

REC'D DEPT. 59

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SUPERIOR COURT

1 KURT EGGERT, ESQ. [Bar #115552]  
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9 SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES  
10

11 ROBERT CHEATHAM and NATHANIEL  
12 BROWN, on behalf of themselves  
and all others similarly  
13 situated, and on behalf of the  
general public,

14 Plaintiffs,

15 vs.

16 AIR SYSTEMS ENGINEERING CO,  
17 INC., a California  
corporation; et. al.

18 Defendants  
19

Case No.: BC-158595

CLASS ACTION

[PROPOSED] STATEMENT OF  
DECISION

DATE: April 28, 1997  
TIME: 10:00 a.m.  
DEPT: 59

TRIAL DATE: None  
DISCOVERY CUT-OFF: None  
LAW & MOTION CUT-OFF: None

20 Plaintiffs Robert Cheatham and Nathaniel Brown  
21 brought this action on behalf of themselves and all others  
22 similarly situated, and on behalf of the general public  
23 ("plaintiffs"), seeking redress for allegedly unlawful and  
24 deceptive practices in the installation and financing of air  
25 conditioning systems. Their Complaint includes allegations of  
26 violations of the California Business and Professions Code, the  
27 Truth In Lending Act, 15 U.S.C. §1601 et seq., and the Consumer  
28 Legal Remedies Act, Civil Code §1750.

1 In their Complaint, plaintiffs assert that Air Systems  
 2 Engineering Co. Inc. ("Air Systems"), an air conditioning  
 3 company, regularly persuaded customers to sign contracts for  
 4 the purchase of central air conditioning units, and then began  
 5 the installation of those units before the customers' time to  
 6 rescind had expired. Plaintiffs allege that Air Systems  
 7 thereby deprived consumers of their legal right to rescind  
 8 these home improvement contracts, overcharging for the services  
 9 provided, and persuading customers that they had to accept the  
 10 financing with which they were presented.

11 One of the alleged victims of these tactics,  
 12 plaintiff Robert Cheatham ("plaintiff" or "Cheatham"), signed a  
 13 Security Agreement ("Security Agreement") that Air Systems then  
 14 assigned to Defendant Royal Thrift and Loan ("Royal"). The  
 15 Security Agreement contained an arbitration clause ("the  
 16 arbitration clause"), providing that the buyer of the air  
 17 conditioning and the holder of the Security Agreement agreed  
 18 that if they could not resolve a dispute between them through  
 19 informal negotiation, they must submit it to binding  
 20 arbitration.<sup>1</sup>

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21  
 22 <sup>1</sup>The arbitration clause, contained in Paragraph 16 of the  
 23 Security Agreement, stated in relevant part, "Should any dispute  
 24 remain or exist between Buyer and Holder after completion of the  
 25 informal negotiation..., then Buyer and Holder shall promptly  
 26 submit any dispute, claim or controversy arising out of or  
 27 relating to this agreement (or any agreement contemplated by this  
 28 agreement including any action in tort, contract, or otherwise,  
 at equity or at law), or any alleged breach (including, without  
 limitation, any matter with respect to the meaning, effect,  
 validity, termination, interpretation, performance or enforcement  
 of this agreement or any agreement contemplated by this  
 agreement) to binding arbitration administered by administered by  
 and under the rules of the American Arbitration Association or  
 the Judicial Arbitration & Mediation Services, Inc.

1 On or about February 27, 1997, Royal filed a Petition to  
2 Compel Arbitration pursuant to that clause, and moved for  
3 severance and stay of the claims against it pending completion  
4 of arbitration. In support of its Petition, Royal submitted  
5 the declaration of Royal's president, John Tonoyan.

