No. 15-56799

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN WISELEY,
Plaintiff-Appellant,

v.

AMAZON.COM INC.,
Defendant-Appellee

Appeal from United States District Court for the Southern District of California,
Civil Case No. 3:15-CV-96 (Honorable Cynthia A. Bashant)

PLAINTIFF-APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Defendant-Appellee Amazon.com, Inc. ("Amazon") is the largest Internet retailer in the United States. Amazon advertises and sells a wide variety of goods to millions of consumers across the United States. Certain of Amazon's sales tactics, however, directly violate California law. Specifically, Amazon coaxes millions of Internet browsers into becoming buyers by touting imaginary discounts and false product valuations. Plaintiff-Appellant Allen Wiseley ("Appellant") is one of those browsers-turned-buyers who was deceived by Amazon into purchasing online goods under the pretense that he was obtaining a discount. Appellant sued on behalf of a class of California consumers.

The issue now before this Court is whether Appellant's claims are subject to arbitration. Amazon, of course, seeks to enforce its terms and conditions, known as its Conditions of Use (the "COU"), which are incorporated by reference into its online transactions and contain an arbitration clause (the "Arbitration Clause"). *See* Excerpts of Record ("ER"), pp. 263, 267-72. Under *California* law, Amazon's Arbitration Clause is manifestly unconscionable and should not be enforced.

The district court, however, did not apply California law in this case. ER, p. 14. Instead, the district court relied on a choice-of-law provision in Amazon's COU, which provides for the application of Washington law. The court's reliance

was premised on its erroneous holding that there is no difference between California's and Washington's unconscionability laws. ER, pp. 13-14. Because the district court found no difference, it declined to conduct *any* conflict-of-laws analysis, and applied Washington law without regard for California. ER, pp. 14-30. The district court analyzed Amazon's Arbitration Clause under the Washington authority provided by Amazon, and held it to be enforceable. ER, pp. 14-30.

The district court came down on the wrong side of each issue. First, there are consequential and well-established differences between California's and Washington's standards for unconscionability, so the court erred by not even conducting a conflict-of-laws analysis. Second, a proper conflict-of-laws analysis unavoidably results in the application of California law to this case, as Washington law is contrary to fundamental California policies and California has an immeasurably greater interest than Washington in this California-only class action. Third, a proper application of California law clearly shows that Amazon's Arbitration Clause exhibits high degrees of *both* procedural and substantive unconscionability, and is therefore unenforceable.

This Court should reverse the decision below and apply California law—not Washington law—in order to revoke the temporary swindler's license enjoyed by Amazon at the expense of Californians.

II. JURISDICTIONAL STATEMENT

Plaintiff initiated this action against Amazon on December 19, 2014 in the Superior Court of California, County of San Diego. The complaint alleges that Amazon falsely advertises discounts on products in violation of California Law. ER, pp. 304-25. Amazon removed the action to the United States District Court for the Southern District of California pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453. ER, pp. 290-96.

The Ninth Circuit Court of Appeals has jurisdiction pursuant to 9 U.S.C. § 16(a)(3) because the order granting Amazon's motion to compel arbitration and judgment dismissing the case without prejudice were final decisions. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000) (A order is final if it "plainly disposed of the entire case on the merits and left no part of it pending before the court."); *Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001) (An order dismissing a case, without prejudice, to compel arbitration is a final award.); ER, pp. 1, 2-32.

Appellant filed his notice of appeal on November 20, 2015 (ER, pp. 33-34), within thirty (30) days of the district court's order granting Amazon's motion to compel arbitration and judgment. ER, pp. 1, 32 (The district court's order compelling arbitration and judgment dismissing the case was entered on October

21, 2015); FED. R. APP. P. 4(a)(1)(A).

III. ISSUES PRESENTED FOR REVIEW

1. Did the district court err in not to applying California's conflict-of-laws analysis when substantial differences exist between Washington and California law as to unconscionability and California has a fundamental and overriding interest in enforcing its laws?

2. Did the district court err in applying Washington law to determine that Amazon's Arbitration Clause was not unconscionable?

3. Did the district court err by compelling arbitration despite the Arbitration Clause's high degrees of procedural and substantive unconscionability?

IV. STATEMENT OF CASE

A. Nature of the Action

Appellant filed this action against Amazon in the Superior Court of California, County of San Diego, on December 19, 2014. The Complaint alleged that Amazon falsely fabricated discounts on its website, Amazon.com, in violation of the California False Advertising Law ("FAL"), CAL. BUS. & PROF. CODE § 17501, California Consumer Legal Remedies Act ("CLRA"), CAL. CIV. CODE §§ 1770, *et seq.*, California Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE §§ 17000, *et seq.* ER, pp. 304-25. Appellant also asserted claims for negligent misrepresentation and for declaratory relief resulting from Amazon's misconduct. ER, pp. 304-25. Appellant subsequently amended his Complaint.

ER, pp. 344-366. Appellant sought to represent a California-only class for violations of California Law. ER, p. 354. Amazon later removed Appellant's action to the United States District Court for the Southern District of California. ER, pp. 290-96.

Amazon is known for its online marketplace – Amazon.com – that allows consumers to purchase goods from either Amazon itself or third-party sellers/retailers. ER, p. 248 fn. 1. Amazon.com has become the largest Internet-based retailer in the United States, holding the vast majority of market share for the online retail market. ER, p. 345. Amazon does not only host an online marketplace for third-parties, but also offers its own goods, services, software, mobile applications, and other online or streaming media (such as videos, music, and e-books). ER, p. 99.

In advertising products on its website, Amazon often compares its current offer price to a purported "list" price. ER, pp. 250-51. The "list" price is displayed to prospective customers in a struck-through typeface (*e.g.* "~~$2,099.99~~") directly adjacent to Amazon's current offer price. *Ibid.* Amazon affirmatively displays the difference between the purported "list" price and current price as a discount or savings (both as a percentage and as a dollar value, *e.g.*, "Save: $600.00 (29%)"). ER, p. 251. Based on the method of presentation, the "list" price must represent either Amazon's standard offer price for the same product

and/or the pricing used by one of its competitors. CAL. BUS. & PROF. CODE § 17501; 4 C.C.R. § 1301.

As such, Amazon employs its "list" price to represent to customers that products offered on its website are discounted from their regular pricing and/or are less expensive than comparable products available in the marketplace. ER, pp. 250-51. Appellant alleged that this is demonstrably untrue. In reality, Amazon's "list" prices are the highest price that a product has *ever* been sold for by Amazon, regardless of when that price was last available or advertised, or the prices are completely fictitious. ER, pp. 251-53. Accordingly, customers do not realize the advertised "savings" when purchasing Amazon's "discounted" products. ER, p. 252.

Amazon's conduct violates the CLRA's prohibitions against "unfair methods of competition and unfair or deceptive acts or practices," including as "[a]dvertising goods or services with intent not to sell them as advertised" and "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reduction." CAL. CIV. CODE § 1770 (a)(9), (13). Additionally, the FAL specifically prohibits Amazon's misleading comparative price advertisements:

> No price shall be advertised as a former price of any advertised thing, *unless the alleged former price was the prevailing market price as above defined within three months* next immediately preceding the publication of the advertisement or *unless the date when the alleged*

> *former price did prevail is clearly, exactly and conspicuously stated in the advertisement*.

CAL. BUS. & PROF. CODE § 17501 (emphasis added).[1]

The law adopted in California mirrors Federal Trade Commission ("FTC") regulations on the same subject:

> One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, *bona fide* price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. … If, on the other hand, *the former price being advertised is not bona fide but fictitious—for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the "bargain" being advertised is a false one*; the purchaser is not receiving the unusual value he expects.

16 C.F.R. § 233.1 (emphasis added).

These laws reflect the reality that any product can easily be advertised as "fifty-percent off" if a dishonest retailer is willing to act deceptively and double that good's "regular" price during the pendency of the sale. It "has long since [been] decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception." *FTC v. Standard Education Soc.*, 302 U.S. 112, 116 (1937) (alteration in original); 16 C.F.R. § 233.1(c). Accordingly, Appellant sought remedy for himself and

[1] The UCL also generally prohibits "deceptive, untrue or misleading advertising." CAL. BUS. & PROF. CODE § 17200.

fellow California consumers.

B. Purchasing Goods on Amazon.com

Appellant purchased numerous items on Amazon.com subject to the above (allegedly unlawful and misleading) advertising scheme. ER, p. 264. The process by which Appellant and other California consumers made their purchases on Amazon.com is uniform, involving the same basic steps. *See* ER, pp. 99-100, 263. First, consumers browse Amazon.com and add items to their online shopping "cart" – a webpage listing items that customers have selected to purchase. ER, pp. 99-100, 112. Next, consumers will "click" a button entitled "Proceed to checkout" to initiate the transaction and provide information needed to make the purchase. ER, p. 112. Customers enter their shipping and payment information on two webpages titled "Choose your shipping," and "Select a payment method." ER, pp. 118-124. Throughout the process to this point, the only reference to Amazon's COU is located at the bottom of each webpage as a small hyperlink, requiring a customer to scroll down to find it. ER, pp. 107-124. At no time in the above-described purchase process are consumers given notice that "[b]y using Amazon Services, you agree to these conditions." ER, pp. 107-124.

It is only at the final step of a customer's transaction – a webpage entitled "Review your order" – that Amazon plants a tiny notice regarding incorporation of the COU. ER, pp. 101, 281-282. The vast majority of content on the "Review

your order" webpage is an overview of the most prominent, previously provided contractual terms. These include the identity and price of each item being purchased, the payment method, shipping information, and total amount owed. ER, pp. 101, 282. However, below the title of the "Review your order" webpage, on the left side, Amazon states "By placing your order, you agree to Amazon's privacy notice and Conditions of Use." ER, pp. 101, 282 ("Conditions of Use" is a hyperlink, offset in blue text.) This notice is in small font, considerably smaller than that of *any* other material term in the transaction. ER, pp. 101, 282.

