

**MAY 09 2006**

**NOT FOR PUBLICATION**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re:	)	BAP No.	CC-05-1258-MaMoPa
	)		
SAMEY A. JAWAD,	)	Bk. No.	LA 04-33249-BR
	)		
Debtor.	)		
_____	)		
MICHAEL R. WHITE & ASSOCIATES,	)		
	)		
Appellant,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
SAMEY A. JAWAD,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on November 18, 2005  
at Los Angeles, California

Filed - May 9, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Barry Russell, Chief Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: MARLAR, MONTALI and PAPPAS, Bankruptcy Judges.

\_\_\_\_\_  
<sup>1</sup>This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 A lender entered into a finance lease with the debtor, which  
2 required the lender to make two payments to the equipment seller  
3 (\$17,000.00 upon execution of the lease and \$19,805.00 upon  
4 completion and delivery of the purchased equipment). As  
5 collateral for the transaction, the debtor pledged certain real  
6 property. The equipment was never delivered to the debtor, and  
7 the transaction was cancelled. The lender never paid the second  
8 installment of \$19,805.00. Although it has now been repaid  
9 \$23,744.65 by the debtor on its advance of \$17,000, the lender  
10 sought to foreclose on the debtor's real property, contending that  
11 the debtor still owed the remainder of the lease payment  
12 obligations.

13 To avoid foreclosure, the debtor filed for chapter 13<sup>2</sup> relief  
14 and later objected to the lender's claim, and also sought  
15 avoidance of the lender's lien. Holding that there was a failure  
16 of consideration under the lease, that the lender had been fully  
17 compensated for its partial performance, and that the lender's  
18 conduct constituted bad faith, the bankruptcy court disallowed the  
19 claim and avoided the lien. We AFFIRM.

20  
21 **I.**  
**FACTS**

22 In July 2000, Samey Jawad ("Debtor") (doing business as  
23 International Auto) agreed to acquire an air-conditioned modular  
24 office building (the "Equipment") from Francine Escobar, Abigail  
25 Escobar, Rudy Escobar and Thermal Dynamics (the "Vendors"). To

26 \_\_\_\_\_  
27 <sup>2</sup>Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 finance this acquisition, Debtor entered into a transaction with  
2 appellant Michael R. White and Associates ("Lender") whereby  
3 Lender would purchase the Equipment and in turn lease it to  
4 Debtor.

5 On July 31, 2000, Debtor and Lender executed a business  
6 equipment lease (the "Lease") and a pre-delivery addendum to the  
7 Lease (the "Addendum"). The Lease and Addendum required Lender to  
8 advance \$36,805.00 to purchase the Equipment from Vendors. In  
9 exchange, Debtor would pay \$1,315.78 monthly to Lender for sixty  
10 months (for a total payment of \$78,946.80).<sup>3</sup> To secure payment of  
11 the Lease, Debtor executed a deed of trust in favor of Lender on  
12 certain real property located in Whittier, California (the  
13 "Property").

14 Pursuant to the Addendum, Lender disbursed \$17,000 to Vendors  
15 upon execution of the Lease. Lender was to disburse the remaining  
16 \$19,805.00 upon completion and delivery of the Equipment. It did  
17 not do so. This is because, as Lender acknowledges, the Equipment  
18 was never delivered or installed.

19 The Lease, a pre-printed form provided by Lender, states that  
20 the risk of loss was assumed by Debtor "[u]pon delivery of the  
21 Equipment to Lessee [Debtor]." Lease at ¶ 15. Thus, prior to  
22 delivery, the risk of loss was borne by Lender. Delivery never  
23 occurred.

24 The Addendum contained language contradictory to the Lease.  
25 It provided that Debtor was deemed to have accepted the Equipment  
26 upon execution of the Lease and not upon completion or delivery of

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28 <sup>3</sup>In addition to these monthly payments, the Lease provides  
that Debtor would make an advance payment of \$3,026.56. The  
record is unclear whether Debtor made this advance payment.

