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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KEVIN BREAZEALE, KARIN SOLBERG, KEVIN HIEP VU, NANCY MORIN, and NARISHA BONAKDAR, on their own behalf and on behalf of others similarly situated,

Plaintiffs,

v.

VICTIM SERVICES, INC., d/b/a CorrectiveSolutions, NATIONAL CORRECTIVE GROUP, INC., d/b/a CorrectiveSolutions, and MATS JONSSON,

Defendants.

Case No. 3:14-cv-05266-VC

PLAINTIFFS' OPPOSITION TO DEFENDANT VICTIM SERVICES, INC.'S MOTION TO COMPEL ARBITRATION AND STAY ACTION

The Honorable Vince Chhabria

CLASS ACTION

Date: February 18, 2016
Time: 10:00 a.m.
Courtroom: 4

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INTRODUCTION

Narisha Bonakdar received a letter from her local prosecutor threatening her with criminal prosecution and jail time unless she paid hundreds of dollars in fees. She was understandably frightened. But what she didn't know was that she faced no real risk of prosecution. The letter was actually sent by Victim Services, Inc. (VSI)—a private, for-profit company that rents out the prosecutor's seal to aid its private debt-collection efforts. Without disclosing its identity, VSI's letters falsely represent that the prosecutor has accused the recipient of violating California's criminal bad-check law. The ABA has described this practice as "abusive" because it falsely "gives the impression that the machinery of the criminal justice system has been mobilized against the debtor." ABA Formal Ethics Op. 469 (2014).

This lawsuit challenges VSI's collection scheme as a wholesale violation of the Fair Debt Collection Practices Act. But, in its latest motion, VSI asserts that *because* Ms. Bonakdar gave into its false threats—and as a consequence of fine print on the third page of its letter—she has traded away her right to challenge VSI's practices in court and must be forced into arbitration.

VSI's gambit fails for a simple reason: A court cannot compel arbitration where the parties did not freely consent to arbitrate, and Ms. Bonakdar did not consent for five independent reasons. *First*, coercing an agreement through threats of prosecution "constitute[s] menace destructive of free consent." *Shasta Water Co. v. Croke*, 128 Cal. App. 2d 760, 764 (1954). Hence, "[i]t is clear that consent to arbitrate obtained by threat of prosecution is invalid." *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 127 (1993). *Second*, where a contracting party is "deceived as to the basic character" of the agreement, "mutual assent is lacking, and [the contract] is void." *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 415, 425 (1996). VSI's many misrepresentations—among others, that the prosecutor sent the letter, and that the prosecutor assessed whether probable cause exists—made meaningful consent

impossible. *Third*, VSI's efforts to disguise its identity undermine the existence of a contract because California law requires that it be "possible to identify" the contracting parties. Cal. Civ. Code § 1558; *see Lee v. Intelius Inc.*, 737 F.3d 1254, 1260 (9th Cir. 2013). *Fourth*, because the agreement is the product of "the weaker party's absence of choice and unequal bargaining power," it is unconscionable. *Chavarria v. Ralphs Grocery*, 733 F.3d 916, 922 (9th Cir. 2013). *Finally*, allowing a private entity wielding the prosecutor's seal to force people into arbitration through threats of prosecution implicates grave constitutional concerns, raising the troubling specter of the routine use of arbitration clauses in plea bargains, dismissal-release agreements, and other contexts in which the state's coercive power is at its apex.

BACKGROUND

A. VSI sends threatening and misleading form letters to thousands of consumers, including Narisha Bonakdar.

Using district attorney letterhead, VSI and its predecessors have sent more than 180,000 form letters deceptively informing California consumers that, unless they pay steep collection fees, they may be prosecuted by the state for writing a bad check. *See* Ex. C at 8.[1]

