FIRST DIVISION
November 25, 2013

No. 1-13-1864

ARKADIY POTIYEVSKIY, RASHID MAMEDOV, ALEKSANDR LUKITSJOV, ROLAND APAKIDZE, SAYAF MOHAMMAD AMIN, SABIT FAKHRATOV, and ELDOR ISKANDAROV, Individually and on Behalf of All Others Similarly Situated, Plaintiffs-Appellees, v. TM TRANSPORTATION, INCORPORATED, and LT CARGO, INCORPORATED, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 13 CH 2739 Honorable Peter Flynn, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this interlocutory appeal, we affirm the trial court's denial of defendants' motion to compel arbitration and stay judicial proceedings. The arbitration clause is substantively unconscionable because of (1) the clause imposing a ten-day "statute of limitations" for challenging any deduction from the workers' pay, (2) the costs of arbitrating the individual claims, and (3) the requirement to arbitrate in Illinois.

¶ 2 This case involves whether a payment contract between a transportation company and its truck drivers is so unconscionable that it cannot be enforced. The court below found that the mandatory arbitration clause in the contract was so one-sided that it was unconscionable. For the following reasons, we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 Defendants, TM Transportation, Incorporated (TM), and its corporate successor, LT Cargo, Incorporated (LT), operate interstate trucks for the transportation of goods and materials. Defendants entered into a series of contracts with the seven named plaintiffs, who are truck drivers. The contracts designated plaintiffs as independent contractors rather than employees. Under the contracts, the plaintiff drivers were paid between $0.94 and $1.01 per mile driven, depending on the geographic area traveled. The relationship between the parties soured. Plaintiffs filed this four-count class action lawsuit, on behalf of themselves and other drivers, alleging a variety of claims.

¶ 5 Count 1, the main count, seeks damages for defendants' alleged violation of the Illinois Wage Payment and Collection Act (820 ILCS 115/1 *et seq.* (West 2010)) (hereinafter, the IWPCA). In count 1, the plaintiffs alleged that defendants improperly reduced the number of payable miles the truckers wrote in their log books, withheld payment from them for weeks, and otherwise made a variety of improper deductions from their payments. The remaining counts in the lawsuit seek (i) a declaratory judgment that defendants' practices were illegal; (ii) an accounting to determine the correct amount LT owed the plaintiffs; and (iii) damages for unjust enrichment.

¶ 6 The underlying contract contains the following arbitration clause:

> "In the event that INDEPENDENT [*i.e.*, the driver] disputes any deductions made by CARRIER [*i.e.*, defendants] from INDEPENDENT'S compensation, and such dispute cannot be resolved by mutual agreement, the dispute shall be submitted to final and binding arbitration. Arbitration may be requested by

> INDEPENDENT by giving written notice to CARRIER on or before the tenth (10th) day following deduction of the disputed amount. The disputed [*sic*] shall be heard by two (2) person[s], one (1) similarly situated contractor selected by INDEPENDENT and one (1) person selected by CARRIER. If these two (2) arbitrators cannot agree, they shall choose a third impartial arbitrator whose decision shall be final and binding on both parties. Any arbitration under this paragraph, shall be conducted in the State of Illinois, and, if an impartial arbitrator is involved, in accordance with the commercial arbitration rules of the American Arbitration Association. The judgment rendered by the arbitrators may be entered in any court having jurisdiction. The parties shall share equally the fee and expenses of the third arbitrator, if any, and the successful party shall be entitled to recover from the other party the costs incurred, including reasonable attorney's fees."

¶ 7 The contract was drafted so as to make it as easy as possible for the defendants to unilaterally make after-the-fact reductions in the pay due to the workers–a practice which would be totally illegal if imposed against employees rather than independent contractors.[1] 820 ILCS 115/9 (West 2012). The contract sets forth a litany of potential deductions from the drivers' final pay, from as little as

[1] The issue of whether the drivers were actually employees and not independent contractors is framed by the pleadings but is not before us on this interlocutory appeal.

