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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

MARTIN AGUILAR et al., Plaintiffs and Appellants, v. KIA MOTORS AMERICA, INC., Defendant and Respondent.	B284143 (Los Angeles County Super. Ct. No. BC567897)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Rosner, Barry & Babbitt, Hallen D. Rosner, Shay Dinata-Hanson and Michelle A. Cook for Plaintiffs and Appellants.

Bowman and Brooke, Brian Takahashi and Joyce Peim for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs Martin Aguilar and Carmen Valenzuela appeal from a judgment following confirmation of an arbitration award. Plaintiffs sued defendant Kia Motors America, Inc. (defendant) for violation of the Song-Beverly Consumer Warranty Act (Song-Beverly) (Civ. Code, § 1790 et seq.) and the federal Magnuson-Moss Warranty Act (MMWA) (15 U.S.C. § 2301 et seq.). WB-Covina KI, LLC (the dealership), a nonappealing defendant, moved to compel arbitration pursuant to an arbitration clause signed by plaintiffs and the dealership. Defendant orally moved to join the motion. The trial court granted the dealership's motion to compel.

Plaintiffs then moved for arbitration before Judicial Arbitration and Mediation Service, Inc. (JAMS). The trial court denied plaintiffs' motion and instead ordered arbitration before the American Arbitration Association (AAA). Following the arbitration proceeding, the arbitrator issued an award in favor of defendant and against plaintiffs. The trial court confirmed the award.

Plaintiffs now challenge the trial court's order purportedly granting defendant's oral motion to join the dealership's motion to compel arbitration. Plaintiffs also argue the trial court erred by permitting the dealership to select AAA as the arbitral forum. Finally, plaintiffs argue the MMWA cause of action was not subject to arbitration. We affirm.

II. BACKGROUND

Plaintiffs entered into a retail installment sale contract (sale contract) with the dealership on May 12, 2012, for the purchase of a pre-owned 2011 Kia Sorrento. The sale contract contained an arbitration clause, which provided in pertinent part: "Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. . . . You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum[1] . . . , the American Arbitration Association . . . , or any other organization that you may choose subject to our approval." Any arbitration under the arbitration clause was governed under

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[1] The National Arbitration Forum no longer does commercial arbitration per a consent judgment. (*Khan v. Dell Inc.* (3d Cir. 2012) 669 F.3d 350, 352.)

the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), and not state law.[2]

Plaintiffs filed their first amended complaint on March 3, 2015, raising eight causes of action against the dealership. Plaintiffs alleged that the dealership had failed to disclose the Sorrento had previously been a rental vehicle. Plaintiffs named defendant only in the seventh and eighth causes of action. Specifically, plaintiffs alleged that defendant and the dealership had failed to repair the defects and nonconformities of the Sorrento, or to replace or repurchase it, in violation of Song-Beverly and the MMWA.

On March 6, 2015, the dealership moved to compel arbitration pursuant to the arbitration clause. The dealership asserted that all of plaintiffs' causes of action were arbitrable, including those alleging violations of Song-Beverly and the MMWA. The dealership also moved to have the claims against defendant ordered to arbitration. It argued that although defendant was not a signatory to the sale contract, "all claims asserted against [the dealership] and [defendant] are premised on, and arise out of, the [sale contract] and thus involve the same facts, vehicle, payments and warranty. Pursuant to the express terms of the [sale contract], such claims are to be resolved through binding arbitration."

Plaintiffs opposed the motion, arguing the arbitration agreement was unconscionable. Alternatively, plaintiffs asserted the arbitration clause forced plaintiffs to waive their statutory

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[2] Courts may nonetheless apply the procedural rules under the California Arbitration Act if they do not defeat the rights granted by the FAA. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409.)

rights under the Consumer Legal Remedies Act, violations of which plaintiffs had asserted as their fifth cause of action against the dealership. Plaintiffs did not respond to the dealership's argument that the claims against defendant should also be arbitrated.