6 Plaintiffs opposed being compelled to arbitrate this  
7 action and opposed severance and stay. In their opposition to  
8 the Petition to Compel Arbitration, plaintiffs argued that (1)  
9 Air Systems' illegal actions rendered the entire Security  
10 Agreement, including the arbitration clause, unenforceable; (2)  
11 arbitration would create the possibility of conflicting  
12 rulings, due to the third parties that are not bound by the  
13 arbitration agreement; and (3) the contract was one of adhesion  
14 that should not be enforced. In support of their opposition,  
15 plaintiffs submitted Cheatham's declaration (hereinafter  
16 "Cheatham Dec.") with attached exhibits, and a declaration by  
17 Manual Duran, a consumer advocate with Bet Tzedek Legal  
18 Services (hereinafter "Duran Dec."), with attached exhibits.

19 On April 4, 1997, by a Notice of Joinder, defendants Air  
20 Systems, Air Systems' president Adam Phoung Pham ("Pham"), and  
21 Air Systems' salesman Howard Anderson ("Anderson") joined  
22 defendant Royal's petition to compel arbitration. No  
23 supporting papers, declarations or other evidence accompanied  
24 that Notice. No declarations stating any facts addressing  
25 plaintiffs' allegations that the Security Agreement and  
26 security interest were illegal and unenforceable were submitted  
27 by any defendant. In addition, no party filed any written  
28

1 statement seeking permission to introduce oral evidence as  
2 required by Rule 323(a) of the California Rules of Court.

3 On April 8, 1997, Royal's Petition to Compel Arbitration  
4 and Motion for Severance and Stay came on regularly for hearing  
5 in Department 59 of this Court, the Honorable Bruce Mitchell,  
6 Judge Pro Tem, presiding. Plaintiffs appeared by their counsel  
7 Bet Tzedek Legal Services, by Jennifer L. Braun, Esq. and Kurt  
8 Eggert, Esq. Defendant Royal appeared by its counsel Ezer &  
9 Williamson, LLP, by Richard E. Williamson, Esq. Defendants Air  
10 Systems, Pham, and Anderson did not appear.

11 The Court, having considered the papers submitted by  
12 the parties in this matter and the arguments made by counsel at  
13 the hearing, denied defendant's Petition to Compel Arbitration,  
14 and accordingly denied its Motion for Severance and Stay.

15 Defendant Royal having timely requested a Statement of Decision  
16 pursuant to Sections 632 and 1291 of the Code of Civil  
17 Procedure, this Court hereby issues this Statement of Decision.

18 As a preliminary matter, it is the Court's responsibility  
19 to determine whether the arbitration clause should be enforced.

20 Section 1281.2 of the Code of Civil Procedure states on its  
21 face that where one party refuses to arbitrate under a written  
22 arbitration agreement, "the court shall order the petitioner  
23 and respondent to arbitrate the controversy if it determines  
24 that an agreement to arbitrate the controversy exists, unless  
25 it determines" that grounds exist for the revocation of the  
26 agreement or that a third party in a pending court action  
27 creates a possibility of conflicting rulings. C.C.P.

28 §1281.2(b) and (c) (emphasis supplied).

1        In Green v. Mt. Diablo Hospital District the court  
 2 accordingly explained, "The legality of the contract should  
 3 first be judicially determined before any contractual disputes  
 4 may be arbitrated." Similarly, it is "within the trial court's  
 5 discretion to decide whether the claims of third parties not  
 6 bound by the arbitration agreement should be brought in one  
 7 judicial forum." (1989) 207 Cal.App.3d 63, 66; 254 Cal.Rptr.  
 8 689, 691. Whether consent to an arbitration agreement has been  
 9 obtained through duress, too, is first to be determined by the  
 10 court, not by arbitration. Bayscene Resident Negotiators v.  
 11 Bayscene Mobilehome Park (1993) 15 Cal.App.4th 119, 127-29, 18  
 12 Cal.Rptr.2d 626, 631-32.

