Filed 1/30/18 Vera v. US Bankcard Services CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAVID VERA et al., Plaintiffs and Respondents, v. US BANKCARD SERVICES, INC., Defendant and Appellant.	B283187 (Los Angeles County Super. Ct. No. BC626185)

APPEAL from an order of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed.

Bryan Cave, Jennifer A. Jackson, David Harford, Christopher P. Galanek and Aiten M. McPherson for Defendant and Appellant.

Carpenter Law, Gretchen Carpenter; Law Offices of Michele L. Jackson and Michele L. Jackson for Plaintiffs and Respondents.

INTRODUCTION

David Vera signed an agreement with US Bankcard Services, Inc. for services relating to processing credit card transactions for Vera's small businesses. US Bankcard itself did not provide credit card processing services; instead, another company, Elavon, Inc. provided those services. US Bankcard recruited merchants such as Vera who wanted credit card processing services, and sold Elavon's services to those merchants.

In the context of the parties' transaction, Vera signed a "Merchant Application," which included a reference to Elavon's "Terms of Service" located on the Elavon website. Vera was never provided a copy of the Terms of Service. In that document, there was an arbitration provision stating that all controversies were to be submitted to arbitration in Georgia and would be subject to Georgia law.

Vera sued US Bankcard, asserting that the contract included improper liquidated damages in the form of fees, US Bankcard engaged in unlawful business practices under the Unfair Competition Law (UCL),[1] and for declaratory relief. US Bankcard moved to compel arbitration, arguing that the arbitration provision in Elavon's Terms of Service required the parties to arbitrate their claims. The trial court denied the motion, finding that the arbitration provision in the Terms of Service was procedurally and substantively unconscionable. US Bankcard appealed.

---

[1] See Business and Professions Code, section 17200, *et seq*.

We affirm. The arbitration provision in the Terms of Service was unconscionable and therefore unenforceable, and US Bankcard's motion to compel arbitration was properly denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint

Vera filed a putative class action complaint in July 2016 naming US Bankcard and Elavon as defendants. The operative complaint at issue on appeal is the first amended complaint, filed in October 2016, so we focus on the allegations in that version.

Vera alleged that he is the owner and operator of three massage-based businesses in Los Angeles County. He stated that US Bankcard is "in the business of processing credit card transactions for and providing related products and services to merchants who accept credit card payments." Vera alleged that Elavon is "in the business of processing credit card transactions for merchants who accept credit card payments, and is one of the nation's largest merchant processors for Visa and MasterCard." Vera asserted that each of his three businesses "had a separate credit card processing agreement with Defendants."

Vera stated that he was "challenging Defendants' practice of imposing unconscionable Payment Card Industry (PCI) Data Security System (DSS) non-compliance fees on merchants, without providing them with anything of value in return." He explained that credit card payment processing companies such as defendants "require merchants to 'validate' their compliance with PCI DSS by completing a Self-Assessment Questionnaire, typically on an annual basis." Defendants imposed a monthly "PCI non-compliance fee" on merchants who did not comply. Vera stated that he was seeking a declaration that "Defendants' merchant processing contracts and applicable law do not allow

Defendants to impose PCI non-compliance fees on merchants without providing anything of value in return and that, even if Defendants are allowed to impose such PCI non-compliance fees (which they are not), the amount of those fees is unconscionable."

Vera alleged that he entered into "Merchant Application" agreements with US Bankcard and Elavon that were "non-negotiable, pre-printed contracts of adhesion." These were drafted by defendants, which were in a position of superior power. Vera also alleged that the "Terms and Conditions" applicable to these agreements required compliance with PCI DSS requirements, and imposed monthly fees for non-compliance.

Vera alleged that "Defendants provide nothing in return for these PCI non-compliance fees. Defendants do not make sure that a non-compliant merchant becomes compliant with PCI DSS, nor do Defendants insure or indemnify the merchant for any damages resulting from PCI DSS non-compliance." Vera asserted that these contractual provisions "constitute illegal penalties rather than validated liquidated damages provisions." Vera asserted both individual and class claims. He asserted three causes of action against both defendants: "unlawful penalty" under Civil Code section 1671; unlawful or unfair business practices under the UCL; and declaratory judgment.

In November 2016, the trial court dismissed Elavon from the case pursuant to Vera's request.

B. US Bankcard's motion to compel arbitration

In December 2016, US Bankcard moved to stay the case and compel arbitration of Vera's claims in Atlanta, Georgia. US Bankcard asserted that Vera had agreed to "arbitrate any claims he had against [Elavon] or its alleged agent, US Bankcard, by signing six (6) different applications to open six (6) merchant

accounts with Elavon, for which US Bankcard provided customer service and technical support." US Bankcard argued that "[e]ach such application specifically referenced and incorporated Elavon's Terms of Service, containing an Arbitration Agreement and a forum selection clause" agreeing to arbitrate disagreements in Georgia.

US Bankcard submitted declarations stating that Elavon retains merchant service providers such as US Bankcard that "re-sell Elavon's payment processing services to . . . merchants while also offering other goods as services to the merchants directly, including processing hardware, software, and technical and customer support." US Bankcard thus "formed relationships with Vera and his businesses on behalf of Elavon."

