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WRITING SAMPLE

The following is an Open Memorandum I prepared for my first year Lawyering class. I did not receive substantive assistance on this assignment and earned a High Pass grade in the course.

QUESTION PRESENTED

Under California common law, unconscionability is a defense to the enforceability of a contract and requires both substantive and procedural unconscionability. Is the post-termination commission clause in the contract between Cody Sky, our client, and Anne Waynes, his former agent—which requires Sky to pay Waynes a 20% commission for a sponsorship that Sky secured after the contract’s expiration—procedurally unconscionable?

BRIEF ANSWER

Likely yes, but minimally. Procedural unconscionability can take on two forms, either one of which is sufficient: “oppression,” an inequality of bargaining power from the absence of real negotiation and a meaningful choice, and “unfair surprise,” which is when the objectionable term is hidden in the document. Sky had a meaningful choice in whether to sign the contract, so even though there was a lack of negotiation and he had less bargaining power than Waynes, procedural unconscionability does not appear in the form of oppression. However, unfair surprise is present despite the conspicuousness of the clause because Waynes failed to disclose the "unusual" contract provision and presented the contract to Sky as standard.

FACTS

At the time the agreement was signed, Sky was a young college student and had been on the professional freeride ski circuit for two seasons. Waynes approached Sky after the 2022-2023 season to discuss representation. Sky had not considered signing on with an agent previously and had no representation, legal or professional. He performed well during the previous season and earned \$90,000 in prizes and sponsorships. He and his parents, none of them experienced in business, thought it wise to work with a professional.

Sky and Waynes's initial conversations occurred over the phone sometime in the summer of 2023 and consisted of Waynes collecting basic background information and attempting to set up in-person meetings.

The first meeting between Sky and Waynes was on August 30, 2023. Waynes's attorney was present at this meeting. Waynes and counsel presented a draft contract with handwritten figures in spaces left blank for the contract's duration and the agent's commission percentage.

Waynes informed Sky that the agreement was standard, with all the standard terms, and that Sky would have to pay Waynes 20% of what he earned while the agreement was in effect. She also told Sky that she typically had long term, multi-year contracts with professional athletes but used a one-year term for college athletes. Waynes explained that this was to allow Sky to try working with her to see how things go with an agent, and that if a year went by and he didn't want an agent, he would not be "locked" into a longer-term agreement.

At their second meeting on September 2, 2023, Waynes was again joined by counsel and presented Sky, who was again unrepresented, with a typed version of the agreement. Sky signed it without re-reading, trusting Waynes's earlier explanations. The final version included a clause extending his commission obligations for one year after expiration. It is unknown whether the previous version also included this post-termination commission clause (PTCC). Waynes did not mention the PTCC and Sky was unaware of it at the time of signing. Waynes also did not inform Sky that the terms of the agreement were negotiable.

During the contract year, Sky paid Waynes 20% of his \$36,000 earnings. After the contract expired, Sky independently secured a \$500,000 sponsorship from Purple Moose Energy Drink. Waynes, claiming the post-expiration clause entitled her to continued commissions, sent the demand letter demanding \$100,000 as provided for by the PTCC.

Sky wants to know if he is obligated to pay Waynes the \$100,000 she demands, or if the PTCC is unenforceable.

DISCUSSION

It is likely that the PTCC is procedurally unconscionable, although the level of procedural unconscionability in this case seems low. Unconscionability is designed to allow California courts to enforce a general business ethic. *Carboni v. Arrospide*, 2 Cal. App. 4th 76, 82. If a court finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the specific unconscionable clause or the entire contract, or it may limit the application of an unconscionable clause to avoid any unconscionable result. California Civil Code §1670.5.

The concept of unconscionability is meant to be flexible to “allow courts to directly consider numerous factors which may adulterate the contractual process.” *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 484 Any clause of a contract may be found to be unconscionable. *Id.* Unconscionability has two elements: substantive unconscionability and procedural unconscionability. *See e.g. Carboni*, 2 Cal. App. 4th at 82. “Substantive unconscionability focuses on the actual terms of the agreement while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties.” *Am. Software v. Ali*, 46 Cal. App. 4th 1386, 1390. Both elements are required to find a clause unconscionable but “there is a sliding scale relationship between the two concepts: the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required.” *Carboni*, 2 Cal. App. 4th at 83. This memo will only discuss procedural unconscionability in detail. Procedural unconscionability appears in one or both of two forms: “oppression” and “surprise.” *See e.g. A&M Produce*, 135 Cal. App. 3d at 486; *Ellis v. McKinnon Broadcasting Co.*, 18 Cal. App. 4th 1796, 1804-1805; *Carboni*, 2 Cal. App. 4th at 85. Either form is sufficient for a court to find a clause procedurally unconscionable.

