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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: JOY MICHIE PIGAO, Debtor.	BAP No. HI-25-1076-BaBrS
JOY MICHIE PIGAO, Appellant, v. WBL SPO II, LLC, Appellee.	Bk. No. 1:24-bk-00591-RJF
	MEMORANDUM*

Appeal from the United States Bankruptcy Court
for the District of Hawaii

Robert J. Faris, Chief Bankruptcy Judge, Presiding

Before: BARASH, BRAND, and SPRAKER, Bankruptcy Judges.

INTRODUCTION

Former chapter 13¹ debtor Joy Michie Pigao appeals from an order overruling her objection to the claim of WBL SPO II, LLC (“WBL”). WBL’s claim is based on a mortgage Pigao executed to secure the debt of another, a business known as PUHI Industrial Parts & Bearing, LLC (“Puhi”), for

* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, *see* Fed. R. App. P. 32.1, it has no precedential value, *see* 9th Cir. BAP Rule 8024-1.

¹ Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

whom she worked and shared ownership with others. Pigao primarily argues that the contractual rate of interest charged on Puhi's debt is per se unconscionable. According to Pigao, the bankruptcy court erred by not considering the substantive unconscionability of the interest rate separate and apart from the procedural unconscionability of the loan transaction. Alternatively, she argues that this interest rate was usurious. As she reasons, the court erred by declining to apply Hawaii usury law to determine that the interest rate charged exceeded Hawaii's statutory cap on interest rates for "home business loans."

We acknowledge that the percentage rate of interest WBL's predecessor in interest Axos Bank ("Axos") charged was remarkably high. Even so, the record before the bankruptcy court failed to establish that Axos (a federal savings bank generally governed by federal law) was subject to Hawaii usury law or that WBL, as the bank's successor in interest, was the "true lender" for usury purposes. Indeed, Pigao did not even make her true lender argument until this matter was on appeal. The failure to make this argument earlier, in and of itself, is fatal to this argument.

As for unconscionability, Pigao argued that the interest rate charged was per se unconscionable. But Hawaii unconscionability law generally requires the party asserting this defense to do so contextually, by, among other things, providing evidence regarding "the commercial setting, purpose and effect" of the transaction. The record here is bereft of such

evidence. Thus, on this record, neither of Pigao's arguments on appeal justify reversal. Accordingly, we AFFIRM.

FACTS²

A. Pigao's chapter 13 case

In July 2024, Pigao commenced her chapter 13 bankruptcy. Her schedules listed her 15% ownership interest in two businesses, one of them was Puhi and the other was P I P B Sales Service & Repairs. According to Pigao, Puhi had no assets and owed "WBL/Axos" \$220,000. Pigao also listed her ownership of a residence on Aewa Street in Eleele, Hawaii ("Property"). She further disclosed three secured claims encumbering the Property. One of these secured claims was for the same \$220,000 Puhi owed to WBL.

Pigao filed her initial chapter 13 plan roughly one month after she filed her petition. She also filed two amended plans. Each version of her plan drew multiple objections, which the bankruptcy court sustained. Upon denial of her second amended plan in April 2025, the bankruptcy court ordered the dismissal of Pigao's bankruptcy case. Pigao did not appeal the denial of confirmation or the case dismissal order.

B. WBL's proof of claim

In September 2024, while the bankruptcy case was still pending, WBL

² We exercise our discretion, when appropriate, to take judicial notice of documents electronically filed in the underlying bankruptcy case and adversary proceeding. See *Atwood v. Chase Manhattan Mortg. Co. (In re Atwood)*, 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

filed a proof of claim for \$272,437.18. According to WBL, its claim was fully secured by a mortgage on the Property. The itemization attached to the proof of claim stated that the loan had matured in April 2021 and was continuing to accrue interest at the contractual rate of 0.3460273973% per day. This daily rate yields a nominal annual percentage rate or “APR” of 126.30%. But when compounded daily, this daily rate yields an effective annual rate or “APY” of 252.83%.³

Also attached to the proof of claim was a copy of a promissory note dated December 12, 2019, for \$65,000. The note identified Puihi as the borrower and Axos as the lender. The note included Puihi’s representation that the loan was for business purposes only and not for personal, consumer, family, or household purposes. The note provided for daily loan payments of \$701.62 each and a final payment of \$699.95 on June 18, 2020. Accompanying the note were personal guaranties of two of Pigao’s other