US Bankcard attached to its motion six single-page "Merchant Applications" signed by Vera. US Bankcard stated, "All six of these applications specifically referenced and incorporated Elavon's [Terms of Service (TOS)] and provided a link to the TOS." The Merchant Application states that the merchant is representing to Elavon that it has authority to enter into the agreement. It also states, "[B]y signing below, if leasing equipment, Merchant and its representative(s) agree that the Leased Equipment is subject to the terms and conditions set forth in the Terms of Service (TOS) and have had an opportunity to review such terms. The signature by an authorized representative of Merchant on the Merchant Application, or the transmission of a Transaction Receipt or other evidence of a Transaction to us, shall be the Merchant's acceptance of and agreement to the terms and conditions contained in the Agreement including, without limitation, this Merchant Application, the TOS and the Merchant Operating Guide (MOG)

incorporated herein by this reference and located at our website at [Internet address] and [Internet address], respectively. If Merchant does not have access to view the TOS or MOG at our website please contact our customer service center. Notwithstanding any such non-receipt of the TOS or MOG, Merchant agrees to comply with the Agreement . . . ."

US Bankcard also included a copy of Elavon's Terms of Service, a 49-page document pertaining to "the Agreement," which is defined in the glossary section as "The TOS, including the Merchant Application, the Merchant Operating Guide, the Electronic Check Service Merchant Operating Guide (if applicable), any Merchant Agreement or Merchant Processing Agreement, and any other guides or manuals provided to the Merchant from time to time, and all additions to, amendments and modifications of, and all replacements to any of them, as applicable."

The arbitration provision is in the "general provisions" section of the Terms of Service, under the heading "Miscellaneous Provisions," which is located on page 17. It states, "All claims or controversies, or other matters in question, between the parties arising out of or related to the Agreement or the relationship between the parties that are not otherwise settled by agreement of parties will be submitted to and decided by arbitration held in Atlanta, Georgia in accordance with the rules of the American Arbitration Association [AAA]." The arbitration provision states that the arbitrator shall be a member of the state bar of Georgia and have the authority to award any relief that a court in Georgia could provide. The provision continues, "The arbitrator shall have no authority to decide claims on a class action basis. An arbitration can only decide our or Merchant's claim and may

not consolidate or join the claims of other persons who may have similar claims." It also states that the parties agree that the arbitration will be governed by the Federal Arbitration Act, and it references the choice-of-law provision earlier in the Terms of Service, which states that the laws of the state of Georgia apply.

US Bankcard asserted that "Vera's claims arise out of the Merchant Applications and his relationship with both Elavon and US Bankcard, and as such are subject to the Arbitration Agreement." US Bankcard acknowledged it was not a signatory to Elavon's Terms of Service, but argued that it could enforce the arbitration provision nonetheless for two reasons. First, Vera had alleged that US Bankcard was an agent of Elavon, and an agent may enforce a principal's arbitration agreement. Second, Vera was estopped from asserting that the Terms of Service did not apply because he had alleged that the Merchant Applications served as the basis of his claims, and in his complaint he "convolute[d] [*sic*] Elavon and US Bankcard, defining them collectively as 'Defendants' and making it impossible to determine which entity allegedly committed which act."

US Bankcard also asserted that the arbitration provision was valid and enforceable because it was incorporated into the Merchant Applications by reference. In addition, US Bankcard argued that the arbitration provision was not procedurally unconscionable because Vera was a sophisticated business owner and had multiple other options for credit card service providers. US Bankcard asserted that the arbitration provision was not substantively unconscionable because there were no terms that were unreasonably favorable to US Bankcard or unreasonably unfavorable to Vera.

US Bankcard requested that the court stay the case pending the outcome of the arbitration. US Bankcard also asked the court to stay the case "while Elavon's challenge to the enforceability of the Arbitration Agreement proceeds in Georgia court." US Bankcard attached a complaint for declaratory judgment and equitable relief that Elavon had filed in Georgia state court against Vera on October 3, 2016. US Bankcard had filed a motion to intervene in the Georgia case.[2]

C. Vera's opposition to the motion to compel arbitration

Vera opposed the motion, arguing that US Bankcard had failed to establish the existence of an agreement to arbitrate. Vera submitted a declaration stating that in entering into the various agreements at issue in this case, he interacted only with representatives of US Bankcard, not representatives of Elavon. He said the documents he signed were paper, not electronic, and US Bankcard representatives never directed him to Elavon's website nor did they give him Elavon's Terms of Service. Vera also said the documents presented to him were pre-printed forms, and "I did not have the opportunity to negotiate or modify the pre-printed terms in any manner."

Vera also argued that the arbitration clause was procedurally and substantively unconscionable. Vera said the agreement was a contract of adhesion with an arbitration agreement hidden in the "miscellaneous provisions" section, so there was both oppression and surprise. Vera asserted that the

---

[2] Vera filed a request for judicial notice asking us to judicially notice several documents filed in the Georgia action. The request is denied; the documents are not relevant to the determination of the issues on appeal. (See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544.)

