2026 IL App (2d) 260410-U
No. 2-26-0410
Order filed October 7, 2026

NOTICE: This order was filed under Illinois Supreme Court Rule 23(b) and is not precedential except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ILLINOIS HOMEOWNERS AGAINST FRAUD, INC., Plaintiff-Appellant,

v.

AIROOM, LLC, KATE PUTZER, and JESSICA HENN, Defendants-Appellees.

Appeal from the Circuit Court of Lake County.
Honorable Charles William Smith, Judge, Presiding.
No. 25-LA-557

JUSTICE MULLEN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court order denying plaintiff's motion to stay arbitration and granting defendant's motion to compel arbitration is affirmed. The trial court's limited, targeted modifications of the arbitration provision cured any arguable substantive unconscionability. The arbitration provision did not cease upon Buyers' elective termination because plaintiff's claims arise out of or relate to the contract's termination fee. Airoom did not waive its right to arbitrate.

¶ 2 Plaintiff, Illinois Homeowners Against Fraud, Inc., appeals from an order of the circuit court of Lake County denying its motion to stay arbitration and granting the motion of defendant, Airoom, Inc. (Airoom), to compel arbitration. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 2, 2025, plaintiff filed a complaint against Airoom, an architectural design and remodeling services company. The complaint arises out of a June 4, 2024, contract between Airoom and homeowners Jennifer Mason (Mason) and Sherman Marek (Marek) to remodel Mason's and Marek's home on Sheffield Court in Lake Forest. We refer to Mason and Marek collectively as "Buyers."

¶ 5 The contract includes a termination clause (paragraph 13) permitting Buyers to terminate the contract "at any time, without cause, provided Buyer pays the Termination Fee (as herein defined)." It further provides that, upon any termination:

> "[T]he Contract shall be deemed null and void (except for those provisions which specifically survive any termination of the Contract), and both Airoom and the Buyer shall be deemed to have expressly waived any and all rights hereunder against each other relating to the Contract, except for Airoom's right to receive the Termination Fee."

The contract also includes a successor/assignee clause (paragraph 20), providing that the contract "shall be binding upon the parties hereto and their respective legal representatives, heirs, successors and assigns, except as herein otherwise provided." Paragraph 23, titled "Waiver," states:

> "No waiver of any term in the Contract or Contract Documents shall be binding on Airoom unless evidenced in writing signed by an authorized officer of Airoom. No failure or delay on the part of Airoom to exercise any right it may have shall prevent Airoom from exercising any right or remedy it may have in the Contract or Contract Documents."

The contract also contains a severability clause (paragraph 21).

¶ 6 In addition, paragraph 25 of the contract is a binding arbitration provision. Although the binding arbitration provision is lengthy, because it is central to arguments raised on appeal, we set it out here in full:

> "***BINDING ARBITRATION*** Any controversy or claim arising out of, or relating to the Contract, the Contract Documents, the Project or the Real Estate shall be resolved by binding confidential arbitration. Arbitrations shall be conducted in Chicago, Illinois before an arbitrator selected in accordance with, and conducted pursuant to, the applicable construction rules of the American Arbitration Association (www.adr.org), unless the parties shall subsequently agree to a different arbitration service or arbitrator in writing signed by the parties. The arbitrator shall make no ruling, finding or award that does not conform to the terms and conditions of the Contract Documents. Costs and fees of arbitration may be awarded to the prevailing party. 'Costs and fees' shall mean all reasonable expenses of arbitration including the arbitrator's fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, and witness fees. Unless otherwise provided or prohibited by law, 'costs and fees' shall not include either party's attorney's fees or costs. The arbitration award shall be in writing and shall specify the factual and legal basis for the award. In rendering the award, the arbitrator shall determine the rights and obligations of the parties in accordance to [*sic*] the substantive laws of Illinois without regard to its provisions regarding conflicts of law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof and the costs incurred in connection with any action to confirm the arbitration award shall be awarded by the court. If Buyer rejects or does not accept this binding arbitration provision, it shall be deemed a counteroffer to Airoom to proceed with the Contract,

without the terms of this paragraph. In such case, Buyer's counteroffer may only be accepted in writing by an authorized officer of Airoom. If Buyer's counteroffer is not accepted by Airoom within 5 days, the Contract shall become null and void and of no further force and effect."

Notwithstanding the option to reject the arbitration provision, the Buyers handwrote "accept" in the margin below paragraph 25, and Marek initialed the provision.

¶ 7 On November 4, 2024, Marek sent Airoom a letter canceling the project and purporting to terminate the contract. Marek also demanded a $35,000 refund for payments tendered to Airoom. On November 8, 2024, Airoom forwarded the Buyers a "termination accounting" statement reflecting $31,581 in costs and acknowledging a $3,419 credit due back to the Buyers ($35,000 – $31,581=$3,419).

¶ 8 Prior to May 22, 2025, the named plaintiff corporation did not exist. On that date, Marek (an attorney), through his law firm, incorporated plaintiff. Following incorporation, plaintiff initiated this lawsuit. On October 29, 2025, Airoom filed a motion for leave to answer or otherwise plead *instanter*. Attached to Airoom's motion was a proposed section 2-619.1 motion to dismiss plaintiff's complaint (735 ILCS 5/2-619.1 (West 2024)) and a proposed motion to compel arbitration.

¶ 9 On November 5, 2025, plaintiff filed an 11-count amended complaint.[1] In the amended complaint, plaintiff described itself as an "Illinois corporation committed to protecting consumer rights and holding fraudulent home remodeling contractors accountable under the law" and "the assignee of legal claims held by certain homeowners, including the owners of certain real property

[1]The amended complaint also names as defendants Kate Putzer (a project development manager for Airoom) and Jessica Henn (a design associate for Airoom).