I. Oppression is not present despite Sky’s inferior bargaining power and the lack of negotiation because he did have meaningful choice in whether to enter the contract.

“‘Oppression’ arises from an inequality of bargaining power which results in no real negotiation and ‘an absence of meaningful choice.’” *A&M Produce*, 135 Cal. App. 3d at 486. Sky’s inexperience in business put him in an inferior bargaining position relative to Waynes which resulted in a lack of

negotiation. However, Sky had access to reasonable alternatives to Waynes's services and did not have to sign the contract.

A. Sky's inexperience in business and contract negotiation and Waynes's expertise indicate unequal bargaining power.

Unequal bargaining power is the basis of oppression and must result in a lack of negotiation and meaningful choice. Courts generally compare the scale and sophistication of the parties to determine their bargaining power. *Dean Witter Reynolds v. Superior Court*, 211 Cal. App. 3d 758, 768; *A&M Produce*, 135 Cal. App. 3d at 491; *Ellis*, 18 Cal. App. 4th at 1805. This was Sky's first experience with talent management while Waynes is a professional sports agent representing multiple athletes. His lack of experience and sophistication put him at a disadvantage relative to Waynes and resulting in unequal bargaining power.

In *A&M Produce Co. v. FMC Corp.*, the court found "ample evidence of unequal bargaining power" between a small buyer and a larger, more sophisticated seller. *A&M Produce*, 135 Cal. App. 3d at 491. The court considered the relative "commercial understanding" and "economic muscle" of each party in making their determination. *Id.* Even though the buyer was not an average consumer, but rather a small company, the advantages of experience and scale of the seller put them "in an entirely different category." *Id.*

Sky is likewise disadvantaged by Waynes's superior experience and scale. He had not negotiated a contract before and was seeking representation because he had no business experience. He was drawn to Waynes precisely because he knew he was vulnerable to being taken advantage of in the professional sporting world. Waynes, on the other hand, is an established part of that world: she presented herself as a successful agent with experience representing professional athletes still in college. Sky "trusted" Waynes because she convinced him she could help him and he was willing to take her words at face value, putting him in an inferior bargaining position.

In a case where the courts did find unequal bargaining power, the complaining party was particularly experienced in contract negotiation. In *Am. Software v. Ali*, the court held that an employee was on equal footing with her former employer in large part because “as part of her responsibilities for [her former employer], she helped negotiate the terms of a contract with IBM representing over a million dollars in sales.” *Am. Software*, 46 Cal. App. 4th at 1391. When the employee and her former employer came together to negotiate the contract initially, it was a meeting of “two sophisticated and experienced parties of comparable bargaining power.” *Am. Software*, 46 Cal. App. 4th at 1394. Sky cannot be described as “sophisticated and experienced” in contract negotiations but Waynes can be, suggesting unequal bargaining power.

“The business conditions under which the contract was formed directly affect the parties' relative bargaining power.” *A&M Produce*, 135 Cal. App. 3d at 489. The conditions present between Sky and Waynes indicate that Sky was at a disadvantage because of his inexperience and lack of sophistication in comparison to Waynes, and so he suffered from unequal bargaining power.

B. The lack of real negotiation between Sky and Waynes resulted from their unequal bargaining power.

As a result of the unequal bargaining power between Sky and Waynes, there was no real negotiation. To find oppression, the absence of real negotiation must result from the unequal bargaining power. *See e.g. A&M Produce*, 135 Cal. App. 3d at 486; *Dean Witter*, 211 Cal. App. 3d at 767. Two important factors courts consider indicative of the absence of real negotiation are: (1) presentation of the proposed contract as “standard” or a “mere formality” by the advantaged party; and (2) the advantaged party not offering negotiation as an option. *See A&M Produce*, 135 Cal. App. 3d at 491, *Ellis*, 18 Cal. App. 4th at 1804. Importantly, failure by the complaining party to object to the terms or request negotiation of a contract clause does not show that the clause was negotiable. *Ellis*, 18 Cal. App. 4th at 1805. Waynes told Sky that the contract was “standard . . . with all the standard terms” and did not tell

him that it was negotiable. He didn't attempt negotiation because of his inferior bargaining position: he trusted Waynes when she said the contract was standard and felt "pressure to just sign the Agreement."