Terms of Service was substantively unconscionable as well, because it required arbitration in Georgia and included a confidentiality clause that limited Vera's ability to obtain relevant information. Vera asked that the court deny US Bankcard's requests to stay the case.[3]

US Bankcard filed a reply, and submitted several objections to Vera's declaration.

D. Court ruling

The court issued a tentative ruling denying US Bankcard's motion, and the parties argued their respective positions at a hearing. The court took the motion under submission, and later issued a written ruling denying the motion to compel. The court also denied US Bankcard's request to stay the case, noting that the Georgia case was later-filed and US Bankcard "has provided the Court with no authority to allow the Court to accede to that request."

The court found that US Bankcard met its burden to demonstrate that there was an agreement to arbitrate. The court noted that Vera signed the Merchant Applications, which "govern the payment processing services provided by Elavon" and incorporated the Terms of Service, including the arbitration provision. The court also held that US Bankcard could enforce Elavon's arbitration clause because Vera's claims were

---

[3] Vera also opposed US Bankcard's motion on the basis that his agreement with US Bankcard (as opposed to the agreements involving Elavon) included a forum selection clause requiring litigation to be brought in California state court in Los Angeles, and that agreement purported to supersede all other agreements. Vera also argued that US Bankcard could not invoke Elavon's arbitration clause under either an agency theory or an estoppel theory.

"inextricably entwined" with the obligations imposed by Elavon's Terms of Service.

However, the court found the arbitration provision to be unconscionable. The court considered the question of procedural unconscionability first. The court noted Vera's statements that he owned very small businesses and handled all primary business operations himself, which "demonstrates that Plaintiff was not particularly a sophisticated business person, and that he stood in a weaker bargaining position than Elavon and US Bankcard." The court said that although US Bankcard had argued that the agreement was not oppressive because Vera had alternative choices for credit card processing services, "there has been no showing that Plaintiff *had* reasonably available alternative sources of supply for credit processing, which were free of unconscionable terms. Accordingly, Plaintiff has demonstrated that oppression is present with respect to the Elavon arbitration agreement in the TOS."

The court also stated, "It is evident that there was a significant amount of 'surprise' involved." The court said that "the arbitration provision is effectively hidden in the TOS," and "there is nothing conspicuous about the arbitration provision." The court also said the arbitration provision was vague because it stated that AAA rules would apply, but it "does not give the party signing the agreement any indication as to *which* AAA rules would govern the dispute." The court concluded, "[T]he existence of surprise and oppression, combined with the fact that this was an adhesive contract, requires a finding that the arbitration provision in the TOS is procedurally unconscionable."

The court then considered whether the arbitration provision was substantively unconscionable. The court held that

the arbitration provision met many of the requirements of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*). However, the court found that because the parties interacted in California, Vera was a resident of California, and Vera's businesses were based in California, the forum selection clause requiring arbitration in Georgia was substantively unconscionable. The court also found the arbitration provision to be substantively unconscionable in that it allowed "any remedy or relief that a court in Georgia could order or grant." Furthermore, the court found unconscionable the statement that the AAA rules were to be followed, but that those rules could be "modified by the Agreement." The court stated, "It is unclear what modifications of the AAA Rules would ultimately be part of any arbitration proceeding. This clause reallocates the risks of the bargain in an objectively unreasonable manner." The court also noted that "none of these provisions are severable," and therefore "the entire arbitration agreement is permeated by unconscionability." The court concluded that because both procedural and substantive unconscionability were present, the arbitration provision was unenforceable, and therefore it denied US Bankcard's motion to compel arbitration and stay the proceedings.

US Bankcard timely appealed. (Code Civ. Proc., § 1294, subd. (a).)

DISCUSSION

A. Denial of request to stay the case

US Bankcard contends that the trial court should have stayed or dismissed the case to allow the action to proceed in Georgia. It points out that the Terms of Service states that "[a]ny challenge to the enforceability of the agreement to

arbitrate . . . shall be brought in either the Superior Court of Fulton County, Georgia or in the Northern District of Georgia." Vera argues that the trial court properly considered whether the parties had an agreement and whether the agreement was unconscionable, and that the court's rejection of US Bankcard's request to stay or dismiss the case was appropriate.

Vera correctly points out that US Bankcard failed to cite any authorities, below or on appeal, supporting its argument that a stay was warranted. "Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' [Citation.]" (*Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862.)

Moreover, we have found no authority suggesting that the trial court was obligated to stay the case under the circumstances here, before the parties had established in any court that an enforceable arbitration provision governed the action. California law provides that a court may stay a pending action *after* "a court of competent jurisdiction . . . has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State." (Code Civ. Proc., § 1281.4.) Here, no court had found that the parties had an enforceable arbitration agreement, and indeed the trial court eventually held that the arbitration provision in the Terms of Service was unconscionable.

Alternatively, where two lawsuits are pending addressing the same parties and subject matter, "the principle of comity may call for a discretionary refusal of the court to entertain the second suit pending determination of the first-filed action." (*Gregg v.*

Superior Court (1987) 194 Cal.App.3d 134, 136.) Here, however, the instant lawsuit was filed first, and the Georgia action was filed later. Comity did not require that the trial court stay the instant case while the Georgia action proceeded. US Bankcard therefore has not demonstrated that the trial court erred in denying the motion to stay the case.

