

1 XXXX XXXXX
2 XXXX XXXXX
3 XXXX XXXXX
4 XXXX XXXXX

5 Attorneys for Petitioner
6 XXXXX XXXXXXXXX

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF XXXXXXXXX

10
11
12 XXXXX XXXXXXXXX, INC.

13 Petitioner,

14 v.

15 XXXXX XXXXXXXXX,

16 Respondent.

NO.

**MEMORANDUM OF POINTS AND
AUTHORITIES SUPPORTING
PETITION TO VACATE
ARBITRATION AWARD**

Hearing Date:
Time:
Dept.:

17
18
19 **INTRODUCTION**

20 This case involves an arbitration award procured through fraud and an unconscionable
21 arbitration clause that infected the entire arbitration proceeding with the impression of possible
22 bias. Accordingly, and as demonstrated in detail below, the court should vacate this award
23 pursuant to Code of Civil Procedure § 1286.2 (a) (1) and (4).

24 **FACTS**

25
26 On February 23, 2004, Petitioner XXXXX XXXXXXXXX, Inc. (“Petitioner”) entered
27 into a written attorney-client fee agreement (the “Agreement”) with “XXXXXX XXXXXXXXX.”

1 A true copy of this Agreement is attached to the Supporting Declaration of XXXXX
2 XXXXXXXX (“XXXXX Decl.”) as Exhibit 1 and incorporated herein by reference. Attorney
3 Bruce E. XXXXX (“Respondent”) signed the Agreement on behalf of XXXXX & Associates.
4 When Petitioner entered the Agreement, it understood that XXXXX & Associates was either a
5 law firm or partnership with multiple attorneys employed as associates. However, as of the date
6 that Respondent entered the Agreement with Petitioner, Respondent was actually engaged in a
7 solo law practice and he had not registered XXXXX & Associates as a fictitious business name
8 or other business entity.
9

10 Under the terms of the Agreement, XXXXX & Associates agreed to provide attorney
11 services to Petitioner and Petitioner agreed to pay for these services at its stated hourly rates (see
12 XXXXX Decl., Exhibit 1, attached “Exhibit A”). The Agreement was a pre-printed XXXXX &
13 Associates form contract entitled “Hourly Fee Agreement,” and Petitioner was not given any
14 opportunity to negotiate its terms (XXXXX Decl., Exhibit 1). The final paragraph of the
15 Agreement contained an arbitration provision which provided the following:
16

17 “In any *litigation or arbitration* required to enforce payment of our statements, the
18 prevailing party will be entitled to reasonable attorneys’ fees and costs. In case of any
19 dispute, California law will govern and *you* agree that all proceedings will be initiated
20 and conducted in Berkeley, California. *You agree that any disputes, including*
21 *malpractice claims, will be handled exclusively in accordance with the Commercial*
Rules of the American Arbitration Association. This agreement is entered into and is
to be performed in Berkeley, California” (XXXXX Decl., Exhibit 1. Emphasis added).

22 As stated in the first sentence of the Agreement’s arbitration clause, this provision allowed
23 XXXXX & Associates to alternatively engage in “*litigation or arbitration*” to enforce its
24 collection of payments due from Petitioner for attorney services provided under the Agreement.
25 However, the arbitration clause exclusively required Petitioner to (1) file any claims or disputes it
26 may have regarding the Agreement, including malpractice claims, with the American Arbitration
27 Association, and (2) initiate and conduct these arbitration proceedings in Berkeley, California.
28

1 At the time that Petitioner entered the Agreement and for several years prior to that date,
2 Respondent, who was the sole owner of XXXXX & Associates, was an active arbitrator for the
3 San Francisco regional office of the American Arbitration Association (the “AAA”).
4 Additionally, in requiring Petitioner to initiate and conduct its arbitration disputes in Berkeley,
5 California, the Agreement mandated that Petitioner arbitrate any claims it may have against
6 XXXXX & Associates in Respondent’s AAA San Francisco regional office. When XXXXX &
7 Associates presented the Agreement to Petitioner for its signature, neither Respondent nor
8 XXXXX & Associates informed Petitioner of Respondent’s membership in the AAA as an active
9 arbitrator in its San Francisco regional office. Between October 2004 and about April 2005, a
10 dispute arose between Petitioner and XXXXX & Associates regarding the alleged non-payment
11 of attorney fees and the performance of certain legal services. This dispute continued and
12 remained unresolved for an extended period and on February 24, 2008 Respondent filed a claim
13 against Petitioner with the AAA San Francisco regional office regarding the allegedly unpaid
14 attorney fees (XXXXX Decl., Exhibit 2).
15