There is no box to be checked or button to be selected that affirmatively states the customer's agreement to Amazon's COU. ER, pp. 101, 282. Rather, the transaction is completed merely by a customer selecting the "Place your order" button. ER, p. 282. This "Place your order" bottom is located both at the top and bottom of the "Review your order" webpage so that a customer can place their order after reviewing the content of the webpage, without returning to the top. The notice of Amazon's COU on the "Review your order" webpage is not near either of the "Place your order" buttons. ER, p. 282. And if the customer used the lower "Place your order" button, it is likely that the notice would not be on his or her computer screen. There is no other admonishment notifying customers that they

are agreeing to Amazon's additional terms in the COU. ER, pp. 101, 282.[2]

C. Amazon's Conditions of Use

Amazon's COU can be found on a separate, long-form webpage that spans six (6) pages when printed. ER, pp. 267-72. The "Disputes" section of the COU containing the Arbitration Clause is on page four (4). *Ibid.* The Arbitration Clause provides:

> **Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court**, except that you may assert claims in small claims court if your claims qualify.

ER, p. 270 (emphasis in original). The scope of this clause is particularly broad given that services are defined as:

> [Amazon's] website features and other products and services to you when you visit or shop at Amazon.com, use Amazon products or services, use Amazon applications for mobile, or use software provided by Amazon in connection with any of the foregoing…

ER, p. 267.

Amazon's Arbitration Clause does not include a copy of the applicable rules. ER, p. 270. Instead, it stated:

> The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's

[2] The check-out process described herein changed substantially after Appellant filed this lawsuit. Amazon's checkout process has since been reduced to a single webpage, and the notice regarding Amazon's COU now appears directly adjacent to each "Place your order" button.

> Supplementary Procedures for Consumer-Related Disputes. The AAA's rules are available at www.adr.org or by calling 1-800-778-7879.

ER, p. 270. The reference "www.adr.org" in the above text is not a hyperlink, and the URL does not even lead to a copy of the applicable rules. ER, p. 102. Instead, www.adr.org is simply the homepage for AAA, necessitating an exploratory excursion on the consumer's part in order to locate any particular set of rules. ER, p. 102.

If Amazon is attempting to incorporate the "Supplementary Procedures for Consumer-Related Disputes" (and not another set of rules) into the Arbitration Clause, then consumers must navigate to the "Rules & Procedures" page on www.adr.org in order to find the rules applicable to Amazon's COU. ER, pp. 102-04. This "Rules & Procedures" page hosts seventy-two active AAA rules. ER, p. 103. Moreover, because Amazon's Arbitration Clause references only "[AAA's] rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes," consumers are left to *guess* which AAA rules are being supplemented. This process is further complicated because the "Supplementary Procedures for Consumer-Related Disputes" – the only rules referenced in the Arbitration Clause – can only be located by searching the "Archived" or inactive rules. *Ibid.*

If a customer does find the Supplementary Procedures for Consumer-Related Disputes, a *further* step is necessary to determine which set of rules this procedure

is intended to supplement. *Ibid.* There are two logical options available from the myriad of active and archived AAA rules: "Consumer Arbitration Rules" or "Commercial Arbitration Rules and Mediation Procedures." ER, p. 104. The former is an unlikely choice, because it supplanted the Supplementary Procedures for Consumer-Related Disputes, while the latter is the set of rules directly referenced in the Supplementary Procedures for Consumer-Related Disputes. . ER, pp. 102, 142. However, to find Commercial Arbitration Rules and Mediation Procedures, a consumer has to navigate through seventy *inactive* rules along with the seventy-two *active* rules. ER, pp. 102-04.

Alternatively, a consumer can assume that the rules actually referenced in the Arbitration Clause are the wrong ones, and that the correct applicable rules are the "Consumer Arbitration Rules." ER, pp. 102, 142.

The Arbitration Clause is governed by the two additional terms in Amazon's COU. ER, p. 270. The first regards the "Applicable Law" and the second its titled "Site Policies, Modification, and Severability." *Ibid.* The COU states:

> by using any Amazon Service, you agree that the Federal Arbitration Act, applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon."

Ibid. Additionally, a "Modification Clause" grants Amazon the *unilateral* right to amend the COU, including the Arbitration Clause, *without notice*: "We reserve the

right to make changes to our site, policies, Service Terms, and these Conditions of Use at any time." *Ibid.* No prior notice to customers is required and no other limitations are placed on Amazon's ability to amend its COU. *Ibid.*

D. The District Court's Decision Compelling Arbitration

Amazon moved to compel arbitration of Appellant's claims on February 23, 2015. ER, pp. 240-41. Amazon asserted that its Arbitration Clause was valid under Washington law and the Federal Arbitration Act ("FAA"). ER, pp. 253-61. Appellant argued that Amazon's Arbitration Clause was both illusory and unconscionable under California law – which properly applied to the COU under California's conflict of laws rules. ER, pp. 78-97. Judge Bashant agreed with Amazon, finding that Washington law governs the COU and that the Arbitration Clause was not illusory or unconscionable under Washington law. The district court entered judgment on October 21, 2015, dismissing the case without prejudice. ER, pp. 1-32.

V. SUMMARY OF THE ARGUMENT

In determining the validity of Amazon's Arbitration Clause the district court erroneously applied Washington contract law to assess unconscionability. The district court failed to conduct a conflict-of-laws analysis, as dictated under California law, based on the mistaken belief that California and Washington law did not differ on the contract defense of unconscionability. These two states,

however, employ markedly different standards in determining whether a contract is unconscionable and thus unenforceable. California law requires findings of both procedural *and* substantive unconscionability, but the two elements are measured on a *sliding scale*; the greater the procedural unconscionability of the contract, the lesser the substantive unconscionability need be to bar enforcement. By comparison, Washington law requires a finding that a contract is either procedurally *or* substantively unconscionable, but sets a much *higher* threshold for unconscionability under either standard, due to the absence of any sliding scale analysis.

When the district court failed to appreciate the material differences between California and Washington laws of unconscionability, that failure pervaded the court's entire analysis and rendered its ensuing legal conclusions invalid. Accordingly, this Court should conduct a proper conflict-of-laws analysis under the Restatement Second to determine that California law governs Amazon's Arbitration Clause. Indeed, California has a well-established, fundamental interest in protecting its consumers from entering into unconscionable contracts. Furthermore, California's interests in protecting a multitude of its consumers and in regulating transactions occurring within its borders *greatly* outweigh any interest Washington might have in protecting one corporation domiciled within its borders.

Having decided that California law applies, the Court should review, *de*

novo, whether Amazon's Arbitration Clause is unconscionable. First, the Arbitration Clause is a contract of adhesion, which renders it somewhat procedurally unconscionable. In addition, the terms of Amazon's COU (including the Arbitration Clause and applicable rules) were presented to consumers in such a fragmented and confusing manner that almost no layperson would be able to discriminate between applicable and inapplicable rules, *even if* they were savvy enough to locate those rules. These facts only augment the procedurally unconscionable nature of Amazon's Arbitration Clause.

Amazon's Arbitration Clause is also substantively unconscionable to a high degree under California law. California's substantive unconscionability analysis asks whether a contract's terms are overly one-sided, given the circumstances under which the contract was formed. Here, *Amazon reserves the right to amend its Arbitration Clause at any time, without any prior notice or other restrictions*. In essence, Amazon has reserved the right to unilaterally "renegotiate" the Arbitration Clause with its customers at any time, so that it can seek and seize future opportunities to rewrite the Arbitration Clause as it alone sees fit. Amazon thus capitalizes on its adhesive COU, creating a binding obligation for its customers to arbitrate while reserving for itself a perpetual "escape hatch" to undo its own promises to arbitrate. In fact, Amazon is currently *using* this escape hatch to sue a nationwide class of consumers, notwithstanding its own arbitration clause

with those consumers.

Moreover, customers cannot even opt-out of *future* changes. This is the absolute pinnacle of a "one-sided" contract in California. The Arbitration Clause also carves out intellectual property disputes: claims that only Amazon would bring. It further provides for attorneys' fees in the event of "frivolous" claims, subjecting consumers to a gross imbalance of risk between themselves and a well-funded global enterprise. At bottom, Amazon's Arbitration Clause lacks any mutuality whatsoever and is therefore substantively unconscionable to an extreme.

Because strong indicia of procedural and substantive unconscionability permeate the entire Arbitration Clause, this Court should find it unenforceable and vacate the decision below.

VI. STANDARD OF REVIEW

A district court's choice of law is reviewed *de novo*. *Pokorny v. Quixtar, Inc.,* 601 F.3d 987, 994 (9th Cir. 2010). Similarly, a district court's decision to grant a motion to compel arbitration and its determination that a contract is (or is not) unconscionable are both reviewed *de novo*. *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 n. 2 (9th Cir. 2002); *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003).

VII. ARGUMENT

A. The District Court erred in finding no Material Difference between California and Washington Law in Determining Unconscionability.

The FAA provides that an arbitration agreement may be unenforceable on "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Although the FAA has "federalized" arbitration law to a certain extent, the determination as to whether an arbitration agreement is valid still turns on state contract law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Courts are to use "ordinary state-law principles that govern the formation of contracts" to decide whether the parties agreed to arbitrate. *See generally First Options of Chicago, Inc., supra,* 514 U.S. at 944; *Circuit City Stores*, 279 F.3d at 892. Before deciding the validity of an arbitration agreement, however, a court must determine which state's laws apply. *Pokorny, supra,* 601 F.3d at 994.[3]

"Federal courts sitting in diversity look to the law of the forum state in making a choice of law determination." *Ticknor v. Choice Hotels Int'l, Inc*., 265 F.3d 931, 937 (9th Cir. 2001). Because the complaint in this case was filed in California, the Restatement Second of Conflict of Laws (the "Restatement") provides the governing test. *Washington Mut. Bank, FA v. Sup. Ct*., 24 Cal.4th 906, 916-17 (2001).

