

1 **II. DISCUSSION**

2 1. Legal Standard

3 The right to a jury trial in federal court is governed by federal law. *Simler v.*
4 *Conner*, 372 U.S. 221, 222 (1963). “While the right to civil jury trial is a fundamental
5 constitutional right, it may be waived by a contract knowingly and voluntarily
6 executed.” *Okura & Co. (America), Inc. v. Careau Group*, 783 F.Supp. 482, 488
7 (C.D. Cal. 1991) (citing *Leasing Service Corp. v. Crane*, 804 F.2d 828, 832-33 (4th
8 Cir. 1986)). Waivers are strictly construed, however, and “courts should indulge
9 every reasonable presumption against waiver.” *Pradier v. Elespuru*, 641 F.2d 808,
10 811 (9th Cir. 1981) (citations omitted).

11 The court is guided by four factors in determining whether a contractual waiver
12 was executed knowingly and voluntarily:

13 (1) the relative bargaining power of the parties; (2) the extent to which
14 the party opposing the waiver understood that provision; (3) the extent to
15 which the provision was negotiated; and (4) the conspicuousness of the
provision.

16 *MZ Ventures LLC v. Mitsubishi Motor Sales of America Inc.*, 1999 WL 33597219,
17 *15 (C.D. Cal. 1999); *see also Phoenix Leasing, Inc. v. Sure Broad., Inc.*, 843 F.Supp.
18 1379 (D. Nev.1994). While some courts disagree, the better view places the burden of
19 persuasion on the party seeking to enforce a waiver provision. *Id.*

20 2. Defendants’ Motion to Strike Jury Demand

21 Defendants point to Section 20.4 of the relevant franchise agreements in
22 support of their motion. That section provides:

23 IN ALL CASES, *EXCEPT WHERE EXPRESSLY PROHIBITED BY*
24 *APPLICABLE STATUTORY LAW*, FRANCHISEE AND FRANCHISOR
25 EACH WAIVES ANY RIGHT TO JURY TRIAL.

26 (McDonald Decl., Exhs. A-K) (emphasis added).

1 ***The Exception Is Inapplicable***

2 Initially, we consider an argument permeating Plaintiffs' Opposition: that the
3 jury waiver is inapplicable on its face. (Opp'n at 1) ("The Court need go no further
4 and should deny MBE's motion."). Specifically, because Section 20.12 of the
5 agreement provides that California law shall govern the parties' relationship, Plaintiffs
6 contend that the waiver does not apply, as such waivers are "expressly prohibited by
7 applicable [California] law." *See Grafton Partners v. Superior Court*, 36 Cal.4th 944
8 (2005) (Cal. Code of Civil Procedure Section 631, which provides six exclusive
9 means of waiving a jury, prohibits pre-dispute contractual waivers).

10 Though facially appealing, Plaintiffs' argument misapprehends the governing
11 law. The court agrees that the waiver "applies only when an 'applicable' statute does
12 not prohibit the waiver of a jury trial." (Opp'n at 1.) The plain language of Section
13 20.4 says that much. However, the court cannot sustain Plaintiffs argument that Cal.
14 Code Civ. Proc. § 631 is "applicable statutory law." The Supreme Court has long
15 instructed that, when federal courts are called upon to decide questions concerning the
16 right to trial by jury, they must apply federal law. *Simler*, 372 U.S. at 222. This
17 directive applies "in diversity as well as other actions." *Id.* Consequently, Plaintiffs
18 mistakenly rely on an exception based on inapplicable law.

