2023 IL App (5th) 220211-U

NO. 5-22-0211

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| COPPER BEND PHARMACY, INC., d/b/a Copper Bend Pharmacy; MEMORIAL PILL BOX, INC., d/b/a John Kross Pharmacy; AMERICAN PHARMACY OF IL, INC., d/b/a Alwan Pharmacy; HUDSON PHARMACY GROUP, INC., d/b/a Hudson Drug Shop; KREMER PHARMACY, INC., d/b/a Kremer Pharmacy; MORTON ALWAN PHARMACY, LLC; PHARMACY PLUS, INC., d/b/a Pharmacy Plus Inc.—Carrollton, Pharmacy Plus, Inc.—Roodhouse, and Pharmacy Plus, Inc.—Whitehall; CARLINVILLE HEALTH & PRESCRIPTIONS, INC., d/b/a Sullivan Drugs; JONES DRUG STORE, INC., d/b/a Jones Drug Store; TWIN CITY PHARMACY, INC., d/b/a Twin City Pharmacy; DISCOUNT DRUGS OF MS, LLC, d/b/a Ackerman Discount Drugs; MISSISSIPPI DISCOUNT DRUGS, LLC, d/b/a Mississippi Discount Drugs and Mississippi Discount Drugs #2; MOSBY'S DRUG STORE, LLC, d/b/a Mosby's Drug Store; KEAVENY DRUG, INC., d/b/a Keaveny Drug; SOUTHPEAKE ENTERPRISES, INC., d/b/a Newman Family Pharmacy; REED PHARMACIES, LLC, d/b/a Oakwood Apothecary and Dicks Pharmacy; ADIRONDACK PHARMACY, INC., d/b/a Adirondack Pharmacy; H&H PHARMACY, INC., d/b/a Dr. Ike's Pharmacy #1; C. BROWNE, INC., d/b/a Browne's Pharmacy; ROPAT, INC., d/b/a East Hills Family Pharmacy; ELGIN DISCOUNT PHARMACY, INC., d/b/a Elgin Discount Pharmacy; FIVE POINTS PHARMACY OF COCOA, LLC, d/b/a Five Points Pharmacy and Wellness; RNE DRUGS, LLC, d/b/a Forshag's Drug Store; GRAND PLAZA PHARMACY, INC., d/b/a Grand Plaza Pharmacy; HAHNEMANN APOTHECARY, INC., d/b/a Hahnemann Apothecary; HARBOR DRUG, INC., d/b/a Harbor Drug #2; HIGH MOUNTAIN CORP., d/b/a Ludlow Pharmacy; MIKE'S FAMILY | ) | Appeal from the Circuit Court of St. Clair County. |

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| PHARMACY, INC., d/b/a Mike's Family Pharmacy; NEW CARE, INC., d/b/a New Care Pharmacy; RIVER STREET PHARMACY, INC., d/b/a River Street Pharmacy; SRUTHI SWAROOP PHARMACY, INC., d/b/a Rutland Pharmacy; SCHMIDT & SONS PHARMACY OF TECUMSEH, INC., d/b/a Schmidt & Sons Pharmacy of Tecumseh; SPRINGFIELD PHARMACY, INC., d/b/a Springfield Pharmacy; SUNSHINE PHARMACY, d/b/a Sunshine Pharmacy Services; MEDICINE CABINET OF MADISONVILLE, LLC, d/b/a The Medicine Cabinet; MISH, INC., d/b/a The Medicine Shoppe-Lebanon; KIMAR CORP., d/b/a The Medicine Store; TIOGA DRUGS CO., d/b/a Tioga Drug; VALENTINE PHARMACY, INC., d/b/a Valentine Pharmacy; 5 GUYS RX, LLC, d/b/a WellCreek Pharmacy—Bethalto; TOCANE, LLC, d/b/a Whitestone Pharmacy; WOLFE'S PHARMACY; WOODLYN PHARMACY, INC., d/b/a Woodlyn Pharmacy; PARIS CLINIC PHARMACY INC.; and PEARMAN PHARMACY INC., | ) | |
| Plaintiffs-Appellees, | ) | |
| v. | ) | No. 20-L-396 |
| OPTUMRX, Successor by Merger to Catamaran Corporation, and OPTUMRX, In Its Own Right, | ) | Honorable Heinz M. Rudolf, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE VAUGHAN delivered the judgment of the court.
Justice McHaney* concurred in the judgment.
Justice Cates dissented.

**ORDER**

¶ 1 *Held*: The circuit court's order denying defendant's motion to compel arbitration is reversed where plaintiffs' claims are based on contracts containing arbitration clauses that are enforceable when unconscionable parts are severed.

*Justice Wharton heard oral argument on this case. Upon his retirement, Justice McHaney was substituted and has reviewed the record, briefs, and audio recording of the oral argument.

¶ 2 Defendant, OptumRx, as successor to Catamaran Corporation, and in its own right, (Optum) appeal the circuit court's order denying their motion to compel arbitration and to dismiss. We reverse.

¶ 3 I. BACKGROUND

¶ 4 On July 24, 2020, plaintiffs, consisting of 48 independent pharmacies in 14 states, filed an eight-count first amended complaint against defendant Optum. Count I alleged breach of Provider Manual contracts (California and Illinois UCC). Count II alleged breach of contract—Provider Manuals. Count III alleged breach of good faith and fair dealing—MAC Appeals. Count IV claimed *quantum meruit* (in the alternative). Count V alleged violations of State MAC laws, State Any Willing Provider Laws, and Laws Against Retroactive Adjustments. Count VI alleged unfair competition pursuant to Business & Professions Code §§ 17200 *et seq*. (California Pharmacies). Count VII alleged violation of Virginia Code § 38.2-3407.7 and § 38.2-3407.15.3 (Virginia Pharmacies). Count VIII alleged violation of Louisiana Rev. Stat. § 22:1863 *et seq*. (Louisiana Pharmacies).

¶ 5 The counts were based on how Optum, a pharmaceutical benefit manager (PBM), "unilaterally determines how much plaintiffs are paid for the generic drug prescriptions they provide to customers." Plaintiffs claimed that, beginning on January 1, 2012, through the present, Optum set unreasonably low reimbursement rates called maximum allowable cost (MAC) price reimbursement rates for generic drug prescriptions dispensed by plaintiffs "based on irrelevant, inapplicable, and/or outdated pricing data, or, in some cases, no pricing data at all, in breach of the Provider Manual contract," thereafter listing seven specific reimbursement violations stemming from the Provider Manual (Provider Manual or PM).

¶ 6 A general explanation of the parties and their relationship, based on the complaint allegations, follows. Optum, as a PBM, contracts with various health insurance companies to administer drug benefit programs on behalf of the insurance company. The PBMs typically use intermediaries known as pharmacy services administrative organizations (PSAOs) to contract with the pharmacies to dispense prescription drugs to the plan members of those insurance companies. The PBM enters into a Provider Agreement (PA) with the PSAO. The PSAO then recruits pharmacies to enroll in the PBM network of providers. According to plaintiffs, "[o]nce enrolled, the Plaintiffs [are] allowed access to the Provider Manuals from [Optum], which governs the terms of the relationship between Plaintiffs and [Optum]." Plaintiffs noted that Optum annually updated the Provider Manuals and stated "[e]ach Plaintiff enrolled in [Optum's] network of pharmacies, received a Provider Manual from Catamaran and Optum, and began to participate in [Optum's] program for that PSAO's pharmacy members." Plaintiffs further stated that the PM "sets forth in writing the terms of the business relationship between Plaintiffs and [Optum] and functions as the contract, even though they are never signed by any Plaintiff." Plaintiffs further alleged that it was the PMs issued by Optum, as well as those issued by Catamaran Corporation (prior to merging with Optum on July 24, 2015), that were the basis of plaintiffs' complaint. Portions of the 2012 and 2013 Catamaran PMs and the 2016 and 2020 OptumRx PMs addressing the MAC were attached to the complaint.

¶ 7 On August 21, 2020, Optum filed a motion to compel arbitration as well as a motion to dismiss plaintiffs' first amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020)) or, in the alternative, section 2-619 of the Code (*id.* § 2-619). The motion to compel addressed plaintiffs' reliance on the PMs as the basis for their complaint and stated each PM contained an arbitration provision expressly requiring that "any and

all issues and/or disputes" between the parties be submitted to mandatory arbitration. Optum further alleged that in addition to the PM arbitration clause, the PAs also contained a mandatory arbitration clause to arbitrate "any and all issues and/or disputes" between the parties or "any disputes" that arise during the term of the agreement. Optum urged the circuit court to compel arbitration pursuant to the Federal Arbitration Act because under both documents, plaintiffs "unequivocally agreed to arbitrate each of the causes of action" asserted in the first amended complaint.

¶ 8 On August 24, 2020, Optum filed a memorandum of law in support of its motion to compel arbitration and motion to dismiss. With regard to the motion to compel arbitration, Optum again argued that plaintiffs alleged the PM was a contract between them and Optum and that the PMs mandated arbitration of all claims asserted in the complaint as did the PAs. The memorandum was supported by the declaration of Josh Van Ginkel, a senior director of network contracting at Optum, which provided: (1) the affiliations of each plaintiff to each PSAO, (2) which plaintiffs contracted directly with Optum, and (3) copies of the arbitration clauses for the applicable PA and PMs for this matter. The declaration further stated that each PM was incorporated into the PA, and that in the event of a conflict between the PM and the PA, the PM prevailed. Van Ginkel's declaration further provided that the governing law was California for the Optum PM and Illinois for the Catamaran PMs, that the 2013 and 2014 Catamaran PMs contained no arbitration clauses, and that the Catamaran and Optum PMs contained arbitration clauses after 2015.

¶ 9 Citing 9 U.S.C. § 2, defendant's memorandum argued that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq*. (2018)) governed the claim, and pursuant to the FAA, an arbitration clause in a contract "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." The remainder of the memorandum cited federal

law addressing any doubts regarding arbitration and the resolution in favor of arbitration. Optum further noted that it would be inequitable to allow plaintiffs to rely on the PM for the basis of their complaint but deny the arbitration agreement contained therein. The memorandum clarified that the PAs involving Catamaran and TriNET or Optum and AmeriSource Bergen did not have arbitration agreements; however, the PMs for the pharmacies involved with those PAs did contain an arbitration clause. No PA could be found for Tioga Drugs Co., but Tioga Drugs had a PM with an arbitration clause.

¶ 10 On November 16, 2020, plaintiffs filed a memorandum in opposition to defendant's motion to compel arbitration. The memorandum argued that the motion to compel arbitration must be denied because the arbitration clauses in the PMs did not apply to claims accrued prior to their enactment and, therefore, no claims prior to July 24, 2015, could be arbitrated because an arbitration clause cannot be retroactively applied under California law, citing *Avery v. Integrated Healthcare Holdings, Inc.*, 218 Cal. App. 4th 50, 159 Cal. Rptr. 3d 444 (2013). Plaintiffs also argued that the court must determine the arbitrability of its claims based on the PM arbitration clause language that included language allowing for judicial intervention if a portion of the clause was "unlawful, invalid, or unenforceable." Plaintiffs argued that reference to the American Arbitration Association (AAA) rules did not mean the parties clearly and unmistakably delegated the arbitrability decisions to the arbitrator. Plaintiffs contended the circuit court should determine state law challenges regarding unconscionability challenges and claimed the post-2015 Optum PM clause was both procedurally and substantively unconscionable under California law, based on the costs associated with the arbitration, the requirement that each claim be individually arbitrated, a documentary hearing, limited discovery, the location, and the lack of mutuality related to the arbitration. Plaintiffs further argued the arbitration clause was hidden and inconspicuous within an

adhesion contract. Similar arguments were presented regarding the pre-merger Catamaran arbitration clause and the SXC clause[1] under Illinois law. Plaintiffs also argued that the PA arbitration clauses were not applicable. Attached to the memorandum were 35 declarations from the corporate officers and/or owners of the pharmacies. The declarations claimed, *inter alia*, the pharmacies: (1) never saw the contracts between Optum and the PSAO; (2) never signed any PA; (3) were never provided, never saw, and were unaware of any PM; (4) never signed any PM; (5) were not allowed to negotiate any term in the PM; (6) were unaware of the arbitration requirement found therein; and (7) averred the costs associated with the arbitration were unaffordable.

¶ 11 On November 16, 2020, plaintiffs also filed a declaration from their attorney, Mark Cuker, addressing the costs associated with another arbitration involving different pharmacies and Optum (*BTBKMK d/b/a Olexy Pharmacy et al. v. OptumRx f/k/a Catamaran*, AAA Arb. Case No. 01 17 0004 4740 (*BTBK*)). Cuker's declaration stated the *BTBK* arbitration required a $7000 administration fee to initiate the arbitration and that the AAA rules, involving three arbitrators, required an initial fee of $4000 and a final fee of $3850. Cuker further declared that the pharmacies in the *BTBK* arbitration were required to pay $26,548.47 to have the arbitrator address a single motion. Documents attached to the declaration confirmed the minimum price ($7850) for a three-arbitrator arbitration. Additional documents revealed that the procedural history related to the arbitration involving the single motion originally stemmed from a demand for arbitration filed by 7 pharmacies who were also plaintiffs along with 22 other pharmacies in the federal action filed in the United States District Court case, *Albert's Pharmacy et al. v. Catamaran*, No. 3:15-cv-00290-MEM, pending in the Middle District of Pennsylvania. After the federal judge compelled

[1]Catamaran was previously known as SXC Health Solutions.

arbitration for 28 of the 29 plaintiffs therein, the *BTBK* arbitration consisted of 28 pharmacies. The single motion referenced by Cuker was a motion to consolidate an additional 483 pharmacies with the 28 pharmacies in the *BTBK* arbitration. Of those 483 pharmacies, 400 were plaintiffs in a different federal case pending in the same jurisdiction (*Robert D. Mabe, Inc. et al. v. OptumRx*, No. 3:17-cv-01102-MEM). After interpreting the arbitration clause language, the arbitrator ultimately sustained the objection to consolidate and issued an order denying consolidation of the arbitrations.