The court conducted a hearing on April 6, 2015. At the hearing, defendant orally moved to join the dealership's motion to compel arbitration. There is no reporter's transcript or suitable substitute such as a settled or agreed statement of the April 6, 2015 hearing. Nor is an order from that hearing included in the record. The case summary, which is in the record, indicates the trial court granted the dealership's motion to compel arbitration.

On October 13, 2015, plaintiffs moved for an order designating JAMS as the arbitration organization. Plaintiffs noted that although the dealership had offered to approve either Judicate West or AAA, it was violating the covenant of good faith and fair dealing by refusing to approve JAMS as the arbitrator. The dealership opposed the motion, asserting that (1) JAMS was too expensive in comparison to AAA, and (2) arbitration before AAA was self-executing per the arbitration clause. The dealership therefore requested that the trial court order arbitration with AAA. On November 16, 2015, the trial court denied plaintiffs' motion and instead selected AAA as the arbitration organization. There is no transcript or suitable substitute of the November 16, 2015 hearing.

The parties proceeded to arbitration before AAA on October 3, 2016. In their arbitration brief, plaintiffs contended, among other things, that defendant had violated the MMWA. The arbitrator issued an interim award on December 5, 2016. The arbitrator found in favor of plaintiffs against the dealership,

awarding: (1) rescission of the contract to plaintiffs, and (2) reasonable attorney fees. Prior to the finalization of the award, on January 10, 2017, plaintiffs and the dealership indicated they had settled their respective issues. Accordingly, the arbitrator's final award did not address the claims between the dealership and plaintiffs. As to defendant, the arbitrator found in favor of defendant against plaintiffs on all claims. The final award was issued on February 27, 2017.

Defendant petitioned to confirm the arbitration award on March 14, 2017. Plaintiffs did not oppose defendant's petition, stating that "[t]he case between Plaintiffs and [defendant] . . . has been decided and [defendant] is entitled to the determination in its favor." Judgment was entered on June 14, 2017. Plaintiffs timely filed a notice of appeal.

III. DISCUSSION

A. *Standing*

As a preliminary matter, we address whether plaintiffs have standing to appeal. In order to have appellate standing, a party must be aggrieved. (Code Civ. Proc., § 902; *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.) A party is aggrieved if its rights or interests are injuriously affected by the judgment. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737; *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1026.) A party who stipulates to a judgment generally lacks standing to appeal. (*Cadle Co. II, Inc. v. Sundance Financial, Inc.* (2007) 154 Cal.App.4th 622, 624 [stipulated judgment becomes final when entered and is normally not appealable].)

Here, plaintiffs did not oppose defendant's petition to confirm the arbitration award. To the contrary, their response to defendant's petition to confirm was that defendant was entitled to the determination in its favor. Nonetheless, an appeal may be taken where a party consents to judgment in order to facilitate an appeal following an adverse determination on a critical issue. (See *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 93-94 [party consented to entry of judgment in order to seek appellate review of order granting petition to compel arbitration; appeal was properly before appellate court].) Here, as asserted by plaintiffs' counsel at oral argument, an order granting a petition compelling arbitration may be reviewed on appeal only after a judgment has been entered. (Code Civ. Proc., §§ 1294, 1294.2.) While plaintiffs did not challenge the merits of the award in the trial court (an issue we discuss further below), plaintiffs had objected to the authority of the trial court to compel them to arbitration. Thus, we find plaintiffs are aggrieved and have standing to appeal the judgment.

B. *Defendant's Oral Motion to Join*

Plaintiffs contend the trial court erred by permitting defendant's oral motion to join the dealership's motion to compel arbitration. Plaintiffs assert defendant was required to file a separate motion to compel arbitration. We first address the adequacy of the record. As noted, there is no record of the April 6, 2015 hearing at which the trial court made its order. Accordingly, we do not know whether the trial court granted or denied defendant's oral motion. We also do not know the basis on which the trial court granted the dealership's motion.

"On appeal, a judgment of the trial court is presumed to be correct. [Citation.] Accordingly, if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning. [Citations.] All intendments and presumptions are made to support the judgment on matters as to which the record is silent. [Citation.] We presume the trial court followed applicable law. [Citation.]" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Failure to provide an adequate record on an issue requires the issue be resolved against appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.)