³ According to Pigao, the interest rate for Puihi’s loan was 252% per annum. However, as indicated above, this annualized statement of the daily interest rate assumes daily compounding. The interest rate provision set forth in Puihi’s promissory note did not specify that interest on the loan was compounding daily. To the contrary, the note stated: “unpaid *Principal* shall bear interest at the rate of 0.34602739726% per day[.]” (Emphasis added.) “Principal” is a defined term in the note, meaning the \$65,000 originally owed on the note. In addition, Pigao’s annualized rate does not take into account that Puihi was required to make daily payments on the loan, which if timely paid would have reduced the daily principal balance on which additional interest would have accrued, even if the interest compounded daily. Even so, we will assume for purposes of this appeal that Pigao has correctly stated the annualized interest rate. WBL never challenged Pigao’s statement of the rate either in the bankruptcy court or on appeal. Nor did the bankruptcy court question it.

owners. Pigao did not execute a personal guaranty, but she did execute a mortgage of the Property to secure Puhi's obligations under the note.⁴ A copy of this mortgage also is attached to WBL's proof of claim.⁵

C Pigao's claim objection

Pigao objected to WBL's claim. Pigao argued that the rate of interest provided for in the note was usurious under Hawaii Revised Statutes ("HRS") § 478-4(a).⁶ Alternatively, Pigao asserted that the interest rate

⁴ The note was amended three times, once in April 2020, again in July 2020, and again December 2020. Collectively, these amendments extended the time for Puhi to pay off the loan until April 2021.

⁵ The documentation accompanying the proof of claim further included a handful of assignments of the mortgage. However, none of these assignments assigned the mortgage to WBL. The attached assignments respectively were in favor of WBL SPO I, LLC and World Business Lenders, LLC. These entities apparently are related to WBL but the specific relationship is unclear. Regardless, WBL's counsel later filed a declaration attaching a copy of an additional assignment of mortgage from World Business Lenders, LC to WBL. Furthermore, WBL claims to hold the original promissory note and in most instances, "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897, 916 (9th Cir. BAP 2011) (quoting *Carpenter v. Longan*, 83 U.S. 271, 274–75 (1872)).

⁶ HRS § 478-4(a) provides in relevant part:

It shall in no case be deemed unlawful, with respect to . . . any home business loan to stipulate by written contract, for any rate of simple interest not exceeding one per cent per month or twelve per cent a year or, in the event the creditor is a financial institution regulated under chapter 412 (other than a trust company or a credit union), for any rate of simple interest not exceeding two per cent per month or twenty-four per cent a year.

Haw. Rev. Stat. Ann. § 478-4(a) (West 2026).

charged was unconscionable. Initially, citing *Gabriel v. Island Pacific Academy, Inc.*, 400 P.3d 526, 538 (Haw. 2017), she acknowledged that “[w]hether a particular contractual provision is unconscionable ‘depends on the facts of each case.’” But instead of identifying the circumstances of the instant case that rendered the note’s interest rate unconscionable, she proceeded to argue that the rate of interest charged in the note was “almost per se unconscionable.” The only surrounding circumstance Pigao referenced was the fact that the loan was secured by her Property. According to Pigao, the fact that the loan was fully secured should have led to a reduction in the note’s interest rate because the security given for the loan reduced Axos’ lending risk.⁷

D. WBL’s response to the claim objection

WBL responded to Pigao’s claim objection. In opposition to her usury argument, WBL contended that Axos was subject to the National Bank Act and that 12 U.S.C. § 85 of the Act permitted Axos to charge interest in accordance with the laws of any state where Axos was “located.” WBL maintained that Axos was located (within the meaning of the statute) in Nevada, not in Hawaii. According to WBL, at the time Axos made the loan to Puhi, Nevada imposed no usury cap on business loans of any kind. As

⁷ Pigao also argued that neither Axos nor WBL were properly licensed under Hawaii law, but Pigao abandoned these licensing arguments by not addressing them in her opening appeal brief. See *Kurtin v. Ehrenberg (In re Elieff)*, 637 B.R. 612, 621 n.7 (9th Cir. BAP 2022) (citing *Christian Legal Soc’y v. Wu*, 626 F.3d 483, 487–88 (9th Cir. 2010)), *aff’d*, 2023 WL 2203564 (9th Cir. Feb. 24, 2023).

