Case No. S273802

In the

Supreme Court

of the

State of California

ANGELICA RAMIREZ,
Plaintiff and Respondent,

v.

CHARTER COMMUNICATIONS, INC.,
Defendant and Appellant.

REVIEW OF A DECISION FROM THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B309408

EXHIBITS TO REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANT'S OPENING BRIEF ON THE MERITS VOLUME I OF II – Pages 1 to 194 of 388

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TABLE OF EXHIBITS

CALIFORNIA SUPERIOR COURT CASES

EXHIBIT 1: FORM 10-K (2022): ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, FOR THE FISCAL YEAR ENDED DECEMBER 31, 2021, RE CHARTER COMMUNICATIONS, INC. (RELEVANT PAGES ONLY)

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2021

or

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Transition Period From to

Commission File Number: 001-33664

Charter Communications, Inc.

(Exact name of registrant as specified in its charter)

Delaware			**84-1496755**
(State or other jurisdiction of incorporation or organization)			(I.R.S. Employer Identification No.)
400 Washington Blvd.	**Stamford**	**Connecticut**	**06902**
(Address of Principal Executive Offices)			(Zip Code)

(203) 905-7801
(Registrant's telephone number, including area code)

Securities registered pursuant to section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Class A Common Stock $.001 Par Value	CHTR	NASDAQ Global Select Market

Securities registered pursuant to section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes x No o

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes o No x

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes x No o

Indicate by check mark whether the registrants have submitted electronically every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrants were required to submit and post such files). Yes x No o

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definition of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act.:

Large accelerated filer x Accelerated filer o Non-accelerated filer o Smaller reporting company ☐ Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. o

Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report. ☒

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No x

The aggregate market value of the registrant of outstanding Class A common stock held by non-affiliates of the registrant at June 30, 2021 was approximately $90.2 billion, computed based on the closing sale price as quoted on the NASDAQ Global Select Market on that date. For purposes of this calculation only, directors, executive officers and the principal controlling shareholders or entities controlled by such controlling shareholders of the registrant are deemed to be affiliates of the registrant.

There were 172,741,236 shares of Class A common stock outstanding as of December 31, 2021. There was 1 share of Class B common stock outstanding as of the same date.

Documents Incorporated By Reference

Information required by Part III is incorporated by reference from Registrant's proxy statement or an amendment to this Annual Report on Form 10-K to be filed no later than 120 days after the end of the Registrant's fiscal year ended December 31, 2021.

PART I

Item 1. ***Business.***

Introduction

We are a leading broadband connectivity company and cable operator serving more than 32 million customers in 41 states through our Spectrum brand. Over an advanced high-capacity, two-way telecommunications network, we offer a full range of state-of-the-art residential and business services including Spectrum Internet®, TV, Mobile and Voice. For small and medium-sized companies, Spectrum Business® delivers the same suite of broadband products and services coupled with special features and applications to enhance productivity, while for larger businesses and government entities, Spectrum Enterprise provides highly customized, fiber-based solutions. Spectrum Reach® delivers tailored advertising and production for the modern media landscape. We also distribute award-winning news coverage, sports and high-quality original programming to our customers through Spectrum Networks and Spectrum Originals.

Our network, which we own and operate, passes over 54 million households and small and medium businesses ("SMBs") across the United States. Our core strategy is to use our network to deliver high quality products at competitive prices, combined with outstanding customer service. This strategy, combined with simple, easy to understand pricing and packaging, is central to our goal of growing our customer base while selling more of our core connectivity services, which include both fixed and mobile Internet, video and voice services, to each customer. We execute this strategy by managing our operations in a consumer-friendly, efficient and cost-effective manner. Our operating strategy includes insourcing nearly all of our customer care and field operations workforces, which results in higher quality customer service. While an insourced operating model can increase the field operations and customer care costs associated with individual service transactions, the higher quality nature of insourced labor service transactions significantly reduces the volume of service transactions per customer, more than offsetting the higher investment made in each insourced service transaction. As we reduce the number of service transactions and recurring costs per customer relationship, we continue to provide our customers with products and prices that we believe provide more value than what our competitors offer. The combination of offering high quality, competitively priced products and outstanding service, allows us to both increase the number of customers we serve over our fully deployed network, and to increase the number of products we sell to each customer. This combination also reduces the number of service transactions we perform per relationship, yielding higher customer satisfaction and lower customer churn, resulting in lower costs to acquire and serve customers and greater profitability.

We have enhanced our service operations to allow our customers to (1) more frequently interact with us through our customer website and My Spectrum application, online chat and social media, (2) have their services installed at the time and in the manner of their own choosing, including self-installation, and (3) receive a variety of video packages on an increasing number of connected devices including those owned by us and those owned by the customer. By offering our customers growing levels of choices in how they receive and install their services and how they interact with us, we are driving higher overall levels of customer satisfaction and reducing our operating costs and capital expenditures per customer relationship. Ultimately, our operating strategy enables us to offer high quality, competitively priced services profitably, while continuing to invest in new products and services.

The capability and functionality of our network continues to grow in a number of areas, especially with respect to wireless connectivity. Our Internet service offers consumers the ability to wirelessly connect to our network using WiFi technology. We estimate that over 400 million devices are wirelessly connected to our network through WiFi. In addition, we extend Internet connectivity to our customers beyond the home via our Spectrum Mobile™ product through our mobile virtual network operator (“MVNO”) partnership agreement with Verizon Communications Inc. ("Verizon"). We intend to use Citizens Broadband Radio Service (“CBRS”) Priority Access Licenses (“PALs”) that we purchased in 2020, along with unlicensed CBRS spectrum, to build our own fifth generation ("5G") mobile data-only network on our existing infrastructure in targeted geographies where there is high outdoor cellular traffic volume. This effort, in combination with our expanding WiFi network and continued 5G enhancements within the MVNO partnership agreement, should position our mobile product for continued customer experience and cost structure improvements.

Our principal executive offices are located at 400 Washington Blvd., Stamford, Connecticut 06902. Our telephone number is (203) 905-7801, and we have a website accessible at ir.charter.com. Our Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, and all amendments thereto, are available on our website free of charge as soon as reasonably practicable after they have been filed. The information posted on our website is not incorporated into this annual report.

Human Capital Management

Successful execution of our strategy is dependent on attracting, developing and retaining key employees and members of our management team. We may be constrained in hiring and retaining sufficient qualified employees to support our growth strategy due to general labor shortages, including potential employee attrition in connection with government or customer COVID-19 vaccine or testing mandates.

We believe the substantial skills, experience and industry knowledge of our employees and our training of our customer-facing employees benefit our operations and performance. There are several ways in which we attract, develop, and retain highly qualified talent, including:

- **Training and investing in our employees to be masters of their craft.** With competitive wages, robust healthcare benefits, a generous retirement program with company match, and opportunities for job training and advancement, our employees develop skills and expertise necessary to build careers. Our Broadband Technician Apprenticeship Program is one of our promising strategies for building our skilled workforce. This program, certified by the U.S. Department of Labor, is aligned with our broadband technician career progression and includes thousands of hours of on-the-job training along with classroom instruction. When enrolled employees complete the program, they are certified broadband technicians.

  The majority of our employees are customer-facing, interacting with thousands of people every day. In March 2021, we increased our minimum wage from $16.50 to $18.00 per hour and committed that in 2022 all hourly employees will have a minimum starting rate of $20 per hour. A $20 per hour minimum wage will enable us to build and retain our highly skilled workforce.

- **Enabling a diverse and inclusive culture.** At Charter, diversity and inclusion mean more than legal or compliance requirements. We are committed to diversity and inclusion in every aspect of our business. We strive to deliver high-quality products and services that exceed our customers' expectations, and embrace the unique perspectives and experiences of our employees and partners and the communities we serve. Our diversity and inclusion efforts are guided by our Executive Steering Committee, External Diversity & Inclusion Council and Diversity & Inclusion team, who regularly assess our progress to ensure we are achieving our goals. Charter's Board of Directors also reviews diversity and inclusion progress annually. We are striving to enhance diversity at every level of our organization, including among our senior leaders.

  We have five Business Resource Groups ("BRGs") focused on people with disabilities, the LGBTQ+ community, employees with multicultural backgrounds, veterans and women. These voluntary groups connect employees with shared characteristics, life experiences, and interests, and enable them to engage in activities that advance our culture of inclusion and contribute to business success. Our BRGs have empowered our team members to grow and succeed by providing networking, mentorship and skill-building opportunities. In 2021, we continued our Charter Inclusion Talks, an internal speaker series built around cultural heritage and identity. Charter Inclusion Talks, which are held across our footprint, raise awareness of the many identities and heritages that contribute to our success and promote inclusive behaviors for the workplace.

- **Focusing on a safe and healthy workplace.** We value our employees and are committed to providing a safe and healthy workplace. All employees are required to comply with company safety rules and expectations, and are expected to actively contribute to making our company a safer place to work, including in response to COVID-19.

Employees

As of December 31, 2021, we had approximately 93,700 active full-time equivalent employees.

Item 1A. Risk Factors.

Risks Related to Our Business

We operate in a very competitive business environment, which affects our ability to attract and retain customers and can adversely affect our business, operations and financial results.

The industry in which we operate is highly competitive and has become more so in recent years. In some instances, we compete against companies with fewer regulatory burdens, access to better financing and greater and more favorable brand name

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, Charter Communications, Inc. has duly caused this annual report to be signed on its behalf by the undersigned, thereunto duly authorized.

CHARTER COMMUNICATIONS, INC.,
Registrant

By: /s/ Thomas M. Rutledge
Thomas M. Rutledge
Chairman and Chief Executive Officer

Date: January 28, 2022

EXHIBIT 2: FORM 10-K (2021): ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, FOR THE FISCAL YEAR ENDED DECEMBER 31, 2020, RE CHARTER COMMUNICATIONS, INC. (RELEVANT PAGES ONLY)

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2020

or

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Transition Period From to

Commission File Number: 001-33664

Charter Communications, Inc.

(Exact name of registrant as specified in its charter)

Delaware			**84-1496755**
(State or other jurisdiction of incorporation or organization)			(I.R.S. Employer Identification No.)
400 Atlantic Street	**Stamford**	**Connecticut**	**06901**
(Address of Principal Executive Offices)			(Zip Code)

(203) 905-7801
(Registrant's telephone number, including area code)

Securities registered pursuant to section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Class A Common Stock $.001 Par Value	CHTR	NASDAQ Global Select Market

Securities registered pursuant to section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes x No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No x

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes x No ☐

Indicate by check mark whether the registrants have submitted electronically every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrants were required to submit and post such files). Yes x No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definition of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act.:

Large accelerated filer x Accelerated filer ☐ Non-accelerated filer ☐ Smaller reporting company ☐ Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No x

The aggregate market value of the registrant of outstanding Class A common stock held by non-affiliates of the registrant at June 30, 2020 was approximately $75.8 billion, computed based on the closing sale price as quoted on the NASDAQ Global Select Market on that date. For purposes of this calculation only,
directors, executive officers and the principal controlling shareholders or entities controlled by such controlling shareholders of the registrant are deemed to be affiliates of the registrant.

There were 193,730,992 shares of Class A common stock outstanding as of December 31, 2020. There was 1 share of Class B common stock outstanding as of the same date.

Documents Incorporated By Reference

Information required by Part III is incorporated by reference from Registrant's proxy statement or an amendment to this Annual Report on Form 10-K to be filed no later than 120 days after the end of the Registrant's fiscal year ended December 31, 2020.

PART I

Item 1. ***Business.***

Introduction

We are a leading broadband connectivity company and cable operator serving more than 31 million customers in 41 states through our Spectrum brand. Over an advanced high-capacity, two-way telecommunications network, we offer a full range of state-of-the-art residential and business services including Spectrum Internet, TV, Mobile and Voice. For small and medium-sized companies, Spectrum Business® delivers the same suite of broadband products and services coupled with special features and applications to enhance productivity, while for larger businesses and government entities, Spectrum Enterprise provides highly customized, fiber-based solutions. Spectrum Reach® delivers tailored advertising and production for the modern media landscape. We also distribute award-winning news coverage, sports and high-quality original programming to our customers through Spectrum Networks and Spectrum Originals.

Our network, which we own and operate, passes over 53 million households and small and medium businesses ("SMBs") across the United States. Our core strategy is to use our network to deliver high quality products at competitive prices, combined with outstanding customer service. This strategy, combined with simple, easy to understand pricing and packaging, is central to our goal of growing our customer base while selling more of our core connectivity services, which include both fixed and mobile Internet, video and voice services, to each individual customer. We execute this strategy by managing our operations in a consumer-friendly, efficient and cost-effective manner. Our operating strategy includes insourcing nearly all of our customer care and field operations workforces, which results in higher quality service delivery. While an insourced operating model can increase the field operations and customer care costs associated with individual service transactions, the higher quality nature of insourced labor service transactions significantly reduces the volume of service transactions per customer, more than offsetting the higher investment made in each insourced service transaction. As we reduce the number of service transactions and recurring costs per customer relationship, we continue to provide our customers with products and prices that we believe provide more value than what our competitors offer. The combination of offering high quality, competitively priced products and outstanding service, allows us to both increase the number of customers we serve over our fully deployed network, and to increase the number of products we sell to each customer. This combination also reduces the number of service transactions we perform per relationship, yielding higher customer satisfaction and lower customer churn, resulting in lower costs to acquire and serve customers and greater profitability.

We have enhanced our service operations to allow our customers to (1) more frequently interact with us through our customer website and My Spectrum application, online chat and social media, (2) have their services installed at the time and in the manner of their own choosing, including self-installation, and (3) receive a variety of video packages on an increasing number of connected devices including those owned by us and those owned by the customer. By offering our customers growing levels of choices in how they receive and install their services and how they interact with us, we are driving higher overall levels of customer satisfaction and reducing our operating costs and capital expenditures per customer relationship. Ultimately, our operating strategy enables us to offer high quality, competitively priced services profitably, while continuing to invest in new products and services.

The capability and functionality of our network continues to grow in a number of areas, especially with respect to wireless connectivity. Our Internet service offers consumers the ability to wirelessly connect to our network using WiFi technology. We estimate that approximately 400 million devices are wirelessly connected to our network through WiFi. In addition, we extend Internet connectivity to our customers beyond the home via our Spectrum Mobile product through our mobile virtual network operator (“MVNO”) reseller agreement with Verizon Communications Inc. ("Verizon"). In 2020, we purchased 210 Citizens Broadband Radio Service (“CBRS”) Priority Access Licenses (“PALs”) within our footprint from the Federal Communications Commission ("FCC"). We intend to use the licenses along with unlicensed CBRS spectrum to build our own fifth generation ("5G") mobile network which we plan to use in combination with our MVNO and WiFi network to enhance our customer’s experience and improve our cost structure.

Our principal executive offices are located at 400 Atlantic Street, Stamford, Connecticut 06901. Our telephone number is (203) 905-7801, and we have a website accessible at www.corporate.charter.com. Our Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, and all amendments thereto, are available on our website free of charge as soon as reasonably practicable after they have been filed. The information posted on our website is not incorporated into this annual report.

There are several ways in which we attract, develop, and retain highly qualified talent, including:

- **Training and investing in our employees to be masters of their craft.** With competitive wages, robust healthcare benefits, a generous retirement program with company match, and opportunities for job training and advancement, our employees develop skills and expertise necessary to build careers. Our Broadband Technician Apprenticeship Program is one of our promising strategies for building our skilled workforce. This program, certified by the U.S. Department of Labor, is aligned with our broadband technician career progression and includes thousands of hours of on-the-job training along with classroom instruction. When enrolled employees complete the program, they are certified broadband technicians.

  The majority of our employees are customer-facing, interacting with thousands of people every day. In April 2020, we increased our minimum wage from $15 to $16.50 per hour and committed that in 2022 all hourly employees will have a minimum starting rate of $20 per hour. A $20 per hour minimum wage will enable us to build and retain our highly skilled workforce.

- **Driving a diverse and inclusive culture.** We are committed to diversity and inclusion in every aspect of our business. As we strive to deliver high-quality products and services that exceed our customers' expectations, we embrace the unique perspectives and experiences of our employees and partners and the communities we serve. Our diversity and inclusion efforts are guided by our Executive Steering Committee, External Diversity & Inclusion Council and Diversity & Inclusion team. Charter's Board of Directors also reviews diversity and inclusion progress annually. We are striving to enhance diversity at every level of our organization, including among our senior leaders.

  In 2019, we launched five Business Resource Groups ("BRGs") focused on disability, LGBTQ, multicultural, veterans and women. These voluntary groups connect employees with shared characteristics, life experiences, and interests, and enable them to engage in activities that advance our culture of inclusion and contribute to business success. BRGs empower our team members to grow and succeed by providing networking, mentorship and skill-building opportunities. We are also building momentum with our Charter Inclusion Talks (the "Talks"), which is an internal speaker series built around cultural heritage and identity. The Talks, which are held across our footprint, raise awareness of the many identities and heritages that contribute to our success.

- **Focusing on a safe and healthy workplace.** We value our employees and are committed to providing a safe and healthy workplace. All employees are required to comply with company safety rules and expectations, and are expected to actively contribute to making our company a safer place to work. In response to COVID-19, as one of the Federal Emergency Management Agency's community lifeline sectors, we continue to maintain operations while employing the latest Center for Disease Control and Prevention ("CDC") guidelines to promote the health of our employees.

Employees

As of December 31, 2020, we had approximately 96,100 active full-time equivalent employees.

Item 1A. Risk Factors.

Risks Related to Our Business

We operate in a very competitive business environment, which affects our ability to attract and retain customers and can adversely affect our business, operations and financial results.

The industry in which we operate is highly competitive and has become more so in recent years. In some instances, we compete against companies with fewer regulatory burdens, access to better financing, greater personnel resources, greater resources for marketing, greater and more favorable brand name recognition, and long-established relationships with regulatory authorities and customers. Increasing consolidation in the telecommunications and content industries have provided additional benefits to certain of our competitors, either through access to financing, resources, or efficiencies of scale including the ability to launch new video services.

Our Internet service faces competition from the phone companies' FTTH, FTTN, fixed wireless broadband, Internet delivered via satellite and DSL services. Various operators offer wireless Internet services delivered over networks which they continue to enhance to deliver faster speeds and also continue to expand 5G mobile services. Our voice and mobile services compete

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, Charter Communications, Inc. has duly caused this annual report to be signed on its behalf by the undersigned, thereunto duly authorized.

CHARTER COMMUNICATIONS, INC.,
Registrant

By: /s/ Thomas M. Rutledge
Thomas M. Rutledge
Chairman and Chief Executive Officer

Date: January 29, 2021

EXHIBIT 3: FORM 10-K (2020): ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, FOR THE FISCAL YEAR ENDED DECEMBER 31, 2019, RE CHARTER COMMUNICATIONS, INC. (RELEVANT PAGES ONLY)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934
For the fiscal year ended December 31, 2019
or

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Transition Period From to
Commission File Number: 001-33664

Charter Communications, Inc.

(Exact name of registrant as specified in its charter)

Delaware	**84-1496755**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)

400 Atlantic Street	**Stamford**	**Connecticut**	**06901**
(Address of Principal Executive Offices)			(Zip Code)

(203) 905-7801
(Registrant's telephone number, including area code)

Securities registered pursuant to section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Class A Common Stock $.001 Par Value	CHTR	NASDAQ Global Select Market

Securities registered pursuant to section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes x No o

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes o No x

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes x No o

Indicate by check mark whether the registrants have submitted electronically and posted on their corporate website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrants were required to submit and post such files). Yes x No o

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definition of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act.:

Large accelerated filer x Accelerated filer o Non-accelerated filer o Smaller reporting company ☐ Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. o

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No x

The aggregate market value of the registrant of outstanding Class A common stock held by non-affiliates of the registrant at June 30, 2019 was approximately $65.3 billion, computed based on the closing sale price as quoted on the NASDAQ Global Select Market on that date. For purposes of this calculation only, directors, executive officers and the principal controlling shareholders or entities controlled by such controlling shareholders of the registrant are deemed to be affiliates of the registrant.

There were 209,975,963 shares of Class A common stock outstanding as of December 31, 2019. There was 1 share of Class B common stock outstanding as of the same date.

Documents Incorporated By Reference

Information required by Part III is incorporated by reference from Registrant's proxy statement or an amendment to this Annual Report on Form 10-K to be filed by April 30, 2020.

PART I

Item 1. *Business.*

Introduction

We are the second largest cable operator in the United States and a leading broadband communications services company providing video, Internet and voice services to approximately 29.2 million residential and small and medium business customers at December 31, 2019. We also offer mobile service to residential customers and recently launched mobile service to small and medium business customers. In addition, we sell video and online advertising inventory to local, regional and national advertising customers and tailored communications and managed solutions to larger enterprise customers. We also own and operate regional sports networks and local sports, news and community channels.

We own and operate a high-capacity, two-way telecommunications network which passes over 52 million households and small and medium businesses across the United States. Our core strategy is to use our network to deliver high quality products at competitive prices, combined with outstanding service. This strategy, combined with simple, easy to understand pricing and packaging, is central to our goal of growing our customer base while selling more of our core connectivity services, which include both fixed and mobile Internet, video and voice services, to each individual customer. We execute this strategy by managing our operations in a consumer-friendly, efficient and cost-effective manner. Our operating strategy includes insourcing nearly all of our customer care and field operations workforces, which results in higher quality service delivery. While an insourced operating model can increase the field operations and customer care costs associated with individual service transactions, the higher quality nature of insourced labor service transactions significantly reduces the volume of service transactions per customer, more than offsetting the higher investment made in each insourced service transaction. As we reduce the number of service transactions and recurring costs per customer relationship, we continue to provide our customers with products and prices that we believe provide more value than what our competitors offer. The combination of offering high quality, competitively priced products and outstanding service, allows us to both increase the number of customers we serve over our fully deployed network, and to increase the number of products we sell to each customer. This combination also reduces the number of service transactions we perform per relationship, yielding higher customer satisfaction and lower customer churn, resulting in lower costs to acquire and serve customers.

We have enhanced our service operations to allow our customers to (1) more frequently interact with us through our customer website and Spectrum TV application, online chat and social media, (2) have their services installed at the time and in the manner of their own choosing, including self-installation, and (3) receive a variety of video packages on an increasing number of connected devices including those owned by us and those owned by the customer. By offering our customers growing levels of choices in how they receive and install their services and how they interact with us, we are driving higher overall levels of customer satisfaction and reducing our operating costs and capital expenditures per customer relationship. Ultimately, our operating strategy enables us to offer high quality, competitively priced services profitably, while continuing to invest in new products and services.

The capability and functionality of our two-way network continues to grow in a number of areas, especially with respect to wireless connectivity. Our Internet service offers consumers the ability to wirelessly connect to our network using WiFi technology. We estimate that over 300 million devices are wirelessly connected to our network through WiFi. Initially, our wireless strategy focused on offering wireless connectivity solutions inside the home and business using WiFi. Through our mobile virtual network operator (“MVNO”) reseller agreement with Verizon Communications Inc. ("Verizon"), we are now able to offer Internet connectivity to our customers beyond the home via our Spectrum Mobile product. We are also actively testing and evaluating opportunities for our customers to wirelessly connect to our network using a combination of licensed and unlicensed radio spectrum to deliver fixed and mobile service directly from our distributed, high capacity network.

Our principal executive offices are located at 400 Atlantic Street, Stamford, Connecticut 06901. Our telephone number is (203) 905-7801, and we have a website accessible at www.charter.com. Our Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, and all amendments thereto, are available on our website free of charge as soon as reasonably practicable after they have been filed. The information posted on our website is not incorporated into this annual report.

DOJ Conditions

The Department of Justice (“DOJ”) Order prohibits us from entering into or enforcing any agreement with a video programmer that forbids, limits or creates incentives to limit the video programmer’s provision of content to online video distributors ("OVDs"). We will not be able to avail ourself of other distributors’ most favored nation (“MFN”) provisions if they are inconsistent with this prohibition. The DOJ’s conditions are effective for seven years after entry of the final judgment in 2016, although we may petition the DOJ to eliminate the conditions after five years.

State Conditions

Certain state regulators, including California, New York, Hawaii and New Jersey also imposed conditions in connection with the approval of the Transactions. These conditions include requirements related to:

- Building out our network to certain households and business locations that are not currently served by cable within the designated states;
- Offering LifeLine service discounts and low-income broadband to eligible households served within the applicable states;
- Investing in service improvement programs and customer service enhancements and maintaining customer-facing jobs within the designated state; and
- Complying with reporting requirements.

Employees

As of December 31, 2019, we had approximately 95,100 active full-time equivalent employees.

Item 1A. Risk Factors.

Risks Related to Our Business

We operate in a very competitive business environment, which affects our ability to attract and retain customers and can adversely affect our business, operations and financial results.

The industry in which we operate is highly competitive and has become more so in recent years. In some instances, we compete against companies with fewer regulatory burdens, access to better financing, greater personnel resources, greater resources for marketing, greater and more favorable brand name recognition, and long-established relationships with regulatory authorities and customers. Increasing consolidation in the telecommunications and content industries have provided additional benefits to certain of our competitors, either through access to financing, resources, or efficiencies of scale including the ability to launch new video services.

Our video service faces competition from a number of sources, including DBS services, as well as other companies that deliver linear network programming, movies and television shows on demand and other video content over broadband Internet connections to televisions, computers, tablets and mobile devices often with password sharing among multiple users and security that makes content susceptible to piracy. Newer products and services, particularly alternative methods for the distribution, sale and viewing of content will likely continue to be developed, further increasing the number of competitors that we face.

The increasing number of choices available to audiences, including low-cost or free choices, could negatively impact not only consumer demand for our products and services, but also advertisers’ willingness to purchase advertising from us. We compete for the sale of advertising revenue with television networks and stations, as well as other advertising platforms, such as radio, print and, increasingly, online media.

Our Internet service faces competition from the phone companies’ FTTH, FTTN, DSL and wireless broadband offerings as well as from a variety of companies that offer other forms of online services, including fixed wireless and satellite-based broadband services. Various mobile phone companies offer wireless Internet services delivered over networks which they continue to enhance to deliver faster speeds and some began deploying 5G mobile services in 2019 with plans to expand 5G more broadly in the 2020. Our voice and mobile services compete with wireless and wireline phone providers, as well as other forms of communication, such as text messaging on cellular phones, instant messaging, social networking services, video conferencing and email. Competition from these companies, including intensive marketing efforts with aggressive pricing, exclusive programming and increased HD broadcasting may have an adverse impact on our ability to attract and retain customers.

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, Charter Communications, Inc. has duly caused this annual report to be signed on its behalf by the undersigned, thereunto duly authorized.

CHARTER COMMUNICATIONS, INC.,
Registrant

By: /s/ Thomas M. Rutledge
Thomas M. Rutledge
Chairman and Chief Executive Officer

Date: January 31, 2020

EXHIBIT 4: FORM 10-K (2019): ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, FOR THE FISCAL YEAR ENDED DECEMBER 31, 2018, RE CHARTER COMMUNICATIONS, INC. (RELEVANT PAGES ONLY)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

x ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2018

or

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Transition Period From to
Commission File Number: 001-33664

Charter Communications, Inc.

(Exact name of registrant as specified in its charter)

Delaware	**84-1496755**
(State or other jurisdiction of incorporation or organization)	*(I.R.S. Employer Identification Number)*
400 Atlantic Street **Stamford, Connecticut 06901**	**(203) 905-7801**
(Address of principal executive offices including zip code)	*(Registrant's telephone number, including area code)*

Securities registered pursuant to section 12(b) of the Act:

Title of each class	Name of Exchange which registered
Class A Common Stock, $.001 Par Value	NASDAQ Global Select Market

Securities registered pursuant to section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes x No o

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes o No x

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes x No o

Indicate by check mark whether the registrants have submitted electronically and posted on their corporate website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrants were required to submit and post such files). Yes x No o

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§ 229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. o

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definition of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act.:

Large accelerated filer x Accelerated filer o Non-accelerated filer o Smaller reporting company o

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. o

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes o No x

The aggregate market value of the registrant of outstanding Class A common stock held by non-affiliates of the registrant at June 30, 2018 was approximately $51.5 billion, computed based on the closing sale price as quoted on the NASDAQ Global Select Market on that date. For purposes of this calculation only, directors, executive officers and the principal controlling shareholders or entities controlled by such controlling shareholders of the registrant are deemed to be affiliates of the registrant.

There were 225,353,807 shares of Class A common stock outstanding as of December 31, 2018. There was 1 share of Class B common stock outstanding as of the same date.

Documents Incorporated By Reference

Information required by Part III is incorporated by reference from Registrant's proxy statement or an amendment to this Annual Report on Form 10-K to be filed by April 30, 2019.

PART I

Item 1. *Business.*

Introduction

We are the second largest cable operator in the United States and a leading broadband communications services company providing video, Internet and voice services to approximately 28.1 million residential and small and medium business customers at December 31, 2018. We also recently launched our Spectrum mobile service to residential customers. In addition, we sell video and online advertising inventory to local, regional and national advertising customers and fiber-delivered communications and managed information technology ("IT") solutions to large enterprise customers. We also own and operate regional sports networks and local sports, news and community channels.

We own and operate a high-capacity, two-way telecommunications network which passes over 50 million households and small and medium businesses across the United States. Our core strategy is to use our network to deliver high quality products at competitive prices, combined with outstanding service. This strategy, combined with simple, easy to understand pricing and packaging, is central to our goal of growing our customer base while selling more of our core connectivity services, which include both fixed and mobile Internet, video and voice services, to each individual customer. We execute this strategy by managing our operations in a consumer-friendly, efficient and cost-effective manner. Our operating strategy includes insourcing nearly all of our customer care and field operations workforces, which results in higher quality service delivery. While an insourced operating model can increase field operations and customer care costs associated with each service transaction, the higher quality nature of insourced labor service transactions significantly reduces the volume of service transactions per customer, more than offsetting the higher investment made in each insourced service transaction. As we reduce the number of service transactions and recurring costs per customer relationship, we continue to provide our customers with products and prices that we believe provide more value than what our competitors offer. The combination of offering high quality, competitively priced products and outstanding service, allows us to both increase the number of customers we serve over our fully deployed network, and to increase the number of products we sell to each customer. That combination also reduces the number of service transactions we perform per relationship, yielding higher customer satisfaction and lower customer churn, resulting in lower costs to acquire and serve customers.

We are also modifying our service operations to allow our customers to (1) interact with us through a variety of new forums, including our customer website, online chat and social media, (2) have their services installed at the time and in the manner of their own choosing, including self-installation, and to (3) receive their selected services on devices of their own choosing, including connected devices, such as Apple TV and Roku. By offering our customers growing levels of choice in how they interact, install and receive their services, we are driving higher overall levels of customer satisfaction and reducing our operating costs and capital expenditures per customer relationship. Ultimately, our operating strategy enables us to offer high quality, competitively priced services profitably, while continuing to invest in new products and services.

The capability and functionality of our two-way network continues to grow in a number of areas, especially with respect to wireless connectivity. Our Internet service offers consumers the ability to wirelessly connect to our network using WiFi technology. We estimate that approximately 250 million devices are wirelessly connected to our network. Our wireless strategy initially focused on offering wireless connectivity solutions inside the home and business. Increasingly, however, we are testing and evaluating opportunities for our customers to connect their devices to our network beyond their current service location or via our mobile virtual network operator ("MVNO") reseller agreement with Verizon Communications Inc. ("Verizon"), using a combination of licensed and unlicensed radio spectrum for fixed and mobile service delivery from our highly distributed, high capacity network.

Our principal executive offices are located at 400 Atlantic Street, Stamford, Connecticut 06901. Our telephone number is (203) 905-7801, and we have a website accessible at www.charter.com. Our Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, and all amendments thereto, are available on our website free of charge as soon as reasonably practicable after they have been filed. The information posted on our website is not incorporated into this annual report.

The Transactions

On May 18, 2016, the transactions contemplated by the Agreement and Plan of Mergers dated as of May 23, 2015 (the "Merger Agreement"), by and among Time Warner Cable Inc. ("Legacy TWC"), Charter Communications, Inc. prior to the closing of the Merger Agreement ("Legacy Charter"), CCH I, LLC, previously a wholly owned subsidiary of Legacy Charter and certain other subsidiaries of CCH I, LLC were completed (the "TWC Transaction," and together with the Bright House Transaction described

this prohibition. The DOJ's conditions are effective for seven years, although we may petition the DOJ to eliminate the conditions after five years.

State Conditions

Certain state regulators, including California, New York, Hawaii and New Jersey also imposed conditions in connection with the approval of the Transactions. These conditions include requirements related to:

- Upgrading networks within the designated state, including upgrades to broadband speeds and conversion of all households served within California and New York to an all-digital platform;
- Building out our network to certain households and business locations that are not currently served by cable within the designated states;
- Offering LifeLine service discounts and low-income broadband to eligible households served within the applicable states;
- Investing in service improvement programs and customer service enhancements and maintaining customer-facing jobs within the designated state;
- Continuing to make legacy service offerings available, including allowing Legacy TWC and Legacy Bright House customers to maintain their existing service offerings for a period of three years; and
- Complying with reporting requirements.

Employees

As of December 31, 2018, we had approximately 98,000 active full-time equivalent employees.

Item 1A. Risk Factors.

Risks Related to Our Business

We operate in a very competitive business environment, which affects our ability to attract and retain customers and can adversely affect our business, operations and financial results.

The industry in which we operate is highly competitive and has become more so in recent years. In some instances, we compete against companies with fewer regulatory burdens, better access to financing, greater personnel resources, greater resources for marketing, greater and more favorable brand name recognition, and long-established relationships with regulatory authorities and customers. Increasing consolidation in the telecommunications and content industries have provided additional benefits to certain of our competitors, either through access to financing, resources, or efficiencies of scale including the ability to launch new video services.

Our video service faces competition from a number of sources, including DBS services, as well as other companies that deliver movies, television shows and other video programming over broadband Internet connections to TVs, computers, tablets and mobile devices. Our Internet service faces competition from the phone companies' DSL, FTTH and wireless broadband offerings as well as from a variety of companies that offer other forms of online services, including wireless and satellite-based broadband services. Various mobile phone companies offer wireless Internet services delivered over networks which they continue to enhance to deliver faster speeds and some have announced that they intend to offer faster 5G services in the future. Our voice and mobile services compete with mobile and wireline phone providers, as well as other forms of communication, such as text messaging on cellular phones, instant messaging, social networking services, video conferencing and email. Competition from these companies, including intensive marketing efforts with aggressive pricing, exclusive programming and increased HD broadcasting may have an adverse impact on our ability to attract and retain customers.

Wireline and wireless overbuilds could also adversely affect our growth, financial condition, and results of operations, by creating or increasing competition. We are aware of traditional overbuild situations impacting certain of our service areas, however, we are unable to predict the extent to which additional overbuild situations may occur.

Our services may not allow us to compete effectively. Competition may reduce our expected growth of future cash flows which may contribute to future impairments of our franchises and goodwill and our ability to meet cash flow requirements, including debt service requirements. For additional information regarding the competition we face, see "Item 1. Business -Competition" and "-Regulation and Legislation."

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, Charter Communications, Inc. has duly caused this annual report to be signed on its behalf by the undersigned, thereunto duly authorized.