1 the Equipment. The Addendum states in Paragraph 3 that the Lease  
2 "shall become effective upon execution and lease payments shall  
3 commence . . . notwithstanding that the [E]quipment may not have  
4 been completed, delivered, installed or tested by that date" and  
5 the Equipment is accepted "AS IS" and "WHERE IS" upon the start  
6 date [i.e., the effective or execution date] even without delivery  
7 or inspection. The Addendum also contains a waiver of warranties  
8 provision in Paragraph 4, which provides that Lessor is not  
9 responsible "for construction or completion of the Equipment" or  
10 for any breaches by Vendor in providing the Equipment.

11 When Vendors failed to deliver the Equipment, Debtor notified  
12 Lender promptly and Lender did not fund the remaining \$19,805.00.  
13 Debtor was able to obtain \$5,200 from the Vendors, which he then  
14 remitted to Lender in two checks (totaling \$5,263.14) in November  
15 and December 2000. This amount was applied against Lender's first  
16 and only advance of \$17,000.00.

17 Nevertheless, in September 2001, deeming Debtor to be in  
18 default, Lender prepared a Notice of Default and Election to Sell  
19 under Deed of Trust. Lender maintained that Debtor was in default  
20 in the amount of \$11,610.58 as of September 7, 2001. Debtor then  
21 filed his initial Chapter 13 petition in 2002 and scheduled Lender  
22 as holding a disputed, secured claim in the amount of \$36,505.00.  
23 Lender filed a proof of claim for \$32,845.52.

24 Debtor obtained confirmation of a plan proposing to make  
25 monthly payments to Lender in the amount of \$1,099.89 on a  
26 disputed principal amount of \$32,843.52 with a 7% interest rate.  
27 Debtor explicitly reserved the "right to litigate the legitimacy"  
28 of the claim. Lender admits that it received \$18,481.51 from

1 Debtor through the Chapter 13 plan. Therefore, Lender has  
2 received at least \$23,744.65 from Debtor.<sup>4</sup>

3 Debtor's initial Chapter 13 case was dismissed because of his  
4 failure to complete plan payments. On October 7, 2004, Lender  
5 again noticed a Trustee's Sale, indicating that the amount due  
6 from Debtor was \$27,011.24. In response, Debtor filed his second  
7 Chapter 13 case on November 3, 2004.

8 On December 20, 2004, Lender filed a proof of claim  
9 indicating that Debtor owed it \$25,222.30 as of the petition date.  
10 According to the "Lease Payment Record" appended to the proof of  
11 claim, the original loan amount was \$35,014.96. Even though the  
12 Lease does not provide an interest rate, Lender added a 7%  
13 interest rate to the outstanding balance, explaining that it used  
14 such rate because that was what was proposed in Debtor's initial  
15 Chapter 13 plan. Lender argues that the amount due in its proof  
16 of claim reflected a credit for the \$19,805.00 which it did not  
17 advance (plus charges and interest associated with that amount),  
18 but then added approximately \$15,000.00 in attorneys' fees to its  
19 claim. If Lender's proof of claim were allowed, Lender would  
20 receive \$48,966.95 for its advance of \$17,000.00.

21 Debtor objected to Lender's proof of claim and requested that  
22 the bankruptcy court avoid the lien securing the debt.<sup>5</sup> Debtor

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24 <sup>4</sup>If Debtor made the initial \$3,026.56 advance payment  
required by the Lease, Lender has actually received \$26,771.21.

25 <sup>5</sup>Debtor did not file an adversary proceeding pursuant to Rule  
26 7001 when it requested avoidance of the lien. Lender objected on  
27 this basis. The bankruptcy court raised this issue at the hearing  
on the claims objection, and Lender's counsel consented to having  
28 the claims objection and the lien avoidance claim heard at that  
time, notwithstanding the absence of an adversary proceeding.  
Inasmuch as Lender has not raised this procedural issue on appeal,  
(continued...)

1 argued that (1) Lender had assumed contrary positions as to the  
2 amount owed, (2) that enforcement of the lease and allowance of  
3 the claim would be unconscionable, and (3) that there was a  
4 failure of consideration by Lender. In response, Lender argued  
5 that the risk of loss for non-delivery of the Equipment was on  
6 Debtor and that the court should enforce all of the terms of the  
7 Lease.