Under its COU, Amazon elected that "the Federal Arbitration Act,

[3] Although courts have found that the FAA represents a strong presumption favoring arbitration, "this presumption disappears when the parties dispute the existence of a valid arbitration agreement." *Dumais v. Am. Golf Corp*., 299 F.3d 1216, 1219-20 (10th Cir. 2002) *citing First Options of Chicago, Inc*., *supra*, 514 U.S. at 944-45.

applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws," should govern the COU. ER, p. 270. The district court reflexively applied Washington law on the basis that there was no material difference between California's and Washington's unconscionability standards – and thus there was no "fundamental conflict that would justify not applying Washington law." ER, pp. 12-14. Consequently, the district court declined to conduct a conflict-of-laws analysis under the Restatement. ER, p. 14.; *Destiny Tool v. SGS Tools Co*., 344 F. App'x 320, 321 (9th Cir. 2009) ("[A] court first determines if there is a "true conflict" of law, and if so, proceeds to apply" a conflict of laws analysis.) The Ninth Circuit recognizes appreciable differences in the approaches of California and Washington. *See Coneff v. AT & T Corp*., 673 F.3d 1155, 1161 n. 5 (9th Cir. 2012) These differences directly affect the outcome of this case. *See Luna v. Household Fin. Corp. III*, 236 F.Supp.2d 1166, 1174 (W.D. Wash. 2002).

Under California law, although both procedural and substantive unconscionability must be present, they need not exist to the same degree as in Washington. *Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal.4th 83, 114 (2000) (interpreting CAL. CIV. CODE § 1670.5). The more substantively one-sided the contractual terms, the less evidence of procedural unconscionability is required, and *vice versa*. *Nagrampa v. MailCoups, Inc.,* 469

F.3d 1257, 1280 (9th Cir. 2006) *citing Mercuro v. Sup. Ct.,* 96 Cal.App.4th 167, 175 (2002). California employs a "sliding scale," which does *not* necessitate that the terms of a contract always "shock the conscious," depending on the level of procedural unconscionability that exists. *Hahn v. Massage Envy Franchising, LLC*, 2014 WL 5100220, at *9 (S.D. Cal. Sept. 25, 2014); *see also Little v. Auto Stiegler, Inc*., 29 Cal.4th 1064, 1071 (2003) ("Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.")

Under Washington law, "either substantive or procedural unconscionability is sufficient to void a contract." *Gandee v. LDL Freedom Enterprises, Inc*., 176 Wash.2d 598, 603 (2013). Lacking California's "sliding scale," a party applying Washington law must show a much higher level of procedural or substantive unconscionability to render a contract unenforceable. Unlike the standard of California, "[t]he fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable," instead a party must have lacked "meaningful choice." *Compare Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash.2d 781, 814-15 (2009) *with Armendariz,* 24 Cal.4th at 113. Alternatively, under the law of Washington, the contract must be "[s]hocking to the conscience, monstrously harsh, and exceedingly calloused." *Zuver v. Airtouch Commc'ns, Inc*., 153 Wash.2d 293, 303 (2004). Accordingly, Washington law on unconscionability offers substantially less protection than California law.

Given these clear and well-established differences, the district court erred when it did not conduct a conflict-of-laws analysis under the Restatement.

B. California Law Applies to the Question of Unconscionability in this Case

The Restatement provides, in relevant part, that:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied ... unless ... (b) application of the law of the chosen state would be *contrary to a fundamental policy of a state* which has a *materially greater interest than the chosen state in the determination of the particular issue…*

Restatement § 187(2).

Here, application of Washington law is contrary to the fundamental policies of California. California prohibits the inclusion of unconscionable provisions in any contract. CAL. CIV. CODE § 1670.5(a). But, California has elected to legislate even more specific contractual protections for its consumers. Both the UCL and CLRA prohibit unconscionable consumer agreements. CAL. CIV. CODE § 1770(a)(19); *California Grocers Ass'n v. Bank of America*, 22 Cal.App.4th 205, 217 (1994) ("[The CLRA] expressly permits a consumer to bring an action for damages and injunctive relief based on insertion of an unconscionable provision in a contract."); *Hahn*, *supra*, 2014 WL 5100220, at *11 (An unconscionable consumer contract is unlawful under the UCL.) And the substantive protections of the UCL and CLRA, as applied to California consumers, *cannot be contracted away*. CAL. CIV. CODE § 1751; *Net2Phone, Inc. v. Sup. Ct,*, 109 Cal.App.4th 583,

591-93 (2003) ("[T]he UCL constitutes an important public policy of the State of California. […] [T]he UCL generally may not be waived by contract because the public interest is involved.")

Accordingly, California has a *fundamental* public policy in refusing to enforce unconscionable terms in *consumer contracts*. *See Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083-84 (9th Cir. 2009) (the CLRA embodies "California's 'strong public policy'" to "protect consumers against unfair and deceptive business practices.").[4] Indeed, the public policy against unconscionable consumer contracts is so strong that courts *presumptively* apply California law under California's conflict-of-laws analysis if the underlying agreement is unconscionable pursuant to § 1670.5. *Samaniego*, 205 Cal.App.4th at 1149 ("[T]he same factors that render the arbitration provision unconscionable warrant the application of California law."); *Flinn v. CEVA Logistics U.S., Inc*., 2014 WL 4215359, at *10 (S.D. Cal. Aug. 25, 2014) (same). Accordingly, the application of Washington law here would violate California's *fundamental* public policy. *See, supra,* § VII(a).

Thus, the question becomes whether California has a "materially greater

[4] Appellant recognizes that *Discover Bank v. Sup. Ct.*, 36 Cal.4th 148 (2005) - which established a California public policy against consumer arbitration - was abrogated by *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). Accordingly, Appellant only discusses California policies applicable to *all* contracts. *Samaniego v. Empire Today LLC*, 205 Cal.App.4th 1138, 1150 (2012) ("In short, arbitration agreements remain subject, post-Concepcion, to the unconscionability analysis employed by the trial court in this case.")

interest" than Washington in determining the issue presented. Restatement § 187(2). Undoubtedly, California's interest in protecting a multitude of its citizens from unconscionable contracts significantly outweighs the interest of Washington in protecting a locally domiciled international corporation. *Oestreicher v. Alienware Corp.*, 322 F.App'x 489, 491-92 (9th Cir. 2009). The Ninth Circuit has specifically "recognize[ed] that each foreign state has an interest in applying its law to transactions within its borders." *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 593 (9th Cir. 2012). The California Supreme Court similarly holds that "California choice-of-law cases nonetheless continue to recognize that a jurisdiction ordinarily has 'the predominant interest' in regulating conduct that occurs within its borders." *McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 97-98 (2010).

Accordingly, California law concludes, "with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest." *Mazza*, *supra,* 666 F.3d at 593 *citing Hernandez v. Burger*, 102 Cal.App.3d 795, 802 (1980). The "place of the wrong" is the state where the "communication of the advertisements to the [consumer] and their reliance thereon in purchasing [an item] took place." *Id.*, at 593-94. Here, Appellant is seeking to represent only a class of California purchasers' rights under California consumer protection laws, based on misrepresentations directed into California. ER, p. 344-

66. Thus, California has the predominant interest in seeing its laws applied to this case.

Moreover, application of Washington law would deprive Amazon's California customers of the statutory protections of their home state – which would lead to unjust results. *See Brack v. Omni Loan Co.*, 164 Cal.App.4th 1312, 1329 (2008); *See also Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1299 (2005) ("California's interest becomes even more intense when it is protecting its citizens from "take it or leave it" agreements that incorporate one-sided protections and impose hidden waivers without actual notice or a realistic opportunity to reject the waiver.")

On the other hand, Washington's interest in this dispute is limited to enforcement of the contractual provisions made by a single corporate citizen. *Brack*, 164 Cal.App.4th at 1329. Amazon is a large retailer that voluntarily transacts business in all fifty states. Thus, Amazon, "through its commercial activities, [ ] purposefully availed itself of the benefits and protections of [multiple states'] laws." *Rakhra v. Capital Games, Inc.*, 1995 WL 261424, at *2 (N.D. Cal. Apr. 26, 1995). Amazon knew that its acts that had foreseeable legal consequences in California, so it cannot establish its COUs as having a unique and overriding connection to Washington that warrants the application of Washington law. *See Pokorny*, *supra,* 601 F.3d at 995 (The interests of Washington "in providing

companies headquartered within its jurisdiction a uniform body of contract law" does not override California's interests in prohibiting unconscionable contracts within its borders.)

Given the number of consumers and the statutory interests involved, application of Washington law would impair California's fundamental interests, to a far greater extent than application of California law would impair Washington's trivial interests. *Id.* at 996. Thus, California's unconscionability laws are applicable to the instant case, and the district court erred in finding otherwise.

C. Amazon's Arbitration Clause is Unconscionable under California Law and should not be Enforced

When examined under California law, Amazon's Arbitration Clause is unconscionable.[5] California Civil Code section 1670.5(a) provided that "[i]f 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" then the court may refuse to enforce any unconscionable provision. *Armendariz*, *supra*, 24 Cal.4th at 122. As noted above, "unconscionability has both a 'procedural' and a 'substantive' element." *Armendariz*, 24 Cal.4th at 114. However, unconscionability is measured on a

[5] The district court's opinion on unconscionability was reasoned, however it solely analyzed the issues presented under Washington law. ER, pp. 19-30. Because there are significant differences, which are too numerous to identify, between California and Washington jurisprudence regarding the discrete issues presented, unconscionability in this case should be determined upon a truly *de novo* review.

sliding scale, the more procedurally unconscionable a contract, the less evidence of substantive unconscionability is required. *Shroyer v. New Cingular Wireless Servs., Inc*., 498 F.3d 976, 981 (9th Cir. 2007); *Mercuro*; 96 Cal.App.4th at 175 ("Given Countrywide's highly oppressive conduct in securing Mercuro's consent to its arbitration agreement, he need only make a minimal showing of the agreement's substantive unconscionability"). Here, Amazon's Arbitration Clause is both procedurally and substantively unconscionable to a significant degree and should not be enforced by the Court.[6]

1. *The Arbitration Clause is Procedurally Unconscionable*

i. The Arbitration Clause is adhesive

Procedural unconscionability measures the degree of "oppression" resulting from unequal bargaining power and "surprise" experienced by the presentation of the contractual terms. *Discover Bank, supra,* 36 Cal.4th at 160. An inquiry into procedural unconscionability begins with a determination of whether the contract is the product of adhesion. *Armendariz*, 24 Cal.4th at p. 113; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group,* 197 Cal.App.4th 1146, 1159 (2011). A contract of adhesion is "drafted by the party of superior bargaining strength, [and] relegates to the subscribing party only the opportunity to adhere to

[6] Appellant only challenges the Arbitration Clause and the validity of the COU as a whole.

the contract or reject it." *Little*, 29 Cal.4th at 1071.