*** on Sheffield Court in Lake Forest." The amended complaint alleged a violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2024)), fraudulent inducement, promissory estoppel, fraudulent misrepresentation, fraudulent concealment, promissory fraud, unjust enrichment, unenforceability of the arbitration clause, a violation of the Home Repair and Remodeling Act (815 ILCS 513/1 *et seq*. (West 2024)), civil conspiracy, and conversion. In connection with these claims, plaintiff sought compensatory damages, interest, restitution, and costs of suit.

¶ 10 On November 6, 2025, the trial court granted Airoom leave to answer or otherwise plead to plaintiff's amended complaint. On February 20, 2026, Airoom filed a section 2-619.1 motion to dismiss the amended complaint (735 ILCS 5/2-619.1 (West 2024)). Among other things, Airoom argued in the motion that plaintiff lacked standing to sue because it was not a party to the contract and is a sham corporation and that the amended complaint must be dismissed for failure to attach the written instruments upon which the claims and purported assignment are based. On April 6, 2026, plaintiff, noting that Airoom had initiated arbitration against Buyers before the American Arbitration Association (AAA), Case No. 01-26-000-8771, filed a "Motion to Prevent Parallel and Overlapping Proceedings and to Require Airoom to Seek Relief in [the trial court] Before Proceeding with Arbitration." Plaintiff asked the court to order Airoom not to take further action in the arbitration proceeding involving the Buyers "unless and until it moved to compel arbitration [in the present case] or otherwise obtains relief from [the trial court] permitting it to proceed."

¶ 11 At an April 30, 2026, hearing, the court directed plaintiff to file supplemental information regarding the assignment, granted Airoom leave to file a motion to compel arbitration, and set deadlines for briefing arbitrability. On May 11, 2026, plaintiff filed supplemental information, including affidavits from Mason and Marek detailing and ratifying the assignment. On May 21,

2026, Airoom filed a response to plaintiff's motion to stay arbitration and a counter-motion to compel arbitration and dismiss plaintiff's amended complaint.[2]

¶ 12 Following briefing and a hearing on the parties' motions, the trial court entered a written order dated July 14, 2026 (but file stamped July 15, 2026) denying plaintiff's motion to stay arbitration and granting Airoom's motion to compel arbitration, subject to the following limitations and requirements:

> "1. The word 'confidential' is hereby severed and stricken from the Binding Arbitration clause in Paragraph 25 of the Contract;
>
> 2. The limitation of relief in Paragraph 25 of the Contract shall not apply to any relief that may be awarded pursuant to the [Consumer Fraud Act];
>
> 3. The Arbitrator shall apply the Home Construction Arbitration Rules and Fees published on the website of the [AAA]."

The order also required plaintiff to submit to the pending AAA proceeding (Case No. 01-26-000-8771).[3] Plaintiff filed a notice of interlocutory appeal on August 10, 2026, seeking review of the trial court's order.

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[2]The record submitted on appeal does not contain a document captioned "motion to stay arbitration" filed by plaintiff. We presume this is a reference to plaintiff's "Motion to Prevent Parallel and Overlapping Proceedings and to Require Airoom to Seek Relief in [the trial court] Before Proceeding with Arbitration" between Airoom and Buyers.

[3]We note that the record does not contain a transcript from the July 2026 hearing or an acceptable substitute. See Ill. S. Ct. R. 323 (eff. July 1, 2017).

¶ 13 II. ANALYSIS

¶ 14 Plaintiff appeals pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017). That rule allows an interlocutory appeal of an order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." A trial court's order compelling arbitration is "injunctive in nature." See *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001). Accordingly, we have jurisdiction to address this appeal pursuant to Rule 307(a)(1). Where the trial court resolves arbitrability as a matter of law and without an evidentiary hearing, our review is *de novo*. *Smith v. Jones*, 2025 IL App (5th) 231136, ¶ 28; see also *Federal Signal Corp. v. SLC Technologies, Inc.*, 318 Ill. App. 3d 1101, 1105-06 (2001) (noting that where the facts are not in dispute and the trial court determines arbitrability as a matter of law, a reviewing court reviews that decision *de novo*).

¶ 15 Plaintiff raises two principal issues on appeal. First, plaintiff argues that the trial court erred in compelling arbitration because no enforceable right to arbitrate exists. Plaintiff also argues that the trial court erred in denying its motion to stay arbitration because Airoom has no enforceable right to arbitrate against either plaintiff or its assignors. We address each argument in turn.

¶ 16 A. Right to Arbitrate

¶ 17 Agreements to arbitrate are favored at both the state and federal level. *QuickClick Loans, LLC v. Russell*, 407 Ill. App. 3d 46, 52 (2011). "A court should grant a motion to compel arbitration if there is (1) a valid arbitration agreement between the parties and (2) the litigation falls within the scope of the arbitration agreement." *Westlake Services LLC v. Williams*, 2025 IL App (1st) 241383, ¶ 14. The decision whether to compel arbitration is not discretionary. *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1175 (2002). "Where there is a valid arbitration agreement and the parties' dispute falls within the scope of that agreement, arbitration is mandatory and the trial court must compel it." *Travis*, 335 Ill. App. 3d at 1175.

¶ 18 By adopting the Uniform Arbitration Act, our legislature placed arbitration agreements on equal footing with other contractual promises. See 710 ILCS 5/1 (West 2024) (providing that an arbitration agreement "is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract"); *Turner v. Concord Nursing & Rehabilitation Center, LLC*, 2023 IL App (1st) 221721, ¶ 19. Thus, like other contracts, state law contract defenses may invalidate an arbitration agreement, including fraud, duress, or unconscionability. *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 18; *Turner,* 2023 IL App (1st) 221721, ¶ 20.

