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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DAVID CEPEDA TORRES, **Plaintiff,** **v.** **JIANG ZHENG GROUP, INC., and HUAFENG GUO,** **Defendants.**	**CIVIL CASE NO. 22-0011** **ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DENYING 12(b)(6) MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER came before the Court for a Hearing on Jiang Zheng Group, Inc. (JZG) and Huafeng Guo's (Guo) (collectively "Defendants") Motion to Compel Arbitration and Motion to Dismiss Complaint on May 10, 2022, at 10:00 a.m. at the CNMI Superior Court, Guma' Hustisia, Courtroom 223A. David Cepeda Torres ("Plaintiff") appeared through his counsel Matthew J. Holley. Defendants appeared through their counsel Joe William McDoulett.

At the hearing, the Court heard oral arguments and took both matters under advisement.

II. BACKGROUND AND FACTS

1. Plaintiff is an individual and a resident of the Commonwealth of the Northern Mariana Islands.
2. JZG is in the business of leasing and selling property.
3. Guo is an individual and resident of CNMI and the owner and principal of JZG.
4. On February 24, 2020, JZG and Plaintiff entered into a contract (Option Agreement) concerning real property owned by Plaintiff.

5. The Option Agreement granted JZG the opportunity to advertise and lease Plaintiff's property in exchange for Defendant JZG's payment of a $5,000.00 fee which is designated as the Option Fee.
6. The Option Fee was to be paid to Plaintiff before the end of a 60-day Due Diligence period that began immediately after the parties signed the Option Agreement.
7. The Option Agreement provides in Section 8.4.1 that, ***in the event of JZG's default***, Plaintiff would be entitled to retain the Option Fee as his sole remedy.
8. The Option Agreement also explains in Section 8.4.2 that, ***in the event of Plaintiff's default***, Plaintiff must return the Option Fee to Defendant JZG and reimburse Defendant JZG for the cost of obtaining a survey and preliminary title report.
9. That same subsection further provides that JZG "may seek: specific performance; any other remedies available in law or equity; and all costs, expenses, and attorney fees incurred from bringing legal action, enforcing this Agreement, or enforcing an arbitral award."
10. Additionally, relevant to this Order, the Option Agreement also contains a mandatory arbitration clause in Section 9.7.1 that explains that in the event of a dispute, "the parties shall attempt to resolve the dispute through friendly discussion and negotiation; and that if such efforts do not resolve the matter—then the dispute shall be settled through final and binding arbitration."

III. LEGAL STANDARD

Pursuant to Rule 12(b)(6) of the NMI Rules of Civil Procedure, a claimant may file a motion to dismiss a cause of action for "failure to state a claim upon which relief can be granted." NMI R. Civ. P. 12(b)(6). In a Rule 12(b)(6) motion to dismiss, "the court reviews the complaint for sufficient

allegations necessary to support a party's legal claims upon which relief can be granted." *Claassens v. Rota Health Ctr*., 2021 MP 9 ¶ 13.

When deciding a Rule 12(b)(6) motion to dismiss, "the court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id*.; *Aurelio v. Camacho*, Civ. No. 10-0021 (NMI Super. Ct. Sept. 10, 2010) (Order Denying Def.'s Mot. to Dismiss and Granting Pl.'s Cross Mot. for Summary Judgment at 3) ("The burden is upon the movant to establish beyond doubt that the plaintiff's action is one upon which the law recognizes no relief.").

However, a complaint requires "more than a blanket assertion of entitlement to relief." *Syed v. Mobil Oil Marianas, Inc*., 2012 MP 20 ¶¶ 20-21. Factual accompaniment or a clear assertion of the claims must be evident, with "direct or indirect allegations [made] on every material point necessary to sustain a recovery." *Id*. (quoting *In re Adoption of Magofna*, 1 NMI 449, 454 (1990)). The Court "has no duty to strain to find inferences favorable to the plaintiff." *Cepeda v. Hefner*, 3 NMI 121, 127 (1992).

