

1 XXXX XXXXX  
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5 Attorneys for Petitioner  
6 XXXX XXXXX, INC.

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF XXXXXXXXX

10 XXXX XXXXX, INC.  
11 Petitioner,  
12 v.  
13 XXXX XXXXX,  
14 Respondent.

**NO. XXXXXXXXX**

**MEMORANDUM OF POINTS AND  
AUTHORITIES SUPPORTING  
PETITIONER'S REPLY TO  
RESPONDENT'S OPPOSITION TO  
PETITION TO VACATE  
ARBITRATION AWARD**

Hearing Date: XXXX XXXXX  
Time: XXXXXXX  
Dept.: XXX

17  
18 **INTRODUCTION**

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

24 Respondent's opposition presents baseless arguments without any evidence to support his  
25 contentions that the court should deny Petitioner's request herein. Indeed Petitioner has clearly  
26 provided sufficient evidence that this arbitration agreement was unconscionable and procured  
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1 through Respondent’s fraud (see XXXXX Decl., ¶ 3-6; see also the Supplemental Declaration of  
2 Dominique S. XXXXX [“Supp. XXXXX Decl.”], ¶ 1-2 supporting this reply). Moreover,  
3 Respondent’s opposition consists of faulty legal analysis that misconstrues applicable precedent  
4 and mischaracterizes Petitioner’s arguments. The court should therefore grant Petitioner’s  
5 request and vacate the subject arbitration award.  
6

7 **ARGUMENT**

8 **I. THE COURT SHOULD DENY RESPONDENT’S IMPROPER**  
9 **REQUEST FOR JUDICIAL NOTICE**

10 Respondent has filed a defective request for judicial notice of certain documents attached  
11 as Exhibits 1 and 2 to his opposition herein (see Respondent’s MPA, page 10, ¶ 1). Respondent  
12 has improperly requested judicial notice of these documents in the body of his points and  
13 authorities. This request for judicial notice violates the mandatory provisions of California Rule  
14 of Court 3.1113(l), which requires Respondent to make this purported request in a separate  
15 document listing the items for which he seeks judicial notice. See California Rules of Court  
16 3.1113(l) and 1.5(b) (1). The Rules of Court have the force and effect of affirmative law and the  
17 judicial notice requirement of Rule 3.1113(l) are clearly mandatory (see Rule of Court 1.5(b)  
18 (1)). Accordingly, Petitioner objects to Respondent’s improper request for judicial notice and the  
19 court should deny this request (see Petitioner’s “Written Objections to Evidence Supporting  
20 Respondent’s Opposition to Petition to Vacate Arbitration Award” filed concurrently herewith).  
21

22 **II. RESPONDENT HAS FAILED TO PRESENT ANY EVIDENCE DISPUTING THE**  
23 **MATERIAL FACTS SUPPORTING THE PETITION HEREIN**

24 Respondent argues in his points and authorities that Petitioner has presented “no facts  
25 regarding the formation of the arbitration agreement” (see Respondent’s MPA, page 3, ¶ 1).  
26 Respondent is wrong.

27 Petitioner has presented sworn declaration testimony from its former chief executive  
28

1 officer that 1) Petitioner entered the written Agreement with Respondent; 2) Respondent  
2 presented this Agreement to Petitioner on a pre-printed standardized form prepared by  
3 Respondent; 3) Respondent did not offer Petitioner any opportunity to negotiate the Agreement’s  
4 arbitration clause; 4) the arbitration provision required Petitioner to arbitrate any of its disputes  
5 with Respondent before the San Francisco regional office of the American Arbitration  
6 Association (“AAA”) which included the Berkeley, California area; 5) when Respondent  
7 presented the arbitration agreement to Petitioner for its signature, Respondent was and remained  
8 an active arbitrator for AAA who worked in its San Francisco regional office; and 6) Respondent  
9 did not disclose the fact that he was an active arbitrator in AAA’s San Francisco regional office  
10 to Petitioner before it agreed to conduct arbitration in that forum (see XXXXX Decl., ¶ 3-5.) .  
11