The adhesive nature of a contract is sufficient, by itself, to satisfy the procedural unconscionability element, justifying "scrutiny of the substantive fairness of the contractual terms." *Gatton v. T-Mobile USA, Inc.*, 152 Cal.App.4th 571, 586 n. 9 (2007). "[T]he imbalance of power creates an opportunity for overreaching in drafting form agreements," especially in ordinary consumer transactions "*because consumers have little incentive to carefully scrutinize the contract terms*… and companies have every business incentive to craft the terms carefully and to their advantage." *Id.,* at 585 (emphasis added); *Hahn*, 2014 WL 5100220, at *7.

Amazon's COU is a prototypical contract of adhesion: it is a form contract drafted by Amazon and is presented to consumers exclusively on a take-it-or-leave-it basis, without opportunity for negotiation. ER. p. 263 (A person who does not wish to accept the COU can only cancel their purchase to avoid its application). Thus, the Arbitration Clause contained therein is also an adhesive contract that is "oppressive" and satisfies the element of procedural unconscionability.[7]

ii. The Arbitration Clause is presented in a disjointed and surprising manner

[7] Amazon is not the only online retailer, however California law "has rejected the notion that the availability in the marketplace of substitute employment, goods, or services alone can defeat a claim of procedural unconscionability." *Nagrampa*, 469 F.3d at 1283; *Hahn*, 2014 WL 5100220 at * 7.

Additional procedural unconscionability arises from the unexpected and surprising manner in which the COU and the Arbitration Clause were presented. *Von Nothdurft v. Steck,* 227 Cal.App.4th 524 (2014) ("Surprise" can be evidenced by a hidden provision in a preprinted form contract drafted by the party having superior bargaining strength.) Assent to contractual terms on a website, which are incorporated by reference, is governed by whether the website provides "reasonable notice" of the terms of the contract and a reasonable mechanism to manifest assent. *See Van Tassell v. United Mktg. Grp., LLC,* 795 F.Supp.2d 770, 791 (N.D. Ill. 2011) *citing Specht v. Netscape Commc'ns Corp*., 306 F.3d 17, 32 (2d Cir. 2002) (J. Sotomayor). Although not directly on point, the same legal analytical framework is helpful to the analysis here. *See Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171, 1178 (9th Cir. 2014) (distinguishing between the requirements needed to find assent to a contract and procedural unconscionability).

Assent on a website takes one of two forms: the "browsewrap" agreement where "a website owner seeks to bind website users to terms and conditions by posting the terms somewhere on the website, usually… a hyperlink located somewhere on the website," or a "clickwrap" agreement that "requires users to expressly manifest assent to the terms by, for example, clicking an 'I accept' button" or some equivalent. *See In re Zappos.com, Inc., Customer Data Sec. Breach Litig.,* 893 F.Supp.2d 1058, 1063-64 (D. Nev. 2012) *citing Specht*, 306

F.3d at 22 n. 4. While the latter is generally accepted as a valid method of obtaining assent, the former is not. *Id.*

Amazon's website depends on many of the elements that render a "browsewrap" agreement unenforceable for lack of assent. When "checking out" on Amazon.com, consumers must navigate four webpages before a purchase is finalized. ER. pp. 100-01, 118-124. However, it is only on the final "Review your order" page, after the substantive portion of the transaction is completed, that customers are first informed that "By placing your order, you agree to Amazon.com's privacy notice and Conditions of Use." ER. p. 282 (The phrase "Conditions of Use" is a blue hyperlink in original - only if a person clicks this hyperlink are they taken to the terms.) This notice is located near the top of the "Review your order" page, but it is in smaller font than *all* of the surrounding text – such as the material terms regarding items purchased and the price paid:

amazon.com
SIGN IN SHIPPING & PAYMENT GIFT OPTIONS PLACE ORDER

Review your order

By placing your order, you agree to Amazon.com's privacy notice and conditions of use.

Shipping address Change
Ship to multiple addresses

Payment method Change
VISA ending in

Billing address Change
Same as shipping address

Gift cards & promotional codes
Enter Code Apply

Place your order

Order Summary

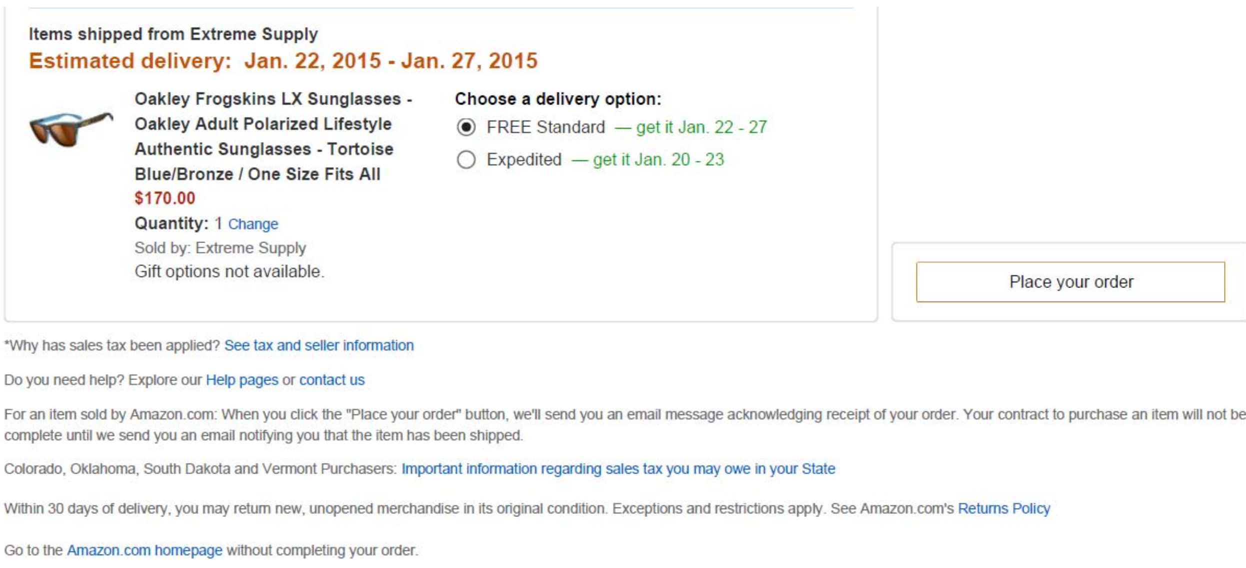
Items (2):	$180.20
Shipping & handling:	$4.98
Total before tax:	$185.18
Estimated tax to be collected:*	$1.44
Order total:	**$186.62**

FREE TWO-DAY SHIPPING FREE Two-Day Shipping on Eligible Items: , you can save $4.98 on eligible items in this order by signing up for a free trial of Amazon Prime. Look for items marked "Amazon Prime eligible" below to see which qualify

ER. p. 282; *see Pollstar v. Gigmania, Ltd.*, 170 F.Supp.2d 974, 981 (E.D. Cal.

2000) (refusing to enforce a browsewrap agreement where textual notice appeared in small gray print).

The incorporation of terms on this last webpage is a trap for the unwary, particularly so given the innocuous title of the webpage itself. *Id.*; *Nguyen*, 763 F.3d at 1178 (noting that a webpage titled "STEP 4 of 4: *Review terms…*" admonishes consumers to seek out additional hyperlinked terms; whereas Amazon's webpage "*Review your order*" only directs a consumer to confirm the correctness of the "order.") A consumer does not expect additional terms to be incorporated when instructed to simply "*Review your order.*" Further, the "Conditions of Use" notice is not directly adjacent to the "Place your order" button, so a person moving impatiently through this "*Review your order*" webpage will miss the link to the COU altogether. ER. p. 282. The likelihood of missing this notice is compounded if a customer was to use the "Place your order" button that appears at the bottom of the "*Review your order*" webpage:



ER. p. 282. Consumers using the lower button may not see the notice admonishing them that "[b]y placing your order, you agree to Amazon.com's privacy notice and Conditions of Use" when they actually "placed" their order. *Ibid.*

Amazon adopts the bare minimum to provide notice to customers of the incorporation of the COU on the "*Review your order*" webpage. Unlike traditional "clickwrap" agreements, customers are not required to "click" any button or box that affirmatively states "I agree" to the COU. *See Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *3 (N.D. Cal. June 25, 2014) (for an example of a traditional click wrap agreement). Rather, the button that is used to affirm customers assent is simply labeled "place your order" – again, not remotely suggestive to a party that he/she is acquiescing to terms incorporated from a separate document. One could easily suspect that the "obtuse" manner in which Amazon, a large and

sophisticated internet retailer, presents its COU is motivated "at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing." *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 490-01 (1982). Otherwise, Amazon would have adopted a more traditional "clickwrap" agreement.

Finally, the Arbitration Clause is placed near the middle of a long webpage. ER. pp. 267-72 (if the document is printed, the arbitration would be found on the fourth of six pages). When these facts are examined in context: (1) incorporation of additional material terms by reference, which are located in a separate document; (2) an inconspicuous notice that additional terms are incorporated on a webpage titled "Review your order"; (3) the method of assenting to the contract does not require a customer to acknowledge that they are assenting to additional terms located in a separate document; and (4) the material terms at issue are located in the middle of a document incorporated by reference, it is clear that the average consumer would be "surprised" to find that they agreed to arbitrate all disputes.