IV. DISCUSSION

a. Motion to Compel Arbitration

There is no specific law, statute or custom in the CNMI governing arbitration between two parties. *PAC United Corp., Ltd. (CNMI) v. Guam Concrete Builders*, 2002 MP 15 ¶ 15. Nonetheless, the CNMI government does utilize arbitration and mediation in disputes with its workers, *see* 1 CMC §§ 9708-9709, and our Supreme Court has explained that there are no legal indications suggesting that arbitration is an affront to the legal system of the Commonwealth. *PAC United Corp., Ltd. (CNMI)* at ¶ 22.

Accordingly, arbitration clauses in compliance with the Federal Arbitration Act have been recognized as valid in the CNMI. *Commonwealth Health Corp. v. Castillion*, No. 05-0517 (NMI

Super. Ct. July 20, 2006) (Order Granting Motion to Stay and to Compel Binding Arbitration at 5, 9). Still, while arbitration clauses are presumed valid, as the United States Supreme Court recently affirmed, arbitration clauses are also subject to general contracting principles that may invalidate an arbitration agreement, such as the defenses of fraud or unconscionability. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 (2022). In other words, arbitration clauses can be presumed to be binding and enforceable—unless general contract principles that would revoke any contract or a contract clause are present, thereby revoking the arbitration agreement. *Id*.

In the same spirit, our Supreme Court recognizes there are situations where departure from the express terms in a contract may be necessary, such as instances where a term is unconscionable. *See Fusco v. Matsumoto*, 2011 MP 17 ¶ 43 (a court may "limit the application of any unconscionable term as to avoid any unconscionable result") (citing Restatement (Second) of Contracts § 208 (1981). Unfortunately, section 208 of the Restatement does not explicitly define "unconscionable."[1] It does, however, state that to remedy a finding of unconscionability, a court may "refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Restatement (Second) of Contracts § 208.

Many courts have considered this question with respect to claims of mandatory arbitration and have found that to render a contract's arbitration clause as unenforceable under the doctrine of unconscionability, "there must be both a procedural and substantive element of unconscionability." *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 783 (9th Cir. 2002) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)); *see also Ins. Distribution Consulting, LLC v. Freedom Equity Grp., LLC*, No. 3:20-cv-96, 2022 U.S. Dist. LEXIS 85473, at

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[1] Black's Law Dictionary defines unconscionability, in part, as "extreme unfairness." 11th ed. 2019.

*10-11 (S.D. Tex. May 11, 2022) (a contract must be both procedurally and substantively unconscionable to claim as a defense to the validity of an arbitration agreement).

The two elements do not need to be present in the same degree; a strong finding of one element and a lesser finding of the other is sufficient for a court to declare a contract or contract provision unconscionable. *Ferguson*, 298 F.3d. at 783. Procedural unconscionability is determined by inequality in the bargaining and contracting process and if those inequalities created "oppression" or "surprise." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003).

Courts find "oppression" where there the inequality in bargaining power prevents the weaker party from enjoying a meaningful opportunity to negotiate, whereas "surprise" is concerned with terms being hidden by difficult language or within the small print of the contract. *Id.* (citing *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (Ct. App. 1997)). Factors to consider are whether there was negotiating power in both parties, whether both parties had legal counsel, and whether it was a contract of adhesion. *Ferguson*, 298 F.3d at 783-84; *see also Commonwealth Health Corporation,* No. 05-0517. (NMI Super. Ct. July 20, 2006) at 13 (analyzing whether group health plans are procedurally unconscionable contracts of adhesion).

Generally, a contract of adhesion (as argued here), is a take-it-or-leave-it contract and uses standardized language and is offered in a way that leaves the other party with little to no ability to negotiate. *See Ferguson*, 298 F.3d at 783-84. The focus of procedural unconscionability under this type of contracting scenario is the ability to meaningfully negotiate, not the availability of other options, nor the time allowed to consider the contract. *Ingle*, 328 F.3d at 1172. The Court may consider if "the stronger party [knew] that the weaker party will be unable to receive substantial benefits from the contract . . . ." Restatement (Second) of Contracts § 208 cmt. d. The threshold inquiry in California's unconscionability analysis is "whether the arbitration agreement is adhesive."

Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1281 (9th Cir. 2006) (quoting *Armendariz*, 24 Cal. 4th at 113).

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Here, as alleged in the Complaint and argued by Plaintiff during the hearing, the Option Agreement was offered as a contract of adhesion with standardized language and Plaintiff had no capacity to negotiate the terms. In addition, Plaintiff argues that JZG and Guo had vastly superior bargaining power and significantly greater knowledge regarding the legal consequences of the contract terms containing the arbitration requirement. Moreover, as alleged in the Complaint and emphasized during the hearing, Defendants willfully and intentionally breached the Option Agreement because there was little or no recourse available for Plaintiff under the provisions of the Option Agreement once Defendants demanded that their Agreement required that any and all controversies had to be settled by arbitration.

Defendants countered that Plaintiff was afforded time to seek legal counsel and chose not to; although as noted above, this is not controlling in a court's analysis of the parties' negotiating power. *See Ingle*, 328 F.3d at 1172. Nonetheless, Defendants further reasoned that the disparate levels of negotiation ability alone are not enough to find procedural unconscionability as there is always going to be one party that has more negotiating power than the other in any contract situation. *See* Restatement (Second) of Contracts § 208 cmt. d. That truth, argued Defendants, does not make every contract unconscionable. Defendants concluded that there is nothing procedurally unconscionable in the Option Agreement besides the differing negotiation abilities and that their agreement was not a contract of adhesion.

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Ultimately, this Court concludes, after consideration of the controlling law and review of the parties' legal arguments set forth in the moving papers—and as argued during the hearing—that

JZG and Guo's vastly superior knowledge and understanding of the details in the Option Agreement restricting the legal recourse available and which they themselves would benefit from, tends to support a finding of unconscionable oppression and surprise. With respect to the other factors, the Court notes that JZG is an experienced business entity, and Guo an experienced businessman, such that when drawing up the contract—Defendants knew and must have understood that the Option Agreement terms were greatly imbalanced in Defendant's favor in the event of default and not a real deterrent. In addition, it appears to this Court that Defendants' business activities with Plaintiff were conducted in such a way as to make the Option Agreement at least somewhat adhesive.

Therefore, the way the Option Agreement works means that the Option Agreement does not actually contain incentives or resulting penalties which would encourage Defendants to actually comply with the terms of the agreement. Moreover, as alleged and argued, Defendants' intentional drafting of the take-it-or-leave-it contract in such a way so as to subtly obscure the resulting consequences of Defendants' breach is a key factor in the Court's analysis of procedural unconscionability supporting a conclusion that the arbitration clause should be found unenforceable. *See* Restatement (Second) of Contracts § 208 cmt. d.

Further, the lack of details in the agreement, such as where the arbitration is to take place and how the arbitration was going to be paid, are details which an inexperienced businessperson could easily over-look, but the same is not true for a more experienced businessman and entities who are well-versed in reading contracts for such hidden expenses. Together, the Court finds all these issues somewhat suspect and seemingly intentionally drafted in such a way as to allow Defendants to avoid paying the Option Fee and leaving an inexperienced property owner without recourse. The Court therefore finds that although the language of the Option Agreement is not overrun by complicated legal terms of art, the limited remedies for Plaintiff coupled with the legal

implications of the arbitration clause are deceptive in effect and were drafted in such a way as to remain cleverly hidden and cause surprise. This fact, combined with an inability to negotiate the terms; the disparate levels of bargaining power; an unequal knowledge of contracts (and the arbitration process between the parties); the end-result is that the Option Agreement resulted in fairly oppressive tactics at the time of contracting. Therefore, by a thin margin, the Court finds that the Option Agreement was drafted with an element of procedural unconscionability.

