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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

C.D. ROWSELL et al., Cross-complainants and Appellants, v. AMERICAN EXPRESS BANK, FSB et al., Cross-defendants and Respondents.	A142306 (San Mateo County Super. Ct. No. CIV501187)

I. INTRODUCTION

In this cross-action arising out of an underlying collection suit, cross-complainants and appellants C.D. Rowsell (Rowsell) and Bosonda International Ltd. (Bosonda) (collectively, appellants) seek a declaratory judgment on behalf of themselves and a putative class of American Express credit and charge cardholders that the arbitration provisions in their cardmember agreements are unconscionable and unenforceable. The trial court denied class certification on the grounds that (1) Rowsell was not an adequate representative and did not have claims typical of the putative class, (2) individualized issues would predominate regarding whether the arbitration provisions were procedurally unconscionable and the requested declaratory relief was necessary or proper, and (3) a class action would not be superior to individual actions. Because we find the trial court's decision rested on improper criteria and erroneous legal assumptions, we reverse the order and remand for further proceedings.

II. FACTUAL AND PROCEDURAL BACKGROUND

Cross-defendant and respondent American Express Bank, FSB (AEFSB) is a federally chartered savings bank engaged in the business of, among other things, issuing American Express credit cards and charge cards. Appellants are former cardmembers on three AEFSB business credit accounts that were opened on various dates in 2006 and 2007. At the time the accounts were opened, Bosonda was incorporated in Delaware and doing business in California, with its principal place of business in China. Rowsell is Bosonda's founder, president, and chairman of the board.

Each of appellants' accounts was governed by a written cardmember agreement setting forth the terms and conditions governing the use of the accounts. The cardmember agreement contained an arbitration provision that required binding individual arbitration of "any claim, dispute or controversy between you and us arising from or relating to your Account, this Agreement, the Electronic Funds Transfer Services Agreement, and any other related or prior agreement that you may have had with us, or the relationships resulting from any of the above agreements ('Agreements'), except for the validity, enforceability or scope of this Arbitration Provision or the Agreements."

Appellants failed to make timely and sufficient payments on their accounts, and AEFSB cancelled the accounts as of June 2009. The total current balance due on the accounts is $84,423.18. In July 2010, AEFSB filed a collection action against Rowsell to recover the balance owed on one of the accounts. In response, Rowsell filed a motion to compel arbitration seeking, counterintuitively, a ruling that the arbitration provision was unconscionable.[1] After AEFSB voluntarily dismissed the collection action, Rowsell filed a demand for arbitration with the American Arbitration Association (AAA) seeking to arbitrate the issue of whether the arbitration provision in the cardmember agreement was

[1] Appellants' stated rationale for moving to compel arbitration was to create standing to challenge the arbitration provision in light of the decision in *Lee v. American Express Travel Related Services* (9th Cir. 2009) 348 Fed.Appx. 205 (dismissing claims alleging unconscionable arbitration terms in cardmember agreements for lack of federal Constitution article III standing).

unconscionable. AAA declined Rowsell's demand for arbitration for reasons not relevant here, and Rowsell later filed a demand for arbitration with JAMS.[2]

In December 2010, AEFSB filed the underlying collection action against Rowsell. Rowsell filed a putative class action cross-complaint against AEFSB and two other American Express card issuers, American Express Centurion Bank (AECB) and American Express Travel Related Services Company, Inc. (AETRSC), alleging the arbitration provision in the cardmember agreement was unconscionable and unlawful under the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.), and seeking a declaratory judgment to that effect. Rowsell again moved to compel arbitration, but the motion was stricken as a sham.

After a demurrer to the cross-complaint was partially sustained with leave to amend, appellants filed the operative first amended cross-complaint against AEFSB, AECB, AETRSC, and American Express Company (collectively, respondents). Appellants alleged the arbitration provisions drafted and inserted by respondents into cardmember agreements and gift card terms and services agreements were unconscionable and in violation of the UCL because they:

"—are imposed on all card holders on a 'take it or leave it' basis with no opportunity by the card holder, including Rowsell, to negotiate any term thereof;

"—are contained in an adhesive form agreement prepared by American Express and concerning which American Express was in a much stronger bargaining position than the card holder, including Rowsell;

"—provide that no injunctive relief—including broad-based injunctive relief authorized by the UCL—may ever be given, and that relief under the agreement can be made only on 'an individual basis' not involving 'the general public' since the decision maker's 'authority is limited to claims between you and us [Cross-Defendants and amorphous others] alone' in which relief 'is limited to awards to you and us alone . . .';

[2] The JAMS arbitration was eventually stayed pending resolution of the instant cross-action due to the arbitration provision's exclusion of matters of unconscionability from the scope of arbitration.