12 While Respondent’s points and authorities present legal arguments, these arguments do  
13 not constitute evidence – and Respondent has failed to present any evidence to dispute the above-  
14 described material facts. Indeed Respondent does not dispute the facts that he was an active  
15 AAA arbitrator when he presented the arbitration agreement to Petitioner, and that he did not  
16 disclose this fact to Petitioner before it agreed to that provision.  
17

18 When the facts contained in a declaration remain undisputed, and the court has no valid  
19 reason for disbelieving those facts, the court should accept them as true. See *Braewood*  
20 *Convalescent Hospital v. Workers Compensation Board* (1983) 34 Cal.3d 159. Since  
21 Respondent has failed to dispute the aforementioned material facts supporting Petitioner’s  
22 request to vacate the arbitration award, the court should accept these facts as both true and  
23 sufficient to grant Petitioner’s request herein. See *Ibid.*  
24

25 **III. ENFORCEABILITY OF AN ARBITRATION AGREEMENT IS**  
26 **DETERMINED BY THE COURT**

27 Respondent opens his opposition with a misstatement of the law regarding the correct  
28

1 standard for determining the issues raised in Petitioner’s request to vacate the arbitration award  
2 (see Respondent’s MPA, page 1, “A Couple of Legal Standards”). While Respondent asserts that  
3 the arbitrator should decide the “scope” or “legality” of an arbitration agreement, this “standard”  
4 of review has no application to the issues herein as Petitioner has not challenged the scope or  
5 legality of the Agreement’s arbitration clause.  
6

7         Instead, Petitioner has challenged this provision’s *enforceability* which is a matter that  
8 only the court can resolve. See Code of Civil Procedure §§ 1281.2 (c), 1286.2 (a); *Flores v.*  
9 *Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4<sup>th</sup> 846; *Nyulassy v. Lockheed Martin Corp.*  
10 (2004) 120 Cal.App.4<sup>th</sup> 1267, 1280-1286. None of Respondent’s case citations involved the  
11 issue of an arbitration agreement’s enforceability (see *Advanced Micro Devices, Inc. v. Intel*  
12 *Corp.* (1994) 9 Cal.4<sup>th</sup> 362 [dispute regarding an arbitrator’s power to award equitable relief];  
13 *Morris v. Zuckerman* (1968) 69 Cal.2d 686 [dispute regarding the scope of an arbitration  
14 agreement]; and *Moncharsh v. Heily & Blase* (1992) 3 Cal.4<sup>th</sup> 1 [challenge to the legality of a  
15 fee-splitting agreement in an employment contract]).  
16

17         Accordingly, the court should disregard Respondent’s baseless contention that *Advance*  
18 *Micro Devices, Inc.*, *Morris* and *Moncharsh* set the correct “legal standard” for determining the  
19 enforceability of the Agreement’s arbitration clause. The rule is well-established that only the  
20 court can resolve this issue, and it should do so by granting Petitioner’s request to vacate the  
21 subject arbitration award. See *Fitz v. NCR Corp.* (2004) 118 Cal.app.4<sup>th</sup> 702, 720-728; *Harper v.*  
22 *Ultimo* (2003) 113 Cal.App.4<sup>th</sup> 1402, 1407-1410; *Flores v. Transamerica HomeFirst, Inc.* (2001)  
23 93 Cal.App.4<sup>th</sup> 846; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4<sup>th</sup> 1267, 1280-  
24 1286.  
25

#### 26                   **IV. THE ARBITRATION AGREEMENT WAS UNCONSCIONABLE**

27                   For the court to find an arbitration agreement unconscionable, both procedural and  
28

1 substantive unconscionability must be present. *Fitz v. NCR Corp.* (2004) 118 Cal.App.4<sup>th</sup> 702,  
2 720-728; *Harper v. Ultimo* (2003) 113 Cal.App.4<sup>th</sup> 1402, 1407-1410; *Flores v. Transamerica*  
3 *HomeFirst, Inc.* (2001) 93 Cal.App.4<sup>th</sup> 846; *Nyulassy v. Lockheed Martin Corp.* (2004) 120  
4 Cal.App.4<sup>th</sup> 1267, 1280-1286. While both procedural and substantive unconscionability must  
5 occur to render an agreement unenforceable, they need not occur in equal amounts. See *Harper*,  
6 *supra*, 1403. In Petitioner's case, the Agreement's arbitration provision was both procedurally  
7 and substantively unconscionable and the court should vacate the arbitration award.