$25 for failure to return "Logs" or the "Company Radio Charger," to $2,250 for failure to return a license plate. For those drivers who leave within six months, "startup costs" would also be charged back--$295 *each* for "DOT Testing and Administrative Fees," "Signs, Permits, GPS System fees," and "Orientation Fees."

¶ 8 Relying on the arbitration clause, defendants moved to compel arbitration and stay judicial proceedings on the basis that plaintiffs' sole remedy was in the arbitration forum. In response, plaintiffs submitted several affidavits attesting that they were given very little (or no) time to review the contracts, they spoke Russian rather than English and were denied a translator to explain the terms of the contract (including the arbitration provision), and were never given any rules or cost information as to the arbitration process. Relying on the rather scanty facts set forth in these affidavits, plaintiffs claimed, *inter alia*, that the 10-day limitation period was unconscionable because they were engaged in long-haul trucking across the country and they would not necessarily even know about improper deductions for some time after they were made. They further claimed that they would be physically unable to demand arbitration in Illinois within that short time. Plaintiffs also attached as an exhibit to their response a document entitled "Employment Arbitration Rules and Mediation Procedures," and issued by the American Arbitration Association (AAA). The AAA document indicated, in its "Standard Fee Schedule" for claims up to $10,000, that there was an "Initial Filing Fee" of $775 and a "Final Fee" of $200. Plaintiffs relied upon these documents to argue that the arbitration provision was procedurally unconscionable, in part because this fee information was never disclosed to them.

¶ 9 Taking the position that they were actually employees despite the contract's classification of them as independent contractors, plaintiffs also contended that the arbitration clause violated section 11 of the IWPCA. Specifically, plaintiffs argued that section 11 allowed employees to file wage claims in the circuit court and that the arbitration provision was invalid under case law such as *Barter Exchange, Inc. of Chicago v. Barter Exchange, Inc.*, 238 Ill. App. 3d 187 (1992).

¶ 10 Defendants' reply in support of their motion to compel arbitration and stay proceedings challenged plaintiffs' affidavits. Specifically, defendants claimed that the affidavits were not notarized, contained legal conclusions, and in one case, was unsigned. Defendants included an affidavit from Laima Bubezlute, the former secretary of TM and current president of LT. Bubezlute, attesting that she spoke both Russian and English, and that she met in person with each of the plaintiffs, explaining to them in Russian the "basic" terms of the contract, the plaintiffs' and defendants' responsibilities, as well as "various costs, fees, insurance, and information." Bubezlute further attested that she did not give plaintiffs a time limit to review the agreement, that they could review the contract at any time, and that she would be available to answer any questions they had. With respect to plaintiffs' claim that the arbitration clause was substantively unconscionable, defendants replied in one paragraph that the terms were not too one-sided because: (1) the clause allows each party to select an arbitrator, and if the two arbitrators disagree, those arbitrators would select a third, whose fees and expenses would be shared; and (2) the fee-shifting provision is available even in a trial context. Defendants did not address whether the ten-day period for plaintiffs to request arbitration is, in effect, a statute of limitations.

¶ 11 On May 15, 2013, the trial court denied defendants' motion and issued a detailed opinion holding that the arbitration clause was unenforceable. The court found, however, that the IWPCA did not prohibit employees from contracting away their rights to contest wage claims because the IWPCA was preempted by the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) (FAA). The trial court further noted that the Supreme Court, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985), held that a party who agrees to arbitrate a statutory claim is agreeing only to the *forum* for resolution of the claim, and does not agree to surrender the substantive rights under the statute.

¶ 12 The trial court's order also indicated that, at "the hearing," plaintiffs raised for the first time a claim that the FAA itself excluded transportation employment contracts from its usual preemptive effect. Noting that section 1 of the FAA exempts employment contracts for "seamen, railroad employees, or any other workers engaged in foreign or interstate commerce," the trial court further observed that, in *Circuit City Stores v. Adams*, 532 U.S. 105, 109 (2001), the Supreme Court held that this exemption applied to transportation workers. The trial court, however, found that it was still unclear whether the FAA applied due to a split of federal court authority as to the meaning of "contract of employment" in the context of independent contractors. The trial court concluded that there "clearly" were factual disputes over the circumstances surrounding plaintiffs' signing of the various agreements, rendering it premature to resolve the preemption question.