B. Unconscionability principles

US Bankcard asserts that the trial court erred by finding the arbitration provision in the Terms of Service unconscionable. "'On appeal from the denial of a motion to compel arbitration, "we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law."' [Citation.] Thus, unconscionability is a question of law we review de novo." (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 82.)

"An evaluation of unconscionability is highly dependent on context." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911 (*Sanchez*).) "'One common formulation of unconscionability is that it refers to "'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.'" [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.'" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133.)

"'"The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause

under the doctrine of unconscionability." [Citation.] But they need not be present in the same degree.'" (*Sanchez, supra,* 61 Cal.4th at p. 910.) "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Id*. at p. 912.)

The trial court found that the Terms of Service was both procedurally and substantively unconscionable. US Bankcard challenges both of these findings, and therefore we address each.

C. Procedural unconscionability

US Bankcard contends the trial court erred in finding that the Terms of Service was procedurally unconscionable, and asserts that the court impermissibly shifted the burden to US Bankcard to show available market alternatives to US Bankcard. US Bankcard also contends the court erred by finding there was an element of surprise in the Terms of Service.

Procedural unconscionability focuses on "oppression" or "surprise" due to unequal bargaining power. (*Armendariz, supra*, 24 Cal.4th at p. 114.) We consider oppression first.

1. *Oppression*

"California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion." (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc*. (2015) 232 Cal.App.4th 1332, 1348.) "In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract." (*Ibid*.) "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to

consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Ibid.*) Thus, "'[o]ppression occurs where a contract involves lack of negotiation and meaningful choice.'" (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317 (*Morris*).)

US Bankcard did not dispute that the Terms of Service constituted a pre-printed contract drafted by Elavon, presented on a take-it-or-leave-it basis. However, US Bankcard asserted that because Vera was a business owner, he was more sophisticated than a typical employee or consumer faced with an oppressive arbitration provision. In support of its motion, US Bankcard submitted the declaration of Edward M. O'Hare, Vice President of Global Development at Elavon. O'Hare stated, "There are at least seventy different payment processors who provide merchants with the same or similar transaction processing services offered by Elavon . . . . [¶] The marketplace for payment processing services is extremely competitive. California merchants, such as the Plaintiff, can select from dozens of companies willing to provide payment processing services and hundreds of [merchant service providers] re-selling such services. If Mr. Vera did not feel the Terms of Service offered by Elavon were fair or appropriate he had numerous other options from which to acquire payment processing services for his business." US Bankcard also submitted the declaration of Christopher Chang, president of US Bankcard services, which included nearly identical language. US Bankcard asserted that

in those circumstances, the "take-it-or-leave-it" nature of the contract was not particularly oppressive because Vera could have chosen to contract with a different company for credit card processing services.

The mere availability of market alternatives does not necessarily undermine a claim of unconscionability. Rather, "the 'oppression' factor of the procedural element of unconscionability may be defeated, if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services *free of the terms claimed to be unconscionable*." (*Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 772 [emphasis added].) Here, although US Bankcard stated that multiple alternative credit card processing companies existed, there was no showing from either party that other companies offered contract terms that were more favorable than those offered by Elavon.

In its written ruling, the court stated, "Here, there has been no showing that Plaintiff had reasonably available alternative sources of supply for credit processing, which were free of unconscionable terms. Accordingly, Plaintiff has demonstrated that oppression is present with respect to the Elavon arbitration agreement in the TOS." US Bankcard asserts that the trial court placed the burden onto US Bankcard to show that reasonable market alternatives existed. However, there is no such burden, because a finding of oppression does not require such a showing. "Courts have recognized a variety of situations where adhesion contracts are oppressive, despite the availability of alternatives." (*Morris, supra*, 128 Cal.App.4th at p. 1320.) "The availability of similar goods or services elsewhere may be

relevant to whether the contract is one of adhesion," but because a non-adhesive contract may also be unconscionable, the availability of other alternatives "is not the deciding factor" in determining unconscionability. (*Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100; see also *Lhotka v. Geographic Expeditions, Inc*. (2010) 181 Cal.App.4th 816, 823-824.) Vera had a burden to demonstrate that the contract was oppressive; he did not have a specific burden to demonstrate the lack of reasonable market alternatives. We therefore reject US Bankcard's argument that the court impermissibly shifted this burden to US Bankcard.

In addition, the trial court did not base its decision solely on the lack of evidence of market alternatives. The court recognized that the classic circumstances of oppression were present, stating, "[I]t is evident that Plaintiff, notwithstanding the fact that he owns a small business, was in a weaker bargaining position in relation to Elavon." US Bankcard did not dispute that the Terms of Service constituted a pre-printed contract, written by Elavon, offered on a take-it-or-leave-it basis with no opportunity for negotiation. These factors indicate that there was at least some degree of oppression, even if market alternatives were available.