Narisha Bonakdar, "a single mother [who] lives month to month," is one of those people. First Am. Compl. 18 (Dkt. No. 8). In June 2014, she received a letter from the "El Dorado County District Attorney Bad Check Restitution Program," on the letterhead of the El Dorado County District Attorney and bearing the signature block of Vern Pierson, the current District Attorney. Ex. A at 1. The letter said that Ms. Bonakdar was "accused" of committing a crime punishable by "up to one … year in the county jail," referencing a $200 check she had written for her monthly bus pass that had been dishonored due to insufficient funds and that she had mistakenly believed had been paid in full. *Id.* Ms. Bonakdar could avoid charges, the letter

[1] All exhibits cited are attached to Deepak Gupta's declaration, filed with this opposition.

continued, by participating in the "Bad Check Restitution Program," which would require that she attend a financial accountability class, pay restitution of the $200 check, and pay $248.50 in program fees—an amount that far exceeds the $65 permitted under California law. *Id.*

Ms. Bonakdar was "confused and frightened" by the letter, as "she believed she had been accused of a crime." Compl. 19. To avoid the risks of prosecution and jail time, she began making regular payments to the bad-check diversion program, even though "[s]he did not believe that she had bounced a check to El Dorado that she had not already paid in full"; she also participated in the mandatory "financial education class," which forced her to secure childcare for her daughter during the time she was absent. *Id.* Yet no attorney at the District Attorney's Office ever reviewed any evidence related to Ms. Bonakdar's check to determine whether probable cause existed under California law before sending her check to VSI. *See* Ex. E at 56.

B. Under California law, bouncing a check is not a crime and criminal diversion programs are strictly circumscribed.

In California, writing a check that is returned for insufficient funds, without more, is not a crime; it becomes a crime only where the check writer has "willfully, with intent to defraud," made or delivered a check, "knowing at the time" that he or she does not have sufficient funds to pay it. Cal. Penal Code § 476a(a). California law regards this "intent to defraud" as "the gist of the offense," *People v. North*, 131 Cal. App. 3d 112, 117 (1982), for which "no presumption of law will suffice," *People v. Becker*, 137 Cal. App. 349, 352 (1934). More generally, courts have long warned that the use of state bad-check laws "should be closely scrutinized," because without a fraudulent-intent element these laws become "no more than a device to force payment of debt." *People v. Vinnola*, 494 P.2d 826, 828, 831 (Colo. 1972). That is, they "lend themselves to use by the unscrupulous who seek only payment of debts and have no interest in criminal prosecution other than as a means of collecting money allegedly due them." *Tolbert v. State*, 321 So. 2d 227, 232

(Ala. 1975). And in California, "the use of criminal prosecution as a means of collecting a debt is against public policy." *Shasta Water*, 128 Cal. App. 2d at 764.

In accordance with that policy, California's Bad Check Diversion Act, Cal. Penal Code §§ 1001.60–67, strictly limits diversion to only those cases in which "there is probable cause to believe there has been a violation of Section 476a," meaning probable cause to believe there has been fraud. *Id.* § 1001.60. The district attorney has the sole authority to "refer a bad check case to the diversion program," and the Act lists factors that he or she should consider in determining whether a "case is one which is appropriate to be referred to the bad check diversion program." *Id.* §§ 1001.61–62. Under the Act, the only fees that may be charged are a $50 administrative fee and the bank charges actually incurred by the merchant, which are capped at $15. *Id.* § 1001.65.

C. VSI administers El Dorado County's bad-check program without the District Attorney's involvement, in violation of state law.

VSI and its predecessors-in-interest have administered the El Dorado County District Attorney's bad-check program for almost seven years. Although the contract between VSI and the District Attorney purports to comply with the Diversion Act's requirements that the District Attorney retain prosecutorial discretion and establish probable cause before referring checks to diversion, *see* Dkt. No. 8-2, at 3, these requirements are entirely disregarded in practice.