WBL further explained, the application of 12 U.S.C. § 85 dovetailed with the note's choice of law provision, which stated that federal law as made applicable to FDIC-insured financial institutions would govern, but to the extent not preempted by federal law, Nevada law would govern.

As for unconscionability, WBL again pointed to Nevada law and stated that Nevada courts typically consider both substantive and procedural unconscionability before deciding whether a contract or one of its provisions is unconscionable. According to WBL, Nevada courts assess unconscionability on a sliding scale: if one type of unconscionability is present to a high degree, not much of the other type of unconscionability needs to be present to hold the contract unconscionable.⁸ WBL insisted that there was no procedural unconscionability, asserting that the instant business loan transaction was between sophisticated parties with relatively equal bargaining power who re-negotiated the terms of the loan three times.

After a hearing, the court took the matter under submission.⁹ On April 3, 2025, the court entered its order overruling the claim objection. It held that Pigao had failed to prove that Axos was subject to Hawaii's usury laws, so her usury defense was unavailing. As for unconscionability, the

⁸ It is unclear whether Hawaii state courts apply the same sliding scale analysis. See *Smith v. Bank of Haw.*, Case No. CV 16-00513 JMS-RLP, 2018 WL 1662107, at *6 (D. Haw. Apr. 5, 2018) (stating that sliding scale applies but solely relying on Williston's treatise on contract law to support this proposition).

⁹ Neither Pigao nor WBL ordered the transcript from the claim objection hearing.

court stated that the interest rate was high enough to render the loan agreement “arguably one-sided.” Citing Hawaii law, the court ultimately determined that the loan agreement was not rendered unconscionable by the high interest rate because Pigao had failed to demonstrate any procedural unconscionability. Pigao timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157. We have jurisdiction under 28 U.S.C. § 158. WBL filed a motion to dismiss this appeal, arguing that this appeal is moot because the bankruptcy court dismissed the underlying bankruptcy case, and Pigao did not appeal the dismissal order. On this point, we disagree with WBL. This appeal is not moot because of the potential preclusive effect of the claim objection order in future legal proceedings between WBL and Pigao. *See Bevan v. Socal Commc’ns Sites (In re Bevan)*, 327 F.3d 994, 996–97 (9th Cir. 2003). Accordingly, WBL’s motion to dismiss is hereby ORDERED DENIED.

ISSUES

1. Did the bankruptcy court commit reversible error when it ruled that Pigao had failed to prove that Hawaii usury law applied to Axos’ loan to Puhi?
2. Did the bankruptcy court commit reversible error when it ruled that Pigao had failed to prove her unconscionability defense?

STANDARDS OF REVIEW

As here, claim objection appeals typically raise legal issues concerning the proper construction and application of relevant law, as well as factual issues concerning whether the evidence presented during the claims litigation established or defeated the asserted claim under the relevant law. *See In re Veal*, 450 B.R. at 918. The legal issues are reviewed de novo, and the factual issues are reviewed under the clearly erroneous standard. *Id.* Factual findings are clearly erroneous if they are illogical, implausible, or without support in the record. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010).

DISCUSSION

A. Preliminary matters

Though not specifically addressed by either party in their appeal briefs, there are two preliminary matters that are relevant to the remainder of our analysis and resolution of this appeal. These two matters concern: (1) who bore the burden of proof regarding the subject matter of Pigao's appeal; and (2) the availability of contract defenses to Pigao as a secondary obligor with respect to Puhī's obligations under the note. We briefly address each of these matters in turn.

1. Burden of proof

Pigao's two arguments on appeal concern unconscionability and usury. She insists that under Hawaii law she should have prevailed under both doctrines. Hawaii recognizes both as affirmative defenses as to which

Pigao bore the burden of proof. *See, e.g., Narayan v. The Ritz-Carlton Dev. Co., Inc.*, 400 P.3d 544, 551 (Haw. 2017) (identifying unconscionability as a “general contract defense”); *Gabriel*, 400 P.3d at 540 (assigning burden of proof to party asserting unconscionability); *K.M. Young & Assocs., Inc. v. Cieslik*, 675 P.2d 793, 800-01 (Haw. App. 1983) (identifying usury as an affirmative defense and stating that the party asserting usury failed to present any evidence to support the defense).¹⁰

In bankruptcy claims litigation, the burden of proof is considered a substantive aspect of the litigation, so bankruptcy courts must apply the same evidentiary burdens as the state courts would in determining the parties’ respective rights and duties. *See Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 21 (2000). Accordingly, given that nonbankruptcy law assigns the burden of proof to Pigao on her affirmative defenses, it was incumbent on Pigao to present sufficient evidence to support each aspect of her usury and unconscionability defenses.

