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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ELITE LOGISTICS CORPORATION)	Case No. CV 11-02952 DDP (PLAx)
and on behalf of all others)	
similarly situated,)	
)	
Plaintiff,)	ORDER DENYING DEFENDANT'S MOTION
)	TO COMPEL ARBITRATION
v.)	
)	
MOL AMERICA, INC.,)	[Dkt. No. 20]
)	
Defendant.)	
_____)	

Presently before the court is a Motion to Compel Arbitration filed by Defendant Mol America, Inc. ("Mol"). The Motion is substantially similar to a motion filed by the defendant in a related case, Unimax Express, Inc. v. Cosco North America, Inc., No. CV 11-2947 DDP. This court denied the motion to compel arbitration in the related case. (See No. CV 11-2947, Dkt. No. 22.) Having considered the submissions of the parties in this case, the court denies the instant Motion on the grounds discussed in Unimax v. Cosco and reiterated below, and adopts the following order.

///

1 **I. Background**

2 Mol transports cargo containers over sea and land. Mol
3 contracts with trucking companies such as Plaintiff Elite Logistics
4 Corp. ("Elite") for the overland portions of Mol's shipments. When
5 truckers do not pick up loaded containers within the agreed upon
6 time, equipment providers such as Mol charge truckers "demurrage,"
7 or late pick-up, fees. Similarly, when trucking companies do not
8 return empty containers on time, Mol charges "per diem," or late
9 drop-off, fees.

10 Mol only contracts with carriers who are signatories to a
11 standard contract, the Uniform Intermodal Interchange and
12 Facilities Access Agreement ("the Agreement"). The Agreement was
13 drafted by the Intermodal Association of North America ("the
14 Association"), a trade organization located in Maryland.¹ Elite
15 has signed the Agreement.

16 The Agreement contains an arbitration provision ("the
17 Provision"). The Provision sets forth default procedures for
18 resolving disputes "with respect to per diem [i.e. late drop-off]
19 or maintenance and repair invoices." (Agreement § H.1). Invoiced
20 parties must provide written notification of disputed charges
21 within thirty days of receipt of the disputed invoice. (Agreement
22 §§ H.2-H.3.) If an invoiced party fails to timely provide written
23 notice of a dispute, that party may not seek arbitration or assert
24 any other defense against the invoice, and must pay the invoiced
25 charges immediately. (Agreement § H.3.)

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28 ¹ The Association is not a party to this action.

1 If arbitration is sought, the Association will appoint a
2 three-member panel to resolve the dispute. (Agreement ¶ 3.)
3 "Disputes must be confined to charges arising from Maintenance and
4 Repair . . . or Per Diem [late drop-off] invoices." (Agreement,
5 Ex. D ¶ 6.) Once an arbitration is initiated, the moving party has
6 fifteen days to submit written arguments to the Association. (Id.
7 ¶ 7.) The non-moving party then has fifteen days to submit
8 responses. (Id. ¶ 8.) The arbitration panel will then render a
9 decision based on the written submissions of the parties. (Id. ¶
10 9.) If further information is required, the panel "may" hold a
11 conference call with both parties. (Id. ¶ 10.) The panel's
12 decisions are final, and are not subject to appeal. (Id. ¶ 11.)

13 On April 7, 2011, Elite filed the instant action against Mol,
14 alleging that Mol unlawfully levies late pick-up and late drop-off
15 fees on weekends and holidays in violation of California Business
16 and Professions Code § 22928. Mol now moves to compel Elite to
17 arbitrate its claims under the Agreement.

18 **II. Legal Standard**

19 Under the FAA, 9 U.S.C. § 1 et seq., a written agreement that
20 controversies between the parties shall be settled by arbitration
21 is "valid, irrevocable, and enforceable, save upon such grounds as
22 exist at law or in equity for the revocation of any contract." 9
23 U.S.C. § 2. A party aggrieved by the refusal of another to
24 arbitrate under a written arbitration agreement may petition the
25 court for an order directing that arbitration proceed as provided
26 for in the agreement. 9 U.S.C. § 4; see e.g., Stirlen v.
27 Supercuts, Inc., 51 Cal. App. 4th 1519, 1526-27 (1997) (considering
28 a motion to compel arbitration). In considering a motion to compel

1 arbitration, the court must determine whether there is a duty to
2 arbitrate the controversy, and "this determination necessarily
3 requires the court to examine and, to a limited extent, construe
4 the underlying agreement." Stirlen, 51 Cal. App. 4th at 1527
5 (internal citation omitted). The determination of the validity of
6 an arbitration clause, which may be made only "upon such grounds as
7 exist for the revocation of any contract," is solely a judicial
8 function. Id. (internal citation omitted).

9 If the court is satisfied that the making of the arbitration
10 agreement or the failure to comply with the agreement is not at
11 issue, the court shall order the parties to proceed to arbitration
12 in accordance with the terms of the agreement. 9 U.S.C. § 3. The
13 FAA reflects a "liberal federal policy favoring arbitration
14 agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20,
15 25 (1991) (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr.
16 Corp., 460 U.S. 1, 24 (1983)).