¶ 12 Cuker's declaration was further supported by a memorandum issued by the federal judge in *Lakeview Pharmacy of Racine, Inc. v. Catamaran*, No. 3:15-cv-00290-MEM (M. Dist. Penn Sept. 28, 2017) (previously *Albert's Pharmacy et al. v. Catamaran*, No. 3:15-cv-00290-MEM prior to granting the motion to compel). The memorandum granted Catamaran's motion to quash Lakeview's subpoenas that were served on Catamaran's clients. Cuker's declaration was also supported by Optum's reply brief filed with the California Fourth Appellate Court, Third Division in *OptumRx v. Prescription Care Pharmacy, LLC*, Civil Appeal No. G057279, in which Optum argued that the contract in effect at the time of the claim accrual applied and did not apply retroactively. Plaintiff's memorandum in opposition to Optum's motion to compel arbitration was further supported by the declaration of Richard Miller, another of plaintiffs' attorneys, which stated the hourly rate of an experienced healthcare law AAA arbitrator on the West coast was at least $750 to $1000.

¶ 13 On January 8, 2021, plaintiffs filed a supplemental submission in opposition to the motion to compel arbitration. The submission consisted of additional declarations from corporate officers of six of the plaintiff pharmacies that were substantially similar to those addressed above. The submission also contained a declaration from Amy Aydinalp, who was employed by Optum's

parent company, United Health Group, which provided the costs Optum previously paid in two AAA arbitrations. One had current arbitration costs over $34,000, and the other had current arbitration costs over $55,000. Aydinalp's declaration stated the AAA estimate of panel compensation and costs in the first case was $246,858 and $260,200 in the second case.

¶ 14 On January 15, 2021, plaintiffs submitted a second supplemental filing that included documents from the circuit court ruling in *Oxnard Drug & Thomas Shilton Corp. v. OptumRx Inc.*, issued by the Superior Court of California, Ventura County, case No. 5-2018-00515296. That ruling found that arbitration clauses did not exist for some of those plaintiffs since no arbitration clause existed prior to 2015.

¶ 15 On February 25, 2021, plaintiffs filed a third supplemental submission, consisting of a declaration from the co-owner of one of the plaintiff pharmacies that was substantially similar to those set forth above. The submission also contained a minute order from another California case, *Prescription Care Pharmacy, LLC v. OptumRx*, No. 30-2018-01014006-CU-BC-CJC; the superior court of Orange County found Optum's arbitration clause, at issue therein, unconscionable.

¶ 16 Plaintiff filed a fourth supplemental submission on June 28, 2021, providing an order denying the motion to compel in *Platt, LLC et al. v. OptumRx, Inc.*, issued by the superior court of California, Alameda County, in case No. RG20074100. The submission also included an additional declaration from plaintiffs' attorney filed in opposition to a motion to compel arbitration in *OptumRx v. Copper Bend et al.*, No. 8:20-cv-2145 (S. D. Cal.) that stated amendments to the 2020 Optum PM arbitration clause (a different version than the one herein) were effective September 17, 2020, but were not communicated to the pharmacies until "months later" on December 11, 2020. Cuker's second declaration also noted that PSAO, AmerisourceBergen, specifically bargained for the removal of the arbitration clause in the Elevate PA contracts based

on Van Ginkel's April 15, 2021, deposition testimony in *Platt.* Attached to Cuker's declaration was (1) the transcript from Josh Van Ginkel's April 15, 2021, deposition in *Platt*; (2) Van Ginkel's December 30, 2020, declaration in *Platt*; (3) portions of the 2020 Optum 4th edition PM which contained new language for the alternative dispute resolution provision; (4) Van Ginkel's February 11, 2021, declaration filed in *Prescription Care Pharmacy, LLC v. OptumRx*, No. 30-2018-01014006-CU-BC-CJC, Superior Court of California, Orange County, that stated at paragraph 10, "OptumRx negotiates pharmacy network agreements with independent pharmacies and has, on occasion, eliminated arbitration provisions from the pharmacy network agreement altogether. *** [A]n example of such a contract is attached as Exhibit 1 hereto"; and (5) copies of the notices that were faxed to the pharmacies when the PM was amended on May 6, 2019, January 1, 2020, June 3, 2020, September 3, 2020, and December 11, 2020. The December 11, 2020, notice included the new alternative dispute resolution language (not applicable here).

¶ 17 On January 6, 2022, Optum filed a reply in support of its motion to compel arbitration. The reply argued, *inter alia*, that the arbitration clause in the PM applied to all claims, including those accrued prior to the 2015 merger because the language "all disputes" was all encompassing and contained no time limitations; the PM arbitration clause was neither procedurally nor substantively unconscionable; pursuant to agency principles, the PAs also required arbitration of plaintiffs' claims, whether they were independently contracted pharmacies or if they contracted with Optum through a PSAO; and even if the court found that agency did not apply, the pharmacies' ratification of the PA would require arbitration. The reply stated the court should not rely on cases submitted by plaintiffs, *i.e.*, claims regarding employment or consumer plaintiffs, and the court must compel arbitration of any claims that were arbitrable. On January 7, 2022, Optum filed complete copies of the 2013-2015 Catamaran and 2015-2020 Optum PMs.

¶ 18 On January 12, 2022, plaintiffs filed an amended fifth supplement consisting of two additional pharmacy owner declarations that were substantially similar to those addressed above. The supplement also included a published decision in *De Leon v. Pinnacle Property Management Services, LLC*, 72 Cal. App. 5th 476, 287 Cal. Rptr. 3d 402 (2021), addressing substantively unconscionable arbitration clauses based on discovery limitations. On January 20, 2022, the parties provided arguments in support of their positions regarding both the motion to compel arbitration as well as the motion to dismiss.

¶ 19 On March 28, 2022, the circuit court issued an order denying Optum's motion to compel arbitration. The order found that Optum could not establish an agreement to arbitrate with any of the plaintiffs that were under the Elevate PAs because the Elevate-Optum PA had no arbitration clause and that language prevailed over the arbitration clause in the PM. The Elevate claimants included: American Pharmacy of IL, Inc.; Hudson Pharmacy Group, Inc.; Morton Alwan Pharmacy, LLC; Jones Drug Store, Inc.; Twin City Pharmacy, Inc.; Kremer Pharmacy, Inc.; Discount Drugs of MS, LLC; Mosby's Drug Store, LLC; Reed Pharmacies, LLC d/b/a Dicks Pharmacy; Reed Pharmacies, LLC d/b/a Oakwood Apothecary; Five Points Pharmacy of Cocoa, LLC; Mish Inc.; 5 Guys Rx, LLC; Woodlyn Pharmacy, Inc.; Paris Clinic Pharmacy Inc.; Pearman Pharmacy Inc.; Schmidt & Sons Pharmacy of Tecumseh, Inc.; and Mississippi Discount Drugs, LLC.

¶ 20 The circuit court's order also found that the relevant PM for each claim was the PM in effect at the time of accrual and denied Optum's claim of retroactivity. Therefore, any claims that accrued prior to the merger on July 25, 2015, were not subject to the Optum PM arbitration clause and could not be required to participate in arbitration for those claims. Similarly, any claims accrued under the pre-2015 Catamaran PM were excluded for the same reason.

¶ 21 The circuit court's order also found that the TriNet Catamaran PA was similar to the Elevate-Optum PA and failed to contain any arbitration clause. Therefore, the court found the six TriNet pharmacies, consisting of Pharmacy Plus, Inc.—Carrollton; Pharmacy Plus, Inc.—Roodhouse; Pharmacy Plus, Inc.—Whitehall; Keaveny Drug, Inc.; Copper Bend Pharmacy, Inc.; and Reed Pharmacies LLC d/b/a Dicks Pharmacy, were not required to arbitrate any claims that accrued prior to July 25, 2015, under that PA. The court also found since no PA was found for Tioga Drugs, it was not required to arbitrate any of its pre-July 25, 2015, claims either.

¶ 22 Thereafter, the circuit court determined that the FAA allowed arbitration clauses to be challenged under state law for unconscionability, and such determination must be made by the court. After addressing the unconscionability standard in California, the circuit court found the Optum PM arbitration clause was procedurally unconscionable because it was oppressive, noting the pharmacy owners' declarations that they were never provided with the PM for their review or acceptance, or given notice of any changes, and were forced to "take it or leave it." The court also, citing *Prescription Care Pharmacy, LLC v. OptumRx, Inc.*, 2020 WL 4932554, at *5-6, found the PM arbitration clause was procedurally unconscionable because it was on page 119; did not tell the pharmacy they would have to pay for half the cost of arbitration as required by the AAA Commercial Disputes rules; and the clause was 14 paragraphs long, confusing, opaque, and riddled with contradictions. The court also noted Optum's conflicting interpretations (in two different courts) regarding retroactivity of the arbitration clause and found the arbitration clause procedurally unconscionable because Optum could unilaterally change the arbitration clause without notice.

¶ 23 The circuit court also found the Optum PM arbitration clause was substantively unconscionable due to limits on discovery and trial, the costs of arbitration, the ban on joinder that

would potentially lower the costs of arbitration, the lack of mutuality regarding the duty to arbitrate, and the required arbitration forum being in California. Thereafter, the court found the arbitration clause could not be severed because it was "permeated with unconscionability."

¶ 24 The circuit court found the Optum PA arbitration clauses were also procedurally unconscionable for similar reasons. The court also found Optum failed to demonstrate an enforceable agreement to arbitrate pursuant to the Catamaran PAs because plaintiffs were not parties subject to the Catamaran clause, the agreement was not enforceable under principles of agency, and the terms were never communicated to plaintiffs. The remainder of the order addressed Optum's motion to dismiss, and granted dismissals with prejudice for counts I and IV and without prejudice for count V. Optum timely appealed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, Optum argues that the circuit court erred by failing to compel arbitration under the PMs because it did not enforce the arbitration agreement's delegation clause, did not apply the arbitration clause to the claims that already accrued, and found the arbitration clause unconscionable, yet refused to sever the unenforceable provisions. In the alternative, Optum argues that the circuit court erred by failing to compel arbitration under the PAs. The pharmacies urge affirmation of the circuit court's order.

¶ 27 A. Initial Issues

¶ 28 Optum's first argument contends the circuit court's denial of its motion to compel arbitration was in error because the arbitration clause designated arbitrability to the arbitrator both in the PM arbitration clause language as well as the arbitration clause's reliance on the AAA rules. In response, plaintiffs argued that Optum failed to argue reliance on the AAA rules before the circuit court, and never argued that the circuit court did not have authority to address arbitrability

and that Optum was collaterally estopped from presenting this argument because a California appellate court (*Prescription Care Pharmacy, LLC v. OptumRx*, 2020 WL 4932554 (Cal. App. 4th 2020)) previously found the language in the arbitration clause did not clearly and unmistakably delegate such authority.

¶ 29 Upon review of the record, plaintiffs are correct in noting Optum's failure to present arguments regarding either the AAA rules or the court's authority to determine arbitrability to the circuit court. Although our parameters for analysis with regard to the Optum PM language are based on California law, adherence to our supreme court rules is still required. Illinois courts have repeatedly held that arguments not raised in the circuit court are forfeited and may not be raised for the first time on appeal. See *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004) ("it is 'axiomatic that questions not raised in the trial court are deemed [forfeited] and may not be raised for the first time on appeal' " (quoting *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 500 (1985))). As such, we find Optum forfeited any argument regarding reliance on the AAA rules for delegation of arbitrability.

¶ 30 Plaintiffs' reliance on *Prescription Care Pharmacy, LLC v. OptumRx*, 2020 WL 4932554 (Cal. App. 4th 2020), as well as numerous other unpublished decisions, is equally concerning despite their contention on appeal that reliance on this unpublished decision is appropriate based on principles of "offensive non-mutual collateral estoppel." In Illinois, citation to an Illinois unpublished decision is prohibited except in certain situations. Ill. S. Ct. R. 23 (eff. Feb. 1, 2023). Similarly, California court rules prohibit reliance on, or citation to, an unpublished decision. See Cal. Rules of Court, Rule 8.1115(a) ("Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action."). Section (b)

provides exceptions, one of which states a party may cite or rely on an unpublished opinion "when the opinion is relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel." Cal. Rules of Court, Rule 8.1115(b)(1).

¶ 31 While plaintiffs claim reliance on the basis of "offensive non-mutual collateral estoppel" in this appeal, the only statement presented to the circuit court on the issue of collateral estoppel was in a footnote, which provided no argument, or declarative statement, as to why collateral estoppel (say nothing of offensive non-mutual collateral estoppel) applied. "Substantive arguments may not be made in footnotes ***." *People ex rel. Department of Labor v. General Electric Co.*, 347 Ill. App. 3d 72, 87 (2004). As no argument regarding collateral estoppel was presented to the circuit court, we find plaintiffs' argument here, along with reliance on *Prescription Care Pharmacy, LLC* (and any other noncitable case), was forfeited.[2] *Stokovich*, 211 Ill. 2d at 121.