Nancy Anderson, the executive secretary to the district attorney and not a lawyer, is the "primary person" at the District Attorney's Office who coordinates the bad-check diversion program with VSI. Ex. E at 17. According to the current District Attorney, Vern Pierson, Anderson is responsible for determining whether a check submitted by a merchant satisfies the office's "intake criteria"—which fall far short of the mandatory five-factor review set out in the statute, *see* Cal. Penal Code § 1001.62—and thus qualifies for the diversion program. Ex. E at 36. But Anderson has testified that she reviews only limited information such as the check writer's

name, the reason for return, and the payment amount before approving enrollment in the diversion program. Ex. D at 17–18, 38. This cursory review does not even apply the Office's own intake criteria, let alone constitute an assessment of probable cause. *See* Cal. Penal Code § 1001.60. Indeed, Anderson conceded that she has referred cases to the diversion program that *failed* the Office's intake criteria. *See* Ex. D at 22–23, 40.

Additionally, both Pierson and Anderson acknowledged that many larger merchants and retailers entirely bypass the District Attorney's Office, submitting allegedly bad checks directly to VSI. *See* Ex. D at 20; Ex. E at 49. Thus, these checks—which make up a substantial proportion of the total checks submitted to the programs—are *never* reviewed by the Office. The District Attorney assumes that VSI applies the intake criteria to such checks, but makes no efforts to ensure that is true. *See id.* 49–50. In other words, most checks submitted to the diversion program are not preceded by a probable-cause determination by a local district attorney, in blatant disregard of state law. *See* Cal. Penal Code § 1001.60.

Despite the prosecutors' total lack of involvement, VSI's form letters to consumers represent that they have been accused of violating Section 476a and are subject to criminal prosecution absent participation in the diversion program. But the record demonstrates that these representations are false: that "very few check writers to whom Defendants send collection letters will ever be prosecuted" and VSI does not even "know [whether] the district attorney will prosecute if the check writer refuses to participate in its program." Compl. 8. For example, Pierson explained that many of the allegedly bad checks the Office receives that are submitted to the diversion program "are not criminal cases and . . . should not be in the criminal field." Ex. E at 33; *see id.* 42 ("[T]here's many cases that we refer to the check program that it would be unlikely that we would ever file.") Likewise, Anderson noted that, "whether or not someone is going to be prosecuted is not a decision the district attorney's office makes until after Corrective

Solutions has exhausted its attempts to . . . collect." Ex. D at 58. And when asked whether VSI in fact referred people who failed to complete the program to the prosecutor to consider filing charges, Assistant District Attorney James Clinchard admitted that he "do[esn't] know if it actually does happen." Ex. F at 20. The prosecution statistics back this up: Based on information produced by VSI and the El Dorado County District Attorneys' Office, VSI sent "Official Notices" to about 2,000 individuals, between January 1, 2011 and August 31, 2015, who did not successfully complete the diversion program. *See* Ex. G (Arons Decl.). Yet only a handful of those individuals—or about 0.3 percent—were ever charged with any crime. *Id.*

D. VSI moves to compel arbitration.

Several victims of VSI's debt-collection scheme, including Ms. Bonakdar, filed this class action alleging that VSI's practices violate the FDCPA and state law. They allege that (1) VSI's use of official letterhead to falsely represent that the letters are from prosecutors violates 15 U.S.C. §§ 1692e(3), (9), and (14); (2) the form letters' false threats that the failure to pay will result in arrest or imprisonment violate 15 U.S.C. §§ 1692e(4)–(5); and (3) the fees charged are not authorized by state law, in violation of 15 U.S.C. §§ 1692e(2)(A) and 1692f(1).

Following a failed attempt at dismissal, VSI moved to compel individual arbitration of Ms. Bonakdar's claims. The motion is premised on an "Agreement to Arbitrate" buried on the third page of VSI's form letter in a "Terms and Conditions" section. Those terms, however, do not once identify VSI by name. Indeed, VSI is never identified by name anywhere in the form letter. Rather, it merely states that the financial counseling class is conducted by a "private entity under contract with the District Attorney to administer the Program ("Administrator")." Ex. A at 3. And, apart from boilerplate acknowledgments and a statement that any participant who "pay[s] the fees charged for the program" is bound by the "terms and conditions of the Program," the terms essentially consist of only the arbitration agreement, nothing else. *Id.*

The purported agreement provides that "[the participant] and Administrator agree to resolve any and all claims and disputes relating in any way to the Program ("Claims"), except for Claims concerning the validity, scope or enforceability of this Arbitration Agreement" through binding individual arbitration. *Id.* According to VSI, no consumer has ever arbitrated claims or disputes relating to its bad-check diversion programs. Ex. C at 10. Ms. Bonakdar "did not notice or read the arbitration provision until [her] attorney pointed it out," because "she never would have expected that a notice from the prosecutor would waive [her] rights to go to court against an unidentified private company." Ex. B at 2.

