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alleged the Fair and Accurate Credit Transaction Act (“FACTA”) requirements were disseminated to Zazzle by various companies and councils affiliated with the credit-card industry. Due to this notice, Zazzle’s failure to comply with FACTA requirements allegedly constituted a willful violation. Smith alleged that she was actually harmed by being exposed to an increased risk of identity theft, but she did not seek actual damages because they would have been too difficult to quantify. She sought to collect statutory damages, punitive damages, and reasonable attorneys’ fees and costs. Smith alleged that similar willful violations by Zazzle had affected other similarly-situated individuals. Zazzle moved to dismiss, arguing that FACTA’s truncation requirement did not apply to internet receipts.

**HOLDING:** Motion granted.

**REASONING:** FACTA’s truncation requirement provides that those who accept payment by credit or debit cards for business transactions are not permitted to print more than the card’s last

five digits or expiration date on any receipt. The term print is not defined, so the court looked to the term’s common usage. Courts are guided by the principle directing courts to construe a general term in light of the more-specific terms within such statute. Based upon the other FACTA language, the court concluded congress intended the term print meant the imprinting of something on paper or another tangible surface. If congress intended the term to extend to email transmissions, then congress would have reflected such intent in clear, plain language. The court held that a merchant’s receipt displayed on a computer screen is not subject to FACTA’s truncation requirement. Smith did not have a cause of action under FACTA. The court granted Zazzle’s motion to dismiss.

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## ARBITRATION

### ARBITRATION CLAUSE GRANTING UNEQUAL POWER AND WAIVING LEGAL RIGHTS DEEMED UNCONSCIONABLE

*Bencharsky v. Cottman Transmission Sys., L.L.C.*, \_\_\_ F. Supp. 2d \_\_\_ (N.D. Cal. 2008).

**FACTS:** Plaintiff, Joseph Bencharsky, entered into a franchise agreement with defendant, Cottman Transmission Systems, LLC, a franchisor of automotive repair businesses. After Cottman acquired a competitor, AAMCO, it stopped promoting the Cottman brand. Cottman refused to renew Bencharsky’s franchises except under AAMCO’s name. Cottman and Bencharsky’s relationship was governed by a franchise agreement, which included a provision requiring arbitration. The franchise agreement represented Cottman had a proven system, Cottman recognized trademarks it would continuously promote, and each franchisee would have a renewable protected territory. Bencharsky asserted Cottman did not uphold these representations after acquiring the AAMCO brand. Bencharsky filed suit against Cottman for breach of contract, fraud, negligent misrepresentation, interference with contractual rights, and violation of the California Franchise Investment Law (“CFIL”). Cottman filed a motion to compel arbitration.

**HOLDING:** Granted.

**REASONING:** Bencharsky argued the arbitration agreement was invalid, because it unconscionable, and thus, unenforceable. In order for a court to invalidate a contract provision on unconscionability grounds, both procedural and substantive unconscionability must be present, but they need not be present in the same degree. Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. The focus is on inequality of bargaining power and whether the arbitration agreement is adhesive. As a national franchisor, Cottman was in a stronger financial position and there was no evidence Bencharsky could have opted out of the arbitration provision, making it evident this was a contract

of adhesion. The court noted there were few other aspects of procedural unconscionability present, and held that there was minimal procedural unconscionability.

Substantive unconscionability focuses on contract terms and whether those terms are so one-sided as to shock the conscience. Cottman had the right to proceed directly to court in order to obtain temporary restraining orders and preliminary or permanent injunctions against conduct that may cause Cottman irreparable harm, while Bencharsky’s only option was arbitration. The court found the lack of mutuality in the arbitration provision to be substantively unconscionable. The arbitration provision also limited rights that would otherwise have been available to Bencharsky. One clause barred recovery of punitive and exemplary damages, and another imposed a one year statute of limitations. The CFIL made punitive damages available and had a statute of limitations of four years. The court noted that the CFIL also may not be waived. The arbitration provision would bar relief otherwise available to Bencharsky by an unwaivable statute, and thus, substantively unconscionable. The court recognized a duty under the Federal Arbitration Act to enforce arbitration agreements. The court granted Cottman’s motion to compel arbitration while severing the unconscionable clauses from the agreement.

### MANIFEST DISREGARD OF THE LAW IS NOT A VALID, NONSTATUTORY BASIS FOR VACATING AN ARBITRATION AWARD SUBJECT TO THE FEDERAL ARBITRATION ACT

*Citigroup Global Mkts, Inc. v. Bacon*, 562 F.3d 349 (5th Cir 2009).