¶ 13 The trial court, however, found that there was no factual dispute as to plaintiffs' arguments that the arbitration provision itself was unconscionable. Although the trial court found that the arbitration provision itself was set off as a separately-numbered paragraph with a bold heading, it

found that there was a degree of procedural unconscionability because defendants never gave plaintiffs the AAA rules and information regarding arbitration costs.

¶ 14 The trial court also found the arbitration provision substantively unconscionable because it imposed a ten-day statute of limitations, which "essentially requires plaintiffs to file a separate arbitration demand for every contested biweekly paycheck." Notably, the ten-day period begins when defendants make the deductions, not when plaintiffs actually receive any notification regarding the deduction, *e.g.*, by receiving the check and deduction notice in the mail. The trial court also noted that, although the two-party arbitration was not required to be conducted under AAA rules, plaintiffs had no way of anticipating whether the two arbitrators would disagree and consequently require the dispute to be submitted to "AAA Arbitration." The trial court further found that the $975 in filing fees rendered it unlikely that plaintiffs would find it worthwhile to contest any deductions. Lastly, the trial court stated that the requirement to conduct the arbitration in Illinois was unconscionable because plaintiffs lived throughout the country and traveling to Illinois every time they disputed a deduction would be both time- and cost-prohibitive.

¶ 15 The trial court further observed that defendants claimed both in their motion to compel and during arguments before the court that disputes over deductions covered any argument regarding compensation. According to the trial court, this gave the arbitration provision a " 'gotcha' flavor," in that plaintiffs agreed to submit "a narrow category of disputes to arbitration," whereas defendants claimed that plaintiffs agreed to submit "virtually any challenge to compensation to arbitration."

¶ 16 In sum, the trial court determined that the deduction clause was unconscionable for three key reasons: (1) the ten-day limitation period, which required drivers to constantly file new claims every

time they completed a job which generated contested deductions; (2) because the AAA would charge at least $975 for an arbitration, the remedy was financially illusory; and (3) the requirement that the arbitration be conducted in Illinois was unfair to the drivers, none of whom were based in Illinois nor necessarily drove through this state.

¶ 17 This interlocutory appeal under Supreme Court Rule 307(a)(1) followed. Ill. Sup. Ct. R. 307(a)(1) (eff. Feb. 26, 2010).

¶ 18 ANALYSIS

¶ 19 The question presented here is whether the trial court erred in denying defendants' motion to compel arbitration and stay judicial proceedings. Defendants contend that the trial court erred in: (1) failing to strike certain of the plaintiffs' affidavits in support of their response to defendants' motion; (2) finding that the arbitration clause at issue was unconscionable and thus unenforceable; and (3) failing to sever the unconscionable terms from the rest of the arbitration clause.[2]

¶ 20 Defendants bring this appeal pursuant to Supreme Court Rule 307(a)(1), which permits interlocutory appeals, *inter alia*, from orders denying an injunction, which includes orders denying a motion to compel arbitration. Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010); see also *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 448 (2004); *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1000 (2003) (holding that orders denying a motion to compel arbitration are injunctive in nature). Rule 307(a)(1) appeals reduce the question to "whether there was a sufficient

[2] Although defendants further argue that the trial court erred in denying their motion to stay proceedings, defendants' request for a stay was solely predicated upon their motion to compel arbitration. Accordingly, we shall treat this point within our discussion of the trial court's denial of the motion to compel arbitration.

showing made to the trial court to sustain its order granting or denying the interlocutory relief sought." *Mohanty v. St. John Heart Clinic, S.C.*, 358 Ill. App. 3d 902, 905 (2005).