16
17 Since the dispute between Petitioner and XXXXX & Associates involved the alleged non-
18 payment of attorney fees, Petitioner was entitled to receive notice from XXXXX & Associates of
19 his statutory right to mandatory fee arbitration (“MFAA”) pursuant to Business and Professions
20 Code § 6200 et seq. As per the applicable statutes, Petitioner was entitled to receive such notice
21 prior to or upon commencement of XXXXX & Associates’ arbitration claim filed with the AAA.
22 However, in contravention of this statutory mandate, neither Respondent nor XXXXX &
23 Associates provided Petitioner with an MFAA notice during the required time period (XXXXX
24 Decl., Exhibit 3). Indeed by the time Respondent provided the required MFAA notice to
25 Petitioner on June 2, 2008, the AAA had already taken jurisdiction of the attorney fee dispute and
26 conducted preliminary arbitration proceedings. On June 6, 2008, and in response to
27
28

1 Respondent's letter of June 2, 2008 (see XXXXX Decl., Exhibit 3), the AAA arbitrator stayed its
2 proceedings pending his further order regarding the MFAA proceedings. On August 18, 2008,
3 and after determining that the parties had not begun any MFAA proceedings, the arbitrator issued
4 an order lifting the stay and restarting the AAA arbitration (see XXXXX Decl., Exhibit 4).

5
6 On April 29, 2009, the AAA held the arbitration hearing regarding Petitioner's fee
7 dispute with XXXXX & Associates. This hearing occurred in the AAA San Francisco regional
8 office. Although Petitioner had initially filed an answer and counterclaim in this proceeding, it
9 was allowed to subsequently to withdraw those pleadings on the basis of its objections to the
10 AAA's jurisdiction over the parties' attorney fee dispute. Petitioner appeared at the hearing for
11 the sole purpose of stating those objections and asserted that (1) the Agreement's arbitration
12 clause was procured through fraud and therefore unenforceable, and (2) this arbitration provision
13 denied Petitioner its fundamental right to fair procedure in resolving its dispute with XXXXX &
14 Associates (see XXXXX Decl., Exhibit 5, pages 20-22 and 24-25).

15
16 Petitioner also objected to AAA jurisdiction on the grounds that Respondent, who
17 identified himself as the individual "claimant" in the arbitration, did not have standing to file
18 such claim as he was not a signatory to the Agreement (XXXXX Decl., Exhibit 5, page 19).
19 Other than making these objections to the enforceability of the Agreement's arbitration clause,
20 Petitioner did not participate in the arbitration hearing. On May 28, 2009, the arbitrator issued an
21 award to Respondent in the total amount of \$156,419.39 plus post-judgment interest against
22 Petitioner (see XXXXX Decl., Exhibit 6, page 3). However, as discussed below, the arbitrator
23 exceeded his powers in rendering this award to Respondent and the court should vacate it
24 pursuant to Code of Civil Procedure § 1286.2 (a) (4). Additionally, Respondent procured the
25 award through fraud or undue means, and the court should therefore vacate it pursuant to Code of
26 Civil Procedure § 1286.2 (a) (1).
27
28

1 **I. THE ARBITRATOR EXCEEDED HIS POWERS IN**
2 **ISSUING THE AWARD TO RESPONDENT**

3 Code of Civil Procedure § 1286.2 (a) (4) provides that a court shall vacate an arbitration
4 award issued in excess of the arbitrator’s powers. See e.g., *Graham v. Scissor-Tail, Inc.* (1981)
5 28 Cal.3d 807; *Loving & Evans v. Blick* (1949) 33 Cal.2d 603; *Flores v. Transamerica*
6 *HomeFirst, Inc.* (2001) 93 Cal.App.4th 846. An arbitrator’s powers derive solely from the
7 arbitration agreement, and an arbitration provision that is void or illegal confers no authority to
8 issue an award. *Ibid*; see also *O’Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044; *Jordan v.*
9 *Department of Motor Vehicles* (2002) 100 Cal.App.4th 431.
10