### 9 **A. Procedural Unconscionability**

10 Procedural unconscionability arises from unequal bargaining power that allows the  
11 stronger party to impose contractual terms on the weaker party without affording any opportunity  
12 to negotiate those terms. See *Ibid.* The fact that there are alternative sources for a product or  
13 service does not affect a court's unconscionability analysis, and the court can find procedural  
14 unconscionability even where such alternatives exist. See e.g., *Armendariz v. Foundation Health*  
15 *Psychcare Service, Inc.* (2000) 24 Cal.4<sup>th</sup> 83; see also *Szetela v. Discover Bank* (2002) 97  
16 Cal.App.4<sup>th</sup> 1094. Moreover, and despite Respondent's erroneous assertion to the contrary,  
17 adhesion is *not* required for a court to find procedural unconscionability. See *Harper v. Ultimo*  
18 (2003) 113 Cal.App.4<sup>th</sup> 1402, 1408-1409; *Nyulassy v. Lockheed Martin Corp.* (2004) 120  
19 Cal.App.4<sup>th</sup> 1267, 1280-1281, fn. 11. While adhesion is a frequent component of procedural  
20 unconscionability, it is not a necessary element of this fatal contract flaw. See *Ibid.*

23 Procedural unconscionability also occurs where a contract's arbitration clause is hidden in  
24 a prolix of fine print or otherwise surprises the party who was unaware of its material terms or  
25 existence. See *Fitz, supra*, 721-722; *Harper, supra*, 1406-1407. For example, such surprise  
26 occurs where these terms are concealed or a contained in third-party arbitration rules that are  
27 incorporated but not attached to the agreement. See *Ibid.*

1           In Petitioner’s case, the arbitration agreement was procedurally unconscionable for  
2 several reasons. First, as discussed in Section II above, the undisputed facts show that the  
3 arbitration clause was contained in a pre-printed form contract prepared by Respondent.  
4 Petitioner’s only choice was to either accept the arbitration clause in the Agreement or seek legal  
5 services elsewhere, i.e., Petitioner was offered no opportunity to negotiate the arbitration  
6 provision (see XXXXX Decl., ¶ 3-5.). The court is not required to find that the Agreement or its  
7 offending arbitration clause was adhesive in order to find procedural unconscionability. See  
8 *Harper v. Ultimo* (2003) 113 Cal.App.4<sup>th</sup> 1402, 1408-1409; *Nyulassy v. Lockheed Martin Corp.*  
9 (2004) 120 Cal.App.4<sup>th</sup> 1267, 1280-1281, fn. 11. Moreover, Petitioner’s undisputed proof that  
10 Respondent prepared the form Agreement and arbitration clause without any negotiation with  
11 Petitioner sufficiently establishes these factual elements of procedural unconscionability. See  
12 *Ibid.*  
13

14  
15           Second, the undisputed facts show that 1) the arbitration provision required Petitioner to  
16 arbitrate any of its disputes, “including malpractice claims,” with Respondent before the San  
17 Francisco regional office of the American Arbitration Association (“AAA”) which included the  
18 Berkeley, California area; 2) Respondent was at all times herein an active arbitrator for AAA  
19 who worked in its San Francisco regional office; and 3) Respondent did not disclose this fact to  
20 Petitioner before it agreed to conduct arbitration in that forum (see XXXXX Decl., ¶ 3-5.) . The  
21 undisputed facts also prove that Petitioner did not discover Respondent’s status as an active AAA  
22 arbitrator until *after* Respondent filed his arbitration claim against Petitioner (see XXXXX Decl.,  
23 ¶ 4-5). Thus, Respondent concealed his AAA membership when he presented the Agreement’s  
24 arbitration clause to Petitioner, and Petitioner was later surprised to discover this fact after the  
25 arbitration had begun (see Supp. XXXXX Decl., ¶ 1-2). Moreover, the arbitration clause  
26 incorporated the “Commercial Rules of the American Arbitration Association” without 1)  
27  
28