2. *Surprise*

Turning to the element of surprise, US Bankcard argues that the trial court erred in holding that the Terms of Service "did not conspicuously present the arbitration provision, and, as such, an element of surprise was present." It argues that "Vera received the Merchant Application containing a link and web address to the TOS on six (6) separate occasions. It was incumbent on Vera, a businessman participating in numerous

commercial transactions, to have read the document (the TOS) governing this dispute."

Unfair surprise "covers a variety of deceptive practices and tactics, including hiding a clause in a mass of fine print or phrasing a clause in language that is incomprehensible to a layperson." (*Penilla v. Westmont Corporation* (2016) 3 Cal.App.5th 205, 216.) Alternately, "'[s]urprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." (*A & M Produce Co. v. FMC Corp*. (1982) 135 Cal.App.3d 473, 486.)

Here, Vera signed the Merchant Application, which is a single-page form. The font is extremely small, and on most copies in the appellate record, much of the font is illegible. The Merchant Application gives no indication that the parties are agreeing to arbitrate disputes. It states that "the Leased Equipment is subject to the terms and conditions set forth in the Terms of Service (TOS)." It also states that by signing the Merchant Application or by completing any transaction, the merchant agrees "to the terms and conditions contained in the Agreement" which is "incorporated herein by this reference and located at our website." The website URL, in underlined text, is not legible in the copies of the Merchant Application in the record on appeal.

Vera stated in his declaration that he never received a copy of the Terms of Service, and he was never told by US Bankcard representatives about the arbitration clause. US Bankcard states that the arbitration provision was not a surprise, because Vera's Merchant Applications included a "link" to the Terms of Service. However, Vera stated in his declaration that he did not

receive an electronic copy of the Merchant Agreement; he signed a paper copy. Therefore, he did not have access to a link to the Terms of Service online, and the arbitration provision was in a document Vera never received.

Moreover, the Terms of Service does not make obvious to a reader that the parties are agreeing to arbitrate disputes. The 49-page document is separated into the following sections: "Section A – General Provisions" on pages 2 through 40; "Section B – Electronic Check Services" on pages 41 and 42; and "Section C – Glossary" on pages 43 through 49. The arbitration provision is located on page 17, in a subsection titled "Miscellaneous Provisions." The table of contents does not note that an arbitration provision is included. Certain parts of the Terms of Service employ bold font or all-capital bold font, such as Elavon's disclaimer of any warranties (in bold) and the option to purchase the leased equipment at the end of the lease term (in bold and all capitals). The arbitration provision is a single paragraph with the word "Arbitration" in bold at the beginning of the paragraph, similar to the bolded titles of each surrounding paragraph. No other words within the arbitration provision are bolded or in all capitals; the typeface is the same as that in the surrounding paragraphs.

The arbitration provision is thus a small piece of a prolix printed form drafted by Elavon. Neither the Terms of Service generally nor the arbitration provision specifically make any effort to call to a merchant's attention that he or she is waiving significant legal rights. The document does not include any space for a signature, and thus purports to bind merchants even if they have never seen the document or agreed to its terms. Indeed, the Merchant Application stated that Vera would be deemed to have

agreed to the Terms of Service by simply completing a transaction; merchants therefore were not required to see or agree to the Terms of Service before purportedly being bound to its terms.

Similarly hidden arbitration provisions have been held to be unconscionable due to surprise. In *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, for example, the court found an arbitration provision unconscionable where it was "in one paragraph near the end of a lengthy, single-spaced document," and the defendants who drafted the document "made no effort to highlight the presence of the arbitration provision in the Agreement. It was one of 12 numbered paragraphs in a section entitled 'miscellaneous.' In contrast to several other paragraphs, no text in the arbitration provision is highlighted. No words are printed in bold letters or larger font; nor are they capitalized. Although petitioners were required to place their initials in boxes adjacent to six other paragraphs, no box appeared next to the arbitration provision." (*Id.* at p. 1252–1253.)

The court in *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138 also found an arbitration agreement unconscionable where "[t]he Agreement was comprised of 11 pages of densely worded, single-spaced text printed in small typeface. The arbitration clause is the penultimate of 37 sections which . . . were neither flagged by individual headings nor required to be initialed by the subcontractor." (*Id.* at p. 1146.) And in *Fittante v. Palm Springs Motors, Inc.* (2003) 105 Cal.App.4th 708, the court found the arbitration clause procedurally unconscionable when it was "hidden 'in plain sight'" as "only one of several provisions in a dense, single-spaced page at the end of the five-page employment application. While it

appears to be in bold type, so are several other provisions; the typeface is quite small, and not otherwise distinguished from any of the other provisions of the employment application. There are no headings or other obvious indications that an applicant is giving up significant legal rights." (*Id*. at p. 723.) In *OTO, L.L.C. v. Kho* (2017) 14 Cal.App.5th 691, the court found the parties' agreement to be procedurally unconscionable where "the arbitration clause is visually impenetrable" because it was "[w]ritten in a single block, without paragraphs to delineate different topics," and "the font chosen is so small as to challenge the limits of legibility. Further, the language is legalistic, and the text is complex. . . . [T]he Agreement is drafted and composed in a manner . . . to thwart rather than promote understanding." (*Id*. at pp. 708-709.)