CHARTER COMMUNICATIONS, INC.,
Registrant

By: /s/ Thomas M. Rutledge
Thomas M. Rutledge
Chairman and Chief Executive Officer

Date: January 31, 2019

EXHIBIT 5: FORM 10-K (2018): ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934, FOR THE FISCAL YEAR ENDED DECEMBER 31, 2017, RE CHARTER COMMUNICATIONS, INC. (RELEVANT PAGES ONLY)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

x ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2017

or

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Transition Period From to
Commission File Number: 001-33664

Charter Communications, Inc.

(Exact name of registrant as specified in its charter)

Delaware	**84-1496755**
(State or other jurisdiction of incorporation or organization)	*(I.R.S. Employer Identification Number)*
400 Atlantic Street **Stamford, Connecticut 06901**	**(203) 905-7800**
(Address of principal executive offices including zip code)	*(Registrant's telephone number, including area code)*

Securities registered pursuant to section 12(b) of the Act:

Title of each class	Name of Exchange which registered
Class A Common Stock, $.001 Par Value	NASDAQ Global Select Market

Securities registered pursuant to section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes x No o

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes o No x

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes x No o

Indicate by check mark whether the registrants have submitted electronically and posted on their corporate website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrants were required to submit and post such files). Yes x No o

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§ 229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. o

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definition of "large accelerated filer," "accelerated filer," and "smaller reporting company" in Rule 12b-2 of the Exchange Act.:

Large accelerated filer x Accelerated filer o Non-accelerated filer o Smaller reporting company o

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. o

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes o No x

The aggregate market value of the registrant of outstanding Class A common stock held by non-affiliates of the registrant at June 30, 2017 was approximately $68.0 billion, computed based on the closing sale price as quoted on the NASDAQ Global Select Market on that date. For purposes of this calculation only, directors, executive officers and the principal controlling shareholders or entities controlled by such controlling shareholders of the registrant are deemed to be affiliates of the registrant.

There were 238,506,059 shares of Class A common stock outstanding as of December 31, 2017. There was 1 share of Class B common stock outstanding as of the same date.

Documents Incorporated By Reference

Information required by Part III is incorporated by reference from Registrant's proxy statement or an amendment to this Annual Report on Form 10-K to be filed by April 30, 2018.

PART I

Item 1. *Business.*

Introduction

We are the second largest cable operator in the United States and a leading broadband communications services company providing video, Internet and voice services to approximately 27.2 million residential and business customers at December 31, 2017. In addition, we sell video and online advertising inventory to local, regional and national advertising customers and fiber-delivered communications and managed information technology ("IT") solutions to large enterprise customers. We also own and operate regional sports networks and local sports, news and community channels and sell security and home management services in the residential marketplace.

Our core strategy is to deliver high quality products at competitive prices, combined with outstanding service. This strategy, combined with simple, easy to understand pricing and packaging, is central to our goal of growing our customer base while also selling more services to each customer. We expect to execute this strategy by managing our operations in a consumer-friendly, efficient and cost-effective manner. Our operating strategy includes insourcing much of our customer care and field operations workforces, which results in higher quality service transactions. While an insourced operating model can increase field operations and customer care costs associated with each service transaction, the higher quality nature of insourced labor service transactions significantly reduces the volume of service transactions per customer, more than offsetting the higher investment made in each service transaction. As we reduce the number of service transactions and recurring costs per customer relationship, we effectively pass those savings on to our customers in the form of products and prices that we believe provide more value than what our competitors offer. The combination of offering competitively priced products and high quality service, allows us to increase the number of customers we serve over our fixed network and increase the number of products we sell to each customer, while at the same time reducing the number of service transactions per relationship, improving customer satisfaction and reducing churn, which results in lower costs to acquire and serve customers. We are also reducing our operating costs per customer relationship by providing customers with the ability to communicate with us through a variety of new forums that they may favor over telephonic communications. These forums include our customer website, mobile device applications, online chat and social media, which are less costly for us to provide than direct telephonic communications. Ultimately, our operating strategy enables us to offer high quality, competitively priced services profitably, while continuing to invest in new products and services.

Our principal executive offices are located at 400 Atlantic Street, Stamford, Connecticut 06901. Our telephone number is (203) 905-7800, and we have a website accessible at www.charter.com. Our Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, and all amendments thereto, are available on our website free of charge as soon as reasonably practicable after they have been filed. The information posted on our website is not incorporated into this annual report.

The Transactions

On May 18, 2016, the transactions contemplated by the Agreement and Plan of Mergers dated as of May 23, 2015 (the "Merger Agreement"), by and among Time Warner Cable Inc. ("Legacy TWC"), Charter Communications, Inc. prior to the closing of the Merger Agreement ("Legacy Charter"), CCH I, LLC, previously a wholly owned subsidiary of Legacy Charter and certain other subsidiaries of CCH I, LLC were completed (the "TWC Transaction," and together with the Bright House Transaction described below, the "Transactions"). As a result of the TWC Transaction, CCH I, LLC became the new public parent company that holds the operations of the combined companies and was renamed Charter Communications, Inc.

Also, on May 18, 2016, Legacy Charter and Advance/Newhouse Partnership ("A/N"), the former parent of Bright House Networks, LLC ("Legacy Bright House"), completed their previously announced transaction, pursuant to a definitive Contribution Agreement (the "Contribution Agreement"), under which Charter acquired Legacy Bright House (the "Bright House Transaction"). Pursuant to the Bright House Transaction, Charter became the owner of the membership interests in Legacy Bright House and the other assets primarily related to Legacy Bright House (other than certain excluded assets and liabilities and non-operating cash).

In connection with the TWC Transaction, Legacy Charter and Liberty Broadband completed their previously announced transactions pursuant to their investment agreement, in which Liberty Broadband purchased shares of Charter Class A common stock to partially finance the cash portion of the TWC Transaction consideration, and in connection with the Bright House Transaction, Liberty Broadband purchased shares of Charter Class A common stock (the "Liberty Transaction"). See Note 3 to the accompanying consolidated financial statements contained in "Part II. Item 8. Financial Statements and Supplementary Data," for more information on the Transactions.

- Refrain from charging usage-based prices or imposing data caps on any fixed mass market broadband Internet access service plans for seven years (with a possible reduction to five);
- Offer 30/4 Mbps discounted broadband where technically feasible to eligible customers throughout our service area for four years from the offer's commencement; and
- Continue to provide CableCARDs to any new or existing customer upon request for use in third-party retail devices for four years and continue to support such CableCARDs for seven years (in each case, unless the FCC changes the relevant rules).

The FCC conditions also contain a number of compliance reporting requirements.

DOJ Conditions

The Department of Justice ("DOJ") Order prohibits us from entering into or enforcing any agreement with a video programmer that forbids, limits or creates incentives to limit the video programmer's provision of content to online video distributors ("OVDs"). We will not be able to avail ourself of other distributors' most favored nation ("MFN") provisions if they are inconsistent with this prohibition. The DOJ's conditions are effective for seven years, although we may petition the DOJ to eliminate the conditions after five years.

State Conditions

Certain state regulators, including California, New York, Hawaii and New Jersey also imposed conditions in connection with the approval of the Transactions. These conditions include requirements related to:

- Upgrading networks within the designated state, including upgrades to broadband speeds and conversion of all households served within California and New York to an all-digital platform;
- Building out our network to households and business locations that are not currently served by cable within the designated states;
- Offering LifeLine service discounts and low-income broadband to eligible households served within the applicable states;
- Investing in service improvement programs and customer service enhancements and maintaining customer-facing jobs within the designated state;
- Continuing to make legacy service offerings available, including allowing Legacy TWC and Legacy Bright House customers to maintain their existing service offerings for a period of three years; and
- Complying with reporting requirements.

Employees

As of December 31, 2017, we had approximately 94,800 active full-time equivalent employees.

Item 1A. Risk Factors.

Risks Related to Our Business

If we are not able to successfully complete the integration of our business with that of Legacy TWC and Legacy Bright House, the anticipated benefits of the Transactions may not be fully realized or may take longer to realize than expected. In such circumstance, we may not perform as expected and the value of Charter's Class A common stock may be adversely affected.

There can be no assurances that we can successfully complete the integration of our business with that of Legacy TWC and Legacy Bright House. We now have significantly more systems, assets, investments, businesses, customers and employees than each company did prior to the Transactions. It is possible that the integration process could result in the loss of customers, the disruption of our ongoing businesses or in unexpected integration issues, higher than expected integration costs and an overall post-completion integration process that takes longer than originally anticipated. The process of integrating Legacy TWC and Legacy Bright House with the Legacy Charter operations requires significant capital expenditures and the expansion of certain operations and operating and financial systems. Management continues to devote a significant amount of time and attention to the integration process and there is a significant degree of difficulty and management involvement inherent in that process.

Even if the new businesses are successfully integrated, it may not be possible to realize the benefits that are expected to result from the Transactions, or realize these benefits within the time frame that is expected. For example, the benefits of our pricing and packaging and converting our video product to all-digital in certain Legacy TWC and Legacy Bright House systems may not be fully realized or may take longer than anticipated, or the benefits from the Transactions may be offset by costs incurred or

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, Charter Communications, Inc. has duly caused this annual report to be signed on its behalf by the undersigned, thereunto duly authorized.

CHARTER COMMUNICATIONS, INC.,
Registrant

By: /s/ Thomas M. Rutledge
Thomas M. Rutledge
Chairman and Chief Executive Officer

Date: February 2, 2018

EXHIBIT 6: KAMELAH MUHAMMAD V. CHARTER COMMUNICATIONS, INC., 21-CV-0614-CV-W-FJG (U.S. DIST. CT., W.D. MISSOURI), JANUARY 6, 2022

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KAMELAH MUHAMMAD, Plaintiff,	)	
v.	)	Case No. 21-0614-CV-W-FJG
CHARTER COMMUNICATIONS, INC., Defendant.	)	

ORDER

Pending before the Court is Defendant Charter Communications, LLC's Motion to Compel Arbitration/Motion to Dismiss (Doc. No. 7). Defendant also requests that the Court award it its costs, expenses, and fees (including attorneys' fees) incurred in filing these pleadings.

I. Background

On February 17, 2021, plaintiff filed the present action in Jackson County Circuit Court. On or about July 21, 2021, Plaintiff filed an amended petition, asserting claims under the Missouri Human Rights Act ("MHRA") for race discrimination, sex discrimination, and retaliation. Defendant agreed to accept service of the Petition on August 23, 2021. Thereafter, on August 24, 2021, Defendant removed this case to federal court asserting the presence of diversity jurisdiction under 28 U.S.C. § 1332, and on September 13, 2021, Defendant filed the present motion to compel arbitration and to dismiss. See Doc. No. 7.

Defendant has submitted the Affidavit of John Fries, Vice President, HR Technology for Charter Communications, LLC, (Doc. No. 7-1) which sets out the following:

Solution Channel is Charter's employment-based legal dispute resolution program ("the Program"). On October 6, 2017, Charter announced the Program by email to all non-union below the level of Executive Vice President, who were active, or who were not on a leave of absence, on that date (hereinafter referred to as "Employees"). Employees received the email announcement from Paul Marchand, Executive Vice President, Human Resources, at the Charter work email address assigned to them.

***

The Solution Channel Announcement indicated to Employees that they would be enrolled in the Program unless they opted out of the Program within 30 days. That 30-day period expired on November 5, 2017. The Solution Channel Announcement stated in part:

> Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled. Instructions for opting out of *Solution Channel* are also located on Panorama.

The Solution Channel Announcement included a link to the Solution Channel web page located on the Charter intranet site accessible to Employees, named *Panorama.* The Solution Channel web page was accessible to the Employees on Charter's network, and included additional information regarding the Program.

The Solution Channel web page accessible to Employees on *Panorama* included a reference and link to Charter's Mutual Arbitration Agreement and the Solution Channel Program Guidelines. The Solution Channel web page accessible to Employees on *Panorama* also included the following information:

> **Opting Out of Solution Channel**
>
> If you do not opt out of Solution Channel within the designated time, you will be automatically enrolled in Solution Channel and considered to have consented to the terms of the Mutual Arbitration Agreement at that time. To opt-out of Solution Channel, please **click here**. In the new window that will open, click Main Menu->Self-Service->Solution Channel.

Employees who wished to learn more about opting out of the Program could select the **"click here"** link, which launched the opening of the PeopleSoft sign-in web page. Employees who signed into PeopleSoft using their regular network credentials could select "Self Service" from the main menu on the PeopleSoft home page, and then select "Solution Channel" from the SelfService menu. By selecting "Solution Channel," Employees would land on a page within PeopleSoft, at which they could opt out of the Program (the "PeopleSoft Solution Channel Page").

> If Employees wished to opt out of the Program, they checked the box next to the phrase "I want to opt out of Solution Channel", entered their name in an adjacent text field, and clicked "SAVE." Employees had the option of printing this page for their records.
>
> Employees who opted out of the Program by following the steps above received an email from Charter confirming that they exercised their right to opt out of the Program. Employees who did not opt out of the Program by following the steps described in paragraph 14 on or before November 5, 2017, were enrolled in the Program. These enrolled Employees could then view their enrollment status in PeopleSoft by accessing PeopleSoft, selecting "Self Service" from the main menu on the PeopleSoft home page, and then selecting "Solution Channel" from the Self Service menu. After November 5, 2017, Employees could no longer use the PeopleSoft Solution Channel Page to opt out of the Program.
>
> Charter maintains within PeopleSoft a record of Employees who opted out of the Program between October 6 and November 5, 2017.
>
> Mr. Fries affirms that he has access to and has reviewed the dates of employment of Plaintiff in PeopleSoft, and confirmed that she was an employee of Charter on October 6, 2017. He also has access to and reviewed the list of Employees to whom the Solution Channel Announcement was emailed on October 6, 2017, and has confirmed that Plaintiff was included in this distribution list. Mr. Fries has also reviewed Charter's record of Employees who opted out of the Program between October 6 and November 5, 2017, and has confirmed that Plaintiff did not opt out of the Program during that period.

See Fries Aff., Doc. No. 7-1.

The Program provides as to all covered employees that the employee and the Defendant "mutually agree[d] that, as a condition... of [the employee's] employment, with [Defendant], any dispute arising out of or relating to [employee's]... employment with [Defendant] or the termination of that relationship, except as specifically excluded below, must be resolved through binding arbitration. . . ." Doc. No. 7-1, p. 10. These covered disputes include:

> All disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which you or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims, whether the claims are denominated as...unlawful discrimination or harassment (including such

> claims based on race, color, national origin, sex, pregnancy, age, religion, sexual orientation, disability, and any other prohibited grounds), [or] claims for unlawful retaliation...

Id. Defendant asserts that all of Plaintiff's claims, therefore, are covered by the Program and should therefore be arbitrated.

In response to the motion, Plaintiff asserts that, until Defendant filed the motion to compel arbitration, she had no knowledge of any arbitration agreement between herself and Defendant. Plaintiff asserts that Defendant has no proof or knowledge that Plaintiff ever saw the email or knew about the Program. Plaintiff also asserts that the email does not explicitly indicate that the Program covers claims such as those brought by Plaintiff in this lawsuit. Plaintiff asserts that she never saw the email in question, she never received any information about the Program and did not log into Panorama to obtain more detailed information about the Program or to opt out. Response, Ex. 1, ¶¶ 3-9.

In its reply suggestions, however, Defendant provides a copy of the Time Detail Report maintained during Plaintiff's employment showing that Plaintiff was at work on the day that the Program was announced by email and that Plaintiff was at work on 22 of the 30 days during the opt out period. See Doc. No. 17-1. Moreover, the declaration of Daniel Vasey, Senior Director, Legal at Charter Communications, LLC, and his review of Charter's electronic records demonstrates that Plaintiff received the Program announcement via email, and opened the email (noting that the email had been opened using Plaintiff's personal login, and employees are prohibited from sharing login credentials with other people). See Vasey Decl., ¶¶ 5-7.

II. Legal Standard

Pursuant to the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. If a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement," it may request in federal district court "an order directing that such arbitration proceed in the manner provided for in [the] agreement." 9 U.S.C. § 4. The Eighth Circuit follows a two-step process in determining whether to compel arbitration. First, the Court determines whether a valid agreement to arbitrate exists between the parties. Second, the Court determines whether the specific dispute falls within the scope of that agreement. Kenner v. Career Educ. Corp., No. 4:11CV00997 AGF, 2011 WL 5966922, at *3 (E.D. Mo. Nov. 29, 2011) (citing Pro Tech Indus., Inc. v. URS Corp., 377 F.3d 868, 871 (8th Cir. 2004)).

To determine whether a valid agreement to arbitrate exists, a court examines whether the agreement complies with the principles of contract law. See 9 U.S.C. § 2; Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010). Missouri contracts must contain an "offer, acceptance, and bargained for consideration." Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. banc 1988). "If a contract contains mutual promises imposing a legal duty or liability on each party as a promise to the other party, the contract is a bilateral contract with sufficient consideration." Vest v. Cracker Barrel Old Country Store, Inc., 371 F. Supp. 3d 593, 599 (W.D. Mo. 2018) (citing Sniezek v. Kan. City Chiefs Football Club, 402 S.W.3d 580, 583 (Mo. Ct. App. 2013)). Agreements between employers and employees to arbitrate claims may be considered sufficiently supported by consideration to be binding. Vest, 371 F. Supp. 3d at 600. Under the FAA, the Court resolves any doubts regarding the parties' intentions in favor of arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

III. Defendant's Motion to Compel Arbitration/Motion to Dismiss (Doc. No. 7)

The claims in this lawsuit appear to fall within the scope of the Arbitration Agreement. Defendant notes that in her Complaint, Plaintiff brings three claims: (1) race discrimination in violation of Title VII; (2) sex discrimination in violation of Title VII; and (3) retaliation in violation of Title VII. See Doc. No. 1. Defendant notes that the Arbitration Agreement covers any dispute arising out of or relating to Plaintiff's employment with Defendant, including claims of discrimination and/or retaliation. See Ex. C to Fries Aff. at 1. Plaintiff does not challenge Defendant's assertion that her claims fall within the scope of the Arbitration Agreement; instead, she argues that she never entered into an arbitration agreement in the first place. Thus, the Court immediately turns to whether a valid agreement to arbitrate exists between the parties.

Defendant argues that a valid and enforceable arbitration agreement exists. Defendant indicates that it offered the Agreement to Plaintiff; that Plaintiff's conduct demonstrates that she reviewed and accepted the Agreement through her inaction; and that the Agreement is supported by valid consideration, noting that the arbitration obligations within the agreement are mutual, and Defendant has agreed to cover certain costs associated with arbitration. See Fries Aff., ¶¶ 20-23; Ex. B to Fries Aff. Therefore, Defendant concludes that there is no question the parties have agreed to arbitrate.

In response, Plaintiff argues that there was no contract formed, as the Agreement lacks acceptance and consideration. With respect to acceptance, Plaintiff argues that she never agreed to anything. Plaintiff argues that Defendant has no knowledge as to whether Plaintiff had notice of the Program and further argues that Defendant cannot demonstrate that she had seen or viewed the email in question during the 30-day opt-out period. Plaintiff also argues that Defendant cannot say with certainty that Plaintiff was actually at work during the 30-day opt-out period. Plaintiff therefore argues that without a

demonstration that she received notice within the 30-day timeframe, Defendant cannot show that her inaction amounted to acceptance. In addition, Plaintiff argues that although a signature is not the exclusive way of demonstrating a party's acceptance, "in the absence of a signature, the party claiming that a contract was formed must present other evidence to establish its assent to abide by the terms of the agreement." Baier v. Darden Restaurants, 420 S.W.3d 733, 738 (Mo. App. W.D. 2014) (finding it to be a question of fact as to intent in determining whether an unsigned contract was valid). See also Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15, 22-23 (Mo. App. W.D. 2008) (finding an arbitration clause to be unenforceable when it was simply presented as a new term and condition of employment and no indicia of the employee's assent appeared in the record).

In its reply, however, Defendant provides evidence that Plaintiff was at work on 22 of the 30 days during the opt-out period, was at work on the date that Defendant announced the Program via email, and was at work on the date of the opt-out deadline. See Doc. No. 17, Ex. 1, at 1, 5. Defendant further indicates that its records demonstrate that Plaintiff received the Program announcement e-mail and that she opened that e-mail. Therefore, for the reasons stated by Defendant, the Court concludes that Plaintiff had notice of the Program and had the means available to her to opt-out of the Agreement. Moreover, under Missouri contract law, an offer may be accepted by not only affirmative conduct, but by failure to act. See Citibank (S. Dakota), N.A. v. Wilson, 160 S.W.3d 810, 813 (Mo. App. W.D. 2005). When interpreting Missouri law, the Eighth Circuit and fellow courts in this district have held that failure to act can constitute acceptance of an arbitration agreement when a party has been informed of opt-out procedures and yet fails to do so. See Cicle v. Chase Bank USA, 583 F.3d 549, 555 (8th Cir. 2009); AT&T Mobility

Servs., LLC v. Inzerillo, No. 4:17-cv-00841-HFS, 2018 WL 10160964, at *2–*3 (W.D. Mo. Jan. 31, 2018). The Court finds that Plaintiff's circumstances are nearly identical to those in Inzerillo, wherein Judge Sachs granted the motion to compel arbitration because the plaintiff was informed of but failed to timely opt out of his employer's arbitration agreement. No signature was necessary in Inzerillo to support contract formation. Given that Defendant's email to Plaintiff explicitly warned Plaintiff that her inaction would result in enrollment in the Program and yet Plaintiff failed to act, the Court finds that Plaintiff's inaction demonstrates her acceptance of this contract under Missouri law.

Plaintiff further argues that the Agreement lacks consideration as required by Missouri law. Plaintiff argues that when (as here) an arbitration agreement is presented several months or years after the parties entered into an employment relationship in exchange for continued at-will employment, such continued employment does not constitute sufficient consideration under Missouri law. See Sniezek v. Kansas City Chiefs Football Club, 402 S.W.3d 580, 585 (Mo. App. W.D. 2013); Baker v. Bristol Care, Inc., 450 S.W.3d 770, 775-76 (Mo. banc. 2014); Colton v. Hibbett Sporting Goods Inc., 2016 WL 3248578, *2, Case No. 2:16-cv-04002-NKL (W.D. Mo. June 13, 2016). Defendant, however, replies that continued at-will employment is not the only item of consideration in the Arbitration Agreement; instead, the Agreement also obligates both Plaintiff and Defendant to arbitrate employment-related disputes (see Agreement, § A), and requires Defendant to bear certain Arbitration costs on behalf of both parties (see Agreement, § K). Defendant argues that this means that the Agreement is adequately supported by consideration on both sides. Notably, Judge Laughrey in Colton, above, determined that where the parties were bound by a mutual promise to arbitrate their claims, such a promise constituted sufficient consideration to support the contract. Colton, 2016 WL

3248578, *3. Upon consideration of the arguments presented by the parties, the Court finds that the Arbitration Agreement between Plaintiff and Defendant is supported by adequate consideration.

Moreover, the Court finds that the Agreement is not unconscionable under Missouri law. Under Missouri law, a contract is considered unconscionable if it contains "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." Franklin v. Cracker Barrel Old Country Store, 2017 WL 7691757, *5 (E.D. Mo., April 12, 2017). The Court finds that Plaintiff's unconscionability argument, which is very brief, merely reiterates her arguments related to the formation of the contract. As the Court has already found Plaintiff's contract formation arguments to be unavailing, the Court likewise declines to invalidate the Arbitration Agreement due to unconscionability. See Vest v. Cracker Barrel Old Country Store, Inc., 371 F. Supp. 3d 593, 603 (W.D. Mo. 2018).

Accordingly, for all the above-stated reasons, the Court finds that defendants' motion to compel arbitration should be **GRANTED.** Although Defendant requests the Court dismiss this action pending arbitration, the Court finds that entering a stay pending completion of arbitration to be the better result. Accordingly, this matter will be stayed pending completion of arbitration pursuant to 9 U.S.C. § 3.

In addition, the Agreement provides that when a party resists arbitration and arbitration is thereafter compelled, the party resisting arbitration will be required to pay the other party all costs, fees, and expenses incurred in compelling arbitration, including reasonable attorneys' fees. See Ex. C to Fries Aff., at 4, ¶ K. Given that Plaintiff's actions in resisting arbitration fall within this contractual provision, Defendant requests that the Court order Plaintiff to pay its costs, fees, and expenses incurred in compelling

arbitration. The Court will **PROVISIONALLY GRANT** Defendant's request, subject to the Court's review of Defendant's submission of its statement of costs, fees, and expenses. Defendant's submission shall be filed on ECF on or before **January 19, 2022**. Plaintiff's objection to this submission (if any) shall be filed on or before **February 2, 2022.**

IV. Conclusion

For the reasons set forth in this order, Defendant Charter Communications, LLC's Motion to Compel Arbitration/Motion to Dismiss (Doc. No. 7) is **DENIED IN PART** as it relates to dismissal of this matter, **PROVISIONALLY GRANTED IN PART** as it relates to an award of Defendant's costs, fees, and expenses in bring this motion, and **GRANTED IN PART** in all other relevant aspects. Defendant shall submit its statement of costs, fees, and expenses on or before **January 19, 2022**, and Plaintiff shall file any objection to this submission on or before **February 2, 2022.** Additionally, the parties shall file status reports every six months indicating the status of arbitration, with the first of those reports due on or before **JULY 6, 2022.**

IT IS SO ORDERED.

Date January 6, 2022
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

EXHIBIT 7: FISSCHA GEZU V. CHARTER COMMUNICATIONS, NO. 21-10198 (5TH CIR., NOVEMBER 2, 2021); 17 F.4TH 547

17 F.4th 547
United States Court of Appeals, Fifth Circuit.

Fisseha GEZU, Plaintiff—Appellant,
v.
CHARTER COMMUNICATIONS, Defendant—Appellee.

No. 21-10198
|
FILED November 2, 2021

Synopsis
Background: Former employee brought pro se action against employer alleging discrimination based on his race and national origin, in violation of Title VII and § 1981. The United States District Court for the Northern District of Texas, A. Joe Fish, J., 2021 WL 410000, adopting report and recommendation of Rebecca Rutherford, United States Magistrate Judge, 2021 WL 419741, granted employer's motion to compel arbitration and to dismiss for improper venue. Former employee appealed.

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:

under Texas law, employee received notice of arbitration agreement;

under Texas law, employee accepted terms of arbitration agreement;

vice president's declaration complied with statute setting forth requirements for use of an unsworn declaration;

senior director's declaration constituted proper rebuttal to employee's response in opposition to employer's motion; and

District Court did not abuse its discretion in striking employee's second "response" in opposition to employer's motion.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration; Motion to Dismiss; Motion to Strike Affidavit; Motion to Amend the Complaint.

***551** Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:20-CV-1476, A. Joe Fish, U.S. District Judge

Attorneys and Law Firms

Fisseha Gezu, Dallas, TX, Pro Se.

Jasmine Wynton, Thompson Coburn, L.L.P., Dallas, TX, Amy E. Oslica, Thompson Coburn, L.L.P., Saint Louis, MO, for Defendant-Appellee.

Before Owen, Chief Judge, and Jones and Wilson, Circuit Judges.

Opinion

Cory T. Wilson, Circuit Judge:

Fisseha Gezu appeals the district court's grant of Charter Communications's motion to compel arbitration and to dismiss under FED. R. CIV. P. 12(b)(3). Finding no error, we affirm.

I.

Gezu worked for Charter from December 2007 to May 2019. [1] On October 6, 2017, Charter sent an email to all active, non-union employees announcing a new employment-based legal dispute resolution program dubbed Solution Channel (the "Program"). The pertinent part of the email stated:

> In the unlikely event of a dispute not resolved through the normal channels, Charter has launched *Solution Channel*, a program that allows you and the company to efficiently resolve covered employment-related legal disputes through binding arbitration.
>
> By participating in *Solution Channel*, you and Charter both waive the right to initiate or participate in court litigation (including class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim .... Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled. Instructions for opting out of *Solution Channel* are also located on Panorama.

The email also hyperlinked the term "Solution Channel" to send recipients to Charter's intranet, where additional information on the Program and opt-out instructions were available.

The arbitration agreement, which was available in full on Charter's intranet, required arbitration of

> all disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which you or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims, whether the claims are denominated as tort, contract, common law, or statutory claims (whether under local, state or federal law), including without limitation claims for: ... unlawful discrimination or harassment (including such claims based upon race, color, national origin, sex, pregnancy, age, religion, sexual orientation, disability, and any other prohibited grounds), [and] claims for unlawful retaliation ....

These provisions in mind, we turn to the actions leading to this lawsuit and the relevant procedural history.

During his employment, Gezu allegedly suffered discrimination based on his race and national origin. According to Gezu, ***552** Charter did not take any action to address the discrimination despite being made aware of it. Instead, Charter ultimately terminated Gezu on May 8, 2019, based on what Gezu alleges were pretextual reasons. As a result of these events, Gezu filed the underlying complaint against Charter on June 8, 2020. Proceeding *pro se*, he asserted claims under Title VII of the Civil Rights Act and 42 U.S.C. § 1981.

In response, Charter moved to compel arbitration and to dismiss under Rule 12(b)(3), contending that Gezu and Charter were parties to a binding arbitration agreement. Charter attached various exhibits to its brief in support of its motion, including, among other things, a declaration of John Fries, its Vice President of HR Technology. Gezu responded in opposition and moved to strike Fries's declaration. According to Gezu, no consensual arbitration agreement existed and Fries's declaration was inadmissible

because it was not sworn or notarized. Charter filed a reply in support of its motion and a response in opposition to Gezu's motion to strike, attaching a declaration of Daniel Vasey, Charter's senior director of records management and eDiscovery. [2] Gezu then filed a second response to Charter's motion to compel arbitration and dismiss, which Charter moved to strike as an unauthorized surreply.

Ultimately, the magistrate judge entered her findings, conclusions, and recommendation in favor of granting Charter's motion to compel arbitration and to dismiss. The magistrate also denied Gezu's motion to strike Fries's affidavit and granted Charter's motion to strike Gezu's second response to Charter's motion. Gezu filed objections to the magistrate's recommendation, but the district court overruled the objections and entered an order accepting it. The district court then entered a judgment granting Charter's motion to compel arbitration and dismissing the action without prejudice to Gezu's right to demand arbitration. Gezu timely appealed.

Gezu primarily contends that the district court erred by adopting the magistrate's recommendation to grant Charter's motion to compel arbitration and to dismiss under Rule 12(b)(3). Gezu also asserts that the court erred by (1) finding Fries's declaration admissible; (2) not seeking responses to a list of questions that Gezu requested the court ask of Charter; (3) accepting new evidence, i.e., Vasey's declaration, presented for the first time in Charter's reply brief; and (4) granting Charter's motion to strike his second response (the surreply) to Charter's motion to compel. We address these issues in turn.

II.

A. Grant of Charter's Motion to Compel and Dismiss

We review *de novo* a district court's grant of both a motion to compel arbitration and a Rule 12(b)(3) motion to dismiss. *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009); *Dealer Comput. Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009).

Determining whether a party should be compelled to arbitrate claims requires a two-step inquiry. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). Step one focuses on "contract formation—whether the parties entered into *any arbitration agreement at all*." *Id.* Step two "involves contract interpretation ***553** to determine whether *this* claim is covered by the arbitration agreement." *Id.* Our analysis for both steps is governed by Texas law. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). [3] Under Texas law, "[a]rbitration agreements between employers and their employees are broadly enforceable." *Kubala*, 830 F.3d at 202. When, like here, an at-will employee is "not initially subject to an arbitration agreement" with his employer, but one is later imposed, the question becomes "whether the arbitration agreement [is] a valid modification of the terms of his employment." *Id.* at 202–03.

To show that such an agreement is a valid modification, the employer must demonstrate that the employee "(1) received notice of the change and (2) accepted the change." *Id.* at 203 (citing *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002)). An employer demonstrates notice by proving "that [it] unequivocally notified the employee of definite changes in employment terms." *Halliburton*, 80 S.W.3d 566 at 568 (quoting *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986)). And "acceptance need not be anything more complicated than continuing to show up for the job and accept wages in return for work." *Kubala*, 830 F.3d at 203.

Here, Gezu urges that he did not "agree" to arbitrate his claims against Charter. [4] However, the record shows a valid modification to his employment contract—i.e., notice and acceptance. On October 6, 2017, Charter sent an email notice to Gezu of its new Program aimed at "efficiently resolv[ing] covered employment-related legal disputes *through binding arbitration*." (Emphasis

added). The email stated that by participating, the recipient and Charter "both waive[d] the right to initiate or participate in court litigation ... involving a covered claim" and that recipients "would be automatically enrolled in the Program *unless* they chose to "opt out of participating ... within ... 30 days." This language, along with the referenced links to additional information about the Program provided in the email, was sufficient to notify Gezu unequivocally of the arbitration agreement. *See* *Kubala*, 830 F.3d at 203 (finding valid notice through a meeting in which employer announced a new policy requiring employees to arbitrate employment disputes).

Moreover, Charter's valid notice is not frustrated by Gezu's assertion that he did not read the October 16, 2017 email. [5] As noted by the district court, the mailbox rule comes into play when, like here, "there is a material question as to whether a document was actually received." *Duron v. Albertson's LLC*, 560 F.3d 288, 290 (5th Cir. 2009) (quoting ***554** *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 419 (5th Cir. 2007)). Under the mailbox rule, "[a] sworn statement is credible evidence of mailing" and creates a presumption of receipt. *Id.*; *see also* *Custer*, 503 F.3d at 420 (quoting *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 964 (9th Cir. 2001)). We agree with the district court that the declarations of Fries and Vasey—averring that Charter sent and that Gezu both received and opened the October 16, 2017 email—were enough to create that presumption here. [6]

Gezu fails to rebut the presumption that he received notice of the modification to his employment contract, so we next address whether he accepted it. He did. The October 6, 2017 email "conspicuously warned that employees were deemed to accept" the Program unless they opted out within 30 days. *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006). The email also provided recipients with directions on how to opt out. Nonetheless, Gezu did not opt out of the Program and continued working for Charter for over a year until he was terminated in May 2019. Accordingly, the district court correctly concluded that Gezu accepted the terms of the Program. *See* *Garrett v. Cir. City Stores, Inc.*, 449 F.3d 672, 675 n.2 (5th Cir. 2006); *Dillard*, 198 S.W.3d at 780.

Because Charter sufficiently demonstrated that Gezu both received notice of and accepted the modification to his employment contract, a valid agreement to arbitrate employment-related disputes exists between Gezu and Charter. And because Gezu does not assert on appeal that *his particular claims* are not covered by the arbitration agreement, we affirm the district court's grant of Charter's motion to compel arbitration.

We likewise affirm the district court's grant of Charter's Rule 12(b)(3) motion to dismiss. Although Gezu generally asserts that the district court erred in granting Charter's motion, he does not contend that Rule 12(b)(3) is an improper avenue for dismissal. [7] Further, to the extent the district court interpreted Gezu's response to Charter's motion to raise new allegations under the Texas Deceptive Trade Practices Act (DTPA) or the Fair Labor Standards Act (FLSA), we find no error in the court's conclusion that allowing Gezu to amend his complaint to include such claims would be futile. *See Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016) ("[A] district court need not grant a futile motion to amend."). As noted by the district court, "[t]he DTPA protects consumers" and "Gezu was an employee of Charter, not a consumer." Along the same lines, the district court correctly reasoned that the FLSA "focuses on wages—minimum hourly rates and overtime pay," and "Gezu offer[ed] no evidence that Charter required or even encouraged him to read ***555** the [October 16, 2017] email outside of working hours."