¶ 19 Here, plaintiff argues that the trial court erred in compelling arbitration because no enforceable right to arbitrate exists. Plaintiff makes several sub-arguments in support of its position. First, plaintiff asserts that the arbitration agreement is substantively unconscionable, the trial court's modifications did not resolve the substantive unconscionability, and the substantively unconscionable provisions are otherwise inseverable from the remainder of the contract. Second, plaintiff contends that the arbitration clause is unenforceable because, under the plain language of the contract, the arbitration clause ceased to exist when the Buyers terminated the contract. Finally, plaintiff maintains that, even if the arbitration clause is enforceable, Airoom waived arbitration by submitting substantive issues to the court and declining to move to compel after obtaining leave.

¶ 20 1. Unconscionability and Severability

¶ 21 Plaintiff argues that the arbitration agreement is substantively unconscionable. " 'Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed.' " *Bain v. Airoom, LLC*, 2022 IL App (1st) 211001, ¶ 25 (quoting *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 28 (2006)). "Substantive unconscionability applies where the contract terms are so one-sided that they oppress or unfairly

surprise an innocent party and create an overall imbalance in the obligations and rights imposed by the bargain and a significant cost-price disparity." *Turner*, 2023 IL App (1st) 221721, ¶ 20.

¶ 22 In asserting that Airoom's arbitration agreement is substantively unconscionable, plaintiff relies principally on *Bain*, 2022 IL App (1st) 211001. According to plaintiff, the court in that case considered the enforceability of a similar arbitration agreement and determined that it was substantively unconscionable because the arbitration agreement had been structured to make a claim expensive to bring, to bar any recovery, and to ensure that the public does not learn of adverse findings against the company. See *Bain*, 2022 IL App (1st) 211001, ¶ 54. We therefore begin our analysis with an examination of *Bain*.

¶ 23 In *Bain*, the homeowner was a disabled senior citizen whose only source of income was $780 in social security benefits. She sued Airoom (the same defendant in this case) for shoddy and incomplete remodeling work. Specifically, the homeowner brought claims against Airoom for breach of contract, breach of the implied warranty of reasonable workmanship and materials, and violations of the Consumer Fraud Act. In connection with these claims, the homeowner sought actual and punitive damages, attorney fees, and litigation costs. Airoom moved the circuit court to compel arbitration pursuant to a binding arbitration provision in the parties' contract. The homeowner responded, *inter alia*, that, for various reasons, the arbitration provision was substantively unconscionable. Although the trial court agreed that language in the arbitration provision waiving punitive damages was unenforceable, it severed that language and granted Airoom's motion to compel. The homeowner appealed.

¶ 24 In *Bain*, the court expressly noted that courts are more likely to find substantive unconscionability where there is a consumer involved and a disparity in bargaining power. *Bain*, 2022 IL App (1st) 211011, ¶ 28 (citing *Kinkel*, 223 Ill. 2d at 24). The reviewing court found several

provisions of the arbitration provision substantively unconscionable. *Bain*, 2022 IL App (1st) 211001, ¶¶ 29-50. First, the court found unconscionable language in the arbitration provision banning the recovery of attorney fees and punitive damages. *Bain*, 2022 IL App (1st) 211001, ¶¶ 31-37. The arbitration agreement in *Bain* provided that "[t]he arbitrator shall have the authority to award only compensatory damages" and that "[e]xcept where prohibited by law, the arbitrator shall have no authority to award punitive or exemplary damages." The arbitration agreement in *Bain* permitted an award of the "[c]osts and fees of arbitration *** to the prevailing party," but it specified that these "shall not include either party's attorney fees or costs." The *Bain* court noted that the Consumer Fraud Act, under which the homeowner had asserted a claim, specifically calls for an award of "reasonable attorney's fees and costs to the prevailing party" (815 ILCS 505/10a(c) (West 2018)) as well as "actual economic damages or *any other relief which the court deems proper*" (emphasis in original) (815 ILCS 505/10a(a) (West 2018)). *Bain*, 2022 IL App (1st) 211001, ¶ 33. The court further noted that the supreme court has recognized that punitive damages are recoverable under the Consumer Fraud Act (see *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 79-80 (1994)) and that the Consumer Fraud Act expressly provides that "[a]ny waiver or modification of the rights, provisions, or remedies of this [Consumer Fraud] Act shall be void and unenforceable" (815 ILCS 505/10c (West 2018)). *Bain*, 2022 IL App (1st) 211001, ¶ 33. The court explained that contractual provisions that conflict with statutory fee-shifting requirements are problematic because, without them, litigants would be reluctant to pursue cases in which the recovery would be nearly or completely consumed by attorney fees. *Bain*, 2022 IL App (1st) 211001, ¶¶ 35-36 (citing *Brne v. Inspired eLearning*, 2017 WL 4263995, *5 (N.D. Ill. Sept. 26, 2017), *Safranek v. Copart, Inc.*, 379 F. Supp. 2d 927, 931 (N.D. Ill. 2005), and *Krautsack v. Anderson*, 223 Ill. 2d 541, 557 (2006)).

¶ 25 Second, the court found unconscionable confidentiality language in the arbitration provision. *Bain*, 2022 IL App (1st) 211001, ¶¶ 38-40. That language provided, "[n]either party nor the arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties." The court explained that although the language applied to both parties, as a "repeat player" in arbitrations under its own contract, Airoom will have access to information about past proceedings that the individual homeowners will lack. *Bain*, 2022 IL App (1st) 211001, ¶ 39 (citing *Kinkel*, 223 Ill. 2d at 42).