1 specifying which version of these Rules would apply to disputes between Petitioner and  
2 Respondent; and 2) attaching a copy of these Rules to the arbitration agreement (see Supp.  
3 XXXXX Decl., ¶ 1-2). Thus, Petitioner’s facts and evidence regarding the Agreement’s  
4 arbitration clause prove the concealment and surprise elements of procedural unconscionability.  
5 *Fitz, supra*, at 721-722; *Harper, supra*, at 1406-1407.

6  
7 **B. Substantive Unconscionability**

8 In deciding whether an arbitration agreement is substantively unconscionable, the court  
9 should examine the agreement’s actual effect even if its language appears facially neutral. See  
10 e.g., *Fitz* and *Harper, supra*. As noted in Petitioner’s opening points and authorities, the subject  
11 arbitration clause provides the following:

12  
13 “In any *litigation or arbitration* required to enforce payment of our statements, the  
14 prevailing party will be entitled to reasonable attorneys’ fees and costs. In case of any  
15 dispute, California law will govern and *you* agree that all proceedings will be initiated  
16 and conducted in Berkeley, California. *You agree that any disputes, including*  
17 *malpractice claims, will be handled exclusively in accordance with the Commercial*  
18 *Rules of the American Arbitration Association. This agreement is entered into and is*  
19 *to be performed in Berkeley, California” (XXXXXX Decl., Exhibit 1, ¶ 9. Emphasis*  
20 *added).*

21 Respondent contends, almost ridiculously, that the first sentence in this provision relates solely to  
22 a prevailing party’s ability to recover attorneys’ fees and nothing more. However, the plain  
23 language of this sentence, when given a common sense reading, specifically states that *litigation*  
24 *or arbitration* may occur to enforce “payment of our statements.” When read in the context of  
25 the entire Agreement, including Paragraph 4 thereof, Respondent was the only party who would  
26 ever file a claim or suit to enforce payment of his billing statements. However, any claims that  
27 Petitioner might file against Respondent were restricted to AAA arbitration (XXXXXX Decl.,  
28 Exhibit 1, ¶ 4 and 9). A common sense reading of the Agreement and its arbitration clause shows  
that Respondent had the option to litigate or arbitrate any claims he had for unpaid attorney fees,

1 while Petitioner could only arbitrate any claims that it had against Respondent. Under applicable  
2 law, this arbitration provision was substantively unconscionable (see *Fitz*, supra, at 724-725) and  
3 the court should grant Petitioner’s request herein.

4 **V. THE ARBITRATION AGREEMENT WAS PROCURED THROUGH FRAUD**

5 As noted above, Respondent does not deny that he was an active AAA arbitrator when he  
6 and Petitioner entered the arbitration agreement and that he failed to disclose this fact to  
7 Petitioner. Thus, the court should accept Petitioner’s evidence on this issue as true. See  
8 *Braewood Convalescent Hospital v. Workers Compensation Board* (1983) 34 Cal.3d 159.  
9 Instead of offering rebuttal evidence, Respondent has completely mischaracterized Petitioner’s  
10 argument regarding Respondent’s fraud and misstated applicable law on this issue.

11 Although Petitioner has expressly argued and presented evidence that Respondent  
12 fraudulently induced Petitioner to accept the *arbitration clause* in the Agreement (see Petitioner’s  
13 opening MPA, pages 7-8, § I B), Respondent incorrectly asserts that Petitioner is claiming fraud  
14 “in the inducement to sign” the Agreement (see Respondent’s MPA, page 6, ¶ 3). Not only has  
15 Respondent mischaracterized Petitioner’s arguments to this court, he has grossly misstated the  
16 holding in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4<sup>th</sup> 394 regarding the  
17 court’s power to resolve this issue. In citing *Larian v. Larian* (2004) 123 Cal.App.4<sup>th</sup> 751,  
18 Respondent contends that *Rosenthal* held that the arbitrator should determine whether fraud in  
19 the inducement to enter an arbitration agreement vitiates its enforceability. However, *Rosenthal*  
20 specifically held, as Petitioner has argued herein, that the power to resolve this issue rests solely  
21 with the court. See *Rosenthal*, supra, 417-419.