¶ 21 A motion to compel arbitration is similar to a motion to dismiss under section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)) based upon the exclusive remedy of arbitration. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101 (2009). The right to arbitration is an affirmative matter that defeats the claim and must be supported by affidavit, unless this right is apparent on the face of the complaint. *Id.* Consequently, a defendant satisfies the initial burden of a 2-619 motion by presenting an affidavit supporting the basis for the motion. *Id.* at 1101-02 (citing *Kedzie & 103rd Currency Exchange, Inc. v. Hodge,* 156 Ill. 2d 112, 116 (1993)). The burden then shifts to the plaintiff to show that the defendant's motion is unfounded by presenting either " a counteraffidavit or other proof" that refutes the evidentiary facts properly asserted by the defendant's affidavit supporting the motion. *Id.* at 1102.

¶ 22 "Where there is a valid arbitration agreement and the parties' dispute falls within the scope of that agreement, arbitration is mandatory and the trial court must compel it." (Internal quotation marks removed.) *Id.* (quoting *Griffith v. Wilmette Harbor Ass'n,* 378 Ill. App. 3d 173, 180 (2007)). In other words, "[t]he trial court's decision to compel arbitration is not discretionary." *Griffith,* 378 Ill. App. 3d at 180. An arbitration agreement is enforceable only if valid, however. The Illinois Uniform Arbitration Act and the FAA both provide that such an agreement may be found invalid based upon either equitable or legal grounds used for the revocation of a contract, such as unconscionability. See 710 ILCS 5/1 (West 2010); 9 U.S.C. § 2 (2000); *Carter v. SSC Odin*

Operating Co., LLC, 2012 IL 113204 ¶ 18 ("an arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability").

¶ 23 Unconscionability may be based upon either procedural unconscionability, substantive unconscionability, or both. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 99 (2006). Procedural unconscionability refers to situations where "a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power." *Id.* at 100. Substantive unconscionability refers to terms that are "inordinately one-sided in one party's favor." *Id.*

¶ 24 We review the denial of both a 2-619 motion and a motion to compel arbitration without an evidentiary hearing *de novo*. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003) (section 2-619 motion to dismiss); *Ragan v. AT & T Corp.*, 355 Ill. App. 3d 1143, 1147 (2005) (denial of a motion to compel arbitration). In addition, whether a portion of a contract is unconscionable is a question of law that we review *de novo*. *Razor*, 222 Ill. 2d at 99.

¶ 25 The parties here agree that defendants met their initial burden in their motion to compel arbitration when defendants provided a copy of the employment agreement with the various plaintiffs that included identically-worded arbitration provisions. Moving to the next stage of the analysis, though, defendants claim that plaintiffs' affidavits were improperly executed and therefore useless to sustain plaintiffs' burden to overcome the arbitration clause. Plaintiffs, in turn, suggest that defendants forfeited the issues of the validity of the affidavits because in the court below, defendants did not ask the court to strike them. Defendants dispute this, relying upon an unpublished appellate court order as authority for their argument, an action plainly prohibited by Supreme Court Rule 23.

Ill. S. Ct. R. 23 (eff. July 1, 2011). Nonetheless, the record indicates that defendants raised this issue itself before the trial court through their reply in support of their motion. We will therefore deem that the issue has been properly preserved for appeal. *Cf. Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971) ("the sufficiency of an affidavit cannot be tested for the first time on appeal where no objection was made *** in the trial court").

¶ 26 Defendants first claim that, because none of plaintiffs' affidavits were notarized, they were improperly considered by the trial court. This claim is meritless. "Under Section 1-109 of the Code of Civil Procedure, a certified pleading may be used 'as though subscribed and sworn to under oath.' " *Griffin v. Universal Casualty Co.*, 274 Ill. App. 3d 1056, 1063 (1995) (quoting 735 ILCS 5/1-109 (West 1992)) (holding that the defendant's vice president's certification of a portion of the defendant's motion to dismiss was the equivalent of an affidavit under Rule 191). Here, Potiyevskiy's and Mamedov's affidavits contain the certification language of section 1-109. They are thus properly sworn and function exactly as notarized affidavits would.