13        The court is to hear a petition to compel arbitration in a  
 14 summary way, in the manner of a motion. C.C.P. §1290.2;  
 15 Strauch v. Eyring (1994) 30 Cal.App.4th 181, 183, 35  
 16 Cal.Rptr.2d 747, 748. The court, therefore, is to determine  
 17 factual issues based on submitted declarations and documentary  
 18 evidence.<sup>2</sup> Id.; Cal. Rules of Court 303(a)(2), 323(a); C.C.P.  
 19 §2009. In making the following factual determinations this  
 20 Court accordingly relied on the declarations and attached  
 21 documentary evidence submitted by the parties.

22        1. With respect to the illegality of the Security  
 23 Agreement, the commencement of work, before the applicable  
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 26        <sup>2</sup>The court may, in its discretion, also hear oral testimony  
 27 upon timely request and for good cause shown. Any party seeking  
 28 to introduce oral evidence must file a written statement,  
 describing the evidence to be introduced, no later than three  
 court days prior to the hearing. Cal. Rules of Court 323(a). In  
 this case no party filed such a statement.

1 three-day rescission period had expired, rendered the entire  
2 agreement, including the arbitration clause, unenforceable.

3 a. The Court based this decision on the following facts:

4 Robert Cheatham and his wife are retired senior citizens,  
5 who were interested in obtaining a humidifier to help Mrs  
6 Cheatham with her respiratory problems. (Cheatham Dec.,  
7 ¶¶3,4). On or about October 3, 1995, the Cheathams received a  
8 telephone call from an Air Systems representative, who informed  
9 them that they had won a free humidifier as a prize. However,  
10 when Air Systems' salesman, Anderson, visited Cheatham at home  
11 that evening, he told Cheatham that to get the humidifier he  
12 had to buy a central air and heating system ("the system") for  
13 \$15,000. (Id., ¶¶5,6).

14 Anderson also said that he would arrange for financing,  
15 and told Cheatham not try to finance the deal through his  
16 credit union. (Id.). Cheatham signed an initial contract, an  
17 addendum to which indicated that financing would be provided,  
18 stating, "Interest will be between 13.9% to 14.9% or current  
19 Market Rate at Simple interest. Financing will be over a  
20 period of 15 yr." (Id., ¶7; Exhibit 1 to Cheatham Dec.).

21 The next morning, or about October 4, 1995, workers  
22 arrived at the Cheathams' house and began to unload equipment.  
23 Cheatham told them that he had changed his mind and no longer  
24 wanted the system, and the workers left. Cheatham also sent a  
25 letter to Air Systems saying that he wanted to cancel the  
26 contract. (Cheatham Dec., ¶8). Nevertheless, that evening,  
27 Anderson returned to the Cheathams' home, offered them a  
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1 television and a \$4,000 rebate, and persuaded them not cancel  
2 the contract. (Id., ¶9).

3 The next day, or about October 5, 1995, Air Systems'  
4 workers came to the Cheathams' house and began installing the  
5 system. (Id., ¶10).

6 On or about, October 7, 1995, another Air Systems  
7 salesman, Robert Grewing ("Grewing") came to the Cheathams'  
8 home. He said that he was from Royal Thrift, and that Cheatham  
9 was to sign for financing. Cheatham again raised the  
10 possibility of obtaining financing through his credit union.  
11 Grewing told him that it was "too late," and that his three  
12 days to cancel the deal had passed. Grewing also told Cheatham  
13 that if he did not sign the financing contract Air Systems  
14 could put a lien on his home. Cheatham felt that he had no  
15 choice, and signed the Security Agreement. (Id., ¶11; Exhibit  
16 4 to Cheatham Dec.).

17 b. The legal basis for this decision is as follows:

18 Under Section 1281.2(b) of the Code of Civil Procedure,  
19 which governs orders to arbitrate, the Court may refuse to  
20 compel arbitration where "[g]rounds exist for the revocation of  
21 the agreement." That provision "does not contemplate that  
22 parties may provide for the arbitration of controversies  
23 arising out of contracts which are expressly declared by law to  
24 be illegal and against the public policy of the state." Loving  
25 & Evans v. Blick (1949) 33 Cal.2d 603, 610, 204 P.2d 23, 29.