Plaintiffs argue that defendant's oral motion deprived plaintiffs of the opportunity to respond. Plaintiffs in effect contend the oral motion was not properly noticed. (See Code Civ. Proc., § 1005, subd. (b) [written notice of motions must be served at least 16 days prior to hearing].) However, a motion in trial court may be made orally, and written notice of the motion may be waived. (*Keck v. Keck* (1933) 219 Cal. 316, 318; *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288 [a party who appears and contests a motion in the trial court cannot object on appeal that he had no notice of the motion, or that the notice was insufficient or defective].)[3] Again, there is no record of what

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[3] Plaintiffs argue that the court had no discretion to permit defendant to join the dealership's motion because defendant was required to bring its own motion to compel arbitration. We disagree. A party joining another party's motion generally adopts the other party's arguments as its own. (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1391, abrogated on other grounds by statute as stated in Stats. 2005, ch. 535, § 3.) The motion determines the relief granted, which does not necessarily include relief on behalf of the joining party. (See, e.g., *Decker v.*

occurred at the April 5, 2015 hearing. Without any record on the matter, we presume no error regarding the trial court's purported ruling on defendant's oral motion to join.

C. *Defendant's Right to Compel Arbitration*

Plaintiffs also argue that defendant could not compel arbitration under the arbitration agreement. Interpretation of the arbitration agreement is a question of law subject to de novo review if there is no conflicting extrinsic evidence. (*Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263; *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1235.) Likewise, de novo review applies to determine whether nonsignatory defendants are entitled to enforce the arbitration agreement. (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 613.)

We note that even after the dealership moved to compel arbitration of the entire case, including the causes of action that pertained to defendant, plaintiff did not argue that the dealership could not compel arbitration for defendant because defendant was a nonsignatory. Accordingly, we could conclude that plaintiffs waived this argument for appeal. (*Mesecher v. County*

U.D. Registry, Inc., supra, 105 Cal.App.4th at pp. 1387, 1391 [joining party had no standing to appeal order denying special motion to strike; motion sought relief only for the moving party, not the joining party].) Here, however, the dealership's motion expressly argued that all of plaintiffs' causes of action against both the dealership and defendant should proceed to arbitration. Thus, the trial court could compel arbitration of plaintiffs' causes of action against defendant by the dealership's motion.

of San Diego (1992) 9 Cal.App.4th 1677, 1685-1686 ["an appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal. [Citations.] There is nothing shocking about these rules. They are consistent with the adversary system's appreciation that lawyers in civil litigation must be given adequate breathing room to select whatever trial strategies they deem appropriate"].)

Nonetheless, because plaintiffs' argument raises a pure issue of law, plaintiffs opposed the dealership's motion to compel arbitration, and a nonsignatory seeking to enforce an arbitration agreement bears the burden of establishing it is a party to or can otherwise enforce the agreement (*Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 15), we exercise our discretion to consider plaintiffs' arguments here (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24).

On the merits, we find no error in the trial court's granting the motion to compel. "'Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it.' [Citations.] 'There are exceptions to the general rule that a nonsignatory to an agreement cannot . . . invoke an agreement to arbitrate, without being a party to the arbitration agreement.' [Citations.] [¶] One pertinent exception is based on the doctrine of equitable estoppel." *(JSM Tuscany, LLC v. Superior Court*, *supra*, 193 Cal.App.4th at pp. 1236-1237.)

"[T]he sine qua non for application of equitable estoppel as the basis for allowing a nonsignatory to enforce an arbitration clause is that the claims plaintiff asserts against the nonsignatory must be dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause."

(*Goldman v. KPMG LLP* (2009) 173 Cal.App.4th 209, 217-218; accord, *JSM Tuscany, LLC v. Superior Court, supra*, 193 Cal.App.4th at p. 1237.) We examine the facts alleged in the operative complaint to determine whether equitable estoppel applies. (*Goldman v. KPMG LLP, supra*, 173 Cal.App.4th at pp. 229-230.)