"—provide that in arbitration '[a]ny Claim shall be resolved . . . by arbitration pursuant to this Arbitration Provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed. Claims shall be referred to either JAMS or the American Arbitration Association ("AAA") . . .' but does not provide the card holder with copies of the rules of those organizations or specify which of several codes of procedure applies to the arbitration;

"—provide that '[t]he arbitration shall be governed by the applicable Code, except that (to the extent enforceable under the FAA [(Federal Arbitration Act; 9 U.S.C. § 1 et seq.)]) this Arbitration Provision shall control if it is inconsistent with the applicable Code' but fails to advise of any specific inconsistency those codes may have with the Arbitration Provision;

"—provide no way for the card holder to know at the time he/she initially entered into the agreement and otherwise paid the required fees what the rules would be at the time of the arbitration as well as what inconsistencies existed between the agreements and the Code because American Express has given itself the unilateral right to amend the arbitration provision at any time (including before, during, or after any arbitration) and the arbitration provision otherwise makes the applicable arbitration rules those in effect when the arbitration is filed;

"—provide that '[n]o arbitrator's award or decision will have any preclusive effect as to issues or claims in any dispute with anyone who is not a named party to the arbitration' which is against public policy by denying any mutual collateral estoppel or precedential value to any decision rendered against American Express;

"—provide that 'should any portion of the "Restrictions on Arbitration" [section containing the injunction waiver] be deemed invalid or unenforceable, the entire Arbitration Provision (other than this sentence) will not apply' even though all determinations as to severability of the provision is a matter exclusively reserved for the Courts;

"—provide a description of the term 'us' relating to the non-card holder parties by whom or against whom a claim can be made by the cardholder that must be arbitrated is

so vague and overbroad that it is patently insufficient to establish any reasonable expectation or knowledge of the cardholder as to what matters and persons are covered by the agreement; and,

"—provide American Express with the unilateral right and authority to add, delete, modify, or otherwise alter any term of the cardmember agreement (including the arbitration provision) without providing a mutual right to cardholders (excluded from this claim of unconscionability and illegality is American Express' statutory right to alter, change, modify, or take other action relative to financial terms contained in the cardmember agreement such as the amount of the annual fee, late fees, interest, and other similar matters)."

Appellants further alleged that as a result of the unconscionability of the arbitration provisions, cardmembers suffered a loss of money, in whole or part, of the sums paid as annual fees or purchase fees to respondents as consideration for the promises contained in the cardmember agreement, including the right to arbitration of claims. The first amended cross-complaint contained seven causes of action, six under the UCL and the seventh for declaratory judgment. In seeking declaratory relief, appellants alleged an actual controversy among the parties over the unconscionability of the arbitration terms in the written cardmember agreements for which a fee is paid by the cardholders. Appellants brought these claims on behalf of a putative class of "[a]ll persons and entities residing in California who, according to the records of American Express, have been issued and have paid or are paying" annual fees for credit and/or charge cards or purchase fees for stored value products (gift cards) issued by respondents.

In October 2012, during the pendency of this litigation, respondents sent some of their cardmembers a change-in-terms notice (October 2012 notice) informing them that effective January 1, 2013, the arbitration provision in the cardmember agreement would be replaced with a new section entitled "Claims Resolution" (modified arbitration provision). Among other changes, the modified arbitration provision allowed cardmembers to reject arbitration altogether by mailing a written rejection notice within 45 days after their first card purchase or by February 15, 2013, whichever was later. The

October 2012 notice was not provided to cardmembers such as appellants whose accounts had been cancelled and who were not paying down the balance on those accounts.

Meanwhile, respondents prevailed in court on several challenges to appellants' causes of action. The trial court sustained without leave to amend respondents' demurrer to the UCL claims pertaining to the gift card allegations (second, fourth, and sixth causes of action). In May 2013, the trial court granted respondents' motion for summary adjudication of the remaining UCL claims (first, third, and fifth causes of action) on the grounds that appellants lacked standing because they did not allege or present evidence of a nontrivial monetary loss that resulted from the alleged UCL violations. The trial court denied summary adjudication of the seventh cause of action for declaratory judgment, finding that it was not duplicative of the statutory claims and that the determination whether declaratory relief was " 'necessary' or 'proper' " was not appropriate for determination by summary adjudication rather than on the merits.