2. Availability of defenses

Though Pigao did not execute a guaranty, her execution of a mortgage to secure Puhi’s obligations under the note is a form of secondary

¹⁰ Though Pigao relies on Hawaii law to support both her arguments on appeal, we note that Nevada law (which WBL contends is applicable) recognizes substantially the same evidentiary burdens as Hawaii law. *See Pease v. Taylor*, 496 P.2d 757, 759 (Nev. 1972) (usury); *see also Ahmed v. Deutsche Bank, N.A.*, No. 2:09-CV-02234-GMN, 2011 WL 3425460, at *7 (D. Nev. Aug. 4, 2011) (recognizing unconscionability as a defense to a contract claim and placing burden of proof on party asserting unconscionability).

obligation generically referred to as a suretyship. *See* Restatement (Third) of Suretyship & Guaranty (“Restatement”) § 1, cmts. b, d & g & illus. 6 (1996); *see also* *Motion Picture Indus. Pension Plan v. Hawaiian Kona Coast Assocs.*, 823 P.2d 752, 757 (Haw. App. 1991) (citing HRS § 490:1–201(40) (1985) and stating “[s]ureties may or may not be guarantors, but guarantors are sureties”). Generally, secondary obligors can—and often do—contractually waive defenses that could be asserted by the primary obligor. *See, e.g., Pi’Ikea, LLC v. Williamson*, 321 P.3d 449, 451 (Ariz. Ct. App. 2014), *as corrected*, (Dec. 7, 2016); *see also* *First Haw. Bank v. Bartel*, Case No. CV 08-00177 DAE-LEK, 2009 WL 10676756, at *6–7 (D. Haw. May 22, 2009) (analyzing scope of guarantor’s waiver of defenses under guaranty agreement). But absent such a waiver, the secondary obligor typically is entitled to assert defenses belonging to the primary obligor. Restatement § 34 & cmt. a (1996); *cf. Joy A. McElroy, M.D., Inc. v. Maryl Grp., Inc.*, 114 P.3d 929, 937 (Haw. Ct. App. 2005), *as amended*, (June 14, 2005) (observing that “[n]o right exists under a guaranty contract to assert the rights of the principal debtor *other than a right to raise defensively the claims of the principal debtor*” (citation omitted and emphasis added)).

Independent of the parties’ arguments, we have reviewed the mortgage Pigao executed, but we did not see any term thereof pursuant to which Pigao waived defenses available to Puhi as the primary obligor. To the contrary, there is an addendum attached to the mortgage which suggests that for purposes of determining the rights and duties of the

parties upon default under the note, Pigao as mortgagor should be treated “just as if [she] had executed the Note.” Thus, Pigao is entitled to assert her usury and unconscionability defenses to the same extent they could be asserted by Puhi to defend against enforcement of the note.

B. Pigao’s usury argument does not justify reversal.

Pigao’s usury argument is perhaps as notable for what it does not raise as for what it does raise. Pigao does not argue that the bankruptcy court incorrectly determined that Axos is an FDIC-insured financial institution that may impose interest rates permissible under the law of any state where Axos is “located” as defined by federal statute. Nor does she dispute the court’s finding that she failed to establish that Axos is located in Hawaii and hence subject to Hawaii usury laws. Her appellate usury argument focuses solely on WBL and asserts that it is the true lender. She ignores the choice of law provision set forth in the note, which identifies Nevada law as controlling (to the extent federal law does not preempt state law). Instead, she focuses exclusively on Hawaii law to posit that the interest rate WBL (as opposed to Axos) charged under the note was usurious. In essence, she claims that the bankruptcy court erroneously failed to consider that WBL is the true lender in conducting its usury analysis and thus failed to properly conclude that WBL violated Hawaii usury law.