¶ 27 We agree, however, that Apakidze's unsigned affidavit, standing alone, is insufficient to meet plaintiffs' burden to show that defendants' motion to compel is unfounded. Defendants again improperly cite an unpublished order in support of this claim, but it is not difficult to find published precedent on the point. See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 340 (2002) ("What is required is that the 'affidavit must be signed by the deponent or his name must appear therein as the person who took the oath.' ") (quoting *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 7 (1993)). Relatedly, defendants also complain that there were no affidavits from four of the drivers. This complaint, however, was filed as a putative class action complaint, with each named plaintiff acting both

individually and on behalf of all others similarly situated. In a class action complaint, the named plaintiff acts as a representative for the members of the class. 735 ILCS 5/2-801(3) (West 2012) (enumerating as one of the prerequisites for a class action that the "representative parties will fairly and adequately protect the interest of the class"). "The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1004 (2004). "Rather than invalidating all class representatives, an inadequate representative may be removed and leave may be granted to the plaintiffs to seek a substitute representative who adequately represents the class." *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 779-80 (2008) (citing *In re Discovery Zone Securities Litigation*, 169 F.R.D. 104, 109 (N.D. Ill. 1996)). Therefore, the absence (or invalidity) of the affidavit of any individual plaintiff does not invalidate the affidavits of the remaining plaintiffs, all of whom were prosecuting this action both individually and as putative class representatives. The affidavits of Potiyevskiy and Mamedov are therefore sufficient to maintain this action as a class action complaint.

¶ 28 Defendants then contend that Potiyevskiy's and Mamedov's affidavits are undated and contain mere legal and factual conclusions, which therefore render them improper. Defendants cite nothing in support of their contention that the lack of a date vitiates an affidavit, and there is nothing in Rule 191 or section 1-109 of the Code requiring a date. This unsupported contention must therefore be rejected. *Adler v. Greenfield*, 2013 IL App (1st) 121066 ¶ 59 (holding that the plaintiffs forfeited their argument on appeal because they failed to supported their argument with citation to legal authority); see also *People v. Ward,* 215 Ill. 2d 317, 332 (2005).

¶ 29 We disagree with defendants' contention that the affidavits contain no factual support. Potiyevskiy's affidavit, for instance, attests that he would not be able to afford each instance of arbitration. There is additional factual support underlying this statement. Defendants' motion to compel arbitration and stay judicial proceedings contained as an exhibit the agreements signed by each of the individual plaintiffs. Those agreements explained the amount plaintiffs would be paid per mile (between $0.94 and $1.01, depending on the geographic location traveled). As noted above, the agreements detailed various deductions that could be taken their final pay, from as little as $25 to $2,250, and for those drivers who left within six months, three separate $295 charges could be imposed. Finally, plaintiffs' response to defendants' motion included arbitration cost information from AAA, which as noted above, totaled $975 in standard fees for any claims up to $10,000. Taken together, we find that the affidavits, when combined with the facts before the trial court, have a sufficient factual basis. In any event, the trial court's order noted that, although there were factual disputes concerning the signing of the agreements, there was no factual dispute underlying plaintiffs' claim that the arbitration provision was unconscionable. We now consider that finding.

¶ 30 Defendants' second claim on appeal is that the arbitration provisions are not unconscionable. Defendants argue that the 10-day limitation provision and the choice of Illinois as a forum were terms that plaintiffs freely agreed to. Defendants also argue that the trial court erred in finding that the arbitration provision was cost- and time-prohibitive because "it is not unconscionable for an arbitration provision to be silent on the costs related to arbitration" and that plaintiffs failed to meet their burden to show that it would be too burdensome from a time standpoint to arbitrate their disputes. Defendants further assert that the trial court erred in finding that defendants wrongfully

failed to submit arbitration costs to plaintiffs and that defendants' interpretation of the arbitration provision had " 'gotcha' flavor." Finally, defendants assert that, even if these provisions are unconscionable, the trial court erred in failing to sever the invalid ones from the others.