¶ 26 Third, the court found unconscionable the arbitration provision's language regarding the applicable arbitration rules. That language provided, "All arbitrations shall be conducted *** before an arbitrator selected in accordance with, and shall be conducted pursuant to, the Construction Industry Arbitration Rules of the [AAA] or any other alternative dispute resolution firm, at Airoom's sole and absolute discretion." *Bain*, 2022 IL App (1st) 211001, ¶¶ 41-50. The court found that the Construction Industry Arbitration Rules are designed primarily for complex construction industry disputes and are ill-suited to and unnecessarily costly for someone suing a company that has done renovation work on his or her personal residence. *Bain*, 2022 IL App (1st) 211001, ¶ 42. The court pointed out that AAA has another set of rules—the Home Construction Arbitration Rules—specifically designed to make the resolution of home remodeling disputes streamlined and affordable for both parties, but those rules were not disclosed in Airoom's contract. *Bain*, 2022 IL App (1st) 211001, ¶¶ 42-50. The court also noted that the language in the arbitration agreement allowing Airoom "at its sole and absolute discretion" to choose another set of rules or forum "simply gives Airoom the power to choose another, perhaps even more expensive and less appropriate, forum and set of rules for resolving this dispute." *Bain*, 2022 IL App (1st) 211001, ¶ 48.

¶ 27 The *Bain* court then addressed whether the arbitration agreement could be salvaged by severing the unenforceable provisions. *Bain*, 2022 IL App (1st) 211001, ¶¶ 51-54. The court noted that Airoom's contract contained a severability clause providing that if any provision "shall become or be held by any court or arbitrator to be illegal, invalid, unenforceable or against public policy for any reason, then such provision shall be severed" and the remaining provisions shall remain in full force and effect. *Bain*, 2022 IL App (1st) 211001, ¶ 52. The court explained that severance is appropriate where a contractual provision is modified " 'only slightly' and 'the balance of the restrictions [are] reasonable and necessary to protect [the drafting party's] legitimate business interests.' " *Bain*, 2022 IL App (1st) 211001, ¶ 52 (quoting *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 80 (1992)). However, courts are far less justified in modifying contractual language if doing so would be " 'tantamount to drafting a new contract.' " *Bain*, 2022 IL App (1st) 211001, ¶ 52 (quoting *Lee/O'Keefe Insurance Agency, Inc. v. Ferega*, 163 Ill. App. 3d 997, 1007 (1987)). Although Airoom defended the trial court's authority to sever the punitive damages waiver, the court noted that Airoom did not argue that severance would be appropriate if other provisions of the arbitration agreement were also found to be unconscionable. *Bain*, 2022 IL App (1st) 211001, ¶ 53. Ultimately, the court determined that the cumulative effect of the unconscionable portions of Airoom's arbitration provision rendered inseverable the unenforceable provisions. *Bain*, 2022 IL App (1st) 211001, ¶ 54. The court explained that "[w]here, as here, the drafting party has structured an arbitration agreement that is designed to make a claim expensive to bring, to bar any full recovery, and to ensure that the public does not learn of adverse findings against the company, the modifications necessary to render the agreement enforceable cannot be considered minor." *Bain*, 2022 IL App (1st) 211001, ¶ 54. As such, the trial court's order compelling arbitration was reversed. *Bain*, 2022 IL App (1st) 211001, ¶ 56.

¶ 28 Plaintiff argues that the arbitration provision in its contract with Airoom did not correct any of the defects the *Bain* court found unconscionable, but instead disguised those same defects and disbursed them throughout other provisions of the contract. According to plaintiff Airoom's arbitration provision still bars recovery of attorney fees, excludes punitive damages, requires confidentiality, and attempts to apply the Construction Industry Arbitration Rules.

¶ 29 We find this case distinguishable from *Bain*. Initially, we note that Marek, unlike the consumer in *Bain*, is an attorney who clearly understood he was negotiating a contract and initialed the arbitration provision at issue. Furthermore, there is evidence that Marek negotiated terms and clearly was not limited by any disparity in bargaining power. In this regard, plaintiff's amended complaint expressly alleged that Airoom, through its representatives, revised the contract pursuant to Buyers' insistence. That Marek was an attorney who negotiated terms of the contract demonstrates that *Bain* is distinguishable from the present case.

¶ 30 In addition, for the reasons explained below, we conclude that the concerns raised by the *Bain* court for invalidating the arbitration provision in that case, *i.e.*, the arbitration agreement made the claim expensive to bring, barred full recovery, and ensured that the public does not learn of adverse findings against the company, have been mitigated by changes Airoom made to the arbitration agreement and the modifications ordered by the trial court. Cumulatively, these changes and modifications do not render the contract terms so one-sided that they can be said to oppress or unfairly surprise plaintiff, create an overall imbalance in the obligations and rights imposed by the bargain, or create a significant cost-price disparity. See *Turner*, 2023 IL App (1st) 221721, ¶ 20.