There is a fundamental and fatal procedural defect, however, with Pigao’s true lender argument. She failed to make this argument in the

bankruptcy court in the first instance. Federal appellate courts generally do not consider arguments raised for the first time on appeal; a litigant may forfeit an issue “by failing to raise it in [the] bankruptcy court.” *Mano-Y&M, Ltd. v. Field (In re Mortg. Store, Inc.)*, 773 F.3d 990, 998 (9th Cir. 2014) (citing *Kieslich v. United States (In re Kieslich)*, 258 F.3d 968, 971 (9th Cir. 2001)). As the *Mortgage Store* court explained:

We have discretion to consider arguments raised for the first time on appeal, but do so only if there are exceptional circumstances. We will address a waived issue (1) when review is required to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a new issue arises while appeal is pending because of a change in the law, and (3) when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

Id. (citation modified).

Nothing in Pigao’s briefs suggests that its true lender argument arose as a result of a recent change in the law. The cases on which she relies reflect that the true lender doctrine existed decades before she commenced the instant claims litigation.¹¹ Nor is the true lender issue a pure issue of

¹¹ See *Wheels Fin. Grp., LLC v. Stolfi*, Case No. 3:24-CV-01543-IM, 2025 WL 1938148, at *5 (D. Or. Jan. 7, 2025) (relying in part on cases from the twentieth century to explain the doctrine); *CFPB v. CashCall, Inc.*, Case No. CV-15-7522-JFW(RAOX), 2016 WL 4820635, at *5 (C.D. Cal. Aug. 31, 2016) (relying on decisions issued between 2004 and 2014, which decisions in turn rely on even older cases); *Rent-Rite SuperKegs W. Ltd. v. World Bus. Lenders, LLC (In re Rent-Rite SuperKegs W. Ltd.)*, 623 B.R. 335, 342 (D. Colo. 2020) (citing in support a Fifth Circuit decision from 1981).

law. The same cases cited by Pigao demonstrate that the true lender issue is a fact-intensive inquiry, which searches for the economic reality of the loan transaction. Its answer typically depends on the totality of circumstances.¹²

Here, Pigao did little or nothing to factually develop the record in a manner that would have enabled the bankruptcy court to discern whether, under the totality of the circumstances, WBL should be considered the true lender for purposes of her usury defense. Indeed, on appeal, she recites only three facts to support her true lender argument: (1) “Axos Bank executed an electronic note on December 12, 2019”; (2) “less than a week later, WBL¹³ recorded the mortgage”; and (3) “a signatory from WBL ‘attorney in fact for Axos’ assigned the mortgage to WBL¹⁴ on August 31, 2021.” These facts by themselves are patently insufficient to reveal “which party [had] the predominant economic interest in [the] loan” at the time it was made. *Wheels Fin. Grp*, 2025 WL 1938148, at *5-6. Hence, they fail to factually develop the true lender issue to a point where the bankruptcy court—or this Panel on appeal—could make an informed decision on the merits of this issue.¹⁵ Finally, given the state of the record as described

¹² See *Wheels Fin. Grp*, 2025 WL 1938148, at *5-6; *CFPB*, 2016 WL 4820635, at *5-6.

¹³ Pigao misstates the record. The mortgage was recorded by World Business Lenders, not WBL.

¹⁴ Pigao again misstates the record. Axos Bank assigned the mortgage in August 2021 to WBL SPO I, LLC, which in turn assigned the mortgage to World Business Lenders, LLC in October 2021, which in turn assigned the mortgage to WBL, also in October 2021.

¹⁵ For the same reasons, even if we were to reach the merits of her true lender argument, the argument necessarily would fail on the record presented.

above, we cannot say that consideration of her true lender argument is necessary to prevent a miscarriage of justice or to preserve the integrity of the court.

Under these circumstances, we have no discretion to consider this argument for the first time on appeal. We conclude, therefore, Pigao has failed to demonstrate any reversible error in the court's ruling on her usury defense.

C. Neither the record nor Hawaii law supports Pigao's unconscionability argument.

The bankruptcy court applied Hawaii law to address Pigao's unconscionability argument. Pigao agrees that Hawaii law applies, but she disagrees with how the bankruptcy court applied it.¹⁶ As the Hawaii Supreme Court has observed: "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Narayan*, 400 P.3d at 551 (quoting *City & Cnty. of Honolulu v. Midkiff*, 616 P.2d 213, 218 (Haw. 1980)). Put differently, the trial court typically must examine "whether, in the light of the general commercial background and the commercial needs of the particular trade

¹⁶ WBL contends that the bankruptcy court should have applied Nevada law to the unconscionability issue instead of Hawaii law. Resp. Opn. Br. at 6-11. But WBL essentially concedes that Nevada and Hawaii law are similar and would lead to the same result. *See id.* Regardless, if WBL wished to challenge the bankruptcy court's application of Hawaii law to the unconscionability issue, it should have filed a cross-appeal.

or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.” *Midkiff*, 616 P.2d at 218 (quoting *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 540 P.2d 978, 983-84 (Haw. 1975)).