LEGAL STANDARDS

Under the Federal Arbitration Act, arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[2] Arbitration, moreover, "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002). It is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." *Granite Rock v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010). Thus, "challenges to the existence of a contract as a whole must be determined by the court prior to ordering arbitration." *Sanford v. MemberWorks*, 483 F.3d 956, 962 (9th Cir. 2007). Only if a contract has actually been formed must "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause," "go to the arbitrator." *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 449 (2006). "[T]he party seeking to compel arbitration[]

[2] As a threshold matter, VSI hasn't even attempted to carry its burden to show that this case involves "interstate commerce"—a prerequisite for the FAA to apply at all. An agreement to avoid criminal prosecution does not, on its face, "affect[] commerce" in even the broadest sense. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

has the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." *Knutson v. Sirius XM Radio*, 771 F.3d 559, 565 (9th Cir. 2014).

ARGUMENT

I. Because no valid contract was formed between Ms. Bonakdar and VSI, this Court cannot order arbitration.

VSI's motion devotes just one sentence to the threshold requirement that an arbitration agreement exists, asserting that Ms. Bonakdar "assented to the terms of the Arbitration Agreement by her failure to opt out, her payment to the BCDP, and her enrollment and completion of the BCDP course." Mot. 6. But VSI sidesteps the fact that Ms. Bonakdar's apparent assent was obtained through threats of prosecution and misrepresentations. Application of "ordinary state-law principles that govern the formation of contracts," including California's doctrines of fraud and duress, makes clear that no "valid arbitration agreement exists." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014). In other words, no agreement between Ms. Bonakdar and VSI was "ever concluded." *Buckeye*, 546 U.S. at 444 n.1.

A. Ms. Bonakdar's "consent" to the diversion program was unlawfully obtained by the coercive threat of criminal prosecution.

Consent to a contract is one of the four elements "essential to the existence of a contract" under California law. Cal. Civ. Code § 1550. And, to be valid, the parties' consent "must be . . . [f]ree." *Id.* § 1565. But "[a]n apparent consent is not real or free when obtained" through "duress" or "menace." *Id.* § 1567; *see also Tiffany & Co. v. Spreckels*, 202 Cal. 778, 784 (1927).

Here, Ms. Bonakdar did not freely consent to be bound when she paid collection fees to VSI. To the contrary, VSI pressured her to participate by threatening criminal prosecution and "up to one (1) year in county jail" if she did not do so. Dkt. No. 8-2, at 1. Such coercion, under California law, destroys the consent necessary to form a contract. *See* 2 Cal. Affirmative Def. § 33:1 (2d ed.) ("Free consent is defeated when one party enters into the contract under duress.").

California law "is clear that consent to arbitrate obtained by threat of prosecution is invalid." *Bayscene*, 15 Cal. App. 4th at 127. That rule is simply an application of the general principle that "an agreement obtained through threat of criminal prosecution is void," because "such threats, like all threats of injury to the character of the party, constitute menace destructive of free consent." *Shasta Water*, 128 Cal. App. 2d at 764; *see also* 1 Witkin, Summary 10th (2005) Contracts, § 312, p. 337. Nor is this principle unique to California; to the contrary, it is an ancient principle of common law that improper threats of imprisonment vitiate a party's free consent to a contract. *See* 28 Williston on Contracts § 71:1 (4th ed.); Restatement (Second) of Contracts § 176(1)(b). In a late-nineteenth-century decision discussing the concept of duress "at common law, as understood in the parent country," the Supreme Court explained:

> [C]onsent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent.