**FACTS:** Debra Bacon notified Citigroup that her husband had made five withdrawals from her Citigroup IRA without her permission. Bacon submitted a claim in arbitration against Citigroup seeking reimbursement for the unauthorized withdrawals. The arbitration panel found in favor of Bacon

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and awarded her \$256,000. Citing the Federal Arbitration Act (“FAA”) § 10, Citigroup made an application to the district court requesting vacatur of the award. The district court granted the motion to vacate, holding that the award was in manifest disregard of the law. Bacon appealed.

**HOLDING:** Vacated and remanded.

**REASONING:** The court began by analyzing the Supreme Court’s recent opinion in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). The court determined that the Supreme Court rejected manifest disregard of the law as an independent ground for vacatur, and noted that §§10 & 11 of the FAA provide the exclusive basis for vacating, modifying or correcting an arbitration award. The court then evaluated the findings of other circuit courts. The Sixth, Second, and Ninth Circuits have found that manifest disregard of the law is folded into §10(a)(4) of the FAA. However, the Fifth Circuit believed the Supreme Court was clear in its holding, and held the statutory provisions in §10 are the exclusive grounds for vacatur. The court stated that manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected. The court, therefore, vacated the district court’s judgment and remanded for reconsideration in accord with the exclusivity of the statutory grounds.

## ARBITRATION CLAUSE IN WIRELESS TERMS HELD CONSCIONABLE ABSENT PROOF OF FINANCIAL HARM

Crandall v. AT & T Mobility, L.L.C., \_\_\_\_ F. Supp. 2d \_\_\_\_ (S.D. Ill. 2008).

**FACTS:** Plaintiffs, Marcie Crandall and others, brought a class action suit claiming AT&T committed common law fraud by misleading them into believing their cell phones were incompatible

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with their new service provider after AT&T’s predecessor companies merged, causing them to buy new phones unnecessarily. The contracts between plaintiffs and AT&T contained an arbitration provision that stated by agreeing to these terms, plaintiffs waived all class action claims and all disputes would be arbitrated

on an individual basis. Plaintiffs claimed the arbitration agreements were unconscionable due to the class action waiver, and consequently, the entire arbitration provision was unenforceable. AT&T filed a motion to compel arbitration under the Federal Arbitration Act and to dismiss the case.

**HOLDING:** Motion granted.

**REASONING:** The court held that a class action waiver is not unconscionable if plaintiffs had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of plaintiffs to obtain a remedy in a cost effective manner. Plaintiffs made no

showing the expenses they would incur would make arbitration prohibitive, nor did they provide any evidence concerning the comparative expense of litigating the claims. A party seeking to invalidate an arbitration agreement on grounds that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such cost. The court stated that a high cost differential between arbitration and litigation was highly probative evidence as to the plaintiff’s claim that requiring arbitration, rather than the court system, will effectively deny legal recourse. The court found plaintiffs did not show their inability to pursue these claims on a class-wide basis effectively denied them legal recourse, especially where small claims courts remained available under the terms of the contract. The court dismissed the class action. Defendant’s motions to compel arbitration and dismiss the action were granted. The court dismissed the case without prejudice and directed the court clerk to close the case on the court’s docket.

## CALIFORNIA RESIDENT SUBJECT TO CLICKWRAP ARBITRATION AGREEMENT FOUND VALID UNDER VIRGINIA LAW

Guadagno v. E\*Trade Bank, 592 F. Supp. 2d 1263 (C.D. Cal. 2008).

**FACTS:** Maria Guadagno, a California resident, had an interest-earning account with E\*Trade Bank (“E\*Trade”), a federally-chartered thrift and savings bank. Before opening her account with E\*Trade, Guadagno filled out an online application. The application contained an arbitration agreement, an arbitration clause and a choice of law provision. Guadagno used E\*Trade’s online service to pay her bills, instructing E\*Trade to withdraw money from her account and send it to her creditors or others in the form of checks or electronic payments. When Guadagno directed E\*Trade to process a payment, E\*Trade immediately withdrew the payment from Guadagno’s account, but then waited three or more days to send the payment to the creditor. Between the start date and the send date, Guadagno did not earn interest on the money withdrawn for payment. Guadagno brought suit against E\*Trade, alleging claims for violation of the Electronic Funds Transfer Act, violation of California’s Unfair Competition Law, unjust enrichment, and breach of contract. E\*Trade moved to compel arbitration based on the arbitration clause contained in its account agreement (“agreement”).

**HOLDING:** Granted.

**REASONING:** The court first determined which state’s law governed the Agreement. The court decided Virginia law would apply because under California law, a contract’s choice-of-law provision determines the governing law unless 1) the chosen state has no substantial relationship to the contracting parties and no reasonable basis for selecting the state exists; or 2) application of the chosen state’s law would contradict a fundamental policy of the state of California and California has a materially greater interest in the matter. The court found there was a substantial relationship to Virginia, because E\*Trade was domiciled there. Application of Virginia law does not contradict California’s fundamental policy against enforcing unconscionable consumer class action waivers.