8 At the claim objection hearing, the court ruled that Lender's  
9 attempted enforcement of the balance of payments due under the  
10 Lease was "unconscionable." It reasoned: "I've read all  
11 documents very carefully and I think under these circumstances  
12 that it would be unconscionable on [sic] the bankruptcy context to  
13 allow that claim to survive anymore. I think it's been paid  
14 considerably more than ever it was owed at a reasonable rate of  
15 interest."

16 The bankruptcy court thereafter signed an order disallowing  
17 the claim and avoiding Lender's lien. The order recites that  
18 Debtor "never received adequate consideration under the [Lease],"  
19 that Debtor "has paid much more to [Lender] than he was ever  
20 obligated to pay," and Lender's claim "was filed in bad faith and  
21 is without merit." This appeal followed.

22  
23 **II.**  
**ISSUE**

24 Did the bankruptcy court err in disallowing Lender's claim  
25 and avoiding its lien?

26 \_\_\_\_\_  
27 <sup>5</sup>(...continued)  
28 it is waived. Golden v. Chicago Title Ins. Co. (In re Choo), 273  
B.R. 608, 613 (9th Cir. BAP 2002) (arguments not specifically and  
distinctly made in an appellant's opening brief are waived).

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**III.  
STANDARD OF REVIEW**

3 This case involves an application of law to undisputed facts.  
4 To the extent that questions of fact cannot be separated from  
5 questions of law, we review these questions as mixed questions of  
6 law and fact, applying a de novo standard. Ratanase v. California  
7 Dep't of Health Servs., 11 F.3d 1467, 1469 (9th Cir. 1993); In re  
8 Jodoin, 209 B.R. 132, 135 (9th Cir. BAP 1997). A mixed question  
9 of law and fact occurs when the historical facts are established,  
10 the rule of law is undisputed, and the issue is whether the facts  
11 satisfy the legal rule. Pullman-Standard v. Swint, 456 U.S. 273,  
12 289 n.19 (1982); In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997).

13 Whether a contract is unconscionable is a question of law  
14 which is reviewed de novo. Ting v. AT&T, 319 F.3d 1126, 1135 (9th  
15 Cir. 2003), cert. denied, 124 S.Ct. 53 (2003). Interpretation of  
16 a contract is reviewed de novo. Flores v. American Seafoods Co.,  
17 335 F.3d 904, 910 (9th Cir. 2003).

18 The BAP can affirm on any basis supported by the record. In  
19 re Woolsey, 117 B.R. 524, 530 (9th Cir. BAP 1990); In re Davis,  
20 177 B.R. 907, 912 (9th Cir. BAP 1995).

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**IV.  
DISCUSSION**

23 Pursuant to section 502(b)(1), a bankruptcy court may  
24 disallow a claim to the extent it is "unenforceable against the  
25 debtor and property of the debtor, under any agreement or  
26 applicable law for a reason other than because such claim is  
27 contingent or unmatured . . . ." 11 U.S.C. § 502(b)(1). To the  
28 extent a lien secures a claim that has been disallowed pursuant to

1 section 502(b)(1), that lien is void. 11 U.S.C. § 506(d)(1).

2 In deciding whether the court erred in disallowing Lender's  
3 claim and voiding its lien, we apply state law. Cossu v.  
4 Jefferson Pilot Securities Corp. (In re Cossu), 410 F.3d 591, 595  
5 (9th Cir. 2005) ("The validity of a creditor's claim is determined  
6 by the rules of state law . . . ."); see also In re Jones, 72 B.R.  
7 25, 26 (Bankr. C.D. Cal. 1987) ("State substantive law is applied  
8 to determine the existence and validity of a claim, unless the  
9 Bankruptcy Code provides otherwise.").

10

11 **A. The Risk of Loss Was Improperly Shifted to Debtor**

12 The Lease is a finance lease under the Uniform Commercial  
13 Code, because the lessor (here, Lender) is strictly acting as a  
14 financing entity (as opposed to the vendor or supplier of goods).  
15 Therefore, the lessee (here, Debtor) generally must look to a  
16 third party (the vendor) if the goods are defective or otherwise  
17 unsuitable for intended use. The lessee (as opposed to the  
18 lessor) bears the risk of loss once the goods are tendered for  
19 delivery. 2 White & Summers, Uniform Commercial Code § 13-3(4th  
20 ed) (updated by 2005 Pocket Part).