Amazon's method of contracting is the electronic equivalent of fine print found in a form consumer contract that states additional terms are incorporated from a separate document, without stating the subject matter of such terms. Courts have found paper versions of such transactions to be procedurally unconscionable

under California law because of the disjointed presentation of material terms. *See A & M Produce Co*., 135 Cal.App.3d at 490-01 (finding a damages limitation procedural unconscionability because it was contained on the back-side page of a preprinted contract and the provision was in font only "slightly larger than most of the other contract text."); *Newton v. Am. Debt Servs., Inc*., 854 F.Supp 2d 712, 724 (N.D. Cal. 2012) *aff'd*, 549 F.App'x 692 (9th Cir. 2013) (finding procedural unconscionability of an arbitration agreement was located on the back of the double-sided document, which was incorporated by reference by the actual contract signed). Amazon's use of an electronic analog is just as offensive as these.

Indeed, under California law, procedural unconscionability does not focus on how burdensome it is to find the additional terms, but on whether the contract was presented in a manner unlikely to inform the consumer. *Ibid*.; *see also Hahn,* 2014 WL 5100220, at *8 ("Presenting the agreement in this disjointed format alone is confusing, as the same topics are covered in three different places in varying levels of detail.") Thus, the Arbitration Clause is presented in a "surprising" manner, and this supports a greater-than-normal finding of procedural unconscionability for adhesive contracts.

iii. <u>Amazon did not provide a copy of the arbitral rules</u>

Amazon further fails to provide its customers with a copy of the relevant

arbitration rules, or a direct link to these rules, in its COU. ER. p. 102. Consequently, a "customer 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." *Harper v. Ultimo,* 113 Cal.App.4th 1402, 1406 (2003). "Numerous cases have held that the failure to provide a copy of the arbitration rules to which [a party] would be bound, support[s] a finding of procedural unconscionability." *Samaniego,* 205 Cal.App.4th at 1146 *citing Trivedi v. Curexo Technology Corp.,* 189 Cal.App.4th 387, 393–394 (2010) (collecting decisions); *Raymundo v. ACS State & Local Solutions, Inc*., 2013 WL 2153691, at *4 (N.D. Cal. May 16, 2013) ("Our court of appeals has found that when rules are not attached, procedural unconscionability is injected.") *citing Pokorny*, 601 F.3d at 997; *Poublon v. Robinson Co.,* 2015 WL 588515, at *5 (C.D. Cal. Jan. 12, 2015).[8]

Amazon's customers are uniquely burdened. Amazon does not state which version of the AAA rules are applicable. ER. p. 270. The COU simply states that any dispute will be decided "by the American Arbitration Association (AAA) under *its rules*, including the AAA's Supplementary Procedures for Consumer-Related Disputes." *Ibid.* (emphasis added). The "Supplementary Procedures for Consumer-Related Disputes," which as its name suggests, are designed to

[8] Failure to provide the AAA Arbitration Rules at the time of contracting alone may not be sufficient to find procedural unconscionability, but it does *support* a finding of procedural unconscionability. *Poublon*, 2015 WL 588515, at *5.

complement another set of AAA rules.[9] Thus, consumers are left to search for the applicable rules on AAA's website.[10]

If a highly diligent consumer engaged in a time-consuming search, reading a number of possibly applicable versions of the AAA rules, he/she would find that Amazon might have cited the wrong rules all together. The reference to "its rules" does not likely refer to any AAA rules supplemented by the "Supplementary Procedures for Consumer-Related Disputes," but instead AAA's "Consumer Arbitration Rules." The "Consumer Arbitration Rules" are a completely separate set of rules, governing consumer disputes, that replaced the "Supplementary Procedures for Consumer-Related Disputes." ER. p. 142.[11] Absent litigation or arbitration, however, there is a cloud of uncertainty regarding which rules are actually applicable here. *C.f. In re Prudential Ins. Co. of Am. Sales Practices Litig*., 924 F.Supp. 627, 637-38 (D.N.J. 1996) (discussing whether a court should

[9] The correct name for the referenced rules is the "Consumer-Related Disputes Supplementary Procedures," another distinction that supports a finding of unconscionability. *Zullo v. Sup. Ct*., 197 Cal. App. 4th 477, 486 fn. 3 (2011).

[10] Calling the toll-free number listed in Defendant's COU leads customers to AAA's automated system that refers them back to AAA's website for a copy of the relevant rules. ER. p. 104. *But see* ER. p. 25 (suggesting that AAA's toll-free number would allow a consumer to clarify the ambiguity in Amazon's Arbitration Clause).

[11] If a consumer did try to faithfully apply the Arbitration Clause, *as written*, the applicable rules would be the "Commercial Arbitration Rules and Mediation Procedures," amended by the "Supplementary Procedures for Consumer-Related Disputes." ER. pp. 103-04.

apply the arbitral rules applicable at the time of contracting or the current version of the same rules).

The normal consumer would have little inclination to spend the time necessary to decipher which AAA rules are actually applicable to the COU – thus, it is unlikely they contracted knowing the full extent of their rights or obligations under Amazon's Arbitration Clause. *See* ER. pp. 102-04. Amazon's failure to identify the applicable rules, and its reference to an outdated and likely inapplicable set of rules in the Arbitration Clause, creates significant surprise and only adds to the procedural unconscionability already present. *See Harper*, 113 Cal.App.4th at 1407 (finding unconscionability where an arbitration agreement is "peg[ged] both the scope and procedure of the arbitration to rules which might change.") (alteration in original); ER. p. 142; *C.f.* ER. p. 25. (The district court's order seemed to suggest that the "Consumer Arbitration Rules" would be applicable to the parties' dispute, but suggested that consumers would understand that the "Consumer Arbitration Rules" modified and replaced the "Supplementary Procedures for Consumer-Related Disputes.")

Both the adhesive nature and disjointed, "browsewrap" presentation of Amazon's COU, combined with the interpretive enigma surrounding Amazon's arbitral rules, demonstrate a high level of procedural unconscionability under California law.

2. *The Arbitration Clause is Substantially Unconscionable*

Amazon's Arbitration Clause is also "unfairly one-sided" and "overly harsh," and thus substantively unconscionable to a high degree. *Armendariz*, 24 Cal.4th at 113-14. Substantive unconscionability occurs when the "allocation of risks or costs" under the contract is "not justified by the circumstances under which the contract was made." *Shaffer v. Sup. Ct.,* 33 Cal.App.4th 993, 1000 (1995); *see Armendariz*, at 117 (finding unconscionability where, *inter alia*, there is no "legitimate commercial need" for an injurious contract term). This will be shown if the "disputed provisions of the agreement fall outside the reasonable expectations of the party of inferior bargaining power in an adhesion contract." *Zaborowski v. MHN Gov't Servs.*, Inc., 936 F.Supp.2d 1145, 1152 (N.D. Cal. 2013); *Graham v. Scissor–Tail, Inc.,* 28 Cal.3d 807, 820 (1981).

i. Amazon retains the unilateral right to amend the Arbitration Clause

While "parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope," substantive unconscionability "limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting the forum for itself." *Ting,* 319 F.3d at 1149 *quoting Armendariz*, 24 Cal.4th at 118. Accordingly, when provisions of an arbitration agreement permit the stronger party to unilaterally amend or terminate the agreement, without written notice to the weaker party, it is presumed

to be substantively unconscionable. *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1179 (9th Cir. 2003) *accord Sullenberger v. Titan Health Corp*., 2009 WL 1444210, at *7 (E.D. Cal. May 20, 2009); *Hwang v. J.P. Morgan Chase Bank, N.A*., 2012 WL 3862338, at *4 (C.D. Cal. Aug. 16, 2012); *Antonelli v. Finish Line, Inc*., 2012 WL 525538, at *7 (N.D. Cal. Feb. 16, 2012); *Geoffroy v. Washington Mut. Bank*, 484 F.Supp.2d 1115, 1123 (S.D. Cal. 2007).

The unenforceability of unilaterally and freely modifiable arbitration agreements is *not* controversial under the FAA. "The prevailing view under the FAA regarding illusory arbitration agreements is… [if a contracting party has an] unrestricted right to amend, modify, or terminate an arbitration agreement at anytime," then the agreement is unenforceable. *Peleg v. Neiman Marcus Grp., Inc*., 204 Cal.App.4th 1425, 1461-62 (2012) (collecting federal cases on illusory contracts, however noting a disagreement with California law); *c.f. Sparks v. Vista Del Mar Child & Family Servs*., 207 Cal.App.4th 1511, 1523 (2012) ("An agreement to arbitrate is illusory if, as here, the employer can unilaterally modify the [arbitration agreement].").[12] The Ninth Circuit has held that a unilateral

[12] Numerous lower federal courts have held the same. *See, e.g., Snow v. BE & K Constr. Co.,* 126 F.Supp.2d 5, 14–15 (D. Maine 2001) (citations omitted) (arbitration agreement is illusory because employer "reserve[d] the right to modify or discontinue [the arbitration] program at any time"; "Defendant, who crafted the language of the booklet, was trying to… bind its employees to the terms of the booklet, while carving out an escape route that would enable the company to avoid

modification provision within an arbitration agreement supports a finding of substantive unconscionability under California law, even if it does not render the contract completely illusory. *See Chavarria v. Ralphs Grocery Co*., 733 F.3d 916, 926 (9th Cir. 2013) *citing Ingle*, 328 F.3d at 1179.[13]

Amazon's unilateral Modification Clause creates the quintessential "one-sided contract," because Amazon retains all the future negotiating power under the COU with an absolute ability to change terms at will. *See Merkin v. Vonage Am. Inc*., 2014 WL 457942, at *7 (C.D. Cal. Feb. 3, 2014) (The right to unilaterally modify an arbitration agreement "transformed an ordinary contract of adhesion into a contract that gave [defendant] the largely unfettered power to control the

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the terms of the booklet if it later realized the booklet's terms no longer served its interests."); *In re Zappos.com, Inc., supra,* 893 F. Supp. 2d at 1066 (same); *Trumbull v. Century Mktg. Corp.,* 12 F.Supp.2d 683, 686 (N.D. Ohio 1998) (no binding arbitration agreement because "the plaintiff would be bound by all the terms of the handbook while defendant could simply revoke any term (including the arbitration clause) whenever it desired. Without mutuality of obligation, a contract cannot be enforced."); *Keanini v. United Healthcare Servs., Inc.*, 2014 WL 3579647 (D. Haw. July 21, 2014); *Grosvenor v. Qwest Corp.,* 854 F.Supp.2d 1021, 1034 (D. Colo. 2012) ("Because Qwest reserved an unfettered ability to modify the existence, terms and scope of the arbitration clause, it is illusory and unenforceable.").