The court found that the agreement was valid and was not a contract of adhesion because Guadagno had 60 days to

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opt out of the agreement by notifying E\*Trade in writing and Guadagno assented to this. Assent was found in the fact that the terms of the arbitration clause were clear and reasonably conspicuous and Guadagno clicked on the acknowledgment icon indicating she accepted the terms. The court found all of Guadagno's statutory or contract law claims were arbitrable and granted E\*Trade's motion to compel arbitration.

## NURSING HOME CAN'T ENFORCE ARBITRATION CLAUSE AGAINST WRONGFUL DEATH CLAIMANT

Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009).

**FACTS:** Dorothy Lawrence resided at Beverly Manor. Lawrence's daughter signed an arbitration agreement on her mother's behalf under a power of attorney. The arbitration agreement compelled arbitration for any claims Lawrence may have had against Beverly Manor and any claim derived through her claims. Shortly after being admitted to Beverly Manor, Lawrence died. Her son, Dale Lawrence, filed a petition against Beverly Manor under the wrongful death statute. He claimed his mother died as a result of injuries incurred when Beverly Manor employees dropped her. Beverly Manor filed a motion to compel arbitration. The circuit court held wrongful death claimants, Lawrence's son and daughter, were not bound by the arbitration agreement. They could bring a court action for their relative's wrongful death. Beverly Manor appealed.

**HOLDING:** Affirmed.

**REASONING:** The court had to determine whether the parties to the wrongful death suit were bound by the arbitration agreement. The court found that parties were not bound under the wrongful death statute because it created a new cause of action, separate and distinct from the underlying tort. The arbitration agreement applied only to any person whose claim is derived through or on behalf of Lawrence. Therefore, the arbitration agreement cannot bind parties to the wrongful death suit. The trial court's judgment was affirmed.

## CLIENTS IN FEE DISPUTES WITH LAWYERS DO NOT NECESSARILY HAVE A RIGHT TO A TRIAL IF THEY AGREED BEFOREHAND TO BINDING ARBITRATION

Schatz v. Allen Matkins Leck Gamble & Mallory, L.L.P., 198 P.3d 1109 (Cal. 2009).

**FACTS:** Richard Schatz retained the law firm of Allen Matkins Leck Gamble & Mallory ("Matkins") to represent him in a partnership dispute. Schatz signed a contract containing an arbitration provision for any matter Matkins might handle on his behalf. The contract provided that any dispute arising out of or relating to the representation contract, their relationship, or the services performed, including but not limited to disputes regarding attorney's fees or costs must be resolved by submission to binding arbitration. Schatz retained Matkins to represent him in another dispute. Schatz did not sign a new contract or arbitration agreement. Schatz stopped making payments to Matkins, but Matkins proceeded to trial despite the nonpayment.

Matkins invoked the former contract's arbitration clause in the partnership dispute. Schatz claimed the arbitration

agreement was illegal, but wanted to exercise his statutory rights to nonbinding fee arbitration pursuant to the Mandatory Fee Arbitration Act ("MFAA"). The matter was arbitrated and the arbitrator ruled in favor of Matkins. Schatz filed a complaint, seeking a new trial, declaratory relief and refund of attorneys' fees. Matkins petitioned to compel binding arbitration under the contract. Schatz argued MFAA's right to trial de novo after statutory arbitration defeats any contractual obligation to arbitrate attorney-client fee disputes. The appellate court agreed with Schatz, and denied Matkins' petition to compel arbitration.

**HOLDING:** Reversed and remanded.

**REASONING:** The court explained MFAA's purpose is to resolve fee disputes between attorneys and clients without forcing the client to further litigation. Under MFAA, clients may invoke MFAA and proceed to arbitration despite the absence of any prior agreement to do so. The award under MFAA is non-binding unless the parties have agreed in writing that it will be binding. After MFAA proceedings have been terminated, leaving one or both parties dissatisfied, the parties are free to proceed with further action. According to MFAA's language, binding arbitration may go forward once MFAA's arbitration process was over. The court explained that MFAA does not confer immunity from valid defenses, such as the existence of a contract to arbitrate. The court reversed the lower court's judgment, and remanded for further proceedings consistent with the opinion.

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## ARBITRATION AGREEMENT WITH SMALL CLAIMS OPTION HELD NOT UNCONSCIONABLE

Strawn v. AT&T Mobility, Inc., 593 F. Supp. 2d 894 (S.D.W.Va. 2009).