11 The question whether an arbitration clause is valid or enforceable is a matter for the court,
12 not the arbitrator. See Code of Civil Procedure § 1281.2 (c); *Flores, supra*; *Ericksen, Arbuthnot,*
13 *Etc. v. 100 Oak Street* (1983) 35 Cal.3d 312. Where an arbitration agreement is void due to
14 unconscionability or fraud, the agreement is unenforceable and the arbitrator exceeds his powers
15 in proceeding on the basis of such provision. *Ibid*; see also *Graham and Loving, supra*. In
16 Petitioner’s case, the Agreement’s arbitration clause was unconscionable and procured through
17 fraud, and the court should vacate the award to Respondent.
18

19 **A. The Arbitration Agreement Was Unconscionable**

20 As noted above, the first sentence of the Agreement’s arbitration clause allowed XXXXX
21 & Associates to alternatively engage in “litigation *or* arbitration” to enforce its collection of
22 payments due from Petitioner for attorney services provided under the Agreement. Conversely,
23 the arbitration clause exclusively required Petitioner to file any claims or disputes it may have
24 regarding the Agreement, including malpractice claims, with the American Arbitration
25 Association. This provision also required Petitioner to arbitrate its disputes with Respondent’s
26 law business in the AAA office where Respondent was an active arbitrator (see XXXXX Decl.,
27
28

1 Exhibit 1, page 1). XXXXX & Associates prepared the Agreement on a pre-printed form and
2 presented it to Petitioner for signature. Petitioner was never given an opportunity to negotiate the
3 arbitration clause or any of the Agreement's other terms.

4
5 When interpreting a contract, a court should apply the plain and ordinary meaning of its
6 words absent a technical usage or definition provided in the agreement. See e.g., *Fireman's*
7 *Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1212-1216. Where a contract uses
8 the disjunctive "or" to separate two words, the ordinary interpretation is that the words have
9 independent meanings. *Ibid*, at 1215. In Petitioner's case, the phrase "litigation *or* arbitration" in
10 the arbitration clause clearly gave XXXXX & Associates alternative methods for pursuing its
11 collection claims against Petitioner, i.e., either a civil court action *or* arbitration. However,
12 Petitioner received no such choice as the arbitration agreement exclusively limited Petitioner to
13 pursuing its claims against XXXXX & Associates in AAA arbitration. The rule is well
14 established that one-side agreements that exclusively impose arbitration on one party while
15 allowing another to have a choice of litigation forums are substantively unconscionable and void.
16 *Armendariz v. Foundation Health Psychcare Service, Inc.* (2000) 24 Cal.4th 83; *Flores v.*
17 *Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846. As applied in Petitioner's case, the
18 Agreement's arbitration provision was one-sided and therefore substantively unconscionable and
19 void. Accordingly, the arbitrator had no authority to proceed on the basis of this provision and
20 the court should vacate his award. See Code of Civil Procedure § 1286.2 (a) (4).

21
22
23 As further grounds to vacate the award for unconscionability, the arbitration clause
24 required Petitioner to arbitrate any of its disputes regarding the Agreement, including malpractice
25 claims, in the AAA office where Respondent was an active arbitrator. As the Supreme Court
26 ruled in *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, where the mandatory arbitration
27 forum is so closely associated with the stronger party to an adhesive arbitration agreement, the
28

1 agreement is unconscionable and fails to meet even the “minimum levels of integrity” required in
2 contractual arbitration. See *Ibid*, at 821-828; see also Civil Code § 1670.5.