The general question of unconscionability typically must be broken down into two subsidiary inquiries: one concerning substantive unconscionability and the other concerning procedural unconscionability. *Narayan*, 400 P.3d at 551-52. The former inquiry focuses on the relative proportionality of the contract or clause in question and looks for undue or unjust one-sidedness or oppressiveness. *Id.* The latter inquiry focuses on the process by which the contract was entered into—considering things like the relative bargaining power of the parties, the presence or absence of unfair surprise, and the availability of a meaningful opportunity to negotiate the contract terms. *Id.*

The Hawaii Supreme Court recognizes that a contract or clause thereof might sometimes be so one-sided and unfair on its face that it can be declared “per se unconscionable.” *Midkiff*, 616 P.2d at 218. Depending on how egregiously one-sided a contract term is, two things might occur. First, the court might be able to hold the contract or clause unconscionable based solely on its substantive unconscionability, without considering its procedural unconscionability (which, again, is ascertained by examining the process by which the contract was entered into). *See Balogh v. Balogh*, 332 P.3d 631, 643 (Haw. 2014). Second, in exceptional cases, the trial court

theoretically can rule as matter of law based on the bare contract terms that the contract is unconscionable on its face without considering how the particular facts and circumstances of the case affected the level of its one-sidedness or oppressiveness. *See Gabriel*, 400 P.3d at 538 (rejecting per se approach in assessing the unconscionability of a cost-splitting provision in an arbitration agreement and instead holding that its unconscionability hinged on the specific circumstances of the case); *see also Midkiff*, 616 P.2d at 218 (acknowledging that some contracts might qualify as per se unconscionable but holding that the contract dispute at issue in that case required an evidentiary hearing, so evidence could be presented to enable the court to assess the “*commercial setting, purpose and effect*” of the contract terms in question (emphasis added)).

Here, Pigao has not challenged the bankruptcy court’s finding that the contract was not procedurally unconscionable. Moreover, given the exceptionally thin evidentiary record presented, we do not see how the court could have found otherwise. There was little or no evidence presented indicating the relative bargaining power of the parties or the circumstances under which the parties entered into the loan transaction.¹⁷ Nor did Pigao present evidence explaining the alleged level of substantive

¹⁷ As for unfair surprise, the court found no surprise, because the interest rate was clearly stated in the note and because the note contained clear and conspicuous language warning of the high cost of the loan and advising Puhi that it should consider other borrowing options—with potentially less-costly loans—before entering into the instant loan.

unconscionability arising from the “commercial setting, purpose and effect” (see *Midkiff*, 616 P.2d at 218) of the interest rate or the loan on the respective parties. Instead, Pigao merely points to the interest rate term of the note and insists that the rate is unconscionable on its face.¹⁸

Citing a handful decisions from other jurisdictions, Pigao maintains that the interest rate of “252% per year” (as she calculates it) is per se unconscionable. But the cases she cites do not support her position. The main case she relies on is *In re Donohue*, Case No. 19-41271 CN, 2020 WL 419727 (Bankr. N.D. Cal. Jan. 27, 2020). This case emphasized multiple times that in assessing the unconscionability of an interest rate for a loan, the court must do more than look at the interest rate by itself. *Id.* at *2. As *Donahue* put it: “[w]hether the price of a bargain is ‘unreasonably and unexpectedly harsh’ depends on more than just a single printed number, so we examine not only the price term itself but other provisions and circumstances affecting a transaction[’s] benefits and burdens.” *Id.*; see also *id.* (stating that unconscionability has been subject to “differing analytical approaches” but noting that “at least one thing about the doctrine is clear: it requires more than just looking at one particular term in a contract,

¹⁸ Pigao further claims that the court “ignored” substantive unconscionability. This is incorrect. The court specifically found that “[t]he [loan] is arguably one-sided because the interest rate is high, but there was no unfair surprise.” Thus, the court specifically considered substantive unconscionability but found the absence of evidence of procedural unconscionability dispositive. Implicitly, it was unwilling to hold that the interest rate was per se unconscionable. Whether this implicit determination constitutes reversible error is the only viable issue raised in this appeal.

comparing it to a fixed benchmark, and declaring the term unconscionable.”).