¶ 32 B. Arbitrability

¶ 33 An order to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal under Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017). *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001). "In a petition to compel arbitration *** the moving party, in essence, requests specific performance of a contractual agreement to arbitrate the controversy." *Green v. Mt. Diablo Hospital District*, 207 Cal. App. 3d 63, 69, 254 Cal. Rptr. 689 (1989). Where there is no evidentiary hearing, the underlying facts are not in dispute, and the court's decision is based on a purely legal analysis, our review is *de novo*. *Fahlstrom v. Jones*, 2011 IL App (1st) 103318, ¶ 13. Upon review of the record, it is apparent that no evidentiary hearing was held, and the circuit court's findings and decision were based on construction of the arbitration clause. As such, our review is *de novo.*

[2]In addition to *Prescription Care Pharmacy, LLC*, the circuit court relied on three other noncitable decisions. For the reasons as set forth above, we will not rely on these decisions either.

¶ 34 Illinois has a "strong public policy in favor of enforcing arbitration agreements." *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 47 (2006). Similarly, California also "has a strong public policy in favor of arbitration, arbitration agreements should be liberally interpreted[,] and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question." *Vianna v. Doctors' Management Co*., 27 Cal. App. 4th 1186, 1189, 33 Cal. Rptr. 188 (1994). "Doubts as to whether an arbitration [provision] applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *Id.*; see also *Moses H. Cone Hospital v. Mercury Construction Corp*., 460 U.S. 1, 24-25 (1983). Section 2 of the FAA states:

> "A written provision in *** a contract *** to settle by arbitration a controversy thereafter arising out of such contract or transaction *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract ***." 9 U.S.C. § 2 (2018).

¶ 35 "A recurring question under § 2 is who should decide whether 'grounds … exist at law or in equity' to invalidate an arbitration agreement." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008). Typically, in deciding whether a party must be compelled to arbitrate under the FAA, the court first considers (1) whether the parties are bound by a given arbitration clause (arbitrability) and, if so, (2) whether the particular dispute falls within the scope of that valid agreement (scope). See *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83-84 (2002). However, an arbitration agreement may contract gateway issues, including arbitrability, scope, and in some instances, enforceability due to alleged unconscionability, to the arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc*., 586 U.S. ___, ___, 139 S. Ct. 524, 529 (2019) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-70 (2010); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1985)).

¶ 36 The question of arbitrability, *i.e.*, whether the parties are bound by a particular arbitration clause, is " 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' " *Howsam*, 537 U.S. at 84 (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986)). "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, [citations] *** the question [of] 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (Emphasis in original.) *Kaplan*, 514 U.S. at 943. When a contract delegates arbitrability to an arbitrator, courts must give full meaning to that delegation and refrain from passing on any issues of arbitrability. *Schein*, 586 U.S. at ___, 139 S. Ct. at 529-30. Such respect must prevail even "if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.' " *Id.* at ___, 139 S. Ct. at 528.

¶ 37 In order to determine whether arbitrability was delegated to the arbitrator, we must first determine which arbitration clauses are applicable to the case before us. Optum relies on both the PA and the PM arbitration clauses. With regard to the PA, the record linked every pharmacy to a PA; however, the PA is signed by the PSAO, not the pharmacy. As such, an agency relationship must be established to bind plaintiffs to the PAs because the plaintiffs repeatedly rejected any agency relationship with the PSAOs that would bind them to the language in the PAs.

¶ 38 While Optum argued the pharmacies were bound to the PAs due to an agency relationship, the basis for the relationship was not well enunciated before the circuit court. In the initial motion to compel, no argument regarding the underlying basis of the agency agreement was presented. Optum's reply in support of its motion to compel was slightly more forthcoming as it claimed each of the independently contracted plaintiff pharmacies, *i.e.*, Keaveny Drug #203, Keaveny Drug, Browne's Pharmacy, Kimar Corp., and The Medicine Store, directly entered into the PAs with

Optum. However, these contracts did not involve PSAOs and have no relevance regarding any agency relationship. As to the remainder of plaintiffs, Optum merely stated that the PSAOs were "their agents" relying solely on the allegations in plaintiffs' first amended complaint that stated plaintiffs "deal" with Optum through PSAOs or that the PSAOs "act as intermediaries" between pharmacies and Optum. No argument, and more specifically, no evidence, as to why the PSAOs were the agents of the pharmacies, was presented to the circuit court.

¶ 39 On appeal, Optum argues that the agency relationship is shown by the language in the PA; however, no such argument was presented to the circuit court and is forfeited here. *Stokovich*, 211 Ill. 2d at 121. Therefore, we hold that Optum failed to present sufficient evidence of any agency relationship between the PSAOs and plaintiffs, and therefore the PA language is relevant only for the five plaintiff pharmacies listed above that signed independent contracts with Optum.

¶ 40 As to the PMs, plaintiffs alleged that the terms of the PM were contractual—despite their lack of signature—and were seeking to enforce the terms of the PM in their complaint. Optum agreed plaintiffs were contractually bound under the PM. Therefore, we hold the only applicable arbitration clauses are those contained within the PMs and those contained in the PAs signed by the five plaintiff pharmacies listed above. Under the FAA, the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

¶ 41 1. Retroactivity of the PM Arbitration Clauses

¶ 42 All of the 2015 PMs, and each subsequent variant issued thereafter, are governed by California law, and contain an arbitration clause. The 2012, 2013, and 2014 Catamaran PMs did not contain an arbitration clause; however, Optum argues that the current PM language in the Optum 2020 PM applies retroactively to any disputes stemming from the prior PMs. In support,

Optum relies on *Salgado v. Carrows Restaurants, Inc.*, 33 Cal. App. 5th 356, 361, 244 Cal. Rptr. 3d 849 (2019), *Desert Outdoor Advertising v. Superior Court*, 196 Cal. App. 4th 866, 877, 127 Cal. Rptr. 158 (2011), *Henderson v. U.S. Patent Comm'n, Ltd*., 2015 WL 6791396, at *3 (N.D. Ill. Nov. 2, 2015), and *In re Currency Conversion Fee Antitrust Litigation*, 265 F. Supp. 2d 385, 407 (S.D.N.Y. 2003).

¶ 43 Plaintiffs disagree and state the arbitration clauses cannot be retroactively applied. Plaintiffs first argue that Optum should be precluded from making this argument because it previously argued in other litigation (*Prescription Care Pharmacy, LLC v. OptumRx, Inc*., 2020 WL 4932554 (Cal. App. 4th 2020)) that the clauses were not retroactive.[3] Plaintiffs also rely on *Avery v. Integrated Healthcare Holdings, Inc*., 218 Cal. App. 4th 50 (2013), *Cobb v. Ironwood Country Club*, 233 Cal. App. 4th 960, 183 Cal. Rptr. 3d 282 (2015), and an unpublished, noncitable California appellate court decision.

¶ 44 In *Salgado*, the court found that "the 'contention that an agreement to arbitrate a dispute must pre-date the actions giving rise to the dispute is misplaced. Such a suggestion runs contrary to contract principles which govern arbitration agreements.' " *Salgado*, 33 Cal. App. 5th at 361 (quoting *Zink v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 13 F.3d 330, 332 (10th Cir. 1993)). The court found the language clear and consistent with the presumption favoring arbitration particularly when the arbitration clause was broad and contained no limitation or restriction based on the age of the claim. See *id*. at 362. The courts in *Desert Outdoor Advertising*, 196 Cal. App. 4th at 877, *Henderson*, 2015 WL 6791396, at *3, and *In re Currency Conversion Fee Antitrust*

[3]Plaintiffs' argument regarding Optum's change in position is not well taken. The court in *Prescription Care Pharmacy* found "that *all* of plaintiff's claims are arbitrable under the terms of the 2015 Provider Manual." (Emphasis in original.) *Prescription Care Pharmacy*, 2020 WL 4932554, at *7. Given that the court's holding was contrary to that of Optum's argument, Optum's changed argument in this case would be expected and is warranted.

*Litigation*, 265 F. Supp. 2d at 407, all applied the same contractual interpretation addressing broad language that encompassed the dispute at issue, even when the arbitration agreement was signed after the dispute arose.

¶ 45 Conversely, the court in *Avery* declined to apply alternative dispute resolution language in a new employee handbook to the employee's wage and hours claims that accrued prior to the issuance of the employer's new handbook. *Avery*, 218 Cal. App. 4th at 62. In *Avery*, the court's denial was based on the implied covenant of good faith and fair dealing. *Id*. at 61-63. The court noted that Avery's claims had already accrued, and she had already filed a class action complaint against her employer at the time the new handbook (that included language precluding class actions against the employer) was issued. *Id.* at 62.

¶ 46 The court in *Cobb* also relied on the covenant of good faith and fair dealing and found that it prohibited a party from making unilateral changes to an arbitration agreement that applied retroactively to "accrued or known" claims because doing so would unreasonably interfere with the other party's expectations regarding how the agreement would be applied to those claims. *Cobb*, 233 Cal. App. 4th at 966. Because Ironwood's arbitration bylaw was enacted after the "dispute *** had not only accrued but was already being litigated in court by the time the arbitration bylaw became effective," the court found the new bylaw "violated the covenant of good faith and fair dealing" and "exceeded the proper source of its amendment power." *Id.* There was "no basis to infer that plaintiffs *agreed in advance* to be bound by such an attempt," noting there was "nothing in the language of either bylaws generally, or this specific amendment, that state[d] it is *intended* to have such a retroactive effect." (Emphases in original.) *Id.* at 966-67.

¶ 47 We find instructive the analysis in *Franco v. Greystone Ridge Condominium*, 39 Cal. App. 5th 221, 252 Cal. Rptr. 3d 149 (2019), addressing the same cases relied upon by the parties

herein. In *Franco*, the employees of Greystone were "presented with and asked to sign an agreement requiring that each employee agree to submit to final and binding arbitration '[a]ny and all claims ... relating to any aspect of ... employment with Employer (pre-hire through post-termination).' " *Franco*, 39 Cal. App. 5th at 223. Ten days later, Franco filed a complaint against Greystone and others asserting employment-related claims. *Id*. Two days after that, Franco signed the arbitration agreement and returned it to Greystone. *Id*. Greystone filed a motion to compel arbitration in the litigation, and Franco objected stating the arbitration agreement failed to expressly state that already accrued claims, including those in Franco's complaint, were subject to arbitration. *Id*. The circuit court denied the motion based on *Avery* and *Cobb*. *Id.* at 226.

¶ 48 On appeal, the circuit court's decision was reversed after the reviewing court found the agreement language was "clear, explicit, and unequivocal with regard to the claims subject to it" and contained "no qualifying language limiting its applicability to claims that had yet to accrue." *Id*. at 223-24. The analysis was based on review of the arbitration clause language, the policy favoring arbitration, as well as the similarities to *Salgado*, noting the language in the agreement was clear and explicit and contained no limitation or restriction based on the age of covered claims. *Id*. at 229-30. The court found the agreement used "any and all claims" language and also referred to pre-hire claims reasonably supporting the interpretation that the agreement applied "to *all* claims, whether they had already accrued, or not, at the time the Agreement was executed." (Emphasis in original.) *Id*. at 230. The court distinguished *Avery* and *Cobb*, finding both cases were based on a unilateral modification that was applied to a preexisting claims and or litigation, without notice of the modification. *Id.* at 232.

¶ 49 With this background we consider the arbitration language found in the 2015 Optum PM[4] which stated:

"M. Alternative dispute resolution

Other than with respect to issues giving rise to immediate termination hereof or non-renewal hereof, the parties will work in good faith as set forth below to resolve any and all issues and/or disputes between them (hereinafter referred to as a 'Dispute') including, but not limited to all questions of arbitrarily [*sic*], the existence, validity, scope, interpretation or termination of the Agreement or PM or any term thereof prior to the inception of any litigation or arbitration.

In the event a Dispute arises, the party asserting the Dispute shall provide written notice to the other party identifying the nature and scope of the Dispute to the other party sufficient for a reasonable person to be apprised thereof. If the parties are unable to resolve the Dispute within thirty (30) days after such notice is provided, then either party may request in writing a meeting or telephone conference to resolve the Dispute. At any such meeting or telephone conference, both parties shall have present its President, Vice President, Chief Financial Officer or Chief Officer. Either party may commence a Dispute Resolution in accordance with the rest of this section (or litigation if both parties waive arbitration) only if a representation of the party seeking to commence such litigation or arbitration certifies in writing that one of the following is true: (i) the Dispute was not resolved after faithfully following the procedures set forth above in this section or (ii) the

[4]After Optum merged with Catamaran in 2015, the Optum PMs were the applicable manuals used to submit claims and receive payment from Optum. The language in the Optum PMs issued after this date is nearly identical to that in the 2015 Optum PM. Therefore, if the 2015 PM language is sufficient to encompass the Catamaran claims based on either the pre-2015 or 2015 Catamaran PMs, the Optum PM language would encompass all the claims filed in this matter.

other Party to the dispute did not fully comply with the procedures set forth above in this section.

If the party asserting the Dispute has satisfied the requirements of this section thereof, it shall thereafter be submitted to binding arbitration before a panel of three (3) arbitrators in accordance with the Commercial Dispute Procedures of the American Arbitration Association, as they may be amended from time-to-time (www.adr.org). All arbitrators must have at least ten (10) years of legal experience in the area of healthcare law.

Any arbitration proceeding under this Agreement shall be conducted in Los Angeles County or Orange County, California. Unless otherwise agreed to in writing by the parties, the party wishing to pursue the Dispute must initiate the arbitration within one (1) year after the date on which notice of the Dispute was given or shall be deemed to have waived its right to pursue the Dispute in any forum.