3 As applied herein, the adhesive character of the Agreement is demonstrated in the facts
4 that: (1) XXXXX & Associates, as the provider of attorney services, had complete power to
5 dictate the terms under which it would provide those services to Petitioner; (2) XXXXX &
6 Associates prepared the Agreement on a pre-printed form and simply presented it to Petitioner
7 for final signature; and (3) Petitioner was never given an opportunity to negotiate the arbitration
8 clause or any of the Agreement’s other terms. See e.g., *Flores*, supra, at 853-854. The virtual
9 identity between the AAA and Respondent, as an active arbitrator in the San Francisco office,
10 was and remains the specific type of relationship that the *Graham* Court found repugnant to the
11 “integrity” and basic fairness required in contractual arbitration. *Ibid*, at 821-828. Accordingly,
12 the court should find the Agreement’s arbitration clause void for unconscionability.
13
14

15 **B. The Arbitration Agreement Was Procured**
16 **Through Fraud**

17 When XXXXX & Associates presented the Agreement to Petitioner for its signature,
18 neither Respondent nor XXXXX & Associates informed Petitioner of Respondent’s membership
19 in the AAA as an active arbitrator in its San Francisco regional office. As a result of this non-
20 disclosure, Petitioner entered the arbitration provision with XXXXX & Associates (see XXXXX
21 Decl., ¶ 1-7). If Petitioner had known that Respondent was an active AAA arbitrator who worked
22 out of its San Francisco regional office, it never would have agreed to the arbitration clause
23 (XXXXX Decl., ¶ 1-7).
24

25 An attorney-client relationship is a fiduciary one that requires full disclosure from the
26 attorney in all dealings with his client. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971)
27 6 Cal.3d 176. Fraud can be actual or constructive, and constructive occurs where a fiduciary fails
28

1 to disclose facts necessary to avoid misleading his client. Civil Code § 1571-1573; see e.g., *Main*
2 *v. Merrill, Lynch, Pierce, Fenner & Smith* (1977) 67 Cal.App.3d 19. Even without a fiduciary or
3 other duty to disclose, one who speaks must speak the whole truth without omitting facts that
4 make the statement deceptive or misleading. See Civil Code § 1709-1710; *Doran v. Milland*
5 *Development Co.* (1958) 159 Cal.App.2d 322; *Vega v. Jones, Day, Reavis & Pogue* (2004) 121
6 Cal.App.4th 282. In the arbitration context, the question whether an arbitration clause was
7 procured through fraud is one for the court, not the arbitrator. Code of Civil Procedure § 1281.2
8 (c); *Ericksen, Arbuthnot, Etc. v. 100 Oak Street* (1983) 35 Cal.3d 312; *Green v. Mt. Diablo Hosp.*
9 *District* (1989) 207 Cal.App.3d 63. The fraud prohibited in procuring an arbitration award is not
10 limited to the arbitrator's conduct, but also applies to the conduct of a party. *Pacific Crown*
11 *Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138.

12
13
14 As Petitioner's attorney(s) under the Agreement, XXXXX & Associates and Respondent
15 had a fiduciary duty to disclose Respondent's activity as an AAA arbitrator in its San Francisco
16 office to Petitioner before it agreed to the arbitration provision. See *Neel, supra*. Even if this
17 fiduciary duty did not attach prior to the signing of the Agreement, the Agreement's stated
18 requirement for AAA arbitration in San Francisco, as drafted by XXXXX & Associates,
19 mandated that it and Respondent speak the whole truth and inform Petitioner of his association
20 with AAA as an active arbitrator in that office. Civil Code § 1709-1710; *Doran v. Milland*
21 *Development Co.* (1958) 159 Cal.App.2d 322; *Vega v. Jones, Day, Reavis & Pogue* (2004) 121
22 Cal.App.4th 282. Again, an arbitrator's powers derive solely from the arbitration agreement, and
23 an arbitration provision obtained through fraud or undue means is void and unenforceable.
24
25 *Loving & Evans v. Blick* (1949) 33 Cal.2d 603; see also *Ericksen* and *Green, supra*.

26 Accordingly, an arbitrator exceeds his powers where, as in Petitioner's case, he asserts
27 jurisdiction and issues an award on the basis of an arbitration agreement procured through fraud
28

1 or deceptive concealment. Code of Civil Procedure § 1286.2 (a) (1). In view of applicable law
2 and the circumstances in this case, the court should grant this Petition and vacate the arbitration
3 award.