In *A&M Produce*, the court found no real negotiation where the seller's form contract was presented as standard and the buyer was never informed that its terms were negotiable. *A&M Produce*, 135 Cal. App. 3d at 491. Although the seller contended that "in some special instances, individual contracts are negotiated," the buyer "was never made aware of that option," leading the court to conclude that the contract was a "bargain only in the most general sense." *Id.* Similarly, in *Ellis v. McKinnon*, the employer's sales manager described the written contract as a mere formality required of all employees, leading to a finding of no real negotiation.

Here, Waynes told Sky that her contract was "standard ... with all the standard terms" and gave no indication that negotiation was possible. Like the seller in *A&M Produce* and the employer in *Ellis*, she set the terms and treated the signing as a formality rather than the product of mutual assent. Sky's "trusted" Waynes, felt "subtle pressure to just sign," and believed that "maybe some of their other clients get better deals because they've done these kinds of agreements," reflecting the sort of environment the courts in *A&M Produce* and *Ellis* sought to control: one where a weaker party feels compelled to accept the contract as is.

Although Sky did not object to any provision or attempt to negotiate, his silence is not evidence that negotiation was possible. In *Ellis*, the court held that because the employee was never told that he could negotiate or modify its terms, his lack of objection did not demonstrate the term's negotiability. *Ellis*, 18 Cal. App. 4th at 1805. Sky's lack of negotiation resulted not from informed consent but from Waynes's representations and his own lack of sophistication. Given these circumstances, the absence of real negotiation was a direct product of the unequal bargaining power between them.

Because Waynes presented the contract as standard, did not disclose that its terms were negotiable, and leveraged her superior sophistication to secure Sky's signature without discussion, the unequal bargaining power between the parties resulted in a lack of real negotiation.

C. Sky had meaningful choice in whether to enter the contract because reasonably available alternatives to Waynes's services existed, precluding a finding of oppression.

Regardless of the unequal bargaining power and absence of real negotiation, Sky did have a choice in whether to enter the contract with Waynes and so the oppression form of procedural unconscionability is not present. To determine the "meaningfulness of a party's choice" the courts will look to their "relationship to the other party" as well as their "ability to obtain the goods or services which are the subject of the parties' contract from others." *Dean Witter*, 211 Cal. App. 3d at 768. The courts generally agree that oppression requires the complaining party to have lacked meaningful choice at the time the agreement was executed. *See e.g. Dean Witter*, 211 Cal. App. 3d at 768; *A&M Produce*, 135 Cal. App. 3d at 486; *Carboni*, 2 Cal. App. 4th at 85-86. Sky and Waynes's relationship did not commit him to working with her prior to the contract being executed, a circumstance noted as eliminating the meaningful choice of a party in other unconscionability cases. *Ellis*, 18 Cal. App. 4th at 1805. He was in no way tied to Wayne until he signed the contract. Nor did Sky find himself unable to secure representation from other agents and so forced to sign with Waynes, unlike cases in which the court found no meaningful choice because a party had no viable alternatives to receive the contracted-for services. *Carboni*, 2 Cal. App. 4th at 86. Other agents exist and presumably would have worked with Sky, a "breakout athlete in a breakout sport."

In *Carboni v. Arrospide*, the court found a lack of meaningful choice where the borrower had unsuccessfully attempted to secure a loan from other sources before entering a "take-it-or-leave-it" agreement with the lender. The court emphasized that the borrower's inability to obtain credit elsewhere "effectively deprived [him] of any meaningful choice." *Carboni*, 2 Cal. App. 4th at 86. And in *Ellis*, the employee had already relocated for the job and had been working for two weeks before being presented with a written contract. *Ellis*, 18 Cal. App. 4th at 1805. Because the employee had no other employment opportunities and was already committed to his employer, the court found a lack of meaningful choice. *Id.*

Sky's circumstances are easily distinguishable from both *Carboni* and *Ellis*. Unlike the borrower in *Carboni*, Sky was not denied access to other options—he could have pursued other agents or none at all. Unlike *Ellis*, he was not already committed to Waynes's services when she presented the contract. He could have declined to sign, sought counsel, or negotiated with other representatives. The agreement was therefore not "take-it-or-leave-it" in any meaningful sense. While Waynes's superior sophistication and assurances created some practical pressure, Sky was not deprived of the ability to choose differently.

Because Sky had reasonably available alternatives to Waynes's services and was not otherwise compelled to sign, he retained meaningful choice. The element of "oppression" requires both a lack of negotiation and an absence of meaningful choice. Although the first is present, the second is not. Consequently, procedural unconscionability in the form of oppression is not established.

II. Surprise form of procedural unconscionability is present because Waynes failed to alert Sky to "unusual" post-termination commission clause.