The arbitrators may construe or interpret, but shall not vary or ignore the terms of this Agreement and shall be bound by controlling law. The arbitrator(s) will decide if any inconsistency exists between the rules of the applicable arbitral forum and the arbitration provisions contained herein. If such inconsistency exists, the arbitration provisions contained herein will control and supersede such rules.

Each party hereby consents to a documentary hearing for all arbitration Claims, by submitting the dispute to the arbitrator(s) by written briefs and affidavits, along with relevant documents; however arbitration claims will be submitted by way of an oral hearing, if any party requests an oral hearing within forty (40) days after service of the

Claim and the party remits the appropriate deposit for fees, as well as the arbitrator compensation within ten (10) days of making the request.

Discovery permitted in any arbitration proceeding commenced hereunder is limited as follows: No later than forty (40) days after the filing and service of a Claim for arbitration, the parties will exchange detailed statements setting forth the facts supporting the Claim(s) and all defenses to be raised during the arbitration and a list of all exhibits, as well as witnesses. In the event any party requests an oral hearing, no later than twenty-one (21) days prior to the oral hearing, the parties will exchange a final list of all exhibits, as well as all witnesses, including any designation of any expert witness(es) together with a summary of their testimony; a copy of all documents to be introduced at the hearing.

Notwithstanding the foregoing, in the event of the designation of any expert witness(es), the following will occur: (i) all information and documents relied upon by the expert witness(es) will be delivered to the opposing party; (ii) the opposing party will be permitted to depose the expert witness(es); (iii) the opposing party will be permitted to designate rebuttal expert witness(es); and (iv) the arbitration hearing will be continued to the earliest possible date that enables the foregoing limited discovery to be accomplished.

The arbitrators will have no authority to award punitive, exemplary, indirect, special damages or any other damages not measured by the prevailing party's actual damages and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Agreement.

The parties expressly intend that any dispute relating to the business relationship between them be resolved on an individual basis so that no other dispute with any third party(ies) may be consolidated or joined with the Dispute. The parties agree that any

arbitration ruling by an arbitrator allowing class action arbitration or requiring consolidated arbitration involving any third party(ies) would be contrary to their intent and would require immediate judicial review of such ruling.

If the Dispute pertains to a matter which is generally administered by certain Administrator procedures, such as a quality improvement plan, the policies and procedures set forth in that plan must be fully exhausted by Administrator before Administrator may invoke any right to arbitration under this section.

The decision of the arbitrator(s) on the points in Dispute will be binding and judgment on the award may be entered in any court having jurisdiction thereof. The parties acknowledge that because this Agreement affects interstate commerce the Federal Arbitration Act applies.

In the event that any portion of this section or any part of this Agreement is deemed to be unlawful, invalid or unenforceable, such unlawfulness, invalidity or unenforceability shall not serve to invalidate any other part of this section or this Agreement. In the event any court determines this arbitration proceeding is not binding or otherwise allows litigation involving a dispute to proceed, the parties hereby waive any and all right to trial by jury in or with respect to such litigation, such litigation would instead proceed with the judge as the finder of fact.

For purposes of clarity, only the arbitration provisions in this section shall apply to any Network Pharmacy Provider terminations or other determinations made as to a Network Pharmacy Provider's status as a participating Network Pharmacy Provider in the Administrator network, pursuant to the NPEC review process as stated in the PM. The laws of the State of California and the laws of the United States (U.S.) applicable therein will

govern as to the interpretation, validity and effect of the Agreement, the PM and any addendums.

This section shall survive any termination of this Agreement."

¶ 50 The 2015 Optum PM arbitration language was substantially similar to the 2015 Catamaran PM language; however, the language in both was a substantial change from the 2012-2014 Catamaran PM language that contained no arbitration language. Despite the Catamaran PM language, we classify the 2015 Optum PM arbitration language as a unilateral modification due to merger and consider whether the implied duty of good faith and fair dealing addressed in *Avery* and *Cobb* was breached.

¶ 51 Plaintiffs' initial complaint was filed in May 2020. *Copper Bend Pharmacy, Inc. v. OptumRx, Inc.*, 2021 IL App (5th) 210083-U, ¶ 4. Despite reliance on *Avery* and *Cobb*, plaintiffs presented no declaration, or any evidence, indicating that any accrued claim existed, or more importantly, that Optum was aware of any accrued claim, at the time the 2015 Optum PM was issued. Instead, plaintiffs submitted, in their fourth supplemental submission, a declaration from Joshua Van Ginkel that stated:

"Following the acquisition of Catamaran in 2015, the ORX [OptumRx] PM became the operative provider manual. Attached hereto as Exhibit 9 is a true and correct copy of the notification that OptumRx sent to all participating pharmacies via FaxBlast[5] following the acquisition of Catamaran, informing them that OPX PM was now the operative provider manual."

[5]A "FaxBlast communication" is defined in the PM as one that is "[s]ent electronically to the contracted network entity *** via facsimile *** or email, which include *** general announcements, Provider Manual updates and Pharmacy Plan Specifications."

¶ 52 Considering the notice provided to plaintiffs following the 2015 merger in conjunction with the lack of evidence indicating awareness of any accrued claim, or pending litigation, at the time the announcement regarding the new 2015 PM was issued, we cannot find any breach of the implied covenant of good faith and fair dealing. This conclusion is further supported by the evidence revealing that plaintiffs continued to utilize Optum's network after the merger by submitting claims and receiving reimbursement pursuant to the terms of the 2015 (and subsequent) Optum PMs.

¶ 53 Here, the arbitration clause addressed "any and all issues and/or disputes" including "arbitrability, the existence, validity, scope, interpretation or termination of the Agreement or PM or any term thereof prior to the inception of any litigation or arbitration." The only exceptions were those involving "immediate termination" or "non-renewal." Language of this breadth has previously been sufficient to apply the arbitration clause retroactively. See *Salgado*, 33 Cal. App. 5th at 360-62; *Desert Outdoor Advertising*, 196 Cal. App. 4th at 877; and *Franco*, 39 Cal. App. 5th at 229-32. As such, we hold that the 2015 Optum PM, as well as the subsequent revisions thereto in 2016, 2017, 2018, 2019, and 2020 (prior to the amended 2020 Optum PM that altered the alternative dispute resolution paragraph language after this litigation was commenced), applies to each of the plaintiffs herein.

¶ 54 Now that the applicable contract language has been determined, we address whether the Optum PM alternative dispute resolution language delegated arbitrability to the arbitrator. The first sentence of the provisions states that the parties will "work in good faith *** to resolve any and all issues and/or disputes between them (hereinafter referred to as a 'Dispute') including, but not limited to all questions of arbitrability, the existence, validity, scope, interpretation or termination of the Agreement or PM or any term thereof prior to the inception of any litigation or arbitration."

The language further states in paragraph three that if the "Dispute" is not resolved in the pre-arbitration manner set forth in the PM, the parties would submit the dispute "to binding arbitration before a panel of three (3) arbitrators in accordance with the Commercial Dispute Procedures of the American Arbitration Association, as they may be amended from time-to-time (www.adr.org)."

¶ 55 The Commercial Arbitration Rules delegate jurisdiction to the arbitrator for issues related to the existence, scope, validity, and arbitrability of the agreement. AAA Commercial Arbitration Rules, R-7(a). Reliance on the AAA rules has been found sufficient to delegate jurisdiction to the arbitrator for issues related to the existence, scope, validity, and arbitrability. *Rodriguez v. American Technologies, Inc*., 136 Cal. App. 4th 1110, 1123, 39 Cal Rptr. 3d 437 (2006); *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 557, 21 Cal. Rptr. 3d 322 (2004); *Preston v. Ferrer*, 552 U.S 346, 362-63 (2008). While one portion of the PM states that arbitration would proceed in accordance with the Commercial Dispute Procedures of the American Arbitration Association, the PM acknowledges potential conflict between the AAA Rules and the PM stating, in such instance, "the arbitration provisions contained herein will control and supersede such rules."

¶ 56 Here, the first sentences of the arbitration clauses indicate that all issues or disputes, including "*questions of arbitrability*," would be addressed in "good faith" by the parties in the pre-arbitration phase (emphasis added). While this language limits the clause to instances "prior to the inception of any litigation or arbitration," unless the parties were determining which issue would be delegated to the arbitrator, the language would have no relevance or meaning in the context presented. As such, we find the language within the arbitration clause conflicts with the absolute delegation found in the AAA rules. Because the PM language states that the agreement language

is given priority over the AAA Rules, we cannot find that the issue of arbitrability was clearly and unmistakably delegated to the arbitrator.

¶ 57 Therefore, the questions of arbitrability and scope in this case requires judicial determination. *Howsam*, 537 U.S. at 84. In California, this inquiry first requires a determination of "whether there is an enforceable agreement between the parties" and, second, whether the claims are covered by the agreement. See *Omar v Ralphs Grocery Co*. 118 Cal. App. 4th 955, 961, 13 Cal. Rptr. 3d 562 (2004). The first "gateway" inquiry, *i.e*., whether there is an enforceable agreement, addresses claims of unconscionability. *Balandran v. Labor Ready, Inc*., 124 Cal. App. 4th 1522, 1530, 22 Cal. Rptr. 3d 441 (2004) (citing *Omar*, 118 Cal. App. 4th at 961).

¶ 58 2. Unconscionability

¶ 59 " 'A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability ***.' " *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___, ___, 142 S. Ct. 1906, 1917 (2022) (quoting *Kindred Nursing Centers L. P. v. Clark*, 581 U.S. 246, 251 (2017), quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "There are two types of validity challenges under § 2 [of the FAA]: 'One type challenges specifically the validity of the agreement to arbitrate,' and '[t]he other challenges the contract as a whole ***.' " *Jackson*, 561 U.S. at 70 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). "[O]nly the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable." *Id.* In California, a finding of unenforceability requires a finding of both procedural and substantive unconscionability. *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 125 (2019). Here, plaintiffs argued that the Optum arbitration clause was both procedurally and substantively unconscionable and, under California's "sliding scale" of unconscionability (see *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83, 114,

99 Cal. Rptr. 2d 745 (2000)), was unenforceable. Under the "sliding scale" both procedural and substantive unconscionability "need not be present in the same degree." *Id.* "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

¶ 60 a. Procedural Unconscionability

¶ 61 A finding of "procedural unconscionability requires oppression or surprise." *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223, 247, 145 Cal. Rptr. 3d 514 (2012). "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise [occurs] where the allegedly unconscionable provision is hidden within a prolix printed form." (Internal quotation marks omitted.) *Id.*

¶ 62 i. Oppression

¶ 63 The plaintiffs first argued that the Optum and Catamaran PMs were "oppressive contract[s] of adhesion" evidencing a lack of negotiation. "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (Internal quotation marks omitted.) *Armendariz*, 24 Cal. 4th at 113. Plaintiffs' argument was based on declarations from the corporate officers or owners of the pharmacies that were essentially identical, except for the pharmacy profits and salaries listed therein. The declarations stated plaintiffs "had never seen" a PM from Catamaran or Optum, never received a PM from Catamaran or Optum, never "negotiated" with Optum or Catamaran regarding the contents of the PM, and had "recently been advised" that the Catamaran and Optum PMs contained an arbitration clause. Those declarations, however, were controverted by plaintiffs' allegations in the first amended complaint which stated that once the plaintiffs were enrolled by the PSAOs, they were "allowed

access to the Provider Manuals" and that "[e]ach Plaintiff *** received a Provider Manual from Catamaran and Optum."

¶ 64 A contract of adhesion is fully enforceable according to its terms unless it violates the " 'reasonable expectations of the weaker or "adhering" party' " or is " 'unduly oppressive or "unconscionable." ' " *Armendariz*, 24 Cal. 4th at 113 (quoting *Graham v. Scissor-Tail, Inc*., 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604 (1981)). As noted by the United States Supreme Court, "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346-47. With regard to the declarations, each plaintiff stated they never negotiated with Optum regarding the language in the PMs. However, again, the declaration is controverted by the testimony of Josh Van Ginkel—submitted by the plaintiffs—that revealed the PSAOs negotiated on behalf of plaintiffs and those negotiations were incorporated into the PAs. Plaintiffs' declarations were further undermined by Cuker's supplemental declaration, originally filed in *Copper Bend et al. v. Optum*, No. 8:20-cv-02145-FLA-JDE (C. Dist. Cal.), that stated at least one PSAO "specifically bargained for the elimination of the arbitration clause from Optum's template contract." The AmerisourceBergen PA contract submitted by Van Ginkel includes language, unlike most of the other PAs, that states the PA language controlled over that of the PM. While the terms of the PM include an arbitration clause, there was evidence submitted by the plaintiffs that revealed the PSAO's negotiations could, and did in at least one instance, negate provisions of the PM. This evidence undermines any alleged lack of negotiation traditionally associated with adhesion contracts; however, given the fact that less than 10 provisions of the over-100-page PM were ever modified, we agree the PM contract would constitute one of adhesion.

¶ 65 While plaintiffs argued they had "no choice" but to join with Optum, such argument is undermined, again by their own evidence. This evidence revealed that Optum had a market share

of 21-25%. None of the submitted evidence showed plaintiffs did not have access to the other PBMs, which leads us to infer that plaintiffs could have signed with any other PBM constituting the remaining 75-79% of the market share. The lack of evidence to demonstrate why plaintiffs had no meaningful choice in signing with Optum as opposed to another PBM precludes a finding of no meaningful choice. As such, we do not find oppression.

