

and CPS Energy's Affirmative Defenses (the "**Sur-Reply**") and, in support thereof, would respectfully show the Court as follows:¹

I. INTRODUCTION

In a last-ditch attempt to divert the Court's attention from its shocking behavior during a time of crisis, Enterprise's Reply in Support of Enterprise's Motion for Summary Judgment on its Breach-of-Contract Claim and CPS Energy's Affirmative Defenses (the "**Reply**") distorts the legal standards applicable to CPS Energy's unconscionability defense beyond recognition. Indeed, while telling the Court that *CPS Energy* has selectively misconstrued the law of unconscionability, Enterprise cites to (and itself selectively misconstrues) case law that supports the very propositions that it claims CPS Energy has gotten wrong. Enterprise's blatant misstatements of the law, which pose a substantial risk of confusing and misleading the Court, warrant correction.

II. ARGUMENTS AND AUTHORITIES

A. Enterprise's insinuation that sophisticated parties cannot assert an unconscionability defense is patently false.

Enterprise implies in a single sentence spanning the first and second pages of its Reply (and then never mentions again, perhaps realizing the fallacy of its argument) that sophisticated parties cannot assert an unconscionability defense.² To support its untenable position, Enterprise cites dicta from a single opinion issued over a decade ago by the Second Circuit (which exercises

¹ Unless otherwise indicated herein, capitalized terms are ascribed the same meaning ascribed to them in CPS Energy's Response to Enterprise's Motion for Summary Judgment on its Breach-of-Contract Claim and CPS Energy's Affirmative Defenses (the "**Response**").

² Reply, at pp. 1–2 (“[CPS Energy] does not ask the Court to *enforce* Texas law so much as *create* it, by asking the Court to be the first in Texas – and perhaps in the nation – to find negotiated transactions between two highly sophisticated parties unenforceable on unconscionability grounds. See, e.g., *NML Capital v. Republic of Argentina*, 621 F.3d 230, 238 (2d Cir. 2010) (“[W]e are aware of [no authority] finding an agreement involving parties of like sophistication unenforceable on substantive unconscionability grounds.”)) (emphasis in original).

federal jurisdiction in Connecticut, New York and Vermont) applying New York law.³ This citation is both telling and entirely misleading.

In Texas, the unconscionability doctrine is incorporated into Article 2 of the Uniform Commercial Code (“UCC”). TEX. BUS. & COM. CODE § 2.302 cmt. 1. The UCC expressly applies to commercial transactions and, accordingly, applies to transactions involving commercial parties. *See* TEX. BUS. & COM. CODE § 1.103(a) (“This title must be liberally construed and applied to promote its underlying purpose and policies, which are: (1) to simplify, clarify and modernize the law governing *commercial transactions*; (2) to permit the continued expansion of *commercial practices* through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.”) (emphasis added), § 2.302(b) (“When 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.”) (emphasis added).

Further, courts *in Texas* have expressly rejected the idea that the unconscionability doctrine does not apply to commercial transactions between sophisticated parties. *See El Paso Nat. Gas v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 62–63 (Tex. App.—Amarillo 1997), *opinion modified on reh’g* (Apr. 8, 1998), *rev’d sub nom. El Paso Nat. Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309 (Tex. 1999) (“Lastly, and to the extent that El Paso argues otherwise, section 2.302 of the Business and Commerce Code does not limit its protections to only those involved in personal, as opposed to commercial transactions. The doctrine has been invoked with success in the latter setting.”); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (contemplating the application of the unconscionability defense to commercial transactions and stating, “[i]n any

³ *Id.*

event, the basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.”).

Of course, the relative sophistication of the parties is a fact issue that the trier of fact will consider and decide to enable the Court to make its ultimate legal determination as to the unconscionability of the transactions at issue here. *El Paso Nat. Gas*, 964 S.W.2d at 63. But Enterprise's suggestion that there is a *per se* legal bar preventing the application of the unconscionability doctrine to sophisticated parties in commercial transactions is nonsensical, expressly contradicted by Texas law, and should be disregarded.

B. To issue a ruling on CPS Energy's unconscionability defense, the Court must consider findings of fact made by the jury, rendering summary judgment inappropriate.

Enterprise incorrectly asserts that there is no place for the jury in an unconscionability analysis. There is no dispute that the ultimate legal determination of whether a price term is unconscionable is a question of law to be decided by the Court. However, the unconscionability analysis involves mixed questions of law and fact. For the Court to decide the ultimate question of law, the Court must look to fact findings made by the jury and construe those findings of fact to make its legal determination.