21 The Uniform Commercial Code ("UCC") accords very few  
22 protections to a lessee under a finance lease. Perhaps  
23 recognizing the harms inherent in a commercial setting that  
24 permits a party to have all of the protections of a lessor  
25 (ownership of leased property as opposed to a security interest)  
26 without any attendant burdens (such as honoring warranties and  
27 ensuring performance of the leased goods), the UCC provides that  
28 finance lease lessors retain the risk of loss until delivery.

1 Unlike in ordinary leases where the lessor retains the risk of  
2 loss throughout the lease term, risk of loss switches to the  
3 finance lease lessee upon acceptance of the leased goods.<sup>6</sup> Under  
4 the UCC, acceptance occurs only after the lessee has had a  
5 reasonable opportunity to inspect the goods.<sup>7</sup>

6 The Lease, at Paragraph 15, conformed to the UCC in that the  
7 risk of loss was on the Lender prior to delivery. If the Lease  
8 controls, the risk of loss did not pass to Debtor because the  
9 Equipment was never delivered. Thus, while Debtor was obligated  
10 to compensate Lender for amounts advanced to the Vendors, Debtor  
11 was not responsible to pay the balance due under the finance  
12 lease. This is consistent with section 10219(a) and (b) (3) of the  
13 California Commercial Code.

14 The Addendum, however, contains terms that appear to be  
15 inconsistent with the Lease, although no provision of the Addendum  
16 directly contradicts or voids the risk of loss provision stated in  
17 Paragraph 15 of the Lease. The Addendum provides that Debtor was

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19 <sup>6</sup>Under California law governing finance leases, the  
20 lender/lessor retains risk of loss until delivery. See Cal. Comm.  
21 Code § 10219(a) and (b) (3) (the risk of loss in finance lease  
22 passes to the lessee "on tender of delivery" while risk of loss in  
23 regular leases never passes to the lessee). All parties agree  
24 that delivery did not occur here.

25 <sup>7</sup>California law contains a "hell or high water" provision  
26 which greatly protects the interests of lenders/lessors in finance  
27 leases. Section 10407 of the California Commercial Code states  
28 that "[i]n the case of a finance lease that is not a consumer  
lease, the lessee's promises under the lease contract become  
irrevocable and independent upon the lessee's acceptance of the  
goods." Cal. Comm. Code § 10407(1) (emphasis added). California  
Commercial Code section 10515 provides that acceptance occurs when  
the lessee "has had a reasonable opportunity to inspect the goods  
and the lessee signifies or acts with respect to the goods in a  
manner that signifies to the lessor or supplier that the goods are  
conforming or that the lessee will take or retain them in spite of  
their nonconformity. . . ." Cal. Comm. Code § 10515(1) (a).

1 deemed to have accepted the Equipment upon execution of the Lease  
2 and not upon completion or delivery of the Equipment. This is  
3 contrary not only to section 10515(a) of the California Commercial  
4 Code) but also to Paragraph 15 of the Lease itself. The Addendum  
5 states in Paragraph 3 that the Lease "shall become effective upon  
6 execution and lease payments shall commence . . . notwithstanding  
7 that the [E]quipment may not have been completed, delivered,  
8 installed or tested by that date" and the Equipment is deemed to  
9 have been accepted "AS IS" and "WHERE IS" upon the start date  
10 [i.e., the effective or execution date] even without delivery or  
11 inspection. The Addendum also contains a waiver of warranties  
12 provision in Paragraph 4, which provides that Lessor is not  
13 responsible "for construction or completion of the Equipment" or  
14 for any breaches by Vendor in providing the Equipment. Notably,  
15 however, the Addendum does not specifically state that the risk of  
16 loss passed to Debtor even before acceptance of the Equipment.

17 The Addendum's "deemed acceptance" clause effectively negates  
18 the Lease's risk of loss provision (as well as the risk of loss as  
19 allocated by the UCC and California law). While parties are able  
20 to contract around some statutory provisions, they may not do so  
21 unreasonably.

22 The effect of provisions of this code may be varied by  
23 agreement, except as otherwise provided in this code and  
24 except that the obligations of good faith, diligence,  
25 reasonableness and care prescribed by this code may not  
26 be disclaimed by agreement but the parties may by  
27 agreement determine the standards by which performance  
28 of such obligations is to be measured if such standards  
are not manifestly unreasonable.