Thereafter, appellants moved for a determination of class issues on their sole surviving claim for declaratory judgment. Appellants sought to certify the following class:

" 'All persons and entities residing in California and having a California billing address who/which, according to the records of American Express Company (including its subsidiaries, affiliates, or licensees (hereinafter "American Express"), have paid or are paying annual fees to American Express for American Express charge cards and/or credit cards bearing the American Express name or the American Express trade or service mark or logo issued by American Express pursuant to a card agreement containing an arbitration provision during all or any part of the period covered by the applicable limitations period and pendency of this action. Excluded from this class are: (1) relative to the first cardholding year only, cardholders who had their first-year annual fee waived by American Express during the class period; (2) all officers and employees of American Express; (3) persons who, as of the date of class certification, have pending in any court an individual action against American Express, or who have obtained a judgment against American Express, or who have executed a release in favor of American Express which

encompasses, adjudicates or releases all of the certified claims in this action; and, (4) judges, court personnel, and jurors hearing this matter.' "

A reported hearing was held on October 25, 2013, and the matter was taken under submission. Thereafter, appellants filed an ex parte application to substitute "Bosonda International Ltd., a Delaware corporation" with "Bosonda International Ltd., a California Corporation" after Bosonda was converted to a California corporation. The application was granted, and the trial court ordered supplemental briefing on whether Bosonda was an adequate class representative and whether its claims were typical of the putative class members' claims. After supplemental briefs were filed, the matter was resubmitted without further oral argument.

On May 12, 2014, the trial court issued a detailed order denying the motion for class certification. The trial court made several preliminary rulings, including denying appellants' motion to strike portions of the declaration of Stephanie Fogelman filed by respondents in opposition to the motion. On the class certification requirements, the trial court found that Rowsell was not an adequate class representative and did not have claims typical of the putative class because there was no evidence that he paid the annual fees, and therefore he was not a member of the class he sought to represent. The trial court further found that individual issues would predominate in regard to determining procedural unconscionability due to the modification to the arbitration provision that occurred during the pendency of this action. The trial court reasoned that since some class members had the ability to reject the modified arbitration provision, it was "potentially not a contract of adhesion" for them, and therefore, in order to establish procedural unconscionability, these class members would have to individually litigate questions regarding the formation of the modified arbitration agreements.

The trial court further found that individual issues would predominate in regard to individual class members' entitlement to declaratory relief. Citing *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634 (*Meyer*) and Code of Civil Procedure section 1061, the trial court held that a declaratory judgment declaring the arbitration provision unconscionable is not " 'necessary or proper' " under section 1061 where no dispute has

arisen that would cause the arbitration provision to come into play. The trial court found that appellants failed to submit evidence as to the number or percentage of putative class members who had a current dispute with respondents or were likely to have a dispute with respondents in the future, and the court rejected appellants' evidence of past collection actions as insufficient to establish pending disputes that would implicate the arbitration provision. Because each class member would be required to litigate factual questions to determine his or her right to declaratory relief, the trial court concluded that a class action was not appropriate.

Finally, the trial court held that a class action would not be superior to individual actions for several reasons. First, because of the absence of evidence of pending or future disputes between respondents and the putative class, the trial court reasoned that "potentially most of the putative Class would not receive any benefit from this lawsuit." Second, the trial court found that unlike appellants who had no monetary loss resulting from the allegedly unconscionable arbitration provision, other members of the putative class who did have monetary harm would "potentially lose or adulterate this claim by proceeding with a class action that cannot adjudicate that monetary claim." Third, the trial court held that because respondents could modify the arbitration procedure, there was nothing to prevent them from changing the arbitration provision further and mooting or giving little legal precedent to any decision in this case if there is a future dispute.

Basing its decision on these enumerated issues, the trial court held that it "need not determine whether Cross-Complainants have met any of the other elements of class certification."

On June 30, 2014, appellants filed a timely notice of appeal. (See *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 ["A decision by a trial court denying certification to an entire class is an appealable order."].)

III. DISCUSSION

A. Certification Requirements; Standard of Review[3]

"Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citation.] The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.] [¶] The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

"We review the trial court's ruling for abuse of discretion and generally will not disturb it ' "unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions." ' [Citation.] We review the trial court's actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530 (*Ayala*).)

B. The Trial Court Did Not Err in Requiring Appellants to Satisfy the Predominance and Superiority Requirements

Appellants argue the trial court abused its discretion by failing to address the threshold question that predominance and superiority are not required for declaratory

[3] Respondents highlight a choice-of-law provision in the cardmember agreements applying Utah law. The trial court did not determine whether Utah or California law applied and relied exclusively on California and federal law in its order. On appeal, respondents do not set forth any legal argument or analysis on the choice-of-law issue under a separate heading of their brief as required by California Rules of Court, rule 8.204(a)(1)(B). Instead, they simply cite to Utah case law and conclude without legal analysis that Utah law applies. We regard the issue as waived. (See *Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1260, fn. 10.)

relief-only class actions in the style of rule 23(b)(2) of the Federal Rules of Civil Procedure (28 U.S.C.) (hereafter rule 23(b)(2)). Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." (*Ibid.*) In comparison, rule 23(b)(3) applies when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." (Fed. Rules Civ. Proc., rule 23(b)(3), 28 U.S.C.)