26 Accordingly, "[i]f a contract includes an arbitration  
27 agreement, and grounds exist to revoke the entire contract,  
28 such grounds would also vitiate the arbitration agreement."

1 Moncharsh v. Heily & Blase (Cal. 1992) 3 Cal.4th 1, 30; 10  
2 Cal.Rptr.2d 183, 201. Thus, if an otherwise enforceable  
3 arbitration agreement is contained in an unenforceable  
4 contract, the arbitration clause may not stand alone. Id.;  
5 see also Green, 207 Cal.App.3d at 66, 73; 254 Cal.Rptr. at 691,  
6 695 (to avoid arbitration, plaintiffs must merely provide  
7 "sufficient grounds alleging illegality of the underlying  
8 agreement," as "[t]he allegations, if proved, would render the  
9 entire contract void").

10 Here, the evidence before the Court demonstrates that the  
11 Security Agreement is illegal and unenforceable under Section  
12 7163 of the Business and Professions Code ("Section 7163").  
13 Subparagraph (a) of that Section states that no contract for  
14 home improvement shall be enforceable if the contractor  
15 provides financing or assists in obtaining a loan unless: (1)  
16 the third party, if any, agrees to make the loan; (2) the buyer  
17 agrees to accept the loan or financing; and (3) the buyer does  
18 not rescind the loan or financing transaction within the three  
19 days provided for rescission under the Truth in Lending Act and  
20 Regulation Z, 12 C.F.R. 226 et seq.<sup>3</sup>

21  
22  
23 <sup>3</sup>Section 125 of the Truth in Lending Act, together with  
24 Regulation Z, provide that in any transaction involving an  
25 extension of credit secured by a consumer's home that is to be  
26 paid in four or more installments, the consumer has an absolute  
27 right to reconsider and cancel the transaction within three days  
28 of the time that he or she enters into a financing agreement. 15  
U.S.C. §1635(a); 12 C.F.R. §§226.1, 226.17, 226.18, 226.23.  
These provisions were enacted to permit the consumer to reflect  
without pressure and "reconsider any transaction which would have  
the serious consequence of encumbering the title to his home."  
S. Rep. No. 368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S.  
Code Cong. and Admin. News 236, 234.



1 Section 7163(b) then mandates that until those acts  
2 specified in Subsection (a) have all occurred, it is unlawful  
3 for the contractor to: (1) deliver any property or perform any  
4 services other than obtaining building permits or other similar  
5 services preliminary to the commencement of the home  
6 improvement for which no mechanic's lien can be claimed; or (2)  
7 represent in any manner that the contract is enforceable or  
8 that the buyer has any obligation thereunder. The statute then  
9 expressly provides, "Any violation of this subdivision shall  
10 render the contract unenforceable." (emphasis supplied).

11 The preponderance of the evidence, indeed the  
12 uncontroverted evidence, shows that Air Systems violated  
13 Section 7163(b)(1). It assisted Cheatham in obtaining a loan,  
14 and then delivered and installed the air conditioning system  
15 within three days of Cheatham signing the initial home  
16 improvement contract. It did so two days before Cheatham  
17 signed the subsequent Security Agreement. Air Systems also  
18 violated Subparagraph (b)(2), by representing to Cheatham that  
19 he could no longer rescind the transaction and that Air Systems  
20 could take a lien against his house if he did not sign. These  
21 actions rendered the Security Agreement illegal and  
22 unenforceable.

23 Royal is subject to any claims and defenses that  
24 Cheatham has regarding the illegal acts of Air Systems, both  
25 pursuant to the Security Agreement, which states on its face  
26 that "any holder of this consumer credit contract is subject to  
27 all claims and defenses which debtor could assert against the  
28 seller," and pursuant to Civil Code §1804.2, which governs

1 retail installment contracts. See also Music Acceptance Corp.  
2 v. Lofing (1995) 32 Cal.App.4th 610, 626; 39 Cal.Rptr.2d 159,  
3 168.