Contrary to Enterprise's misleading characterization, the *Budget Rent a Car Sys., LLC v. Ozumba* case directly supports the jury's role in issuing fact findings with respect to the unconscionability analysis, expressly stating that “the facts underlying the defense of unconscionability may present a question of fact for *the jury*.” No. 01-20-00408-CV, 2022 Tex. App. LEXIS 4467, at *34, 2022 WL 2347742 (Tex. App.—Houston [1st Dist.] June 30, 2022, no pet.) (mem. op.) (emphasis added). The court of appeals overturned the trial court's decision in

Budget Rent a Car because the jury charge included more than questions of fact underlying the unconscionability analysis—the jury charge erroneously asked the jury to make the ultimate legal determination as to whether the contract in question was unconscionable:

The jury, however, was not asked to make a finding about any facts that would support a finding of unconscionability. Rather, the jury was asked whether Ozumba’s failure to comply with the Rental Agreement was excused, and they were instructed they could find excuse if they found the ‘terms of the Rental Agreement were unconscionable.’ ***While the facts underlying the defense of unconscionability may present a question of fact for the jury, the ultimate issue presented to the jury—whether the agreement is unconscionable—is a question of law the court should have decided.*** The trial court thus abused its discretion by submitting an unconscionability instruction to the jury that required the jury to determine a question of law.

Id., at *33–34; *see also Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 137–38 (Tex. App.—Waco 2005, pet. denied) (identifying 27 fact issues that supported a finding of unconscionability).

This case is rife with fact issues that must be decided by the jury, all of which underlie and impact the Court’s ultimate legal determination as to whether the prices Enterprise charged CPS Energy for natural gas during a state declared disaster were unconscionable.⁴ The role of the jury in making factual findings regarding the circumstances that underlie an unconscionability defense is both clear and vital under Texas law. Enterprise’s attempt to misconstrue the legal standard should be ignored.

⁴ For instance, the jury will have to make findings of fact such as those included in, but certainly not limited to, the following non-exhaustive list of examples:

- Did the natural gas market in Texas break during Winter Storm Uri?
- Did Enterprise know that CPS Energy could not refuse or wait to purchase natural gas on any given day during Winter Storm Uri?
- Did CPS Energy lack alternatives to purchase the needed volumes of natural gas during Winter Storm Uri?
- Did Enterprise know that CPS Energy lacked alternatives to purchase the needed volume of natural gas during Winter Storm Uri?
- Did CPS Energy have diminished bargaining ability due to the circumstances presented by Winter Storm Uri?
- Did Enterprise know that CPS Energy had diminished bargaining ability during Winter Storm Uri?
- Did Enterprise have significantly greater bargaining power than CPS Energy during Winter Storm Uri?
- Did the difference in the parties’ relative bargaining power cause CPS Energy to accept the price terms in the Disputed Transactions?

C. Contrary to Enterprise’s assertion, CPS Energy’s briefing on unconscionability is supported by both law and fact.

i. The Court need not address both procedural and substantive unconscionability.

Enterprise asserts on page 5 of its Reply, citing a 2011 Houston case and a 2005 Waco case, that CPS Energy must prove both procedural and substantive unconscionability.⁵ Not so. While there are some decisions issued by Texas courts of appeal that indicate that a party asserting an unconscionability defense must prove both procedural and substantive unconscionability, the procedural history reveals that those cases all stem from dicta contained in a 1975 case issued by the Texarkana court of appeals (which itself cites to no authority). *See Wade v. Austin*, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ).

However, the Texas Supreme Court has clarified multiple times in subsequently rendered opinions that a party need not prove both procedural and substantive unconscionability. In *In re Poly-Am, L.P.*, the Texas Supreme Court clarified that a party need only prove one prong of unconscionability when it issued a ruling that certain provisions in an arbitration agreement were substantively unconscionable and void without considering procedural unconscionability or commenting on the lower court’s failure to consider procedural unconscionability. 262 S.W.3d 337, 360–61 (Tex. 2008). This approach was affirmed by the Texas Supreme Court in 2015, and Texas courts of appeal have followed suit. *See Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 502 (Tex. 2015) (“An arbitration agreement is unenforceable if it is procedurally unconscionable, substantively unconscionable, or both.”); *Cont’l Homes of Tex., L.P. v. Perez*, No. 04-21-00396-CV, 2022 Tex. App. LEXIS 7691, at *4–9, 2022 WL 10758697 (Tex. App.—San Antonio Oct. 19, 2022, no pet.) (mem. op.) (finding attorneys’ fees provisions in an

⁵ Reply, at p. 5.

arbitration agreement unconscionable based solely on substantive unconscionability); *Casa Ford, Inc. v. Armendariz*, 656 S.W.3d 823, 827–28 (Tex. App.—El Paso 2022, no pet.) (finding an arbitration agreement unconscionable based solely on substantive unconscionability); *Delfingen US-Tex, L.P. v. Valenzuela*, 407 S.W.3d 791, 797–98 (Tex. App.—El Paso 2013, no pet.) (finding an arbitration agreement unconscionable based solely on procedural unconscionability).