Respondents argue that appellants cannot pursue this argument on appeal because they did not raise it below. " 'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.' " (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.) Although appellants cited rule 23(b)(2) in their moving papers and requested certification pursuant to California law "and, as applicable, Federal Rule of Civil Procedure 23(b)(2)," they did not specifically argue that certification under rule 23(b)(2) would dispense with California's predominance and superiority requirements, and they proceeded to argue that these requirements were met. Appellants cannot validly claim the trial court improperly applied criteria that they themselves asked the court to apply.

Moreover, the cases cited by appellants do not support their position that predominance and superiority are not required in California class actions seeking solely declaratory relief, even where rule 23(b)(2) is referenced. In *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, *Frazier v. City of Richmond* (1986) 184 Cal.App.3d 1491, and *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, the issue was whether class notice and an opportunity to opt out—not predominance and superiority—were required in rule 23(b)(2)-style class actions seeking primarily injunctive or declaratory relief. (See *Hefczyc v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 535 (*Hefczyc*).) In *Capitol People First v. State Dept. of*

Developmental Services (2007) 155 Cal.App.4th 676 (*Capitol People First*), we recognized that it was appropriate for the trial court to look to rule 23(b)(2) for guidance in determining whether common issues of law or fact predominated where the defendant has acted or refused to act on grounds generally applicable to the class. (See *Capitol People First*, at p. 692, fn. 12.) We did not hold that rule 23(b)(2) dispenses with the predominance and superiority requirements under California law, and we went on to examine whether these requirements were met. (*Capitol People First*, at pp. 693–696.)

Furthermore, the requirements of predominance and superiority are mirrored in the factors of cohesiveness and necessity applied in rule 23(b)(2) class actions. As a leading secondary authority observes: "Notwithstanding the absence of these textual requirements, some courts have grafted onto Rule 23(b)(2) a set of requirements that approximate the predominance and superiority tests. Specifically, a number of courts have demanded that Rule 23(b)(2) classes be 'cohesive,' and a smaller number of courts have required that class certification be 'necessary.' " (2 Rubenstein, Newberg on Class Actions (5th ed. 2012) § 4:33, p. 118.) "[T]he cohesiveness inquiry mirrors [rule] 23(b)(3)'s predominance inquiry . . . ." (*Id.*, § 4:34, p. 126; see *Barnes v. American Tobacco Co.* (3d Cir. 1998) 161 F.3d 127, 142–143 [holding that courts have discretion to deny certification in rule 23(b)(2) cases in presence of disparate factual circumstances].) The necessity requirement "roughly parallels the superiority requirement for [rule 23(b)(3)] classes." (Newberg on Class Actions, § 4:35, pp. 132–133.)

For all of these reasons, we see no error in the trial court's application of well-established California case law on the predominance and superiority requirements in deciding whether to certify a putative class action seeking solely declaratory relief. (See *Hefczyc*, *supra*, 17 Cal.App.5th at pp. 535–536 [finding no gap in California precedent to be filled by reference to rule 23(b)(2)]; *Kendall v. Scripps Health* (2017) 16 Cal.App.5th 553, 578 [same].)

C. Predominance of Common Issues of Law or Fact

"Commonality as a general rule depends on whether the defendant's liability can be determined by issues common to all class members." (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.) "As the focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case [citations], in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.] 'Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.' " (*Sav-On, supra*, 34 Cal.4th at p. 327.)

"The predominance [criterion] means 'each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.' " (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1421.)

"Once common and individual factors have been identified, the predominance inquiry calls for weighing costs and benefits. 'The "ultimate question" the element of predominance presents is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." ' " (*Ayala, supra*, 59 Cal.4th at p. 539.) "Accordingly, the impact of individual variations on certification will depend on the significance of the factor they affect. Some may be of no consequence if they involve minor parts of the overall calculus and common proof is available of key factors . . . ; conversely, other variations, if they undermine the ability to prove on a common basis the most significant factor or factors in a case, may render trial unmanageable even where other factors are common. The proper course, if there are individual variations in parts of the common law test, is to

consider whether they are likely to prove material [citations], and, if material, whether they can be managed [citation]." (*Id.* at pp. 539–540.)

1. Declaratory Relief

" 'The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) A court may refuse to grant the requested declaratory relief "in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061.)