19 ***Whether the Waiver Was Knowing and Voluntary***

20 We begin our inquiry by examining the relative bargaining power of the parties.
21 As individual franchisees of the franchisor Defendants, Plaintiffs are sophisticated
22 investors, not hapless or necessitous men. Nonetheless, Defendants had slightly more
23 bargaining power with respect to this "take it or leave it" transaction. And, although
24 similar jury waivers were upheld notwithstanding a slight disparity in bargaining
25 power, (Mot. at 3), those decisions balanced this factor against others. *See, e.g.,*
26 *Bonfield v. AAMCO Transmissions, Inc.*, 717 F.Supp. 589, 595 (N.D.Ill. 1989) (where
27 waiver provision was *expressly* discussed).
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1 Second, we explore the extent to which Plaintiffs understood the provision.
2 Defendants contend the provision is clearly written in plain English, and suggest that
3 Plaintiffs' inconsistent arguments – that they did not understand the waiver, on the
4 one hand, and that they understood they were waiving their right only if such waivers
5 are permitted under California law, on the other – show that Plaintiffs in fact
6 understood the waiver provision. (Reply at 6.) The court disagrees.

7 Plaintiffs are entitled to argue inconsistent positions, and their understanding of
8 the waiver provision will not be inferred from such practice. See, *e.g.*, *Continental*
9 *Illinois Corp. v. C.I.R.*, 998 F.2d 513, 518 (7th Cir. 1993) (“A party can argue
10 inconsistent positions in the alternative, but once it has sold one to the court it cannot
11 turn around and repudiate it . . .”), *cert. denied*, 510 U.S. 1041, 114 S.Ct. 685, 126
12 L.Ed.2d 652 (1994). Further, while the waiver provision is indeed written in plain
13 English, it is not necessarily clear. Indeed, the very exception discussed above
14 confuses the otherwise clear waiver, and Plaintiffs' arguments before this court
15 demonstrate their misunderstanding of that provision.

16 Third, the court considers the extent to which the provision was negotiated.
17 This factor overlaps to some extent with the first factor, the relative bargaining power
18 of the parties. Defendants concede that neither the waiver provision nor the franchise
19 agreement was negotiated. (See Reply at 5-6.) Accordingly, this factor weighs
20 against waiver. See, *e.g.*, *Dreiling v. Peugeot Motors of America, Inc.*, 539 F.Supp.
21 402, 403 (D. Colo. 1982), *rev'd on other grounds by* 850 F.2d 1373 (10th Cir. 1988)
22 (“Agreement appears to be Peugeot's standardized printed dealer contract, drafted by
23 Peugeot. Obviously, the plaintiffs had little, if any, opportunity to negotiate the
24 provisions. Absent proof to the contrary, such an inequality in relative bargaining
25 positions suggests that the asserted waiver was neither knowing nor intentional.”)
26 (citation omitted); compare *Bonfield*, 717 F.Supp. at 595 (waiver presumed in part
27 because parties *expressly* discussed waiver provision).
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1 Finally, the court considers whether the waiver provision was “conspicuous.”
2 Defendants argue the provision is conspicuous because it is set forth in all capital
3 letters in a stand-alone section of the franchise agreements. (Reply at 6.) Defendants
4 further argue that Plaintiffs “were given the opportunity and encouraged to . . . consult
5 with [] legal counsel . . . prior to executing the agreements.” (Id.) Plaintiffs contend
6 the provision is inconspicuous because it is buried deep in the voluminous franchise
7 agreements, including “attachments and exhibits.” (Opp’n at 11.)

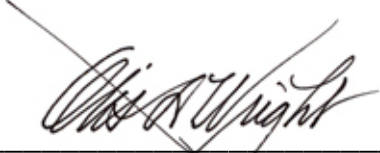
8 The court has reviewed the several franchise agreements and found that the
9 waiver provision is indeed in all capital letters in a stand-alone section of the
10 agreements. However, this is counterbalanced by the fact that the provision is found
11 on page 41 of a fifty-one page agreement, exclusive of the nearly sixty pages in
12 exhibits attached thereto. The court is therefore disinclined to find the waiver
13 provision conspicuous. *See, e.g., Dreiling*, 539 F.Supp. at 403 (“A constitutional
14 guarantee so fundamental as the right to jury trial cannot be waived unknowingly by
15 mere insertion of a waiver provision on the twentieth page of a twenty-two page
16 standardized form contract.”).