27 Cal. Comm. Code § 1102(3). Shifting risks in a one-sided manner  
28 is unreasonable. See A&M Produce Co. v. FMC Corp., 135 Cal. App.

1 3d 473, 487, 186 Cal. Rptr. 114, 122 (1982) (disclaimer of  
2 warranties in contract was an unconscionable and unenforceable  
3 shifting of risks under the Uniform Commercial Code; "a  
4 contractual term is substantively suspect if it reallocates the  
5 risks of the bargain in a objectively unreasonable or unexpected  
6 manner").

7 In the Addendum, the Lender negated the few protections  
8 accorded to Debtor by law and the Lease itself, thereby rendering  
9 the inconsistent and one-sided "deemed acceptance" clause  
10 unenforceable under case law interpreting the UCC. Other finance  
11 lessors who have attempted to improve their position in a manner  
12 inconsistent with the acceptance provisions of the UCC have not  
13 been successful. Most of the courts facing clauses providing that  
14 acceptance occurs upon signature without a reasonable opportunity  
15 to inspect have refused to enforce them. See, e.g., JAZ, Inc. v.  
16 Foley, 104 Hawai'i 148, 85 P.3d 1099, 1104 (2004) (applying  
17 provisions identical to California Commercial Code sections 10407  
18 and 10515, the court held that a written acceptance clause was  
19 ineffective because there must be a tender or delivery of goods  
20 for the risk of loss to pass to the lessee in the case of a  
21 finance lease).

22 Lender cites one case with a contrary holding: Stewart v.  
23 United States Leasing Corp., 702 S.W.2d 288 (Tex. App. 1985). As  
24 the Foley court notes, Stewart is unpersuasive and is inconsistent  
25 with the majority line of cases:

26  
27 Other cases dealing with signing an acceptance  
28 certificate before delivery are contrary to Stewart. In  
Colonial Pacific Leasing Corp. v. J.W.C.J.R. Corp., 977  
P.2d 541 (Utah Ct. App. 1999), the Utah Court of Appeals

1 stated that taking possession of the goods, signing a  
2 form acceptance before receipt of goods, and making a  
3 lease payment are not determinative of acceptance. Id.  
4 at 545. In Moses v. Newman, 658 S.W.2d 119 (Tenn. Ct.  
5 App. 1983), the Tennessee Court of Appeals held  
6 acceptance had not occurred despite purchaser's  
7 possession of the goods because affording a purchaser a  
8 reasonable opportunity to inspect does not imply  
9 possession. Id. at 121-22. In Tri-Continental Leasing  
10 Corp. v. Law Office of Richard W. Burns, 710 S.W.2d 604  
11 (Tex. Ct. App. 1985), the Texas Court of Appeals held  
12 that there was no acceptance because the buyer must have  
13 a reasonable opportunity to inspect the goods. Id. at  
14 608. In Information Leasing Corp. v. GDR Investments,  
15 Inc., 152 Ohio App.3d 260, 787 N.E.2d 652 (2003), the  
16 Ohio Court of Appeals held that merely signing an  
17 acceptance certificate is not acceptance because the  
18 requirement of a reasonable time for inspection cannot  
19 be circumvented. Id. at 655-56. Under these cases,  
20 signing an acceptance certificate before delivery does  
21 not mean a lessee has accepted the goods. The lessee  
22 must have a reasonable time for inspection, which  
23 requires that lessee have actual possession of the  
24 goods.

25 Foley, 85 P.3d at 1104 (emphasis added). We also decline to hold  
26 that mere execution of an "acceptance" deprives the lessee of the  
27 right to reject the goods even before their receipt.

28 Under this case law, the bankruptcy court's decision not to  
allow Lender's claim was correct. The Addendum's efforts to  
impose a "deemed acceptance" (and thus a "deemed" disavowal of the  
express risk of loss provision of the Lease and of California law)  
upon Debtor is unenforceable. Therefore, the risk of loss  
provision (Paragraph 15) of the Lease and sections 10219, 10407  
and 10515 of the California Commercial Code control and the risk  
of loss never passed to Debtor since the Equipment was never  
delivered or accepted. Debtor therefore was not required to pay  
for goods that he never received, and for which Lender also never  
paid.