The other cases Pigao cites are: (1) *Ow v. Oropeza (In re Ow)*, Case No. 15-41959 CN, 2016 WL 4204036 (Bankr. N.D. Cal. Aug. 5, 2016); (2) *Foss v. Boardwalk Partners (In re Boardwalk Partners)*, 171 B.R. 87 (Bankr. D. Ariz. 1994); (3) *In re Hollstrom*, 133 B.R. 535, 539 (Bankr. D. Colo. 1991); and (4) *In re White*, 88 B.R. 498 (Bankr. D. Mass. 1988). Like *Donahue*, none of these other cases help Pigao either. In *Ow*, the court was presented with extensive evidence showing both procedural and substantive unconscionability. Additionally, the *Ow* court relied on California Civil Code § 1670.5, which specifically requires assessment of the “commercial setting, purpose, and effect of the contract.” *In re Ow*, 2016 WL 4204036, at *3. As for *Boardwalk Partners*, it did not even address unconscionability. Instead, the court merely analyzed the applicable default rate of interest to determine whether the default rate charged was reasonable in light of market interest rates and the risks to the lenders associated with the defaulted loans. *In re Boardwalk Partners*, 171 B.R. at 91-92.¹⁹ Moreover, the court’s remarks indicate that it placed the burden on the lenders to demonstrate that their default rates were not unenforceable penalties. *Id.* at 92. In contrast, because Pigao bore the burden to factually establish her

¹⁹ *Boardwalk Partners* did not even address or apply state law. Instead, it assessed the reasonableness of the default interest rate charged as a matter of bankruptcy law (citing § 506(b)) and general equitable principles. *See id.* at 91-92.

unconscionability defense, she needed to come forward and present evidence explaining why—when viewed in context—the interest rate Axos charged was substantively unconscionable. But Pigao failed to do so. Finally, while both *Hollstrom* and *White* offered some passing remarks about unconscionability in general, neither determined whether the default interest rates at issue therein were unconscionable contract terms. Instead, they held that the subject default interest rates constituted unenforceable penalties. *In re Hollstrom*, 133 B.R. at 538-41; *In re White*, 88 B.R. at 510-11.

We have not located any Hawaii cases assessing the potential unconscionability of contractually-set interest rates. Nor have the parties cited any. But we find the Hawaii Supreme Court's decision in *Gabriel v. Island Pacific Academy, Inc.*, 400 P.3d 526 (Haw. 2017), instructive. In *Gabriel*, the Hawaii Supreme Court needed to assess whether a provision in an arbitration agreement providing for the splitting of arbitration costs between an employer and its employee was unconscionable. *Id.* at 529-30. As a preliminary matter, *Gabriel* considered whether the mere existence of the cost-splitting provision in the arbitration agreement was “per se unconscionable.” *Id.* at 538. First, *Gabriel* referenced Hawaii law, which it said typically requires a showing of both procedural and substantive unconscionability. But *Gabriel* also recognized that a contract may be so impermissibly one-sided as to render it unnecessary to consider and find procedural unconscionability. *Id.* (citing *Balogh*, 332 P.3d at 643). *Gabriel* then addressed the issue of per se unconscionability head on. It cited three

cases from the Ninth Circuit Court of Appeals, which it interpreted as holding that cost-splitting provisions are so substantively unconscionable on their face as to, standing alone, render the entire arbitration agreement unenforceable regardless of the surrounding circumstances. *Id.* (citing *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002), *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002), and *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003)).

As a matter of Hawaii law, however, *Gabriel* rejected the Ninth Circuit's approach of holding all cost-splitting provisions in arbitration agreements per se unconscionable. As *Gabriel* explained:

We do not go so far as to adopt a holding that a cost-splitting requirement in arbitration is per se unconscionable and, therefore, unenforceable. Rather, whether cost-splitting in arbitration is unconscionable depends on the facts of each case. Under the circumstances of this case, the cost-splitting provision is substantively unconscionable because it would be prohibitively expensive for Gabriel to pursue her claims in the arbitral forum.