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However, still more is necessary to find the arbitration requirement unenforceable and substantive unconscionability is determined by whether the terms of the contract are so unfair and one-sided that it "shocks the conscience." *Ferguson*, 298 F.3d at 782. The factors a court may consider are similar to those noted above and include: whether the party with superior bargaining power is allowed remedy in court while all other claims must be arbitrated; whether one party is forced to bear the costs of arbitration; and whether there is a pattern of terms that does not simply seek to use cost-saving arbitration, but instead seeks to fully tilt the playing field in one side's favor. *Id.* at 784-87.

Here, the Option Agreement shows two terms of substantive unconscionability—more easily identifiable than the procedural unconscionability factors discussed above. The most egregious of these terms is that if "JZG defaults, [Plaintiff] shall keep the Option Fee as his sole remedy." Option Agreement at 6. In comparison, Plaintiff's default allows JZG to reclaim the Option Fee, be reimbursed for the cost for obtaining a survey and a preliminary title report, demand specific performance and any other remedy available in law or equity, and recover all costs, expenses, and attorney's fees. *Id.* at 6-7.

As such, it appears that the contract at issue works to deprive Plaintiff of substantive default remedies aside from the possibility of retaining $5,000.00 while reserving every possible legal

remedy and additional benefits for JZG. The difference in remedies so as to extremely favor the party with superior bargaining power that drafted the contract, is in practice somewhat outrageous and shocking to the conscience especially when taken in consideration of the procedural unconscionability discussed above.

Moreover, the disparity between these options for remedies is not excused by greatly different risks being assumed by only one of the contracting parties. Plaintiff risked JZG not being able to sell his property and losing the opportunity to sell his property himself, or, with another broker while the property was under option to Defendants at a higher price than what was contracted for with JZG. Such risk eventually turned into reality as evidenced by JZG requiring Plaintiff to cease advertising in March 2020. Complaint at 3. On the other hand, JZG risked $5,000.00 and its limited time and minimum costs incurred to sell Plaintiff's property. In this Court's opinion, the balance of risks is not weighted enough in favor of Defendant JZG that Plaintiff should have absolutely no remedy except to retain the Option Fee upon Defendant JZG's default.[2]

Likewise, as noted above, the lack of an explicit clause specifying which party pays for the arbitration fees when the sole remedy for Plaintiff is retention of the $5,000.00, *see* Option Agreement at 7, is substantively unconscionable. If the arbitration fees were split evenly between the parties, as represented by JZG's counsel during oral argument, the act of completing arbitration would likely reduce the award to next to nothing as arbitration can be expensive. It could also be in JZG's control how long the arbitration lasted, therefore sharply tipping the arbitration in JZG's favor long before a claim is ever brought regardless of which party prevailed in the arbitration. If a provision had been inserted into the Option Agreement explaining that arbitration costs were to be

[2] Moreover, as alleged herein the Option Fee has not been paid which caused the filing of this Civil Action which now clearly exposes how the potential cost of arbitration—left unaddressed in the Option Agreement—undermines the legitimacy of requiring arbitration under the facts of this case.

split evenly, or, to be deducted from the Option Fee, such a clause may have alerted Plaintiff to more carefully consider the arbitration cost factor when choosing to enter into the contract.

In any respect, the observable degree of substantive unconscionability noted immediately above and the less-obvious degree of procedural unconscionability noted earlier are such that to require this claim be resolved only through arbitration would create an unconscionable result: Plaintiff would be unlikely to bring any claim and ***not*** come out at a loss. To prevent this unconscionable result, the Court hereby utilizes its authority to **DENY** Defendants' Motion to Compel Arbitration and will not enforce the Option Agreement's arbitration clause.