¶ 66 The dissent takes issue with our inference and claims it is speculative and unsupported by the record. However, the claim of a 25% market share came directly from plaintiffs and was supported by citation. The reduction to 21% came from defendant utilizing the same (updated) source. Neither party disputed the values. As the party opposing arbitration, it was plaintiffs' burden (see *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal. 4th 394, 413, 58 Cal. Rptr. 875 (1996)) to rebut any inference created by its own evidence; however, none was presented. The rationale presented by the dissent is nearly identical to the argument presented by plaintiffs; however, plaintiffs produced no evidence in support of that argument either. As such, we continue to find the argument uncompelling.

¶ 67 ii. Surprise

¶ 68 Plaintiffs' remaining procedural unconscionability contention relates to surprise. Plaintiffs argue the arbitration clause is procedurally unconscionable because it is "hidden and inconspicuous." The argument is based on the fact that the arbitration clause is found on pages 119-120 of a 156-page document (2017 Optum PM) and claims Optum failed to prove that the PMs were ever seen by the plaintiffs. In support, plaintiffs rely on *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 7 Cal. Rptr. 3d 267 (2003), *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412 (N.D. Cal. 2015), and *Flinn v. CEVA Logistics U.S., Inc.*, 2014 WL 4215359.

¶ 69 We find plaintiffs' reliance on these cases is misplaced as they are easily distinguishable. For example, *Gutierrez* involved 8-point font on the back of a vehicle lease. *Gutierrez*, 114 Cal. App. 4th at 89. *Saravia* involved an employment arbitration clause written in English and a plaintiff who did not speak or read English well as his native language was Spanish, and there was nothing in the text to call attention to the arbitration clause. *Saravia*, 310 F.R.D. at 416, 420. *Flinn* also involved an employment arbitration clause that was part of a 51-page "Agreement for Leased Equipment and Independent Contractor Services" which he was required to sign or be "terminated," and there was nothing in the agreement to draw his attention to the provision as it was neither in bold nor underlined. *Flinn*, 2014 WL 4215359, at *1, *9.

¶ 70 Here, while the Optum PM was lengthy, the contract between two businesses did not involve an employee or a consumer.[6] California is protective of employees and consumers. See *Armendariz*, 24 Cal. 4th at 110-11; *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 956-58, 216 Cal. Rptr. 3d 627 (2017). Additionally, the Optum PM contained a table of contents listing "Alternative Dispute Resolution" with a corresponding page number where information related to this topic could be found. While the Optum PMs alternative dispute resolution language was located toward the back of the PM, the table of contents clearly revealed the location where the information was located, and the table of contents was found at the beginning of each PM. Similar provisions, also in lengthy documents, have been held not to establish procedural unconscionability. See *Uptown Drug Co. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1182 (N.D. Cal. 2013); see also *Torrecillas v. Fitness International, LLC*, 52 Cal. App. 5th 485, 493, 266 Cal. Rptr. 3d 181 (2020) ("The 2008 arbitration agreement has no elements of surprise. It was but three pages long and was

[6]While *Flinn* would also appear to be between two businesses, ultimately, it was determined that Flinn was an employee, not an independent contractor. *Flinn*, 2014 WL 4215359, at *7.

in a conventional font. Its title, in large and bold font, was in plain English[.] *** Neither was the 2013 employment agreement surprising. It too was in conventional font [and] [t]he pertinent heading was underlined[.]"). As such, we disagree that the language is "hidden or inconspicuous" and further find that the table of contents including a section for alternative dispute resolution found at the beginning of each such PM undermines any contention of surprise. Further decreasing any likelihood of surprise is the fact that each subsequent PM issued by Optum contained the same, or nearly identical, table of contents along with the same, or nearly identical, alternative dispute resolution language as that found in the 2015 versions. See *Bigler v. Harker School*, 213 Cal. App. 4th 727, 737, 153 Cal. Rptr. 3d 78 (2013) (finding no surprise where a provision was not new or different from previous versions).

¶ 71 Nor do we find any merit in plaintiffs' claim that Optum failed to prove that the pharmacies saw, let alone acknowledged, the PMs. As noted above, the plaintiffs' declarations supporting this claim were controverted by the first amended complaint allegations stating Optum provided each pharmacy access to the PM once they were enrolled in the Optum network. Plaintiffs further alleged that the PMs provided the "terms of the business relationship" between the pharmacies and Optum, that included the terms related to how the pharmacy claims would be submitted, how Optum would reimburse the pharmacies, and included the language regarding the MAC at issue in the plaintiffs' first amended complaint. In order to claim a deficient reimbursement based on a MAC, as claimed by plaintiffs, the pharmacies had to submit claims to Optum in the manner described in the PM. As plaintiffs point to no other document that provides the necessary claim submission information, we find plaintiffs' first amended complaint is sufficient evidence of the plaintiffs' possession and awareness of the PM contents. See *Castillo v. Barrera*, 146 Cal. App.

4th 1317, 1324-26, 53 Cal. Rptr. 3d 494 (2007) (repeated factual allegations in the complaint were judicial admissions).

¶ 72 Upon consideration of procedural unconscionability claims presented by plaintiffs, we find the underlying PM between the pharmacies and Optum were, in part, adhesion contracts. However, we do not find this classification strongly supports a finding of oppression because the evidence revealed that both plaintiffs, as well as the PSAOs, were able to modify or remove some of the PM terms via language in the PAs. Further, plaintiffs failed to establish a lack of meaningful choice given Optum's percentage of market share so as to classify the terms as unduly oppressive. Nor do we find the arbitration terms so difficult to locate within the PM that they could be classified as a surprise. Although we found the PM was an adhesion contract, the level of adhesion was low considering the evidence revealing the PM could be modified. Further, the remaining procedural issues raised by plaintiffs failed to support their claims of either oppression or surprise. As such, we find the degree of procedural unconscionability related to the PM arbitration terms to be *de minimis*; however, since there is some, we must also consider plaintiffs' claims of substantive unconscionability.

¶ 73 b. Substantive Unconscionability

¶ 74 "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 912, 190 Cal. Rptr. 3d 812 (2015). Because the low threshold of procedural unconscionability was met, we also consider whether the arbitration terms were so substantively unconscionable to preclude arbitration thereunder. Substantive unconscionability focuses on the terms of the agreement and whether those terms are "overly harsh or one-sided." (Internal quotation marks omitted.) *Id*. at 910.

¶ 75 Plaintiffs' arguments before the circuit court claimed the Optum arbitration provisions were substantively unconscionable "because it (1) unreasonably limits discovery; (2) deprives Plaintiffs of a trial with witnesses; (3) prevents Plaintiffs with similar claims from consolidating their claims in arbitration to avoid multiplication of effort and waste of time; (4) causes arbitration to be prohibitively expensive; (5) requires most Plaintiffs to litigate in a venue more than a thousand miles away; and (6) is not mutual." As such, we consider each.

¶ 76 i. Limited Discovery

¶ 77 With regard to discovery, the Optum clause states that

> "[n]o later than forty (40) days after the filing and service of a Claim for arbitration, the parties will exchange detailed statements setting forth the facts supporting the Claim(s) and all defenses to be raised during the arbitration and a list of all exhibits, as well as witnesses."

For claims involving an oral hearing,

> "no later than twenty-one (21) days prior to the oral hearing, the parties will exchange a final list of all exhibits, as well as all witnesses, including any designation of any expert witness(es) together with a summary of their testimony; a copy of all documents to be introduced at the hearing." In the event an expert witness is designated "(i) all information and documents relied upon by the expert witness(es) will be delivered to the opposing party; (ii) the opposing party will be permitted to depose the expert witness(es); (iii) the opposing party will be permitted to designate rebuttal expert witness(es); and (iv) the arbitration hearing will be continued to the earliest possible date that enables the foregoing limited discovery to be accomplished."

¶ 78 Plaintiffs contend that its "price discrimination claims are extremely prejudiced without evidence of what [Optum] pays large chain pharmacies and its own mail order." Plaintiffs further contend that "[p]roof of [Optum's] violation of the MAC provisions requires some evidence of what wholesale pricing data [Optum] used to set the MAC price." Plaintiffs argue this information is solely within Optum's possession and the clause provides plaintiffs with no opportunity to obtain the documents they need to arbitrate their claims. We note, however, the arguments are supported solely by the language delineating the discovery limitations in the arbitration clause and not by any declaration or evidence submitted by plaintiffs in support of its claim that the information was solely within Optum's possession or necessary to prove its price discrimination claims.

¶ 79 "[C]ounsel's arguments are not evidence." *Maudlin v. Pacific Decision Sciences Corp.*, 137 Cal. App. 4th 1001, 1015, 40 Cal. Rptr. 3d 724 (2006). " 'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Cal. Evid. Code § 140 (eff. Jan. 1, 1967). Here, as in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), there has been no showing that the limited discovery allowed in the arbitration clause is insufficient. As noted therein, "[a]lthough those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' " *Id.* at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). With no factual support for its argument, we must reject plaintiffs' contention.

¶ 80 ii. Prohibitive Costs

¶ 81 Plaintiffs also argued that the arbitration clause language requiring three arbitrators with 10 years' health law experience was prohibitively expensive. In support, plaintiffs rely on the

declaration of plaintiffs' counsel, Mark Cuker. The declaration is based on his representation of plaintiffs in *BTBKMK d/b/a Olexy Pharmacy et al. v. OptumRx f/k/a Catamaran* (*BTBK*), which commenced to arbitration. The declaration stated that plaintiffs paid a $7000 "administrative fee" and the arbitrator charged $1095 per hour. In dealing with Optum's objection to a single motion in the *BTBK* arbitration, plaintiffs share of the arbitrator's billing was $26,548.47. The remainder addresses how plaintiffs attempted to lower the costs and Optum's objections thereto as well as the advertised rates for three arbitrator arbitration under the AAA minimum initial filing fee of $4400 and a final filing fee of $3850. The declaration also addressed AAA's "hardship policy" and stated it only covered "administrative fees" not arbitrator fees. A separate declaration from another of plaintiffs' counsels, Richard Miller, declared that based on his communications with AAA, the cost of an experienced healthcare arbitrator in the West Coast area would charge "at least $750 to $1000 an hour, or more, per arbitrator."

¶ 82 The exhibits attached to the declaration confirmed the minimum rates for three-arbitrator arbitration with the AAA, but also revealed that 28 plaintiffs were initially involved in the *BTBK* arbitration that Cuker relied upon in addressing costs. The arbitrator's order on the "single motion" revealed that subsequent to the start of the *BTBK* arbitration, 483 additional plaintiffs attempted to join and add new claims to the *BTBK* arbitration, and 400 of those same additional plaintiffs filed suit in a separate case filed in the United States District Court of the Middle District of Pennsylvania. Here, the arbitration clause specifically limits arbitration on an "individual basis" and prohibits other claims from consolidation or joinder. As such, the likelihood of the arbitrators being required to address a "single motion" involving over 500 plaintiffs as contended by Cuker's declaration is very low.

¶ 83 Plaintiffs also rely on the following cases: *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205, 207 Cal. Rptr. 3d 473 (2016), *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77 (2003), *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (Cal. 2015), *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1580, 98 Cal. Rptr. 3d 743 (2009), *Trompeter v. Ally Financial, Inc.*, 914 F. Supp. 2d 1067 (N.D. Cal. 2012), and *Chavarria v. Ralphs Grocer Co.*, 812 F. Supp. 2d 1079, 1088 (C.D. Cal. 2011), in support of their argument. First, citing *Green Tree*, 531 U.S. 79, plaintiffs claim that "[s]tate courts can invalidate arbitration agreements which 'saddle' the plaintiff with 'prohibitive costs.' " Such a claim, however, is not supported by the citation. The *Green Tree* Court stated, "The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

¶ 84 We further note that Randolph in *Green Tree*, as in each of the other cases cited by plaintiffs, is a consumer or an employee, not a business. See *id.* at 82 (mobile home purchaser); *Penilla*, 3 Cal. App. 5th at 209 ("low-income" mobile homeland renters); *Gutierrez*, 114 Cal. App. 4th at 83 (vehicle purchaser); *Trompeter*, 914 F. Supp. 2d at 1070 (vehicle purchaser); *Sanchez*, 61 Cal. 4th at 906 (vehicle purchaser); *Chavarria*, 812 F. Supp. 2d at 1081 (employee at grocery store who alleged wage and hour violations). Further, while plaintiffs contended the parties being forced into arbitration in *Parada* were "professional investors" and claim this is a "business" case, *Parada* reveals the petitioners therein were two schoolteachers, a driver for Federal Express, and a school custodian. *Parada*, 176 Cal. App. 4th at 1560. Here, the case involves multiple professional businesses with no evidence that any of the owners or corporate officers were unsophisticated. The difference is significant because California and the Ninth Circuit limit arbitration fees for employees who are mandated to arbitration pursuant to the terms of an

employment agreement. See *Cole v. Burns International Security Services*, 105 F.3d 1465, 1484-85 (9th Cir. 1997); *Armendariz*, 24 Cal. 4th at 108-09. Employer-mandated arbitration clauses may "not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum" for statutory claims. *Armendariz*, 24 Cal. 4th at 102. The doctrine was expanded to employer-mandated arbitration of tort claims for wrongful discharge "to ensure minimum standards of fairness in arbitration so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum." *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1080, 130 Cal. Rptr. 2d 892 (2003). Two years later, however, the court refused to extend the doctrine to "common law claims generally" and declined to extend the doctrine to insurance disputes. *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 507-08, 30 Cal. Rptr. 3d 787 (2005). Similarly, in *McGill*, 2 Cal. 5th at 961, the California Supreme Court declined to enforce arbitration agreement language that waived a consumer's right to file for injunctive relief.