Baker v. Morton, 79 U.S. 150, 157–58 (1870). This "moral compulsion," the Court continued, is similarly present where "a party enters into a contract . . . for fear of imprisonment." *Id.* at 158.

Ms. Bonakdar did just that; she paid fees to participate in the diversion program "to avoid the risk[s] of going to jail" and losing her job, pension, and child. Ex. B at 1–2. Here, as in *Bayscene*, "it is uncontroverted that the Agreement to Arbitrate was obtained under threat of criminal prosecution and that [Ms. Bonakdar] would not have signed the agreement absent such threat." 15 Cal. App. 4th at 128. Thus, just as in *Bayscene*, "[VSI's] threats constituted menace destructive of [the] free consent" required to form a contract under California law. *Id.* at 129.

It is irrelevant whether VSI really believed what it was threatening. Where "a threat [of prosecution] is made," even "the fact that the one who makes it honestly believes that the recipient is guilty is not material," because "[t]he threat involves a misuse, for personal gain, of

power given for other legitimate ends." Restatement (Second) of Contracts § 176. Here, however, VSI's threats are all the more "unlawful," because it "kn[ew] the falsity of [its] claim." *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123, 128 (1966). As described above, the District Attorney's Office in most instances fails to conduct the required review of checks and to determine probable cause for a bad-check violation. *See* Compl. 6, 8, 20. VSI not only coerced Ms. Bonakdar into paying it fees but knowingly coerced her on the basis of false pretenses.

Threatening an individual with the coercive power of the state is, apart from physical violence, one of the strongest forms of duress. As the ABA recently observed in an ethics opinion, the kind of threats used by VSI in this case "abusive[ly] . . . give[] the impression that the machinery of the criminal justice system has been mobilized against the debtor, and that unless the debtor pays the debt, the debtor faces criminal prosecution and possible incarceration." Formal Ethics Op. 469 (2014). This Court should conclude that no contract was ever formed because VSI's coercion destroyed Ms. Bonakdar's free consent.

B. Because VSI misrepresented the very nature of the purported agreement, no contract was formed.

VSI's threats to prosecute Ms. Bonakdar were not only coercive but fundamentally deceptive. This, too, requires a finding that no valid agreement was formed. Under California law, where "the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is void." *Rosenthal*, 14 Cal. 4th at 415; 1 Witkin, Summary 10th (2005) Contracts, § 299. This type of deception, known as "fraud in the inception or execution," undermines the very formation of a contract; it goes to "whether any contract had *ever* existed." *Saint Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1200 (2003) (emphasis added).

The form letter that VSI sent to Ms. Bonakdar—like all its letters in California—was rife with fraudulent misrepresentations. VSI conveyed the false impression that the letter was sent directly from El Dorado County prosecutors, going so far as to include the signature block of Vern Pierson, the current District Attorney. *See* Ex. A at 1. VSI also represented that Ms. Bonakdar was "accused of violating California Penal Code 476a," implying both that a prosecutor had reviewed her case and found probable cause of a violation and that Ms. Bonakdar would in fact be prosecuted if she did not pay the requested fees. *Id.* Yet neither representation was true. And, to the extent VSI even mentioned "a private entity," it falsely suggested that its role is limited to "print[ing] and mail[ing]" notices on behalf of the District Attorney, hiding from Ms. Bonakdar the fact that it—not the prosecutor—is the *only* entity that reviews the bulk of bad checks submitted by merchants. *Id.*

To be sure, claims of "fraudulent inducement" as to a contract as a whole, rather than an arbitration provision specifically, may be referred to an arbitrator. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). But the deception here was different, and more problematic: As noted above, it constituted "fraud in the inception" under California law—and where "a party's apparent assent to a written contract is negated by fraud in the inception, there is simply no arbitration agreement to be enforced." *Rosenthal*, 14 Cal. 4th. at 416. Thus, "*Prima Paint* does not preclude the court from deciding claims of fraud in the execution of the entire contract." *Id.* at 417. In sum, because the misrepresentations here constitute "fraud so fundamental" that Ms. Bonakdar was "deceived as to the basic character of the documents [she] signed and had no reasonable opportunity to learn the truth," her "apparent assent" to the contract is "negated," and no arbitration agreement exists. *Id.*[3]