¶ 31 As a preliminary matter, we note that defendants never disputed in their reply in support of their motion before the trial court that the ten-day period in which plaintiffs "may" request arbitration was in fact a "statute of limitations." Since this argument was never presented to the trial court, it is forfeited. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 63 (citing *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."); *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 36. In addition, the trial court's order refers to defendants' arguments at a "hearing" on their motion, but there is no report of proceedings or acceptable substitute with respect to that hearing. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Defendants, the appellants in this case, have a duty to provide a complete record on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of such a record, we must presume the trial court acted in conformity with the law and with a sufficient factual basis for its findings. *Id.* Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Id.* Thus, notwithstanding the wording in the arbitration agreement indicating that plaintiffs "may" request arbitration within 10 days of a challenged deduction, we must presume that the trial court was correct that this provision is, in effect, a time limitation on plaintiffs' ability to challenge their deductions.

¶ 32 As the court below observed, this provision would require the drivers to file a separate arbitration demand for every contested biweekly paycheck. The time frame within which the drivers

would have to review their paycheck, verify the deduction(s), and then request arbitration is illusory and patently unreasonable. In reply, defendants cite numerous cases they believe support their argument. None of them do, however. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) concerned a judicially-created blanket prohibition of class-action arbitration waivers. *Id.* at 1744. This case concerns unconscionability of a 10-day limitations provision in an arbitration provision. *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947), is equally distinguishable. There, the Court stated, "a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, *provided that the shorter period itself shall be a reasonable period*." (Emphasis added.) *Id.* at 608. Here, the 10-day limitations period is far from reasonable. Finally, in both *1000 Condominium Ass'n v. Carrier Corp.*, 180 Ill. App. 3d 467, 468 (1989), and *Village of Lake in the Hills v. Illinois Emcasco Insurance Co.*, 153 Ill. App. 3d 815, 816 (1987), the relevant contracts limited the time to file a cause of action to one year, not ten days, as here. As such, defendants' claim that the ten-day limitations provision is not unconscionable fails.

¶ 33 In addition, in the factual context of this case, requiring Illinois as the forum state is equally unconscionable. Unlike in a typical lawsuit, where the plaintiffs would challenge a series of allegedly improper deductions, plaintiffs would have to request arbitration for every individual improper deduction because of the ten-day limitation period. They would thus be required to make numerous individual appearances in Illinois from out of state solely to arbitrate these individual claims. While the selection of Illinois as a forum for arbitration is not *per se* unconscionable,

requiring the drivers to make repeated trips to Illinois from out of state to arbitrate numerous low-dollar-amount claims is. Defendants' argument is thus unavailing.

¶ 34 Defendants next claim that the trial court erred in finding that the arbitration provision was cost-prohibitive because "it is not unconscionable for an arbitration provision to be silent on the costs related to arbitration." Defendants further assert that plaintiffs failed to meet their burden to make this showing. We disagree.

¶ 35 As noted above, plaintiffs' response to defendants' motion to compel included an exhibit entitled, "Employment Arbitration Rules and Mediation Procedures" issued by AAA indicating standard fees of at least $975 for claims up to $10,000. Under the terms of the arbitration clause at issue, the $975 in minimum standard fees would be evenly split between plaintiffs and defendants. Thus, plaintiffs would have to pay a minimum of nearly $500 to arbitrate each two-week paycheck containing a disputed improper deduction. As noted above, although the deductions listed in the agreement can reach as high as $2,250 (for failure to return a license plate), the deductions are as low as $25. It is implausible to believe that a plaintiff would be willing to pay about $500 and travel to Illinois solely to recover a disputed $25 deduction. For these reasons, we believe that plaintiffs made a sufficient showing to the trial court to sustain its order denying defendants' motion to compel. *Mohanty*, 358 Ill. App. 3d at 905.

¶ 36 With respect to plaintiffs' claim that the arbitration provision was time-prohibitive, defendants provide no coherent argument; they merely assert that plaintiffs failed to meet their burden to show that it would be too burdensome from a time standpoint to arbitrate their disputes. See Ill. S. Ct. R. 341(h) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in

the reply brief, in oral argument, or on petition for rehearing."). Waiver aside, we reiterate our above holding that requiring plaintiffs to repeatedly return to Illinois to arbitrate sequential small claims is unconscionable. As such, the trial court's decision on this point was not erroneous.