¶ 85 Here, while there is evidence that plaintiffs' attorney and Optum have participated in arbitrations that were expensive, the fees related to the arbitration were split, which was consistent with California's default rule for arbitration. See Cal. Code. Civ. Proc. § 1284.2 (West 2020). The rule states:

> "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit." *Id.*

¶ 86 Further, while the pharmacy declarations state that they were "informed that the costs for a single arbitration are likely to be $50,000 to $100,000 or more," the record is devoid of any invoices or evidence related to single pharmacy arbitration to support such contention. As noted above, the costs related to the *BTBK* arbitration involved 28 pharmacies. Similarly, the costs associated with Optum's other arbitrations as declared by Amy Aydinalp involved more than one pharmacy as noted by the "et al." after the initial pharmacy in the caption.

¶ 87 The AAA's rates, as submitted by plaintiffs, are based on the amount of the claim. However, no claim amount was provided by plaintiffs beyond the unverified request for damages in excess of $50,000 for each plaintiff in the prayer for relief which failed to contain the corresponding Rule 222(b) affidavit (Ill. S. Ct. R. 222(b) (eff. Jan. 1, 2011)). Indeed, plaintiffs conceded they could not "quantify their claims" yet and stated it was "premature to ask them to show that the costs are prohibitive compared to the amounts in controversy."

¶ 88 Plaintiffs' evidence—specifically, AAA's document entitled *Parties and Counsel: Make Commercial Arbitration More Efficient and Less Expensive*—revealed the two greatest factors increasing the costs of arbitration were discovery costs and motion practice. Here, plaintiffs complain about the discovery limitations imposed by the arbitration clause yet submit evidence revealing that additional discovery would only increase the cost. Additional documents from the AAA submitted by plaintiffs indicated that AAA had hardship exemptions related to filing fees as well as a "streamlined" process for three-arbitrator panel arbitrations. No evidence was submitted revealing that either of these options were unavailable.

¶ 89 In California, the court considers the party's ability to pay, which can be expressed as a net worth, at the time the agreement was signed. *Monex Deposit Co. v. Gilliam*, 671 F. Supp. 2d 1137, 1145-46 (C.D. Cal. Nov. 24, 2009). Despite plaintiffs' failure to correlate the declarative

statements within the applicable time period the contracts were signed with the minimum payment requirement of $8250 for three-arbitrator arbitration, our review of the record reveals that five pharmacies (5 Guys Rx, LLC; H&H Pharmacy; Hudson Pharmacy Group, Inc.; Mississippi Discount Drugs; and Memorial Pill Box, Inc. d/b/a John Kross Pharmacy[7]) provided no financial information. An additional 19 pharmacies (American Pharmacy of IL d/b/a Alwan Pharmacy; Ropat; Jones Drug Store; Kimar Corp.; Morton Alwan Pharmacy; Medicine Cabinet of Madisonville LLC; RNE Drugs, Inc. d/b/a Forshag's Drug Store; Twin City Pharmacy, Inc., Tocane, LLC d/b/a Whitestone Pharmacy; Five Points Pharmacy of Cocoa, LLC; Woodlyn Pharmacy, Inc.; Harbor Drug, Inc.; Southpeake Enterprises, Inc.; Elgin Discount Pharmacy, Inc.; New Care Pharmacy, Inc.; Valentine Pharmacy; Mish, Inc. d/b/a The Medicine Shoppe-Lebanon; Paris Clinic Pharmacy Inc.; and Pearman Pharmacy) provided financial information; however, the information did not correlate with dates when any contracts were signed. As such, over half of the plaintiffs failed to submit financial information supporting their claims that they could not afford arbitration based on the financial status at the time the agreement was entered.

¶ 90 Of the pharmacies that did provide the applicable information for the inquiry, the record revealed that six pharmacies (Pharmacy Plus, Inc.—Carrollton; Pharmacy Plus, Inc.—Roodhouse; Pharmacy Plus, Inc.—Whitehall; Carlinville Health & Prescriptions; Tioga Drug; and Wolfe's Pharmacy, Inc.) had sufficient financial resources to afford arbitration in the years their contracts were entered or provided such vague financial information that no determination could be made.

¶ 91 The remaining 18 pharmacies—based solely on net monthly or annual profits and losses—provided sufficient financial information to support a conclusion that they had insufficient

[7]Memorial Pill Box Inc. d/b/a John Kross Pharmacy "agreed to be dismissed without prejudice" in the circuit court's March 21, 2022, order. No copy of the motion or order were included in the record and no issue regarding this dismissal was raised by either party. As such, we do not address this dismissal.

financial means to afford arbitration that required empaneling three experienced healthcare arbitrators at the time they entered their contracts. These include: Adirondack Pharmacy, Inc.; Reed Pharmacies-Oakwood; Reed Pharmacies-Dicks Pharmacy; Copper Bend; C. Browne, Inc.; Hahnemann Apothecary, Inc.; Keaveny Drug, Inc.; Kremer Pharmacy; High Mountain Corp. d/b/a Ludlow Pharmacy; Mike's Family Pharmacy; Mosby's Drug, LLC; River Street Pharmacy, Inc.; Sruthi Swaroop Pharmacy, Inc. d/b/a Rutland Pharmacy; Springfield Pharmacy; Ackerman Discount Drugs LLC; Grand Plaza Pharmacy, Inc.; Schmidt & Sons Pharmacy of Tecumseh, Inc.; and Sunshine Pharmacy, Inc. As such, we hold that prohibitive costs stemming from arbitration with three experienced healthcare arbitrators would, at least as for these plaintiffs, evidence substantive unconscionability.

¶ 92 "[W]e believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree*, 531 U.S. at 92. While this case involved a showing greater than that seen in *Green Tree*, the majority involved speculative evidence regarding the ultimate cost of any arbitration, beyond the base fee for a three-panel arbitration and the hourly fees for each experienced healthcare arbitrator. No evidence was submitted regarding the actual amount any of these cases would require or provided any basis to conclude the plaintiff's requested relief during arbitration would be similar to that seen with arbitrations involving over 400 litigants. Regardless, the declarations did reveal that some of the plaintiffs would not be able to afford three-arbitrator arbitration at the time the agreements were entered. As such, we hold that costs associated with the three-arbitrator arbitrations are evidence of substantive unconscionability.

¶ 93 iii. Consolidation Preclusion

¶ 94 Plaintiffs also argue that even without considering the arbitration costs, the consolidation preclusion was substantively unconscionable. However, except for a claim that such requirement would "try and retry the same questions of fact and law, with an intolerable risk of inconsistent adjudications," the remainder of the argument was based on cost, claiming the "outrageous time, expense and duplication of effort *** made it impossible *** to proceed with individual arbitration." In support, plaintiffs cited *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 48 Cal. App. 4th 976, 56 Cal. Rptr. 2d 16 (1996), *Sunrise Financial, LLC v. Superior Court*, 32 Cal. App. 5th 114, 243 Cal. Rptr. 3d 623 (2019), and a 2014 unpublished and noncitable Illinois appellate court decision (*Park v. Kim*, 2014 IL App (1st) 132316-U). However, none of those cases involved an arbitration clause precluding consolidation of arbitration claims as seen here. In fact, none of those cases involved arbitration.

¶ 95 Regardless, even if they had involved arbitration, reliance on such authority would be unwarranted following dispositions issued by the United States Supreme Court in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), and *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___, 142 S. Ct. 1906 (2022).[8] Both decisions require the courts to enforce the arbitration clause as written. *Epic Systems Corp.*, 584 U.S. at ___, 138 S. Ct. at 1621 ("Not only did Congress require courts to respect and enforce agreements to arbitration; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures."); *Viking River Cruises, Inc.*, 596 U.S. at ___, 142 S. Ct. at 1919 ("The FAA's mandate is to enforce '*arbitration agreements*.' [Citation] (emphasis added). And as we have described it, an arbitration agreement is a specialized

[8]The decision was issued just prior to the deadline for Optum's reply brief. Both parties were granted additional time post-oral argument to address the decision and provide supplemental briefs addressing the decision in *Viking River*.

kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." (Internal quotation marks omitted.)). Here, the arbitration clauses require resolution "on an individual basis" and specifically preclude consolidation or joining third party disputes with the individual claim. As no evidence or applicable argument was provided beyond cost, which was addressed above, we hold that the consolidation preclusion revealed no evidence of substantive unconscionability.

¶ 96 iv. Nonmutuality of Arbitration Requirements

¶ 97 Plaintiffs also contend the arbitration clause is not mutual. Mutuality requires both parties to participate in arbitration. *Armendariz,* 24 Cal. 4th at 115-16. In support, plaintiffs argue that, pursuant to other provisions in the PM, Optum is permitted to use "self-help" with regard to reimbursement disputes. As noted above, claims of unconscionability, as it relates to arbitrability, are limited to those found in the arbitration clause. *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 403-04 (1967); *Jackson*, 561 U.S. at 70-72. As such, we decline plaintiffs' invitation to consider any other part of the contract than the arbitration clause.

¶ 98 While plaintiffs rely on *Armendariz* and *Nyulassy v. Lockheed Martin Corp*., 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296 (2004), in support of their argument, those cases fail to support plaintiffs' position. In *Armendariz,* the arbitration clause only required the employee not the employer to proceed through arbitration for cases involving wrongful termination. *Armendariz,* 24 Cal. 4th at 120. Similarly, in *Nyulassy,* the arbitration agreement contained time limitations for the employee's claims but not for the employer's claims. *Nyulassy,* 120 Cal. App. 4th at 1283. Here, the arbitration clause requires "all disputes" to be arbitrated, time limitations that relate to both parties and contains no evidence that would indicate either party was not bound by the arbitration

requirement. As such, we hold that the arbitration clause fails to support any claim of nonmutuality that would evidence substantive unconscionability.

¶ 99 v. Venue for Arbitration

¶ 100 Finally, plaintiffs argue that the Optum arbitration clause was substantively unconscionable because it required plaintiffs to arbitrate in a distant forum. In support, plaintiffs cited numerous cases in which a forum selection clause was found unconscionable based on "distance" and "unreasonableness." In support, plaintiffs cite *Nagrampa v. MailCoups, Inc*., 469 F.3d 1257, 1269 (9th Cir. 2006); *Acosta v. Fair Isaac Corp*., 669 F. Supp. 2d 716, 722 (N.D. Tex. 2009), *Bolter v. Superior Court*, 87 Cal. App. 4th 900, 909-10, 104 Cal. Rptr. 2d 888 (2001), *Capili v. Finish Line, Inc*., 116 F. Supp. 3d 1000, 1007 (N.D. Cal. 2015); *Magno v. The College Network, Inc*., 1 Cal. App. 5th 277, 288-89, 204 Cal. Rptr. 3d 829 (2016), *Newton v. American Debt Services, Inc*., 549 Fed. App'x 692, 695 (9th Cir. 2013), *Pinedo v. Premium Tobacco Stores, Inc*., 85 Cal. App. 4th 774, 781, 102 Cal. Rptr. 2d 435 (2000), along with an additional noncitable case from 2018. Based on these decisions, plaintiffs claim the clause requiring them to arbitrate in Orange County, California, was substantively unconscionable because it was "a distant forum for the vast majority" of plaintiffs.

¶ 101 While each of these cases provided a remedy related to the forum selection provision set forth in the arbitration clause at issue therein, none of these cases address the subsequent precedent that refined the standard by which forum selection clauses are judged. *Tompkins v. 23andMe, Inc*., 840 F.3d 1016, 1029-30 (9th Cir. 2016). Parties opposing a forum selection clause must now show that the forum is "unavailable or unable to accomplish substantial justice" in order to demonstrate substantive unconscionability. (Internal quotation marks omitted.) *Id.* at 1029. Additional expense or inconvenience are insufficient, unless proceeding in the selected forum would be " 'so gravely

difficult and inconvenient that [the plaintiffs] will for all practical purposes be deprived of [their] day in court.' " *Id.* (quoting *Aral v. EarthLink, Inc.*, 134 Cal. App. 4th 544, 36 Cal. Rptr. 3d 229 (2005)); see also *Ramos v. Superior Court*, 28 Cal. App. 5th 1042, 1067, 239 Cal. Rptr. 3d 679 (2018).

¶ 102 Distance from the forum does not address the California standard. Plaintiffs produced no evidence, and none of the plaintiffs' declarations claimed, that California "would be unavailable or unable to accomplish substantial justice," or "that the selected forum was so gravely difficult and inconvenient as to deprive them of their day in court." As such, we cannot hold that the Optum PM arbitration clause's forum selection clause supports a finding of substantive unconscionability.

¶ 103 In conclusion, we hold that a modest amount of substantive unconscionability has been proven, namely involving the costs related to a three-arbitrator panel with the requisite health law experience. The remaining allegations of substantive unconscionability have not been proven.

¶ 104 3. Severance

¶ 105 "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." Cal. Civ. Code § 1670.5(a) (West 2020). As noted by the California Supreme Court:

> "Comment 2 of the Legislative Commission comment on section 1670.5, incorporating the comments from the Uniform Commercial Code, states: 'Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit

unconscionable clauses so as to avoid unconscionable results.' " *Armendariz*, 24 Cal. 4th at 122 (quoting Legis. Com. com., 9 West's Ann. Civ. Code (1985 ed.) foll. § 1670.5, p. 494 (Legislative Committee comment)).

¶ 106 The California Supreme Court has provided two reasons for severing rather than voiding a contract, which are as follows:

> "The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement—particularly when there has been full or partial performance of the contract. [Citations.] Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme." *Id.* at 123-24.