Fairly construed, appellants' theory of liability is that respondents deprived them and the putative class of the full value of their annual fees by placing unconscionable, and therefore "defective," arbitration provisions into standardized cardmember agreements common to the putative class. Appellants analogize this to class actions involving the manufacture of an " 'inherently defective' " product or a price-fixing scheme where the anticompetitive injury is inferred from the conspiracy. (See *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 912 [product defect]; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1352–1353 [antitrust violations].) We assume for purposes of the certification motion that the theory has merit and ask only if it can be established with common proof. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023 (*Brinker*).) We find that it can, because appellants allege a common practice directed towards similarly situated individuals. (See *Capitol People First, supra,* 155 Cal.App.4th at pp. 692–693 [alleging systemic failure of agencies and regional centers to provide developmentally disabled persons with least restrictive community settings]; *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1278–1279 [challenging county's practice of depriving general relief recipients of benefits]; *Mendoza v. County of Tulare* (1982) 128 Cal.App.3d 403, 417 [challenging jail conditions on inmates].) Every putative class member who paid annual fees and received the allegedly unconscionable arbitration terms would have generally been affected by this practice, and because respondents allegedly deny the unconscionable and illegal nature of the arbitration terms, it follows that the challenged provisions come into play. Unlike

cases where the defendant's liability cannot be determined without reference to individual variations among the putative class (see, e.g., *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1426–1431), the wrongfulness of the challenged practice here is capable of being judged in the abstract based on what the arbitration provisions say and do not say.

We feel the trial court did not give due consideration to the allegations and theory of relief advanced by appellants and failed to take "a broader, systemic view concentrating on respondents' policies and practices." (*Capitol People First, supra,* 155 Cal.App.4th at p. 690.) It also relied too heavily on *Meyer,* even though *Meyer* is not a class certification case (see *Sav-On, supra,* 34 Cal.4th at p. 336 [rejecting reliance on non-class certification case]) and the plaintiffs in *Meyer* did not advance the same theory as appellants do here (see *Meyer, supra,* 45 Cal.4th at p. 639 [characterizing action as "a preemptive lawsuit to strike these terms should any dispute arise"]). To the extent the trial court implicitly rejected appellants' theory of an overarching dispute with respondents as not a necessary or proper basis for granting declaratory relief, it was an adjudication of the merits that was not essential to decide the class certification issues. (See *Brinker, supra,* 53 Cal.4th at pp. 1024–1025.) For these reasons, we find that the trial court's decision as to the declaratory relief claim rested on improper criteria.

2. Procedural Unconscionability

Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114, abrogated in part on another ground in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339–340.) In this case, the trial court held that individual issues would predominate on the issue of procedural unconscionability because putative class members who opted out of arbitration would be required to individually litigate questions regarding the formation of their modified arbitration agreements.

As a threshold matter, appellants contend the modified arbitration agreement was illusory because respondents had the power to unilaterally modify the arbitration terms to

cover existing claims. Appellants further argue the trial court erred in focusing exclusively on adhesion, which is not a prerequisite for procedural unconscionability, and ignoring the other allegations of unconscionable terms in the arbitration agreement.

a. Substantial Evidence Supports the Implied Finding That the Modified Arbitration Agreement Is Not Illusory

" 'To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them.' " (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 216.) We infer that the trial court found the modified arbitration agreement to be non-illusory, since it went on to find that the opt-out clause contained therein created individualized issues with regard to procedural unconscionability. Both parties appear to agree that this is a necessary threshold factual question for resolution on the merits. (See *Brinker, supra*, 53 Cal.4th at p. 1026 [examining merits at parties' request].)

The cardmember agreements at issue contain identical provisions entitled "Changing this Agreement/Assignment of this Agreement" that state in relevant part: "We may change the terms of or add new terms to this Agreement at any time, in accordance with applicable law. We may apply any changed or new terms to any then-existing balances on your Account as well as to future balances." Similarly, the October 2012 notice contained a paragraph describing the effect of the modifications: "This notice formally amends the Agreement as described below. This change applies to existing and future balances on your account."

"A contract is unenforceable as illusory when one of the parties has the unfettered or arbitrary right to modify or terminate the agreement or assumes no obligations thereunder." (*Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 385.) However, where the contract gives one party the power to modify or terminate, " ' "it is not fatal if the exercise of the power is subject to prescribed or implied limitations such as the duty to exercise it in good faith and in accordance with fair dealings." ' " (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214.) "[W]hile the covenant may imply limitations making the use of that right fair and in good faith, it may

not give rise to duties or obligations that conflict with the agreement's express terms." (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1464.) "A unilateral modification provision that is silent as to whether contract changes apply to claims, accrued or known, is impliedly restricted by the covenant so that changes do not apply to such claims. . . . If, however, a modification provision expressly addresses whether contract changes apply to claims that have accrued or are known to the employer, the covenant cannot create implied terms that contradict the express language." (*Id.* at p. 1465.)