17 **III. CONCLUSION**

18 After considering the applicable factors, as well as the presumption against
19 waivers, the court finds that Plaintiffs did not knowingly and voluntarily waive their
20 right to trial by jury. Defendants’ motion is therefore DENIED.
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22 **SO ORDERED**

23 DATED: July 15, 2008

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26 Hon. Otis D. Wright II
27 United States District Judge
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4 *Whirlpool Financial Corp. v. Sevaux*, 866 F.Supp. 1102, 1105-06 (N.D. Ill. 1994)

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7 Consequently, Plaintiffs' reliance on an exception purporting to apply California law is misplaced because that law is not "applicable."

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9 *Phoenix Leasing, Inc. v. Sure Broadcasting, Inc.*, 843 F.Supp. 1379, 1384

10 (D.Nev.1994). Courts place the burden of establishing these factors on the party
11 seeking to enforce a waiver provision. *See id.*

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13 Federal Rule of Civil Procedure 12(f) provides that a party may move to strike "before
14 responding to a pleading..." Rule 12(f) provides no procedure to move to strike after a
15 party has responded to a pleading.

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18 A contractual agreement can operate to waive the right to jury trial. *See Wright &*
19 *Miller, supra*, at § 2321. But such agreements are strictly and narrowly construed. *See,*
20 *e.g., Paracor Fin., Inc. v. General Elec. Cap. Corp.*, 79 F.3d 878 (9th Cir.1996).
Against this background, courts sometimes find contractual waivers unenforceable.
See, e.g., Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp., 913 F.Supp. 1088,
1146 (N.D.Ill.1995)

21 1. The parties do not disagree as to the factors courts use to consider contractual
22 jury-trial waivers. Both parties identify four factors: (1) the relative bargaining
23 power of the parties; (2) the extent to which the party opposing the waiver
24 understood that provision; (3) the extent to which the provision was negotiated;
25 and (4) the conspicuousness of the provision. *See, e.g., id.; Phoenix Leasing,*
Inc. v. Sure Broadcasting, Inc., 843 F.Supp. 1379, 1384 (D.Nev.1994). Courts
26 place the burden of establishing these factors on the party seeking to enforce a
27 waiver provision. *See id.*

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The Court will first address each of the these factors as applied to this case. Then, the
Court will address the other issues raised in the motion.

MZ Ventures LLC v. Mitsubishi Motor Sales of America Inc. 1999 WL 33597219, 15
(C.D.Cal.) (C.D.Cal.,1999)

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2 California law permits a court to refuse to enforce an unconscionable clause in a
3 contract. *See* Cal. Civ.Code § 1670.5(a). The determination of unconscionability
4 under California law has two prongs: a procedural prong and a substantive prong. *See*
A & M Produce Co. v. FMC Corp., 186 Cal.Rptr. 114, 121 (App.Div.1982); Witkin,
supra, at § 33.

5 2. The procedural prong focuses on the circumstances under which the parties
6 entered into the agreement. Two factors the Court must look for are
7 “oppression” and “surprise.” *A & M Produce*, 186 Cal.Rptr. at 121-22.
8 Oppression means that the parties had an imbalance of bargaining power at the
time of the agreement, leaving one party with “no meaningful choice.” *Id.* “
9 ‘Surprise’ involves the extent to which the supposedly agreed-upon terms are
10 hidden in a prolix printed form drafted by the party seeking to enforce them,
11 usually the party with the superior bargaining position.” Witkin, *supra*, at *id.*

12 The substantive prong of the unconscionability inquiry focuses on the substantive
13 reasonableness of the term at issue. While “there is no precise definition,” courts have
14 spoken in terms of “ ‘unduly harsh’ or ‘one-sided’ results.” *Id.* Both the procedural
15 and substantive prongs are part of a single determination: the greater the showing of
16 unfair surprise or unequal bargaining power, the less unreasonable the risk allocation
17 which will be tolerated. *A & M Produce*, 186 Cal.Rptr. at 122.