An unconscionability defense must be considered based on the totality of the circumstances. *See Besteman v. Pitcock*, 272 S.W.3d 777, 787–88 (Tex. App.—Texarkana 2008, no pet.) (“Unconscionability must be determined on a case-by-case basis in light of a variety of factors.”). The two-pronged approach to considering procedural and substantive unconscionability is not a requirement, as the Texas Supreme Court has made clear; instead, it is merely a useful tool to help categorize the various factors that weigh in favor of an unconscionability finding. *In re Poly-Am, L.P.*, 262 S.W.3d at 360–61; *Royston et al.*, 467 S.W.3d at 502; *El Paso Nat. Gas Co.*, 964 S.W.2d at 61 n.5 (noting that an unconscionability defense should be considered based on the totality of the circumstances and that the two-pronged analysis is a “way of categorizing pertinent factors and, to that extent, it is useful”). Accordingly, CPS Energy need only prove procedural *or* substantive unconscionability to succeed on its unconscionability defense (even though, as described in its Response, it has presented evidence of and can establish both).

ii. *CPS Energy has been consistent in disputing prices from Winter Storm Uri.*

On pages 7 and 8 of its Reply, Enterprise again attempts to shift the focus away from the Disputed Transactions by discussing a topic about which it has no actual knowledge—CPS Energy’s transactions with a third-party gas supplier, EOG, during Winter Storm Uri. Enterprise presents a series of unsupported theories about CPS Energy’s dealings with EOG, basing those musings on nothing more than pure speculation. Enterprise’s arguments here, like its others, are fundamentally incorrect.

Unconscionability is assessed on a case-by-case basis. *See Besteman*, 272 S.W.3d at 787–88. Each circumstance regarding other gas suppliers charging CPS Energy different prices for natural gas during Winter Storm Uri is going to be heavily fact dependent and requires an individualized analysis of the parties’ bargaining ability at the time, the disparity in value of the gas sold, and any sharp business practices employed by the requisite gas supplier, all of which would not be at issue when determining whether the prices that **Enterprise** charged CPS Energy were individually unenforceable because they are unconscionable. *See* TEX. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”). The Court’s focus is limited to the Disputed Transactions between CPS Energy and Enterprise.

Nevertheless, CPS Energy **did** challenge the natural gas prices [REDACTED] charged CPS Energy during Winter Storm Uri.⁶ That CPS Energy’s challenge to [REDACTED] prices was resolved without a lawsuit has no bearing on whether the prices **charged by Enterprise** are unenforceable. It is strange that Enterprise chooses to highlight [REDACTED] conduct, as [REDACTED] did what Enterprise did not—it chose on February 16 (when CPS Energy was particularly vulnerable following cuts to a significant majority of the gas it purchased from other suppliers for the long weekend) to **not** price gouge CPS Energy.⁷ There has been no disparate treatment in CPS Energy’s approach to challenging natural gas prices resulting from Winter Storm Uri, so Enterprise’s focus on this is misplaced and should be disregarded. TEX. R. EVID. 401.

⁶ [REDACTED]

⁷ Response, at pp. 69–70; [REDACTED]

iii. *Enterprise's profits are directly tied to the factors of unconscionability under Texas law.*

Finally, in yet another attempt to distract the Court from the egregious nature of the prices Enterprise charged CPS Energy for natural gas during a state declared disaster, Enterprise contends that there is “no Texas authority supporting profits or profit margins as relevant to the unconscionability analysis.”⁸ Yet again, Enterprise is wrong. The profits and profit margins Enterprise reaped from its natural gas sales to CPS Energy during Winter Storm Uri are directly relevant to demonstrate both the procedural and substantive unconscionability of the Disputed Transactions.

Procedural unconscionability assesses whether a party employed “sharp business practices,” whether there was “overreaching” by a party, and the relative “financial ability of the parties involved.” *In re Poly-Am, L.P.*, 964 S.W.2d at 61. The fact that Enterprise had budgeted profitability for February in natural gas sales to be approximately [REDACTED], and ultimately ended up charging prices that resulted in [REDACTED] in profit, speaks squarely to each of these unconscionability considerations.⁹ Enterprise could have charged significantly less for natural gas during a state declared disaster while still making a healthy profit, but chose not to do so in a time during which it enjoyed outsized bargaining ability. This overreaching—at the ultimate expense of the residents of San Antonio—is evidenced by the profits Enterprise received. The challenged price terms cannot be divorced from profits because those profits contextualize the prices Enterprise charged.

Further, substantive unconscionability considers whether an agreement is so unfair, oppressive or shocking that the Court should step in and find the agreement unenforceable. *See*

⁸ Reply, at p. 9.

⁹ *See* [REDACTED].