17 **III. Discussion**

18 A. Viability of Unconscionability Defense

19 Elite opposes Mol's instant motion on the grounds that the
20 Provision is unconscionable and, therefore, unenforceable. As an
21 initial matter, the court rejects Mol's suggestion that this
22 argument is controlled by the Supreme Court's decision in AT&T
23 Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011). Concepcion
24 limited state-law-based unconscionability challenges to class-
25 action waiver provisions in arbitration agreements. Concepcion,
26 131 S.Ct. at 1753. The Court recognized, however, that "agreements
27 to arbitrate may be invalidated by generally applicable contract
28 defenses, such as fraud, duress, or unconscionability." Id. at

1 1746; See also Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947, 963
2 (9th Cir.2012) ("Concepcion did not overthrow the common law
3 contract defense of unconscionability whenever an arbitration
4 clause is involved. Rather, the Court affirmed that the [FAA's]
5 savings clause preserves generally applicable contract defenses
6 such as unconscionability"); Community State Bank v.
7 Strong, 651 F.3d 1241, 1267 n.28 (11th Cir. 2011) ("The ability of
8 such contractual defects to invalidate arbitration agreements is
9 not affected by the Supreme Court's decision in [Concepcion]. . .
10 .").

11 B. Choice of Law

12 Before determining whether the Provision is valid, this court
13 must first determine, under the choice-of-law rules of the forum
14 state, which state's laws apply. Pokorny v. Quixtar, 601 F.3d 987,
15 994 (9th Cir. 2010). Here, the Agreement contains a Maryland
16 choice of law provision. (Agreement § G.7.) In California, courts
17 generally respect choice-of-law provisions within contracts that
18 have been negotiated at arm's length. Nedlloyd Lines B.V. v.
19 Superior Court, 3 Cal. 4th 459, 464 (1992).² Choice-of-law
20 provisions will not be enforced, however, if "the chosen state has
21 no substantial relationship to the parties or the transaction and
22 there is no reasonable basis for the parties choice" or 2) the
23 chosen state's law is contrary to the fundamental public policy of

24 _____
25 ² The court notes that here, as discussed further infra, the
26 Agreement was not negotiated at arm's length. The Association
27 drafted the standard language of the Agreement, to which Elite had
28 to agree in order to conduct business with Mol. "[C]ourts should
not apply choice-of-law provisions in adhesion contracts if to do
so would result in substantial injustice to the adherent." Flores
v. American Seafoods Co., 335 F.3d 904, 918 (9th Cir. 2003)
(internal quotation marks omitted).

1 a state that has a materially greater interest in the issue at hand
2 and whose law would otherwise apply. Bridge Fund Capital Corp. v.
3 Fastbucks Franchise Corp., 622 F.3d 996, 1002-1003 (9th Cir. 2010);
4 Nedlloyd, 3 Cal.4th at 465.

5 Here, Maryland has no relationship to the parties or the
6 transactions at issue here. No party is located in Maryland, nor
7 does it appear that any party conducts substantial business in
8 Maryland. Elite asserts, and Mol does not dispute, that all of the
9 transactions relevant here occurred in California. Elite's claims
10 arise under California state law alone. This case's only tie to
11 Maryland is the fact that the Association, which drafted the
12 Agreement, is located in Maryland. The Association, however, is
13 not a party to this case. The court cannot find any reasonable
14 basis to apply Maryland law where the only conceivable connection
15 to Maryland is a contract of adhesion drafted by a third party.
16 Accordingly, California law applies.

17 C. Validity of the Arbitration Provision

18 Unconscionability has generally been recognized to include (1)
19 an absence of meaningful choice on the part of one of the parties
20 and (2) contract terms which are unreasonably favorable to the
21 other party. Stirlen, 51 Cal. App. 4th at 1531. Put another way,
22 unconscionability has a "procedural" and "substantive" element.
23 See Kilgore, 673 F.3d at 963. "[A]n arbitration agreement, like any
24 other contractual clause, is unenforceable if it is both
25 procedurally and substantively unconscionable." Pokorny, 601 F.3d
26 at 996.

27 California courts apply a "sliding scale" analysis in making
28 this determination. "[T]he more substantively oppressive the

1 contract term, the less evidence of procedural unconscionability is
2 required to come to the conclusion that the term is unenforceable,
3 and vice versa." Armendariz v. Found. Health Psychcare Servs.,
4 Inc., 24 Cal.4th 83, 114 (2000). Both procedural and substantive
5 unconscionability must be present for a contract to be declared
6 unenforceable, but they need not be present to the same degree.
7 Id.; See also Harper v. Ultimo, 113 Cal. App. 4th 1402, 1406
8 (2003).