[13] To the extent that there is conflicting authority on this issue, Appellant requests that this Court follow its published precedent and reasoning set out in the cases cited herein. *Compare Serpa v. California Sur. Investigations, Inc*., 215 Cal.App.4th 695, 707 (2013)**Error! Bookmark not defined.**; *Ashbey v. Archstone Property Management, Inc*., 612 Fed.Appx. 430 (9th Cir. 2015) (unpublished) *with Mohamed v. Uber Techs., Inc*., 109 F.Supp.3d 1185, 1228-29 (N.D. Cal. 2015).

terms of its relationship with its subscriber.") Arbitration agreements create continuing obligations between parties that subsist beyond the underlying transaction itself. Here, Amazon's Modification Clause permits Amazon to make changes – at "*any time*" – to the parties' ongoing obligations to arbitrate disputes and requires *no notice*, let alone a reasonable notice period, to customers before doing so. ER. p. 270.

Thus, Amazon's customers are unable to "cancel" their accounts if they do not want to assent to any modified terms. *See Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1100 (2002); *Asmus v. Pac. Bell*, 23 Cal.4th 1, 16 (2000) (The unilateral right to modification a contract must be tempered by the some limitations, such as reasonable notice). Indeed, Amazon periodically updates its COU, most recently on February 12, 2016. However, there is no evidence that Amazon provides notice to its consumers before changes are enforced.[14] Accordingly, consumers have no protection at all against Amazon's capricious application of unrestricted discretion.

Amazon's Modification Clause is particularly unsavory here because it allows Amazon limitless discretion to *select which claims to arbitrate in the future*. Amazon's customers have no similar ability to do so. Here, "the agreement

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[14] https://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088

allows [Amazon] to hold its customers and users to the promise to arbitrate while reserving its own escape hatch." *In re Zappos.com, Inc.*, 893 F.Supp.2d at 1066; *Macias v. Excel Bldg. Servs. LLC*, 767 F.Supp.2d 1002, 1009-10 (N.D. Cal. 2011) (The ability to modify, change, or delete terms of an arbitration agreement without notice "contribute to substantive unconscionability because such terms undermine the voluntary nature of arbitration agreements.")[15] Certainly, if substantive unconscionability "arises from an inequality of bargaining power," then the totally unchecked authority to modify terms of a contract ensures that "all of the power rests in [Amazon]'s hands." *Merkin*, *supra*, 2014 WL 457942, at *7.

The district court suggested that the Modification Clause would be profoundly limited by the "duty of good faith and fair dealing." ER, p. 26. Although, a contractual right to unilaterally modify an arbitration agreement may be limited by the implied covenant of good faith and fair dealing:

> this implied covenant should not be what saves a facially unequal and unfair contractual provision. If a contractual provision allows one side, particularly the side with stronger bargaining power, to completely turn an agreement on its head, then there is no reason for a court to go further—this is unconscionable.

Ridgeway v. Nabors Completion & Prod. Servs. Co., 2015 WL 5971545, at *7 (C.D. Cal. Oct. 13, 2015) *appeal filed* (Oct. 29, 2015) (invalidating an arbitration agreement under California law).

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[15] Zappos.com, Inc. is an Amazon subsidiary.

The covenant of good faith and fair dealing only prevents a contract that grants a party the right to unilaterally modify the agreement from being illusory. *Peleg*, *supra*, 204 Cal.App.4th 1425, 1445. Yet, the mere fact that a contract contains mutual consideration does not, in and of itself, prevent a finding of unconscionability. *Mattei v. Hopper,* 51 Cal.2d 119, 122 (1958) ("[I]f one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration.") "Under California law, a court may refuse to enforce a facially valid contract that is unconscionable." *Navellier v. Sletten*, 262 F.3d 923, 940 (9th Cir. 2001) *citing Graham*, *supra*, 28 Cal.3d 807. Accordingly, the validity of the formation of a contract and whether it is unconscionable are two separate legal questions. And one does not necessarily inform the other. *Merkin*, *supra*, 2014 WL 457942 at *7 ("*Serpa* and *Badie* analyzed whether, under general principals of contract law, one party's power to unilaterally modify a contract rendered that contract illusory," not if it is term "result[ed] in no real negotiation and an absence of meaningful choice."); *Dominguez v. Alden Enterprises, Inc*., 2009 WL 27156, at *8 (Cal. Ct. App. Jan. 6, 2009) (unpublished) ("While the implied duty of good faith and fair dealing may prevent the modification provision from rendering the agreement illusory, we conclude that it inserts an element of unduly harsh or oppressive results."); *McLemore v. Circuit City Stores, Inc*., 2005 WL 1634981, at

*5 (Cal. Ct. App. July 13, 2005) (unpublished) (same).[16]

Applied to the instant circumstances, the implied covenant of good faith and fair dealing is a hollow protection for Amazon's customers.[17] First, "California law allows parties to opt out of the covenant of good faith and fair dealing." *Kelly v. Skytel Commc'ns, Inc.*, 32 F.App'x 283, 285 (9th Cir. 2002). When "a contract expressly confers unrestricted discretion on one party, courts may not imply a covenant of good faith and fair dealing to limit that party's discretion and contradict the contract's express terms." *Id. citing Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal.4th 342, 372 (1992) ("We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement.")

Consequently, it is questionable whether a court could impose additional restrictions on Amazon's *unqualified and unilateral* contractual right to amend the

[16] "It is well-established that unconscionability is a generally applicable *contract defense*, which may render an arbitration provision unenforceable." *Nagrampa*, 469 F.3d at 1280 (emphasis added).

[17] "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). The doctrine of severability establishes that a court's should focus solely on the validity of an arbitration clause when considering a petition to compel arbitration and not the entire commercial contract in which it is contained. *Id*., at 70-71 ("The issue before the Court is not the validity of the contract as a whole, but only whether the parties validly contracted to arbitrate disputes arising out of the contract.") Accordingly, other rights and obligations arising under the COU are of no consequence on the Court's analysis.

Arbitration Clause *without notice*:

> Here, the language of the right to modify the policies, including the arbitration agreement, fails to put any limits on how or why this would occur. [Citation]. Thus, the Court declines to imply limitations of this authority via the covenant of good faith and fair dealing in light of the fact that this appears inconsistent with [*Asmus v. Pac. Bell*, 23 Cal.4th 1, 15 (2000)]. Thus, the Court concludes that under California law, the right of unilateral amendment by the Hospital is substantively unconscionable.

Montes v. San Joaquin Cmty. Hosp., 2014 WL 334912, at *14 (E.D. Cal. Jan. 29, 2014), *Ridgeway*, 2015 WL 5971545, at *7 ("Courts are admonished to not rewrite contracts for the parties, but that is exactly what the implied covenant is asking the court to do: to write in that an employer, for example, will only modify an agreement if it is fair and reasonable to do so.").

Second, even if the covenant of good faith and fair dealing did limit Amazon's discretion to modify the Arbitration Clause, such restrictions would be modest at best. The covenant generally requires parties to act reasonably and prohibits a party from doing "anything which injures the right of the other to receive the benefits of the agreement." *Bleecher v. Conte*, 29 Cal.3d 345, 350 (1981); *Lazar v. Hertz Corp*., 143 Cal.App.3d 128, 141 (1983) ("The essence of the good faith covenant is objectively reasonable conduct.")

This "reasonable" standard, however, encompasses a broad range of permissible conduct. For example, in *Badie v. Bank of America*, the California Court of Appeal reasoned that the implied covenant prevented a bank from using

its contractual right to unilaterally "amend" the terms of its customers' credit accounts to add "new" terms not contemplated by the parties at the time of contracting. 67 Cal.App.4th 779, 800-03 (1998). But, the *Badie* Court noted that the implied covenant did not necessarily prohibit the bank from changing preexisting terms, such as "fees, grace periods, annual percentage rates." *Ibid.* And in *Guz v. Bechtel Nat. Inc.*, the California Supreme Court held that the "covenant of good faith and fair dealing… exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." 24 Cal.4th 317, 349 (2000). The Court held that an employer's failure to follow its own employment policies when firing an "at-will" employee did not breach the covenant of good faith and fair dealing. *Ibid.* The fact that the employer may have acted arbitrarily, and outside of its established policies and norms, did not change the fact that the employee's contract did not place any limitations on the employer's right to terminate the employee. *Id.*, at 349-50. The implied covenant of good faith and fair dealing simply offered the employee no relief. *Id.*, at 351.

Such results follow from the fact that the implied covenant cannot "impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Id.*, at 350. Here, this Court is barred from using the covenant of good faith and fair dealing to add the most minimal

consumer protections to the Arbitration Clause – which expressly allows Amazon "to make changes to [its] site, policies, Service Terms, and these Conditions of Use at any time." ER. p. 270 ("But insofar as [ ] authorities suggest that the implied covenant may impose limits on an employer's termination rights beyond those either expressed or implied in fact in the employment contract itself, they… are therefore disapproved."). Indeed, the only restriction that the implied covenant *may* place on Amazon's right to amend the Arbitration Clause is likely the prohibition from "mak[ing] unilateral changes to [the Agreement] that apply retroactively to 'accrued or known' claims because doing so would unreasonably interfere with the [opposing party's] expectations regarding how the agreement applied to those claims." *Cobb v. Ironwood Country Club*, 233 Cal.App.4th 960, 966 (2015), *review denied* (Apr. 15, 2015).

Given the confined nature of the covenant of good faith and fair dealing, courts have not been convinced that the implied covenant serves as a meaningful bar on a parties' discretion in modifying an arbitration agreement. As noted by Judge Chen, in *Mohamed v. Uber Techs., Inc.*;

> [T]he Court is not entirely persuaded by the logic of *24 Hour Fitness* and *Serpa*, which conclude that the implied duty of good faith and fair dealing will prevent the drafting party from abusing its modification power to render a contract unfairly one-sided. But the duty of good faith will only prohibit Uber from imposing bad faith modifications, not all one-sided modifications.