1 **B. The Addendum Terms Were Substantively Unconscionable**

2 Notwithstanding the protections accorded to it as a finance  
3 lease lender/lessor, Lender here attempted to allocate  
4 disproportionately the risk of loss to Debtor, and enforce it to  
5 his detriment. Section 1670.5 of the California Civil Code allows  
6 a court to refuse to enforce a contract if any clause is  
7 unconscionable. Moreover, “[e]very contract or duty within this  
8 code imposes an obligation of good faith in its performance or  
9 enforcement.” Cal. Comm. Code § 1203. “In California, a  
10 contract or clause is unenforceable if it is both procedurally and  
11 substantively unconscionable.” Ting, 319 F.3d at 1148. A  
12 “principle of equity applicable to all contracts generally . . .  
13 is that a contract or provision, even if consistent with the  
14 reasonable expectations of the parties, will be denied enforcement  
15 if, considered in its context, it is unduly oppressive or  
16 unconscionable.” Perdue v. Crocker Nat’l Bank, 38 Cal.3d 913,  
17 925, 216 Cal.Rptr. 345, 702 P.2d 503 (1985).

18 To determine if a contract is unconscionable, California  
19 courts apply a sliding scale: “the more substantively oppressive  
20 the contract term, the less evidence of procedural  
21 unconscionability is required to come to the conclusion that the  
22 term is unenforceable, and vice versa.” Ting, 319 F.3d at 1148.  
23 quoting Armendaiz v. Found. Health Psychcare Servs., Inc., 24 Cal.  
24 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669, 690 (2000).

25 “A contract is procedurally unconscionable if it is a  
26 contract of adhesion, i.e., a standardized contract, drafted by  
27 the party of superior bargaining strength, that relegates to the  
28 subscribing party only the opportunity to adhere to the contract

1 or reject it.” Ting, 319 at 1148. Substantive unconscionability  
2 “focuses on the one-sidedness of the contract terms.” Id. at  
3 1149.

4 Here, the terms of the Addendum are unduly one-sided, and  
5 stripped the finance lessee of the few basic protections provided  
6 by law. They are also inconsistent with the Lease itself and the  
7 UCC. Because the Addendum terms are substantively  
8 unconscionable, the sliding scale does not require evidence of  
9 procedural unconscionability. Id. Nonetheless, the record does  
10 contain at least some evidence of procedural unconscionability in  
11 that the Lease and Addendum were pre-printed contracts supplied by  
12 Lender; moreover, the record contains no evidence that Debtor was  
13 in a position to negotiate the terms, including the “deemed  
14 acceptance” clause. Therefore, the bankruptcy court did not err  
15 in concluding that allowance of the claim would be unconscionable,  
16 and was correct in disallowing it.

17

18 **C. The Requested Damages Were Unreasonable Under California Law**

19 Section 1103 of the California Commercial Code states that  
20 the principles of law and equity shall supplement the provisions  
21 of the UCC. Section 3359 of the California Civil Code prohibits a  
22 court from awarding unreasonable or oppressive damages, even if a  
23 contract calls for such damages. California Civil Code section  
24 3359 provides: “Damages must, in all cases, be reasonable, and  
25 where an obligation of any kind appears to create a right to  
26 unconscionable and grossly oppressive damages, contrary to  
27 substantial justice, no more than reasonable damages can be  
28 recovered.”

1 Here, Lender advanced a total of \$17,000 and was repaid at  
2 least \$23,744.65 by Debtor. Yet, Lender filed a proof of claim  
3 for \$25,222.30 which, according to Lender, included approximately  
4 \$15,000 in attorneys' fees. The bankruptcy court correctly held  
5 that Lender's recovery of further lease damages under these facts  
6 was unconscionable. As a result, the bankruptcy court also did  
7 not err in denying Lender's claim for recovery of attorneys' fees  
8 for pursuing its claim. 11 U.S.C. § 506(b) (secured creditor  
9 only entitled to reasonable attorneys' fees).