[3] It is black-letter law that a "false promise"—that is, "[a] promise made without any intention of performing it"—constitutes "actual fraud." 1 Witkin, Summary 10th (2005)

C. VSI violated California's law requiring the identification of contracting parties.

No valid contract was formed here for yet another reason: Under California law, "it is essential . . . not only that the [contract] parties should exist, but that it should be possible to identify them." Cal. Civ. Code § 1558. Although case law construing § 1558 is sparse, California courts understand it to mean that, at a minimum, where "[n]othing in the [contract] identifies the . . . defendants as parties to be bound or benefitted by the agreement," the parties were not "entitle[d] . . . to invoke the contract." *Westlye v. Look Sports*, 17 Cal. App. 4th 1715, 1728 (1993); *see also Myers v. Darnall*, 2005 WL 2715864, at *6 (Cal. Ct. App. 2005) (no contract where "[t]he parties are not identified"). The Ninth Circuit, too, has held that an arbitration agreement is not formed where the "essential element" of "identification of the parties" is lacking. *See Lee*, 737 F.3d at 1260 (no valid arbitration agreement existed where, as here, even "an exceptionally careful consumer" would have been unable to identify the party with whom it was contracting).

VSI does not identify itself anywhere in its form letter to Ms. Bonakdar. The letter, signed by the District Attorney, purports to be from the "El Dorado County District Attorney Bad Check Restitution Program." Ex. A at 1. While the notice states that it has been "printed and mailed on behalf of my office by a third party administrator" and the terms and conditions state that the "Agreement to Arbitrate" is between "You and Administrator," the identity of this "Administrator" is never revealed. *Id.* at 1, 3. More critically, it is not even "*possible* [for consumers] to identify" that the "Administrator" is VSI. Cal. Civ. Code § 1558 (emphasis

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Contracts, § 293. That VSI is entirely unaware of whether the District Attorney will actually prosecute a consumer proves that its promise to Ms. Bonakdar was "false" in this sense as well.

Similarly, because VSI itself has no ability to criminally prosecute individuals, it did not give Ms. Bonakdar any consideration in exchange for her payment. *See Michaelian v. State Comp. Ins. Fund*, 50 Cal. App. 4th 1093, 1112 (1996) ("[G]iving up of a legal right is not sufficient [consideration] when the claim is wholly invalid or worthless."); 1 Witkin, Summary 10th (2005) Contracts, § 220, p. 253. For that reason, too, no contract was ever formed.

added). The contact information provided refers only to the "El Dorado County District Attorney," although the phone number and mailing address in reality belong to VSI. Ex. A at 1–3. And even those individuals who call the phone number are given the false impression that they are speaking with prosecutorial staff, not VSI employees; indeed, these employees "routinely make express and implicit threats of prosecution to check writers with whom they speak." Compl. 9. VSI's brazen efforts to disguise its identity violate Section 1558, undermining the existence of any valid contract with Ms. Bonakdar.

II. The arbitration agreement is unconscionable.

The arbitration agreement also cannot be enforced because it is unconscionable. Procedural unconscionability "focus[es] on the level of oppression and surprise." *Chavarria*, 733 F.3d at 922. "Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in 'no real negotiation,'" while "[s]urprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party." *Id.* Here, no consumer would "reasonabl[y] expect[]" that a letter from a prosecutor concerning state criminal law would contain an arbitration agreement—buried in the third page's fine print—with an unidentified private company. *Id.*; *see* Ex. B at 2. The arbitration agreement is not a typical consumer adhesive contract; it is a set of terms imposed on Ms. Bonakdar on a take-it-or-leave-it basis, under penalty of criminal prosecution and jail. That coercion reflects a *total* "absence of choice" and extraordinarily "unequal bargaining power." *Id.*