Mohamed, 109 F.Supp.3d at 1229-30 (examining conflicting California appellant

jurisprudence). Even subject to the covenant of good faith and fair dealing, Amazon would be permitted to amend the Arbitration Clause to limit its scope or change the applicable arbitral rules. And it is unlikely that Amazon would do so to benefit its customers. *Ibid. citing* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 608 (2010) (explaining numerous reasons why unilateral modification provisions should be suspect, including that the power to alter procedural terms unilaterally "undermines the bedrock economic assumption that adherents can impose market discipline on procedural terms" because when drafters can freely alter terms, "they face little pressure to bow to adherents' preferences").

A recent case, *Amazon v. John Does 1-1114* (Case No. 15-2-25395 (Wash. Sup. Ct. Oct. 16, 2015)), is a direct embodiment of the abusive power Amazon wields under its COU and Arbitration Clause. Appellant's Motion to take Judicial Notice ("MJN"), Ex. A. Amazon, in an attempt to suppress "paid" product reviews on Amazon.com, sued a number of unknown Amazon users in Washington state court for, *inter alia*, breach of contract and violations of Washington's Consumer Protection Act, R.C.W. Ch. 19.86.[18] *Id,* pp. 10-13. Still, to leave a user review, an individual must become a registered user of Amazon's website, and likely agrees to its COU (including Arbitration Clause at issue) in doing so. ER. p. 264. Indeed,

[18] No misuse of intellectual property is alleged.

the very basis of Amazon's contract claims is a breach of the COU. MJN, Ex. A, p. 10. Therefore, it is axiomatic that its Arbitration Agreement binds the parties in its Washington lawsuit. Amazon, nonetheless, filed its action in state court and does not believe itself to be bound by the Arbitration Clause when enforcing its legal rights against customers.[19]

Amazon's consolidated lawsuit against over a thousand doe defendants is not unsurprising. Initiating 1114 arbitrations against 1114 unknown defendants in the hopes that an arbitrator will order third-party discovery to uncover the defendants' identities (discovery orders that may ultimately have to be enforced by a court) would be extremely costly and unlikely to be successful. ER, pp. 153 (the AAA Rules do not specifically allow for third-party discovery), 166 (Amazon must pay $1,500 to file a *single* arbitration and between $750 to $2,000 to have an arbitrator for an initial hearing). However, the same can be said about arbitration of individual consumer actions absent class litigation. *See AT&T Mobility LLC v. Concepcio*n, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting). Nevertheless,

> [t]he benefits of alternative dispute resolution cannot only adhere to the party with the greater bargaining power who drafts an arbitration agreement; an [consumer], for instance, should also reap the benefits of an increase in predictability when signing such an agreement.

[19] Amazon not only violates its own agreement to arbitrate such claims in *Amazon v. John Does 1-1114*, but also violates its prohibition against "consolidated" actions. ER. p. 270.

Ridgeway, supra, 2015 WL 5971545, at *7. It is clear that Amazon only utilizes its Arbitration Clause as a shield, and does not intend it to be a bilateral obligation when it does not benefit Amazon. *See Ridgeway*, *supra*, 2015 WL 5971545, at *7-8. (A consumer should also "reap the benefits of an increase in predictability" in agreeing to alternative dispute resolution and not "being subjected to a potentially shifting target.") Here, the Court should not believe that Amazon would act differently in enacting one-sided amendments the Arbitration Clause.

Accordingly, Amazon's unilateral and unfettered right to amend the Arbitration Clause grants it broad discretion to transform the scope of the parties' contractual rights, for its own benefit, and thus renders the contract unfairly one-sided.

ii. Amazon exempts claims from the Arbitration Clause that would only be asserted against its customers

In addition to Amazon's unilateral Modification Clause, the scope of the Arbitration Clause is indicative of the oppressive nature of the Arbitration Clause. California law provides that "substantive unconscionability may manifest itself in the form of an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." *Nagrampa*, 469 F.3d at 1285–86 *quoting Armendariz, Inc*., 24 Cal.4th 83, 99). Here, Amazon expressly exempts claims regarding "intellectual property rights" from its Arbitration Clause. ER, p. 270.

California courts have considered and held that the carving-out of intellectual property disputes from an arbitration agreement is unfairly one-sided if such claims are likely to be brought only by the stronger party. *Mohamed*, *supra,* 109 F.Supp.3d at 1227-28 *citing Fitz v. NCR Corp*., 118 Cal.App.4th 702, 725 (2004) and *Mercuro*, *supra,* 96 Cal.App.4th at 176–79. Here, it is inconceivable that a normal customer purchasing online goods would bring an intellectual property claim against Amazon. However, it is likely that Amazon could bring such claims against consumers. *See Macias, supra,* 767 F.Supp.2d at 1009. Under Amazon's COU, customers grant Amazon a "nonexclusive, royalty-free, perpetual, irrevocable, and fully sublicensable right to use, reproduce, modify, adapt, publish, perform, translate, create derivative works from, distribute, and display" any user recreated "reviews, comments, photos, videos, and other content." ER, p. 268. There are simply no intellectual property rights that a normal user would provide Amazon, under the COU, which could be infringed or otherwise misused requiring adjudication. And Amazon has not presented any evidence that its users would benefit from this carve-out. *Mohamed*, *supra,* 109 F.Supp.3d at 1228; ER, p. 60.[20]

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[20] The district court referenced three cases, *Milo & Gabby, LLC v. Amazon.com*, *Inc*., 12 F.Supp.3d 1341 (W.D. Wash. 2014) (seller and product designer bringing trademark and copyright claims against Amazon); *Routt v. Amazon.com*, Inc., 2012 WL 5993516 (W.D. Wash. 2012) (artist and designer bringing copyright infringement suit against Amazon); *Hendrickson v. Amazon.com, Inc*., 298 F.Supp.2d 914 (C.D. Cal. 2003) (the owner of copyright to

On the other hand, many aspects of Amazon's business involves intellectual property, which Amazon has an interest in protecting. A consumer's use of Amazon's website, patents, copyrights, and trademarks are included in the COU. ER, pp. 267-68. Furthermore, Amazon does not only offer goods on its website, but also computer-based services and software which are each governed by their own end-user license agreements ("EULAs") that restrict the users' access to and use of Amazon's intellectual property.[21] ER, pp. 269, 272. The proper access to such services is often the subject of litigation. For example, the seminal case on software licenses, *ProCD, Inc. v. Zeindenberg*, involved a software company suing a customer to protect its intellectual property under its EULA. 86 F.3d 1447 (7th Cir. 1996). Amazon's Arbitration Clause is drafted in a manner that makes it unlikely that it will be used contrary to Amazon's interests; adding to the unconscionable nature of the Arbitration Clause and the lack of mutuality. *See*

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motion picture bringing a suit against Amazon for copyright infringement) for the position that consumers may bring intellectual property actions against Amazon. ER, p. 27. Yet, each of these cases involved either third-party businesses or retailers who use Amazon.com, not consumers. These entities and individuals are not subject to COU's all-encompassing intellectual property license (retailers and advertises have separate agreements with Amazon, not governed by the COU). Accordingly, these cases only confirm Appellant's position, not Amazon's.

[21] These services include cloud-based computing services, online videos, private networking services, digital music, mobile apps and other software, which subject to Amazon's license agreement. ER, pp. 99, 269, 272. (referencing Amazon "Service Terms" for mobile apps), 10 (software license).

Mohamed, *supra,* 109 F.Supp.3d at 1228.

iii. The Arbitration Clause allows Amazon to collect attorney's fees against its customers

Amazon's Arbitration Clause also contains language that permits Amazon to seek attorney's fees and costs if an arbitrator determines a consumer's claims to be frivolous. ER, 270. Arbitration provisions are substantively unconscionable if they "'potentially offer[ed]' defendants attorneys' fees for which they might not otherwise be eligible under California law." *Grabowski v. Robinson* 817 F.Supp.2d 1159, 1178 (S.D. Cal. 2011). For many consumer claims, such as those under the UCL, California courts will not grant attorney's fees to a prevailing defendant. *See Walker v. Countrywide Home Loans, Inc*., 98 Cal.App.4th 1158, 1179 (2002). *Poublon*, *supra,* 2015 WL 588515, at *8-9. *But see* CAL. CIV. CODE § 1780(e). However, Amazon's Arbitration Clause allows the arbitrator to award both arbitrator/arbitration costs and fees. ER. 270 ("We will reimburse those fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous. Likewise, Amazon will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous.").[22]

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[22] When reviewing the Arbitration Clause, any ambiguities are resolved against the drafter. CAL. CIV. CODE § 1654. Additionally, "courts interpreting the language of contracts 'should give effect to every provision,' and 'an interpretation which renders part of the instrument to be surplusage should be avoided.'" *United States v. 1.377 Acres of Land, More or Less, situated in City of San Diego*, 352

Amazon's Arbitration Clause, for the above-listed reasons, is both procedurally and substantially unconscionable to a high degree. Accordingly, the Court should refuse to enforce the Arbitration Clause as unconscionable under California law.

3. *The Court Must Invalidate the Entire Arbitration Clause*

Once a court has determined that an arbitration agreement is unconscionable, a court must determine whether that unconscionability permeates the entire agreement to such an extent as to preclude the severing of any unconscionable terms. *Armendariz*, *supra,* 24 Cal.4th at 122; *see also Ingle*, *supra,* 328 F.3d at 1180. The procedural unconscionability present here is based on the adhesive nature of the instant Arbitration Clause and the manner in which it is presented to customers, neither of which can be retroactively corrected by this Court. These issues strike at the very nature of the Agreement and thus pervade the Arbitration Clause in its entirety. *Macias*, *supra,* 767 F.Supp.2d at 1012.