¶ 107 As shown above, we held that the Optum PMs were, in part, adhesion contracts, but plaintiffs failed to establish evidence of a lack of meaningful choice so as to classify the terms as unduly oppressive and the table of contents, coupled with similar language in each subsequent PM, dispensed with any argument regarding surprise. As such, we held the level of procedural unconscionability was *de minimis*. We also found low to moderate substantive unconscionability, depending on the plaintiff, based on the minimum costs associated with a three-arbitrator panel of 10-year experienced healthcare arbitrators when considered in conjunction with the declarations submitted herein.

¶ 108 We do not find the arbitration clause "permeated by unconscionability." The greatest level of unconscionability stemmed from the costs associated with arbitration with at least some of the plaintiffs establishing a financial inability to proceed with arbitration in the manner required by the clause at the time the contract was entered. Given the strong public policy that "California law, like federal law, favors enforcement of valid arbitration agreements" (*Armendariz*, 24 Cal. 4th at

97), the proper course is to proceed, pursuant to § 1670.5(a) of the California Code of Civil Procedure (eff. Sept. 19, 1979), to strike the offensive language. As such, we strike the alternative dispute resolution language requiring "a panel of three (3) arbitrators" and that "[a]ll arbitrators must have at least ten (10) years of legal experience in the area of healthcare law" and hold the remaining language comprises an enforceable arbitration agreement for all of the plaintiffs herein.

¶ 109 Finally, we respectfully note the dissent's disagreement with our disposition of this issue. Although we disagree with the conclusions therein, our response is limited to addressing the dissent's claim of "alignment" with a recent unpublished California decision.

¶ 110 Plaintiffs submitted the California decision with a motion for leave to cite supplemental authority. In support of the motion, plaintiffs relied on our recently amended Rule 23 that allows for the submission of unpublished authority. However, Rule 23 addresses unpublished Illinois decisions and has no authority to usurp another state's authority to determine its own dispositions. California rules prohibit citation to unpublished decisions in civil cases except in certain situations not relevant, and not argued here. Cal. Rules of Court, Rule 8.1115(a), (b) (eff. Apr. 21, 2021).

¶ 111 "The purpose of allowing parties to cite additional authority is to bring this court's attention to relevant or dispositive case law that was decided after the parties' briefs were filed." *People v. Molina*, 379 Ill. App. 3d 91, 99 (2008). An unpublished decision California decision meets neither of those requirements as it is not "legal authority" (see *People v. Sanders*, 2020 IL App (3d) 180215, ¶ 26 (Holdridge, J., specially concurring)) and therefore plaintiffs' motion was denied.

¶ 112 Given the denial of the plaintiffs' motion, our colleague's "considering and adopting some of the reasoning expressed" (*infra.* ¶ 146) in that decision is concerning as such action is contrary to California law governing its decisions which has consistently adhered to the nonprecedential

rule of that state. See *People v. Russo*, 25 Cal. 4th 1124, 1133-34 n.1 (2001); *People v. Webster*, 54 Cal. 3d 411, 428 n.4 (1991).

¶ 113 C. Scope

¶ 114 The second inquiry after addressing arbitrability requires the court to determine whether the particular dispute falls within the scope of the agreement. *Howsam*, 537 U.S. at 84. Here, no argument was presented that plaintiffs' claims did not fall within the scope of the Optum PM arbitration clause. However, even if an argument had been presented, "[d]oubts as to whether an arbitration [provision] applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *Vianna*, 27 Cal. App. 4th at 1189; see also *Moses H. Cone Hospital*, 460 U.S. at 24-25; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 476 (1989)). No reason to deter from this well-established principle was presented. As such, we hold that scope is no deterrence to arbitration.

¶ 115 D. Optum's Motion to Compel

¶ 116 Optum's motion requested the court to compel all plaintiffs to arbitration. Prior to its analysis regarding the arbitration clause language, the circuit court excluded 12 pharmacies based on the Elevate PA. The court made a similar finding with regard to six pharmacies under the TriNet-Catamaran PA and also found that plaintiff Tioga Drugs was not required to arbitrate its pre-July 2015 claims because no PA was found for that pharmacy. However, plaintiffs specifically rejected any agency relationship stemming from those agreements and we agreed the record contained insufficient evidence to support the proclaimed agency relationship that would allow for enforcement of the PA contracts. As such, neither the language in the Elevate and TriNet-Catamaran PAs nor the lack of any PA for Tioga Drugs have any relevance here.

¶ 117 The only relevant PAs to Optum's motion to compel were those five entered personally by Keaveny Drug #203, Keaveny Drug, Browne's Pharmacy, Kimar Corp., and The Medicine Store. Upon review of those PAs, all but one contained arbitration clauses similar to those found in the Optum PM, except the arbitration would occur in Illinois, and some only required one arbitrator. However, none of those contracts contained language stating the PA language controlled over any conflicting PM language. Further, while the PA submitted on behalf of Keaveny Drug did not contain any arbitration requirement, the Keaveny PA contained language incorporating the PM into the PA and stated that in the event of any conflict between the language in the PA and the PM, the PM language controlled. Therefore, upon review of those five PAs, none contained language that usurped the PM language. As such, pursuant to the alternative dispute language found in the Optum PMs, except for those portions severed herein, the court erred in denying Optum's motion to compel arbitration as to each plaintiff herein.

¶ 118 III. CONCLUSION

¶ 119 For the foregoing reasons, we reverse the circuit court's order denying defendant's motion to compel arbitration, and remand with directions to grant defendant's motion to compel arbitration, consistent with the directives of the order herein, and stay the proceedings pursuant to 9 U.S.C. § 3 (2018).

¶ 120 Reversed and remanded.

¶ 121 JUSTICE CATES, dissenting:

¶ 122 I agree with the majority's findings that the arbitration clause in the Optum Provider Manual (Optum PM)[9] does not provide clear and unmistakable evidence of the parties' intent to

[9]The majority finds that "the 2015 Optum PM, as well as the subsequent revisions thereto in 2016, 2017, 2108, 2019, and 2020 (prior to the amended 2020 Optum PM that altered the alternative dispute resolution paragraph language after this litigation was commenced), applies to each of the plaintiffs herein."

delegate arbitrability to the arbitrator and that threshold questions of arbitrability were for the circuit court. I part ways with my colleagues because I do not agree that the plaintiff established only a *de minimis* degree of procedural unconscionability and a modest degree of substantive unconscionability. In addition, I do not agree that mere severance of the provisions requiring a panel of three arbitrators, each of whom have at least 10 years of legal experience in healthcare, will cure the unconscionability. The unconscionable provisions are not limited to the requirements for three highly experienced arbitrators and the severance of all of the unconscionable provisions would fundamentally alter the arbitration clause, essentially creating a new agreement that was not negotiated or agreed to by the parties. Because I find that the degree of the procedural and substantive unconscionability renders the arbitration clause unenforceable, I would affirm the circuit court's order denying Optum's motion to compel arbitration. Accordingly, I respectfully dissent.

¶ 123 Both the California Arbitration Act (West's Ann. Cal. Civ. Code § 1280 *et seq.* (West 2018)) and the Federal Arbitration Act (9 U.S.C. § 1 *et seq.* (2018)) recognize arbitration as a speedy and relatively inexpensive means of dispute resolution. *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 125 (2019); *Avery v. Integrated Healthcare Holdings, Inc.*, 218 Cal. App. 4th 50, 59 (2013). Although arbitration is a favored method of dispute resolution, an agreement to arbitrate is a matter of contract, and public policy favoring arbitration cannot supplant the requirement for a voluntary agreement to arbitrate. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 478-79 (1989) (arbitration is a matter of consent, not coercion); *Avery*, 218 Cal. App. 4th at 59. Like other contracts, arbitration agreements may be invalidated by

*Supra* ¶ 53. Because the arbitration language in each of the aforementioned Optum Provider Manuals is nearly identical, unless otherwise indicated, I will refer to the Optum PM arbitration clause generally for purposes of this dissent.

generally applicable contract defenses, such as fraud, duress, or unconscionability. 9 U.S.C. § 2; *OTO, L.L.C.*, 8 Cal. 5th at 125.

¶ 124 In this case, the circuit court found that the Optum PM arbitration clause was unenforceable because it was unconscionable. Generally, under California law, a contract is unconscionable if one of the parties lacks a meaningful choice in deciding whether to enter into the contract and the contract contains terms that are unreasonably favorable to the other party. *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133 (2013) (*Sonic II*). Thus, unconscionability has both procedural and substantive elements. *Sanchez*, 61 Cal. 4th at 910. Under California law, as distinguished from Illinois, a court must find evidence of both substantive and procedural unconscionability in order to invalidate a contract. *Sanchez*, 61 Cal. 4th at 910. The level of unconscionability is evaluated on a sliding scale so that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required" to find that the term is unenforceable, and vice versa. (Internal quotation marks omitted.) *Sanchez*, 61 Cal. 4th at 910. "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." *Sanchez*, 61 Cal. 4th at 912.

¶ 125 *Procedural Unconscionability*

¶ 126 Procedural unconscionability addresses the circumstances of contract negotiation and formation, focusing on the oppression or surprise that arises due to unequal bargaining power. *OTO, L.L.C.*, 8 Cal. 5th at 125. In analyzing procedural unconscionability, the court initially considers whether the contract is one of adhesion. *OTO, L.L.C.*, 447 Cal. 5th at 126; *Armendariz v. Foundation Health Psychcare Service, Inc*., 24 Cal. 4th 83, 113 (2000). The question is whether the circumstances of the contract's formation created such oppression or surprise that closer

scrutiny of its overall fairness is required. *OTO, L.L.C.*, 447 Cal. 5th at 126. Oppression occurs when the weaker party is presented with the contract and told to "take it or leave it" without the opportunity for meaningful negotiation. *OTO, L.L.C.*, 447 Cal. 5th at 126; *Bakersfield College v. California Community Collegiate Athletic Ass'n*, 41 Cal. App. 5th 753, 762 (2019). Surprise involves the extent to which the allegedly unconscionable terms are hidden within a wordy, preprinted form, drafted by the party seeking to enforce the disputed terms. *OTO, L.L.C.*, 447 Cal. 5th at 126; *Bakersfield College*, 41 Cal. App. 5th at 762. The focus is on whether a contract provision was unconscionable at the time it was made, and not what occurred thereafter. See *Sonic II*, 57 Cal. 4th at 1134; *Bakersfield College*, 41 Cal. App. 5th at 762.

¶ 127 According to the record, Optum is a pharmacy benefits manager. Optum contracts with Pharmacy Services Administrative Organizations (PSAOs) to recruit and enroll individual pharmacies, like the plaintiffs, into Optum's provider network. Optum also contracts with health insurance companies to manage prescription drug benefits programs for their plan members. The plaintiffs are independent pharmacies who provide prescription medication to the people enrolled in the health insurance plans.

¶ 128 The arbitration clause at issue was included in a preprinted provider manual that was drafted by Optum. The plaintiffs did not have access to the provider manual prior to enrolling in Optum's provider network. They had no ability to negotiate, review, or reject any of the terms of the arbitration clause prior to enrollment. Once enrolled, individual pharmacies were given online access to the provider manual. Optum, however, asserted a unilateral right to amend the terms of the Optum PM, including the arbitration clause, without notice to the pharmacies enrolled in its network. If an individual pharmacy wanted to serve local customers whose prescription drug benefits plan was managed by Optum, it had no choice but to accept the provisions in the Optum

PM. Consequently, an individual pharmacy could either agree to the terms or opt out entirely—in other words, the pharmacy could take or leave it.

¶ 129 Even after an individual pharmacy enrolled in Optum's provider network, it had no voice in negotiating amendments to the arbitration provisions. As noted by the majority, the relationship between the PSAOs and the individual pharmacies was not well articulated in the circuit court (*supra* ¶¶ 37-39). There was some evidence that one PSAO attempted to negotiate with Optum over arbitration language in an Optum provider manual. But that does not indicate that the PSAO was acting an as agent on behalf of individual pharmacies. Furthermore, there is no evidence that the individual pharmacies were aware of those negotiations. The plaintiffs denied that there was an agency relationship between themselves and the PSAOs. Each plaintiff attested that it had no opportunity to negotiate with Optum regarding the arbitration clause in the Optum PM. Based on the record, I agree that Optum failed to present sufficient evidence to establish an agency relationship between the PSAOs and the individual pharmacies. Even assuming for the sake of argument that the individual pharmacies had some opportunity to negotiate, such negotiations would have commenced only after the pharmacies had been enrolled in the Optum provider network. In determining unconscionability, the focus is on whether a contract provision was unconscionable at the time it was made, and not what happened thereafter. *Sonic II*, 57 Cal. 4th at 1134; *Bakersfield College*, 41 Cal. App. 5th at 762-63. Here, Optum drafted the arbitration clause. The individual pharmacies had no opportunity, either personally or through an agent, to negotiate the terms of the arbitration agreement prior to or after enrollment in the Optum network. Under the circumstances, the arbitration clause drafted by Optum was an oppressive contract of adhesion.

¶ 130 In many contracts of adhesion, the weaker party lacks not only the opportunity to negotiate, but also any realistic opportunity to do business elsewhere. *Madden v. Kaiser Foundation*

*Hospitals*, 17 Cal. 3d 699, 711 (1976). A claim of oppression may be defeated if there is evidence that the complaining party has reasonably available and realistic market alternatives. *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 768 (1989). In this case, the majority has inferred, based on evidence established that Optum controlled approximately 25% of the market, that the plaintiffs could have enrolled in other prescription benefits networks. The majority's inference, however, ignores another equally reasonable scenario that could be obtained from the evidence of Optum's market share[10]—that the plaintiffs could not offset the loss of their existing customer base by "signing on" with other prescription benefits managers. The plaintiffs are small, independent pharmacies, not nationwide pharmacy chains, and they have a finite base of local customers. If the plaintiffs declined to join and do business in the Optum network, they could no longer serve those local customers who were enrolled in the health insurance plans managed by Optum. Therefore, the loss of the preexisting customer base provides some indication of adverse economic impacts should the plaintiffs forego enrollment in Optum's network.