10  
11 **V.  
CONCLUSION**

12 For the foregoing reasons, we AFFIRM.<sup>8</sup>

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14  
15 MONTALI, Bankruptcy Judge, dissenting:  
16

17 I believe the majority is refusing to honor the sanctity of  
18 contract and is rewriting the Lease to relieve Debtor of a bad  
19 bargain. That is not the proper role for a trial or appellate  
20 court. The majority treats the Lease as sacred and the Addendum  
21 as an inconsistent undermining of the Lease. The Lease and  
22 Addendum were executed at the same time and must be considered  
23 together as the agreement of the parties. The documents were  
24 executed when Debtor needed the Equipment and Lender was willing  
25

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26  
27 <sup>8</sup>Because we conclude that the bankruptcy court did not err in  
28 finding that Lender's recovery of the full amount of its claim  
would be unconscionable, we express no opinion concerning the  
bankruptcy court's decision to disallow Lender's claim because it  
was "filed in bad faith."

1 to advance the costs, with an appropriate shifting of the risks.  
2 The majority should not reverse that negotiated balance of rights  
3 and obligations.

4       The Lease is a finance lease under Article 2A of the Uniform  
5 Commercial Code (adopted at Cal. Comm. Code § 10101 et seq). A  
6 finance lease involves three parties: the lessor (Lender), the  
7 lessee (Debtor) and the supplier (Vendors). See Cal. Comm. Code  
8 § 10103. The lessor retains title to the leased property and  
9 provides the financing. Because the lessor is not the supplier,  
10 it is not responsible for the fitness or merchantability of the  
11 property. See Cal. Comm. Code § 10209. The lessee's obligation  
12 to pay rent under a finance lease is "irrevocable and independent  
13 upon the lessee's acceptance of the goods." Cal. Comm. Code  
14 § 10515(1) (a). This is known as the "hell or high water" clause  
15 of the Uniform Commercial Code:

16       The lessee under the statute must pay the finance lessor  
17 - come hell or high water. After all, the parties have  
18 actually entered into a financing transaction in which  
19 the lessor is really lending money and dealing largely  
20 in paper rather than goods. Put another way, the lessor  
21 as lender has no interest in how the lessee as debtor  
22 chooses to spend the money for goods. If the lessee  
23 should order [property] which is unsuitable or  
24 defective, this is not the lessor's problem. The  
25 lessor's responsibility is merely to provide the money,  
26 not to instruct the lessee like a wayward child  
27 concerning a suitable purchase. . . . This deprives the  
28 finance lessee of the argument that any defects in the  
goods as supplied by the supplier or manufacturer are  
somehow attributable to the lessor and in some way grant  
the lessee a right of setoff or of cancellation as  
against the finance lessor.

25 James J. White and Robert S. Summers, Uniform Commercial Code  
26 § 13-3 (4th ed.) (updated by 2005 Pocket Part).

27       Here, Debtor signed an Addendum agreeing that acceptance  
28 occurred upon execution and prior to delivery. Therefore, the

1 "hell or high water" provisions of the Lease and the Uniform  
2 Commercial Code came into play and Debtor is responsible for  
3 payments due under the Lease, even absent delivery. The majority  
4 seeks to relieve Debtor of his agreement by holding that the  
5 "deemed acceptance" clause of the Addendum is unconscionable or  
6 somehow otherwise unenforceable. This is not supported by the  
7 record.

8 First, there is insufficient evidence to support a finding  
9 that the Lease or its "deemed acceptance" clause is  
10 unconscionable. As the majority notes, "a contract or clause is  
11 unenforceable if it is both procedurally and substantively  
12 unconscionable." Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir.  
13 2003). "A contract is procedurally unconscionable if it is a  
14 contract of adhesion, i.e., a standardized contract, drafted by  
15 the party of superior bargaining strength, that relegates to the  
16 subscribing party only the opportunity to adhere to the contract  
17 or reject it." Ting, 319 at 1148. I have searched in vain for  
18 evidence in the record of a lack of good faith by Lender, of any  
19 "unduly one-sided" stripping of Debtor's protection, of a contract  
20 of adhesion, or of Lender's superior bargaining strength. At a  
21 minimum, we should reverse and remand for further development of  
22 this issue.