Additionally, the Arbitration Clause contains a number of substantively unconscionable terms, and any "attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter." *Ingle*, *supra,* 328 F.3d at 1180 (alteration

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F.3d 1259, 1265 (9th Cir. 2003). Thus, a contractual term should not read as simply a "recitation of rights to which [Appellant] was already entitled under California law." *Ibid*.

in original); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1109 (9th Cir. 2003). Given its numerous and serious offenses against California unconscionability law, Amazon's Arbitration Clause should be found unconscionable as a whole and thus unenforceable. *Macias*, *supra,* 767 F.Supp.2d at 1012; *Armendariz*, *supra,* 24 Cal.4th at 124.

VIII. CONCLUSION

Based on California jurisprudence, and the established precedent of this Court, the Arbitration Clause is both procedurally and substantively unconscionable to a high degree. Accordingly, the Court should reverse the district court ruling compelling arbitration and vacate the judgment below.

Respectfully submitted,

FINKELSTEIN & KRINSK LLP

Dated: February 28, 2016

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant certifies that there is no related appeals pending in this court.

/s/ Trenton R. Kashima
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)(7)(C)

I certify, pursuant to FED. R. APP. P. 32(a)(7)(C) and Circuit Rule 32(a)(7)(C), that the foregoing brief was prepared using Microsoft Word 2010 and is proportionately spaced, has a typeface of 14 points, and contains 12, 209 words.

/s/ Trenton R. Kashima
Trenton R. Kashima, Esq.

9th Circuit Case Number(s) 15-56799

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No. 15-56799

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN WISELEY,
Plaintiff-Appellant,

v.

AMAZON.COM INC.,
Defendant-Appellee

Appeal from United States District Court for the Southern District of California,
Civil Case No. 3:15-CV-96 (Honorable Cynthia A. Bashant)

ADDENDUM TO PLAINTIFF-APPELLANTS' OPENING BRIEF

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Key Provisions of California Law

Cal. Civil Code § 1670.5

(a) 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.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

Cal. Civil Code § 1751

Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

Cal. Civil Code § 1770

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(1) Passing off goods or services as those of another.

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

(3) Misrepresenting the affiliation, connection, or association with, or certification by, another.

(4) Using deceptive representations or designations of geographic origin in connection with goods or services.

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

(6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(8) Disparaging the goods, services, or business of another by false or misleading representation of fact.

(9) Advertising goods or services with intent not to sell them as advertised.

(10) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

(11) Advertising furniture without clearly indicating that it is unassembled if that is the case.

(12) Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller.

(13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

(14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

(15) Representing that a part, replacement, or repair service is needed when it is not.

(16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

(17) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.

(19) Inserting an unconscionable provision in the contract.

(20) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (A) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (B) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. This subdivision shall not apply to in-store advertising by businesses which are open only to members or cooperative organizations

organized pursuant to Division 3 (commencing with Section 12000) of Title 1 of the Corporations Code where more than 50 percent of purchases are made at the specific price set forth in the advertisement.

(21) Selling or leasing goods in violation of Chapter 4 (commencing with Section 1797.8) of Title 1.7.

(22) (A) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

(B) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient.

(23) (A) The home solicitation, as defined in subdivision (h) of Section 1761, of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of either subsection (h) or (i) of Section 1639 of Title 15 of the United States Code or paragraphs (1), (2), and (4) of subdivision (a) of Section 226.34 of Title 12 of the Code of Federal Regulations.

(B) A third party shall not be liable under this subdivision unless (1) there was an agency relationship between the party who engaged in home solicitation and the third party or (2) the third party had actual knowledge of, or participated in, the unfair or deceptive transaction. A third party who is a holder in due course under a home solicitation transaction shall not be liable under this subdivision.

(24) (A) Charging or receiving an unreasonable fee to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services.

(B) For purposes of this paragraph, the following definitions shall apply:

(i) "Public social services" means those activities and functions of state and local government administered or supervised by the State Department of Health Care Services, the State Department of Public Health, or the State Department of Social Services,

and involved in providing aid or services, or both, including health care services, and medical assistance, to those persons who, because of their economic circumstances or social condition, are in need of that aid or those services and may benefit from them.

(ii) "Public social services" also includes activities and functions administered or supervised by the United States Department of Veterans Affairs or the California Department of Veterans Affairs involved in providing aid or services, or both, to veterans, including pension benefits.

(iii) "Unreasonable fee" means a fee that is exorbitant and disproportionate to the services performed. Factors to be considered, when appropriate, in determining the reasonableness of a fee, are based on the circumstances existing at the time of the service and shall include, but not be limited to, all of the following:

(I) The time and effort required.

(II) The novelty and difficulty of the services.

(III) The skill required to perform the services.

(IV) The nature and length of the professional relationship.

(V) The experience, reputation, and ability of the person providing the services.

(C) This paragraph shall not apply to attorneys licensed to practice law in California, who are subject to the California Rules of Professional Conduct and to the mandatory fee arbitration provisions of Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code, when the fees charged or received are for providing representation in administrative agency appeal proceedings or court proceedings for purposes of procuring, maintaining, or securing public social services on behalf of a person or group of persons.

(25) (A) Advertising or promoting any event, presentation, seminar, workshop, or other public gathering regarding veterans' benefits or entitlements that does not include the following statement in the same type size and font as the term "veteran" or any variation of that term:

(i) "I am not authorized to file an initial application for Veterans' Aid and Attendance benefits on your behalf, or to represent you before the Board of Veterans' Appeals within the United States Department of Veterans Affairs in any proceeding on any matter, including an application for such benefits. It would be illegal for me to accept a fee for preparing that application on your behalf." The requirements of this clause do not apply to a person licensed to act as an agent or attorney in proceedings before the Agency of Original Jurisdiction and the Board of Veterans' Appeals within the United States Department of Veterans Affairs when that person is offering those services at the advertised event.

(ii) The statement in clause (i) shall also be disseminated, both orally and in writing, at the beginning of any event, presentation, seminar, workshop, or public gathering regarding veterans' benefits or entitlements.

(B) Advertising or promoting any event, presentation, seminar, workshop, or other public gathering regarding veterans' benefits or entitlements which is not sponsored by, or affiliated with, the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or any other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries that does not include the following statement, in the same type size and font as the term "veteran" or the variation of that term:

"This event is not sponsored by, or affiliated with, the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or any other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries. None of the insurance products promoted at this sales event are endorsed by those organizations, all of which offer free advice to veterans about how to qualify and apply for benefits."

(i) The statement in this subparagraph shall be disseminated, both orally and in writing, at the beginning of any event, presentation, seminar, workshop, or public gathering regarding veterans' benefits or entitlements.

(ii) The requirements of this subparagraph shall not apply in a case where the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries have granted written permission to the advertiser or promoter for the use of its name, symbol, or insignia to advertise or promote the event, presentation, seminar, workshop, or other public gathering.

(26) Advertising, offering for sale, or selling a financial product that is illegal under state or federal law, including any cash payment for the assignment to a third party of the consumer's right to receive future pension or veteran's benefits.

(27) Representing that a product is made in California by using a Made in California label created pursuant to Section 12098.10 of the Government Code, unless the product complies with Section 12098.10 of the Government Code.

(b) (1) It is an unfair or deceptive act or practice for a mortgage broker or lender, directly or indirectly, to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and which is used to finance a home improvement contract or any portion of a home improvement contract. For purposes of this subdivision, "mortgage broker or lender" includes a finance lender licensed pursuant to the California Finance Lenders Law (Division 9 (commencing with Section 22000) of the Financial Code), a residential mortgage lender licensed pursuant to the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000) of the Financial Code), or a real estate broker licensed under the Real Estate Law (Division 4 (commencing with Section 10000) of the Business and Professions Code).

(2) This section shall not be construed to either authorize or prohibit a home improvement contractor from referring a consumer to a mortgage broker or lender by this subdivision. However, a home improvement contractor may refer a consumer to a mortgage lender or broker if that referral does not violate Section 7157 of the Business and Professions Code or any other law. A mortgage lender or broker may purchase an executed home improvement contract if that purchase does not violate Section 7157 of the Business and

Professions Code or any other law. Nothing in this paragraph shall have any effect on the application of Chapter 1 (commencing with Section 1801) of Title 2 to a home improvement transaction or the financing of a home improvement transaction.

Cal. Bus. & Prof. Code § 17501

For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

4 C.C.R. § 1301

The term "former price" as used in Section 17501 of the Business and Professions Code and in this article includes but is not limited to the following words and phrases when used in connection with advertised prices; "formerly -," "regularly -," "usually -," "originally -," "reduced from ________," "was ________ now ________," "____% off."
Note: Authority cited: Sections 19034 and 19088, Business and Professions Code. Reference: Sections 17500, 17501, 19150 and 19210, Business and Professions Code.

Restatement Second of Conflict of Laws § 187

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Key Provisions of Federal Law

9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. § 16

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

16 C.F.R. § 233.1

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious—for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the "reduced" price is, in reality, probably just the seller's regular price.

(b) A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith—and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. And the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, "Formerly sold at $___"), unless substantial sales at that price were actually made.

(c) The following is an example of a price comparison based on a fictitious former price. John Doe is a retailer of Brand X fountain pens, which cost him $5 each. His usual markup is 50 percent over cost; that is, his regular retail price is $7.50. In order subsequently to offer an unusual "bargain", Doe begins offering Brand X at $10 per pen. He realizes that he will be able to sell no, or very few, pens at this inflated price. But he doesn't care, for he maintains that price for only a few days. Then he "cuts" the price to its usual level—$7.50—and advertises: "Terrific Bargain: X Pens, Were $10, Now Only $7.50!" This is obviously a false claim. The advertised "bargain" is not genuine.

(d) Other illustrations of fictitious price comparisons could be given. An advertiser might use a price at which he never offered the article at all; he might feature a price which was not used in the regular course of business, or which was not used in the recent past but at some remote period in the past, without making disclosure of that fact; he might use a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced.

(e) If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the

advertisement, as when the ad merely states, "Sale," the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to $9.99," when the former price was $10, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered. [Guide I]

9th Circuit Case Number(s) 15-56799

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 2-29-16 .

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Signature (use "s/" format) s/Trenton R. Kashima

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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