4 2. With respect to the illegality of the Security  
5 Agreement, the Agreement is also illegal and unenforceable  
6 because Air Systems' salespersons were not registered.

7 a. The Court based this decision on the following facts:

8 The evidence presented shows that Howard Anderson and  
9 Robert Grewing were the salespersons who negotiated the  
10 contracts with Cheatham. (Cheatham Dec., ¶¶6-11; Exhibit 4 to  
11 Cheatham Dec.). Neither Anderson nor Grewing was registered as  
12 a salesperson for Air Systems by the Contractors' State License  
13 Board. (Duran Dec., ¶¶2-6). They were not exempt from  
14 registration, as they were not officers, qualified managing  
15 agents, salespersons at retail establishments, schedulers, or  
16 repairpersons. (Duran Dec., ¶¶8-11; Exhibits 5-7 to Duran  
17 Dec.).

18 b. The legal basis for this decision is as follows:

19 Section 7153 of the Business and Professions Code ("Section  
20 7153") makes it a misdemeanor to act as a salespersons for home  
21 improvement contractors without being registered for that  
22 particular contractor. Moreover, Section 7153(b) specifically  
23 provides that any security interest taken by a contractor after  
24 January 1, 1995 is unenforceable if the person soliciting the  
25 act or contract is not a duly registered salesperson or was not  
26 exempt from registration under Business and Professions Code  
27 Section 7152, which exempts officers, qualified managing  
28

1 agents, some salespersons at retail establishments, schedulers,  
2 and repairpersons.

3 Here, again, the uncontroverted evidence shows that  
4 Anderson and Grewing were not registered, and do not fall  
5 within any of the exemptions. Therefore, under Section 7153,  
6 the Security Agreement was illegal and the security interest is  
7 unenforceable. See Loving, 33 Cal.2d at 603, 614, 204 P.2d at  
8 29 (California Supreme Court held an arbitration clause was  
9 unenforceable, where the underlying contract was illegal  
10 because it was for the work of an unlicensed contractor).

11 3. Arbitration is also inappropriate because other  
12 parties to this action are not bound by the Security Agreement.

13 a. The Court based this decision on the following facts:

14 Plaintiffs have filed suit against the following  
15 defendants not currently parties to the Security Agreement: (1)  
16 Air Systems; 2) Pham; (3) Anderson; (4) Developers' Insurance  
17 Company ("Developers"), Air Systems' surety; and (5) four other  
18 lender assignees of Air Systems' contracts, Portfolio  
19 Acceptance Corporation, Nationscredit Commercial Corporation,  
20 Eagle Capital Mortgage, Ltd. ("Eagle"), and Associates  
21 Financial Services Company of California, Inc. ("Associates").

22 The lenders other than Royal, as well as Developers, are  
23 not parties to the Security Agreement (and hence the  
24 arbitration clause) assigned to Royal. (Exhibit 4 to Cheatham  
25 Dec.). Moreover, Developers and Eagle have already filed their  
26 respective Answers to the Complaint in court.

27 Although Air Systems, Pham and Anderson also filed an  
28 Answer in court. Although they then, four days before the

1 hearing, noticed their joinder in the Petition to Compel  
2 Arbitration, it is doubtful whether they may do so. The  
3 arbitration clause by its express terms binds only the "Buyer,"  
4 or Cheatham, and the "Holder" of the Security Agreement.  
5 Plaintiffs argued that once Air Systems transferred all rights  
6 under the Agreement to Royal, Royal, and not Air Systems,  
7 became the "holder" subject to the arbitration clause.  
8 Plaintiff's argument is well supported, as the Assignment of  
9 Security Agreement states that "all rights" under the Security  
10 Agreement are granted, assigned and transferred to Royal. It  
11 is unlikely that Royal would identify Air Systems as a holder  
12 of the Security Agreement for the purpose of determining who  
13 owns the security. The Security Agreement itself identifies  
14 the holder as the "Seller, its Successors or Assigns." (emphasis  
15 supplied). Moreover, the Retail Installment Sales Act, Civ.  
16 Code §1800 et seq., which governs the sale of goods and  
17 services on installment, defines a "holder" as "the retail  
18 seller ... or if the contract or installment account is  
19 purchased by a financing agency or other assignee, the  
20 financing agency or other assignee." Civ. Code §1802.13  
21 (emphasis supplied). However, in any event, other parties to  
22 the suit, namely Eagle, Associates, Portfolio, Nationscredit,  
23 and Developers, are alleged to have taken part in the same  
24 series of transactions in issue but are not even arguably  
25 parties to the arbitration agreement.