¶ 31 First, in *Bain*, the arbitration provision limited awards to compensatory damages, barred punitive/exemplary damages except where prohibited by law, and excluded attorney fees from costs and fees. *Bain*, 2022 IL App (1st) 211001, ¶ 6. By contrast, the arbitration provision in this

case is not identical to the arbitration provision in *Bain*. The arbitration provision here does not permit only compensatory damages, it does not prohibit punitive damages, and it only excludes attorney fees and costs from an award of costs and fees "[u]nless otherwise provided or prohibited by law." More important, the trial court addressed the concern of the *Bain* court and clarified that the limitation of relief in the arbitration provision of the contract "shall not apply to any relief that may be awarded pursuant to the [Consumer Fraud Act]." This ensures the availability of statutory remedies and fee-shifting recognized as integral to consumer protection. See *Krautsack*, 223 Ill. 2d at 557 (quoting *Cruz v. Northwestern Chrysler Plymouth Sales, Inc.*, 179 Ill. 2d 271, 279-80 (1997) (noting that the Consumer Fraud Act's fee-shifting provision " 'is premised on the recognition that plaintiffs would be reluctant to seek redress for consumer fraud if the recovery would be nearly or completely consumed by attorney fees and was designed to encourage plaintiffs who have a cause of action to sue even if recovery would be small.' ")

¶ 32 Plaintiff argues that Airoom nevertheless continues to limit attorney fees and punitive damages. Plaintiff points to language in the arbitration provision (paragraph 25) instructing the arbitrator to "conform to the terms and conditions of the Contract Documents" and to separate "limited liability" language in paragraph 9 of the parties' contract. Paragraph 9 states in relevant part:

> **"9. <u>AIROOM'S LIMITED LIABILITY</u> (a) BUYER AGREES, *TO THE FULLEST EXTENT PERMITTED BY LAW*, TO LIMIT THE LIABILITY OF AIROOM, ITS AGENTS, EMPLOYEES, AND/OR OFFICERS TO BUYER FOR ANY AND ALL CLAIMS, LOSSES, COSTS, EXPENSES, OR DAMAGES OF ANY NATURE WHATSOEVER, INCLUDING ATTORNEYS' FEES, EXPERT-WITNESS FEES, OR COSTS, FROM ANY CAUSE OR CAUSES, SO THAT THE TOTAL**

AGGREGATE LIABILITY OF AIROOM, ITS AGENTS, EMPLOYEES, AND/OR OFFICERS TO BUYER SHALL NOT EXCEED AIROOM'S TOTAL COMPENSATION RECEIVED FOR SERVICES RENDERED ON THE PROJECT PURSUANT TO THE CONTRACT DOCUMENTS. IT IS INTENDED THAT THIS LIMITATION APPLY TO ANY AND ALL LIABILITY OR CAUSES OF ACTION HOWEVER ALLEGED OR ARISING, *UNLESS OTHERWISE SPECIFICALLY PROHIBITED BY LAW. UNLESS OTHERWISE PROVIDED OR PROHIBITED BY LAW*, IN NO EVENT SHALL AIROOM, ITS AGENTS, EMPLOYEES, AND/OR OFFICERS BE LIABLE FOR SPECIAL, EXEMPLARY, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND WHATSOEVER, INCLUDING ADDITIONAL COMPENSATION FOR TIME DELAYS BEYOND THE AMOUNT SPECIFIED IN THE GUARANTEED TIME COMPLETION PER THE SPECIFICATIONS, OR FOR LOSS OF PROFITS OR REVENUE, OR FOR LOSS OF USE." (Emphasis added.)

We agree that the language in the arbitration provision instructing the arbitrator to "conform to the terms and conditions of the Contract Documents" coupled with the above language from paragraph 9 may be read as an attempt to preserve terms similar to those invalidated in *Bain*. However, the arbitrator must apply governing law, and any contractual cap cannot defeat nonwaivable statutory rights. See *Bain*, 2022 IL App (1st) 221001, ¶¶ 32-33; *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 238-239 (2008). The trial court's carve-out forecloses restrictions on remedies under the Consumer Fraud Act, and Illinois law treats attempts to limit statutory rights as unenforceable. See *Bain*, 2022 IL App (1st) 221001, ¶¶ 32-33; *Tortoriello*, 379 Ill. App. 3d at 238-239. On this record, the remedial framework, as modified, does not bar any full

recovery. The categorical bans that underpinned *Bain* are gone from the arbitration paragraph, and the statutory consumer remedies remain.

¶ 33 Second, in *Bain*, the court invalidated language that provided, "[n]either party nor the arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties." That contract restraint was central to *Bain*'s "repeat player" concern. In this case, the trial court struck from the arbitration provision the word "confidential" from the requirement that the parties' dispute be resolved "by binding confidential arbitration." Thus, the parties may disclose the outcome of their case (unless a protective order is entered). We acknowledge the *Bain* court's concern that, as a "repeat player" in arbitrations under its own contract, Airoom will have access to information about past proceedings that the individual homeowners will lack. *Bain*, 2022 IL App (1st) 211001, ¶ 39 (citing *Kinkel*, 223 Ill. 2d at 42). While prior proceedings that were contractually confidential may remain non-public, the court's severance here removes any party-wide gag for this matter, enabling plaintiff to disclose its own outcome absent a protective order. We therefore conclude that striking "confidential" was a minor severance that cured any one-sided suppression of information in this particular case without redrafting the parties' agreement.

¶ 34 Third, in *Bain*, the arbitration provision required homeowner disputes to proceed under AAA Construction Industry Arbitration Rules and vested Airoom with sole and absolute discretion to choose another forum. *Bain*, 2022 IL App (1st) 211001, ¶ 42. As noted, the *Bain* court found this language unconscionable because it steered consumers into more complex and expensive administration and preserved unilateral control in Airoom. *Bain*, 2022 IL App (1st) 211001, ¶¶ 41-50. The arbitration provision in this case is different. It provides that arbitration shall be conducted pursuant to "the *applicable* construction rules of the [AAA]" (emphasis added), with any change

of service or arbitrator to be made by agreement of the parties. In other words, the arbitration provision at issue did not mandate use of AAA's Construction Industry Arbitration Rules. Additionally, the trial court directed application of the Home Construction Arbitration Rules for this dispute. That directive aligns the forum with AAA's regime designed to make the resolution of home remodeling disputes "streamlined and affordable" for both parties. See *Bain*, 2022 IL App (1st) 211001, ¶ 42. Moreover, the provision does not preserve unilateral control in Airoom.