California employs a "sliding-scale" approach to unconscionability: "[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." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000). Given the enormous procedural unconscionability here, only the slightest evidence of substantive unconscionability is enough to

doom the contract. Yet there is ample evidence that the agreement "is unjustifiably one-sided to such an extent that it 'shocks the conscience.'" *Chavarria*, 733 F.3d at 923. Indeed, state courts have held that an arbitration agreement obtained through threat of criminal prosecution, by an "agent" of the government, is "particularly abhorrent." *Bayscene*, 15 Cal. App. 4th at 128–29.[4]

III. Compelling arbitration on the basis of an involuntary agreement obtained by threats of prosecution would raise substantial constitutional concerns.

Applying the ordinary California contract-law principles above, this Court should find that no contract was formed, and that Ms. Bonakdar therefore cannot be required to submit to arbitration. But this Court should also refrain from compelling arbitration because doing so would raise serious constitutional problems. When it sends out letters on District Attorney letterhead, VSI is not acting as an ordinary private party but as a stand-in for the prosecutor—as a state actor. *See Lee v. Katz*, 276 F.3d 550, 554–55 (9th Cir. 2002). And when private parties like VSI "are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Id.*

If this Court were to compel arbitration where a private, for-profit company has wielded the state's coercive power to obtain an individual's involuntary assent, it would violate the cardinal principle that "[w]aiver of a constitutional right must be knowing and voluntary." *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987). "The presumption against waiver of constitutional rights applies equally in the criminal and civil contexts," and thus applies to

[4] VSI argues that the provision is not unconscionable because it gives recipients the right to opt out. Mot. 8. This right, however, appears to have rarely been invoked. VSI admits that it "does not keep data regarding the number of persons who have opted out of arbitration." Ex. C at 12. An arbitration agreement containing an opt-out provision is procedurally unconscionable where, as here, a party's failure to opt out does not "represent an authentic informed choice." *Gentry v. Super. Ct.*, 42 Cal. 4th 443, 470 (2007), *abrogated on other grounds by Iskanian v. CLS Transp.*, 59 Cal. 4th 348 (2014); *see also Mohamed v. Uber*, No. C-14-5200, 2015 WL 3749716 (N.D. Cal. June 29, 2015), at *12–*13.

waivers of due process and Seventh Amendment rights. *Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 969 (9th Cir. 2011). Whatever the contours of the "knowing and voluntary" standard may be in a run-of-the-mill consumer case, it surely cannot be satisfied here. Ms. Bonakdar's assent was coerced through false threats; it was not "the product of an informed and voluntary decision." *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987); *cf. Norton v. Chicago*, 690 N.E.2d 119, 125 (Ill. Ct. App. 1997) (parking-violation notices sent by private government contractor, "urg[ing] recipients to pay the fines in lieu of steeper penalties or court action," were "coercive enough to render plaintiffs' payment involuntary").

VSI's invocation of the state's coercive machinery closely resembles prosecutors' role in plea bargains and dismissal-release agreements, which likewise are not contracts when viewed from the vantage point of ordinary duress principles. To ensure that plea bargains are sufficiently "voluntary," the Constitution requires scrupulous attention to whether assent is the product of "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see Lynch v. City of Alhambra*, 880 F.2d 1122, 1126 (9th Cir. 1989) (outlining standards for dismissal-release agreements). Yet in this analogous context, no "safeguards to insure" voluntary consent were provided to Ms. Bonakdar. *Santobello v. New York*, 404 U.S. 257, 262 (1971). In fact, the opposite occurred—VSI falsely threatened her with prosecution, failed to disclose its true identity, and sought to immunize its practices from challenge through the fine print. Rather than being made "sufficient[ly] aware[] of the relevant circumstances and likely consequences," Ms. Bonakdar was duped by VSI as to the very nature of the agreement to which she purportedly assented. To call her assent "voluntary and knowing" here would render the constitutional standard a dead letter.

CONCLUSION

This Court should deny VSI's motion to compel arbitration.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on January 12, 2016, I electronically filed the foregoing opposition with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the following:

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