B. Gezu's additional assertions of error

The additional issues raised by Gezu also fail. First, Gezu asserts that the district court erred by finding Fries's declaration admissible "because it was not sworn and notarized." However, as noted by the district court, and in Gezu's own brief, "28 U.S.C. § 1746 ... permits unsworn declarations to substitute for an affiant's oath if the statement contained therein is made 'under penalty of perjury' and verified as 'true and correct.' " *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988). In his declaration, Fries "declare[d] under penalty of perjury under the laws of the United States of America that

[his averments were] true and correct." Fries also signed the declaration. The district court thus did not err in finding Fries's declaration admissible.

Gezu next contends the district court erred by not seeking responses to a list of questions that Gezu requested the court ask of Charter. However, Gezu did not serve Charter with discovery requests pursuant to the Federal Rules of Civil Procedure, and Gezu fails to direct this court to any authority supporting his position that he was entitled to have either the magistrate judge or district court do so for him. Accordingly, Gezu has effectively abandoned this issue, and we will not address it further. *City of Austin v. Paxton*, 943 F.3d 993, 1003 n.4 (5th Cir. 2019); *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993); *see also* FED. R. APP. P. 28(a)(8)(A) ("[T]he appellant's brief must contain ... appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies ....").

Lastly, Gezu contends that the district court erred in considering Vasey's declaration, which was submitted as an exhibit to Charter's reply in support of its motion to compel arbitration and to dismiss, and in striking Gezu's second response (a surreply) in opposition to Charter's motion to compel arbitration and to dismiss. We disagree.

Gezu did not file a motion to strike Vasey's declaration before the district court. [8] And "[a] party forfeits an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal." *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). [9] As to Gezu's second response to Charter's motion, the district court did not abuse its discretion in granting Charter's motion to strike the surreply. *See Cambridge Toxicology Grp., Inc. v. Exnicios*, 495 F.3d 169, 178 (5th Cir. 2007) ("This court reviews a motion to strike for abuse of discretion."). The district court correctly noted that "[n]either the local rules of [the district] court nor the Federal ***556** Rules of Civil Procedure allow a party to file a surreply as a matter of right." *Corbello v. Sedgwick Claims Mgmt. Servs., Inc.*, 856 F. Supp. 2d 868, 890 (N.D. Tex. 2012); *see also* N.D. Tex. Loc. Civ. R. 7.1. Because the rules do not provide for surreplies as a matter of right, the district court only accepts such filings "in exceptional or extraordinary circumstances." *Lacher v. West*, 147 F. Supp. 2d 538, 539 (N.D. Tex. 2001) (mem.). Because we discern no abuse of discretion in the district court's conclusion that Gezu had "not shown the existence of any extraordinary circumstances that necessitate[d] the filing of a surreply," this issue lacks merit.

* * *

For the foregoing reasons, the district court's judgment is

AFFIRMED.

All Citations

17 F.4th 547, 2021 Fair Empl.Prac.Cas. (BNA) 420,585

Footnotes

1 Gezu initially worked for Time Warner Cable; Charter purchased Time Warner Cable in 2016. For ease of reference, we simply refer to Gezu's employer as Charter. Gezu does not dispute that he was employed by Charter during the time relevant to this case.

2 In his declaration, Vasey stated that a copy of the October 6, 2017 email was sent to Gezu's Charter email address. He also stated that Gezu opened the email between October 6, 2017, and the November 5, 2017 opt-out deadline. Vasey attached copies of the relevant email receipt and email click data to his declaration.

3 Because Charter employed Gezu in Texas, the parties agree that Texas law applies. For contract cases, "Texas follows the 'most significant relationship test' set out in the Restatement (Second) of Conflict of Laws § 6 and § 145." *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 802 (5th Cir. 2007) (citing *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000); *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979)).

4 Gezu mistakenly asserts that the relevant question before the court is whether the parties *entered* a binding contract. But as stated *supra*, due to Gezu's pre-existing at-will employment contract, the issue before the court is whether the arbitration agreement was a valid *modification* of the terms of his employment. Although Gezu asserts in his appellate reply brief that "there is no pre-existing contract between me and Charter," this assertion is forfeited. *United States v. Bowen*, 818 F.3d 179, 192 n.8 (5th Cir. 2016) ("[A]ny issue not raised in an appellant's opening brief is forfeited.").

5 We construe this as an assertion that Gezu did not "receive" notice.

6 As noted in Charter's brief, in reaching this conclusion, we align ourselves with several other courts that have enforced the Program's arbitration obligations in similar situations. *See Krohn v. Spectrum Gulf Coast, LLC*, No. 3:18-CV-2722-S, 2019 WL 4572833 (N.D. Tex. Sept. 19, 2019); *Hughes v. Charter Commc'ns, Inc.*, No. 3:19-cv-01703-SAL, 2020 WL 1025687 (D. S.C. Mar. 2, 2020); *Harper v. Charter Commc'ns, LLC*, No. 2:19-cv-01749, 2019 WL 6918280 (E.D. Cal. Dec. 19, 2019); *Moorman v. Charter Commc'ns, Inc.*, No. 18-cv-820-wmc, 2019 WL 1930116 (W.D. Wis. May 1, 2019); *Castorena v. Charter Commc'ns, LLC*, No. 2:18-cv-07981-JFW-KS, 2018 WL 10806903 (C.D. Cal. Dec. 14, 2018).

7 *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005) ("[O]ur court has treated a motion to dismiss based on a forum selection clause as properly brought under Rule 12(b)(3) (improper venue) .... And, other circuits agree that a motion to dismiss based on an arbitration or forum selection clause is proper under Rule 12(b)(3)." (citations omitted)).

8 In fact, Gezu relied on Vasey's declaration to support his own contentions in his objections to the findings, conclusions, and recommendation of the magistrate judge.

9 Even assuming that Gezu did not forfeit this argument, we cannot say that the district court erred in considering Vasey's declaration. "The purpose of a reply brief under local rule 7.1(f) is to rebut the nonmovants' response, thereby persuading the court that the movant is entitled to the relief requested by the motion." *Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 773 (N.D. Tex. 2008) (internal quotation marks and citation omitted). As part of his response to Charter's motion to compel arbitration and dismiss, Gezu submitted an affidavit, stating that he did not recall opening the October 16, 2017 email at issue. Charter included Vasey's declaration—providing evidence that Gezu had in fact opened the email—as part of its reply in rebuttal to Gezu's assertion.

EXHIBIT 8: DEVANAN MAHARAJ V. CHARTER COMMUNICATIONS, INC., 20-CV-00064 BAS-LL, 2021 WL 5014352 (U.S. DIST. CT., S.D. CALIFORNIA), OCTOBER 27, 2021

2021 WL 5014352
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

Devanan MAHARAJ, Plaintiff,
v.
CHARTER COMMUNICATIONS, INC., Defendant.

Case No. 20-cv-00064-BAS-LL
|
Signed 10/27/2021

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ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

(ECF No. 49)

Cynthia Bashant, United States District Judge

***1** Before this Court is Defendant's motion to compel arbitration of Plaintiff's wage-and-hour claims, dismiss his class-action claims, and stay his Private Attorney General Act claim ("Motion"). (Mot., ECF No. 49.) Plaintiff opposed (Opp'n, ECF No. 51), Defendant replied (Reply, ECF No. 49), and, pursuant to this Court's October 6, 2021 order (Order, ECF No. 63), both parties provided supplemental briefing (Def.'s Supp. Mem., ECF No. 64; Pl.'s Supp. Mem., ECF No. 65). The Court finds the Motion suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the reasons stated below, the Court **GRANTS** the Motion and **STAYS** the action.

I. BACKGROUND

Plaintiff Devanan Maharaj worked as a non-exempt maintenance technician ("Technician") for Defendant Charter Communications, Inc., a telecommunications company. (Am. Compl. ¶ 23, ECF No. 21.) He began his employment in approximately November 2000. (*Id.*) In approximately October 2017, Plaintiff injured his shoulder and, consequently, went on short-term disability leave from approximately December 2017 through approximately May 2018. (Decl. of Keith Rasher, Esq. ("Rasher Decl."), Ex. 1 at 8, ECF No. 49-2.)[1] Though he returned, in August 2018, Plaintiff went back on leave and never again resumed his duties with Defendant. (*Id.*; Decl. of John Fries ("Fries Decl.") ¶ 5, ECF No. 49-3.)[2] While out on leave in 2019, Plaintiff submitted two applications for new positions with Defendant. (Fries Decl. ¶¶ 5, 8, Ex. 2.) Neither application was successful, and Plaintiff ultimately resigned in approximately November 2019. (Fries Decl. ¶ 5.)

On November 5, 2019, Plaintiff filed suit against Defendant in San Diego Superior Court, alleging pervasive violations of California wage-and-hour laws and regulations during the time that Defendant employed Plaintiff as a Technician. (*See* Compl., Ex. 1 to Notice of Removal ("Removal"), ECF No. 1-2.) In addition, Plaintiff alleged claims on behalf of a putative class of similarly situated Technicians and a claim pursuant to the California Private Attorney General Act ("PAGA") premised upon the same factual bases as his wage-and-hour claims. (*Id.*) On January 9, 2020, Defendant removed the action to this Court. (Removal, ECF No. 1.)

Approximately thirteen months following Removal, and after filing two motions to dismiss (ECF Nos. 14, 23), propounding and responding to discovery (Declaration of David Lin, Esq. ("Lin Decl.") ¶¶ 3–11, Exs. B–G, ECF No. 51-1), [3] and participating in court conferences and meet-and-confers with Plaintiff (*id.* ¶¶ 11, 13), Defendant submitted the present Motion on March 17, 2021 (Mot.). Defendant asserts that Plaintiff "expressly agreed to arbitrate all disputes" when he applied internally for new positions in 2019. (Mot. 3.) Specifically, Defendant avers that, when Plaintiff completed his applications through Defendant's online interface known as "BrassRing," Plaintiff agreed to (1) participate in Defendant's "employment-based legal dispute and resolution and arbitration program," entitled "Solution Channel," and (2) be bound by the terms of Defendant's Mutual Arbitration Agreement ("MAA"). (*Id.*; Fries Decl. ¶¶ 6, 9–11.)

A. BrassRing Interface

***2** As mentioned above, while on leave but still employed as a Technician, Plaintiff applied for "Project Manager" and "Field Operations Supervisor" positions with Defendant in March and June of 2019, respectively. (Fries Decl. ¶¶ 5, 8, Ex. 2.) According to Defendant, during the application processes, BrassRing presented Plaintiff (as it would any applicant) with Defendant's "Solution Channel webpage." (Webpage, Ex. 3 to Fries Decl., ECF No. 49-6; *id.* ¶ 9.) BrassRing prompted Plaintiff:

> Charter requires that all legal disputes involving employment with Charter or application for employment with Charter, be resolved through binding arbitration. Charter believes that arbitration is a fair and efficient way to resolve these disputes. Any person who submits an application for consideration by Charter agrees to be bound by the terms of Charter's Mutual Arbitration Agreement, where the person and Charter mutually agree to submit any covered claim, dispute or controversy to arbitration. By submitting an application for consideration you are agreeing to be bound by the Agreement.

(Webpage)

The interface does not permit an applicant to proceed unless they select one of two radio buttons—"I agree" or "I do not agree"—and then click "Save and continue." (Fries Decl. ¶ 14.) BrassRing warns that an applicant who selects the button entitled "I do not agree" "remov[es] [them]sel[ves] from the application process, and [Defendant] will not consider [their] application for employment." (*Id.*; Webpage.) Plaintiff selected the "I agree" radio button each time he submitted applications for open positions, indicating that he agreed to be bound by the terms of the MAA. Defendant proffers Plaintiff's completed applications as proof that he did so. (Fries Decl., Exs. 1–2.)

BrassRing refers and provides links to Defendant's MAA and a second document, the link of which is entitled "Program Guidelines." (Webpage.) An applicant can access, review, save, and print both documents through BrassRing. (Webpage.)

B. The MAA

The MAA starts with a notice instructing the applicant:

> PLEASE READ THE FOLLOWING MUTUAL ARBITRATION AGREEMENT ("AGREEMENT") CAREFULLY. IF YOU ACCEPT THE TERMS OF THE AGREEMENT (WHETHER YOU ARE AN APPLICANT, CURRENT EMPLOYEE, OR FORMER EMPLOYEE), YOU ARE AGREEING TO SUBMIT ANY COVERED EMPLOYMENT-RELATED DISPUTE BETWEEN YOU AND CHARTER COMMUNICATIONS (CHARTER) TO BINDING ARBITRATION. YOU ARE ALSO

> AGREEING TO WAIVE ANY RIGHT TO LITIGATE THE DISPUTE IN A COURT AND/OR HAVE THE DISPUTE DECIDED BY A JURY.

(MAA at 1, Ex. 4 to Fries Decl., ECF No. 49-7.)

The MAA states:

> You and Charter mutually agree that, as a condition of Charter considering your application for employment and/or your employment with Charter, any dispute arising out of or relating to your pre-employment application and/or employment with Charter or the termination of that relationship, except as specifically excluded below, must be resolved through binding arbitration by a private and neutral arbitrator, to be jointly chosen by you and Charter.

(*Id.* § 1.)

Under the MAA, Defendant and applicant mutually agree to submit certain "covered claims" to arbitration. In pertinent part, Section B of the MAA defines "covered claims" as:

1. All disputes, claims, and controversies that could be asserted in court or before an administrative agency for which [the applicant] or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims whether the claims are denominated as tort, contract, common law, or statutory claims (whether under local, state or federal law), including without limitation claims for: ... wage and hour-based claims including claims for unpaid wages, commissions, or other compensation or penalties (including meal and rest break claims, claims for inaccurate wage statements, claims for reimbursement of expenses) ...; [and]

***3**

* * * *

3. All disputes related to the arbitrability of any claim or controversy.

(*Id.* §§ B.1, B.3.)[4]

The MAA contains a severability clause as well. (*Id.* § Q.) It provides, in pertinent part:

> [I]f any portion or provision of this Agreement (including, without implication or limitation, any portion or provision of any section of this Agreement) is determined to be illegal, invalid, or unenforceable by any court of competent jurisdiction and cannot be modified to be legal, valid, or enforceable, the remainder of this Agreement shall not be affected by such determination and shall be valid or enforceable to the fullest extent permitted by law and said illegal, invalid, or unenforceable portion or provisions shall be deemed not to be a part of this Agreement. The only exception to this severability provision is, should the dispute involve a representative, collective or class action claim, and the representative, collective, and class action wavier (Section D) is found to be invalid or unenforceable for any reason, then this Agreement (except for the parties' agreement to waive a jury trial) shall be null and void with respect to

> such representative, collective, and/or class claim only, and the dispute will not be arbitrable with respect to such claims.

Finally, the MAA contains an integration clause. (*Id.*§ P.) It expressly provides that the MAA "supersedes any prior or contemporaneous oral or written understanding on the subject[.]" (*Id.*)

Notably, for the purpose of deciding this Motion, the MAA does not contain an "opt-out" provision or otherwise confer upon applicants a right to "opt-out." The MAA provides that an applicant becomes "legally bound by" its terms "as of the date [the applicant] consent[s] to participate in Solution Channel." (*Id.* § V.)

C. Solution Channel Guidelines

The "Program Guidelines" document to which BrassRing refers is entitled "Solution Channel Guidelines." (Guidelines, Ex. 5 to Fries Decl., ECF No. 49-8.) As the name suggests, the Solution Channel Guidelines delineate the rules and parameters for Defendant's Solution Channel program. (Fries Decl. ¶ 6.) Solution Channel "is a dispute resolution alternative [that] is the means by which a current employee, a former employee, an applicant for employment, or [Defendant] can efficiently and privately resolve covered employment-based legal disputes." (Guidelines 6.)

Defendant implemented Solution Channel on October 6, 2017. (*Id.*) The Solution Guidelines provide the following parameters for enrollment pursuant to its "General Rules":

1. Unless there is an agreement to the contrary, Solution Channel is the exclusive means of resolving employment-related legal disputes that are covered under this Program.

* * * *

3. Upon implementation of Solution Channel, current employees will be provided a 30-day opt-out period. Those employees will be covered by Solution Channel unless they opt out. Those employees covered by a collective bargaining agreement or other employment agreement are excluded from Solution Channel unless expressly allowed under those agreements (although nothing in this document shall limit the applicability of any arbitration or other dispute resolution provision contained in those agreements.)

***4** 4. Applicants who choose to be considered for employment with Charter are required to accept Charter's Mutual Arbitration Agreement.

(Guidelines 8.)

Neither party proffers evidence or otherwise avers that Plaintiff was covered by a collective bargaining agreement or other employment agreement pre-dating Solution Channel and the MAA. Moreover, although Plaintiff was a "current employee" at the time of Solution Channel's implementation, Defendant acknowledges that, because of its own oversight, it never enrolled Plaintiff into Solution Channel. (Def.'s Supp. Mem. 1 & n.1.) Specifically, Defendant asserts that it did "not presen[t]" Plaintiff "with the opportunity to participate in Solution Channel in October 2017" because Defendant's human-resources software "had not yet updated to reflect that [Plaintiff] had returned from a recent leave of absence." (*Id.* n.1.) Accordingly, Defendant did not send to Plaintiff the Solution Channel "announcement email." (*Id.*) For that reason, Defendant concedes that Plaintiff was not subject to the MAA by virtue of Solution Channel's implementation; rather, Defendant asserts Plaintiff became bound by the MAA when he first applied for a new position in March of 2019. (*Id.*)

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") applies to contracts involving interstate commerce. 9 U.S.C. §§ 1, 2. If a party is bound to an arbitration agreement that falls within the scope of the FAA, the party may move to compel arbitration in a federal court. *Id.* §§ 3–4; *see also* *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). "Generally, the [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985 (9th Cir. 2017), *as amended* (Aug. 28, 2017) (citation omitted).

Given this strong federal preference for arbitration and the contractual nature of arbitration agreements, "a district court has little discretion to deny an arbitration motion" once it determines that a claim is covered by a written and enforceable agreement to arbitrate. *Republic of Nicar. v. Standard Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991). "In determining whether to compel a party to arbitration, a district court may not review the merits of the dispute[.]" *Esquer v. Educ. Mgmt. Corp.*, 292 F. Supp. 3d 1005, 1010 (S.D. Cal. 2017) (quotations omitted). Instead, a district court's determinations are limited to (1) whether a valid arbitration exists and, if so, (2) whether the agreement covers the relevant dispute. *See* 9 U.S.C. § 4; *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)).

"[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (citing *Howsam*, 537 U.S. at 83–85, 123 S.Ct. 588 and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion)). "Courts should not assume that the parties agreed to arbitrate arbitrability issues unless there is clear and unmistakable evidence that they did so." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (internal citations omitted); *Howsam*, 537 U.S. at 84, 123 S.Ct. 588 (a gateway dispute about whether the parties are bound by a given arbitration clause raises a question of arbitrability that is presumptively for the court to decide). However, the Supreme Court has "repeatedly held" that "the FAA provides the default rule" that "ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration." *Lamps Plus, Inc. v. Varela*, —— U.S. ——, 139 S.Ct. 1407, 1418–19, 203 L.Ed.2d 636 (2019) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

III. ANALYSIS

***5** Defendant now moves to compel arbitration and, consequently, to dismiss Plaintiff's class action claims and stay Plaintiff's PAGA claim. (Mot.) Defendant argues that Plaintiff agreed to arbitrate all wage-and-hour claims, including those underlying this action, when he twice signed the MAA in March and June of 2019. (Mot. 10–13.) In opposition, Plaintiff argues: (1) the parties never agreed to arbitrate claims arising out of his employment as a Technician (*id.* 6–8, 103 S.Ct. 927); (2) Defendant waived its right to compel arbitration (Opp'n 11–14); and (3) the MAA is unconscionable under California law and therefore unenforceable (*id.* 8–11, 103 S.Ct. 927).

Defendant does not contest that this Court must determine as a preliminary matter whether an agreement to arbitrate exists. (Mot. 11–16.) However, Defendant argues that Section B of MAA clearly and unmistakably delegates arbitrability of "all" other arbitrability issues, including waiver, scope, and validity, and thus precludes the Court from reaching Plaintiff's other arguments. (Mot. 10–11.)

Because the Court finds that the MAA constitutes a valid agreement to arbitrate and the Court agrees with Defendant's interpretation of the delegation clause, the Motion is granted.

A. Formation of Contract to Arbitrate

"[A] party who contests *the making of a contract* containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate." *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (emphasis in original) (citations and quotation marks omitted). Courts generally "apply ordinary state-law principles that govern the formation of contracts" to decide "whether the parties agreed to arbitrate a certain matter (including arbitrability)." *First Options*, 514 U.S. at 944, 115 S.Ct. 1920. The party seeking arbitration has "the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017).

To determine whether the parties agreed to arbitrate, the Court turns to California law governing the formation of contracts. *See, e.g.*, *id.* at 1289; *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). California Civil Code Section 1550 requires three elements for contract formation: "(1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration." *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 52–53, 67 Cal.Rptr.2d 850, 855 (1997) (quoting *Marshall & Co. v. Weisel*, 242 Cal. App. 2d 191, 196, 51 Cal.Rptr. 183, 196 (1966)).

"[O]rdinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms." *Marin Storage & Trucking v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049, 107 Cal.Rptr.2d 645, 651 (2001); *see also* *Esparza v. KS Indus., L.P.*, 13 Cal. App. 5th 1228, 1238, 221 Cal.Rptr.3d 594, 601 (2017) ("Under California law, consent to a written contract may be implied by conduct."). It is undisputed that, by completing applications for Project Manager and Field Operations Supervisor positions in March and June 2019, respectively, Plaintiff twice electronically signed the MAA, which obliges Plaintiff to submit to any arbitration "any [covered] dispute arising out of or relating to [Plaintiff's] pre-employment application and/or employment with [Defendant] or the termination of that relationship." (*See* Fries Decl., Exs. 1–2; MAA § A); *Mendez v. LoanMe, Inc.*, 20-CV-00002-BAS-AHG, 2020 WL 6044098, at *5 (S.D. Cal. Oct. 13, 2020) (holding electronic signature is equivalent to wet-ink signature). Nor is it disputed that the parties had capacity at the times they entered the MAA; the subject of arbitration is a lawful object of contract; and the MAA was supported by adequate consideration. Simply put, Plaintiff does not challenge the existence of any of the essential elements of contract under California law.

***6** Instead, Plaintiff argues that "the parties' conduct indicates that they did not intend for the [MAAs] to apply to" claims arising out of Plaintiff's employment as a Technician. (Opp'n 7.) Plaintiff asks the Court to infer this from his assertion that Defendant treated Plaintiff differently than other "current employees" under the Solution Channel Guidelines by failing to provide him with a 30-day opt-out period following his submission of either application. (*Id.*) Under California law, a "contrac[t] must be interpreted, not only within the four corners of the instrument, but also by whatever extrinsic *evidence* is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Stilson v. Moulton-Niguel Water Dist.*, 21 Cal. App. 3d 928, 937, 98 Cal. Rptr. 914, 919 (Ct. App. 1971) (citing *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37, 69 Cal.Rptr. 561, 564, 442 P.2d 641 (1968)) (emphasis added). "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Pac. Gas & Elec. Co.*, 69 Cal.2d at 37, 69 Cal.Rptr. 561, 442 P.2d 641.

To be sure, Plaintiff is not arguing that he opted out of Solution Channel and, therefore, the MAA is unsupported by mutual assent. *C.f. Mendez*, 2020 WL 6044098, at *4 & n.5 ("[W]hether or not [a] plaintiff timely opted out—and therefore whether the parties mutually agreed to [arbitrate]—is an issue for the Court to resolve" and "cannot be subject to a delegation clause[.]")

(citing *Erwin v. Citibank, N.A.*, 16-CV-03040-GPC-KSC, 2017 WL 1047575, at *1 (S.D. Cal. Mar. 20, 2017)); *Sonico v. Charter Comms., LLC*, No. 19-CV-01842-BAS-LL, 2021 WL 268637, at *6 (S.D. Cal. Jan. 27, 2021) ("Timely opting out of an agreement has generally been understood to be a rejection of an offer." (collecting cases)). Rather, Plaintiff asks the Court to infer from Defendant's purported failure to abide by its own Solution Channel Guidelines that Defendant never intended to compel Plaintiff to arbitrate the underlying claims which pertain exclusively to time Plaintiff worked as a Technician, going back nearly four years prior to the applications at issue. This argument fails for several reasons.

As an initial matter, Plaintiff does not submit any evidence in support of his opt-out argument, despite this Court having afforded him opportunity to do so. (Order 1.) Only in his Opposition does Plaintiff assert Defendant never provided him with an opportunity to opt-out. (Opp'n 8.) These statements have no evidentiary value. *Moran v. Selig*, 447 F.3d 748, 759–60 (9th Cir. 2006) (holding that opposition and reply briefs are not verified and therefore have no evidentiary value). Even if the Court were to excuse the lack of evidence, Plaintiff's argument still must fail. While it is true that Plaintiff was treated differently from other employees respecting the implementation of Solution Channel given Defendant's failure to enroll him in the Program automatically, Plaintiff's assertion that he was treated differently than "current employees" in applying for new employment with Defendant is not borne out in the record.

BrassRing does not provide applicants with the opportunity to opt out. (Webpage.) Indeed, BrassRing prompts all applicants that refusal to agree to the MAA and Solution Channel will result in the disposal of their application. (*Id.*) The MAA does not contain an opt-out provision. (*See* MAA.) The only opt-out procedure delineated by the Solution Channel Guidelines relates to the initial enrollment of employees on October 6, 2017, when Solution Channel was first implemented. (Guidelines 8.) The Solution Channel Guidelines do not provide "applicants" with an opportunity to opt-out. (*See* Solution Channel Guidelines 8 ("Applicants who choose to be considered for employment with [Defendant] are required to accept Charter's Mutual Arbitration Agreement.").) The Solution Channel Guidelines do not distinguish between "applicants" who are employed by Defendant at the time of their applications and "applicants" who have no employer-employee relationship with Defendant, as Plaintiff claims. (*Id.*)

***7** While it is true Plaintiff slipped through the cracks when Solution Channel was first implemented due to no fault of his own, Defendant's error concerning Plaintiff's enrollment has no bearing on the MAAs Plaintiff signed in 2019, for the MAA expressly "supersedes any prior or contemporaneous oral or written understanding on th[e] subject [of resolution of the covered disputes]." (MAA § P); *Sonico*, 2021 WL 268637, at *5 (" 'It is a well-settled principle of contract law that a new agreement between the same parties on the same subject matter supersedes the old agreement.' ") (citing *Mumin v. Uber Techs., Inc.*, 239 F. Supp. 3d 507, 524 (E.D.N.Y. 2017)). Thus, even if Defendant had enrolled Plaintiff properly when it implemented Solution Channel, should Plaintiff subsequently have decided to exercise his opt-out rights under the Guidelines, by its terms, the MAA would supplant Plaintiff's decision to do so. (MAA § P.) Thus, this Court finds that the meaning Plaintiff ascribes to Defendant's failure to provide Plaintiff an opportunity to opt-out following his submission of Project Manager and Field Operations Supervisor applications is unsupported by the record. [5]

Finally, Plaintiff cites no case supporting the notion that the absence of an opportunity to opt-out should be conceptualized as a contract formation issue. The Ninth Circuit repeatedly analyzed the question whether an arbitration agreement is felled by the lack of a "meaningful opportunity to opt-out" through the lens of unconscionability. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893–96 (9th Cir. 2002) ("The [arbitration agreement] is unconscionable because it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely." (citing *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 99 Cal. Rptr.2d 745, 6 P.3d 669 (2000))); *see also* *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) ("Conversely, if an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable."). Indeed, Plaintiff

himself argues that the MAA must be set aside on the ground of procedural unconscionability because it is a contract of adhesion precisely because Defendant offered Plaintiff "no opportunity to opt-out except by abandoning his job application[s]." (Opp'n 9.) For the reasons stated below, the Court need not address today whether the MAA was procedurally unconscionable because that issue has been delegated to arbitration.

Plaintiff also styles as a formation issue his argument that the MAAs he signed "are too far attenuated from Plaintiff's work as a [Technician] to apply" to the claims underlying this action. (Opp'n 6–7.) In Plaintiff's view, the MAA applies only to claims arising from his applications for the Project Manager and Operations Field Supervisor positions to which he applied in 2019. [6] (*Id.*) Put differently, Plaintiff asserts that there is no valid and enforceable agreement between the parties to arbitrate claims arising out of his employment as a Technician. The Court observes that this strand of Plaintiff's formation argument, too, is without textual support from the MAA. Specifically, the MAA contains language that cuts against Plaintiff's interpretation. The MAA's first paragraph provides: "IF YOU ACCEPT THE TERMS OF THE AGREEMENT (WHETHER YOU ARE AN APPLICANT, *CURRENT EMPLOYEE*, OR FORMER EMPLOYEEE), *YOU ARE AGREEING TO SUBMIT ANY COVERED EMPLOYMENT-RELATED DISPUTE BETWEEN YOU AND* [*CHARTER*] TO BINDING ARBITRATION." (MAA at 1 (emphasis added).) The MAA expressly covers claims "arising out of or relating to [Plaintiff's] pre-employment application and/or employment with Charter[.]" (MAA § A.) Under the MAA, "covered claims" include "all disputes, claims, and controversies that could be asserted in court or before an administrative agency for which you or Charter have an alleged cause of action related to pre-employment, employment, employment or post-employment-related claims[.]" (*Id.* § B.) Each of these provisions are without limitation to the positions in connection with which Plaintiff signed the MAAs in 2019.

***8** Even if it could be said that the MAA is ambiguous, it is well-settled that ambiguities about the scope of an agreement to arbitrate must be resolved in favor of arbitration. *First Options*, 514 U.S. at 944, 115 S.Ct. 1920; *AT&T Techs., Inc. v. Comms. Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("Where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that 'An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " (citing *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582–83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960))).

Most of all, this strand of Plaintiff's argument goes not to the MAA's validity—it does not raise questions about "the making of a contract," *Three Valleys Mun. Water Dist.*, 925 F.2d at 1140—but towards the scope of the MAA. It is akin to asking this Court whether the claims underlying this action are "covered claims" delineated in Paragraph 1 of Section B of the MAA, which, for reasons stated below, the Court need not reach as such gateway arbitrability issues.

Because Plaintiff fails to dispute the existence of any essential element of a valid contract under California law, and because Defendant has proffered sufficient evidence and analysis in support of each such element, the Court finds that the MAA controls this dispute.

B. Delegation of Arbitrability

Given that Plaintiff agreed to the MAA, he also agreed to its delegation clause, located at Paragraph 3 of Section B ("Delegation Clause"), which provides that "You and Charter mutually agree that the following disputes, claims, and controversies (collectively referred to as 'covered claims') will be submitted to arbitration in accordance with this Agreement: ... (3) all disputes related to the arbitrability of any claim or controversy. (MAA § B.) Plaintiff contends that the Delegation Clause only requires the Court to submit to arbitration whether the wage-and-hour claims underlying this action are "covered claims" under the MAA. Plaintiff argues that the Delegation Clause does not preclude the Court from assessing waiver or validity because it "does not include the [American Arbitration Association ("AAA")]'s language specifying that disputes about 'the existence, scope, or validity of the arbitration agreement' are subject to arbitration." (Opp'n 5.)

The determination of whether an arbitration clause is valid, applicable, and enforceable is reserved to the district court unless "the parties clearly and unmistakably provide[d] otherwise," such as by delegating the issue of arbitrability to arbitration. *AT&T Techs., Inc.*, 475 U.S. at 649, 106 S.Ct. 1415. Although Plaintiff is correct that the Ninth Circuit has held that "incorporation of the AAA rules constitutes clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability," *Brennan*, 796 F.3d at 1130, a court "need not reference extrinsic materials" where, as here, the arbitration agreement "facially gives an arbitrator the exclusive authority to determine his or her own jurisdiction." *Anderson v. Pitney Bowes, Inc.*, No. 04-CV-4808 SBA, 2005 WL 1048700, at *3 (N.D. Cal. May 4, 2005). Indeed, "[w]hen the contractual language is clear, there is no need to consider extrinsic evidence of the parties' intentions; the clear language of the agreement governs." *Han v. Synergy Homecare Franchising LLC*, 16-CV-3759-KAW, 2017 WL 446881, at *7 (N.D. Cal. 2017) (citing *Berman v. Dean Witter & Co.*, 44 Cal. App.3d 999, 1004, 119 Cal.Rptr. 130, 133 (Cal. App. 1975)).

***9** As mentioned above, the Delegation Clause provides that "all disputes related to arbitrability of any claim or controversy" must be resolved through binding arbitration before the AAA. (MAA § B.3.) As Defendant correctly notes, "questions of arbitrability" include "gateway dispute[s] about whether the parties are bound by a given arbitration clause" or "whether an arbitration clause ... applies to a particular type of controversy." (Mot. 10 (citing *Howsam*, 537 U.S. at 84, 123 S.Ct. 588)); *see also Yu v. Volt Inf'o. Sci., Inc.*, No. 19-CV-01981-LB, 2019 WL 3503111, at *7 (N.D. Cal. Aug. 1, 2019) (holding that procedural unconscionability is a "question of arbitrability"); *Pac. Media Workers Guild v. San Francisco Chronicle*, No. 17-CV-00172-WHO, 2017 WL 1861853, at *3 (N.D. Cal. May 9, 2017) ("As the Supreme Court has held, when parties have agreed to have questions of arbitrability go to arbitration, 'procedural questions, such as whether a contractual grievance procedure has been followed, or the effect of waiver or delay,' must also be arbitrated." (quoting *Howsam*, 537 U.S. at 84, 123 S.Ct. 588)).

In support of their respective interpretations of the Delegation Clause, the parties point this Court towards competing decisions from the United States District Court for the District of Central California, both of which analyze whether precisely the same Delegation Clause delegates all gateway issues to the arbitrator or whether its language is more limited. Plaintiff relies principally upon *Gonzales v. Charter Comms., LLC et al.*, 20-CV-08299-SB-AS (C.D. Cal.).[7] (*See* Opp'n 5–6.) In that case, the *Gonzales* Court held that the MAA's Delegation Clause refers to arbitration only the issue whether the claims underlying a judicial action fall within the list of "covered claims" set forth under Paragraph 1 of Section B. *Gonzales* at 5–6. The Court rejected the insinuation that the MAA's Delegation Clause "calls for the delegation of any gateway arbitrability issue whatsoever[.]" *Id.* Conversely, Defendant cites *Gennarelli v. Charter Comms., Inc. et al.*, 19-CV-09635-JLS-ADS (C.D. Cal.).[8] (Def.'s Supp. Mem., Ex. 1.) There, the *Gennarelli* Court held that by agreeing to the MAA's Delegation Clause, "the parties clearly and unmistakably indicated that the gateway issues of scope and validity must be decided by the arbitrator," including the plaintiff's arguments concerning waiver, scope, and validity. *Gennarelli* at 9.

The Court finds the *Gennarelli* Court's interpretation more closely fits the language deployed by the Delegation Clause, and that the Delegation Clause clearly and unmistakably indicates that the parties intended to arbitrate all gateway arbitrability issues, including waiver, scope, and unconscionability. "An arbitration provision that explicitly refers arbitrability questions to an arbitrator is evidence that the parties clearly and unmistakably have referred the arbitrability question to the arbitrator." *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 954 (N.D. Cal. 2015). This the Delegation Clause does. (*See* MAA § B.3.)