26 There is a possibility of conflicting rulings if Royal and  
27 plaintiffs were to arbitrate but the other lenders and  
28 plaintiffs were to proceed in court. An arbitrator and the

1 trier of fact may disagree regarding whether Air Systems  
2 practices were unlawful, or whether sales agents were properly  
3 licensed. One of the assignee lenders, Associates, was  
4 assigned some Security Agreements from Air Systems directly,  
5 but was assigned others by Royal itself. (Declaration of  
6 Manuel Duran submitted in opposition to severance and stay, ¶5,  
7 and Exhibit 1 thereto). Nevertheless, while an arbitrator  
8 could find that Royal holds enforceable Security Agreements,  
9 the fact-finder at trial could find that the other assignees  
10 including Associates have unenforceable contracts.

11 b. The legal basis for this decision is as follows:  
12 Section 1281.2(c) of the Code of Civil Procedure provides that  
13 the Court may refuse to compel or may stay arbitration where:

14 A party to the arbitration agreement is  
15 also a party to a pending court action ...  
16 with a third party, arising out of the same  
17 transaction or series of related  
18 transactions and there is a possibility of  
19 conflicting rulings on a common issue of  
20 law or fact.

21 Moreover, "an arbitrator has no power to determine the  
22 rights and obligations of one who is not a party to the  
23 arbitration agreement." American Builder's Ass'n v. Au-Yang  
24 (1990) 276 Cal.App. 3d 170, 178; 276 Cal.Rptr. 262, 266.  
25 Accordingly, neither the arbitrator nor a party to the  
26 arbitration has the power to join a stranger to the agreement.  
27 Id. at 178.

28 Given that defendants other than Royal are not bound by  
the arbitration clause, and that those defendants are alleged  
to have been involved in the same transactions or series of  
transactions as Royal, arbitration should be avoided due to the

1 possibility of conflicting rulings on common issues of law and  
2 fact. As the Court of Appeal explained in Henry v. Alcove  
3 Inv., Inc., the possibility of conflicting rulings on a common  
4 issue of fact or law is "obvious" where an arbitrator could  
5 find that home improvement sales agents did not defraud a  
6 homeowner plaintiff, while at trial the trier of fact could  
7 find there was fraud committed. (1991) 233 Cal.App.3d 94, 101;  
8 284 Cal.Rptr. 255, 259-60.

9 4. With respect to whether the arbitration agreement was  
10 an unenforceable contract of adhesion, enforcement of the  
11 Security Agreement is not precluded due to duress or  
12 oppression.

13 a. The Court based this decision on the following facts:  
14 The Security Agreement was a form document, prepared by  
15 Air Systems for its own use. (Exhibit 4 to Cheatham Dec.). It  
16 included a written arbitration clause. (Id., at ¶16).

17 In Cheatham's declaration he states that he told Anderson  
18 that he not read well and had trouble understanding what he did  
19 read. (Cheatham Dec., ¶7). When Grewing gave Cheatham the  
20 Security Agreement he did not explain to Cheatham that he was  
21 agreeing to arbitration. According to Cheatham, he did not  
22 even know what arbitration was, and would not have agreed to it  
23 if he did. (Id., ¶12).

24 When Grewing brought Cheatham the Security Agreement, he  
25 told Cheatham that he had to sign because work had already  
26 started, Cheatham's three days to rescind purportedly had  
27 passed, and that if Cheatham did not sign, Air Systems might  
28 file a lien on his property. Cheatham did not believe he had

1 any choice but to sign, and so signed the Security Agreement.  
2 (Id., ¶11).