¶ 35 Plaintiff acknowledges that the Home Construction Arbitration Rules are the default rules where "no particular set of rules has been specified." See *Bain*, 2022 IL App (1st) 221001, ¶ 43; see also Home Construction Arbitration Rules and Mediation Procedures of the American Arbitration Association, Rule ARB-1(a) (eff. Aug. 1, 2018), https://www.adr.org/media/dxpeyc0q/home_construction_arbitration_rules_and_mediation_procedures.pdf (last visited September 29, 2026) (providing that "[t]he parties shall be deemed to have made these [Home Construction Arbitration] Rules a part of their agreement *** whenever they have provided for arbitration of a home construction dispute in a contract which does not designate a particular AAA rule set and is dated after the effective date of these Rules"). However, it asserts that "built-in exceptions" to those rules leave Airoom with the power to choose a more expensive forum because Rule ARB-2 provides that "claims or counterclaims of $1,000,000 or greater, involving more than two parties or with issues of joinder or consolidation" shall be heard under the Construction Industry Arbitration Rules. Home Construction Arbitration Rules and Mediation Procedures of the American Arbitration Association, Rule ARB-2 (eff. Aug. 1, 2018), https://www.adr.org/media/dxpeyc0q/home_construction_arbitration_rules_and_mediation_procedures.pdf (last visited September 29, 2026). Thus, plaintiff asserts, even where homeowners allege claims of less than $1 million, Airoom need only file an expensive counterclaim against

them, join other parties, or consolidate claims, and the Home Construction Arbitration Rules will no longer apply. The possibility of routing based on case characteristics is inherent in AAA's framework. Importantly, it does not reintroduce the unilateral control invalidated in *Bain*. Moreover, plaintiff's argument is entirely speculative as it does not cite, and the record does not disclose, any evidence that Airoom filed an expensive counterclaim against them, joined other parties, or consolidated claims. On this record, AAA rule selection does not create an overall imbalance. The arbitration provision's "applicable rules" language, stripped of one-party forum control and the court's instruction to apply AAA's Home Construction Arbitration Rules, render the administration suitable for homeowner disputes, and the resulting arrangement does not "make a claim expensive to bring" in the manner *Bain* condemned.

¶ 36 2. Modifications and Severability

¶ 37 Plaintiff next argues that because Airoom's substantively unconscionable provisions persist, they remain inseverable under *Bain*. Plaintiff also claims that the trial court's modifications to the arbitration agreement did not resolve the issue.

¶ 38 The trial court may, in its discretion, modify a contract so that it comports with the law or sever unenforceable provisions from the contract, particularly where a severability clause expresses the parties' intent to preserve lawful portions. *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13, 21 (1993). "In determining whether it is appropriate to sever an unconscionable provision from an agreement and enforce the remainder of the agreement, Illinois courts are to consider whether the provisions operate independently of each other or whether the valid provisions are 'so closely connected with unenforceable provisions that to do so would be tantamount to rewriting the Agreement.' " *Kinkel v. Cingular Wireless, LLC*, 357 Ill. App. 3d 556, 569 (2005) (quoting *Abbott-Interfast Corp.*, 250 Ill. App. 3d at 21).

¶ 39 The contract here has an express severability clause, and the trial court's modifications were minimal. The court struck the single word "confidential" from the arbitration paragraph, clarified that any limits on relief do not restrict Consumer Fraud Act remedies (including punitive damages and fee-shifting), and directed application of AAA's Home Construction Arbitration Rules. These alterations fall squarely within Illinois's severance doctrine. They are limited to effectuate compliance with the statute without redrafting the parties' bargain and do not rewrite the agreement. See *Kinkel*, 223 Ill. 2d at 45-47 (excising terms that contravene statutory policy without nullifying arbitration agreement); *Abbott-Interfast Corp.*, 250 Ill. App. 3d at 21 (holding that where parties intended provisions in agreement to be severable, equities favor enforcing those provisions unless they are so closely connected with unenforceable provisions that to do so would be tantamount to rewriting the agreement).

¶ 40 Plaintiff, however, directs us to *Bain*, noting that the court in that case acknowledged Airoom's severability clause, but declined to sever the unconscionable portions of the arbitration agreement. Plaintiff argues that Airoom could have used the *Bain* court's ruling to improve its contract and legitimize its commercial dealings. Instead, however, it ignored the court and developed workarounds to disguise its deceptive practices. As such, plaintiff asserts that severance would not only condone Airoom's misconduct, but create an agreement that the parties did not intend.

¶ 41 *Bain* found the arbitration clause in that case inseverable because (1) it mandated the use of AAA Construction Industry Arbitration Rules and gave Airoom sole discretion to select another forum, (2) categorically banned punitive damages and attorney fees, and (3) contained a sweeping confidentiality gag. The *Bain* court concluded that modifications necessary to render the agreement enforceable cannot be considered minor. As noted above, however, *Bain* does not control here.

First, the current arbitration provision does not mandate the use of AAA Construction Industry Arbitration Rules or give Airoom sole discretion to select another forum. It references "*applicable* construction rules" (emphasis added) and permits any change of forum only by agreement of the parties. The trial court further directed application of the AAA Home Construction Arbitration Rules. The changes eliminate the forum steering condemned by *Bain* and align administration with AAA's Home Construction Arbitration Rules, thereby addressing the *Bain* court's concerns over the costs under AAA's Construction Industry Rules. Second, the arbitration provision here does not contain the same language as the provision in *Bain* regarding punitive damages or attorney fees. More important, the trial court carved out Consumer Fraud Act remedies, ensuring arbitrators can award statutory relief. Third, the confidentiality provision in *Bain* bound the parties. In this case, the trial court struck the word "confidential."