"[E]ven where there is clear and unmistakable evidence of an intent to delegate questions of arbitrability to the arbitrator, the enforcement of the delegation provision itself is a separate, threshold for this Court to determine." *Id.* at 955 (citing *Rent-A-Ctr.*, 561 U.S. at 70–71, 130 S.Ct. 2772). For example, where the delegation clause itself is unconscionable or otherwise unenforceable under the MAA, a court may decline to enforce it. *Meadows v. Dickey's Barbecue Rests. Inc.*, 144 F. Supp. 3d 1069, 1079 (N.D. Cal. 2015) (citing *Brennan*, 796 F.3d at 1132). Plaintiff does not challenge the enforceability of

the Delegation Clause. And although Plaintiff provides a single legal authority in support of a narrower reading of that Clause, *see Gonzales*, the Court is unmoved. Instead, Plaintiff argues that (1) Defendant waived its right to compel arbitration; (2) the MAA does not cover claims arising prior to its signing; and (3) the MAA is unconscionable. But these arguments are nonspecific to the Delegation Clause and instead bear upon the scope and validity of the MAA in its entirety. *See* *Rent-A-Ctr.*, 561 U.S. at 74, 130 S.Ct. 2772 (instructing courts must give effect to delegation provision in an arbitration agreement when nonmovant "d[oes] not make any arguments specific to the delegation provision" and "challenge[s] only the validity of the contract as a whole"); *Gennarelli* at 9. The Court ends its inquiry here.

C. PAGA Claim

***10** As mentioned above, in addition to individual and class-based wage-and-hour claims, the Complaint also contains a claim brought pursuant to PAGA predicated upon identical factual allegations. (Am. Compl. ¶¶ 161–86.) Both parties acknowledge that although the MAA contains a representative action waiver, Plaintiff's PAGA claims cannot be waived. (Opp'n 11; Reply 6); *see*, *e.g.*, *Whitworth v. SolarCity Corp.*, 336 F.3d 1119, 1129–30 (N.D. Cal. 2018).

Under California law, courts have discretion to sever an unconscionable provision or refuse to enforce the contract in its entirety. *See* Cal. Civ. Code § 1670.5(a). The relevant provision states:

> If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id. The California Supreme Court "has interpreted this provision to mean that if a trial court concludes that an arbitration agreement contains unconscionable terms, it then 'must determine whether these terms should be severed, or whether instead the arbitration agreement as a whole should be invalidated.' " *Lange v. Monster Energy Co.*, 46 Cal. App. 5th436, 452–53, 260 Cal.Rptr.3d 35, 48 (2000) (quoting *Gentry v. Superior Court*, 42 Cal. 4th 443, 472–73, 64 Cal.Rptr.3d 773, 796, 165 P.3d 556 (2007)). California courts have further held that "the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement[,]" noting that refusing to enforce an entire agreement is "contemplate[d] ... only when an agreement is 'permeated' by unconscionability.' " *Id.* at 453, 64 Cal.Rptr.3d 773, 796, 165 P.3d 556 (alterations in original) (quoting *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1478, 92 Cal.Rptr.3d 153, 167 (2009)); *see also* *Armendariz*, 24 Cal. 4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d 669 ("If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.").

Here, the parties appear to agree that the MAA's representative action waiver is invalid to the extent it applies to Plaintiff's PAGA claim. Plaintiff does not, nor can he, argue that the asserted PAGA waiver permeates the MAA with unconscionability. Accordingly, the Court severs the PAGA waiver pursuant to Section Q of the MAA, and grants Defendant's motion to compel arbitration of Plaintiff's wage-and-hour claims. *See Whitworth v. SolarCity Corp.*, 336 F. Supp. 3d at 1130 (severing PAGA waiver and compelling individual claims to arbitration).

D. Stay and Dismissal

The FAA provides that when the claims asserted by a party are "referable to arbitration," the Court shall "stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. Defendant requests that the Court dismiss Plaintiff's class-action claims

and stay his PAGA claim pending arbitration. (Mot. 13.) Under the FAA, a court must "stay litigation of arbitral claims pending arbitration of those claims 'in accordance with the terms of the agreement.' " *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (quoting 9 U.S.C. § 3). If a court "determines that all of the claims raised in the action are subject to arbitration," the court may either "stay the action or dismiss it outright." *Johnmohammadi v. Bloomingdale's Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014). "However, if a court finds that the plaintiff asserts both arbitrable and nonarbitrable claims, district courts have 'discretion whether to proceed with the nonarbitrable claims before or after the arbitration and [have] ... authority to stay proceedings in the interest of saving time and effort for itself and litigants.' " *Jenkins v. Sterling Jewelers, Inc.*, No. 17-CV-1999-MMA-BGS, 2018 WL 922386, at *7 (S.D. Cal. Feb. 16, 2018) (quoting *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal. 1984)).

***11** "[T]he Ninth Circuit has suggested, without expressly holding, that a class encompassing members with valid arbitration agreements and others not subject to the arbitration agreements cannot be certified." *Berman v. Freedom Fin. Network, LLC*, No. 18-CV-01060-YGR, 400 F.Supp.3d 964, 2019 WL 4194195, at *17 (N.D. Cal. Sept. 4, 2019) (citing *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018)). Given this Court's decision to grant Defendant's Motion to compel arbitration of Plaintiff's wage-and-hour claims, Plaintiff cannot continue to serve as class representative of the putative class. Accordingly, the Court dismisses Plaintiff's class-wide claims. Yet the Complaint's class claims do not warrant dismissal with prejudice at this stage, *inter alia*, because Plaintiff's inadequacy as a class representative does not speak to the merits of the class claims.

Turning next to Defendant's request to hold in abeyance Plaintiff's PAGA claim, Plaintiff argues that "staying the PAGA action would produce no benefit for the proper administration of this case." (Opp'n 14.) Plaintiff's PAGA claims "are derivative in nature of [his] substantive claims that will proceed to arbitration, and the outcome of the nonarbitrable PAGA claims will depend upon the arbitrator's decision." *Shepardson v. Adecco USA, Inc.*, No. 15-CV-05102-EMC, 2016 WL 1322994, at *6 (N.D. Cal. Apr. 5, 2016). This Court joins others in finding that where, as here, the factual and legal overlap between arbitrable wage-and-hour claims and nonarbitrable PAGA claims is considerable, courts are well-within their discretion to stay the PAGA claims pending arbitration of the individual claims, as it would serve the Court's interest in efficiency and give proper effect both to the principles enshrined in Rule 1 of the Federal Rules of Civil Procedure and the parties' agreement to arbitrate. *See id.*; *Hermosillo v. Davey Tree Surgery Co.*, No. 18-CV-00393-LHK, 2018 WL 3417505, at *20 (N.D. Cal. July 13, 2018) (staying PAGA claim pending arbitration of individual wage and hour claims); *Whitworth*, 336 F. Supp. 3d at 1131 (same); *Castro Cardenas v. Aaron's Inc.*, No. 2:20-CV-01327-TLN-AC, 2021 WL 2355942, at *3 ("district courts in the Ninth Circuit have routinely—and recently—stayed PAGA claims" while individual claims are properly arbitrated); *Musoff v. NRC Env't Servs., Inc.*, No. 2:20-CV-01387-KJM-CKD, 2021 WL 1696282, at *3 (E.D. Cal. Apr. 29, 2021) ("Given the entanglement of the non-arbitrable PAGA claim for civil penalties with the other [wage and hour] claims for damages, including in part a portion of the PAGA claim, the court stays the entire action here in the interest of efficiency, pending completion of arbitration.").

IV. CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendant's Motion. Specifically, the Court severs the PAGA waiver from the MAA as discussed above; **ORDERS** the parties to proceed to arbitration with Plaintiff's individual wage-and-hour claims in the manner provided for in the MAA; **DISMISSES** Plaintiff's class-action claims without prejudice; and **STAYS** this action. *See id.* 9 U.S.C. §§ 3–4.

The Court directs the Clerk of Court to **ADMINISTRATIVELY CLOSE** this case. The decision to administratively close this case pending resolution of the arbitration does not have any jurisdictional effect. *See Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) ("[A] district court order staying judicial proceedings and compelling arbitration is not appealable even if accompanied by an administrative closing. An order administratively closing a case is a docket management tool that has no jurisdictional effect.").

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 5014352

Footnotes

1 Mr. Rasher represents Defendant in this proceeding. (Rasher Decl. ¶ 1.) Because Exhibit 1 to the Rasher Declaration lacks consistent internal pagination, all page citations thereto refer to the page numbers provided by the Court's ECF system.

2 Mr. Fries is a Vice President of HR Technology for Defendant. (Fries Decl. ¶ 1.) He is "responsible for data reporting sourced from PeopleSoft, a system used by [Defendant] to electronically collect maintain and report on employee information[.]" (*Id.*)

3 Mr. Lin represents Plaintiff in this action. (Lin Decl. ¶ 1.) All exhibits to the Lin Declaration are attached at ECF No. 51-1.

4 The MAA provides a list of "Excluded Claims," none of which appear applicable here. (MAA § C.)

5 Plaintiff further argues without citing any authority that Defendant's admission that it stored Plaintiff's MAAs on its BrassRing platform rather than in Plaintiff's personnel file on the human-resource software known as "PeopleSoft" "is a strong indicator that [Defendant] did not intend for the agreements to apply to Plaintiff's employment as a [Technician]." (Opp'n 7.) Because Plaintiff does not explain why the location where Plaintiff's files were stored bears upon whether Defendant intended to be bound to arbitrate, the Court is unmoved by this argument.

6 Plaintiff acknowledges that had Defendant selected him for one of these positions, the MAA would have applied to covered claims arising from his employment in that role. (Opp'n 7.) However, as stated above, Plaintiff's applications were unsuccessful.

7 Citations to "*Gonzales* at __" refer to the Order, dated October 26, 2020, located at ECF No. 66 on the docket of that case, which can be accessed using the Public Access to Court Electronic Records service ("PACER").

8 Citations to "*Gennarelli* at __" refer to the Order, dated April 22, 2021, located at ECF No. 39 on the docket of that case, which can be accessed using PACER.

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EXHIBIT 9: LIONEL HARPER V. CHARTER COMMUNICATIONS, LLC, 2:19-CV-00902 WBS DMC, 2021 WL 4784417 (U.S. DIST. CT., E.D. CALIFORNIA), OCTOBER 13, 2021

2021 WL 4784417
United States District Court, E.D. California.

Lionel HARPER, Daniel Sinclair, Hassan Turner, Luis Vazquez, and Pedro Abascal, individually and on behalf of all others similarly situated and all aggrieved employees, Plaintiffs,
v.
CHARTER COMMUNICATIONS, LLC, Defendant.

No. 2:19-cv-00902 WBS DMC
|
Signed 10/12/2021
|
Filed 10/13/2021

Attorneys and Law Firms

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ORDER RE: DEFENDANT'S MOTIONS TO COMPEL ARBITRATION

WILLIAM B. SHUBB, UNITED STATES DISTRICT JUDGE

***1** Plaintiffs Lionel Harper, Daniel Sinclair, Hassan Turner, Luis Vazquez, and Pedro Abascal ("plaintiffs") brought this putative class action against their former employer, Charter Communications, alleging various violations of the California Labor Code. Among other things, plaintiffs allege that Charter misclassified them and other California employees as "outside salespersons," failed to pay them overtime wages, failed to provide meal periods or rest breaks (or premium wages in lieu thereof), and provided inaccurate wage statements. (See generally Second Amended Complaint ("SAC") (Docket No. 147).) Charter now moves to (1) compel arbitration of plaintiff Harper's claims and stay the action and (2) compel arbitration of plaintiff Turner, Vazquez, and Abascal's claims and dismiss them from the case. (Mots. to Compel Arbitration (Docket Nos. 162, 165).) [1]

I. Facts & Procedural History

Much of this case's factual background is set forth in the court's accompanying Order Re: Plaintiffs' Motion to Modify the Scheduling Order and for Leave to File a Third Amended Complaint. Accordingly, the court will not repeat it here except where relevant to the instant motions.

A. Plaintiff Harper

Plaintiff Harper worked for Charter from September 2017 to March 2018. (SAC at ¶ 5 (Docket No. 147).) Upon hire, Harper signed an agreement to arbitrate "any and all claims, disputes, and/or controversies between [Harper] and Charter arising from or related to [Harper's] employment with Charter," designating JAMS as the arbitration provider and stating that JAMS rules, procedures, and policies would govern arbitrations under that agreement (the "JAMS Agreement"). (Order re Mot. to Compel Arb. at 2 (Docket No. 24).) The JAMS Agreement included a waiver of representative, collective, and class actions (the "Waiver") and a severance and so-called "poison pill" provision. (Id. at 2.) The severance provision stated that if any part

of the agreement was found to be void or unenforceable, that part would be severed and the remainder enforced. (Id. at 2-3.) It went on to state one exception (the "poison pill"): that if a dispute involved a representative, collective, or class action claim, and the Waiver were found to be invalid or unenforceable, "then th[e] entire Agreement ... shall be null and void and the dispute will not be arbitrable." (Id. at 3.)

***2** In October 2017, while Harper was still employed by Charter, Charter adopted a new arbitration agreement requiring arbitration of claims via "Solution Channel," Charter's employment-based legal dispute resolution program, which provided for arbitration under the rules of the American Arbitration Association (the "Solution Channel Agreement"). (Id. at 3.) When announcing the change, Charter notified employees that they would be bound by the Solution Channel Agreement unless they opted out within thirty days. (Id.) Harper did not do so. (Id.)

In November 2018, Harper filed a Demand for Arbitration and Request for Rulings as to Inarbitrability with JAMS, seeking a ruling on whether his employment-related grievances against Charter could be arbitrated under the JAMS Agreement. (Id. at 5-6.) Charter consented to and participated in the ensuing arbitration process with JAMS, and in April 2019 an arbitrator issued an award finding that Harper's wage-and-hour claims were inarbitrable and dismissing the arbitration. (Id. at 6; see Mot. to Confirm Arb. Award, Ex. 16 ("Order of Dismissal"), at 157-66 (Docket No. 9-1).)

Specifically, the arbitrator determined that because pre-dispute waivers of representative claims brought under PAGA are unenforceable under California law, the JAMS Agreement Waiver could not be enforced. (Order of Dismissal at 159-61 (Docket No. 9-1) (citing Iskanian v. CLS Transp. L.A. LLC, 59 Cal. 4th 348, 384 (2014)).) The arbitrator accordingly determined that this activated the poison pill, nullifying the entire agreement. (Id. at 163-65.) The arbitrator rejected Charter's argument that the poison pill be limited so as to nullify the agreement only as to the representative, collective, or class action claim at issue as contrary to the JAMS Agreement's plain text, which included no such limitation. (Id.)

In May 2019, after Harper had initiated this action in state court, Charter sought to enforce the Solution Channel Agreement against Harper, who refused. (Order re Mot. to Compel Arb. at 6-7 (Docket No. 24).) In August 2019, this court confirmed and entered judgment pursuant to the JAMS arbitration award. (Id. at 19.) Further, the court found that there had been a novation as a result of Charter's acquiescence to arbitration under the JAMS Agreement rather than the Solution Channel Agreement, held that any rights Charter had as against Harper under the Solution Channel Agreement with respect to his wage-and-hour claims were thus "dead and extinguished," and denied a motion by Charter to compel arbitration under the Solution Channel Agreement. (Id. at 18-20.) [2]

In May 2021, Harper again sought employment with Charter via an online application. (Fries Decl. at ¶ 16, Ex. D (Docket No. 162-1).) When proceeding through Charter's online application, applicants are presented with a webpage featuring information about Charter's Solution Channel Agreement, with links to the agreement itself and to Solution Channel Program Guidelines, both of which applicants may save and print. (Id. at ¶¶ 7-10.) To proceed with their application, applicants are required to affirmatively agree to be bound by the Solution Channel Agreement by clicking an "I Agree" button. (Id. at ¶ 11.) They are informed that if they do not agree, they will be removed from consideration for employment; their application is not submitted, and they are given the option to begin the application process again. (Id. at ¶¶ 12-13.) On May 23, 2021, Harper consented to the Solution Channel Agreement and submitted an online application to Charter. (Id. at ¶ 16, Ex. D.)

B. Plaintiffs Turner, Vazquez, and Abascal

***3** In addition to consenting to the Solution Channel Agreement in order to complete Charter's online application, individuals who accept offers of employment from Charter are again required to consent to the same agreement, or else they cannot become a Charter employee. (Fries Decl. re Turner at ¶¶ 9-18 (Docket No. 165-2).) Plaintiff Turner submitted an online application on May 23, 2018, consenting to the Solution Channel Agreement, and subsequently completed Charter's employee onboarding process, consenting to the agreement again. (Id. at ¶¶ 8, 19, Exs. A & B.) Plaintiff Vazquez did the same, submitting his application on

October 9, 2019. (Fries Decl. re Vazquez at ¶¶ 8, 19, Exs. A & B.) Plaintiff Abascal did as well, submitting his application on November 5, 2019. (Fries Decl. re Abascal at ¶¶ 8, 19, Exs. A & B.)

C. The Solution Channel Agreement

The Solution Channel Agreement contains several provisions currently at issue. It requires parties to the agreement to resolve "all disputes, claims and controversies that could be asserted in court or before an administrative agency for which you or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims," including wage-and-hour-related claims, through binding arbitration. (Fries Aff., Ex. C ("Solution Channel Agreement"), at §§ A, B(1) (Docket No. 165-2).)

The agreement specifically excludes certain claims from arbitration, including "[a]ny claims that have already been filed in federal or state court at the time you execute this Agreement, provided that such claims were not previously subject to any arbitration agreement." (Id. at § C(14).) It also includes a merger clause, providing that the Solution Channel Agreement represents the complete agreement between parties on the resolution of covered disputes, but noting that "this Agreement will not apply to the resolution of any charges, complaints, or lawsuits that have been filed with an administrative agency or court before the Effective Date of this Agreement." (Id. at § P.) Finally, like the JAMS Agreement, the Solution Channel Agreement includes a waiver of representative, class, or collective action claims. (Id. at § D.)

II. Analysis

The Federal Arbitration Act ("FAA") provides that a written provision in a "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Because arbitration is a matter of contract, "the central ... purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) (internal quotations omitted); see also Perry v. Thomas, 482 U.S. 483, 490 (1987) (under the FAA, arbitration agreements "must be rigorously enforced") (internal quotations omitted, alterations adopted).

The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). Accordingly, "the FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1119 (9th Cir. 2008) (internal quotations omitted).

"[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is a construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24–25 (1983); see Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1259 (9th Cir. 2017) (same). Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. See Cohen v. Wedbush, Noble Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988).

***4** The primary exception to courts' obligation to enforce arbitration agreements under the FAA comes from the Act's "saving clause," which "allows courts to refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract.' " Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (quoting 9 U.S.C. § 2). Such "generally applicable contract defenses" most frequently include "fraud, duress, or unconscionability," but do not include

"defenses that apply only to arbitration." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (internal quotations omitted).

A. Applicability of the Solution Channel Agreement

Charter seeks to compel plaintiffs Harper, Turner, Vazquez, and Abascal to submit their California Labor Code and Unfair Competition Law ("UCL") claims to arbitration on an individual basis. (See Mot. to Compel Arb. re Harper at 1 (Docket No. 162); Mot. to Compel Arb. re Turner, Vazquez, & Abascal at 1 (Docket No. 165).) Plaintiffs contend that to do so, Charter must prove that (1) a valid agreement to arbitrate exists and (2) the agreement encompasses the claims Charter seeks to arbitrate. (See Opp. to Mot. to Compel Arb. at 16-17 (citing Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)) (Docket No. 172); Opp. to Mot. to Compel Arb. at 14 (same) (Docket No. 173).)

Turner, Vazquez, and Abascal acknowledge that they each executed the Solution Channel Agreement both when applying for employment with Charter and when accepting their jobs, (see Opp. to Mot. to Compel Arb. at 9-11 (Docket No. 173)), and Harper acknowledges that he did when re-applying for employment with Charter in May 2021, (see Opp. to Mot. to Compel Arb. at 14 (Docket No. 172)). On this basis, plaintiffs concede that a valid agreement to arbitrate exists. (See id. at 17; Opp. to Mot. to Compel Arb. at 14 (Docket No. 173).) Accordingly, the question becomes whether the agreement applies to plaintiffs' Labor Code and UCL claims, of which Charter seeks to compel arbitration. [3]

The Solution Channel Agreement provides that "[y]ou and Charter mutually agree that ... any dispute arising out of or relating to your pre-employment application and/or employment with Charter or the termination of that relationship, except as specifically excluded below, must be resolved through binding arbitration." (Solution Channel Agreement at § A (Docket No. 165-2).) This is followed by a section titled "Covered Claims," (id. at § B), which specifies that such disputes include "wage and hour-based claims including claims for unpaid wages, commissions, or other compensations or penalties (including meal and rest break claims, claims for inaccurate wage statements, [and] claims for reimbursement of expenses)," (id. at § B(1)). The parties do not dispute that the claims of which Charter seeks to compel arbitration clearly fall into this category.

However, that section is followed by another, titled "Excluded Claims," which lists a variety of claims to which the "Covered Claims" section does not apply. (See id. at § C.) Notably for purposes of the instant motions, these include "[a]ny claims that have already been filed in federal or state court at the time you execute this Agreement, provided that such claims were not previously subject to any arbitration agreement." (Id. at § C(14).) The aforementioned merger clause, which appears later in the agreement, also provides that "this Agreement will not apply to the resolution of any charges, complaints, or lawsuits that have been filed with an administrative agency or court before the Effective Date of this Agreement." (Id. at § P.)

***5** Plaintiffs argue that these two provisions operate to exclude plaintiffs Vazquez and Abascal's claims from mandatory arbitration under the agreement. Specifically, they argue that because plaintiff Harper had already filed this action by the time Vazquez and Abascal executed the agreement, their claims qualify as having "already been filed in ... court" and having "been filed with a[ ] ... court before the Effective Date of th[e] Agreement" under these provisions. [4] (See Opp. to Mot. to Compel Arb. at 15-19 (Docket No. 173).)

They argue the same as to Harper, given that he executed the operative agreement in May 2021, after bringing this action, and contend that his claims "were not previously subject to any agreement" pursuant to section C(14) because the agreements he previously signed were no longer in effect by May 2021. (See Opp. to Mot. to Compel Arb. at 16-22 (Docket No. 172).) In light of the differing arguments put forward with respect to Harper and to the other plaintiffs for whom Charter seeks to compel arbitration, the court will address the two groups separately.

1. Plaintiffs Turner, Vazquez, and Abascal

Charter argues that Vazquez and Abascal improperly seek to avoid arbitration by, in essence, piggybacking off of Harper's already-filed claims, which they did not join until well after executing the agreement. (See Def.'s Reply at 5-10 (Docket No. 182).) It contends that because section C creates exceptions to section B's requirement that various claims be arbitrated, the two sections must be read together, and that because section B by its terms applies to "claims ... for which you or Charter have an alleged cause of action," the exclusion contained in section C(14) is properly read to exclude only already-filed claims between the signing party and Charter, rather than any already-filed claims to which Charter is a party. (Solution Channel Agreement at § B(1) (emphasis added) (Docket No. 165-2); see id. at 5-6.) The court agrees.

Because, as a general matter, contract interpretation is a matter of state law, the court looks to California law in construing these provisions. See DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 54 (2015) (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989)). Three provisions of the California Civil Code, governing the interpretation of contracts, are relevant here. First, "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. Second, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Id. at § 1636. Third, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Id. at § 1641.

Under these provisions, it is clear that section C(14) of the agreement cannot be read to prevent arbitration of Vazquez and Abascal's claims by virtue of Harper's previously filed claim. Because section C specifically lists exclusions to section B, the two must be read together. See also id. Per section B's clear language, claims covered under that section — and thus excluded under section C — are those between "You" (i.e., the individual signatory) "and Charter." This clearly signifies an intention to require arbitration of claims — and thus, under section C, exclude from arbitration — only claims that might arise as between the signatory and Charter. See id. at §§ 1636, 1638. To allow signatories to avoid arbitration of otherwise-covered claims by joining suits filed by individuals not party to the contract would plainly frustrate this intention.

***6** For similar reasons, section P likewise does not exclude Vazquez and Abascal's claims from arbitration. As noted above, the Solution Channel Agreement's core provisions specify that it applies to disputes between "You and Charter." Although section P does not directly incorporate this language in the manner that section C does, to apply it in plaintiffs' preferred manner would run counter to the contract's central purpose, which is to require arbitration of disputes. See id. at § 1636. And to the extent that this omission creates a conflict between sections P and C(14), "in a contract, when a general and particular provision are inconsistent, the latter is paramount to the former," meaning that "a particular intent will control a general one that is inconsistent with it." Karpinski v. Smitty's Bar, Inc., 246 Cal. App. 4th 456, 464 (1st Dist. 2016) (internal quotation marks and citation omitted).

For these reasons, together with the FAA's mandate that any doubts as to an arbitration agreement's applicability be resolved in favor of arbitration, see Moses H. Cone Mem'l Hosp., 460 U.S. at 24–25; Poublon, 846 F.3d at 1259, the court concludes that the Solution Channel Agreement applies to compel arbitration of Vazquez and Abascal's claims. Plaintiffs do not contest that the agreement applies to Turner's claims, and sections C(14) and P clearly do not exclude them, as this action had not yet been filed at the time he executed the agreement. Accordingly, the court concludes that the Solution Channel Agreement applies to Turner's claims as well.

2. Plaintiff Harper

Plaintiffs also contend that section P of the agreement excludes Harper's claims from its coverage. (See Opp. to Mot. to Compel Arb. at 18-19 (Docket No. 172).) They further argue that, because this court confirmed the JAMS arbitrator's award finding that

the JAMS agreement was "null and void," and because it subsequently held that Charter's acquiescence to the JAMS arbitration effected a novation of Harper's first Solution Channel contract — rendering it "dead and extinguished" — Harper's claims do not qualify as "previously subject to any arbitration agreement" under section C(14). (See id. at 20-22.) Accordingly, they argue that section C(14) excludes Harper's claims from coverage under the agreement as well. (See id.)

As noted above, section C(14) provides that the agreement excludes "[a]ny claims that have already been filed in federal or state court at the time you execute this Agreement, provided that such claims were not previously subject to any arbitration agreement." (Solution Channel Agreement at § C(14) (Docket No. 165-2).) Thus, because it is undisputed that Harper's claims had already been filed in court when he executed the agreement, (see Opp. to Mot. to Compel Arb. at 20 (Docket No. 172)), the only question is whether those claims "were ... previously subject to any arbitration agreement," (Solution Channel Agreement at § C(14) (Docket No. 165-2)). The court concludes that they were.

While Harper was employed by Charter, he consented to the JAMS Agreement, and later to the Solution Channel Agreement. Plaintiffs argue that the JAMS arbitrator's determination that the JAMS Agreement was invalid means that Harper's claims were never "subject to" that agreement, contending that claims are only "subject to" an arbitration agreement if they are validly required to be arbitrated under that agreement. (See Opp. to Mot. to Compel Arb. at 20 (Docket No. 172).)

The court assumes, for these purposes, that plaintiffs' construction of "subject to" is correct, such that Harper's claims were not "previously subject to" the JAMS Agreement. Even so, it is clear that they were nonetheless "previously subject to" the Solution Channel Agreement. Although this court determined that there was a subsequent novation, extinguishing that agreement, the fact remains that for a period of time — beginning when Harper first executed the Solution Channel Agreement and ending with Charter's acquiescence to the JAMS arbitration — Charter could have asserted the Solution Channel Agreement against Harper with respect to any wage-and-hour claims he had. Under the plain meaning of "previous" – earlier in time – Harper's claims, at the time he executed the Solution Channel Agreement in May 2021, were "previously subject to" the earlier-signed copy of the same agreement. As such, Harper's claims are not excluded from arbitration under section C(14). [5]

***7** To the extent that Harper challenges Charter's ability to compel him to arbitrate his individual claims arising out of his prior employment because his latest execution of the Solution Channel Agreement occurred when he applied for another position, (see id. at 14), at least one other district court in California has already held that the Solution Channel Agreement applies in such circumstances. In Durruthy v. Charter Communications, LLC, like in this case, the plaintiff was hired by Charter, was later terminated, subsequently reapplied for employment, and in doing so executed the agreement, which Charter then sought to enforce against her. Durruthy, 20-CV-1374-W-MSB, 2020 WL 6871048, at *1 (S.D. Cal. Nov. 23, 2020). As the court in the Southern District of California observed:

> The Agreement covers "any dispute arising out of or relating to [an applicant's] preemployment application and/or employment with Charter or the termination of that relationship ...." The Agreement does not limit its application to future employment, nor does it exclude claims from prior employment periods. Therefore, an objective reading supports that "employment" reasonably means any employment period between the two parties of the agreement ..... Plaintiff's alleged lack of consent to arbitrate claims from her prior employment period with Defendant are absent from the Agreement, and "unexpressed subjective intentions are irrelevant ...."

Id. at *4-5 (quoting Martinez v. BaronHR, Inc., 51 Cal. App. 5th 962, 970 (2020)) (alterations in original). This court agrees with the Durruthy court's analysis of this issue. [6]

For the foregoing reasons, the court concludes that the Solution Channel Agreement applies to Harper's claims.

B. Unconscionability

Plaintiffs also argue that the Solution Channel Agreement is unconscionable. (See id. at 22-38; Opp. to Mot. to Compel Arb. at 19-34 (Docket No. 173).) If true, this would mean that the contract was not validly entered into in the first instance, allowing the court to invalidate the agreement pursuant to the FAA's saving clause. See Concepcion, 563 U.S. at 339.

"Unconscionability under California law has 'both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.' " Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 963 (9th Cir. 2012) (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 99 (2000)). While courts "use a 'sliding scale' in analyzing these two elements .... [n]o matter how heavily one side of the scale tips ..., both procedural and substantive unconscionability are required for a court to hold an arbitration agreement unenforceable." Id. (citing Armendariz, 24 Cal. 4th at 99).

This court previously assessed whether the Solution Channel Agreement is unconscionable in the related action between plaintiff Harper and Charter. See Harper v. Charter Comms., LLC, 2:19-cv-01749 WBS DMC, 2019 WL 6918280, at *5-6 (E.D. Cal. Dec. 18, 2019). There, the court determined that the agreement was not procedurally unconscionable, relying in large part on the fact that when Harper was first confronted with the Solution Channel Agreement, it was via an email notifying employees of their ability to opt out of the agreement within thirty days. Id. at *1, 5 (citing Kilgore v. KeyBank, Nat'l Ass'n, 718 F.3d 1052, 1058-59 (9th Cir. 2013) (en banc) (deeming an arbitration agreement not procedurally unconscionable because it noted the option to opt out within sixty days of signing)). Here, on the other hand, there is no indication that plaintiffs were given the same option to opt out; indeed, they assert that they received none, (see Opp. to Mot. to Compel Arb. at 24 (Docket No. 172); Opp. to Mot. to Compel Arb. at 21 (Docket No. 173)), which Charter does not contest, (see Def.'s Reply at 15-17 (Docket No. 182); Def.'s Reply at 16-18 (Docket No. 183)).

***8** The Ninth Circuit has previously held that an arbitration agreement was procedurally unconscionable where it was presented to employees "on an adhere-or-reject basis," with no opportunity to opt out. See Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172 (9th Cir. 2003); see also Steele v. Am. Mortg. Mgmt. Servs., 2:12-cv-00085 WBS JFM, 2012 WL 5349511, at *4-5 (E.D. Cal. Oct. 26, 2012) (holding pre-employment arbitration agreement procedurally unconscionable because it did not contain an opt-out clause). Conversely, it has also held that an arbitration agreement that included an opt-out provision was not procedurally unconscionable. See Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1211 (9th Cir. 2016).

Thus, an arbitration agreement that individuals are required to sign as a condition of employment, with no ability to opt out, is procedurally unconscionable, though Ninth Circuit precedent also establishes that this form of procedural unconscionability is "low" on California's sliding scale analysis. See Poublon, 846 F.3d at 1261. In such a situation, if "there is no other indication of oppression or surprise, then the agreement will be enforceable unless the degree of substantive unconscionability is high." Id.

Regardless of the particular degree of procedural unconscionability present here, however, in order for their unconscionability defense to succeed, plaintiffs must also show that the agreement is substantively unconscionable. See Kilgore, 673 F.3d at 963. And as this court previously held in the related action between Harper and Charter, in which Charter sought to enforce the Solution Channel Agreement against him with respect to claims not present in the current litigation, the agreement is not substantively unconscionable. See Harper, 2019 WL 6918280, at *5-6. [7] Because the agreement at issue in this litigation is the same as the one upon which the court ruled in the separate litigation, and plaintiffs do not allege that it has changed, [8] the court again concludes that the Solution Channel Agreement is not substantively unconscionable.

***9** Because the Solution Channel Agreement is not substantively unconscionable, plaintiffs' unconscionability defense must fail.

C. California Labor Code Section 432.6

Finally, in supplemental briefing, plaintiffs argue that the Ninth Circuit's recent decision in Chamber of Commerce of the United States v. Bonta, — F.4th —, 2021 WL 4187860 (9th Cir. Sept. 15, 2021), precludes enforcement of the Solution Channel Agreement against Harper. (See Not. of Supp. Auth. at 2 (Docket No. 196).) That decision upheld part of California Labor Code section 432.6, which prohibits employers from "requir[ing] any applicant for employment or any employee to waive any right, forum, or procedure" established under the Labor Code or California Fair Employment and Housing Act as a condition of employment, on the basis that it was not preempted by the FAA.[9] See id. at *4-10; Cal. Lab. Code § 432.6(a).

Plaintiffs contend that under Chamber of Commerce, Charter's use of the Solution Channel Agreement violates section 432.6 because Harper's consent to the agreement was a mandatory condition for consideration of his application and for any subsequent employment, with no ability to opt out. (See Not. of Supp. Auth. at 2 (Docket No. 196).) Per Chamber of Commerce's clear language, however, whether this requirement violated section 432.6 has no effect on the court's present decision to enforce the Solution Channel Agreement: "§ 432.6 does not make invalid or unenforceable any agreement to arbitrate, even if such agreement is consummated in violation of the statute." 2021 WL 4187860, at *7 (emphasis added); see also 2021 WL 4187860, at *6 ("§ 432.6 cannot be used to invalidate, revoke, or fail to enforce an arbitration agreement ....").

The most that Chamber of Commerce does to aid employees who seek to challenge arbitration agreements is to simply reaffirm the applicability of the FAA's saving clause to arbitration agreements under section 432.6. See id. at *6 (citing Cal. Lab. Code § 432.6(f) ("Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the [FAA].")) (other citations omitted). In doing so, the Ninth Circuit observed, in dicta:

> [A]n employee may attempt to void an arbitration agreement that he was compelled to enter as a condition of employment on the basis that it was not voluntary. If a court were to find that such a lack of voluntariness is a generally applicable contract defense that does not specifically target agreements to arbitrate, the arbitration agreement may be voided in accordance with saving clause jurisprudence.

Id. at *9. However, here the court has addressed Harper's "generally applicable contract defense[s]" and determined that they do not apply here. Chamber of Commerce thus has no impact on this decision.

For the foregoing reasons, the court will grant Charter's motions to compel arbitration of plaintiffs Harper, Turner, Vazquez, and Abascal's individual claims.