3 b. The legal basis for this decision is as follows:

4 A contract of adhesion is "a standardized contract,  
5 which, imposed and drafted by the party of superior bargaining  
6 strength, relegates to the subscribing party only the  
7 opportunity to adhere to the contract or to reject it." Graham  
8 v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 817; 171 Cal.Rptr.  
9 604, 610. The Security Agreement was just such a standardized  
10 form. Contracts of adhesion will not be enforced where either  
11 (a) the contract, considered in its context, is truly  
12 oppressive or (b) unconscionable or (c) the contract or  
13 provision does not fall within the reasonable expectation of  
14 the weaker or "adhering" party. Id. 28 Cal.3d at 820; 171  
15 Cal.Rptr. at 612.

16 "'Oppression' arises from an inequality of bargaining  
17 power which results in no real negotiation and 'an absence of  
18 meaningful choice.'" A & M Produce Co. v. FMC Corp. (1982) 135  
19 Cal.App.3d 473, 486; 186 Cal.Rptr. 114, 122; see also Bayscene,  
20 15 Cal.App.4th at 127, 18 Cal.Rptr.2d at 631 (arbitration  
21 agreement obtained through duress is unenforceable). The  
22 transaction here would seem to have been oppressive, as the  
23 evidence all indicates that Cheatham was told and believed that  
24 he had no choice but to sign the financing agreement when it  
25 was brought to him after the work had begun. The element of  
26 "surprise" also appears here, as Cheatham could not and did not  
27 understand the language in Paragraph 16 of the Security  
28

1 Agreement (see Note 1), and had no idea that he was agreeing to  
2 an arbitral forum.

3 However, the Court feels constrained by the decision in  
4 Rosenthal v. Great Western Securities, Inc. (1996) 14 C.4th  
5 394, 58 Cal.Rptr. 875. There the Supreme Court found that an  
6 arbitration agreement cannot be vitiated by a claim of fraud in  
7 the inducement where the signing party had "reasonable  
8 opportunity to know" of the character or essential terms of the  
9 contract. The court explained that "[i]f a party, with such  
10 reasonable opportunity fails to learn the nature of the  
11 document he or she signs, such 'negligence' precludes a finding  
12 the contract is void for fraud in the execution." 14 Cal.4th  
13 at 423, 58 Cal.Rptr. at 892.

14 Rosenthal addressed claims that bank customers were  
15 fraudulently induced to sign arbitration agreements, rather  
16 than the plaintiffs' argument here, that the contract is one of  
17 adhesion, signed due to oppression. In addition, even in  
18 Rosenthal the Court found that particular facts showing that an  
19 individual lacked reasonable opportunity to learn of the nature  
20 of the document in issue, especially where the plaintiff  
21 informed the defendant's agent that he or she could not read  
22 the document, for example, mandate against compelled  
23 arbitration. 58 Cal.Rptr. at 895. This Court need not reach  
24 this issue, given its earlier decisions that arbitration will  
25 not be compelled here due to the enforceability of the contract  
26 and the existence of third parties. However, based on  
27 Rosenthal the Court believes that this argument would not  
28 excuse Cheatham from arbitration.



1 5. With respect to the denial of the Motion for Severance  
2 and Stay, in order to promote convenience and economy, and  
3 avoid prejudice to any party, Section 1048 of the Code of Civil  
4 Procedure gives the Court discretion to order a joint trial or  
5 separate trials of any matters in issue. As arbitration will  
6 not be compelled, there is no need for severance or stay of any  
7 of the claims in this action.

8 For the foregoing reasons, the Court denied the Petition  
9 to Compel Arbitration and the Motion for Severance and Stay.

10  
11 DATED: APR 30 1997

~~BRUCE E. MITCHELL~~  
BRUCE MITCHELL  
Judge Pro Tem