18 Mitsubishi asserts that MZ Ventures was represented by people who “were not
19 neophytes in their dealings” with Mitsubishi. This assertion is based on the
20 representation in MZ Ventures's business plan that the owners of MZ Ventures had
21 over forty years business experience in the auto industry. (Mot. at 17 (citing Link
22 Decl. Ex.3).)

23 The sophistication of MZ Ventures's representatives, however, is a question of fact.
24 While the business plan indicates that the representatives worked in the industry for
25 many years, it does not indicate that they had any experience negotiating or even
26 understanding dealer agreements. (*See* Link Decl. Ex.3 at 105.) “[C]ourts have begun
27 to realize that ‘experienced but legally unsophisticated businessmen’ may be unfairly
28 surprised by unconscionable terms, and that even ‘large business entities’ may have
relatively little bargaining power under the circumstances.” Witkin, *supra*, at *id.* If so,
the sophistication of the representatives is a question of fact that cannot be resolved
here.

*11 Mitsubishi also asserts that auto dealers and manufacturers do not have unequal
bargaining power because dealers are protected by various statutory schemes. (Mot. at
17.) Again, however, this raises a question of fact. As noted, the unconscionability
determination depends on various factors, of which the strength of one will lessen the
required showing as to another. If so, the Court cannot yet resolve this issue.

This conclusion is consistent with California Civil Code § 1650.5, which provides that
“[w]hen it is claimed or appears to the court that the contract or any clause thereof
may be unconscionable the parties shall be afforded a reasonable opportunity to
present evidence as to its commercial setting, purpose, and effect to aid the court in
making the determination.” Cal. Civ.Code § 1670.5(b). Here, this means that this
question cannot yet be answered.

MZ Ventures LLC v. Mitsubishi Motor Sales of America Inc. L 33597219, 10 -11 (C.D.Cal.,19

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3 *Simler*, 372 U.S. at 222.

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5 **Misplaced**

6 Our philosophy is that we do best what we know best - litigation and trial work.

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8 Defendants argue that the choice of law clause in the EAs should be honored by applying
9 California law on contractual jury waivers. This contractual choice of law situation is analogous
10 to a contract case in diversity where the law of a particular state may govern the interpretation
of the contract. In diversity cases, [*8] federal courts have applied federal law to assess the
enforceability of jury waiver provisions.

11 *TransFirst Holdings, Inc. v. Phillips*, 2007 U.S. Dist. LEXIS 20483, 7-8 (N.D. Tex. Mar. 22, 2007)

12 Plaintiffs argue that the exception in the franchise agreements should be honored (in
13 conjunction with the choice of law clause) by applying California law to the jury
14 waiver. (Opp'n at 5.) This argument is analogous to a contract case in diversity
15 where California law may govern the interpretation of the contract. All the same,
however, even in diversity cases where California law may apply, federal courts must
still apply federal law to assess the validity of jury waivers.

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23 *Okura & Co. (America), Inc. v. Careau Group*, 783 F. Supp. 482 (C.D. Cal. 1991).

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25 FEDPROC § 77:128

26 Defendant cites the adage that “**necessitous men are not free men.**” *Bonfield v. AAMCO*
27 *Transmissions, Inc.*, 717 F.Supp. 589, 596 (N.D.Ill.1989). However, Defendant was not in
28 the position of necessitous men. The ability to take out a loan to start up a profit making cable
company is not a necessity of life such that Defendant was compelled to accept Plaintiff's loan on

1 whatever terms it was offered.

2 Phoenix Leasing Inc. v. Sure Broadcasting, Inc. 843 F.Supp. 1379, 1385 (D.Nev.,1994).

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4 The Fourth and Second Circuits place the burden on the party seeking to strike the demand for a jury trial. *See National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir.1977) (a presumption exists against the waiver of a jury trial); *Leasing Service Corp. v. Crane*, 804 F.2d 828, 832-833, (4th Cir.1986) (“Where a waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed”).