Appellants argue the modification provision at issue expressly permits contract changes to apply to existing claims because it states that respondents may "apply any changed or new terms to any then-existing balances on your Account as well as to future balances." However, in view of the contractual language as a whole, we reject appellants' interpretation of "balance" as synonymous with "claim." "Claim" is expressly defined in the cardmember agreements and October 2012 notice as "any current or future claim, dispute or controversy" including "claims that arise from or relate to . . . any account created under any of the agreements, or any *balances* on any such account." (Italics added.) The provision allowing changed terms to apply to existing "balances" is not an express allowance as to existing "claims" as that term is defined (i.e., disputes or controversies relating to balances). Accordingly, the modification provision is impliedly restricted by the covenant of good faith and fair dealing so that changes to the arbitration terms do not apply to existing "claims." (See *Peleg v. Neiman Marcus Group, Inc.*, *supra,* 204 Cal.App.4th at p. 1465.)

Appellants submit that respondents denied a request for admission that the modification to the arbitration provision was "prospective-only," and this, appellants contend, was an admission of the provision's retroactivity to existing claims. However, the denial of a request for admission does not have the conclusive effect that an admission does. (See Code Civ. Proc., §§ 2033.410, subd. (a) [matters admitted in response to request for admission are conclusively established], 2033.420, subd. (a) [cost of proof sanctions for "fail[ure] to admit" truth of proven matter]; *Gonsalves v. Li* (2015)

232 Cal.App.4th 1406, 1416–1417 [denial of request for admission is not admissible at trial].) Though respondents' denial is consistent with the matter appellants wish to prove, it simply " ' "is not a statement of fact" ' " that the modified arbitration agreement is retroactive. (See *Gonsalves*, at p. 1416, citing *Gutierrez v. Mass. Bay Transp. Authority* (Mass. 2002) 772 N.E.2d 552, 567.) Furthermore, given that the matter to be proved was the interpretation of a contract, the trial court, with its broad discretion to determine the scope, effect, and relevance of any admission, could have reasonably concluded that the clear and explicit language of the modified arbitration agreement governed its interpretation over any extrinsic evidence. (See Civ. Code, § 1638; *Milton v. Montgomery Ward & Co., Inc.* (1973) 33 Cal.App.3d 133, 138.)

Accordingly, substantial evidence supports the trial court's implied finding that the modified arbitration agreement is not illusory.

b. The Trial Court Improperly Ignored Appellants' Allegations of Procedural Unconscionability, Focused Too Heavily on Adhesion, and Erroneously Assumed That Unalleged Individual Issues Would Predominate

The trial court reasoned that because many putative class members were given the ability to opt out of arbitration, their agreements were potentially not adhesive, and therefore the determination of procedural unconscionability would necessarily involve individualized issues about contract formation. We find that this reasoning was in error.

Although "[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071), adhesion is not a prerequisite for unconscionability (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1410). Even where an arbitration provision provides the ability to opt out, the agreement may not be entirely free from procedural unconscionability if there is not "an authentic informed choice" in exercising the decision to opt out. (See *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 470–471, abrogated on other grounds as stated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 359–360.) Appellants argued below that the October 2012 notice's failure to advise putative class members of the pending litigation constituted unfair surprise, especially for those who

opted out without being told they may have given up class membership by doing so. On appeal, they continue with this argument by citing *In re Currency Conversion Fee Antitrust Litigation* (S.D.N.Y. 2005) 361 F.Supp.2d 237 (*Currency Conversion*), a federal case in which two defendant banks inserted arbitration clauses into putative class members' credit card agreements after the litigation had already begun without disclosing any information about the litigation to the putative class members. The federal court held that these unauthorized communications to putative class members "for the purpose of altering the status of a pending litigation" were improper because "they sought to eliminate putative class members' rights in this litigation." (*Id.* at pp. 253–254.)

Respondents argue the current matter is distinguishable from *Currency Conversion* because here, the cardmembers who opted out did not forfeit any litigation rights and actually received the benefit sought by appellants in this action (i.e., not being bound by the allegedly unconscionable arbitration provision). However, this argument simply ignores appellants' allegations and theory of recovery that they and the putative class did not receive conscionable and legal arbitration terms in exchange for a portion of their fees. Furthermore, the October 2012 notices were sent out when there were still active UCL causes of action seeking restitution and injunctive relief. Although these causes of action were ultimately dismissed in May 2013, the narrow issue here is whether the October 2012 notice was procedurally unconscionable because it attempted to alter the status of pending litigation (i.e., induce putative class members to forfeit rights and remedies) by not mentioning the litigation at the time the putative class members were given the chance to opt out. More importantly for our purposes, the wrongfulness of this alleged conduct is amenable to common proof because it is based simply on what the October 2012 notice did or did not say.