D. Motions to Dismiss or Stay Judicial Proceedings

***10** In its motion to compel arbitration of Harper's Labor Code and UCL claims, Charter requests that, should the court grant that motion, the court stay this case — including Harper's PAGA claim – pending arbitration of the other claims. (See Mot. to Compel Arb. re Harper at 23-24 (Docket No. 162).) Charter suggests that although it has not sought arbitration of the PAGA claim, staying proceedings as to the PAGA claim would avoid conflicting rulings between this court as to the PAGA claim and the arbitrator as to the other claims. (See id. at 24.) Plaintiffs oppose this request, pointing out that because this court will not be bound by any rulings the arbitrator might make, staying Harper's PAGA claim would not in fact avoid conflicting rulings. (See Opp. to Mot. to Compel Arb. at 38-39 (Docket No. 172).) They further argue that proceedings as to the PAGA claim should not be stayed because of the distinct nature of a PAGA claim, which belongs to the state rather than to Harper. (See id. at 39.)

Further, in its motion to compel arbitration of Turner, Vazquez, and Abascal's claims, Charter also requests that, should the court grant that motion, the court dismiss those plaintiffs from the case. (See Mot. to Compel Arb. re Turner, Vazquez, & Abascal at 20-21 (Docket No. 165).) Plaintiffs oppose this request and instead request that the court stay proceedings as to these plaintiffs pending arbitration of their individual claims. (See Opp. to Mot. to Compel Arb. at 35 (Docket No. 173).) In response to the court's questioning at oral argument, counsel for plaintiffs indicated that they preferred a stay of plaintiff Sinclair's individual claims pending arbitration of the other plaintiffs' individual claims.

The FAA provides that, where a suit presents "issue[s] referable to arbitration under an agreement in writing for such arbitration," the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. Further, the Supreme Court has stated that "[i]n some cases, it may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 n.23 (1983).

Because plaintiffs have requested a stay of Turner, Vazquez, and Abascal's individual claims, the court will stay those claims pending arbitration. Additionally, because Charter has requested that the court otherwise stay this case pending arbitration of Harper's individual claims, because plaintiffs' counsel supported a stay of Sinclair's individual claims at oral argument, and because the court agrees that a stay of Sinclair's claims pending arbitration is "advisable," the court will stay Sinclair's individual claims pending arbitration as well.

However, because a stay would impede vindication of California's interests in enforcing the Labor Code through representative PAGA actions, discussed above, and because the PAGA claim represents a distinct "action" in this case, the court will not stay Harper's PAGA claim. See Jarboe v. Hanlees Auto Grp., 53 Cal. App. 5th 539, 557 (1st Dist. 2020) ("Because a PAGA claim is representative and does not belong to an employee individually, an employer should not be able dictate how and where the representative action proceeds.").

IT IS THEREFORE ORDERED that Charter's Motions to Compel Arbitration (Docket Nos. 162, 165) be, and the same hereby are, GRANTED.

IT IS FURTHER ORDERED that, as to the claims presented in Counts One through Nine of the Second Amended Complaint only, this action is STAYED pending arbitration of plaintiff Harper, Turner, Vazquez, and Abascal's individual claims.

All Citations

Slip Copy, 2021 WL 4784417, 2021 Wage & Hour Cas.2d (BNA) 392,699

Footnotes

1 The parties have requested that the court take judicial notice of two filings in Harper's related FEHA case, other documents filed in this litigation, the American Arbitration Association's rules and procedures, and two unpublished Los Angeles Superior Court decisions addressing Charter's motions to compel arbitration in other cases. (See Docket Nos. 171, 184, 185.) Plaintiffs object to Charter's request as to the Los Angeles Superior Court decisions. (See Docket No. 191.) Because the court does not find these materials relevant to this matter or helpful in deciding any of the issues currently before the court, however, the court declines to take judicial notice of these materials.

2 In late 2019, the court also adjudicated a separate, related action between Harper and Charter brought under California's Fair Employment and Housing Act ("FEHA"). See Harper v. Charter Comms., LLC, 2:19-cv-01749 WBS DMC, 2019 WL 6918280 (E.D. Cal. Dec. 18, 2019). There, Harper had also sought to arbitrate his FEHA claims under the JAMS agreement, but this time Charter did not participate. Id. at *2. The court held that because "Charter did not engage with [Harper's] FEHA claims" in the manner it had with his wage-and-hour claims, there had been no novation of arbitration agreements with respect to the FEHA claims. Id. at *3. After determining that the Solution Channel Agreement applied to Harper's FEHA claims and was valid, the court granted a motion by Charter to compel arbitration of those claims under that agreement. Id. at *3-6.

3 Although at oral argument the parties briefly discussed whether questions of arbitrability should themselves be submitted to an arbitrator, neither party raised this issue in their briefing. Accordingly, this court will decide whether plaintiffs' claims are arbitrable rather than submit the issue to the arbitrator. See also Momot v. Mastro, 652 F.3d 982, 987 (9th Cir. 2011) (gateway issues of arbitrability are presumptively reserved for the court).

4 Plaintiffs do not make this argument with respect to plaintiff Turner, as he had already executed the agreement when this litigation began, and therefore they concede that sections C(14) and P do not apply to him. (See Opp. to Mot. to Compel Arb. at 17 n.6 (Docket No. 173).)

5 Plaintiffs contend that to find that Harper's claims were previously subject to the initial Solution Channel Agreement, the court would need to reconsider whether that agreement was extinguished by the previously mentioned novation, which they argue the court is precluded from doing under the law of the case doctrine. (See Opp. to Mot. to Compel Arb. at 21 (Docket No. 172).) However, plaintiffs are mistaken in their logic, as finding that an applicable agreement had terminated is not the same as concluding that it was never applicable in the first place. Although the court did the former, it did not do the latter.

6 This court's agreement with the Durruthy court's evaluation of the Solution Channel Agreement, however, does not extend to its unconscionability analysis.

7 Specifically, the court determined that (1) the Solution Channel review process was not one-sided, as Harper contended, but rather its requirements applied equally to employees and to Charter; (2) the agreement did not enable Charter to conclusively decide whether a claim is arbitrable, instead providing claimants the ability to proceed with arbitration on this and other issues; and (3) a provision of the agreement requiring "each party [to] bear its own attorney's fees regardless of the action brought," although unenforceable under California law, could be severed pursuant to the agreement's severability clause in light of the court's determination that the agreement was "not otherwise permeated by unconscionability." See Harper, 2019 WL 6918280, at *5-6 (citing Serpa v. Cal. Sur. Investigations, Inc., 215 Cal. App. 4th 695, 709-10 (2d Dist. 2013)).

8 Although plaintiff Harper refers to the Solution Channel Agreement to which he consented the first time as the "Old SC Agreement" and the one to which he consented when re- applying as the "New SC Agreement," his bases for these differences in nomenclature are that the former was included in an email informing him that he could opt out, whereas the latter was not — not that the agreement itself had changed. (See Opp. to Mot. to Compel Arb. at 9 n.1 (Docket No. 172).)

Moreover, the Solution Channel Agreement is dated September 25, 2017 — well before plaintiffs Turner, Vazquez, and Abascal first applied for employment with Charter — further indicating that it had not changed between when plaintiff Harper first signed it and when they did. (See Solution Channel Agreement (Docket No. 165-2); supra Section II.B.)

9 Because section 432.6 came into effect after Turner, Vazquez, and Abascal executed the Solution Channel Agreement, but before Harper did in May 2021, plaintiffs only contend that the Ninth Circuit's decision applies to Harper. (See Not. of Supp. Auth. at 2 n.1 (Docket No. 196).)

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EXHIBIT 10: PETER W. ANDERSON, JR. V. CHARTER COMMUNICATIONS, INC., ET AL., NO. 20-5894 (6TH CIR., JUNE 11, 2021); 860 FED.APPX 374

860 Fed.Appx. 374
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

Peter W. ANDERSON, Jr., Plaintiff-Appellant,

v.

CHARTER COMMUNICATIONS, INC., dba Spectrum; Christopher Cornett, Defendants-Appellees.

No. 20-5894

FILED June 11, 2021

Synopsis

Background: Former employee brought state court action against former employer after he was terminated for allegedly using offensive language, asserting a number a state-law claims. Following removal, the United States District Court for the Western District of Kentucky, Charles R. Simpson, III, Senior District Judge, granted employer's motion to compel arbitration and dismiss the suit. Employee appealed.

Holdings: The Court of Appeals, Murphy, Circuit Judge, held that:

employee's argument that agreement did not cover his specific claims in his suit because agreement excluded claims older than the statute of limitations applicable to such claims was for the arbitrator to decide;

employee's argument that arbitration agreement with former employer was unconscionable was question for arbitrator;

under Kentucky law, both employee and employer gave adequate consideration for arbitration agreement by agreeing to arbitrate with each other; and

a stay, rather than dismissal, was appropriate remedy upon compelling arbitration of employee's claims.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration; Motion to Dismiss; Motion to Stay Proceedings.

***375** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Attorneys and Law Firms

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BEFORE: GIBBONS, KETHLEDGE, and MURPHY, Circuit Judges.

Opinion

MURPHY, Circuit Judge.

When enforcing the Federal Arbitration Act, the Supreme Court has long held that parties may agree to arbitrate more than the merits of their legal claims. They may also agree to arbitrate "gateway" questions that are preliminary to the merits, such as whether their arbitration contract even covers the claims that a party seeks to litigate. This case requires us to consider several "gateway" questions. Peter Anderson sued his former employer. The district court compelled him to arbitrate his claims and dismissed his suit. Anderson now argues that his arbitration agreement did not cover his claims, that it was unconscionable, and that his employer failed to give adequate consideration in return for his agreement to arbitrate. But the agreement reserved his coverage and unconscionability arguments for the arbitrator to resolve, and his former employer gave adequate consideration. We thus affirm the decision to compel arbitration. But we also hold that the court should have stayed rather than dismissed Anderson's suit.

I

For 18 years, Anderson worked for Charter Communications, a telecommunications company that most of the public knows as "Spectrum." Charter fired Anderson in 2018 after coworkers complained that he had used offensive language. Asserting that their allegations were false, Anderson brought a bevy of state-law claims against Charter in Kentucky state court. Charter removed Anderson's suit to federal court.

Charter then moved to compel arbitration and dismiss (or, in the alternative, stay) the suit. In 2017, Charter had announced a "Solution Channel" dispute-resolution program in an email to employees. The email told employees that they would agree to arbitrate employment disputes with Charter unless they opted out within 30 days. Anderson did not opt out. With a few exceptions, the agreement thus required Anderson to arbitrate "any dispute arising out of or relating to" his termination from Charter. Agreement, R.5-2, PageID#87.

The district court held that Anderson agreed to arbitrate his claims. *See* *Anderson v. Charter Commc'ns*, 2020 WL 3977664, at *3 (W.D. Ky. July 14, 2020). It compelled arbitration and dismissed Anderson's suit with prejudice. We review the court's decision to compel arbitration de novo. *See* *Bratt Enters. v. Noble Int'l Ltd.*, 338 F.3d 609, 612 (6th Cir. 2003).

II

A

The Federal Arbitration Act makes arbitration agreements "valid, irrevocable, and ***376** enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Act creates a substantive body of federal arbitration law that requires courts to enforce arbitration contracts "according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, —— U.S. ——, 139 S. Ct. 524, 529, 202 L.Ed.2d 480 (2019). These terms commonly indicate that an arbitrator should decide the merits of the claims that one of the parties might raise against the other. A hypothetical employment contract, for example, might note that the employee must arbitrate any employment claims that the employee has against the employer under the relevant laws. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, —— U.S. ——, 139 S. Ct. 1407, 1413, 203 L.Ed.2d 636 (2019); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109–10, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Yet arbitration agreements often send more than the parties' legal claims (like those hypothetical employment claims) to arbitration. An agreement might also state that an arbitrator should decide preliminary issues that arise before the merits—what the Supreme Court calls "gateway" questions about the "arbitrability" of the claims. *See* *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). The Supreme Court has developed different rules for different types of gateway questions.

Some gateway questions concern an arbitration agreement's "coverage." Suppose that the hypothetical employee argues that the parties' arbitration contract does not cover the employment claims raised in court. Who should decide whether the agreement includes them? Courts presumptively decide this coverage question on the background assumption that the parties did not mean to arbitrate it. *See* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–45, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). But if the arbitration contract unambiguously indicates that the arbitrator gets to decide whether the contract applies to the claims, courts must respect that choice and send the question to arbitration. *See* *Henry Schein*, 139 S. Ct. at 530.

Other gateway questions concern an agreement's "enforceability." Suppose that the employee argues instead that a court should resolve the merits of the employment claims because the contract that contains the arbitration clause is invalid under a general contract-law theory like unconscionability or duress. Who should decide whether the employment contract or arbitration clause is enforceable? The Supreme Court's answer to this question distinguishes between a general challenge to the contract *as a whole* and a specific challenge to the *arbitration clause*. *See* *Preston v. Ferrer*, 552 U.S. 346, 353–54, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–45, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). A general challenge to the entire contract (for example, a claim that the contract was fraudulently induced) must be sent to the arbitrator even when it might invalidate the arbitration clause too. *See* *Prima Paint*, 388 U.S. at 403–04, 87 S.Ct. 1801 (relying on 9 U.S.C. § 4). Conversely, a specific challenge to the arbitration clause (for example, the claim that it was fraudulently added at the last minute) must be decided by a court before the court compels arbitration. *See* *Buckeye*, 546 U.S. at 444–46, 126 S.Ct. 1204.

***377** This same distinction applies even when an employer and employee enter into a separate contract that is solely about arbitration. Suppose that this standalone arbitration agreement contains a "delegation clause" that requires the arbitrator to decide questions about the contract's enforceability, such as the employee's claim that the arbitration agreement is unconscionable. If the employee's unconscionability claim attacks the *entire arbitration agreement* rather than the *delegation clause*, the arbitrator gets to decide the claim. *See* *Rent-A-Ctr.*, 561 U.S. at 72, 130 S.Ct. 2772. If, by contrast, the employee's unconscionability claim attacks the delegation clause specifically, the court must resolve that claim before sending the suit to arbitration. *See* *id.*

Still other gateway questions concern an agreement's "formation." Suppose that the employee argues that a court should resolve the employment claims because the employee never entered into the contract containing the arbitration clause (say, the employee argues that the arbitration agreement has a forged signature). An arbitration contract, like any other contract, rests on the parties' consent. *See* *Lamps Plus*, 139 S. Ct. at 1415–17. So a party generally may not be coerced to arbitrate if the party has not agreed to it. *See* *VIP, Inc. v. KYB Corp. (In re Auto. Parts Antitrust Litig.)*, 951 F.3d 377, 382–83 (6th Cir. 2020). Indeed, the Supreme Court has repeatedly disclaimed the notion that its cases compel a party to arbitrate the fundamental question whether the parties agreed to arbitrate at all. *See* *Rent-A-Ctr.*, 561 U.S. at 70 n.2, 130 S.Ct. 2772. Courts instead must decide whether the parties actually entered into an arbitration agreement before sending the dispute to arbitration. *See* *Sevier Cnty. Schs. Fed. Credit Union v. Branch Banking & Tr. Co.*, 990 F.3d 470, 475 (6th Cir. 2021); *see also, e.g.*, *MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 401–02 (3d Cir. 2020); *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d

225, 234 (4th Cir. 2019); *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 514–15 (5th Cir. 2019); *Rivera-Colón v. AT&T Mobility P.R., Inc.*, 913 F.3d 200, 207–08 (1st Cir. 2019); *Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 & n.2 (8th Cir. 2014).

B

These background rules doom Anderson's three challenges to the district court's decision to compel arbitration. *First*, Anderson raises a "coverage" claim: He argues that his arbitration agreement with Charter does not cover his specific claims in this suit. That is so, Anderson says, because the parties' agreement "specifically excluded" "[c]laims older than the statute of limitations applicable to such claims[.]" Agreement, R.5-2, PageID#88. Anderson asserts that this carveout applies here because the one-year statute of limitations for his claims ran between the time that he sued and the time that the district court compelled arbitration.

Yet Anderson ignores that his agreement unambiguously sent this coverage question to the arbitrator. *Henry Schein*, 139 S. Ct. at 530. The agreement noted that "all disputes related to the arbitrability of any claim or controversy" should be submitted to arbitration; it added for good measure that "the arbitrator shall have the sole authority to determine whether a particular claim or controversy is arbitrable." Agreement, R.5-2, PageID#87, 89. Thus, the arbitrator must decide whether Anderson's claims in this suit fall within the arbitration exclusion for untimely claims.

Second, Anderson raises an "enforceability" claim: He argues that his arbitration ***378** agreement with Charter is unconscionable. For two reasons, however, the arbitrator must decide this unconscionability claim. To begin with, Anderson has never challenged (and so has forfeited any challenge to) the district court's holding that his agreement with Charter contains provisions delegating this enforceability question to the arbitrator. *Anderson*, 2020 WL 3977664, at *3. (Some other district courts that have considered the same Charter agreement have suggested that it would not send the enforceability question to arbitration. *See* *Durruthy v. Charter Commc'ns, LLC*, 2020 WL 6871048, at *2–3 (S.D. Cal. Nov. 23, 2020); *Gonzales v. Charter Commc'ns, LLC*, 497 F.Supp.3d 844, 849–50 (C.D. Cal. 2020).)

In addition, Anderson's unconscionability arguments attack the arbitration agreement *as a whole*, not the *specific provisions* delegating unconscionability claims to an arbitrator. He argues that the agreement is unconscionable because of the parties' unequal bargaining power and because Charter required him to consent to arbitration to keep his job. He adds that the agreement unfairly limits discovery. But he raises these arguments against the entire agreement, asserting that we should invalidate it and allow him to pursue his claims in court. He does not limit his challenge to the delegation provisions.

These facts make this case identical to *Rent-A-Center*. That case, like this one, involved a standalone arbitration contract. 561 U.S. at 71–72, 130 S.Ct. 2772. And that case, like this one, involved an unconscionability challenge to the agreement as a whole rather than to the specific "delegation" provision reserving unconscionability claims for the arbitrator. *Id.* at 72–75, 130 S.Ct. 2772. *Rent-A-Center* held that the plaintiff must raise this challenge with the arbitrator. *Id.* at 71–72, 130 S.Ct. 2772. That was so even if some of the plaintiff's arguments against the contract (such as a complaint about the limits on discovery) could have been used in support of a specific challenge to the contract's delegation provision. *Id.* at 74, 130 S.Ct. 2772. Because the plaintiff did not raise that sort of specific challenge, the arbitrator needed to decide the plaintiff's unconscionability claim. *Id.* at 72–75, 130 S.Ct. 2772. Here, too, Anderson raised his arguments about the parties' unequal bargaining power and the limits on discovery to challenge the arbitration agreement generally, not the delegation provisions

specifically. Like the plaintiff in *Rent-A-Center*, he thus must raise his unconscionability claim with the arbitrator. *Id.*; *see also* *Swiger v. Rosette*, 989 F.3d 501, 506–07 (6th Cir. 2021).

Third, Anderson raises what may (or may not) be considered a "formation" claim: He argues that Charter offered insufficient consideration for his agreement to arbitrate. Must we address this consideration question ourselves even if the agreement's delegation provisions send it to the arbitrator? On the one hand, every first-year law student learns that consideration is "an essential element of contract *formation*," which might suggest that we must ensure that it exists before compelling the parties to arbitrate. *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 252 (2d Cir. 2019) (emphasis added). On the other hand, this technical argument does not go to whether the parties mutually assented to arbitration (unlike, for example, the claim that a party never "signed the contract," *Buckeye*, 546 U.S. at 444 n.1, 126 S.Ct. 1204). It instead goes to whether the agreement is legally *enforceable*, which might suggest that the parties could leave it for the arbitrator to resolve. *See MZM Constr.*, 974 F.3d at 398 n.7; *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 550–51 (5th Cir. 2018); ***379** *Alwert v. Cox Commc'ns, Inc. (In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.)*, 835 F.3d 1195, 1209–11 (10th Cir. 2016).

Ultimately, we opt not to decide whether the parties could send this consideration question to an arbitrator. Even if Anderson is correct that a court (not an arbitrator) must answer it, he is wrong that the agreement lacked consideration. We can assume that Kentucky law applies to the agreement because both parties agree that it does. *See Masco Corp. v. Wojcik*, 795 F. App'x 424, 427 (6th Cir. 2019). Kentucky law makes clear that "an arbitration clause requiring both parties to submit equally to arbitration constitutes adequate consideration." *Energy Homes, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013) (citation omitted). Both sides in this case thus gave adequate consideration by agreeing to arbitrate with each other.

In response, Anderson argues that Charter provided no "new" consideration for his agreement to arbitrate his disputes with the company. He simply ignores that Charter also gave up the right to litigate any disputes that it had with Anderson. And Anderson makes no claim that Charter's consideration was "illusory" because, for example, the company could amend the agreement at any time. *Cf.* *Day v. Fortune Hi-Tech Mktg., Inc.*, 536 F. App'x 600, 603–04 (6th Cir. 2013). The district court thus properly compelled Anderson to arbitrate his claims.

III

Anderson also appeals the district court's remedy: dismissal of his suit with prejudice. Charter moved to dismiss the suit or stay it pending arbitration. If the court compelled arbitration, Anderson alternatively argued that it was required to stay the case. The court disagreed and dismissed the case outright, reasoning that it had sent all his claims to arbitration. *Anderson*, 2020 WL 3977664, at *3–4. Could the court legally do so? The Supreme Court has repeatedly reserved this question. *See* *Lamps Plus*, 139 S. Ct. at 1414 n.1. And the question has split the circuits.

The Federal Arbitration Act establishes procedures for parties to enforce arbitration agreements in federal court. 9 U.S.C. §§ 3–4. Section 3 applies when, as in this case, a plaintiff sues in federal court and the defendant claims that the plaintiff's action contains "any issue referable to arbitration under an agreement in writing for such arbitration[.]" 9 U.S.C. § 3. The section indicates that, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration," the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement[.]" *Id.*

Several circuits interpret § 3 to compel a district court to stay a case if a party requests that remedy, which means that the court may not dismiss the case outright even when sending all claims to arbitration. *See* *Katz v. Cellco P'ship*, 794 F.3d 341, 344–

46 (2d Cir. 2015); *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269–71 (3d Cir. 2004); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955–56 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (per curiam). These circuits rely on § 3's text: It uses the mandatory verb "shall." They also rely on the Act's structure: It "permits immediate appeal of orders hostile to arbitration ... but bars appeal of interlocutory orders favorable to arbitration." *Katz*, 794 F.3d at 346 (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)). A discretionary dismissal could upend this structure because, unlike a stay, ***380** the dismissal allows an appeal from an order favoring arbitration. *Id.*; *compare* *Preferred Care of Del., Inc. v. Est. of Hopkins*, 845 F.3d 765, 768 (6th Cir. 2017), *with* *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275–76 (6th Cir. 1990).

Several other circuits, by contrast, have adopted a "judicially-created exception" to § 3's stay requirement, one that gives district courts discretion to "dismiss an action rather than stay it where it is clear the entire controversy between the parties will be resolved by arbitration." *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769–70 (8th Cir. 2011); *see* *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 & n.21 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 637–38 (9th Cir. 1988). These circuits rely on an efficiency rationale, reasoning that "retaining jurisdiction and staying the action will serve no purpose" when the court has found all of the plaintiff's claims to be arbitrable. *Alford*, 975 F.2d at 1164 (citation omitted).

For our part, we have followed the latter approach in unpublished decisions. *See Andrews v. TD Ameritrade, Inc.*, 596 F. App'x 366, 372–73 (6th Cir. 2014); *Ozormoor v. T-Mobile USA, Inc.*, 354 F. App'x 972, 975 (6th Cir. 2009); *Hensel v. Cargill, Inc.*, 1999 WL 993775, at *4 (6th Cir. Oct. 19, 1999) (per curiam). We have also indicated that we have appellate jurisdiction when a district court does, in fact, dismiss a suit in this setting. *See* *Arnold*, 920 F.2d at 1275–76; *see also* *Hilton v. Midland Funding, LLC*, 687 F. App'x 515, 517–19 (6th Cir. 2017).

Which side of this split has the better argument? And do our cases already put us on the side that allows district courts to dismiss a suit? We need not answer these questions here. Under either approach, the district court should have stayed Anderson's case. Even the circuits that give courts discretion to dismiss a case recognize that the court may abuse its discretion when doing so. *See* *Green*, 653 F.3d at 770. One court, for example, held that a district court abused its discretion by dismissing a case when it was not clear that the arbitrator would resolve all claims and when the plaintiff could face prejudicial statute-of-limitations hurdles to refiling the suit later. *Id.*; *see also* *Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 318 (7th Cir. 2002).

This case fits that mold. Because the parties left several "gateway" issues for the arbitrator, the arbitration may not resolve all claims. Charter concedes that Anderson may again pursue his claims in court if the arbitrator finds the agreement unenforceable. Anderson also argues that he could face statute-of-limitations problems if he must file a second suit. Charter admits that the district court's dismissal subjects him to this risk but says that it would disavow a statute-of-limitations defense if the arbitrator found the agreement unenforceable. Yet the district court should not have simply left Anderson to Charter's good graces. It should have stayed the suit pending the arbitration (even assuming that it had discretion to dismiss it). *See* *Green*, 653 F.3d at 770.

Charter responds that a stay might incentivize Anderson to improperly seek a judicial forum by arguing to the arbitrator that his arbitration submission was untimely and arguing to the courts that his complaint was nevertheless timely (because the statute of limitations had run between these two filings). Yet this argument depends on how an arbitrator will interpret the arbitration exclusion for "[c]laims older than the statute of limitations applicable to such claims[.]" Agreement, R.5-2, PageID#88. When did the statute of limitations stop running under ***381** this provision? Was it when Anderson initially filed this suit? Or when

he submitted his claim to arbitration? If Anderson continues to press the latter argument, the arbitrator may well decide that his claims fell outside the governing statute of limitations. Perhaps, too, such a finding might bind courts and foreclose him from seeking relief in *any* forum. In the end, though, the parties agreed to contract language that left this coverage question for an arbitrator, not a court, to decide. We thus can leave this concern for another day.

We affirm in part and reverse in part. We affirm the court's decision to order arbitration but remand the case with instructions to enter a stay pending that arbitration.

All Citations

860 Fed.Appx. 374

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EXHIBIT 11: MICHAEL GENNARELLI V. CHARTER COMMUNICATIONS, INC., ET AL., 2:19-CV-09635-JLS-ADS, 2021 WL 4826612 (U.S. DIST. CT., C.D. CALIFORNIA), APRIL 22, 2021

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Michael GENNARELLI
v.
CHARTER COMMUNICATIONS, INC., et al.

Case No. 2:19-cv-09635-JLS-ADS
|
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PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION, STAYING ACTION, AND DISMISSING CLASS CLAIMS WITHOUT PREJUDICE (Doc. 31)

JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE

***1** Before the Court is a Motion to Compel Arbitration and Dismiss or Stay Proceedings filed by Charter Communications Inc. ("Charter"). (Mot., Doc. 31; Mem. Doc. 31-1.) Plaintiff Michael Gennarelli ("Gennarelli") opposed, and Charter replied. (Opp., Doc. 32; Reply, Doc. 34.) Having taken the matter under submission, and for the reasons below, the Court GRANTS the Motion.

I. BACKGROUND

A. General Background

This is a putative class action arising out of Gennarelli's former employment with Charter as a Direct Sales Representative ("DSR"). (Compl., Doc. 1-2, ¶ 8.)

Charter is a telecommunications company that offers telephone, internet, and cable services to consumers nationwide. (Fries Decl., Doc. 31-3 ¶ 4.) In October 2016, Gennarelli began working for Charter as a DSR. (Compl. ¶ 7.) Gennarelli's original employment contract contained no arbitration provision. (*See* Gennarelli Decl., Doc. 32-1 ¶ 3; *see also* Ex. A. to Gennarelli Decl.) On February 28, 2017, as Gennarelli was driving in the course of his duties for Charter, his vehicle was struck by another driver. (*Id.* ¶ 4.) Thereafter, Gennarelli went on leave and never again resumed his duties with Charter. (*Id.*) Gennarelli ultimately resigned from the position in August 2019.

In September 2019, Gennarelli filed suit in Orange County Superior Court, asserting claims for (1) Failure to Reimburse Necessary Business Expenses, (2) Failure to Provide Accurate Itemized Wage Statements, (3) Failure to pay Wages Due at Separation of Employment, and (4) Unfair Business Practices. (*See* Compl.) On November 7, 2019, Charter removed the action to this Court.

B. The Agreement

In June 2019, while on leave, but before resigning from his position, Gennarelli applied for four other positions within Charter – Special Pricing Analyst, National Account Manager, Associate Project Manager, and Field Marketing Specialist. (Fries Decl. ¶ 17.) The online interface that Gennarelli used to apply for these Charter positions contained a Mutual Arbitration Agreement ("MAA")—the agreement at issue in Charter's current motion. (MAA, Ex. B to Fries Decl., Doc. 31-3.)

During the application process, Gennarelli was presented with Charter's Solution Channel webpage, which contained the following statement:

> Charter requires that all legal disputes involving employment with Charter or application for employment with Charter, be resolved through binding arbitration. Charter believes that arbitration is a fair and efficient way to resolve these disputes. Any person who submits an application for consideration by Charter agrees to be bound by the terms of Charter's Mutual Arbitration Agreement, where the person and Charter mutually agree to submit any covered claim, dispute, or controversy to arbitration. By submitting an application for consideration you are agreeing to be bound by the Agreement.
>
> (Fries Decl. ¶¶ 8–9; Ex. A.)

Below this statement, the application page linked to the MAA and the Solutions Channel Program Guidelines. (Fries Decl. ¶ 10, Ex. A.) Applicants could click on the links to open, review, save, or print the documents. (*Id.* ¶ 11, Ex. A.) Applicants were also informed, "[i]f you do not agree you will be removing yourself from the application process, and Charter will not consider your application for employment." (*Id.* ¶ 13, Ex. A.) In order to proceed with the application, Gennarelli had to select one of two radio buttons, "I agree" or "I do not agree," and then click either "Save and continue" or "Save and finish later." (*Id.* ¶¶ 11–14, Ex. A.) Gennarelli would have been unable to finish and submit the applications without selecting one of the buttons. (*Id.* ¶ 16.) Gennarelli had to select the "I agree" radio button each time he submitted applications for open positions in June 2019, indicating that he agreed to be bound by the terms of the MAA. (*Id.* ¶¶ 12, 17, Ex. E-1 through E-4.)

***2** The MAA starts with a notice, instructing the applicant: "PLEASE READ THE FOLLOWING MUTUAL ABITRATION AGREEMENT ("AGREEMENT") CAREFULLY." (MAA at 1.) The MAA also states: "You and Charter mutually agree that, as a condition of Charter considering your application for employment and/or your employment with Charter, any dispute arising out of or relating to your pre-employment application and/or employment with Charter or the termination of that relationship ... must be resolved through binding arbitration by a private and neutral arbitrator, to be jointly chosen by you and Charter." (MAA at Section A.) Under the MAA, Charter and the applicant mutually agreed to submit certain "covered claims" to arbitration. As relevant here, Section B of the MAA defines "covered claims" as:

> 1. all disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which you or Charter have an alleged cause of action *related to pre-employment, employment, employment termination or post-employment-related claims*, ... including without limitation ... wage and hour-based claims including claims for unpaid wages, commissions, or other compensation o penalties ..., *whether arising before, during or after the termination of your employment* ... ;
>
> ...
>
> 3. *all disputes related to the arbitrability of any claim or controversy.* (MAA at Section B) (emphasis added).

The MAA also contains a class action waiver, which provides that "[applicant] and Charter agree that both parties may only bring claims against the other party in their individual capacity and not as a plaintiff or class member in any purported class or representative proceeding, whether those claims are covered claims under Section B[.]" (MAA at Section D.) This Section also prohibits the arbitrator from consolidating claims or ordering a class or collective arbitration. (*Id.*)

Charter now moves to compel arbitration and stay or dismiss the action based on the MAA.

II. LEGAL STANDARD

Congress enacted the Federal Arbitration Act ("FAA") to "establish[ ] a federal policy in favor of arbitration." *Circuit City Stores, Inc. v. Adams* ("*Circuit City I*"), 279 F.3d 889, 892 (9th Cir. 2002). The FAA applies to written provisions to settle by arbitration a controversy arising out of transactions "involving commerce." 9 U.S.C. § 2. The Supreme Court has concluded that employment contracts are agreements evidencing a transaction "involving commerce" within the FAA's meaning. *See* *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1154 (9th Cir. 2008) (citing *Circuit City Stores, Inc. v. Adams* ("*Circuit City II*"), 532 U.S. 105, 113 (2001)). The contract at issue here—the MAA—concerns an employment relationship and the FAA therefore governs.

A party seeking to compel arbitration under the FAA has the burden of showing "(1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue." *Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015) (internal quotation marks omitted). As to validity, Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds that exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added). Thus, when deciding whether a certain contract governed by the FAA is enforceable, courts apply ordinary state contract law principles. *See* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "[A]lthough 'courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions,' general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements." *Circuit City I*, 279 F.3d at 892 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

***3** "[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent–A–Ctr., West, Inc. v. Jackson*, 561 U.S. at 63, 68–69 (2010). Although ambiguities about the *scope* of an agreement to arbitrate must be resolved in favor of arbitration, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 514 U.S. at 944 (internal citations omitted); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (a gateway dispute about whether the parties are bound by a given arbitration clause raises a question of arbitrability that is presumptively for the court to decide).

III. DISCUSSION

Charter now moves to compel arbitration, arguing that the MAA is a validly formed agreement between the parties and that it clearly and unmistakably delegates arbitrability issues to the arbitrator. (Mem. at 7–13.) In opposition, Gennarelli argues: (1) the MAA is ambiguous about whether it applies to claims that predate its signing, and contractual ambiguities should be resolved in Gennarelli's favor; (2) the MAA is not supported by adequate consideration; (3) Charter has waived its right to compel arbitration; and (4) the MAA is unconscionable under California law and therefore unenforceable. (Opp. at 2–8.)

Charter does not dispute that this Court must determine, as a preliminary matter, whether an agreement to arbitrate exists, and therefore challenges the merits of Gennarelli's contention that the MAA is unsupported by consideration. (Mem. at 7–8.) However, Charter argues that the Court may not reach Gennarelli's other arguments because the MAA delegates them to the arbitrator. (Mem. at 10.) The Court agrees.