A plain reading of the arbitration clause indicates it contemplates and applies to plaintiffs' claims for breach of warranty against defendant. Plaintiffs sued both the dealership and defendant for breach of express and implied warranties pursuant to Song-Beverly and the MMWA. Plaintiffs alleged defendants failed to repair defects, and failed to replace or repurchase the Sorrento. The arbitration clause specifically applies to all claims that "arise[] out of or relate[] to [plaintiffs'] credit application, purchase or *condition of this vehicle*, this contract *or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract)* (emphasis added) . . . ." Plaintiffs' allegations concerned the condition of the Sorrento and the resulting relationship (the failure to repair, replace, or repurchase) with defendant, the third party nonsignatory. Plaintiffs' claims against defendant therefore are "founded in and inextricably intertwined with[] the underlying contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG LLP, supra*, 173 Cal.App.4th at p. 218.)

Plaintiffs cite *Kramer v. Toyota Motor Corp.* (9th Cir. 2013) 705 F.3d 1122, 1124 (*Kramer*), for the proposition that equitable estoppel does not apply. *Kramer* involved a retail installment sale contract in which the Ninth Circuit, applying California law, found Toyota, the manufacturer, could not invoke equitable

estoppel to compel arbitration. (*Id.* at pp. 1128-1129.) *Kramer* is unpersuasive. First, "the decisions of federal district and circuit courts, although entitled to great weight, are not binding on state courts even as to issues of federal law." (*Alan v. Superior Court* (2003) 111 Cal.App.4th 217, 229.) More importantly, the arbitration clause at issue in *Kramer* did not have language concerning third parties or the condition of the vehicle. (See *Kramer, supra*, 705 F.3d at pp. 1124-1125.) Thus, *Kramer* is readily distinguishable.

Plaintiffs' argument that defendant's warranties are not within the scope of the arbitration clause also is unavailing. Plaintiffs assert defendant's warranties were specifically excluded from the sale contract and thus could not be the basis of an equitable estoppel argument. Plaintiffs cite the term under the heading "**WARRANTIES SELLER DISCLAIMS**" which provided, "This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide." The "provision" referred to above concerns the warranties that the dealership, as seller, disclaims in the event the buyers do not obtain a written warranty.[4] The warranty disclaimer provision

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[4] The full section provides: "**If you do not get a written warranty, and the Seller does not enter into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.** [¶] This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide. If the Seller has sold you a certified used vehicle, the warranty of merchantability is not disclaimed." (Emphasis original.)

has no bearing on the arbitration clause here. Accordingly, equitable estoppel applies to compel plaintiffs to arbitrate their claims against defendant.

D. *Argument as to Arbitrability of the MMWA was Waived*

Plaintiffs argue for the first time on appeal that the MMWA cause of action was not arbitrable. Plaintiffs never raised this argument before the trial court or the arbitrator. To the contrary, plaintiffs asserted in their arbitration brief that defendant had violated the MMWA. Moreover, plaintiffs did not oppose defendant's petition to confirm the arbitration award, which resulted in judgment in favor of defendant on plaintiffs' causes of action, including the eighth, which alleged a violation of the MMWA. We therefore find plaintiffs waived the arbitrability argument on appeal. (See *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743 [acquiescence to a claimed error constitutes waiver]; *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779 [party waived right to assert argument on appeal by having expressly consented to the trial court's action].) On these facts, we decline to exercise our discretion to consider plaintiffs' arguments on appeal. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.)

E. *Selection of Arbitration Organization*

Plaintiffs contend the trial court erred by selecting JAMS instead of AAA as the arbitration organization.[5] This is a dispute

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[5] Plaintiffs' motion to select JAMS was a motion to choose the arbitration organization. Thus, although plaintiffs referenced

over interpretation of a contract, which we review de novo when there is no conflicting evidence. (See *Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1320 [interpretation of choice of law provision on undisputed facts is question of law reviewed de novo].)