Procedural unconscionability in the form of surprise is present because the PTCC seems to be an "unusual" clause, meaning the burden is on Waynes to show that Sky had knowledge of it before signing. She cannot do so because he did not know about the term, and in fact Waynes misrepresented the contract as being more limited in time than it actually was.

Surprise is one of the two forms of procedural unconscionability, alongside oppression. *Ellis*, 18 Cal. App. 4th at 1804; *Carboni*, 2 Cal. App. 4th at 85; *Am. Software*, 46 Cal. App. 4th at 1391. "Surprise . . . occurs when the objectionable term is hidden in the document." *Carboni*, 2 Cal. App. 4th at 85. However, a term does not need to be visibly hidden if it is "unusual." *A&M Produce*, 135 Cal. App. 3d at 490. In that case, the drafting party bears the burden to show the other had knowledge of any unusual or unconscionable terms. *Id.* Failure to read a contract is not dispositive of surprise when the term was unusual or when the stronger party's conduct reasonably led the weaker party to believe there was nothing unusual. *Ellis*, 18 Cal. App. 4th at 1804.

In *A&M Produce*, surprise was found even though the terms were visible, because the seller failed to alert the buyer to a warranty disclaimer printed on the reverse side of a pre-printed form. The court emphasized that “the burden should be on the party submitting [a standard contract] in printed form to show that the other party had knowledge of any unusual or unconscionable terms.” *A&M Produce*, 135 Cal. App. 3d at 490. The court found the buyer “was never made aware” of the clause and that it was only casually presented, rendering the contract procedurally unconscionable. *Id.*

In *Ellis*, the court found surprise where an employee was unaware of a post-termination forfeiture provision until rereading his contract months later. *Ellis*, 18 Cal. App. 4th at 1801. Even though the employee could have read the contract, he was told it was a “mere formality” and had no reason to suspect it contained such a term. *Id.* The court called the forfeiture provision, which required forfeiture of \$20,000 in earned commissions, “unusual,” and held that the employer had a duty to point it out. *Ellis*, 18 Cal. App. 4th at 1804.

The same reasoning applies here. The PTCC is an “unusual” clause because it obligates Sky to pay 20% of earnings from sponsorships he obtained independently, after the contract’s expiration. Like the forfeiture clause in *Ellis*, it forces forfeiture of substantial post-termination income. Waynes did not identify the clause or explain its effect and instead told Sky the agreement was “standard . . . with all the standard terms” and lasted only one year. Her statement that Sky “would not be locked in” to the contract directly contradicts the PTCC’s effect. This misrepresentation deprived Sky of notice of the clause’s true effect, satisfying the element of surprise.

Although the clause was not hidden in fine print, the law does not require visible inconspicuousness where an unusual term was neither discussed nor expected. *A&M Produce*, 135 Cal. App. 3d at 490; *Ellis*, 18 Cal. App. 4th at 1804. Sky’s failure to read the contract is not dispositive because he reasonably relied on Waynes’s explanation and he had no reason to suspect the contract contained a post-termination payment obligation.

Procedural unconscionability in the form of surprise is therefore present. The PTCC was an unusual term that Waynes had a duty to disclose. She failed to do so and further acted to surprise Sky by misrepresenting the contract's duration.

CONCLUSION

The PTCC is likely procedurally unconscionable, although not significantly. The oppression form of procedural unconscionability is not found because, despite the unequal bargaining power of the parties and lack of real negotiation, Sky had meaningful choice in whether to enter the contract. Sky was disadvantaged compared to Waynes because of his inexperience in business and relative lack of sophistication, leading him to "trust" Waynes and assume an inferior bargaining position. There was no real negotiation as a result because Sky simply believed Waynes when she presented the contract as standard, and he did not question her when she failed to indicate the contract was negotiable. However, Sky had access to reasonably available alternatives to Waynes's services. He could have found other representation or continued without an agent. The contract was not presented to him on a "take-it-or-leave-it" basis in regard to him being able to secure representation generally. However, procedural unconscionability is present in the form of surprise. The PTCC was an unusual term that Waynes had a duty to disclose. Her failure to do so, and her misrepresentation of the contract as a one-year commitment, combined to make Sky's surprise at the PTCC's inclusion reasonable. Importantly, "contracts between parties of unequal bargaining power are routinely enforced, and the fact that one party is surprised by the inclusion of a term will clearly not void a contract." *Ellis*, 18 Cal. App. 4th at 1805. Procedural unconscionability alone, particularly in only one form, does not render a contract clause unenforceable. Substantive unconscionability will have to be shown to find the clause unconscionable, and Sky will likely need a strong finding of substantive unconscionability to avoid payment because "a compelling case of substantive unreasonableness will overcome a relatively weak showing of procedural unconscionability." *Id.*