A. Existence of an Agreement

Here, the parties dispute whether the MAA is supported by consideration. Generally, an arbitration provision is severable, and a party's challenge to the contract as a whole does not prevent a court from enforcing a specific agreement to arbitrate. *See* *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010) (noting that Section 2 of the FAA makes a written provision to settle by arbitration a controversy "valid, irrevocable, and enforceable" without mention of the validity of the contract in which it is contained). However, the Ninth Circuit has distinguished between those challenges to the entire contract that "seek[ ] to *avoid or rescind* a contract" and those that "go[ ] to the very existence of a contract that a party claims never to have agreed to." *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (emphasis in original). That is, if the agreement to arbitrate is broad enough, "an arbitrator may properly decide whether a contract is 'voidable' because the parties have agreed to arbitrate [that] dispute." *Id.* However, "a party who contests *the making of a contract* containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate." *Id.* (citations and quotation marks omitted) (emphasis added). "A contrary rule would lead to untenable results. Party A could forge party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature." *Id.* Here, the parties' dispute about consideration goes to the MAA's existence, and the Court therefore addresses it as a preliminary matter. [1]

***4** Under California law, the existence of a written contract is presumptive evidence of consideration. Cal. Civ. Code § 1614. [2] Moreover, a party's agreement to forbear a legal right in reliance on a promise constitutes adequate consideration. *See* *Anglo California Nat. Bank of San Francisco v. Far WestLumber Co.*, 152 Cal. App. 2d 284, 286–8 (1957). And, "[w]here an agreement to arbitrate exists, the parties' mutual promises to forego a judicial determination and to arbitrate their disputes provide consideration for each other." *See* *Strotz v. Dean Witter Reynolds, Inc.*, 223 Cal. App. 3d 208, 216 (1990) (overruled on other grounds).

The Court concludes that the MAA is adequately supported by consideration under any of the enumerated theories. The MAA is a written agreement between the parties and therefore presumptive evidence of consideration. *See* Cal. Civ. Code § 1614. Moreover, Section B provides in relevant part: "You and Charter mutually agree that, as a condition of Charter considering your application for employment and/or your employment with Charter, any dispute arising out of or relating to your pre-employment application and/or employment with Charter ... must be resolved through binding arbitration." The quoted language is a promise by Charter to review Gennarelli's employment application in exchange for Gennarelli's promise to forbear judicial determination of any disputes arising out of his pre-employment application *and/or* his employment with Charter. Moreover, under the MAA, the parties' promise to arbitrate is mutual and therefore constitutes adequate consideration on its own.

Gennarelli argues, in conclusory fashion, that Charter's promise to review his employment application cannot provide adequate consideration for a promise by Gennarelli to arbitrate claims arising *prior* to signing the MAA. (Opp. at 4 (emphasis in original).) Why not? Gennarelli provides no analysis or legal authority in support of this assertion. And Gennarelli's invitation to the Court to evaluate the adequacy of consideration runs counter to well-settled contract principles. That is, if the requirement of consideration is met, there is no additional requirement of equivalence in values exchanged. *See* Restatement (Second) of Contracts § 79 (1981). And, in any event, "courts do not inquire into the adequacy of consideration." *See id.*

In sum, the Court finds that the essential elements of contract formation, including consideration, are satisfied here. [3]

B. Delegation of Arbitrability

Having determined that a contract was formed, the Court addresses whether the MAA delegates the gateway issues of validity and scope to the arbitrator. Where, as here, the FAA governs, federal common law controls the question of arbitrability unless

the parties have clearly and unmistakably designated that nonfederal arbitrability law applies. *See* *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015). The MAA does not designate non-federal law, and federal common law therefore governs. Under federal common law, evidence that the parties agreed to "arbitrate arbitrability" must be clear and unmistakable. *Id.* at 944. Such clear and unmistakable evidence might include a course of conduct manifesting agreement to arbitrate arbitrability or an express written agreement to do so. *See* *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (internal citations omitted); *see also* *First Options*, 514 U.S. at 943 ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter.").

***5** Charter contends that the MAA clearly and unmistakably delegates arbitrability issues to the arbitrator. (Mem. at 11.) Section B of the MAA provides that "all disputes related to arbitrability of any claim or controversy" must be resolved through binding arbitration by a private and neutral arbitrator. (MAA at Section B (3).) As Charter correctly notes, questions of arbitrability include "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause ... applies to a particular type of controversy." (Mem. at 10 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (discussing and summarizing case law about the types of disputes encompassed within "questions of arbitrability")).) The Court finds that by agreeing to delegate disputes related to arbitrability, the parties clearly and unmistakably indicated that the gateway issues of scope and validity must be decided by the arbitrator. *Accord* *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 954 (N.D. Cal. 2015)("An arbitration provision that explicitly refers arbitrability questions to an arbitrator is evidence that the parties clearly and unmistakably have referred the arbitrability question to the arbitrator.").

"[E]ven where there is clear and unmistakable evidence of an intent to delegate questions of arbitrability to the arbitrator, the enforceability of the delegation provision itself is a separate, threshold issue for this Court to determine." *Id.* at 955. (citing *Rent–A–Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010)). Gennarelli does not challenge the enforceability of delegation clause. Nor does he provide legal authority or analysis in support of a narrower reading of the clause. Indeed, Gennarelli fails to address delegation altogether. Instead, Gennarelli argues that (1) the MAA is ambiguous about whether it applies to claims arising prior to its signing; (2) Charter waived its right to compel arbitration; and (3) the MAA is unconscionable. But these arguments go to the scope and validity of the MAA; are not challenges to the enforceability of the delegation clause; and are therefore "arbitrability" disputes that must be decided by the arbitrator.[4] The Court's inquiry ends here.

C. Dismissal and Stay

The FAA provides that when the claims asserted by a party are "referable to arbitration," the court shall "stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. Given the Court's decision to grant Charter's Motion to Compel, Gennarelli cannot continue to serve as class representative of the putative class. *Cf.* *Berman v. Freedom Fin. Network, LLC*, No. 18-CV-01060-YGR, 2019 WL 4194195, at *17 (N.D. Cal. Sept. 4, 2019) ("[T]he Ninth Circuit has suggested, without expressly holding, that a class encompassing members with valid arbitration agreements and others not subject to the arbitration agreements cannot be certified.") (citing *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018)). Accordingly, the Court DISMISSES Gennarelli's class-wide claims. Yet, the Complaint's class claims do not warrant dismissal with prejudice at this stage, because Gennarelli's inadequacy as class representative does not speak to the merits of the class claims

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendant's Motion to Compel Arbitration. The proceedings on those individual claims are STAYED pending arbitration, and Gennarelli's class-wide claims are DISMISSED without prejudice. The

parties are ORDERED to file a joint status report at the earlier of six (6) months from the date of this Order or within ten (10) days of completion of the arbitration proceedings.

All Citations

Slip Copy, 2021 WL 4826612

Footnotes

1 It is undisputed that consideration is an essential element of contract formation. By contrast, Gennarelli's other arguments, addressed below, are not challenges to the contract's existence. Rather, they are arguments about the scope and enforceability of the MAA.

2 The existence of an arbitration agreement is governed by generally applicable state law on contract formation. *See* *First Options*, 514 U.S. at 944; *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (noting that "[s]tate contract law controls whether the parties have agreed to arbitrate" and looking to California contract law in deciding contract formation).

3 Under California law, essential elements of a contract are: (1) capacity to contract; (2) consent; (3) a lawful object; and (4) adequate consideration. Cal. Civ. Code § 1550. Charter has proffered sufficient analysis and evidence in support of the other elements, which are not in dispute.

4 A court may "decline to enforce the delegation clause if the clause itself is unconscionable or otherwise unenforceable under the FAA." *Meadows v. Dickey's Barbecue Restaurants Inc.*, 144 F. Supp. 3d 1069, 1079 (N.D. Cal. 2015) (citing *Brennan*, 796 F.3d at 1132). However, when the parties delegate arbitrability and plaintiff's unconscionability challenge is directed at the arbitration agreement more broadly, and not at the delegation clause in particular, that challenge must be heard by an arbitrator. *See id.* (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010).) Here, Gennarelli contends that the MAA is unconscionable, and therefore unenforceable, but does not challenge the delegation clause itself on unconscionability grounds. Gennarelli's unconscionability argument must be heard by the arbitrator.

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EXHIBIT 12: DANIEL D. YOUNG V. CHARTER COMMUNICATIONS, INC., 6:20-CV-989-WWB-GJK (U.S. DIST. CT., MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION), MARCH 10, 2021

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DANIEL D. YOUNG,

Plaintiff,

v. Case No: 6:20-cv-989-WWB-GJK

CHARTER COMMUNICATIONS, INC.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion to Compel Arbitration and to Dismiss (Doc. 17) and Plaintiff's Response (Doc. 30) thereto. For the reasons set forth below, the Motion will be granted in part.

I. BACKGROUND

Plaintiff was employed by Defendant from February 9, 2018, until his termination on August 7, 2019. (Doc. 1, ¶ 14). Plaintiff alleges that during his employment he was subjected to discrimination and was retaliated against for making claims of discrimination. (*Id.* ¶¶ 14, 16, 27). As a result, Plaintiff filed a thirteen count Complaint asserting state and federal claims for discrimination on the basis of race, national origin, color, religion, and sex and a claim for retaliation. (*Id.* ¶¶ 29–196).

II. LEGAL STANDARD

In general, the Federal Arbitration Act ("**FAA**"), 9 U.S.C. § 1 *et seq*., governs the enforceability of arbitration provisions in contracts involving transactions in interstate commerce. *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005). "A written provision in . . . a contract evidencing a transaction involving commerce to settle by

arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The FAA embodies a 'liberal federal policy favoring arbitration agreements.'" *Hill*, 398 F.3d at 1288 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). However, it is well-settled that "arbitration 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." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quotation omitted).

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. In determining whether to compel arbitration, courts do not weigh the merits of the parties' claims. *AT & T Techs.*, 475 U.S. at 649. Rather, courts must limit their review to three factors: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitrate was waived." *Senti v. Sanger Works Factory, Inc.*, No. 6:06-cv-1903-Orl-22DAB, 2007 WL 1174076, at *2 (M.D. Fla. Apr. 18, 2007).

III. DISCUSSION

Defendant argues that Plaintiff signed a binding Mutual Arbitration Agreement ("**Agreement**," Doc. 17-1 at 16–20), when he applied for employment. (*Id.* at 2–3). The Agreement, which all employees must sign to apply for or begin work with Defendant, provides that:

> You and Charter mutually agree that the following disputes, claims, and controversies (collectively referred to as "covered claims") will be submitted to arbitration in accordance with this Agreement:
>
> 1. all disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which you or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims, whether the claims are denominated as tort, contract, common law, or statutory claims (whether under local, state or federal law), including without limitation claims for: . . . unlawful termination, unlawful failure to hire or failure to promote, . . . unlawful discrimination or harassment (including such claims based upon race, color, national origin, sex, pregnancy, age, religion, sexual orientation, disability, and any other prohibited grounds), claims for unlawful retaliation[.]

(*Id.* at 2, 5, 16). Defendant argues that Plaintiff signed the Agreement on January 9, 2018, through Defendant's application system, called BrassRing. (*Id.* at 2, 3). Thereafter, Plaintiff received an offer letter from Defendant that he accepted through Defendant's confidential and secure Onboarding System. (*Id.* at 3, 8). Defendant argues that Plaintiff again executed the Agreement through the Onboarding System on January 21, 2018. (*Id.* at 4, 10).

"The party asserting the existence of the contract containing the arbitration agreement must prove its existence by a preponderance of the evidence." *De Pombo v. IRINOX N. Am., Inc.*, No. 20-CV-20533, 2020 WL 2526499, at *4 (S.D. Fla. May 18, 2020) (quotation omitted). Under Florida law, the basic elements of a contract are "offer, acceptance, consideration and sufficient specification of essential terms." *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1332 (11th Cir. 2017) (quoting *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004)).

Plaintiff argues either no valid agreement to arbitrate exists because he did not accept the terms of the Agreement or the Agreement is unconscionable. With respect to

the former, Plaintiff argues that he would not have signed the Agreement on January 21, 2018, which fell on a Sunday, because he does not work on Sundays. He further asserts that the systems used by Defendant have known security vulnerabilities, rendering his assent to the Agreement unclear.[1]

In ruling on a motion to compel arbitration, a district court "may conclude as a matter of law that parties did or did not enter into an arbitration agreement only if there is no genuine dispute as to any material fact concerning the formation of such an agreement." *Bazemore v. Jefferson Cap. Sys., LLC*, 827 F.3d 1325, 1333 (11th Cir. 2016) (quotation omitted). "A dispute is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Id.* (quoting *Baloco v. Drummond Co.*, 767 F.3d 1229, 1246 (11th Cir. 2014)). "[C]onclusory allegations without specific supporting facts have no probative value for a party resisting summary judgment." *Id.* (quotation omitted).

Plaintiff has failed to direct this Court to any genuine issue of material fact regarding his acceptance of the Agreement. At the outset, although Plaintiff argues that he did not consent to the Agreement on January 21, 2018, (Doc. 30-3, ¶¶ 5–6), he fails to address Defendant's evidence that he initially consented to the Agreement on January 9, 2018,—which fell on a Tuesday—in connection with his employment application. On

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[1] Plaintiff additionally argues, in passing, that no valid agreement exists because "the entity seeking to enforce the agreement is defunct and did not have the authority to conduct business in the State of Florida at the time that the Plaintiff allegedly accepted the agreement." (Doc. 30 at 5). However, Plaintiff fails to provide any citation to the record or legal authority in support of his claim or to further elaborate on this argument. Accordingly, the Court deems this argument waived. *See Edmundson v. City of Atlanta*, 717 F. App'x 977, 978 (11th Cir. 2018); *Action Nissan, Inc. v. Hyundai Motor Am.*, No. 6:18-cv-380-Orl-78EJK, 2020 WL 7419669, at *7 (M.D. Fla. Nov. 5, 2020).

this basis alone, the Court can and does reject Plaintiff's argument that Defendant has not presented sufficient evidence of acceptance.

Even assuming that Defendant had not established acceptance on January 9, 2018, Plaintiff's conclusory statements that he does not work on Sundays and would typically be in church at that time, fail to raise an issue of fact that is more than merely colorable with respect to his acceptance of the Agreement. (*Id.*). To be clear, Plaintiff does not state or provide evidence that he *was* at church when the document was signed. He simply argues that he typically would have attended church at that time. He also fails to state how his presence at church would have prevented him from accessing and signing the Agreement through his cell phone or other portable electronic device. There is likewise no allegation by Defendant that Plaintiff was at work when the document was signed or needed to be at work to sign the document. Indeed, Plaintiff concedes that he did not begin employment with Defendant until February 9, 2018, several weeks after the Agreement was signed. Instead, the document was e-mailed to Plaintiff and he could have signed it without being present at work, a fact that Plaintiff fails to address. Additionally, Plaintiff alleges in his Complaint that he did not begin requesting Sundays off until "late June of 2019," (Doc. 1, ¶ 21), which would belie any argument that he could not have been at work or working on a Sunday prior to that date. Plaintiff also does not dispute that he completed an application for employment with Defendant and was subsequently employed by Defendant or that he would have been required to sign the Agreement to do so.

Finally, to the extent that Plaintiff attempts to argue that his consent to the Agreement is not authentic because the system used by Defendant has "security

vulnerabilities," Plaintiff's argument amounts to nothing more than a conclusory allegation without any supporting facts. Accordingly, there is no genuine issue of material fact with respect to Plaintiff's acceptance of the Agreement and Plaintiff has not argued that any other element of a binding contract is lacking. Therefore, this Court determines as a matter of law that Plaintiff and Defendant entered into a binding arbitration agreement.

In the alternative, Plaintiff argues that the Agreement is not valid because it is unconscionable. "[W]hen a litigant seeks to avoid enforcement of a requirement to proceed with arbitration, pursuant to the parties' prior agreement, the challenging party must establish that the arbitration agreement is both procedurally and substantively unconscionable." *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1158 (Fla. 2014); *see also Howse v. DirecTV, LLC*, 221 F. Supp. 3d 1339, 1342–43 (M.D. Fla. 2016) (noting that if the court finds that "either component is lacking, the arbitration clause in dispute is not unconscionable"). With respect to procedural unconscionability, Plaintiff offers nothing more than the conclusory statement that he alleges "that the subject Agreement is unconscionable." (Doc. 30 at 6). This not sufficient to meet Plaintiff's burden in establishing procedural unconscionability or to raise a material issue of fact as to this issue. Consequently, Plaintiff's unconscionability argument fails, and this Court need not consider if the Agreement is substantively unconscionable.

Based on the foregoing, the Court finds that the parties have a valid and enforceable agreement to arbitrate and there is no evidence or argument that Defendant has waived its rights thereunder. Additionally, the Agreement delegates the issue of arbitrability to the arbitrator. (Doc. 17-1 at 16). Therefore, this Court will grant the Motion to the extent that it seeks to compel Plaintiff to arbitrate the claims raised in the Complaint.

Next, Defendant requests that, because all of the claims in this litigation are subject to arbitration, the Court dismiss this case rather than stay it pending arbitration. Plaintiff argues that the case should be stayed, not dismissed. Pursuant to the FAA, "the court . . . , upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement[.]" 9 U.S.C. § 3. Accordingly, because the plain language of the FAA mandates that a stay be entered, and because Plaintiff has explicitly requested that the case be stayed and not dismissed, the Court finds that a stay pending the resolution of the arbitration is appropriate in this case.

Finally, Defendant requests that it be awarded its attorneys' fees and costs incurred in compelling Plaintiff to submit his claims to arbitration in accordance with the Agreement. While Plaintiff argues that the fee shifting provision is substantively unconscionable—which the Court has already addressed—and that he cannot pay such fees, he fails to dispute that the plain language of the Agreement mandates such an award. (Doc. 17-1 at 19 ("If any judicial action or proceeding is commenced in order to compel arbitration, and if arbitration is in fact compelled . . . , the party that resisted arbitration will be required to pay to the other party all costs, fees and expenses that they incur in compelling arbitration, including, without limitation, reasonable attorneys' fees.")). However, the arbitrability of such an award is, at best, unclear under the Agreement and Defendant has not directed this Court to any authority, either within the Agreement or otherwise, for the proposition that the issue should be resolved by this Court as opposed to in arbitration. Thus, this Court finds that Defendant's request should be presented, in

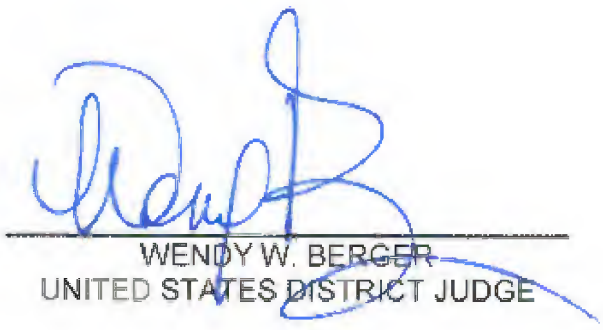
the first instance, to the arbitrator. If it is determined that the request is not arbitrable under the parties' Agreement, Defendant may promptly renew its request in this Court.

IV. CONCLUSION

For the reasons set forth herein, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion to Compel Arbitration and to Dismiss (Doc. 17) is **GRANTED in part** as set forth in this Order and **DENIED** in all other respects.
2. Plaintiff shall submit all claims to binding arbitration in accordance with the Agreement.
3. This case is **STAYED** pending arbitration. On or before **September 7, 2021**, and every one hundred and eighty days thereafter, Defendant shall file a report as to the status of the arbitration. Additionally, Defendant shall notify this Court within fourteen days of the final resolution of the arbitration proceeding.
4. The Clerk is directed to administratively close this case.

DONE AND ORDERED in Orlando, Florida on March 10, 2021.



Copies furnished to:

Counsel of Record

EXHIBIT 13: CHARTER COMMUNICATIONS, INC. V. KARIN GARFIN, 20 CIV. 7049 (KPF), 2021 WL 694549 (U.S. DIST. CT., S.D. NEW YORK), FEBRUARY 23, 2021

2021 WL 694549
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

CHARTER COMMUNICATIONS, INC., Petitioner,
v.
Karin GARFIN, Respondent.

20 Civ. 7049 (KPF)
|
Signed 02/23/2021

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

***1** Petitioner Charter Communications, Inc. ("Charter" or "Petitioner") filed a petition to compel arbitration (the "Petition"), pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4 (the "FAA"), against Respondent Karin Garfin. Prior to the Petition, Respondent had filed a related action in state court (the "Underlying Action"), against Charter and Charter employees Kevin Dugan, Audrey Gruber, and Joi De Leon (the "Individual Defendants"). Charter removed the Underlying Action to this Court, where it was stayed pending the resolution of Charter's Petition. For the reasons stated below, Charter's Petition is granted.

BACKGROUND [1]

A. Factual Background

1. The Parties

Petitioner is a telecommunications services company that is incorporated in Delaware with its principal executive offices in Stamford, Connecticut. (Petition ¶ 20). Respondent is a resident of New York, New York. (*Id.* at ¶ 21). For approximately four months in 2017, Respondent was employed by Petitioner in New York, New York, as a senior producer on the NY1 television show "On Stage." (*Id.* at ¶ 25). She was hired in or around June 2017, and her employment was terminated at some point between late September 2017 and November 2017. (*Id.;* Garfin Decl. ¶¶ 2-3). [2] Petitioner submits that Plaintiff was terminated for unsatisfactory performance (Petition ¶ 25), while Respondent has alleged that she lost her job due to "her refusal to acquiesce" either to "her boss's sexual advances" or to the Individual Defendants' "discriminatory behavior toward other female employees at [Charter]" (Rodriguez Decl., Ex. M at ¶ 4).

2. The Arbitration Agreements

***2** Petitioner asserts that Respondent received two arbitration agreements during her employment at NY1: the first as a condition of her hiring, and the second towards the end of her term as an employee. (Petition ¶¶ 3-4). The Court will discuss each in turn.

a. The JAMS Agreement

Respondent's offer of employment with Petitioner was contingent upon her assent to the JAMS Arbitration Agreement (the "JAMS Agreement"). (Petition ¶ 3; JAMS Agreement 1). Respondent electronically acknowledged and accepted the JAMS Agreement on June 13, 2017, as part of Charter's web-based "onboarding" process for her position. (Cassidy Decl. ¶¶ 8-17). The JAMS Agreement provided that: "any and all claims, disputes, and/or controversies between [Respondent] and Charter arising from or related to [Respondent's] employment with Charter shall be submitted exclusively to and determined exclusively by binding arbitration before a single Judicial Arbitration and Mediations Services, Inc. ('JAMS') arbitrator under the [FAA]." (JAMS Agreement 1). The agreement provided that all arbitration proceedings would be conducted in accordance with the JAMS Employment Arbitration Rules & Procedures and JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness. (*Id.*).

b. The Solution Channel Announcement and Agreement

On October 6, 2017, Charter's Vice President of Human Resources distributed an email to certain employees announcing "Solution Channel," its internal employment-based legal dispute resolution and arbitration program (the "Solution Channel Announcement"). (Fries Decl. ¶¶ 5-6). The email was sent to the work email addresses of all of Charter's non-union employees below the level of Executive Vice President. (*Id.* at ¶ 6). Respondent was among those included in this distribution list. (*Id.* at ¶ 11; *see also id.*, Ex. C (October 6, 2017 email sent to Respondent)). However, Respondent states that she was unable to access her work email account as of September 28, 2017, and did not receive any messages sent to that email address after September 2017. (Garfin Decl. ¶¶ 4-5). In support, Respondent has submitted a cell phone screenshot, dated September 28, 2017, that appears to reflect a failed attempt to access the "On Stage NY1" account. (*Id.*, App'x). Specifically, the screenshot indicates that an "incorrect" password was entered, and includes a prompt for password reentry. (*Id.*).

The Solution Channel Announcement explained that the new legal dispute and arbitration program would "resolve covered employment-related legal disputes through binding arbitration[,]" and that "by participating in [the program]" both the employees and Charter "waive[d] the right to initiate or participate in court litigation ... involving a covered claim and/or the right to a jury trial involving any such claim." (Solution Channel Announcement 1). The announcement directed the email recipients to "more detailed information" about the program on Charter's internal systems. (*Id.*). And the announcement explained that unless the recipients "opt[ed] out" of participating in the program within "the next 30 days," they would be "enrolled" in the program. (*Id.*). Recipients were further directed to instructions for opting out of the program on Charter's internal systems. (*Id.*).

***3** Under the Solution Channel program, covered employees who did not affirmatively "opt out" agreed to the terms of a mutual arbitration agreement (the "Solution Channel Agreement"). The agreement covered:

> [A]ll disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which [the employee] or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims ..., including without limitation claims for: ... unlawful discrimination or harassment (including such claims based upon race, color, national origin, sex, pregnancy, age, religion, sexual orientation, disability, and any other prohibited grounds)[.]

(Solution Channel Agreement ¶ B.1). Unlike the JAMS Agreement, which covered only claims against Charter itself, the Solution Channel Agreement provided that employment disputes were covered "whether made against Charter, or any of its ... individual ... employees (in an official or personal capacity ...)." (*Id.* at ¶ B.2; *see also* JAMS Agreement 1). The agreement also stated that "all disputes related to the arbitrability of any claim or controversy" would be submitted to arbitration. (Solution Channel Agreement ¶ B.3).

The Solution Channel Agreement provided that arbitration would be held before an arbitrator who was a current member of the American Arbitration Association (the "AAA"). (Solution Channel Agreement ¶ H). The arbitration would be conducted pursuant to "Solution Channel Program Guidelines." (*Id.; see also* Fries Decl., Ex. B). The agreement itself provided: "This Agreement will be governed by the [FAA]." (Solution Channel Agreement ¶ R).

Under the terms of the Solution Channel Agreement, employees agreed that Charter had offered "sufficient consideration" for the agreement, including "employment with Charter, and/or Charter's mutual agreement to arbitrate disputes." (Solution Channel Agreement ¶ S). Lastly for these purposes, the agreement stated that it "survive[d]" the termination of employment with Charter. (*Id.* at ¶ T).

B. Procedural Background

1. The 2019 State Court Action

On March 19, 2019, Respondent commenced an action in the Supreme Court of the State of New York, County of New York, against Petitioner and the Individual Defendants. (Petition ¶ 5). Respondent alleged that Defendants had engaged in sexual harassment and gender discrimination, created a hostile work environment, and retaliated against her in violation of the New York State Human Rights Law (the "NYSHRL") and the New York City Human Rights Law (the "NYCHRL"). (Rodriguez Decl., Ex. A at 1). Petitioner's counsel informed Respondent's counsel that Respondent was bound to arbitrate her claims pursuant to the Solution Channel Agreement, and Respondent proceeded to voluntarily discontinue the case in May 2019. (Petition ¶ 6; Goddard Decl. ¶¶ 3-4). Later that month, Respondent's counsel informed Petitioner's counsel that Respondent had not received the October 2017 Solution Channel Agreement, as Petitioner had "cut off" her email access on September 25, 2017. (Goddard Decl., Ex. 1 at 4). Petitioner's counsel responded that even if Respondent had not received the Solution Channel Agreement, she remained bound to arbitrate by the initial JAMS Agreement. (*Id.* at 2).

2. The Arbitration Filings

***4** The following year, on July 6, 2020, Respondent's counsel emailed Petitioner's counsel a Demand for Arbitration and a Statement of Claim (the "Demand"), and stated that the submissions would be filed with JAMS. (Petition ¶ 7). Respondent proceeded to submit the Demand to JAMS, but enclosed with her submission the Solution Channel Agreement, rather than the JAMS Agreement. (Duaban Decl. ¶ 4). As such, JAMS informed Respondent that they could not hear the matter, as the operative agreement appeared to require an AAA arbitration. (*Id.* at ¶ 5).

Respondent's counsel has since attested that submitting the Solution Channel Agreement to JAMS was one of several "mistakes" counsel made that were occasioned by various stresses during the ongoing COVID-19 pandemic. (*See* Duaban Decl. ¶¶ 3-12; Goddard Decl. ¶¶ 11-17). Specifically, Respondent's counsel, Megan Goddard, has stated that she was responsible for this matter until July 2020, when an associate at her firm, Saranicole Duaban, assisted with the filing of the initial JAMS arbitration while Ms. Goddard was dealing with several medical issues. (Goddard Decl. ¶¶ 11-12). As a result of this transition, Respondent's counsel admits to having made several "mistakes" in the course of their submissions to arbitration. (Duaban Decl. ¶¶ 3-12; Goddard Decl. ¶¶ 11-17).

On July 7, 2020, Ms. Duaban contacted Petitioner's counsel to explain that the filing with JAMS was "inadvertent," and that Respondent would be filing the Demand with the AAA the same day. (Petition ¶ 8; Duaban Decl. ¶ 6). Counsel discussed the matter on a telephone call the same day, and Petitioner's counsel informed Ms. Duaban that pursuant to the Solution Channel Agreement that Ms. Duaban had enclosed with her submission to JAMS, Respondent was required to first submit her claim through Petitioner's internal Solution Channel dispute resolution program, rather than filing directly with the AAA. (Petition ¶ 9; Duaban Decl. ¶ 7). Ms. Duaban proceeded to submit Respondent's Statement of Clam through the Solution Channel program later that day. (Duaban Decl. ¶ 10). Ms. Duaban has attested that at the time, she was unaware that her colleague, Ms. Goddard, had taken the position with Petitioner's counsel that Respondent was not bound by the Solution Channel Agreement. (*Id.* at ¶¶ 8-9, 11-12).

Following Petitioner's review of Respondent's claim through its internal Solution Channel program (Petition ¶ 11), on July 31, 2020, Petitioner contacted Respondent to state that it "denie[d] the allegations of any wrongdoing" and indicated that Respondent should determine whether she "wish[ed] to seek further review of [her] claim" (Rodriguez Decl., Ex. F). Ms. Duaban responded: "We'd like to request arbitration of our client Karin Garfin's claims." (*Id.*). [3]

***5** On August 4, 2020, Petitioner submitted Respondent's Demand to the AAA, initiating arbitration proceedings. (Petition ¶ 12). Ms. Duaban acknowledged receipt of the Demand sent to the AAA. (*Id.*; *see also* Rodriguez Decl., Ex. H). On August 13, 2020, the AAA contacted counsel for Petitioner and Respondent confirming receipt of the Demand, and providing case initiation materials, as well as deadlines for next steps. (Petition ¶ 13). The same day, the AAA sent Petitioner an invoice for its case management fee, which Petitioner paid. (*Id.*).

Ms. Duaban submits that only after the initiation of the AAA proceedings did she learn that her colleague, Ms. Goddard, had taken the position with Petitioner's counsel that Respondent was not bound by the Solution Channel Agreement. (Duaban Decl. ¶¶ 11-12). Accordingly, on August 26, 2020, Ms. Duaban contacted the AAA and Petitioner, informing them that Respondent would not be participating in the arbitration "because there [was] no agreement between the parties to arbitrate at AAA, and even if there were, any such agreement would be null and void." (Rodriguez Decl., Ex. K at 1). Ms. Duaban stated that Respondent had not received, nor been "given the opportunity to opt-out of," the Solution Channel Agreement because it was sent to her work email account at a time when she no longer had access to that account. (*Id.*). Further, Ms. Duaban argued that the agreement was "null and void" under amended New York state regulations as interpreted in a recent decision by the Supreme Court of the State of New York, County of New York. (*Id.* (citing N.Y. C.P.L.R. § 7515(b)(iii); *Newton* v. *LMVH Moët Hennessy Louis Vuitton Inc.*, Index No. 154178/2019, 2020 WL 3961988 (N.Y. Sup. Ct. July 10, 2020))).

3. The Underlying Action and the Instant Case

On August 26, 2020, the same day that Respondent withdrew from the AAA arbitration proceedings, Respondent commenced a second action in the Supreme Court of the State of New York, County of New York, against Petitioner and the Individual Defendants (the "Underlying Action"). (Petition ¶ 16). Respondent's Complaint closely tracks her initial Demand. (*Compare* Rodriguez Decl., Ex. C, *with id.*, Ex. M). Respondent alleges that Petitioner and the Individual Defendants violated the NYSHRL and the NYCHRL by subjecting Respondent to a hostile work environment, discrimination on the basis of her sex and gender, and retaliation following her reports of and objection to the discrimination directed at her. (*Id.*, Ex. M at ¶¶ 240-57).

On August 31, 2020, Petitioner removed the Underlying Action to this Court. (20 Civ. 7050 Dkt. #1). The same day, Petitioner commenced the instant matter by filing the Petition and supporting memorandum of law and declarations. (Dkt. #1-5). The Court subsequently accepted the cases as related. At a conference held on September 11, 2020, the Court set a briefing schedule on the Petition, and stayed the Underlying Action pending the resolution of the Petition. (*See* Dkt. #19 (transcript)). Respondent subsequently requested, and was granted, an extension of time to submit her response to the Petition. (Dkt. #21, 23). Respondent submitted briefing and declarations in opposition to the Petition on November 13, 2020 (Dkt. #24-27), and Petitioner submitted its reply briefing and a supporting declaration on December 11, 2020 (Dkt. #28-29). The Petition is now ripe for consideration.

DISCUSSION

A. Applicable Law

1. Petitions to Compel Arbitration Under the FAA

The FAA "reflects a liberal federal policy favoring arbitration agreements and places arbitration agreements on the same footing as other contracts." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 73 (2d Cir. 2017) (internal quotation marks and citations omitted). Section 2 of the FAA provides that "[a] written provision in ... a contract ... to settle by arbitration a controversy thereafter

arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 4 of the FAA allows a party to such an agreement to petition a district court for an order compelling arbitration where a counterparty "fail[s], neglect[s], or refus[es] ... to arbitrate" under the terms of an arbitration agreement. *Id.* § 4. A court ruling on a petition to compel arbitration must decide two issues: (i) whether the parties agreed to arbitrate, and, if so, (ii) whether the scope of that agreement encompasses the claims at issue. *See* *Holick v. Cellular Sales of N.Y., LLC*, 802 F.3d 391, 394 (2d Cir. 2015).

***6** A court resolving a motion to compel arbitration applies a standard similar to that for summary judgment. *Meyer*, 868 F.3d at 74 (quoting *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003)). In doing so, "the court considers all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, and draws all reasonable inferences in favor of the non-moving party." *Id.* (internal quotation marks, alterations, and citations omitted). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). A party opposing arbitration may not satisfy this burden through "general denials of the facts on which the right to arbitration depends"; in other words, "[i]f the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried." *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995).

In accordance with the "strong federal policy favoring arbitration as an alternative means of dispute resolution," a court must resolve any doubts concerning the scope of arbitrable issues "in favor of arbitrability." *Daly v. Citigroup Inc.*, 939 F.3d 415, 421 (2d Cir. 2019) (quoting *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 61 (2d Cir. 1996)), *cert. denied*, 140 S. Ct. 1117 (2020). In so doing, courts "will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* (internal quotation marks and citation omitted).

2. Choice of Law

Whether parties agreed to arbitrate is determined under state law. *See* *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002) ("Because an agreement to arbitrate is a creature of contract ... the ultimate question of whether the parties agreed to arbitrate is determined by state law."). As jurisdiction in this matter is premised on diversity of citizenship (*see* Petition ¶ 22), the Court applies New York choice-of-law rules. *See* *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001) ("A federal trial court sitting in diversity jurisdiction must apply the law of the forum state to determine the choice-of-law."). "Under New York choice of law rules, the first inquiry in a case presenting a potential choice of law issue is whether there is an actual conflict of laws on the issues presented." *Fed. Ins. Co. v. Am. Home Assurance Co.*, 639 F.3d 557, 566 (2d Cir. 2011) (citing *Fieger*, 251 F.3d at 393). "If not, no choice of law analysis is necessary." *Id.*

Petitioner and Respondent have presented a narrow question about the extent to which the FAA preempts recently-amended New York law on mandatory arbitration agreements, which question the Court will address in due course. (*See* Pet. Br. 10 n.3; Resp. Opp. 10). In support of its position on this issue, Petitioner argues that the arbitration dispute is governed by the FAA as it involves "interstate commerce." (Pet. Br. 10 n.3). The FAA "applies in federal court to diversity suits which relate to contracts involving interstate or international commerce." *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 249 (2d Cir. 1991) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)). Petitioner argues that the FAA applies here because arbitration agreements covering employment relationships necessarily involve interstate commerce (Pet. Br. 10 n.3 (citing *Zendon v. Grandison Mgmt., Inc.*, No. 18 Civ. 4545 (ARR) (JO), 2018 WL 6427636, at *1 n.1 (E.D.N.Y. Dec. 7, 2018))), and because certain of Respondent's allegations implicate conduct that occurred across state

lines — specifically between New York and Connecticut (*id.*; *see also* Rodriguez Decl., Ex. M at ¶¶ 90-98). Petitioner also notes that it is not a citizen of New York. (Pet. Br. 10 n.3).