22 Again, as a matter of common sense, if Petitioner had known that Respondent was an  
23 active AAA arbitrator who worked out of its San Francisco regional office, it never would have  
24 agreed to the arbitrate in that forum (XXXXX Decl., ¶ 3-7). Even if Respondent had no fiduciary

1 duty to disclose this fact to Petitioner, his failure to do so made the arbitration clause deceptive  
2 and misleading. See Civil Code § 1709-1710; *Doran v. Milland Development Co.* (1958) 159  
3 Cal.App.2d 322; *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4<sup>th</sup> 282. Moreover, an  
4 arbitrator exceeds his powers where, as in Petitioner’s case, he issues an award based on an  
5 arbitration agreement procured through fraud or deceptive concealment. See Code of Civil  
6 Procedure § 1286.2 (a) (1). In view of applicable law and the circumstances in Petitioner’s case,  
7 the court should grant its Petition and vacate the arbitration award.  
8

9 **VI. THE ARBITRATION PROCEEDED UNDER THE IMPRESSION OF POSSIBLE**  
10 **BIAS AND THE COURT SHOULD VACATE THE AWARD**

11 When a party obtains an award in an arbitration that proceeded under the impression of  
12 possible bias, the court should vacate the award. *Wheeler v. St Joseph Hospital* (1976) 63  
13 Cal.App.3d 345; *Ceriale v. AMCO Ins. Co.* (1996) 48 Cal.App.4<sup>th</sup> 500. In Petitioner’s case, such  
14 strong impression flowed naturally from Respondent’s close business association with the  
15 AAA’s San Francisco regional office. See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807; see  
16 also Supp. XXXXX Decl., ¶ 1-3. As Respondent’s part-time employer who was in the business  
17 of selling arbitration services, AAA benefitted financially from Respondent’s funneling of his  
18 client disputes to this arbitration forum. Rather than directing his clients to MFAA or other  
19 neutral arbitration, Respondent’s legal services contract directed them to AAA arbitration in  
20 Respondent’s home office. While Respondent’s referrals advanced AAA’s interest in earning  
21 arbitration fees, these referrals also advanced Respondent’s interest in securing a friendly (i.e.,  
22 biased) arbitration forum. See *Fitz, supra*, at 727. This symbiotic relationship between  
23 Respondent and AAA permeated Petitioner’s arbitration (see Supp. XXXXX Decl., ¶ 1-3).  
24 However, AAA, the arbitrator and Respondent never disclosed this relationship to Petitioner, and  
25 it discovered Respondent’s active AAA employment through its own independent research (see  
26  
27  
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1 Supp. XXXXX Decl., ¶ 1-3). Under the circumstance of this case, Respondent's undisclosed and  
2 ongoing business relationship with AAA's San Francisco regional office created a clear  
3 impression of possible bias. Accordingly, the court should grant Petitioner's request to vacate the  
4 arbitration award.

5  
6 **CONCLUSION**

7 On the basis of the foregoing facts and legal arguments, Petitioner has demonstrated that  
8 the arbitrator's award was based on an unconscionable arbitration clause procured through fraud  
9 that infected the entire arbitration process with the impression of possible bias. Accordingly,  
10 under applicable law, the court should find that 1) this arbitration clause was and remains  
11 unenforceable; and 2) the arbitrator exceeded his powers in issuing an award based on an  
12 unenforceable arbitration agreement. These defects cannot be severed or corrected s they  
13 permeate the entire arbitration provision. See *Fitz v. NCR Corp.* (2004) 118 Cal.app.4<sup>th</sup> 702,  
14 726-728. Accordingly, the court should vacate the AAA arbitration award herein and order the  
15 parties to proceed to MFAA arbitration.  
16

17  
18 Dated: October xxx, 2009

19 \_\_\_\_\_  
20 XXXX XXXXXXXX  
21 Attorney for Petitioner  
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