7 Hydramar, Inc. v. General Dynamics Corp. 1989 WL 159267, 2 (E.D.Pa.) (E.D.Pa.,1989)

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12 Seaboard correctly states that the Seventh Amendment preserves a right to a jury trial on issues of fact in suits for breach of contract damages between private party litigants, *see Northern Pipeline Constr. Co. v. Marathon Pipe Line*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), but Seaboard fails to carry its analogy through to its logical conclusion. The Supreme Court has long recognized that a private litigant may waive its right to a jury and to an Article III court in civil cases. Waiver can be either express or implied. *Commodity Futures Trade Comm. v. Schor*, 478 U.S. 833, 848, 106 S.Ct. 3245, 3255, 92 L.Ed.2d 675 (1986); *cf. D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972) (contractual waiver of due process rights). Waiver requires only that the party waiving such right do so “voluntarily” and “knowingly” based on the facts of the case. *Brookhart v. Janis*, 384 U.S. 1, 4, 5, 86 S.Ct. 1245, 1246, 1247, 16 L.Ed.2d 314 (1966); *cf. D.H. Overmyer*, 405 U.S. at 185-86, 92 S.Ct. at 782. The acceptance of contract provisions providing for dispute resolution in a forum where there is no entitlement to a jury trial may satisfy the “voluntary” and “knowing” standard. *See, e.g., Northwest Airlines, Inc. v. Air Line Pilots Ass’n Int’l*, 373 F.2d 136, 142 (8th Cir.) *cert. denied*, 389 U.S. 827, 88 S.Ct. 77, 19 L.Ed.2d 83 (1967); *Maryland Casualty Co. v. United States*, 135 Ct.Cl. 428, 438, 141 F.Supp. 900 (Ct.Cl.1956) (Jones, C.J.,

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25 The right to a jury trial in federal court is governed by federal law. *Simler v. Conner*, 372 U.S. 221, 221-22, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963).

26 Phoenix Leasing Inc. v. Sure Broadcasting, Inc. 843 F.Supp. 1379, 1384 (D.Nev.,1994)

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28 Although the right to jury trial in civil cases tried before federal courts is a constitutionally protected

1 right, it may be waived by a contract knowingly and voluntarily executed. *Okura & Co. (America),*
2 *Inc. v. Careau Group*, 783 F.Supp. 482, 488 (C.D.Cal.1991) citing *Leasing Service Corp. v. Crane*,
3 804 F.2d 828, 832-33 (4th Cir.1986).

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5 Phoenix Leasing Inc. v. Sure Broadcasting, Inc. 843 F.Supp. 1379, 1384 (D.Nev.,1994)

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8 Stephen Slesinger, Inc. v. Walt Disney Co. 155 Cal.App.4th 736, 762, 66 Cal.Rptr.3d 268, 289
9 (Cal.App. 2 Dist.,2007)

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12 3.

13 “The acceptance of contract provisions providing for dispute resolution in a forum
14 where there is no entitlement to a jury trial may satisfy the ‘voluntary’ and ‘knowing’
15 standard.” *Seaboard Lumber Co. v. U.S.*, 903 F.2d 1560, 1563 (Fed. Cir.
16 1990)(citations omitted).

17 Grafton Partners L.P. v. Superior Court 36 Cal.4th 944, 951 (2005)
18 Having found that the waiver provisions were valid and enforceable, the court
19 had to determine the scope of the jury waiver. *Okura*, 783 F.Supp. at 489.

20 “Because the right to a jury trial is a fundamental right guaranteed to our
21 citizenry by the Constitution, courts should indulge every reasonable presumption
22 against waiver.” *Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981) (citations
23 omitted).

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25 As with the choice-of-law clause, a jury waiver is a contractual right and generally
26 may not be invoked by one who is not a party to the contract. *Paracor Finance, Inc.*
27 *v. General Elec. Capital Corp.*, 96 F.3d 1151, 1166 (9th Cir. 1996) (citing *Britton v.*
28 *Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir.1993)).

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