¶ 37 Relatedly, defendants further assert that the trial court erred in finding that defendants wrongfully failed to submit arbitration costs to plaintiffs. The trial court's order, however, references *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 27 (2006), in which the supreme court found the absence of cost information for arbitration to be merely a "degree" of procedural unconscionability that, alone, was insufficient to render a class action waiver unenforceable. Thus, here, as in *Kinkel*, the failure of defendants to provide information as to arbitration costs or where that information can be found–or, for that matter, a plainly-worded statement that the rules and regulations of AAA were incorporated by reference–resulted in only a degree of procedural unconscionability that we consider in combination with our findings as to substantive unconscionability.

¶ 38 Defendants' final contention is that the trial court erred in failing to sever the unconscionable terms from the arbitration provision and enforce the remaining terms. Defendants point out that each of the agreements with plaintiffs contained a severability clause. Defendants conclude that the unconscionable provisions should thus be excised from the arbitration agreement and the remaining terms be enforced. For the following reasons, defendants' final claim is unavailing.

¶ 39 It is well established that an unenforceable provision is severable unless it is " 'so closely connected' " with the remainder of the contract that to enforce the valid provisions of the contract without it " 'would be tantamount to rewriting the [a]greement.' " (Alteration in original.) *Wigginton v. Dell, Inc.*, 382 Ill. App. 3d 1189, 1198 (2008) (quoting *Abbott-Interfast Corp. v.*

Harkabus, 250 Ill. App. 3d 13, 21 (1993)). "Also relevant is whether the contract contains a severability clause." *Id.* The presence of a severability clause, however, is not dispositive. *Id.*

¶ 40 Here, severability is not possible. The unconscionable provisions that would be severed (*e.g.*, the 10-day limitations period, the forum selection clause, and the requirement that the rules and regulations (including costs) of AAA be followed with respect to a third arbitrator, etc.) would leave the arbitration provision at issue here an empty shell. Although no term individually stands out as essential to the arbitration provision, the totality of the unconscionable provisions are essential to the arbitration provision such that, absent those provisions, the arbitration provision is meaningless. As a result, the unconscionable terms were so closely connected to the arbitration provision that to sever those terms would be tantamount to rewriting it–something we may not do. See *Wigginton*, 382 Ill. App. 3d at 1198. Therefore, the trial court did not err in failing to sever the unconscionable provisions, and defendants' final claim of error is without merit.

¶ 41 Nonetheless, defendants note that, under *Kinkel*, the supreme court held that an unconscionable provision in an arbitration clause could be severed and the remainder of the clause could be enforced. *Kinkel*, 223 Ill. 2d at 48. In *Kinkel*, however, the unconscionable provision at issue solely related to a waiver of the arbitration of class claims (a "class action waiver"). *Id.* at 6. In considering the parties' severability arguments, the *Kinkel* court held that, where the agreement containing the arbitration clause also has a severability provision and in light of the "strong public policy in favor of enforcing arbitration agreements, the class action waiver at issue in *Kinkel* was not "essential to [defendant's] making of the agreement," and affirmed the appellate court's decision severing the unconscionable class action waiver from the rest of the arbitration provision and

enforcing the provision as revised. *Id.* at 47-48. By contrast, the unconscionable provisions in this case are not discrete provisions such as a class action waiver. Instead, the provisions constitute the operative nucleus of the arbitration provision. *Kinkel* is therefore distinguishable.

¶ 42 CONCLUSION

¶ 43 A few months ago, in *Crown Mortgage Co. v. Young*, 2013 IL App (1st) 122363 ¶ 9, we invalidated a contract on the basis that it was unconscionable. Such judicial action is rare, and employed only in the most egregious circumstances. This case presents another example of those circumstances and so we agree with the trial court's finding that the limitation period is unconscionable. The totality of the challenged contractual clauses provided a sufficient basis to justify the trial court's order denying defendants' motion to compel arbitration and stay judicial proceedings. *Mohanty*, 358 Ill. App. 3d at 905.

¶ 44 Accordingly, we affirm the judgment of the trial court.

¶ 45 Affirmed.