There were numerous other allegations of procedural unconscionability in the first amended cross-complaint beyond the allegations of adhesion. These included the failure to attach the arbitral rules, the failure to specify inconsistencies between the arbitration provision and the applicable codes of procedure of the arbitration organizations, and the failure to inform cardmembers of which arbitral rules would be in effect at the time they

initially entered into the agreement. Once again, because the wrongfulness of the alleged conduct is based simply on what the arbitration provisions say or do not say, the claim of procedural unconscionability is amenable to common proof. The trial court improperly ignored these allegations and erroneously assumed that the procedural unconscionability determination would necessarily involve unalleged circumstances of contract formation for each putative class member.

After the conclusion of briefing in this matter, the Supreme Court in *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237 held that the failure to attach arbitral rules to an arbitration agreement did not, by itself, increase the degree of procedural unconscionability. (*Id.* at p. 1246.) However, the high court recognized that procedural unconscionability has been found where the claim "depended in some manner on the arbitration rules in question. [Citations.] . . . [C]ourts will more closely scrutinize the substantive unconscionability of terms that were 'artfully hidden' by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement." (*Ibid*.) Because *Baltazar* is not a class certification case, we do not decide how it affects appellants' declaratory relief claim on the merits. For our purposes, we observe that *Baltazar* does not foreclose class certification in a case of this type, since a claim of procedural unconscionability based on the failure to attach arbitral rules containing substantively unconscionable terms would still be amenable to common proof.

We accordingly conclude that the court used improper criteria and made erroneous assumptions in finding that the determination of procedural unconscionability would involve predominantly individualized issues.

D. Superiority

"[T]he assessment of suitability for class certification entails addressing whether a class action is superior to individual lawsuits or alternative procedures for resolving the controversy." (*Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1204.) As appellants contend, class certification in this case would allow claims of many individuals to be resolved at the same time, eliminate the possibility of repetitious

litigation, and afford the class members a method of obtaining redress for claims which would otherwise be too insignificant to warrant individual litigation.

The trial court reasoned that a class action would not be superior to individual actions because there was insufficient evidence as to how many putative class members had a pending dispute with respondents, and thus, "potentially most of the putative Class would not receive any benefit from this lawsuit." The trial court also noted that respondents could simply modify the arbitration provision again so that any ruling issued by the court would have no effect on future disputes. However, because the trial court's reasoning here was based on its erroneous assumption that there is no current, overarching dispute between the parties, we find that it was not a sound basis for denying class certification.

The trial court further reasoned that superiority was lacking because any putative class members with a monetary injury would potentially lose this claim by participating in a declaratory-relief-only class action that cannot adjudicate that monetary claim. However, for purposes of claim preclusion, "purely declaratory judgments are exempt from the bar of res judicata . . . ." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 899; see Code Civ. Proc., § 1062 [declaratory relief remedies are cumulative and do not preclude party from obtaining additional relief based on same facts].) As for issue preclusion, the doctrine of collateral estoppel bars relitigation of identical issues that were actually litigated in a prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341–342.) "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." (*Id*. at p. 342.) Even if class members are precluded from relitigating the broad, systemic issues of unconscionability raised in this class action, they may not be precluded from proving unconscionability under their own different and particular factual circumstances. (See *Cooper v. Federal Reserve Bank of Richmond* (1984) 467 U.S. 867, 880 [holding that adverse judgment at liability stage of class action alleging pattern and practice of companywide discrimination did not automatically

preclude, by virtue of res judicata or collateral estoppel, later individual discrimination lawsuits by class members].)

Because we find that the reasons given by the trial court were unsound, the ruling must be reversed. (See *Ayala*, *supra*, 59 Cal.4th at p. 538.)

E. Adequacy of Representation and Typicality

"It is elementary that the named plaintiff in a class action must be a member of the class he purports to represent. [Citations.] The plaintiff must be a person who will fairly and adequately protect the interests of the class and whose claims or defenses are typical of the claims or defenses of the class." (*Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 146, overruled on another ground in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 269–270.)