US Bankcard argues that this case is similar to *Morris*, *supra*, in which the court said, "[I]t is reasonable to expect even an unsophisticated businessman to carefully read, understand, and consider all the terms of an agreement affecting . . . a vital aspect of his business." (*Morris, supra*, 128 Cal.App.4th at p. 1322.) US Bankcard also cites *West v. Henderson* (1991) 227 Cal.App.3d 1578, in which the court said, "[L]oose business practices, such as failure to read, investigate, and negotiate a commercial contract, often impose significant and costly consequences. . . . Parties to commercial contracts fail to read them at their own peril." (*Id*. at p. 1587.) However, both *Morris* and *West* involved singular contracts that were actually provided to plaintiffs in the course of the parties' dealings. Here, the arbitration provision, written by a party with which Vera never interacted, was embedded in a dense, prolix document that did not require Vera to receive, read, or sign it before purportedly

binding him. Vera stated that he never received the Terms of Service and was unaware of its terms. The trial court correctly held that under these circumstances, the element of surprise is "significant."

Vera also argued that the arbitration provision was procedurally unconscionable because it did not attach the AAA rules that purportedly bound the parties. The trial court found that failure to attach the rules did not necessarily render the provision unconscionable, but found that the provision was vague: "The agreement . . . merely states that the claims would be decided by arbitration in accordance with the rules of the American Arbitration Association as modified by the Agreement. This is vague, and does not give the party signing the agreement any indication as to *which* AAA rules would govern the dispute."

US Bankcard challenges this finding because "the AAA Rules are clearly set forth on the AAA Website" and "[t]he trial court could have taken judicial notice of these rules, and Vera could have easily accessed them." Some cases have found that "the failure to provide a copy of the governing rules 'contributes to oppression because the employee "is forced to go to another source to find out the full import of what he or she is about to sign and must go to that effort prior to signing."' [Citation.] The level of oppression is increased when, as here, the employer not only fails to provide a copy of the governing rules, but also fails to clearly identify which rules will govern so the employee could locate and review them." (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 245.)

US Bankcard's failure to identify or attach the applicable rules contributed to the unconscionability of the arbitration provision. "[F]ailure to attach the AAA rules, standing alone, is

insufficient grounds to support a finding of procedural unconscionability." (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472.) Here, however, Vera was never provided with the Terms of Service or the applicable arbitration rules, and the Terms of Service failed to identify which set of AAA rules applied. These failures, standing alone, may not be sufficient to render the arbitration provision unconscionable, but because there were multiple factors present indicating oppression and surprise, the court correctly held that the arbitration provision in the Terms of Service was procedurally unconscionable.

D. Substantive unconscionability

The court also found that the arbitration provision was substantively unconscionable, primarily due to the Georgia forum selection clause and the Georgia choice-of-law clause. US Bankcard challenges both of these conclusions.

"Substantive unconscionability arises when a contract imposes unduly harsh, oppressive, or one-sided terms." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 797.) As noted above, "[b]oth procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree. and are evaluated on "'a sliding scale."' [Citation.] '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247.)

The trial court held that "the Georgia forum selection clause is substantively unconscionable," and "the fact that the

arbitration provision limits the remedies to any remedy or relief that a court in Georgia could order or grant is evidence of substantive unconscionability." US Bankcard asserts that these findings were erroneous.

1. *Forum selection*

US Bankcard argues that the forum selection clause should be enforced here because "California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable." (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11 (*America Online*).) This is a correct statement of law, but it is not without limit: "Our law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement. Therefore, to be enforceable, the selected jurisdiction must be 'suitable,' 'available,' and able to 'accomplish substantial justice.'" (*Id.* at p.12.)

As discussed above, there is significant procedural unconscionability here, in that Vera did not negotiate the terms of the agreement. Indeed, Vera stated in his declaration that he never saw or read the Terms of Service before he signed the Merchant Agreement or US Bankcard's Terms and Conditions. "[T]he substantive unfairness of the terms [of an agreement] must be considered in light of any procedural unconscionability." (*Sanchez, supra,* 61 Cal.4th at p. 912.) The forum selection clause in the Terms of Service is therefore not a contract provision that was "procured freely and voluntarily" as a result of

negotiation between the two parties such that it should be given substantial deference.

US Bankcard does not make any substantive arguments about why the Georgia forum selection clause is not unconscionable. It has not argued, for example, that Georgia is convenient for either party, or that the parties have ties to Georgia. To the contrary, the record indicates that while non-party Elavon is based in Georgia, neither Vera nor US Bankcard has any ties to Georgia. Vera alleged in his complaint that US Bankcard is a California corporation with its principal place of business in California. Vera said in his declaration that he always been a resident of California, he received all relevant paperwork in California, and it would be difficult and expensive for him to travel to Georgia for an arbitration. As noted above, the location in a forum selection clause should bear some "logical nexus to one of the parties or the dispute. . . ." (*America Online, supra*, 90 Cal.App.4th at p. 12.) There is no such nexus here.