"An arbitration clause is governed by the same principles of interpretation as other agreements. '"The fundamental rule is that interpretation of . . . any contract . . . is governed by the mutual intent of the parties at the time they form the contract."'" (*Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 447.) The record indicates plaintiffs chose only JAMS, which the dealership rejected. Based on the terms of the arbitration clause, the dealership's authority to reject a non-enumerated arbitration organization was limited by the implied covenant of good faith and fair dealing. (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1409.) Whether the implied covenant of good faith and fair dealing has been breached is ordinarily a question of fact. (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509.) There is no record of the November 16, 2015 hearing at which the trial court selected AAA as the arbitration organization. Making, as we must, all presumptions in favor of the trial court's order, we conclude the dealership's rejection of plaintiffs' choice of JAMS was in good faith.[6]

Code of Civil Procedure section 1281.6, selection of an arbitrator, in their motion, it is not applicable. (See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 981 [Code Civ. Proc., § 1281.6 provides a statutory method for resolving breakdowns in the *arbitrator* selection process].)

[6] Based on the limited record, it appears the dealership rejected JAMS because it was more expensive than AAA.

We next discuss whether the trial court erred by selecting AAA as the arbitration organization. Again, the record does not indicate why the court chose AAA. Plaintiffs argue that per the arbitration clause, they did not have to choose AAA. However, under our interpretation of the arbitration clause, the trial court's choice of AAA fell well within the terms of the contract. The provision, "[y]ou may choose *one of the following* arbitration organizations" is clearly meant to *limit* the buyer's choice of arbitration organizations to one of the enumerated organizations, including an organization that the dealership approves. Plaintiffs contend the provision means they can choose any organization they wish and if the dealership does not approve it, then there is no agreement and the matter goes to the court for decision. If that were true, however, then the provision would simply require the plaintiffs and the dealership to agree to an arbitrator, and the words "[y]ou may choose one of the following" would be superfluous. (See Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."].) Plaintiffs' interpretation that they can unilaterally refuse to choose AAA, an available, agreed-upon organization, would rewrite the arbitration clause. We find the trial court did not err by selecting AAA as the arbitration organization.

F. *Unconscionability*

Plaintiffs contend that permitting the dealership to choose the arbitration organization is unconscionable. Plaintiffs also argue AAA's consumer arbitration rules are "unfair." Finally, plaintiffs complain that the AAA arbitrator selection method is

not neutral, and that AAA has a bias in favor of businesses. These latter arguments also appear to be an argument of unconscionability.

Unconscionability remains a valid defense against enforcement of an arbitration clause under the FAA. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1142.) "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Civ. Code, § 1670.5, subd. (a).)

Unconscionability has both a procedural and substantive element. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 910.) Both elements must be present for a court to exercise its discretion to refuse to enforce an arbitration agreement. (*Ibid*.) A contract of adhesion, such as the consumer contract for this vehicle, contains some degree of procedural unconscionability. (*Id.* at p. 915.) "Yet 'a finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that the court will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided.' [Citation.]" (*Ibid*.)

We next address whether the purported term that allowed the dealership to choose the arbitration organization, and AAA's consumer arbitration rules, are substantively unconscionable. Substantive unconscionability focuses on whether the provision at issue is overly harsh or one-sided. (*Sanchez v. Valencia Holding Co., LLC, supra*, 61 Cal.4th at pp. 910-911.)

1. Arbitration Organization Selection Clause

Plaintiffs contend the arbitration organization selection clause is illusory. However, in explaining the concept of illusory promises, the Supreme Court has stated: "an unqualified right to modify or terminate the contract is not enforceable. But the fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement, if the exercise of the power is subject to limitations, such as fairness and reasonable notice." (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 16.) "Likewise, 'a contracting party's discretionary power to vary the price or other performance does not render the agreement illusory if the party's *actual* exercise of that power is reasonable.'" (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 923; see also *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1463, 1465 [an implied obligation to use good faith is enough to avoid finding a contract null and void due to an illusory promise].)

As discussed above, we presume the trial court found the dealership acted in good faith in rejecting JAMS. Also as discussed, we find that AAA was an agreed-upon organization for arbitration by both plaintiffs and the dealership per the arbitration clause and the trial court did not err by sending the matter to arbitration with AAA. We therefore conclude the arbitration organization selection clause is not unconscionable.