**FACTS:** Strawn contracted with AT&T Mobility Inc. to receive mobile telecommunication services. The terms of service contained an arbitration provision stating the parties agreed to arbitrate all disputes. The provision allowed for either party, solely in their individual capacity, to bring an action in small claims court, and specifically prohibited class action suits against AT&T. Strawn noticed AT&T charged a small monthly fee for a roadside assistance plan he never requested. He was required to identify the charge and affirmatively opt out in order to avoid being billed.

Strawn brought a class action lawsuit in state court, alleging the monthly fee was an unfair and deceptive practice that violated the West Virginia Consumer Credit and Protection Act ("WVCCPA"). Pursuant to the Federal Arbitration Act ("FAA"), AT&T removed the case to federal court. AT&T filed a motion to compel arbitration or force the class to pursue their claims individually in small claims court, according to the arbitration provision.

**HOLDING:** Motion granted.

**REASONING:** The court determined the arbitration provision

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was not unconscionable and thus, enforceable. Strawn argued that the arbitration provision was unenforceable, because the ability to institute a small claims case was illusory. Strawn calculated his damages based on the formula in the arbitration agreement. Specifically, if the amount in dispute was less than \$5,000, and if the arbitrator were to award less than \$5,000, but more than AT&T's settlement offer, then AT&T would pay \$5,000 plus attorney's fees. Thus, the damages Strawn calculated exceeded the West Virginia jurisdictional maximum for magistrate courts. The court rejected that argument, reasoning an unconscionability finding on Strawn's suggested basis might encourage aggrieved AT&T customers to inflate their damage claims in an attempt to avoid the arbitration provision. The court noted it is the legislature and not AT&T that sets the magistrate court jurisdictional maximum. Strawn's remaining argument was class action relief would be proper in a small dollar - high volume case. The court agreed with the argument, but found this case was not a small dollar-high volume case because each litigant could have a potential claim of \$5,000 or more. Therefore, the court dismissed the complaint and renewed AT&T's motion to compel arbitration.

## CLAIM AGAINST CREDIT CARD COMPANY MUST GO TO ARBITRATION

### CLASS ACTION WAIVER IS VALID

*Pleasants v. Am. Express Co.*, 541 F.3d 853 (8th Cir. 2008).

**FACTS:** American Express Incentive Services ("AEIS") sent Chrystin Pleasants three pre-paid cards in exchange for her participation in online surveys. The cards could be used to make purchases at establishments that accepted American Express credit cards. Attached to each card was a document entitled card terms and conditions. The document stated that any claim must be resolved by arbitration, and there was no right or authority for any claim to be arbitrated on a class action basis. Pleasants used the cards to pay at a restaurant, but the restaurant processed the cards for more than their stored value. AEIS requested Pleasants pay the difference within ten days. A month later, AEIS sent Pleasants another letter requesting she pay the difference, a late fee,

and a transaction fee. Pleasants disputed the charges, but AEIS continued its collection efforts. Pleasants brought this lawsuit on behalf of herself and others similarly situated, claiming AEIS violated the Truth in Lending Act ("TILA") by issuing prepaid cards without making the required disclosures. Pleasants sought injunctive relief, actual and statutory damages, attorney's fees, and other costs. AEIS moved to compel arbitration on an individual basis as provided

**The court found the arbitration clause did not exhibit procedural unconscionability, and noted the class-action waiver's font was in all-caps and conspicuous.**

in the terms and conditions of the card agreement and the Federal Arbitration Act. The district court granted AEIS's motion and compelled Pleasants to submit her claim to arbitration on an individual basis. Pleasants appealed, arguing that the contract's class-action waiver is unconscionable.

**HOLDING:** Affirmed.

**REASONING:** Pleasants argued that under Missouri law, the class-action waiver contained in the arbitration clause was unconscionable and unenforceable. Missouri law requires that for a contract to be voided as unconscionable, it must be both procedurally and substantively unconscionable, but not necessarily in equal amounts. The court provided examples of procedural unconscionability, including fine print font, misrepresentation or unequal bargaining power between contracting parties. The court found the arbitration clause did not exhibit procedural unconscionability, and noted the class-action waiver's font was in all-caps and conspicuous. Substantive unconscionability is defined as an undue harshness in the contract terms themselves. The court found the arbitration clause did not limit Pleasants's remedies. Under TILA, a prevailing plaintiff may recover attorney's fees, costs, and statutorily-capped and actual damages. Pleasants would not be practically prohibited from seeking redress for an alleged violation, because her total recovery would likely exceed her claim's arbitration costs. The court determined that enforcing the agreement, under the circumstances, did not lead to an unconscionable result.