US Bankcard argues that because Vera was "an experienced business person contracting for a service vital to how his patrons would pay for his business services," the forum selection clause should not be compared to cases addressing consumer transactions. Instead, US Bankcard argues that this case is more like those involving "sophisticated commercial entities," such as the unreported Southern District of California case *Captain Bounce, Inc. v. Business Financial Services, Inc.* (S.D. Cal., Mar. 19, 2012, No. 11-CV-858 JLS WMC) 2012 WL 928412 (*Captain Bounce*). In that case, small businesses sued corporations that offered cash advances to small and mid-sized businesses. The parties' agreements included arbitration provisions that called for arbitration to be held in North Carolina.

(*Id*. at *2.) The court held that the plaintiffs were sophisticated business owners. (*Id*. at *7.) In addition, the *Captain Bounce* court held that there was very little procedural unconscionability, because "Plaintiffs had at least some opportunity to negotiate terms and were given the opportunity to review the agreement" before it became effective, and the defendant "presented the contracts following some period of negotiation and discussion over financing terms and other matters." (*Id*. at *8.) The court found that the forum selection clause was not substantively unconscionable, in part because "Plaintiffs have not argued that they had no reason to expect arbitration would take place in North Carolina." (*Id*. at *10.)

There are substantial factual differences between *Captain Bounce* and this case. The *Captain Bounce* court found the plaintiffs to be sophisticated business owners; the trial court here found that Vera was not particularly sophisticated. The *Captain Bounce* plaintiffs had the opportunity to review their contract and negotiate its terms; here, Vera never saw the Terms of Service and was not provided with any opportunity to negotiate. These significant differences render the reasoning in *Captain Bounce* unpersuasive.

Instead, Vera's business is more like the ones at issue in *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900 (*Bolter*). In that case, the plaintiffs were three individuals operating as carpet cleaning franchises under the "Dry-Chem" name. The franchisees sued the franchisor, Harris Research, Inc., alleging that it breached the franchise agreements. The trial court held that the business owners were required to arbitrate their cases in Utah pursuant to the arbitration agreements' forum selection clause. (*Id*. at p. 902.) The Court of Appeal held that the forum

selection clause was unconscionable. The court noted that "Harris is a large international corporation and petitioners are small 'Mom and Pop' franchisees located in California." (*Id.* at p. 909.) Under these circumstances, "the 'place and manner' terms are unduly oppressive: The agreement requires franchisees wishing to resolve any dispute to close down their shops, pay for airfare and accommodations in Utah, and absorb the increased costs associated in having counsel familiar with Utah law." (*Ibid.*) The court continued, "Because Dry-Chem franchises are by nature small businesses, it is simply not a reasonable or affordable option for franchisees to abandon their offices for any length of time to litigate a dispute several thousand miles away." (*Ibid.*) The court therefore held that the "place and manner" provision of the arbitration provision was unconscionable, and severed it from the remainder of the franchise agreement. (*Id.* at p. 910-911.)

The Ninth Circuit relied on *Bolter* in finding unconscionable a similar forum selection clause for a franchisee. In *Nagrampa v. MailCoups, Inc.* (9th Cir. 2006) 469 F.3d 1257, the plaintiff, Nagrampa, "entered into an agreement with MailCoups to establish and operate a direct mail coupon advertising franchise." (*Id.* at p. 1265.) The franchise agreement required the parties to arbitrate any disagreements in Boston, Massachusetts. (*Ibid.*) Nagrampa terminated the agreement, and MailCoups initiated arbitration, alleging that Nagrampa owed $80,000 in fees. (*Ibid.*) Nagrampa then sued, and MailCoups sought to compel arbitration. The Ninth Circuit, sitting en banc, held that under California law the forum selection clause was unconscionable. The court stated, "The parties' bargaining positions were unequal, resulting in an

oppressive contract of adhesion containing a forum selection clause that places venue in Boston, Massachusetts, only a few miles away from MailCoups headquarters in Avon, but three thousand miles away from Nagrampa's home. As in *Bolter*, the MailCoups contract would require a one-woman franchisee who operates from her home to fly across the country to arbitrate a contract signed and performed in California. Nagrampa would incur additional traveling and living expenses and 'increased costs associated in having counsel familiar with [Massachusetts] law.' *Bolter*, [*supra*,] 87 Cal.App.4th at [p.] 909." (*Id*. at p. 1289.) The court held that the location provision and other aspects of the arbitration agreement rendered the agreement unconscionable and unenforceable. (*Id*. at p. 1293.)

Here, Vera's businesses were similar. Vera said in his declaration that his businesses are very small, and he handles all primary business operations himself. He stated that he interacted with US Bankcard representatives in California, his customers patronized his businesses in California, the bills from US Bankcard and Elavon were mailed to him in California, and he had no ties to Georgia. He also stated that it would be "very difficult and unduly expensive for me to travel to Georgia to litigate or arbitrate my claims against USBSI, particularly in light of the fact that my individual claims relating to the PCI non-compliance fees at issue in this case are relatively small and not worth the difficulty of pursing if they had to be pursued in Georgia and on an individual basis." "[A] forum selection clause that requires a consumer to travel 2,000 miles to recover a small sum is not reasonable." (*Aral v. EarthLink, Inc*. (2005) 134 Cal.App.4th 544, 561.) Given the lack of a logical nexus to Georgia, the lack of arms-length negotiations leading to the

forum selection clause, the nature of Vera's businesses, and the difficulty inherent in requiring a small business owner to travel across the country for an arbitration, the trial court did not err in holding that the forum selection clause was substantively unconscionable.