¶ 42 Given these cures, the trial court did not draft a new contract. It used minor severance and modifications to enforce the lawful remainder, a course *Kinkel* and *Abbott-Interfast* endorse. See *Kinkel*, 223 Ill. 2d at 45-47; *Abbott-Interfast Corp.*, 250 Ill. App. 3d at 21-22. Notably, plaintiff has not convinced us that the modifications and severances made by the trial court were essential to Buyers entering into the contract. Indeed, the modifications and severances benefit plaintiff (as the assignees to Buyers) by eliminating the confidentiality provision, ensuring the arbitrator can award statutory relief under the Consumer Fraud Act, and requiring application of the AAA's more-favorable Home Construction Arbitration Rules, the homeowner-specific track. See *Kinkel*, 223 Ill. 2d at 47 (allowing severance where provision at issue was not essential to making parties' agreement).

¶ 43 3. Termination

¶ 44 Next, plaintiff argues that the arbitration provision is unenforceable because, under the contract's plain meaning, the arbitration provision ceased to exist when the contract terminated. We disagree.

¶ 45 Plaintiff relies on two cases for this proposition, *Clanton v. Oakbrook Healthcare Centre, Ltd.*, 2023 IL 129067, and *Nord v. Residential Alternatives of Illinois, Inc.*, 2023 IL App (4th) 220669. Plaintiff's reliance on *Clanton* and *Nord* is misplaced. Those cases turned on broad "termination upon death" provisions that did not carve out arbitration. In *Clanton*, the supreme court held the entire contract "ceased to exist, including the forum provision," where termination was triggered by death and no survival language preserved arbitration, even for accrued claims. *Clanton*, 2023 IL 129067, ¶¶ 32-35. In *Nord*, the appellate court applied the same logic to a nursing-home discharge at death. *Nord*, 2023 IL App (4th) 220669, ¶¶ 47-48. The present case does not involve a "termination upon death" provision. Therefore, *Clanton* and *Nord* are distinguishable.

¶ 46 In support of its position, plaintiff relies on paragraph 13 of the parties' contract. As noted earlier, paragraph 13 allows the Buyers to terminate the contract "at any time, without cause, *provided Buyer pays the Termination Fee* (as herein defined)." (Emphasis added.) Paragraph 13 further provides:

> "Upon any termination, the Contract shall be deemed null and void (except for those provisions which specifically survive any termination of the Contract), and both Airoom and the Buyer shall be deemed to have expressly waived any and all rights hereunder against each other relating to the Contract, *except for Airoom's right to receive the Termination Fee*." (Emphasis added.)

Plaintiff argues that under paragraph 13's plain language, once the contract was terminated, the entire contract, including the arbitration provision, ceased to exist. We disagree. When he terminated the contract, Marek requested a full refund of payments made to Airoom. Airoom calculated a termination fee. Plaintiff then brought suit, arguing, *inter alia*, that it sustained ascertainable losses, including "prepayments," "withheld refunds," "inflated charges for services not performed," "loss of payments," "financial injury," "funds retained without justification," and "converted funds." Therefore, the termination fee is central to plaintiff's claims, and arbitration to determine the termination fee is contemplated by the language in paragraph 13, as italicized above. Under these circumstances, we reject the contention that the arbitration provision "ceased to exist" when Marek terminated the contract.

¶ 47 4. Waiver

¶ 48 Finally, plaintiff argues that even if enforceable, Airoom waived arbitration by submitting substantive issues to the court and declining to move to compel arbitration after obtaining leave. We find this issue waived by plaintiff's April 6, 2026, motion. In that motion, plaintiff requested the trial court to enter an order directing Airoom "not to take further action [in the arbitration case against Buyers], or any other arbitration proceeding arising from the arbitration clause at issue in this action unless and until it moves to compel arbitration here or otherwise obtains relief from this Court permitting it to proceed." In response, at the hearing on April 30, 2026, the trial court directed Airoom "to bring a motion to compel arbitration." Airoom then filed its motion to compel arbitration. This record demonstrates that, at plaintiff's request, the court directed Airoom to file a motion to compel arbitration, which Airoom then filed and the court granted. Nothing compelled plaintiff to make this demand. Plaintiff cannot now complain because its actions induced this result. See *In re Detention of Swope*, 210 Ill. 2d 210, 217 (2004) ("[A] party cannot complain of

error which that party induced the court to make or to which that party consented."); see also *Illinois Concrete-I.C.I., Inc. v. Storefitters, Inc.*, 397 Ill. App. 3d 798, 803 (2010) (holding that the defendants waived their right to arbitration by demanding that the plaintiff bring suit on its mechanic's lien).

¶ 49 Regardless, we find this argument unpersuasive. Illinois courts favor using arbitration as a matter of settling disputes. *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill. App. 3d 504, 507 (2005) (noting that because public policy concerns favor arbitration, courts disfavor a finding of waiver by a party). Nevertheless, a contractual right to arbitrate may be waived when a party's conduct is inconsistent with its right to arbitrate, indicating abandonment of that right. *Westlake Services LLC*, 2025 IL App (1st) 241383, ¶ 18. A party acts inconsistently with its right to arbitrate when it places substantive issues before the court prior to attempting to invoke arbitration. *Watkins v. Mellen*, 2016 IL App (3d) 140570, ¶ 15. Whether a substantive issue was placed before the court depends on the type of issue raised and not the form of the document used to raise it. *Watkins*, 2016 IL App (3d) 140570, ¶ 15. In determining waiver, courts also consider (1) the moving party's conduct, (2) the party's delay in proclaiming the right to arbitrate, (3) any prejudice to the nonmoving party, and (4) whether the parties incorporated a no-waiver provision in their arbitration agreement. *Westlake Services LLC*, 2025 IL App (1st) 241383, ¶ 18. Whether a party has waived its right to arbitration is a legal question, which we review *de novo*. *Rathje v. Horlbeck Capital Management, LLC*, 2014 IL App (2d) 140682, ¶ 40.