Id. In concluding that the surrounding circumstances demonstrated that the cost-splitting provision was impermissibly one-sided, *Gabriel* looked at evidence regarding the employee's financial condition, the specific up-front costs to the employee of initiating the requisite arbitration proceedings necessary to attempt to vindicate her rights, and the economic reality of these facts demonstrating that there was no way she could afford the up-front costs. *Id.* at 538-39. Furthermore, based on what these circumstances

demonstrated, *Gabriel* held that there was no need for it to address procedural unconscionability. *Id.* As *Gabriel* put it, these circumstances established “that the cost-splitting requirement alone is unconscionable as impermissibly one-sided” and hence “it [was] unnecessary for this court to pass on the issue of procedural unconscionability.” *Id.*

Here, Pigao offered no evidence regarding the circumstances surrounding Puhi’s decision to take the loan from Axos or Pigao’s decision to mortgage her residence to secure the loan. Nor was there any evidence presented regarding Puhi’s business, financial circumstances, or economic goals in taking the loan and whether the high interest rate provided for in the note necessarily defeated those goals.²⁰ In contrast, the surrounding economic circumstances in *Gabriel* established that the cost-splitting provision rendered the entire arbitration agreement self-defeating. In effect, the arbitration agreement in *Gabriel* was not designed to facilitate arbitration, but instead to prevent the employee from ever seeking legal redress for alleged wrongdoing by the employer.²¹

²⁰ We note that we have focused, above, on the lack of evidence of the surrounding circumstances from the perspective of the primary obligor, Puhi. But there also was a similar lack of evidence from the perspective of the secondary obligor, Pigao. For purposes of analyzing the potential unconscionability of a secondary obligation, we have not found any Hawaii law clarifying whose perspective should control: the primary obligor, the secondary obligor, or both. Regardless, the result here would be the same because the evidence in the bankruptcy court record was insufficient to address any of these perspectives.

²¹ Absent evidence of the surrounding circumstances here, the economic reality of Axos’ loan to Puhi is far from clear. The only context Pigao attempted to offer in relation to the interest rate was that the loan was secured by the Property. According to

On appeal, our charge is to review the bankruptcy court's decision for reversible error. But our ability to do so is circumscribed by the law, the arguments of the parties, and the record they develop in the bankruptcy court. Here, the debt enforced against Pigao's home was premised on an indisputably high interest rate, but it originated as a business loan under circumstances that Pigao did not establish before the bankruptcy court. In the absence of any evidence of procedural unconscionability, it was incumbent on Pigao to create an evidentiary record demonstrating the substantive unconscionability of the interest rate, i.e., contextual evidence regarding the "commercial setting, purpose and effect" (*see Midkiff*, 616 P.2d at 218) of the loan and the interest rate charged, and the circumstances surrounding Pigao's decision to pledge her home as collateral for a business loan made to Puhi. On this record, we cannot conclude the

Pigao, the availability of her residence as collateral should have diminished the risk to Axos and correspondingly led to a lesser interest rate. But this is only one part of a larger equation regarding the economic effect of the interest rate on the loan as a whole. Another facet of the transaction was its relatively short term (six months) as originally agreed to by the parties. The relatively short term and relatively modest amount of the loan arguably ameliorated the economic impact of what is admittedly an eye-catching rate of interest. Assuming without deciding that the loan's daily interest rate compounded daily as asserted by Pigao, the six-month "cost" of the loan would have been roughly \$57,000—a bit less than 100% of the principal. Whether paying \$122,000 (\$57,000 + \$65,000) over six months for the temporary availability of \$65,000 qualifies as exorbitant depends in large part on Puhi's goals, purpose, and/or strategy in taking out the loan in the first place. There is no evidence giving any information regarding the circumstances leading to Puhi's desire or need for this loan. Nor is there any information offered regarding why Puhi did not pay off the loan at the end of the initial six-month loan term. The failure to provide such information ultimately is fatal to Pigao's unconscionability argument given that she bore the burden of proof.

bankruptcy court misapplied Hawaii law by declining to find the interest rate per se unconscionable.

In sum, the evidentiary record presented is insufficient to support either of Pigao's arguments on appeal.

CONCLUSION

For the reasons set forth above, we AFFIRM the bankruptcy court's order overruling Pigao's claim objection.