23 I look at this from a practical point of view: Debtor, who  
24 selected the Vendors, wants the Equipment and does not have the  
25 money. Lender, who is providing the money for Debtor to get the  
26 Equipment, is asked to provide the funds prior to delivery. Why  
27 would it not shift the risk? If Lender has to commit \$17,000 for  
28 Debtor's benefit, Debtor should bear the risk. The economics of

1 the deal are exactly like a third party purchase money finance,  
2 except it was styled as a lease here.

3 Unlike the majority, I would adopt the reasoning of the court  
4 in Stewart v. United States Leasing Corp., 702 S.W.2d 288, 290  
5 (Tex. App. 1985), that parties who sign a "deemed acceptance"  
6 clause are bound by such clauses. Stewart, 702 S.W.2d at 290.  
7 The Stewart court noted that the lessee's execution of the  
8 acceptance certificate prior to actual delivery was part of the  
9 consideration for the lessor's agreement to provide financing.  
10 The same is true here; the parties agreed on the terms for the  
11 financing and Debtor must live by those terms.

12 I understand that the terms may seem unfair. The bankruptcy  
13 court even queried:

14 Why would any sane person enter into an agreement as you say  
15 it is? You sign it. It doesn't matter if you get the stuff  
16 and even if you don't get it you'll pay for it for years rent  
[sic]. Why would anybody ever enter into that kind of  
agreement?

17 The answer is (1) this is a financing lease under the Uniform  
18 Commercial Code that statutorily grants lessors multiple  
19 protections and (2) Debtor did agree to accept the goods prior to  
20 delivery. Otherwise the Vendors would not have to deliver them.  
21 While it may seem unfair, it is the contract. This court should  
22 not rewrite it.

23 The majority also emphasizes that the "deemed acceptance"  
24 clause in the Addendum is contrary to the Lease itself. I believe  
25 that this demonstrates why it should be enforced. Hand-written or  
26 typed terms that differ from a pre-printed form govern. See Cal.  
27 Civ. Code § 1651; Fid. & Deposit Co. v. Charter Oak Fire Ins. Co.,  
28 66 Cal. App. 4th 1080, 1087, 78 Cal. Rptr. 2d 429, 433 (1998)

1 ("Where a contract is partly written or printed under the special  
2 direction of the parties, and the remainder is copied from a form  
3 prepared without reference to the particular contract in question,  
4 the parts which are original control those which are not.").

5 I have reviewed the transcript of the hearing and believe  
6 that the bankruptcy court started with an incorrect assumption,  
7 viz. that Debtor received nothing and, having paid Lender more  
8 than \$23,000, that enough was enough. I believe the court failed  
9 to appreciate that the commercial realities are such that the  
10 parties were free to shift the risk of the vendor's breach, and  
11 Lender in fact parted with \$17,000 which it was entitled to  
12 recover, either as a finance lessor or as an oversecured creditor,  
13 inasmuch as Lender held a lien on Debtor's residence. It is not  
14 "unconscionable" to do what the law permits.

15 In addition to disagreeing with the majority's conclusion  
16 that Lender improperly shifted the risk of loss, I also disagree  
17 that the record shows that Lender's claim was unreasonable. If  
18 Lender was an oversecured creditor (as the record appears to  
19 suggest) and its attorneys' fees were provided for in the Lease  
20 (which was the case), it is entitled to its reasonable attorneys'  
21 fees and costs. Hassen Imp. P'ship v. KWP Financial VI (In re  
22 Hassen Imp. P'ship), 256 B.R. 916, 925 (9th Cir. BAP 2000). 11  
23 U.S.C. § 506(c). While there was some confusion in the way Lender  
24 presented its claim in Debtor's prior Chapter 13 case, the  
25 evidence does include an accounting which was unchallenged and  
26 which properly credits Debtor with amounts not advanced by Lender.  
27 The accounting also includes attorneys' fees, and the court never  
28 considered the reasonableness of those fees. Therefore, we should

1 reverse and enforce the terms of the Lease and Addendum, directing  
2 the bankruptcy court to make a determination of whether Lender was  
3 oversecured and, if so, to fix its reasonable attorneys' fees and  
4 costs. The court might -- on remand -- conclude that the total  
5 claimed by Lender was unreasonable, but that conclusion should  
6 only follow a full review of the accounting and consideration of  
7 the reasonableness of the claimed attorneys' fees.

8 For the foregoing reasons, I respectfully DISSENT.

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