¶ 50 Plaintiff argues that Airoom repeatedly acted inconsistently with its purported right to arbitrate for several reasons. First, plaintiff asserts that Airoom (1) filed a section 2-619.1 motion to dismiss that raised multiple substantive issues and (2) invoked judicial procedures by filing a jury demand, litigating a motion to disqualify plaintiff's counsel, agreeing to a Rule 218 case

management order, and seeking a protective order against merits discovery. Second, plaintiff claims that Airoom's course of conduct demonstrates a lack of diligence in pursuing arbitration. Third, plaintiff contends that Airoom's delay required plaintiff to expend substantial time and resources litigating for months in the trial court. Plaintiff concludes that, viewed cumulatively, Airoom's substantive litigation, use of judicial procedures, prolonged delay, and express decision not to compel arbitration demonstrate waiver.

¶ 51 Initially, we reject plaintiff's claim that Airoom's conduct was inconsistent with its purported right to arbitration. Illinois courts have found that a party abandons its right to arbitration by filing substantive pleadings prior to invoking an arbitration clause. See *Glazer's Distributors of Illinois, Inc. v. NSW-Illinois, LLC*, 376 Ill. App. 3d 411, 425-26 (2007) (finding right to arbitrate waived where party filed complaint without mentioning arbitration and sought complete relief before the trial court to resolve the underlying dispute); *Atkins v. Rustic Woods Partners*, 171 Ill. App. 3d 373, 378-79 (filing a motion to dismiss complaint for failure to state a cause of action without raising arbitration clause constituted waiver); *Gateway Drywall & Decorating, Inc. v. Village Construction Co.*, 76 Ill. App. 3d 812, 816-17 (1979) (filing an answer without asserting the right to arbitrate constitutes waiver). In contrast, courts have concluded that a party does not abandon its right to arbitrate by filing a pleading referencing the arbitration agreement or a responsive pleading suggesting preservation of an arbitration agreement. See *Stearns v. Newby*, 2024 IL App (5th) 240677-U, ¶ 25 (filing a motion to dismiss or, in the alternative, to compel arbitration); *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1174-75 (2008) (holding there was no waiver of an arbitration agreement where the parties did not conduct any discovery and the defendant did not file pleadings other than pleadings that were responsive to the plaintiff's claims); *Jenkins*, 356 Ill. App. 3d at 508 (finding no waiver where the defendants

first filed a motion for summary judgment asserting arbitration as the exclusive remedy for disputes between the parties and later filed an answer specifically raising the court's lack of jurisdiction as an affirmative defense); *Kessler, Merci, & Lochner, Inc. v. Pioneer Bank & Trust Co.*, 101 Ill. App. 3d 502, 509 (1981) (filing an answer including the affirmative defense of the arbitration agreement). We find this case more akin to the latter cases. Here, in its motion to dismiss, Airoom noted that it had initiated arbitration against Buyers but was not seeking to compel arbitration against plaintiff "as [plaintiff] is clearly not the correct party in interest." Airoom added, however, that it was "not waiving its right to file a motion to compel arbitration." In addition, Airoom initiated arbitration proceedings against Buyers. By filing a motion to dismiss challenging whether plaintiff was the correct party in interest and stating that it was preserving its right to file a motion to compel arbitration while also initiating arbitration proceedings against Buyers, we conclude that Airoom's conduct was not inconsistent with its right to arbitrate.

¶ 52 Moreover, we do not find that Airoom's course of conduct demonstrated a lack of diligence in pursuing arbitration or that any purported delay resulted in prejudice to plaintiff. Any delay between the filing of plaintiff's complaint and defendant's motion to compel arbitration resulted from the fact that plaintiff brought suit against Airoom on a contract that it was not a party to. See *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 537 (1986) (finding relevant to the analysis whether the party asserting waiver contributed to the delay in asserting the right to arbitrate). Moreover, Airoom filed its motion to compel on May 21, 2026, less than a month after the trial court's April 30, 2026, hearing granting plaintiff's request to require Airoom to move to compel arbitration. For the same reasons, we reject plaintiff's contention that Airoom's purported delay required plaintiff to expend substantial time and resources litigating for months in the trial court.

¶ 53 B. Motion to Stay

¶ 54 Plaintiff also argues that the trial court erred in denying its motion to stay because Airoom has no enforceable right to arbitrate against either plaintiff or its assignors (Buyers). In support, plaintiff asserts that if Airoom's motion to compel is denied on any of the bases argued above, Airoom will have failed to establish an enforceable right to arbitrate issues under the contract, whether against plaintiff or Buyers. Thus, plaintiff posits, its motion to stay should have been granted. Having rejected plaintiff's arguments against enforceability, termination, and waiver, we likewise reject the motion to stay, because Airoom has an enforceable right to arbitrate and plaintiff's claims fall within the arbitration clause as modified.

¶ 55 III. CONCLUSION

¶ 56 For the reasons set forth above, we affirm the judgment of the circuit court of Lake County.

¶ 57 Affirmed.