Besteman, 272 S.W.3d at 789 (“Unconscionability has been found when there is a gross disparity in the values exchanged and the grounds for substantive abuse are sufficiently shocking or gross to compel the court to intercede.”) (internal citations omitted). The substantive component of unconscionability is really summed up with the following broad question: “Are there legitimate commercial reasons justifying the inclusion of the terms?” *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 822 (Tex. App.—San Antonio 1996, no writ). Enterprise’s profits fall directly within this scope.

With respect to profits and profit margin, CPS Energy asks the Court to consider (1) the cost basis of the natural gas that Enterprise sold to CPS Energy in the Disputed Transactions in comparison to the prices that Enterprise ultimately charged CPS Energy, and (2) the end result (i.e., the profit result) for Enterprise. These considerations are important because they demonstrate that Enterprise had the ability to charge substantially lower prices for the natural gas it sold to CPS Energy during Winter Storm Uri but affirmatively chose not to and reaped an unprecedented windfall as a result.¹⁰ CPS Energy challenges the prices Enterprise charged as shocking and unconscionable. Prices tie inexorably to profits. The profits reaped by Enterprise from these natural gas transactions during a one-week period so outstripped anything Enterprise had ever experienced that they contextualize quite succinctly and in a value determinative way how and

¹⁰ See Response, at pp. 68–70; [REDACTED]

why the challenged prices are excessive, exorbitant, shocking and unconscionable.¹¹ Profits, therefore, represent an essential circumstance for the court to consider.

Despite Enterprise's insinuation, there is no bright-line rule in Texas that dictates what a court can and cannot consider for purposes of determining the applicability of an unconscionability defense in a particular case. *See Pony Express*, 921 S.W.2d at 821 ("Unconscionability' has no precise legal definition because it is not a concept but is a determination to be made in light of a variety of factors."). Indeed, Texas law makes abundantly clear that unconscionability is a heavily fact-dependent inquiry that considers the totality of the circumstances on a case-by-case basis. *See Besteman*, 272 S.W.3d at 787–88; *McCalla*, 167 S.W.3d at 137–38 (identifying 27 fact issues that supported a finding of unconscionability); *El Paso Nat. Gas. Co.*, 964 S.W.2d at 61. The fact that the unprecedented profits and profit margins Enterprise enjoyed were not at all justified by Enterprise's costs for the same gas demonstrates that Enterprise could have chosen to charge substantially lower prices to CPS Energy in the Disputed Transactions. Enterprise's profits and profit margins are thus directly relevant to the unfair, oppressive and shocking nature of those transactions and should be considered.

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, CPS Energy prays that this Honorable Court deny Enterprise Products Operating, LLC's Motion for Summary Judgment on its Breach-of-Contract Claim and CPS Energy's Affirmative Defenses, and grant CPS Energy all such other and further relief, general and special, at law and in equity, to which CPS Energy may be justly entitled.

¹¹ Response, at pp. 80–82. [REDACTED]

Dated: April 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in compliance with the Texas Rules of Civil Procedure on this 15th day of April 2024, to the following counsel of record:

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/s/ Lauren A. Valkenaar

Lauren A. Valkenaar

Exhibit A

involving moral turpitude. I make this Affidavit based upon personal knowledge and each statement made in this Affidavit is true and correct.

2. I am Vice President, Energy Supply & Market Operations for Defendant/Counter-Plaintiff City of San Antonio, acting by and through its City Public Service Board (“CPS Energy”), in the above-titled dispute.

3. I am making this Affidavit in support of CPS Energy’s Response to Enterprise Products Operating LLC’s Motion for Summary Judgment on its Breach-of-Contract Claim and CPS Energy’s Affirmative Defenses.

4. Exhibit A-1 is a business record of CPS Energy. I am an employee of CPS Energy and am familiar with the manner in which these records are created and maintained by virtue of my duties and responsibilities. Exhibit A-1 was made at or near the time of the event recorded therein by someone with knowledge or from information transmitted by someone with knowledge within CPS Energy.

5. Attached to this Affidavit is a true and correct copy of the following exhibit:

<u>EXHIBIT</u>	<u>DESCRIPTION</u>
■	[REDACTED]

I, Kevin Pollo, certify under penalty of perjury that the foregoing is true and correct.

Further affiant sayeth not.”



KEVIN POLLO

SWORN TO AND SUBSCRIBED TO before me, the undersigned notary public, on this the 15th
of April 2024, to certify which witness my hand and seal of office.



NOTARY PUBLIC, STATE OF TEXAS



Printed Name of Notary

My Commission Expires:

10-21-2025

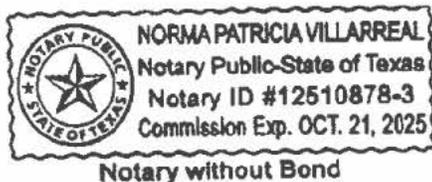


Exhibit A-1

Sealed