¶ 131 The majority also observed that this case does not involve a dispute between a corporation and an employee or an individual consumer. While that is true, the unconscionability doctrine applies to business contracts as well as consumer contracts, as "even large businesses may have relatively little bargaining power," depending on the identity of the other party to the contract and the commercial circumstances surrounding the agreement. See *Bakersfield College*, 41 Cal. App. 5th at 764 (and cases cited). Unlike a nationwide pharmacy chain, the plaintiffs are small independent pharmacies who serve customers in their respective communities. In this case, there is some evidence, together with reasonable inferences therefore, to show the plaintiffs lacked not

[10]As noted by the majority, both parties have referenced Optum's market share in support of their respective arguments on the issue of oppression.

only the opportunity to negotiate with Optum, but also any reasonably available and realistic alternative sources of business.

¶ 132 There is also evidence of surprise. In the context of procedural unconscionability, surprise occurs when the allegedly unconscionable provisions are hidden in a wordy, preprinted contract. *OTO, L.L.C.*, 447 Cal. 5th at 126; *Bakersfield College*, 41 Cal. App. 5th at 762. In this case, the pharmacies were not given access to Optum's PM until they enrolled in Optum's provider network. The 2015 Optum PM and subsequent editions are standardized documents that contain almost identical arbitration language. For example, the 2015 Optum PM (11th ed.) is 135 pages in length, excluding addendums. According to a note in the introductory section, the information in this PM is "current at the time of publication," and while efforts are made to keep the information current, "this PM is subject to change without notice." There are additional notes in the opening section of the Optum PM, but none mentions arbitration. The 2015 Optum PM contains a six-page table of contents. A section entitled, "M. Alternative dispute resolution," is listed on the last page of the table of contents. There is no mention of binding arbitration under that specific heading or elsewhere in the table of contents. The alternative dispute resolution section of the provider manual begins on page 113 of the document. The arbitration provisions appear on pages 113 and 114 and encompass 15 paragraphs. As with other sections of the manual, the arbitration provisions are printed in single-spaced paragraphs. Notably, there is no emphasis on the word "arbitration"; it is not printed in capital letters or bold-face type. The arbitration provisions are unclear and hidden in plain sight. By all accounts, the provider manuals that preceded the 2015 Optum PM did not contain arbitration clauses.

¶ 133 After reviewing the record, I do not agree with the majority's conclusions that the arbitration provisions are not "hidden or inconspicuous" and that the reference to an alternative

dispute resolution section "undermines any contention of surprise" (*supra* ¶ 70). Such conclusions ignore the realities regarding the placement and appearance of the arbitration clause within the manual.

¶ 134 In sum, I find the arbitration clause in the Optum PM is an oppressive contract of adhesion. The arbitration clause is positioned near the end of a lengthy, standardized document, and its provisions are complex and unclear. The individual pharmacies had no opportunity to negotiate the terms of the arbitration clause either before or after they enrolled in Optum's provider network. Optum reserved the unilateral right to amend the agreement without notice. Additionally, the individual pharmacies had relatively limited bargaining power and no realistic opportunity to forego Optum's provider network and pursue other alternatives. Thus, the degree procedural unconscionability was not "*de minimis*." It was significant.

¶ 135 *Substantive Unconscionability*

¶ 136 In considering substantive unconscionability, the focus is on the actual terms of the arbitration agreement and whether those terms are manifestly harsh or one-sided. *Sanchez*, 61 Cal. 4th at 910. The court considers whether the agreement allocates the risks of the bargain in an objectively unreasonable or unexpected manner. *Bakersfield College*, 41 Cal. App. 5th at 765. Thus, the court is not concerned with an "old-fashioned bad bargain," but instead with whether contract terms are unreasonably favorable to the more powerful party. *Sanchez*, 61 Cal. 4th at 910. The court must ensure that private arbitration systems resolve disputes not only with speed and economy, but also with fairness. *Bakersfield College*, 41 Cal. App. 5th at 765.

¶ 137 In this case, the plaintiffs argued that the arbitration clause was substantively unconscionable because several of its provisions were manifestly harsh or one-sided. The plaintiffs claimed that the arbitration clause unreasonably limited discovery; deprived the plaintiff of witness

testimony, other than by expert witnesses; prevented plaintiffs from consolidating their claims; caused arbitration to be prohibitively expensive; required most of the plaintiffs to litigate in a far-away venue; and lacked mutuality.

¶ 138 The Optum PM arbitration clause provides that each party consents to a "documentary hearing for all arbitration Claims," by submitting disputes to the arbitrators through written briefs, affidavits, and relevant documents. The arbitration clause further provides that any party may request an oral hearing, provided that the requesting party makes the request within 40 days after service of the claim and remits "the appropriate deposit for fees, as well as arbitrator compensation within ten (10) days of making the request."

¶ 139 The arbitration clause further provides for limited discovery:

> "No later than forty (40) days after the filing and service of a Claim for arbitration, the parties will exchange detailed statements setting forth the facts supporting the Claim(s) and all defenses to be raised during the arbitration and a list of all exhibits, as well as witnesses. In the event any party requests an oral hearing, no later than twenty-one (21) days prior to the oral hearing, the parties will exchange a final list of all exhibits, as well as all witnesses, including any designation of any expert witness(es) together with a summary of their testimony; a copy of all documents to be introduced at the hearing.
>
> Notwithstanding the foregoing, in the event of the designation of any expert witness(es), the following will occur:
>
> (i) all information and documents relied upon by the expert witness(es) will be delivered to the opposing party; (ii) the opposing party will be permitted to depose the expert witness(es); (iii) the opposing party will be permitted to designate rebuttal expert witness(es); and (iv) the arbitration hearing will be continued to the earliest possible date that enables the foregoing limited discovery to be accomplished."

¶ 140 A plain reading of these provisions reveals that Optum has significantly restricted discovery, limiting the parties to an exchange of detailed statements of facts supporting their respective claims or defenses, along with a list of witnesses and exhibits. There is no provision for any written discovery and depositions are limited to expert witnesses. In the absence of a request for an oral hearing, the parties are deprived of the opportunity to examine and cross-examine

pertinent fact witnesses. California courts have held that arbitration clauses must ensure minimum standards of fairness, including discovery sufficient to establish one's claims. See *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 715-16 (2004); see also *Armendariz*, 24 Cal. 4th at 105-06. Arbitration provisions, such as those in the Optum PM clause, which foreclose any opportunity for necessary discovery of information and preclude cross-examination of fact witnesses, are unfair and substantively unconscionable.

¶ 141 The plaintiffs also note that the Optum PM arbitration clause prohibits consolidation of claims and requires each pharmacy to arbitrate claims on an individual basis. They argue that the prohibition against consolidation renders arbitration a prohibitively expensive forum in which to resolve their disputes. A mandatory arbitration agreement is substantively unconscionable if it requires the payment of unaffordable fees to initiate the process. *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205, 218 (2016). In determining the affordability of arbitration costs, courts are to conduct a case-by-case analysis, with the burden on the party resisting arbitration to show the likelihood of prohibitive costs. *Penilla*, 3 Cal. App. 5th at 218. An arbitration provision cannot be held unconscionable absent a showing that the arbitration costs would be unaffordable or would have a substantial deterrent effect in the plaintiff's case. *Sanchez*, 61 Cal. 4th at 920.

¶ 142 Here, the plaintiffs offered evidence of the individual costs of arbitration before three arbitrators, each of whom had at least 10 years of experience in the area of healthcare law. The plaintiffs submitted individual affidavits and they averred that the filing fees and compensation for the arbitrators rendered arbitration unaffordable. In addition, the arbitration clause mandated individual arbitration, thereby precluding the plaintiffs from consolidating common issues and sharing the costs among themselves. Furthermore, should a plaintiff request an oral hearing, that plaintiff would be required to tender the appropriate deposit for fees and arbitrator compensation

within 10 days of making the request. Even if, as the majority suggests, the fees are ultimately split between the parties, each individual plaintiff would be required to advance a substantial sum covering fees and compensation in order to obtain a hearing or face a suspension of the arbitration proceedings or possible default of its claims. Further, any potential to recoup expenses with a favorable award would be limited because of the arbitration provision that prohibits the arbitrators from awarding "punitive, exemplary, indirect, special damages or any other damages not measured by the prevailing party's actual damages." Additionally, a provision in the Optum PM arbitration clause requires that arbitration be held in California. At least for the independent pharmacies based in Illinois, there is no indication that they could have reasonably expected, at the time they enrolled in the Optum network, that they would be required to resolve any disputes over reimbursement rates in California. The forum-selection clause provides additional evidence of prohibitively high arbitration costs. See, *e.g.*, *Magno v. The College Network, Inc.*, 1 Cal. App. 5th 277, 288-89 (2016); *Bolter v. Superior Court of Orange County*, 87 Cal. App. 4th 900, 909 (2001). Based upon this record, the trial court properly determined that several provisions within the Optum PM arbitration clause were substantively unconscionable.

¶ 143 *Severability*

¶ 144 The final question is whether the offending provisions can be severed to cure the taint of procedural and substantive unconscionability from the arbitration clause. Under California law, if a court finds as a matter of law that the contract or any clause of the contract was 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." West's Ann. Cal. Civ. Code § 1670.5(a) (West 2018). In deciding whether to sever terms, the core question is whether the

interests of justice would be furthered by severance, and there is a strong preference for severance unless the agreement is permeated by unconscionability. *Bakersfield College*, 41 Cal. App. 5th at 770. An agreement is considered permeated by unconscionability when it contains more than one unconscionable provision. *Bakersfield College*, 41 Cal. App. 5th at 770. Multiple defects indicate a systematic effort to impose arbitration on the nondrafting party not as an alternative to litigation, but as an inferior forum that works to the drafting party's advantage. *Armendariz*, 24 Cal. 4th at 124. The circuit court's decision regarding severability is reviewed for an abuse of discretion. *Armendariz*, 24 Cal. 4th at 121-22.

¶ 145 As explained above, the Optum PM arbitration clause is replete with procedural unconscionability and multiple substantively unconscionable terms, and the unconscionability cannot be cured by severance of one or two provisions. Severance of all of the offensive provisions would gut the arbitration clause and essentially create a new alternative dispute resolution section that was not negotiated or agreed to by the parties. A court is not permitted to cure unconscionability by rewriting the parties' agreement or augmenting it with additional terms. *Armendariz*, 24 Cal. 4th at 125. Here, for example, the arbitration clause would have to be rewritten to add, at a minimum, provisions for reasonable discovery. Therefore, the circuit court did not abuse its discretion in determining that the arbitration clause is permeated by unconscionability and therefore unenforceable.

¶ 146 I pause to note that my findings and conclusions align with a recent unpublished decision issued by the California Court of Appeals in *Platt, LLC. v. OptumRx, Inc.*, 2023 WL 2507259 (Mar. 15, 2023), wherein the court scrutinized a substantially similar Optum PM arbitration clause and, consistent with this dissent, found its provisions unenforceable due to procedural and substantive unconscionability. Although Rule 8.1115 of the California Rules of Court (eff. July 1,

2016) restricts the citation of and reliance on unpublished opinions in California courts, there is no prohibition against considering and adopting some of the reasoning expressed in those decisions. See, *e.g.*, *Cynthia D. v. Superior Court*, 5 Cal. 4th 242, 254 n.9 (1993). The California courts have indicated that there are occasions where unpublished opinions may be cited for reasons other than reliance. See *Cynthia D.*, 5 Cal. 4th at 254 n.9 (where the majority stated its analysis was "adapted from a concurring opinion" in a nonpublished case); see also *Mangini v. J.G. Durand International*, 31 Cal. App. 4th 214, 219-20 (1994) (decertified opinions were referenced to illustrate that an issue presented in the cases was recurring and remained unresolved). The dissent's reference to the unpublished decision in *Platt* is in harmony with, and not contrary to, those authorities.

¶ 147 To be sure, the parties to this case have fiercely litigated the validity of the arbitration clause at issue, both in the circuit court and on appeal. This court has respectfully engaged in thoughtful discussion and debate over the issues raised by the parties during this appeal, but ultimately no consensus was reached. Because courts have consistently held that an arbitration agreement is a matter of consent, not coercion; because I find that the Optum arbitration agreements at issue are both substantively and procedurally unconscionable under California law; and because I understand the importance of dissents—to paraphrase Justice Ruth Bader Ginsberg, that today's dissents can inform tomorrow's arguments, and perhaps over time become the majority view,[11] I remain steadfast in this dissent.

[11]"Dissents speak to a future age. It's not simply to say, 'My colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions and gradually over time their views become the dominant view. So that's the dissenters hope: that they are writing not for today, but for tomorrow." See U.S. Supreme Court Justice Ruth Bader Ginsburg's interview with National Public Radio. https://www.npr.org/2002/05/02/1142685/ruth-bader-ginsburg-and-malvina-harlan; see also Pocket RBG Wisdom, p. 29, Hardie Grant Books (2019).

¶ 148 For the foregoing reasons, I find that the Optum PM arbitration clause is procedurally and substantively unconscionable, and therefore unenforceable. I would affirm the order of the circuit court denying Optum's motion to compel arbitration.

¶ 149 Accordingly, I respectfully dissent.