***7** To the extent Petitioner's position is understood as an argument that federal common law provides the relevant substantive law, the Court understands that "the balance of more recent Second Circuit case law" suggests that courts "should apply state-law [rather than the FAA] to the question of whether a party is bound by a purported agreement to arbitrate." *Dynamic Int'l Airways, LLC* v. *Air India Ltd.*, No. 15 Civ. 7054 (PKC), 2016 WL 3748477, at *4 (S.D.N.Y. July 8, 2016) (collecting cases); *see also* *Progressive Cas. Ins. Co.* v. *C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993) (observing that while the FAA "preempts state law which treats arbitration agreements differently from any other contracts, it also 'preserves general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate' " (quoting *Cook Chocolate Co.* v. *Salomon, Inc.*, 684 F. Supp. 1177, 1182 (S.D.N.Y. 1988))). The Court will thus apply state law to the contract formation issues presented in this case, though it will "bear[ ] in mind the presumptions provided by the FAA." *Dynamic Int'l Airways, LLC*, 2016 WL 37488477, at *4 (applying state law to formation of contract issues where jurisdiction was premised on diversity). [4]

Neither party suggests that the Court should apply the law of a state other than New York. *See Fed. Ins. Co.*, 639 F.3d at 566 ("[W]here the parties agree that New York law controls, this is sufficient to establish choice of law."). New York courts apply an "interest analysis" to choice of law issues involving contractual disputes, whereby, "the law of the jurisdiction having the greatest interest in the litigation will be applied." *Progressive Cas. Ins. Co.*, 991 F.2d at 46 n.6. While nine of the paragraphs in Respondent's 60-page Complaint reference conduct that took place either in, or en route to or from, Connecticut (*see* Rodriguez Decl., Ex. M at ¶¶ 90-98), the Court observes that: (i) Respondent resides in New York (*id.* at ¶ 6); and (ii) the vast majority of Respondent's underlying allegations involve acts or omissions that took place in New York (*see generally id.*). Thus, New York is the jurisdiction with the greatest interest in the matter, and the Court will apply New York law to the contract formation issues in this case. *Cf.* *Progressive Cas. Ins. Co.*, 991 F.2d at 46 n.6 (applying New York law where the parties had different domiciles but the relevant policy was signed in New York and required that the underlying claim be presented in New York); *Thompson* v. *Body Sculpt Int'l, LLC*, No. 18 Civ. 1001 (ARR) (GRB), 2018 WL 3235545 at *3 n.3 (E.D.N.Y. July 2, 2018) (applying New York law where the majority of plaintiffs' work took place in New York, and one plaintiff resided in New York, though the remaining parties resided in other states).

Under New York law, the party seeking arbitration must prove by a preponderance of the evidence that a valid arbitration agreement exists. *See* *Progressive Cas. Ins. Co.*, 991 F.2d at 46. A valid arbitration agreement requires "a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement[.]" *In re Express Indus. & Terminal Corp.* v. *N.Y. State Dep't of Transp.*, 93 N.Y.2d 584, 589 (1999). By signing a written instrument, a party creates presumptive evidence of its assent to enter into a binding agreement. *See, e.g.*, *Gold* v. *Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004); *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 11 (1988) (holding that a party's signature generally creates a presumption that the party assented to the terms of the agreement).

B. Analysis

1. The Parties Agreed to Arbitrate

***8** Both parties appear to be in agreement that Respondent may be bound to arbitrate her claims against Petitioner under the JAMS Agreement (Pet. Br. 9-10; Resp. Opp. 13), though Respondent submits that she should be permitted to proceed with her Underlying Action against the Individual Defendants (Resp. Opp. 13). Petitioner disagrees, and argues in the first instance that Respondent should be compelled to arbitrate all of her claims before an AAA arbitrator pursuant to the Solution Channel

Agreement. (Pet. Br. 7-9). In this regard, Petitioner asserts that Respondent received and assented to the agreement, but that even had she not, she demonstrated her agreement through her conduct. (*Id.*). Respondent raises a number of arguments in response, including that she did not agree to the Solution Channel Agreement (Resp. Opp. 4-6), and that the Solution Channel Agreement is invalid (*id.* at 6-8).

The parties agree that Respondent is bound to arbitration; at its core, their disagreement is over the forum for such arbitration and the scope of the claims subject to arbitration. And because the parties do not dispute the validity and scope of the JAMS Agreement as it pertains to Respondent's claims against Petitioner, the Court focuses in this Opinion principally on the Solution Channel Agreement. The Court concludes that Respondent agreed to arbitrate against Petitioner pursuant to the Solution Channel Agreement. However, the Court is unable to resolve the parties' core dispute — arbitration pursuant to the JAMS Agreement or arbitration pursuant to the Solution Channel Agreement — and an arbitrator will thus need to determine the forum and scope of the claims subject to arbitration.

a. Respondent Agreed to Arbitration Under the Solution Channel Agreement

Respondent submits that she did not receive the Solution Channel Agreement, as she was effectively terminated from NY1 at the time of its email distribution and was unable to access her work email. (Resp. Opp. 4; *see also* Garfin Decl. ¶¶ 4-5). In support, Respondent put forth a mobile phone screenshot reflecting a prompt to re-enter a password to access an account labeled "On Stage NY1." (Garfin Decl., App'x). While Petitioner questions the significance of the screenshot submitted by Respondent (*see* Pet. Reply 5 n.3 (referencing Garfin Decl., App'x)), it argues that Respondent nonetheless demonstrated her assent to the Solution Channel Agreement through the actions of her counsel, which actions included: (i) informing Petitioner that she intended to file her Demand with the AAA; (ii) participating in the Solution Channel internal review process; and (iii) following the Solution Channel internal review, confirming that she wished to proceed with arbitration. (*Id.* at 3-4; Pet. Br. 7-9).

"[B]racketing the question of whether [Respondent] *expressly* bound [herself] to the [Solution Channel Agreement] ... by affirmatively agreeing to and accepting the Agreement's terms and conditions," the Court finds that Respondent has "at least *impliedly* agreed to arbitrate" her claims against Petitioner and has "waived [her] rights to object to proceeding with the [a]rbitration." *Clarke* v. *Upwork Glob., Inc.*, No. 17 Civ. 560 (AJN), 2017 WL 1957489, at *6 (S.D.N.Y. May 10, 2017) (internal quotation marks and alterations omitted). Under New York and federal law, "[a]lthough a party is bound by an arbitral award only where it has agreed to arbitrate, an agreement may be implied from the party's conduct." *Gvozdenovic* v. *United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991); *see also In re Nat'l Cash Register Co. (Wilson)*, 8 N.Y.2d 377, 382 (1960); *cf. Kamakazi Music Corp.* v. *Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982) ("[I]t is hornbook law that parties by their conduct may agree to send issues outside an arbitration clause to arbitration."). Thus, even where a party is "not contractually bound" to participate in arbitration, it "may waive its right to object to going forward with an arbitration" "through its conduct." *Sands Bros. & Co.* v. *Zipper*, No. 03 Civ. 7731 (VM), 2003 WL 22439789, at *1 (S.D.N.Y. Oct. 27, 2003). Specifically, a party may be found to have waived its right to object to arbitration if it participates in arbitration proceedings "without making a timely objection to the submission of the dispute to arbitration[.]" *Cpals on Ice Lingerie* v. *Bodylines Inc.*, 320 F.3d 362, 368 (2d Cir. 2003); *see also In re McNulty*, 575 N.Y.S.2d 351, 352 (2d Dep't 1991) ("By participating in the arbitration proceedings prior to moving for a stay, the petitioner has waived his objections thereto[.]" (internal citations omitted)); *Mufale* v. *Romeo*, 504 N.Y.S.2d 933, 934 (4th Dep't 1986) (finding that participation in the arbitration process served as waiver of right to apply for stay of arbitration).

***9** In support of its argument that Respondent has waived her right to object to arbitration proceedings, Petitioner cites cases in which arbitration proceedings had progressed further, and involved more extensive participation by the parties, than the AAA arbitration initiated here. (Pet. Br. 8). *See* *Gvozdenovic*, 933 F.2d at 1104-05 (plaintiffs sent representative to act on their behalf in arbitration, and representative participated in arbitration hearing); *Clarke*, 2017 WL 1957489, at *6 (plaintiffs

"appeared, either in person or through a representative, [for] at least two Arbitration conferences before a designated arbitrator," and one plaintiff "expressly advised" the arbitrator that plaintiffs "did not object to arbitration" and consented to expedited proceedings and entry of a discovery schedule and hearing date (emphasis omitted)); *Merrill Lynch & Co.* v. *Cptibase, Ltd.*, No. 03 Civ. 4191 (LTS) (FM), 2003 WL 21507322, at *3 (S.D.N.Y. June 30, 2003) (plaintiff affirmatively sought adjudication of certain claims in arbitration and pursued discovery in that forum). Here, though Petitioner submitted Respondent's Demand to the AAA at Respondent's direction, and paid the AAA's case initiation fee, the Court's understanding is that the parties undertook no further meaningful steps in the proceedings prior to Respondent's withdrawal. (Petition ¶¶ 11-14).

That being said, cases where a party has retained viable objections to an arbitration proceeding "turn in significant part on the relevant party making its resistance to arbitration expressly known early and often, whether by formal objection, motion practice, or otherwise." *Clarke*, 2017 WL 1957489, at *6 (collecting cases); *cf. Home Mut. Ins. Co.* v. *Springer*, 515 N.Y.S.2d 76, 76 (2d Dep't 1987) (finding that party waived right to object to arbitration "by filing a notice of appearance and participating in the selection of an arbitrator and the scheduling of the arbitration hearing"). Given that Respondent informed Petitioner she intended to file her Demand with the AAA, submitted her claims to Petitioner's internal pre-arbitration dispute resolution program, subsequently directed Petitioner to commence arbitration before the AAA, and withdrew from arbitration several weeks after her Demand had been submitted to the AAA, she cannot be said to have timely objected to arbitration. (*See* Petition ¶¶ 7-14). *Cf. Morse* v. *Levine*, No. 19 Civ. 6711 (GHW) (SN), 2019 WL 7494619, at *5 (S.D.N.Y. Dec. 19, 2019) ("The parties' activity — such as Petitioners' filing a demand to arbitrate and Respondent's engagement with the AAA over the applicable rules — demonstrates both parties' intent to arbitrate issues relating to the Agreement."), *report and recommendation adopted*, No. 19 Civ. 6711 (GHW), 2020 WL 85410 (S.D.N.Y. Jan. 3, 2020); *Pupiales* v. *BLDG Mgmt. Co.*, 2 N.Y.S.3d 798, 798-99 (1st Dep't 2015) (finding that plaintiff waived any objection to arbitration where her union commenced arbitration proceedings on her behalf). [5] As such, even if Respondent did not enter into the Solution Channel Agreement when it was distributed to Petitioner's employees via the Solution Channel Announcement on October 6, 2017, [6] she later impliedly consented to arbitration under the terms of that agreement.

b. The Solution Channel Agreement Is Not Invalid

***10** Respondent proffers two alternate grounds for this Court to invalidate the Solution Channel Agreement. She argues that Petitioner's failure to alert its employees to "material changes" between the JAMS Agreement and the Solution Channel Agreement rendered the latter agreement procedurally unconscionable, and further, that there was no valid consideration for the Solution Channel Agreement. (Resp. Opp. 6-7). The Court will address each in turn.

i. Procedural Unconscionability

Respondent argues that Petitioner was required to notify its employees of certain changes between the JAMS Agreement and the Solution Channel Agreement, including that the arbitral forum changed from JAMS to AAA, and that the Solution Channel Agreement expressly required arbitration of claims against individual officers and employees. (Resp. Opp. 6-7). She submits that the failure of the Solution Channel Announcement to alert employees to the broadened scope of claims subject to arbitration is a "clear indication of procedural unconscionability." (*Id.*).

In general, a contract provision may be deemed unenforceable on unconscionability grounds "only where it is 'both procedurally and substantively unconscionable when made.' " *Spinelli* v. *Nat'l Football League*, 903 F.3d 185, 208 (2d Cir. 2018) (quoting *Gillman*, 73 N.Y.2d at 10). The New York Court of Appeals has explained that "[t]he procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice." *Gillman*, 73 N.Y.2d at 10-11. This examination involves a consideration of factors, including "the size and commercial setting of the transaction,

whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." *Id.* (internal citations omitted).

Respondent refers the Court to a single case in which the court determined that the arbitration agreement at issue was "tainted by procedural unconscionability" where the employer failed to alert employees that the new agreement's scope had expanded from stock-related disputes to all disputes. *Chen-Oster* v. *Goldman, Sachs & Co.*, 449 F. Supp. 3d 216, 248-49 (S.D.N.Y. 2020). However, even in *Chen-Oster*, the court found that the arbitration agreement was enforceable *despite* its procedural unconscionability, as it was not substantively unconscionable. 449 F. Supp. 3d at 252; *see also Zam & Zam Super Market, LLC* v. *Ignite Payments, LLC*, 736 F. App'x 274, 277 (2d Cir. 2018) (summary order) ("A contractual provision will be deemed unenforceable on unconscionability grounds only where it is both procedurally and substantively unconscionable, meaning that the provision is so grossly unreasonable in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms[.]" (internal citations and quotation marks omitted)). Respondent does not argue that the arbitration clause of the Solution Channel Agreement was substantively unconscionable, and the Court sees no basis to find that the provision is "grossly unreasonable." *Zam & Zam Super Market, LLC*, 736 F. App'x at 276; *see, e.g.*, *Brundage* v. *Pension Assocs. Ret. Planning, LLC*, No. 18 Civ. 2473 (NSR), 2019 WL 2465146, at *5 (S.D.N.Y. June 13, 2019) (finding arbitration clause not substantively unconscionable where it "applie[d] equally" to both parties and neither "prohibit[ed] Plaintiffs from initiating arbitration" nor "provide[d] Defendant with special rights withheld from Plaintiffs"); *Desiderio* v. *Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999) (declining to find unconscionability where the agreement "binds *both* parties to mandatory arbitration and may not be said to favor the stronger party unreasonably"). Accordingly, the Solution Channel Agreement is not unenforceable on these grounds. [7]

ii. Consideration

***11** Respondent next argues that the Solution Channel Agreement is invalid due to lack of consideration. (Resp. Opp. 7). Because she had been terminated from her position at NY1 at the time the agreement was distributed, Respondent argues, she was offered neither employment nor anything additional that could be viewed as consideration. (*Id.*).

The Solution Channel Agreement mutually binds both parties to submit covered claims exclusively to arbitration. (Solution Channel Agreement ¶ B.1). Respondent herself acknowledges that courts have found that mutual arbitration provisions can constitute sufficient consideration to support an arbitration agreement. (Resp. Opp. 7). *See* *Bassett* v. *Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 104 (E.D.N.Y. 2015); *see also* *Marciano* v. *DCH Auto Grp.*, 14 F. Supp. 3d 322, 337 (S.D.N.Y. 2014) (collecting cases finding that a mutual arbitration provision suffices as consideration). However, Respondent argues that because she had agreed to arbitrate her claims pursuant to the earlier JAMS Agreement, the Solution Channel Agreement offered Respondent no additional consideration. (Resp. Opp. 7). Respondent cites to no case law in support of this argument.

The Court observes that under New York law, employers are not required to provide additional consideration for agreements to arbitrate disputes entered into post-hiring. *See Metzler* v. *Harris Corp.*, No. 00 Civ. 5847 (HB), 2001 WL 194911, at *5 (S.D.N.Y. Feb. 26, 2001) ("[I]t is now the law in New York that a court will compel arbitration even where an at-will employee was given no additional consideration for the insertion of an arbitration clause in his contract."); *see also* *Ahing* v. *Lehman Bros.*, No. 94 Civ. 9027 (CSH), 2000 WL 460443, at *7 (S.D.N.Y. Apr. 18, 2000) (observing that continuation of employment is sufficient, without additional consideration, "to support a new post-employment promise made by that employee"). However, at least one court in this District has declined to determine whether an arbitration agreement signed after a party's employment had ended provided adequate consideration, *see* *Solis* v. *ZEP LLC*, No. 19 Civ. 4230 (JGK), 2020 WL 1439744, at *6 n.3 (S.D.N.Y. Mar. 24, 2020), though the court acknowledged that in certain circumstances, mutual promises to arbitrate claims can suffice as

consideration, *id.* (citing *Marciano*, 14 F. Supp. 3d at 337). While Respondent argues that the Solution Channel Agreement was distributed after she had been effectively terminated by Petitioner (Resp. Opp. 4-5), she nonetheless continued receiving the benefit of Petitioner's mutual obligation to arbitrate any claims against her. *Cf. Chung Chang* v. *Warner Bros. Ent., Inc.*, No. 19 Civ. 2091 (LAP), 2019 WL 5304144, at *3 (S.D.N.Y. Oct. 21, 2019) (finding that arbitration clause survived terminated employment agreement where employee received continued consideration from employer's mutual arbitration obligation). The Court concludes that the Solution Channel Agreement was supported by adequate consideration.

2. The Parties' Dispute Falls Within the Scope of the Solution Channel Agreement

Having found the Solution Channel Agreement to be valid and enforceable, the Court next considers whether its arbitration clause is applicable. Courts generally construe arbitration clauses broadly. *See, e.g.*, *McMahan Sec. Co. L.P.* v. *Forum Cap. Mkts. L.P.*, 35 F.3d 82, 88 (2d Cir. 1994) ("[F]ederal policy favoring arbitration requires us to construe arbitration clauses as broadly as possible[.]" (internal quotation marks omitted)); *accord Collins & Aikman Prods. Co.* v. *Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995). That is particularly true where the agreement itself uses broad language to define the scope of arbitration, which language "creates a presumption of arbitrability." *Smith/Enron Cogeneration Ltd. P'ship* v. *Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999) (quoting *WorldCrisa Corp.* v. *Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997)). That presumption "is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* (quoting *WorldCrisa Corp.*, 129 F.3d at 74)).

***12** Under the Solution Channel Agreement, Respondent must arbitrate "*all disputes* ... related to pre-employment, employment, employment termination or post-employment-related claims." (Solution Channel Agreement ¶ B.1 (emphasis added)). Further, the arbitration clause includes a non-exhaustive list of arbitrable claims, including disputes related to "unlawful discrimination or harassment (including such claims based upon race, color, national origin, sex, pregnancy, age, religion, sexual orientation, disability, and any other prohibited grounds)[.]"

Respondent's claims fall squarely within the terms of this broad arbitration clause. Not only are they covered by the provision's reference to "all disputes ... related to employment, employment termination, or post-employment-related claims," but they are encompassed in the more specific list of arbitrable claims. For these reasons, the Court finds that the Solution Channel Agreement encompasses Respondent's claims, and that the agreement is applicable to the parties' underlying dispute. [8]

3. The Arbitrator Must Decide Venue

Both parties have indicated their willingness to arbitrate before JAMS pursuant to the JAMS Agreement. However, they continue to dispute whether, in the first instance, Respondent is required to arbitrate her claims before the AAA under the Solution Channel Agreement. The Court must refer the parties to an arbitrator to determine, if necessary, where Plaintiff's claims are to be arbitrated.

Under New York law, a subsequent agreement must establish the parties' intent "to revoke retroactively their contractual obligations to submit disputes arising" under an earlier arbitration agreement. *Primex Int'l Corp.* v *Wal-Mart Stores*, 89 N.Y.2d 594, 599 (1997). The Solution Channel Agreement provides: "This Agreement sets for the complete agreement of the parties on the subject of resolution of the covered disputes, and supersedes any prior or contemporaneous oral or written understanding on this subject[.]" (Solution Channel Agreement ¶ P). In sum, the Solution Channel Agreement: (i) encompasses the disputes covered by the JAMS Agreement (*compare* JAMS Agreement 1, *with* Solution Channel Agreement ¶ B.1); (ii) provides that it contains the "complete agreement of the parties on ... the covered disputes" (Solution Channel Agreement ¶ P); and (iii) states that it supersedes any prior arbitration agreements between the parties (*id.*).

***13** However, the Court recognizes that in similar circumstances, it has declined to reach the issue of whether a subsequent arbitration agreement "functions to supersede or terminate" a prior arbitration agreement, on the grounds that this is an issue for the arbitrator to resolve. *See* *Winter Investors, LLC* v. *Panzer*, No. 14 Civ. 6852 (KPF), 2015 WL 5052563, at *8, 10 (S.D.N.Y. Aug. 27, 2015) (collecting cases holding that, *inter alia*, an arbitrator decides issues such as expiration and termination). In *Winter Investors*, like here, the Court was faced with one agreement calling for arbitration before the AAA, and a second agreement requiring arbitration before JAMS. *Id.* at *9. The Court further declined to require the parties to arbitrate before either forum. *Id.* at *10. The Court reasoned that where "the question to be resolved is not '*whether* to proceed by arbitration, but *which arbitration panel* should decide certain issues," such question is not for the Court to decide. *Id.* (quoting *UBS Fin. Servs., Inc.* v. *W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 655 (2d Cir. 2011)); *see also* *UBS Fin. Servs., Inc.*, 660 F.3d at 655 ("[V]enue is a procedural issue that ... arbitrators should address in the first instance, and that the District Court lacked subject matter jurisdiction to resolve[.]"). The Court sees no reason to depart from its prior approach. While it finds that Respondent's claims against Petitioner must be arbitrated, the venue of such arbitration is outside the bounds of the instant motion.

4. The Arbitration Should Not Be Stayed

Respondent asks that the Court refrain from deciding the Petition pending appellate review of cases currently before the Second Circuit and the Appellate Division of the New York Supreme Court. (Resp. Opp. 10-11 (referencing *Newton* v. *LMVH Moët Hennessy Louis Vuitton Inc.*, Index No. 154178/2019, 2020 WL 3961988 (N.Y. Sup. Ct. July 10, 2020); *Tantaros* v. *Fox News Network, LLC*, 465 F. Supp. 3d 385 (S.D.N.Y. 2020), *appeal docketed*, No. 20-3413, Dkt. #1 (2d Cir. Oct. 6, 2020))). Further, Respondent argues that the Court should permit this matter and the Underlying Action to proceed to discovery pending the appellate courts' review, in what she submits would be in the interest of efficiency and conservation of resources (though the Court questions whether allowing such discovery during the appeals' pendency would further resource conservation). (*Id.* at 11-13). As to be expected, Petitioner disagrees that *Newton* and *Tantaros* provide any basis for staying the Court's decision. (Pet. Reply 8-9).

Specifically, Respondent asks that the Court defer its decision until there is greater clarity from other courts as to whether Section 7515 of the New York Civil Practice Law and Rules preempts the FAA. Section 7515(b)(i) provides that "[e]xcept where inconsistent with federal law" no written contracts can contain certain prohibited clauses, N.Y. C.P.L.R. § 7515(b)(i), defined as "any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination," *id.* § 7515(a)(2). Section 7515(b)(iii) states that such prohibited mandatory arbitration clauses are "null and void" "[e]xcept where inconsistent with federal law." *Id.* § 7515(b)(iii).

Section 7515, which became effective on July 11, 2018, initially applied to sexual harassment claims only, but was amended, effective October 11, 2019, to expand the prohibition on mandatory arbitration with respect to all forms of unlawful discrimination. Since its enactment, a number of courts in New York and the Second Circuit have considered the interplay between Section 7515 and Section 2 of the FAA, the latter of which provides that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. And several courts in this District have found that Section 7515 is preempted by the FAA. *See, e.g.*, *Gilbert* v. *Indeed, Inc.*, No. 20 Civ. 3826 (LJL), 2021 WL 169111, at *13-15 (S.D.N.Y. Jan. 19, 2021); *White* v. *WeWork Cos.*, No. 20 Civ. 1800 (CM), 2020 WL 3099969, at *5 (S.D.N.Y. June 11, 2020); *Latif* v. *Morgan Stanley & Co.*, No. 18 Civ. 11528 (DLC), 2019 WL 2610985, at *3-4 (S.D.N.Y. June 26, 2019). However, there is one contrary decision by a New York State trial court, currently pending appellate review. *See* *Newton*, 2020 WL 3961988.

***14** Though Respondent does not specify the potential import of the appeal in *Newton*, the Court understands her to be suggesting that her arbitration agreements with Petitioner may be null and void under Section 7515, should Section 7515 be

found not to be preempted by the FAA. Respondent does not ask the Court to reach its own conclusion on this issue, but rather, to refrain from making a determination until the state appellate court has done so. (Resp. Opp. 9-10). However, given that several courts in this District have reached this issue, and have determined that Section 7515 is preempted by the FAA, the Court is disinclined to stay its decision on this basis. In particular, the Court observes that following the decision in *Newton*, Judge Liman addressed Section 7515's impact on the FAA and determined that *Newton* was "not persuasive." *Gilbert*, 2021 WL 169111, at *15. In a well-considered opinion that recounted both the FAA's legislative history and the Supreme Court's body of cases interpreting its scope, Judge Liman determined that "regardless of the intent of the New York legislature," Section 7515 could not be applied "to relieve Plaintiff from the effect of her arbitration agreement even as to her state claims." *Id.* at *12-15. The Court agrees with Judge Liman and sees no grounds for staying its decision pending the Appellate Division's review of *Newton*.

Respondent also asks that the Court stay its decision pending the Second Circuit's review of *Tantaros*, 465 F. Supp. 3d 385. (Resp. Opp. 11). However, Respondent mischaracterizes the issue in *Tantaros* as "whether the prohibition on mandatory arbitration clauses contained in CPLR § 7515 conflicts with the FAA." (*Id.*). In fact, *Tantaros* considered a jurisdictional issue: whether the case required remand to state court for lack of subject matter jurisdiction based on the question of "whether a claim arising under § 7515 necessarily raises a federal question within the original jurisdiction of this Court pursuant to 28 U.S.C. § 1331." 465 F. Supp. 3d at 389. Here, where both the Petition and Underlying Action have been brought before the Court pursuant to its diversity jurisdiction (*see* Petition ¶ 22; 20 Civ. 7050 Dkt. #1 at ¶¶ 7-8), and Plaintiff has not moved to remand the case to state court, or otherwise questioned the Court's jurisdiction, the Court's view is that further developments in the *Tantaros* action are unlikely to have any bearing on the cases before this Court. As such, Respondent has provided no basis for awaiting the outcome of the appeal before the Second Circuit.

5. This Case Is Stayed Pending Arbitration

The Court must next decide whether to dismiss or stay the action. When all claims have been referred to arbitration and a stay is requested, the Court must grant the stay. *See* *Katz* v. *Cellco P'ship*, 794 F.3d 341, 345 (2d Cir. 2015). However, when a stay is not requested, the district court has discretion in determining whether to stay or dismiss the case pending arbitration. *See* *Benzemann* v. *Citibank N.A.*, 622 F. App'x 16, 18 (2d Cir. 2015) (summary order) (concluding that district court was not required to enter a stay where parties did not request one); *see also* *Castellanos* v. *Raymours Furniture Co., Inc.*, 291 F. Supp. 3d 294, 302 (E.D.N.Y. 2018) ("Although defendant's motion requests that the Court dismiss the action, the Court concludes that a stay is appropriate.").

Here, Petitioner has not requested either a stay or a dismissal of this action. (*See generally* Pet. Br.; Pet. Reply). Following *Katz*, courts in this Circuit regularly stay, rather than dismiss, complaints subject to an arbitration agreement. *See, e.g.*, *TIG Ins. Co.* v. *Am. Home Assurance Co.*, No. 18 Civ. 10183 (VSB), 2020 WL 605974, at *4 (S.D.N.Y. Feb. 7, 2020); *Porcelli* v. *JetSmarter, Inc.*, No. 19 Civ. 2537 (PAE), 2019 WL 2371896, at *4 (S.D.N.Y. June 5, 2019); *Crawley* v. *Macy's Retail Holdings, Inc.*, No. 15 Civ. 2228 (KPF), 2017 WL 2297018, at *6 (S.D.N.Y. May 25, 2017). As the Second Circuit has observed, a stay permits the parties to move their dispute "out of court and into arbitration as quickly and easily as possible." *Katz*, 794 F.3d at 346. A stay would also allow the Court, at a later stage, to address any claim or lingering issue that is not resolved in arbitration. *See* *Zambrano* v. *Strategic Delivery Sols., LLC*, No. 15 Civ. 8410 (ER), 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016). Accordingly, the Court stays the action pending arbitration of Respondent's claims.

6. The Underlying Action Remains Stayed

***15** Respondent asks that if arbitration is compelled, it is done so pursuant to the JAMS Agreement, so that Respondent may proceed against the Individual Defendants in the Underlying Action. (Resp. Opp. 13). As discussed above, an arbitrator must decide whether the parties are to proceed pursuant to the Solution Channel Agreement or the JAMS Agreement. As the latter agreement is limited to claims against Petitioner, and is silent as to claims against Petitioner's employees, the determination

as to which agreement controls may well resolve whether Respondent is required to arbitrate her claims against the Individual Defendants. This counsels in favor of staying the Underlying Action under Section 3 of the FAA, which provides that where the claims pending before a court are "referable to arbitration," the court "shall ... stay the trial of the action" until the parties arbitrate the dispute. 9 U.S.C. § 3.

Moreover, "[a] trial court may, with propriety, ... enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Maritima de Ecologia, S.A. de C.V.* v. *Sealion Shipping Ltd.*, No. 10 Civ. 8134 (DLC), 2011 WL 1465744, at *5 (S.D.N.Y. Apr. 15, 2011) (quoting *Admin. Comm. of the Time Warner, Inc. Benefit Plans* v. *Biscardi*, No. 99 Civ. 12270 (DLC), 2000 WL 565210, at *1 (S.D.N.Y. May 8, 2000)). This falls within a district court's inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* (quoting *WorldCrisa*, 129 F.3d at 76). And courts have found that stays are warranted where an arbitration is likely to have preclusive effect over some or all of the claims not subject to arbitration. *See, e.g.*, *Maritima de Ecologia, S.A. de C.V.*, 2011 WL 1465744, at *5 (finding that stay was appropriate where the arbitration "will have a significant bearing on this case"); *see also* *Bear, Stearns & Co.* v. *1109580 Ont., Inc.*, 409 F.3d 87, 91 (2d Cir. 2005) (observing that under certain conditions, "[a]n arbitration decision may effect collateral estoppel in a later litigation or arbitration if the proponent can show with clarity and certainty that the same issues were resolved" (internal quotation marks omitted)). Here, should the arbitrator refrain from resolving Respondent's claims against the Individual Defendants, the issues they will decide in resolving the claims against Petitioner "overlap significantly (if not entirely)" with the issues the Court would need to reach to adjudicate the claims against the Individual Defendants in the Underlying Action. *See* *Winter Investors, LLC*, 2015 WL 5052563, at *12. Accordingly, the Underlying Action must remain stayed.

CONCLUSION

For the reasons stated in this Opinion, the Petition to compel arbitration is GRANTED. The Clerk of Court is ORDERED to terminate the motion at docket entry 1 and to STAY this case. In a separate Order, the Court will confirm the stay of the Underlying Action.

The parties are ORDERED to update the Court on or before June 23, 2021, regarding the status of any arbitration.

SO ORDERED.

All Citations

Slip Copy, 2021 WL 694549

Footnotes

1 The facts contained in this Opinion are drawn from Charter's Petition to Compel Arbitration (the "Petition") (Dkt. #1), and the parties' submissions and accompanying exhibits in connection with the instant motion.

For ease of reference, Petitioner's Memorandum of Law in Support of Its Petition to Compel Arbitration is referred to as "Pet. Br." (Dkt. #6); Respondent's Memorandum of Law in Opposition to the Petition is referred to as "Resp. Opp." (Dkt. #27); and Petitioner's Reply Memorandum of Law in Further Support of its Petition to Compel Arbitration

is referred to as "Pet. Reply" (Dkt. #28). The declarations of attorneys and witnesses submitted in connection with the parties' opening and opposition briefing are referred to as "[Name] Decl." The Declaration of Melissa C. Rodriguez submitted in support of Petitioner's reply briefing is referred to as "Rodriguez Reply Decl." (Dkt. #29). The JAMS Arbitration Agreement that was in effect as of June 2017, is referred to as the "JAMS Agreement" (Cassidy Decl., Ex. B). The Solution Channel Agreement in effect as of October 6, 2017, is referred to as the "Solution Channel Agreement" (Fries Decl., Ex. B); and the October 6, 2017 email from Paul Marchand, Executive Vice President of Human Resources at Charter, announcing and distributing the Solution Channel Agreement, is referred to as the "Solution Channel Announcement" (Fries Decl., Ex. A).

References to filings on the Underlying Action docket will be referred to as "20 Civ. 7050 Dkt. #[number]."

2 Respondent claims that she was terminated by Charter on or about September 19, 2017, and that her last day of work at NY1 was on September 23, 2017, but that Charter continued to pay her for some time through the fall of 2017. (Garfin Decl. ¶¶ 2-3). Charter's Vice President of HR Technology has attested that Charter's electronic employee records system reflects that Respondent was an employee of Charter as of October 6, 2017. (Fries Decl. ¶¶ 1, 10).

3 Respondent's counsel submits that, given the parties' initial discussions about the Solution Channel Agreement in 2019, Petitioner's counsel was aware that Respondent had previously taken the position that she was not bound by the Solution Channel Agreement. (Duaban Decl. ¶¶ 8-9). Respondent's counsel's view is that Petitioner's counsel failed to "extend the courtesy" of reminding Respondent of her prior position. (*Id.* at ¶¶ 8-9).

Petitioner responds that Respondent's counsel made the determination that they had "inadvertently" filed with JAMS and would instead be filing with the AAA. (Pet. Reply 3 (quoting Rodriguez Decl., Ex. D)). Additionally, Petitioner asserts that Ms. Goddard remained involved in the decision to pursue arbitration before the AAA. (*Id.* at 3-4). In support, Petitioner has submitted correspondence from July 31, 2020, and August 2, 2020, between Ms. Goddard and Petitioner's counsel, in which Ms. Goddard inquired about the impact of Respondent's submission to the Solution Channel program on the tolling of her claims, stating, among other things: "I need an answer to this question today in order to make our decision." (Rodriguez Reply Decl., Ex. C at 1-2).

4 Petitioner cites to *Zendon* v. *Grandison Mgmt., Inc.*, No 18 Civ. 4545 (ARR) (JO), 2018 WL 6427636, at *1 n.1 (E.D.N.Y. Dec. 7, 2018), but that case does not compel a different result. *Zendon* considered an argument from the party opposing arbitration that the FAA had no application because there was no agreement in writing between the parties to arbitrate their disputes. *Id.* Here, the Court agrees that the FAA "provides the overarching framework" for adjudicating the Petition, but applies state law to questions of contract formation, consistent with Second Circuit law. *See* *Dynamic Int'l Airways, LLC* v. *Air India Ltd.*, No. 15 Civ. 7054 (PKC), 2016 WL 3748477, at *4 (S.D.N.Y. July 8, 2016).