To be clear, at this point the Court is ***only*** finding that the arbitration clause as applied would be unconscionable. The unconscionability of the Option Agreement as a whole, as alleged in Plaintiff's Second Cause of Action, remains to be proven.

b. Motion to Dismiss Complaint

Defendants claim that the Complaint in this action is insufficient to form the basis of a claim on two grounds: specifically, that Plaintiff's Third (Violation of Consumer Protection Act) and Sixth [*sic*] Causes of Action (Alter Ego Against Guo) should be dismissed under the NMI Rules of Civil Procedure Rule 12(b)(6). In this regard, our Supreme Court, having rejected the *Iqbal v. Twombly* standard of pleading, requires instead that a claimant need only "plead enough direct and indirect allegations to provide adverse parties fair notice of the nature of the action." *Claassens v. Rota Health Ctr.*, 2021 MP 9 ¶ 17 (quoting *Syed v. Mobil Oil*, 2012 MP 20 ¶ 19) (quoting *In re the Adoption of Magofna*, 1 NMI 449, 454 (1990)). All elements must be supported with "some alleged facts." *Id.* Furthermore, "the court must construe the complaint in the light most favorable to the plaintiff and take its allegations to be true for purposes of a motion to dismiss." *Id.* at ¶ 16. The purpose of Rule 12(b)(6) is to weed out groundless claims that could ***never*** win, even when assuming

the factual allegations in the complaint are true. *See id.* (citing *Foley v. Wells Fargo Bank*, 772 F.3d 63, 72 (1st Cir. 2014)).

Here, Defendants first argue that Plaintiff could never prevail on his Third Cause of Action and is insufficient because the Consumer Protection Act does not apply in this matter. Defendant argues that the only legally defined "seller" in this action is Plaintiff—selling a lease to his property—and therefore the Consumer Protection Act does not protect him. Defendants' Mot. to Compel Arbitration at 4. Additionally, it is alleged that under the Option Agreement, JZG is purchasing the property from Plaintiff and selling it to someone else (apparently equating contracting for the right to sell Plaintiff's property with acquisition of the property) and, therefore Defendants claim that at no point is Plaintiff a proper consumer as envisioned by the Consumer Protection Act. *Id.*

This reasoning is somewhat faulty. The findings of the Consumer Protection Act explain that the public's interest "requires that consumers be protected from abuses in commerce which deprive them of the full value and benefit of their purchases of goods ***and services*** . . . ." 4 CMC § 5102(a)(1) (emphasis added). Further, "'[c]ommerce' and 'trade' mean the sale, advertising, offering for sale, contracting for sale, exchange, distribution for consideration, or solicitation for purchase to the general public of any goods or other property, real, personal, or tangible, or of ***any service*** . . . ." 4 CMC § 5104(b) (emphasis added).

The Option Agreement at issue explains that JZG is in the business of leasing and/or selling other people's property; but unlike real-estate brokers (who normally require that a seller pay for the broker's services), JZG will pay the Optionor for the right to sell or lease Optionor's land . . . ." Option Agreement at 1. This background section of the Option Agreement therefore highlights the possibility that JZG is offering the service of selling Plaintiff's property to someone else, similar to a real estate broker. In addition, the reason Plaintiff was supposed to be paid the Option Fee was

because JZG would be paid for its services by retaining the difference between the price JGZ actually sold the property for and the $425,000.00 Purchase Price listed in the Option Agreement. *Id.* at 2. A larger sum from the sale of property would—absent the Option Agreement—typically belong to Plaintiff, but as envisioned, would allow Defendants to retain any amount in excess of the stated Purchase Price was how Plaintiff was to pay JZG for its, making JZG more like a merchant and Plaintiff a consumer.

As further alleged, JZG offers similar services to other property owners in the CNMI, demonstrating that its "services" are marketed to the general public. *See* Complaint at 9. Accordingly, it could be that Plaintiff's alleged injury flows from consuming JZG's services as a seller of other people's land, a merchant of this service—and not as a buyer of the land. Therefore, this Court finds that the Consumer Protection Act could apply to such an interpretation to be proven at trial. Plaintiff's Third Cause of Action thus survives the 12(b)(6) motion.