9 1. Procedural Unconscionability

10 Mol's contention that the Agreement is not adhesive is not
11 persuasive. Mol appears to argue that Elite had some voice in
12 the drafting of the Agreement, presumably because motor carriers
13 were represented on the Association's Executive Committee. (Mot.
14 at 14; Reply at 20.) There is no evidence, however, that Elite
15 took part in any negotiations. Indeed, Elite insists that it did
16 not. (Opp. at 11.) Mol further asserts that the Agreement was not
17 adhesive because Unimax had already signed on to the Agreement
18 prior to the adoption of the Arbitration Provision. (Mot. at 14.)
19 Mol does not, however, dispute Unimax's assertion that Unimax had
20 to agree to the standardized Agreement, including the Provision, in
21 order to conduct business as an intermodal carrier after the
22 adoption of the Provision in 2008.

23 It is well settled that standardized, adhesive contracts
24 drafted by the stronger party are procedurally unconscionable.
25 Pokorny, 601 F.3d at 996. The fact that the Association, and not
26 Mol, drafted the Provision's language, does not affect the strength
27 of the parties' relative positions. Though Mol did not itself
28 draft the Agreement, it clearly approved of the Provision's

1 language, and proceeded to present the Provision to Elite on a take
2 it or leave it basis. Elite could not operate as an intermodal
3 carrier unless it agreed to the Provision. As such, the Provision
4 is procedurally unconscionable. See, e.g. Bridge Fund, 622 F.3d at
5 1004 ("California law treats . . . terms over which a party of
6 lesser bargaining power had no opportunity to negotiate[] as
7 procedurally unconscionable to some degree.") (citing Armendariz,
8 24 Cal.4th at 114); Pokorny, 601 F.3d at 996 ("An agreement or any
9 portion thereof is procedurally unconscionable if 'the weaker party
10 is presented the clause and told to "take it or leave it" without
11 the opportunity for meaningful negotiation.'" (quoting Szetela v.
12 Discover Bank, 97 Cal.App.4th 1094 (2002))).

13 2. Substantive Unconscionability

14 Substantive unconscionability focuses on the one-sidedness of
15 the contract terms. Armendariz, 24 Cal.4th at 114. "Where an
16 arbitration agreement is concerned, the agreement is unconscionable
17 unless the arbitration remedy contains a 'modicum of
18 bilaterality.'" Ting, 319 F.3d at 1149 (citing Armendariz, 319
19 F.3d at 117).

20 Here, the burdens of the arbitration procedures fall
21 inordinately on the invoiced party. If Elite believes it has been
22 improperly charged, it must provide written notice of the dispute
23 to Mol within thirty days, at pain of forfeiting any defense to
24 such charges, regardless of whether the charges are proper. This
25 thirty-day notice period operates as a statute of limitations
26 shorter than the four-year claim period available under California
27 law, and works solely to Mol's benefit. See California Business
28 and Professions Code § 17208.

1 Other terms of the Provision also operate solely to Mol's
2 benefit. While both parties could theoretically initiate an
3 arbitration, the burden is always on the invoiced party to initiate
4 a dispute. (Agreement § H.1.) Though an invoiced party may
5 receive any number of invoices in a given thirty-day period, it may
6 not dispute more than five invoices in a single arbitration.
7 (Agreement Ex. D ¶ 6.) Here, it appears that Mol took over one
8 hundred billing actions during some months. (Declaration of Don
9 Licata in Support of Motion, Ex. 1.) When an invoiced party
10 believes it has been wrongly charged and proceeds to arbitrate five
11 or fewer charges, it must submit all of its arguments to the
12 arbitration panel first. The invoiced party must articulate its
13 arguments with a clarity bordering on prescience, for it has no
14 right to discovery and will have no opportunity to rebut the
15 invoicing party's response (notwithstanding the possibility that
16 the arbitration panel "may" initiate a conference call).

17 Finally, even if the invoiced party receives a favorable
18 determination, the arbitration panel lacks the power to enjoin the
19 invoicer's wrongful conduct, leaving the invoicer free to repeat
20 the offense. In the case of an ongoing violation, the invoiced
21 party's only option is to initiate a separate dispute every thirty
22 days, ad infinitum. Under these circumstances, the arbitration
23 procedures lack even a modicum of bilaterality, and the Provision
24 is, therefore, substantively unconscionable.

25 **IV. Conclusion**

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1 For the reasons stated above, Defendants' Motion to Compel
2 Arbitration is DENIED.³ Any class certification motion shall be
3 filed within ninety days of the date of this order.
4 IT IS SO ORDERED.

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7 Dated: June 21, 2012


DEAN D. PREGERSON
United States District Judge

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26 ³ The court acknowledges that the Los Angeles County Superior
27 Court disagreed with this court's reasoning regarding the viability
28 of the unconscionability defense and compelled arbitration in Elite
Logistics Corp v. Wan Hai Lines, et al., Case No. BC 459050 and
Unimax Express v. Hyundai Merchant Marine, Case No. BC 459051.