2. Criticism of AAA Procedures

Plaintiffs also criticize various AAA procedures. None of these criticisms, however, demonstrate that the trial court erred

in ordering arbitration before AAA. Plaintiffs complain that discovery is restricted by the arbitrator's discretion and thus unfairly one-sided. "We . . . reject the proposition . . . that the mere fact that the opportunities for formal (and time consuming and expensive) discovery are limited under the commercial rules of the [AAA] makes the arbitration agreement 'one-sided' and so unfair as to 'shock the conscience.' [Citation.]" (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 689.) Plaintiffs also complain that AAA's consumer arbitration rules do not require that all witnesses testify under oath. Unless otherwise indicated, however, courtroom rules of evidence need not be observed for an arbitration proceeding (*Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881, 888-889), and thus not requiring witness testimony to be under oath is not a substantively unconscionable term.

3. Arbitration Selection Process

Plaintiffs contend that AAA sells its list of arbitrators, which renders the selection process not neutral. Plaintiffs cite to a pamphlet describing AAA's Arbitrator Select service, in support of its contention. According to the pamphlet, Arbitrator Select is a service that AAA provides as an alternative to its arbitration services. With Arbitrator Select, AAA offers to act as a referral source and offers to sell a list of arbitrators to clients. But there is no indication in the record that the parties used AAA

Arbitrator Select rather than its arbitration services.[7] AAA's consumer arbitration rules provide that if the parties have not agreed to a method to select an arbitrator, "AAA will administratively appoint an arbitrator from the National Roster." Any arbitrator appointed must be neutral. Moreover, per AAA's consumer arbitration rules, an arbitrator has a duty to disclose any bias, financial or personal interest in the outcome of arbitration, or any past or present relationship with a party or their representatives. (See Cal. Ethics Stds. For Neutral Arbitrators in Contractual Arb., stds. 7 and 8.)

There is no evidence that the arbitrator selected was actually biased. To the contrary, the evidence in the record indicates the arbitrator did not favor the dealership as the interim award found in favor of plaintiffs against the dealership. Accordingly, we find the arbitrator selection process is not substantively unconscionable.

4. No Evidence of Bias

Finally, plaintiffs contend that AAA is biased, citing a declaration by their counsel, who stated he did a search of AAA's

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[7] The parties appear to have used AAA's full arbitration services, as the record includes reference to an arbitration hearing before AAA as well as an AAA arbitration award.

Plaintiffs also claim, without citation to evidence, that a business can contact an AAA arbitrator from this list directly and ex parte. This argument is directly contradicted by the record. AAA's consumer arbitration rules specifically prohibit communications by a party with an arbitrator or potential arbitrator about an arbitration outside the presence of the opposing party.

Web site regarding consumer disputes and listed some numbers which indicated only 3.5 percent of consumer arbitrations identified the consumer as the "prevailing party." Plaintiffs cite to no other competent evidence. Statements made in declarations are an exception to the hearsay rule when submitted in conjunction with a motion. (Code Civ. Proc., §§ 2009, 2015.5.) The sufficiency of a declaration is tested by the same rules applicable to oral testimony. (*McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 359.) The information on Web sites is typically hearsay. (*People v. Stamps* (2016) 3 Cal.App.5th 988, 997.) Plaintiffs made no request for judicial notice of the information from AAA's Web site. Thus, none of the information from AAA's Web site is properly before this court.

Even if we were to accept plaintiffs' counsel's declaration in its entirety as evidence, plaintiffs still failed to demonstrate AAA's bias. There was no evidence, for example, as to why only 3.5 percent of consumers were the prevailing party or that a higher percentage should have prevailed on the merits. We note that based on plaintiffs' counsel's declaration, the vast majority of the consumer arbitration entries, 86.3 percent, had no prevailing party. We find no unconscionability.

IV. DISPOSITION

The judgment is affirmed. Defendant Kia Motors America, Inc., is entitled to recover its appeal costs from plaintiffs Martin Aguilar and Carmen Valenzuela.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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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.