2. *Choice of law*

US Bankcard also argues that the trial court incorrectly held that substantive unconscionability was evident in "the fact that the arbitration provision limits the remedies to 'any remedy or relief that a court in Georgia could order or grant.'" US Bankcard argues that "applying Georgia law does not limit remedies," and that without a choice-of-law analysis comparing California and Georgia law, the court erred in determining that this provision was substantively unconscionable.

The choice-of-law provision in the Terms of Service states that "the Agreement" will be governed by Georgia law, and the arbitration provision will be governed by the Federal Arbitration Act. US Bankcard asserts, "There is no requirement that Georgia substantive law must apply," and "the arbitrator could easily decide [that] California law should apply to this dispute." However, nothing in the Terms of Service suggests that the choice-of-law provision is limited to a conflicts-of-law analysis. "Contractual choice of law clauses are generally construed to designate the substantive law of the chosen jurisdiction. In effect, they substitute for the conflict of laws analysis that would otherwise be used to establish the applicable law." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 251 fn. 13.) US Bankcard has not provided any evidence or authority to suggest that the choice-of-law clause in the Terms of Service is

limited only to a choice-of-law analysis rather than including substantive law.

Vera argues that the choice-of-law provision "is unconscionable to the extent it purports to eliminate remedies or relief, including statutory remedies, that would be available in California courts." Vera's first and third causes of action are basic contract claims, but his second cause of action is based on California's UCL. For this cause of action, Vera sought restitution, disgorgement, and permanent injunctive relief under California's statutory scheme on behalf of himself and members of the alleged class. Neither party has suggested that such remedies are available under Georgia substantive law. Vera has therefore met his burden to show that the Georgia choice-of-law provision contributes to the substantive unconscionability of the arbitration provision.[4]

The arbitration provision in the Terms of Service was therefore procedurally and substantively unconscionable, and

---

[4] Vera argues that the recent case *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945 renders the Terms of Service unenforceable. In that case, the Supreme Court held that "a provision in *any* contract—even a contract that has no arbitration provision—that purports to waive, in all fora, the statutory right to seek public injunctive relief under the UCL . . . is invalid and unenforceable under California law." (*McGill*, 2 Cal.5th at p. 962.) Vera argues that the Terms of Service is unenforceable because it bars certain remedies provided by the UCL. This argument was not developed in the trial court, because *McGill* was decided after the hearing on US Bankcard's motion. Because we find the arbitration agreement to be unconscionable and therefore unenforceable, we do not address whether it would also be unenforceable under the reasoning of *McGill*.

therefore unenforceable. US Bankcard's motion to compel arbitration was properly denied.

E. Severability

US Bankcard asserts that even if certain provisions of the Terms of Service were unconscionable, the trial court abused its discretion by not severing the unconscionable provisions. "In assessing whether the trial court erred in declining to sever any unconscionable provisions and enforce the remainder of the arbitration agreement, we will not reverse the trial court's severance decision unless an abuse of discretion is shown." (*Baxter v. Genworth North America Corporation* (2017) 16 Cal.App.5th 713, 722 (*Baxter*).)

Severance may be properly denied where the agreement contains more than one unconscionable provision, and " 'there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.' ([Citation.])" (*Baxter, supra*, 16 Cal.App.5th at p. 738; see also Civ. Code, § 1670.5, subd. (a) ["If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."].) Here, the Terms of Service and its arbitration provision included multiple substantively unconscionable terms, including the forum selection clause and the choice-of-law provision. Moreover, the procedural unconscionability inherent in the contract cannot be severed. The trial court therefore did not abuse its discretion by holding

that the unconscionable provisions could not be severed from the remainder of the contract.

F. Additional grounds for denying the motion

In his respondent's brief, Vera asserts a number of additional bases for denying US Bankcard's motion to compel arbitration. For example, Vera argues that the trial court erred in holding as follows: US Bankcard could invoke the arbitration provision even though it was not a party to the Terms of Service, the Merchant Agreement incorporated the Terms of Service, and the parties reached an agreement to arbitrate. US Bankcard asserts that Vera may not challenge the court's rulings on these issues because he did not file a cross-appeal.

Because we have already held that the arbitration provision was unconscionable and therefore unenforceable, we do not address these alternative bases for affirming the court's ruling. (See, e.g., *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1029 ["[W]hen an appellate court concludes that affirmance of the judgment is proper on certain grounds it will rest its decision on those grounds and not consider alternative grounds which may be available."]; *Kaiser Foundation Health Plan, Inc. v. Superior Court* (2012) 203 Cal.App.4th 696, 715 ["We decline to review an issue that will have no effect on the parties."].)

DISPOSITION

The order denying US Bankcard's petition to compel arbitration is affirmed. Vera is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

WILLHITE, Acting P. J.

MANELLA, J.