively unconscionable as well.

We find the arbitration provision to be procedurally unconscionable for the same reasons the delegation provision is unconscionable. This is a contract of adhesion, where the stronger party chose the contract terms and presented it for signature under circumstances where the weaker party did not have an adequate opportunity to read the document before signing it. The respondents had little choice but to sign. Appellant Rakes told each of them that the owners required all of them to sign the agreement and was going to pick them up right away. Respondents felt pressured because of those circumstances and because of the difficulty they would face in finding alternative housing that they could afford if evicted for failure to sign the agreement. There was no discussion of the existence of the arbitration provision, of the fact respondents would have to pay fees to both the arbitration forum and the arbitrator for the services rendered, or of how much that would be.

Appellants' argument there was no procedural unconscionability because the respondents had to opt in to the arbitration clause by initialing it is not persuasive. Procedural unconscionability concerns the manner in which the contract was

negotiated and the circumstances of the parties at the time. (*Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) The trial court found the "lack of any explanation of the opportunity to negotiate or to opt out of any of the provisions, and the tenants' educational levels and degree of sophistication, persuades the court that the tenants simply initialed or signed wherever there was a blank in the belief that they were required to do so." It was appellants' affirmative duty, as the indisputably stronger party in the transaction, to draw respondents' attention to the arbitration provision and its terms and explain their import. (See *Penilla*, *supra*, 3 Cal.App.5th at p. 217 [finding 'surprise' when the stronger party's agents 'failed to draw respondents' attention to the arbitration provision or explain its import'].) Appellants may not ignore this duty or delegate the job to the lease itself.

The arbitration clause is also substantively unconscionable because the costs the tenant would be expected to bear are excessive. Substantial evidence demonstrates the fee splitting provision is harsh for the tenants, both in connection with the delegation clause, and the arbitration clause which covers a wider range of disputes. The costs would be even higher, more unaffordable and more of an obstacle or deterrent to pursuing their claims. The provision entitling the prevailing party to recover the professional fees paid to the arbitrator and the administrative fees paid to the arbitration company also operates to impose an unaffordable penalty upon the low income tenants.

Appellants argue that the clause is not substantively unconscionable due to the prohibitively high cost of arbitration because Code of Civil Procedure section 1284.3, subdivision (b)(1) provides in pertinent part that "[a]ll fees and costs charged to or

assessed upon a consumer party by a private arbitration company in a consumer arbitration, exclusive of arbitrator fees, shall be waived for an indigent consumer." This section, however, does not waive the professional fees of the arbitrator, which are likely to be the most significant cost. Although appellants contend that the JAMS and AAA[12] Rules provide for waivers, the court notes that the JAMS rule regarding these waivers applies to arbitrations commenced by a "consumer" who is defined to be "an individual who seeks or acquires any goods or services, primarily for personal family or household purposes, including the credit transactions associated with such purchases, or personal banking transactions." The court is not convinced that a contract for the rental of an apartment is a transaction involving a good or a service, such that respondents would qualify as "consumers" who would be entitled to a waiver under the rule to which appellants refer. Arbitrations concerning real estate are specifically exempted from consumer transactions under the rule.

The Weinberg Claims Are not Subject to Arbitration

The trial court denied the motion to compel respondent Susan Weinberg to arbitrate her claims because it was under the mistaken impression that the commercial lease she signed in 1977 did not contain an arbitration clause. This court is required to review the correctness of the trial court's decision, not its reasons. "If the appealed judgment or order is correct on any theory, then it must be affirmed regardless of the trial court's reasoning, whether such basis was actually invoked." (*Hoover v.*

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12 The rules of AAA are irrelevant to this discussion inasmuch as the parties have not agreed to arbitration at that company.

American Income Life Ins. Co. (2012) 206 Cal.App.4th 1193, 1201.)

The 1977 lease, with a three-year term, does have an arbitration clause contained within paragraph 17, called "Destruction of Premises."[13] However, respondents contend that because the 1977 lease expired years before the fire, the Weinbergs have no agreement to arbitrate. They recognize there is a hold over provision[14] in the document, but assert it violates the requirement of Civil Code section 1945.5 that it be in at least eight-point boldface type and immediately prior to the place where the lessee executes the agreement. No evidence is cited in the record establishing the size of the font for this paragraph. But whether or not the 1977 lease complies with section 1945.5, a new tenancy is presumed on the same terms and for the same period as under the prior fixed term, not exceeding one month when the rent is payable monthly, nor in any case one year, if a landlord accepts rent from the holdover tenant. (Civil Code,

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[13] The arbitration clause consists of two sentences and provides in its entirety: "(d) In the event of any dispute between Lessor and Lessee relative to the terms of Paragraph 17 each party shall select a Realtor as an arbitrator and the two so selected shall choose a Realtor as the third arbitrator; and said three arbitrators shall hear and determine the controversy and their majority decision shall be final and binding upon both parties. Lessor and Lessee shall bear the expense of such arbitration in equal shares."

[14] It states: "Any holding over after the expiration of the term of this Lease with the consent of Lessor, shall be a tenancy from month to month at a minimum rent of . . . $550.00 . . . and all other . . . agreements of this lease shall be applicable to such holding over."

§ 1945; *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1077; *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 740.) Clearly, the landlord has been accepting rent from the Weinbergs since 1980 and a new tenancy was created on the same terms as under the 1977 lease.

We agree with respondents that the 1977 arbitration provision is procedurally unconscionable because it is hidden in a prolix form under a paragraph dealing with destruction of the premises. There is no heading indicating the paragraph also concerns arbitration. The font is the same as used in every other paragraph and there is nothing which makes the two simple sentences conspicuous. Respondent Weinberg expressed surprise the arbitration clause was in the document and testified that no one pointed the provision out to her or explained to her there was a provision that waived the right to sue in court or that she would have to pay up to half of the fees charged for the arbitration.

It is also substantively unconscionable for the same reasons the arbitration provision in the 2014 Rental Agreements is substantively unconscionable. It subjects a low income individual to the payment of one half of the fees charged by three realtors to conduct the arbitration, fees she cannot afford. This effectively deprives the Weinberg respondents from access to any forum for the redress of claims.

DISPOSITION

The trial court's order is affirmed. The matter is remanded for further proceedings in the trial court. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.*
MATZ

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.
HOFFSTADT

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.