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Finally, Defendants argue that the Complaint fails to survive the pleading requirements for the Sixth Cause of Action[3] because there are insufficient facts pled to support the claim that JZG is an alter-ego of Guo. The standard for determining if a corporation is acting as an alter ego involves a two-part analysis by a court. *United Enters., Inc. v. King*, 4 N. Mar. I. 304, 307 (1995). First, the Court must look at several factors to determine if the corporation and the individual are acting as one by examining:

> Undercapitalization, failure to observe corporate formalities, nonpayment of dividends, siphoning of corporate funds by dominant stockholders, nonfunctioning of other officers or directors, absence of corporate records, use of the corporation as a

[3] The alter-ego claim is titled "Sixth Cause of Action" in Plaintiff's Complaint, and though the Complaint is missing a fourth and fifth cause of action, the claim is referenced here as the Sixth Cause of Action for consistency.

> facade for the operations of the dominant stockholders, and use of the corporate entity in promoting injustice or fraud.
>
> Other relevant factors considered by courts may include:
>
> 1. Whether the individual is in a position of control or authority over the entity;
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> 2. Whether the individual controls the entity's actions without need to consult others;
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> 3. Whether the individual uses the entity to shield himself from personal liability;
>
> 4. Whether the individual uses the business entity for his or her own financial benefit;
>
> 5. Whether the individual mingles his own affairs in the affairs of the business entity; [and]
>
> 6. Whether the individual uses the business entity to assume his own debts, or the debts of another, or whether the individual uses his own funds to pay the business entity's debts.

Id. After finding the shareholder and the corporation are identical, the Court must then determine whether the interests of the dominant shareholder and the corporation are so intertwined that they are not separate entities and whether injustice (or, fraud) would result if the separation between shareholder and corporation is upheld. *Id.*

The Complaint alleges that Guo was the sole or majority legal beneficiary and owner of JZG, that JZG did not comply with corporate formalities or maintain proper corporate records, and that JZG was grossly undercapitalized in view of it actual and potential obligations and liabilities. Complaint at 10. JZG argues that these are actually legal conclusions and are insufficient to pass a 12(b)(6) sufficiency examination.

Nonetheless, the purpose of the pleading requirements in the CNMI is to inform Defendants of the basis of a Plaintiff's claim and, concerning 12(b)(6) motions in general, the alleged facts must be read in the light most favorable to the non-moving party. *Claassens*, 2021 MP 9 ¶¶ 16-17.

Defendants are informed from the Complaint that, to prove his Sixth Cause of Action, Plaintiff will be required to bring evidence of Guo's status as the sole beneficiary/owner of JZG, evidence that JZG's corporate formalities and corporate records are lacking, and evidence that JZG has been undercapitalized compared to its actual potential liabilities.

These allegations, if true, form an alter ego theory. While, conclusory allegations of alter ego status will not survive a motion to dismiss, at the same time alter ego determinations are "highly fact-based, and require considering the totality of the circumstances." *Legacy Wireless Services, Inc. v. Human Capital, LLC*, 314 F.Supp.2d 1045, 1058 (D.Or. 2004). Accordingly, Plaintiff's pleading is sufficient at this point in time to inform Defendant of the basis of the claim and the evidence that will be brought and for which Defendants should be prepared to defend against. *See id.* Thus, Plaintiff's Sixth Cause of Action survives Defendant's Motion to Dismiss.

V. CONCLUSION

Based upon the foregoing, because enforcing the Option Agreement's arbitration clause would create an unconscionable result, Defendants' Motion to Compel Arbitration is hereby **DENIED**. Defendants' Motion to Dismiss under the Consumer Protection Act is **DENIED** as explained above; and Defendant's Motion to Dismiss the alter ego claim against Defendant Guo individually is also **DENIED.**

SO ORDERED this 31st day of August 2022.

/s/
WESLEY M. BOGDAN, Associate Judge