The trial court ruled that Rowsell was not an adequate class representative and did not have claims typical of the putative class because he testified at deposition that he did not pay the annual fees for appellants' accounts and therefore, he was not a member of the putative class. On appeal, appellants did not present any argument in their opening brief challenging this portion of the trial court's ruling. (See *Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361 [failure to raise issue in opening brief waives issue on appeal].) While the statement of facts section of the opening brief mentioned that Rowsell had several personal American Express credit or charge accounts, appellants did not set forth any legal argument or analysis regarding the effect of this evidence under a separate heading or subheading of the brief, as required by the Rules of Court. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) In their reply brief, appellants contend for the first time on appeal that the trial court erred by ignoring the evidence of Rowsell's personal American Express accounts, which showed that he personally paid annual fees. However, "[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

Even if the issue was properly presented on appeal, we would find no abuse of discretion in the trial court's ruling. At the October 25, 2013 hearing, the trial court stated that there was "no evidence that [Rowsell] paid an annual fee" and "the evidence is that it's Bosonda who paid the annual fee, not Mr. Rowsell." In response, appellants' counsel asserted, "I believe he did, Your Honor. I think it's in the record someplace," but counsel provided no specific citation to evidence. When the trial court pressed further, saying, "it may be your understanding, but you're not citing anything in the record that I have," appellants' counsel again cited no evidence and instead turned to another aspect of the class definition. Our review of the record finds no evidence submitted *during the class certification proceedings* that established Rowsell's payment of annual fees for his personal accounts. In their reply brief, appellants cite to evidence they submitted in connection with a different motion (respondents' summary adjudication motion), not their class certification motion. However, the trial court was not obligated to search for supporting evidence filed in other motions based on counsel's vague assertion that it was "in the record someplace," as he himself was unable to pinpoint the location of this evidence on request. On this record, the trial court did not abuse its discretion in ruling against Rowsell's adequacy and typicality.

As for Bosonda, we cannot assume the trial court determined its adequacy as class representative or the typicality of its claims since the court expressly stated that it did not determine any elements of class certification other than those discussed in its order. We decline respondents' invitation to determine on appeal Bosonda's adequacy, typicality, and related choice-of-law implications, as these are matters that should be addressed by the trial court in the first instance. *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, cited by respondents, is inapposite. There, the court found that appellate review was possible despite the lack of a detailed ruling from the trial court because the record otherwise elucidated the trial court's reasoning. (*Id.* at pp. 986–987.) This rationale does not apply where the trial court expressly declined to determine the remaining elements of class certification. (See *Ramirez v. Balboa Thrift & Loan* (2013)

215 Cal.App.4th 765, 783 [refusing to consider alternative arguments regarding propriety of class certification where trial court stated it was unnecessary to address them].)

For the trial court's assistance, we note that if the class certification requirements are otherwise met, it may be appropriate to consider pre- and postmodification subclasses as well as the need for a class representative for the postmodification subclass, since Bosonda did not receive the October 2012 notice. We express no opinion on whether such subclasses are sufficiently ascertainable, numerous, and manageable under the appropriate legal standards.

F. Appellants Demonstrate No Prejudice from the Trial Court's Refusal to Strike Portions of the Fogelman Declaration

In opposing class certification, respondents submitted the declaration of Stephanie Fogelman, assistant custodian of records for AETRS, to establish facts such as respondents' states of residence, the nature of their businesses, and appellants' account histories, as well as to authenticate documents including appellants' cardmember agreements and the October 2012 notice. Appellants moved to strike portions of the Fogelman declaration on the grounds of lack of personal knowledge and hearsay. The trial court denied the motion, and appellants renew their evidentiary challenges on appeal.

We need not deal extensively with this matter because appellants did not even attempt to demonstrate that the admission of this evidence resulted in a miscarriage of justice. (See *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 446–447; Evid. Code, § 353, subd. (b).) Most of the challenged portions of Ms. Fogelman's declaration did not expressly or implicitly factor into the trial court's ruling on the certification issues. The only portions of the Fogelman declaration cited in the trial court's order were Ms. Fogelman's averments that the October 2012 notice was not mailed to appellants because their accounts were cancelled and they were not paying down their balances. However, these facts were established through competent evidence elsewhere in the record (i.e., respondents' discovery responses). We, accordingly, find no miscarriage of justice in the admission of the Fogelman declaration.

G. Remand for Reconsideration

On the record before us, the proper disposition is to reverse the order and remand with instructions for the trial court to reconsider the propriety of the class certification motion in a manner consistent with the determinations expressed above, and to consider the other certification requirements that the trial court did not previously determine. (See *Ayala*, *supra*, 59 Cal.4th at p. 538; *Ramirez v. Balboa Thrift & Loan*, *supra*, 215 Cal.App.4th at p. 783.)

IV. DISPOSITION

The order denying appellants' motion for class certification is reversed. The matter is remanded for further consideration consistent with this opinion.

_____
REARDON, J.

We concur:

_____
STREETER, ACTING P. J.

_____
LEE, J.*

*Judge of the Superior Court of California, County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.