4 **II. THE ARBITRATION PROCEEDED UNDER THE IMPRESSION OF POSSIBLE**
5 **BIAS AND THE COURT SHOULD VACATE THE AWARD**

6 When a party obtains an award in an arbitration that proceeded under the impression of
7 possible bias, the court should vacate the award. *Wheeler v. St Joseph Hospital* (1976) 63
8 Cal.App.3d 345; *Ceriale v. AMCO Ins. Co.* (1996) 48 Cal.App.4th 500. In determining whether
9 such impression exists, the court should apply an objective test of whether a reasonable person
10 would doubt an arbitrator’s impartiality under the circumstances of the arbitration. See *Ibid.*
11 There is no requirement of actual bias or arbitrator misconduct, and the impression of possible is
12 sufficient to warrant vacation of the award. *Ibid.* As applied to Petitioner’s case, the strong
13 impression of possible bias flowed naturally from XXXXX & Associates’ and Respondent’s
14 close association with the AAA. See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807. Indeed
15 their association was so close that it rendered the Agreement’s arbitration provision
16 unconscionable as a matter of law. *Ibid*; see also *Flores, supra*. Thus, the court should exercise
17 its power to vacate the arbitration award herein as tainted with the impression of possible bias.

18 **III. THE ARBITRATOR EXCEEDED HIS POWERS IN ISSUING AN AWARD TO**
19 **BRUCE E. XXXXX AS AN INDIVIDUAL CLAIMANT**

20 During the arbitration proceedings, Petitioner objected on the grounds that Respondent
21 identified himself as the “claimant” in the arbitration and that he did not have standing to file
22 such claim because he was not a signatory to the Agreement (XXXXX Decl., Exhibit 5, page 19).
23 Under California law, standing to arbitrate is a question of substantive arbitrability that must be
24 resolved in court before the arbitration can proceed. *Unimart v. Superior Court* (1969) 1
25 Cal.App.3d 1039; *Valley Casework, Inc. v. Comfort Constr.* (1999) 76 Cal.App.4th 1013. In
26
27
28

1 issuing the award to Respondent as an individual who was not a signatory to the arbitration
2 agreement, the arbitrator proceeded with arbitration without first securing court resolution of
3 Respondent's standing to act as the "claimant." However, the arbitrator lacked authority to
4 proceed in this manner as a matter of law and the court should therefore vacate his award. See
5 *Ibid*; see also *American Builder's Ass'n v. Au Yang* (1990) 226 Cal.App.3d 170.

7 **IV. THE ARBITRATOR EXCEEDED HIS POWERS IN ISSUING THE AWARD**
8 **BEFORE PETITIONER HAD CONCLUDED ARBITRATION UNDER MFAA**

9 The dispute between Petitioner and XXXXX & Associates involved the alleged non-
10 payment of attorney fees. Thus, Petitioner was entitled to receive notice from XXXXX &
11 Associates of his statutory right to mandatory fee arbitration pursuant to Business and
12 Professions Code § 6201. See e.g., *Schatz v. Allen, Matkins, Leck, Gamble & Mallory, LLP*
13 (2009) 45 Cal.4th 557. Petitioner was entitled to receive such notice prior to or upon
14 commencement of XXXXX & Associates' arbitration claim filed with the AAA. Business and
15 Professions Code § 6201 (a). Since XXXXX & Associates admittedly failed to meet this
16 requirement (XXXXX Decl., Exhibit 3), no waiver of these rights occurred and the arbitrator had
17 no authority to issue his award before Petitioner had completed MFAA arbitration. Business and
18 Professions Code § 6201 (b). Accordingly, the court should vacate the award and allow the
19 parties to arbitrate their attorney fee dispute under MFAA procedures.

21 **CONCLUSION**

22 On the basis of the foregoing facts and legal arguments, Petitioner requests that the court
23 vacate the AAA arbitration award herein and order the parties to proceed to MFAA arbitration.

26 Dated: September xxx, 2009

27 _____
XXXXXXX XXXXX
Attorney for Petitioner

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28