5 Respondent requests that this Court refrain from finding that she assented to arbitrate because of the "mistakes" of her counsel in requesting arbitration with the AAA. (Resp. Opp. 4; Garfin Decl. ¶¶ 10-11; *see also* Goddard Decl. ¶¶ 11-17; Duaban Decl. ¶¶ 3-12). However, it has long been established that a litigant "is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1879)). Ms. Goddard and Ms. Duaban were Respondent's agents for the purpose of "making, or declining to make, objections [to arbitration] on [Respondent's] behalf." *York Rsch. Corp.* v. *Landgarten*, 927 F.2d 119, 122 (2d Cir. 1991). "To hold otherwise would invite chaos." *Id.*

6 Under New York law, it is presumed that a party has received an email when it is delivered to the party's email address in accordance with regular office procedures. *See Clearfield* v. *HCL Am. Inc.*, No. 17 Civ. 1933 (JMF), 2017 WL 2600116, at *2 (S.D.N.Y. June 15, 2017); *see also* *Meckel* v. *Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985). However, a party can rebut this presumption by producing admissible evidence showing that the email was not sent or was not

received. *See* *Lockette* v. *Morgan Stanley*, No. 18 Civ. 876 (JGK), 2018 WL 4778920, at *4 (S.D.N.Y. Oct. 3, 2018); *cf.* *Weiss* v. *Macy's Retail Holdings, Inc.*, 741 F. App'x 24, 28 (2d Cir. 2018) (summary order) (concluding that plaintiff defeated New York's mailing presumption by "provid[ing] evidence of his family's regular procedure for reviewing with him the mail he received and assert[ing], with sworn support, that the relevant mailings did not arrive and go through that process"). A plaintiff's mere denial of receipt of an email is insufficient. *Lockette*, 2018 WL 4778920, at *4. Here, Petitioner has submitted evidence that the email was addressed and delivered to Respondent's work email address. (Fries Decl. ¶¶ 10-11; *id.*, Ex. C). Respondent has in turn provided more than a mere denial of receipt; she has submitted a screenshot purportedly demonstrating that she was unable to access her work email account eight days before Petitioner distributed the Solution Channel Agreement. (Garfin Decl., App'x). Because the Court has determined that Respondent impliedly assented to arbitration under the Solution Channel Agreement, it need not determine whether Respondent's proffered evidence is sufficient to rebut the presumption of receipt.

7 Further, the Court observes that the Solution Channel Announcement notified employees that: (i) covered employment-related disputes would be subject to binding arbitration; and (ii) unless employees opted out, they would be enrolled in the program in the next 30 days; and (iii) directed employees to additional information about the program and instructions for opting out. As such, the Court doubts that the arbitration provision could be deemed procedurally unconscionable. *See* *Lockette*, 2018 WL 4778920, at *4 (finding notice of expanded arbitration provision sufficient where it notified employees that: "[i] all covered claims by employees ... would be subject to mandatory arbitration; [ii] unless employees opted out ... their continued employment would be considered assent to the program; and [iii]] they could opt out by submitting a form before the program's effective date.").

8 The Court recognizes that another court in this District, when considering whether to compel arbitration pursuant to the very same agreement, and facing parties who disagreed as to whether the claims at issue were covered under the agreement, found that the parties had delegated the authority to decide such questions of arbitrability to the arbitrator. *See* *Torre* v. *Charter Commc'ns, Inc.*, No. 19 Civ. 5708 (JMF), 2020 WL 1048933, at *1 (S.D.N.Y. Mar. 4, 2020). In particular, the court observed: "The Arbitration Agreement defines 'Covered Claims' to include 'all disputes related to the arbitrability of any claim or controversy.' And were there any doubt, it elsewhere provides unambiguously that 'the arbitrator shall have the sole authority to determine whether a particular claim or controversy is arbitrable.' " *Id.* (internal citations omitted). (*See also* Solution Channel Agreement ¶¶ B.3, I.1). Here, in contrast, the parties do not dispute that Respondent's claims against Petitioner fall

> within the scope of the Solution Channel Agreement — rather, their dispute pertains to the agreement's validity and enforceability. While the Court's view is that the Solution Channel Agreement is applicable to the parties' underlying dispute, it forewarns that any future disagreements as to the scope of the claims subject to arbitration will need to be resolved by an arbitrator.

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EXHIBIT 14: FISSCHA GEZU V. CHARTER COMMUNICATIONS, 3:20-CV-01476-G (BT), 2021 WL 410000 (U.S. DIST. CT., N.D. TEXAS, DALLAS DIVISION), FEBRUARY 5, 2021

2021 WL 410000
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

Fisseha GEZU, Plaintiff,
v.
CHARTER COMMUNICATIONS, Defendant.

CIVIL ACTION NO. 3:20-CV-01476-G (BT)
|
Signed 02/05/2021

Attorneys and Law Firms

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Jasmine Selia Wynton, Thompson Coburn LLP, Dallas, TX, Amy Elizabeth Oslica, Thompson Coburn LLP, St. Louis, MO, for Defendant.

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

A. JOE FISH, Senior United States District Judge

***1** The Court has under consideration the Findings, Conclusions, and Recommendation of United States Magistrate Judge Rebecca Rutherford dated January 7, 2021. The Court has made a *de novo* review of those portions of the proposed Findings, Conclusions, and Recommendation to which objections were made. The objections are overruled.

SO ORDERED.

All Citations

Slip Copy, 2021 WL 410000

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EXHIBIT 15: FISSCHA GEZU V. CHARTER COMMUNICATIONS, 3:20-CV-01476-G-BT, 2021 WL 419741 (U.S. DIST. CT., N.D. TEXAS, DALLAS DIVISION), JANUARY 7, 2021

2021 WL 419741
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

Fisseha GEZU, Plaintiff,
v.
CHARTER COMMUNICATIONS, Defendant.

Case No. 3:20-cv-01476-G-BT
|
Signed 01/07/2021

Attorneys and Law Firms

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FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

REBECCA RUTHERFORD, UNITED STATES MAGISTRATE JUDGE

***1** Before the Court is Defendant's Motion to Compel Arbitration and to Dismiss Under Rule 12(b)(3). Mot. (ECF No. 10). For the reasons stated, the Court should GRANT the Motion and DISMISS this civil action without prejudice to Plaintiff's right to demand arbitration.

Background

Defendant Charter Communications (Charter) employed Plaintiff Fisseha Gezu beginning in 2007. Compl. 2, ¶ 6 (ECF No. 3). While employed at Charter, Gezu allegedly suffered discrimination due to his race and national origin in the form of derogatory name calling and bullying. *Id.* 2–3, ¶¶ 9–13, 19–20. Charter also allegedly denied Gezu promotions and subjected him to disparate discipline because of his race and national origin. *See id.* ¶¶ 12–13, 23–25. Gezu contends that he made Charter aware of these issues, but nothing was done. *Id.* at ¶ 14–15. Instead, the discrimination allegedly continued, and Charter retaliated against him by terminating him for a pretextual reason on or about May 8, 2019. *Id.* at 4, ¶ 29.

Based on this conduct, Gezu filed a *pro se* lawsuit on June 8, 2020 asserting claims under Title VII of the Civil Rights Act and 42 U.S.C. § 1981. *Id.* at 1, ¶ 4; 4–7.

In response, Charter filed the pending Motion to Compel Arbitration under Federal Rule of Civil Procedure 12(b)(3). According to Charter, Gezu entered into a binding arbitration agreement while he was still employed. The agreement requires Gezu to participate in a legal dispute resolution program (the "Program") that provides for mandatory binding arbitration of "[a]ll disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which [an employee] or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims, whether the claims are denominated as tort, contract, common law, or statutory claims (whether under local, state or federal law)." Def.'s Ex. C 13 (ECF No. 11-1); Def's Br. 2 (ECF No. 11). The Program explicitly includes claims for "unlawful discrimination or harassment (including such claims based upon race, color, national origin, sex, pregnancy,

age, religion, sexual orientation, disability, and any other prohibited grounds)" and claims for "unlawful retaliation" as subject to mandatory binding arbitration. Def.'s Ex. C 13; Def.'s Br. 2.

Gezu filed his Response to Charter's Motion (ECF No. 12) on August 3, 2020, in which he denies that he is required to arbitrate his claims. He argues that he lacked adequate notice of the Program and never accepted the change to his employment contract. Charter filed a Reply (ECF No. 15) on August 20. Gezu then filed a response to Charter's Reply (ECF No. 16). Charter's Motion is, therefore, fully-briefed and ripe for determination.

Preliminary Matters

Gezu's Surreply

As an initial matter, Charter has filed a Motion to Strike (ECF No. 18) Gezu's second Response to Charter's Motion to Compel. The Court construes Gezu's second Response as a surreply and GRANTS Charter's Motion to Strike.

***2** Neither the local rules of this court nor the Federal Rules of Civil Procedure allow a party to file a surreply as a matter of right. N.D. Tex. Loc. Civ. R. 7.1(e)–(f); *Progressive Concepts, Inc. v. Hawk Elec., Inc.*, 2009 WL 10705253, at *1 (N.D. Tex. July 10, 2009). Indeed, surreplies are "highly disfavored" and permitted only in "extraordinary circumstances," such as when necessary to respond to new issues, theories, or arguments raised for the first time in a reply brief. *Luna v. Valdez*, 2017 WL 4222695, at *6 (N.D. Tex. Sept. 21, 2017); *see also* *Racetrac Petroleum, Inc. v. J.J.'s Fast Stop, Inc.*, 2003 WL 251318, at *18 (N.D. Tex. Feb. 3, 2003) ("A sur-reply is appropriate by the non-movant only when the movant raises new legal theories or attempts to present new evidence at the reply stage.").

Gezu has not shown the existence of any extraordinary circumstances that necessitate the filing of a surreply. Charter's reply does not raise any new issue, theory, or argument that would necessitate a surreply. Therefore, the Court orders the Clerk of Court to STRIKE Gezu's second Response to Charter's Motion to Compel Arbitration and Dismiss.

Fries's Affidavit

Additionally, in his first Response, Gezu moves to strike the affidavit of John Fries, provided by Charter in support of its Motion, arguing the affidavit "is not admissible because it was not sworn and notarized." Pl.'s Resp. 6 (ECF No. 12). John Fries is Charter's Vice President for HR Technology. For the following reasons, the Court DENIES Gezu's request.

Pursuant to Federal Rule of Civil Procedure 56(c)(4), a "declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the ... declarant is competent to testify on the matters stated." *Mason v. AT&T Servs. Inc.*, 2019 WL 4721015, at *5 (N.D. Tex. Aug. 27, 2019) (Rutherford J.) (quoting Fed. R. Civ. P. 56(c)(4)) (internal quotation marks omitted). 28 U.S.C. § 1746 sets out the requirements for a proper declaration:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), *such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration*, certificate, verification, or statement, in writing of such person *which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form*
>
> ...

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

Id. (quoting 28 U.S.C. § 1746) (emphases added). The Fifth Circuit has held that § 1746 "permits unsworn declarations to substitute for an affiant's oath if the statement contained therein is made 'under penalty of perjury' and verified as 'true and correct.' " *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988).

John Fries has worked in Charter's HR technology or reporting functions since 2003. Def.'s Ex. 1, 2, ¶ 1. He offered a statement in support of Charter's Motion based on his own personal knowledge. *See id.* at 4–5, ¶¶ 18–21 (documenting Fries's access to and review of relevant records kept by Charter). Though unsworn, Fries's declaration ends in the exact form required by § 1746: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.... Executed this 1st day of July 2020," followed by his signature. *Id.* at 4. Accordingly, the Court finds that the affidavit of John Fries is proper and DENIES Gezu's request to strike. *See Ortez v. Wise Cnty. Dep't*, 2020 WL 6820845, at *1 (considering an affidavit as competent evidence where the affiant declared her statement to be "true and correct" and made "under penalty of perjury").

Legal Standards and Analysis

Rule 12(b)(3)

***3** Charter moves to dismiss Gezu's Complaint and compel arbitration under Federal Rule of Civil Procedure 12(b)(3). Under Rule 12(b)(3), claims may be dismissed for improper venue. Fed. R. Civ. P. 12(b)(3). "The United States Supreme Court has described an arbitration agreement as a 'specialized kind of forum-selection clause.' " *Wheeler v. Dollar Tree Stores, Inc.*, 2017 WL 3426300, at *2 (W.D. La. Aug. 8, 2017) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.")). Thus, the enforceability of an arbitration agreement may be analyzed under Rule 12(b)(3). *Id.*; *see also McDonnel Grp., L.L.C. v. Great Lakes Ins. SE, UK Branch*, 923 F.3d 427, 430 n.5 (5th Cir. 2019) (acknowledging that while the Fifth Circuit has not decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper vehicle for a motion to dismiss based on an arbitration clause, it has accepted Rule 12(b)(3) as a proper method for seeking dismissal in favor or arbitration) (citing *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472 n.3 (5th Cir. 2010); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005)).

The Fifth Circuit has not ruled on which party bears the burden on a Rule 12(b)(3) motion, but "most district courts within this circuit have imposed the burden of proving that venue is proper on the plaintiff once a defendant has objected to the plaintiff's chosen forum." *Galderma Labs., L.P. v. Teva Pharm. USA, Inc.*, 290 F. Supp. 3d 599, 605 (N.D. Tex. 2017) (citing cases); *see also Victory Renewables, LLC v. Energy Trading Co.*, 2019 WL 2539209, at *3 (N.D. Tex. Feb. 8, 2019), *rec. adopted*, 2019 WL 2540738 (N.D. Tex. Mar. 6, 2019). When deciding a Rule 12(b)(3) motion, the court must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff. *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 Fed. App'x 612, 615 (5th Cir. 2007) (per curiam) (citations omitted). The court may consider evidence in the record beyond the facts alleged in the complaint and its proper attachments. *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) (citations and internal quotation marks omitted) ("[T]he court may find a plausible set of facts by considering any of the following: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."). "Absent an evidentiary hearing on a Rule 12(b)(3) motion, affidavits and other evidence submitted by the non-moving party are viewed in the light most favorable to

that party." *Mem'l Hermann Health Sys. v. Blue Cross Blue Shield of Tex.*, 2017 WL 5593523, at *4 (S.D. Tex. Nov. 17, 2017) (citing *Ambraco*, 570 F.3d at 238).

The Federal Arbitration Act

American courts adopted from the English common law "centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). Congress passed the Federal Arbitration Act (FAA) to reverse this hostility and "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Section 2 of the FAA provides that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity or the revocation of any contract." 9 U.S.C. § 2; *see also* *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "The FAA thereby places arbitration agreements on an equal footing with other contracts ... and requires courts to enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67.

***4** Under § 4 of the FAA, parties aggrieved by another party's failure to arbitrate a claim pursuant to a written arbitration agreement "may petition a federal court 'for an order directing that such arbitration proceed in a manner provided for in such agreement.' " *Id.* at 68 (quoting 9 U.S.C. § 4). "Once the court is satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, it shall order arbitration." *Floyd v. Kelly Servs., Inc.*, 2019 WL 4452309, at *2 (N.D. Tex. Aug. 30, 2019) (Rutherford, J.) (citing *Rent-A-Center*, 561 U.S. at 67) (internal quotation marks omitted).

"Courts perform a two-step inquiry to determine whether parties should be compelled to arbitrate a dispute." *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003). First, the court determines "whether the parties agreed to arbitrate the dispute," *Floyd*, 2019 WL 4452309 at *2, as "[a]rbitration is strictly a matter of consent." *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 299 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)) (internal quotation marks omitted). This inquiry involves answering two questions: "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in questions falls within the scope of the arbitration agreement." *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537 (5th Cir. 2003) (quoting *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996)) (internal quotation marks omitted). The strong federal policy favoring arbitration does not apply "to the determination of whether there is a valid agreement to arbitrate between the parties." Second, the court must determine "whether any federal statute or policy renders the claims nonarbitrable." *Floyd*, 2019 WL 4452309 at *2 (quoting *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992)) (internal quotation marks omitted). Neither Gezu nor Charter contest that (1) if there is a valid arbitration agreement, Gezu's claims fall within the scope of the Agreement or (2) there is a federal statute or policy rendering Gezu's claims nonarbitrable. The Court, therefore, need only address whether a valid agreement to arbitrate exists between the parties.

I. There is a valid agreement to arbitrate between Gezu and Charter.

In determining whether a valid arbitration agreement exists, "[c]ourts apply ordinary state-law principles that govern the formation of contracts." *Maravilla v. Gruma Corp.*, 783 Fed. App'x 392, 394 (5th Cir. 2019) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)) (internal quotation marks omitted). "Texas courts apply the 'most significant relationship test' to determine which state's law to apply in breach of contract case." *Krohn v. Spectrum Gulf Coast, LLC*, 2019 WL 4572833, at *3 (N.D. Tex. Sept. 19, 2019) (citing *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 802 (5th Cir.

2007); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000)). Relevant factors to consider under this test include "the place where the injury occurred, the place where the injury causing conduct occurred, the parties' residence, and the place where the relationship, if any, between the parties is centered." *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 674 (5th Cir. 2003).

Here, Charter employed Gezu in Texas and Gezu resided in Texas while working for Charter. Def.'s Reply 3 n. 1. The relationship between the two parties is centered around their interactions in Texas. Additionally, both parties appear to agree that Texas law applies in the present case. *See* Def.'s Br. 5 (discussing Texas contract law); Pl.'s Resp. 3 (same); Def.'s Reply 3 n. 1 (ECF No. 15) ("Texas law governs in this case"). Accordingly, the Court will apply Texas contract law.

***5** "Under Texas law, a binding contract requires: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with intent that it be mutual and binding." *Hi Tech Luxury Imps., LLC v. Morgan*, 2019 WL 1908171, at *1 (Tex. App.—Austin Apr. 30, 2019, no pet.) (quoting *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689 (5th Cir. 2018)) (internal quotation marks omitted). " 'The determination of a meeting of the minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did and not on their subjective state of mind.' " *In re Capco Energy, Inc.*, 669 F.3d 274, 280 (5th Cir. 1980) (quoting *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. App.—San Antonio 1999, pet. denied)). Additionally, a valid contract also requires consideration. *Id.*

Here, Charter maintains that a valid and enforceable contract exists because Charter offered the arbitration agreement to Gezu by email; Gezu reviewed and accepted the agreement; and mutual arbitration obligations make up consideration that supports the agreement. Def.'s Br. 5. Specifically, Charter avers that Gezu was still an employee of Charter on October 6, 2017, when Charter sent an announcement via email informing its employees of a modification to their existing employment contracts in the form of a new employment-based legal dispute resolution Program known as the Solution Channel. Def.'s Br. 1. The announcement stated that employees would be enrolled in the Program unless they opted out within thirty days while providing instructions for employees that did wish to opt out of the Program. Def.'s Br. 1–2; Def.'s Ex. 1, 3–4, ¶¶ 8–15 (ECF No. 11-1).

Gezu, however, argues that he did not consent to the arbitration agreement. Pl.'s Resp. 2–3, 5, 7. He asserts that he does not recall opening the email announcement informing employees of the Program and their right to opt out; and even if he did open the email, "it doesn't mean that [he] read it in its entirety and agreed with any arbitration agreement." Pl.'s Aff. 2, ¶¶ 9–10 (ECF No. 12-1).

The Fifth Circuit has explained that an agreement to arbitrate may be established by modifying a pre-existing at-will employment contract. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202–03 (5th Cir. 2016). The question then becomes "whether the arbitration agreement was a valid modification of the terms of ... employment." *Butler v. TFS Oilfield Servs., LLC*, 2017 WL 7052306, at *3 (W.D. Tex. Aug. 24, 2017), *rec. adopted*, 2017 WL 7052277 (W.D. Tex. Sept. 28, 2017) (citing *Kubala*, 830 F.3d at 202). "To demonstrate a modification of the terms of at-will employment, the proponent of the modification must demonstrate that the other party (1) received notice of the change and (2) accepted the change." *Kubala*, 830 F.3d at 203 (citing *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002)).

a. Gezu received sufficient notice from Charter regarding modification of his employment contract.

To determine whether an employee has received adequate notice of modification to a pre-existing employment contract, "Texas courts look to 'all communications between the employer and employee.' " *Krohn*, 2019 WL 4572833, at *3. "To be sufficient,

the notice must 'unequivocally notif[y]' the employee of the existence of an arbitration agreement." *Id.* (quoting *In re Halliburton*, 80 S.W.3d at 568). This Court has previously found in a similar case that Charter's email announcement to employees regarding the Program provided notice sufficient to satisfy this standard. *See id.* In *Krohn v. Spectrum Gulf Coast, LLC*, the court found that Charter's email announcement constituted adequate notice because the email informed employees of the launch of a new program requiring "binding arbitration"; that they waived their right to initiate or participate in court litigation; that they could access the full agreement through a link in the email; and that the agreement would be binding on any employee who did not timely opt out. *Id.* The court, therefore, concluded that the announcement "unequivocally notified" the plaintiff of the existence of the agreement. *Id.*

***6** The plaintiff in *Krohn* also argued—like Gezu—that he did not receive adequate notice because he did not recall having received or read the email. *Id.* Applying the mailbox rule, the court dismissed this objection, as the plaintiff failed to rebut the presumption raised by Charter that he had received the announcement. *Id.*

Courts apply the mailbox rule "when there is a material question as to whether a document was actually received." *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 419 (5th Cir. 2007). A presumption of receipt is created when a party provides credible evidence that it properly sent a message to the recipient. *Wells Fargo Bus. Credit v. Ben Kozloff, Inc.*, 695 F.2d 940, 944 (5th Cir. 1983) (citing *Southland Life Ins. Co. v. Grenwade*, 159 S.W.2d 854 (Tex. 1942)); *see also Nart v. Open Text Corp.*, 2013 WL 442009, at *2 n. 4 (W.D. Tex. Feb. 5, 2013) (applying the mailbox rule to emails that do not "bounce back" to the sender). It is not necessary to show that the other party *actually received* the notice, only that the message was sent in keeping with regular procedures. *Marsh v. First USA Bank, N.A.*, 103 F.Supp.2d 909, 918–19 (N.D. Tex. May 23, 2000). Once a presumption of receipt is established, the burden then shifts to the other party to rebut the presumption with credible evidence. *Krohn*, 2019 WL 4572833, at *3 (citing *Custer*, 503 F.3d at 419; *Nart*, 2013 WL 442009, at *2).

The Court in *Krohn* found that the plaintiff did not overcome the presumption of receipt raised by Charter. *Id.* Charter met its burden in that case, according to the court, by submitting a sworn affidavit of a knowledgeable officer swearing that Charter sent the announcement to a group of employees that included the plaintiff while the plaintiff merely cited a lack of memory. *Id.* The plaintiff's rebuttal was insufficient, as a "bare allegation of memory loss is not credible evidence sufficient to rebut the presumption of receipt," so the court concluded the plaintiff did have adequate notice of the Agreement. *Id.*

In the present case, just as in *Krohn*, Charter sent notice of the program by email on October 6, 2017. Def.'s Br. 1; *see* Pl.'s Resp. 1, ¶ 2. Charter offers two statements from knowledgeable officers attesting to this fact. A statement made under penalty of perjury by John Fries, Charter's Vice President for HR Technology, asserts that Gezu did receive the announcement—based on a record of the distribution list. Def.'s Ex. 1, 2, ¶ 1; 5, ¶ 20. Daniel Vasey, the Senior Director of Records Management and eDiscovery at Charter, similarly alleges, based on his review of the company's email archives, that the announcement was sent to Gezu's Charter email address. Def.'s Ex. 2, 2–3, ¶¶ 1, 5 (ECF No. 15-1); Def.'s Ex. A 5 (ECF No. 15-1). Additionally, Vasey claims that Charter's email click data shows that Gezu opened the announcement five times. Def.'s Ex. 2, 3, ¶ 7.

These statements, paired with evidence of actual receipt and opening of the announcement, is enough for Charter to meet its burden under the mailbox rule. *See Krohn*, 2019 WL 4572833, at *3 (finding Charter met its burden to show it sent notice in keeping with regular procedures "by submitting the Affidavit of [an officer], which swears that Charter sent the Email to a group of employees that included Plaintiff"); *Gamel v. Grant Prideco, L.P.*, 625 Fed. App'x 690, 694 (5th Cir. 2015) ("[A] sworn statement is credible evidence of mailing for the purposes of the mailbox rule."). Gezu fails to rebut this presumption of receipt. He merely claims that he did not receive the announcement—or at least did not read it—without more. This bare allegation is not enough to overcome the presumption of receipt. *See Krohn*, 2019 WL 4572833, at *3. Gezu's other arguments for why he lacked adequate notice also fail.

*7 First, Gezu challenges the adequacy of notice by relying on the fact that he was not working on the date of the announcement. *See* Pl.'s Resp. 1, ¶ 5 (ECF No. 12). This does not appear to be relevant, as Gezu does not claim that he was not scheduled to work for the entire thirty-day opt-out period. Gezu also makes a number of unsupported assertions that Charter should have: (1) sent reminder emails regarding the announcement; (2) held meetings to discuss the arbitration agreement; (3) sent him a hard copy of the announcement; (4) flagged the announcement as important; (5) required employees to opt-in rather than opt-out; (6) required an acknowledgement signature from employees; (7) provided him with a laptop computer to review the documents; (8) not sent the announcement on a Friday afternoon; (9) blocked off time in his work schedule for him to read the announcement; and (10) mentioned arbitration or the Program earlier in the email. *See* Pl.'s Resp. 1–5; Pl.'s Aff. 1–2 (ECF No. 12-1).

Gezu identifies no authority, and the Court finds none, that requires Charter to take any of these actions. To the extent that Gezu contends he had technical difficulty accessing the announcement, this argument is belied by Charter's evidence showing that Gezu opened the email five times. *See* Def.'s Ex. 2, 2–3, ¶¶ 1, 5 (ECF No. 15-1); Def.'s Ex. A 5 (ECF No. 15-1). Accordingly, the Court finds that Gezu had sufficient notice of the modification to his employment contract.

b. Gezu accepted the modification of his employment contract by continuing to work for Charter after he had notice of the modification.

Under Texas law, employees who have received notice of modification to the terms of their employment contract accept the modification as a matter of law by continuing to work with knowledge of the modified terms. *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006) (citing *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002)). "[W]hen the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit," as acceptance "need not be anything more complicated than continuing to show up for the job and accept wages in return for work." *Kubala v. Supreme Prod. Servs. Inc.*, 830 F.3d 199, 203 (5th Cir. 2016) (quoting *Hathaway v. Gen. Mills, Inc.*, 711 S.W.3d 227, 229 (Tex. 1986)). "Texas law is no different when the modification in question is an arbitration requirement for employment-related disputes." *Id.*

Here, it is undisputed that Gezu continued to work for Charter until May 2019—nearly a year-and-a-half after Charter sent notice of the modification to his employment contract. *See* Compl. 4, ¶ 29; Def.'s Reply 7. As stated, Gezu had the opportunity to opt out of the Program but chose not to. Def.'s Ex. 1, 5, ¶ 21. Accordingly, Gezu accepted the terms of the Program, including those mandating binding arbitration of his claims. *See Krohn*, 2019 WL 4572833, at *3 (finding the plaintiff accepted modification of his employment contract by continuing to work for his employer); *Matos v. AT&T Corp.*, 2019 WL 5191922, at *4 (N.D. Tex. 2019) ("Plaintiff accepted the terms of the Agreement by failing to opt out."). A valid agreement to arbitrate work-related disputes, therefore, exists between Gezu and Charter.

II. Gezu's other arguments fail.

Gezu asserts two additional arguments in opposition to Charter's Motion to Compel Arbitration and Dismiss. First, he claims that Charter's use of email to announce the Program constituted an "unfair deceptive practice." Pl.'s Resp. 3, 6. Although Gezu did not raise such a claim in his Complaint, the Court could construe this as a claim under Texas' Deceptive Trade Practices Act (DTPA). *See Baney v.* Holder, 2012 WL 12886977, at *3 (N.D. Tex. Nov. 16, 2012) (stating that "a court must look at a *pro* se litigant's response to a motion to dismiss as a motion to amend the complaint to the extent that it raises new claims"). Such a construction is unnecessary, however, if an amendment would be futile. *See Anderson v. Law Firm of Shorty, Dooley & Hall*, 393 Fed App'x 214, 217–18 (5th Cir. 2010) ("Generally it is improper for a district court to dismiss a pro se complaint without affording the plaintiff the opportunity to amend, ... but, after reviewing the record, including [Plaintiff's] filings in opposition to the motions to dismiss filed by other defendants, we are convinced that [Plaintiff] had pleaded her best case. Accordingly, there was no reversible error."). "[A]n amendment is considered futile if it would fail to state a claim upon which relief could be granted." *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016).

***8** The DTPA protects consumers, those who "seek to acquire goods or services by purchase or lease." *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 724–25 (5th Cir. 2013). Consumers only receive protection if "the goods or services purchased or leased ... form the basis of the complaint. *Id.* (citing Tex. Bus. & Com. Code § 17.45(4) (defining "consumer")). Here, Gezu was an employee of Charter, not a consumer. No part of his claim is centered around acquiring goods or services from Charter. Accordingly, it would be futile to allow him to amend his Complaint to add a DTPA claim.

Second, Gezu argues that the size and timing of Charter's email would have necessitated reading the announcement outside of his scheduled work hours in violation of "the 'fair labor act of 1938.' " Pl.'s Resp. 4. The Fair Labor Standards Act (FLSA), passed in 1938, focuses on wages—minimum hourly rates and overtime pay. *Berry v. Bd. Of Supervisors of L.S.U.*, 715 F.2d 971, 976 (5th Cir. 1983). It requires employers to pay covered employees a minimum wage and at least one-and-one-half-times their regular wages when they work more than forty hours in a week. *Molina-Aranda v. Black Magic Enters., L.L.C.*, —— F.3d ——, 2020 WL 7486307 (5th Cir. 2020). "Work" in the context of the FLSA has been defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (quoting *Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)).

Even construing Gezu's argument liberally, he fails to state a wage-and-hour claim under the FLSA. Although Charter sent the email on a Friday, Gezu offers no evidence that Charter required or even encouraged him to read the email outside of working hours. He similarly fails to provide any evidence that he was unable to read the email on company time during the thirty-day opt-out period. As stated, Gezu identifies no authority, and the Court finds none, that requires Charter to block off time for employees to read the email announcement. And to the extent that Gezu contends he had technical difficulty accessing the announcement, this argument is belied by Charter's evidence showing that Gezu opened the email five times. *See* Def.'s Ex. 2, 2–3, ¶¶ 1, 5 (ECF No. 15-1); Def.'s Ex. A 5 (ECF No. 15-1).

Accordingly, a claim under the FLSA would be futile as well. The Court, therefore, concludes that the additional arguments raised in Gezu's Response do not warrant construction as a motion to amend.

III. Dismissal of Gezu's claims is appropriate.

When a dispute is subject to mandatory arbitration, "the proper course of action is usually to stay the proceedings pending arbitration." *Ruiz v. Donahoe*, 784 F.3d 247, 249 (5th Cir. 2015) (citing 9. U.S.C. § 3; *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 658–59, 662 (5th Cir. 1995)). "The Fifth Circuit has interpreted that language as authorizing 'dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.' " *Krohn*, 2019 WL 4572833, at *4 (N.D. Tex. Sept. 19, 2019) (quoting *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)). This decision—of whether to stay or dismiss—is left to the sound discretion of the district court. *Fedmet Corp. v. M/V BUYALK*, 194 F.3d 674, 678–79 (5th Cir. 1999) ("We have previously held that district courts have discretion to dismiss cases in favor of arbitration under 9 U.S.C. 3."); *Parrott v. D.C.G., Inc.*, 2020 WL 1876096, at *2 (N.D. Tex. Apr. 14, 2020). Accordingly, because all of Gezu's claims against Charter fall under the Program and will be resolved by arbitration, the Court should dismiss his claims. *See Floyd*, 2019 WL 4452309, at *2 (granting the defendant's motion to dismiss because all of plaintiff's claims were arbitrable); *Krohn*, 2019 WL 4572833, at *4 (same)

Recommendation

***9** For the foregoing reasons, the Court should GRANT Defendant's Motion to Compel Arbitration and to Dismiss Under Rule 12(b)(3) (ECF No. 10) and DISMISS this action without prejudice to Plaintiff's right to demand arbitration. Additionally,

the Court GRANTS Defendant's Motion to Strike Plaintiff's Surreply (ECF No. 18) and DENIES Plaintiff's Motion to Strike the affidavit of John Fries (ECF No. 12).

SO ORDERED.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See* *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996), *mod.fied by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections to 14 days).

All Citations

Slip Copy, 2021 WL 419741

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EXHIBIT 16: MICHAEL GONZALES, ET AL. V. CHARTER COMMUNICATIONS, LLC, 2:20-CV-08299-SB (ASX), 497 F.SUPP.3D 844 (U.S. DIST. CT., C.D. CALIFORNIA), OCTOBER 26, 2020

497 F.Supp.3d 844
United States District Court, C.D. California.

Michael GONZALES, et al.
v.
CHARTER COMMUNICATIONS, LLC

Case No.: 2:20-cv-08299-SB (ASx)
|
Filed 10/26/2020

Synopsis
Background: Current and former employees brought putative collective action against employer alleging violations of the Fair Labor Standards Act (FLSA). Employer moved to compel arbitration.

Holdings: The District Court, Stanley Blumenfeld, Jr., J., held that:

employees failed to show that agreement was procedurally unconscionable, and

employees failed to show that agreement was substantively unconscionable.

Motion granted.

Procedural Posture(s): Motion to Compel Arbitration.

Attorneys and Law Firms

***846** Attorney(s) Present for Plaintiff(s): Max R. Englehardt.

Attorney(s) Present for Defendant(s): Joseph W. Ozmer, II, Abigail Stecker Romero.

Proceedings: [IN CHAMBERS] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION (DKT. NO. 22)

STANLEY BLUMENFELD, JR., U.S. District Judge

Pending before the Court is Defendant Charter Communications, LLC's ("Charter") Motion to Dismiss and Compel Arbitration ("Motion") under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3, **4**. (Mot., Dkt. No. 22.) Plaintiffs have filed an Opposition. (Opp., Dkt. No. 31.) Charter has filed a Reply. (Reply, Dkt. No. 36.) For the following reasons, the Court **GRANTS** Charter's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are eighteen current or former employees of Charter who have brought this putative collective action for violations of the Fair Labor Standards Act ("FLSA") as well as individual actions alleging violations of the California Labor Code and California Business and Professions Code. (Mot. at 2; Opp. at 1.)

Plaintiffs commenced this action on April 17, 2020 in the Northern District of California. (Compl., Dkt. No. 1.) Plaintiffs filed the operative First Amended Complaint ("FAC") on June 11, 2020, adding two additional Plaintiffs. (FAC, Dkt. No. 17.) On July 2, Charter filed the instant motion concurrently with a Motion to Transfer Venue. (Mot. to Transfer, Dkt. No. 25.) Judge Edward Chen held a hearing ***847** on both motions on August 13, 2020. (Dkt. No. 44.) On August 24, 2020, Judge Chen granted Charter's Motion to Transfer Venue and referred the instant motion to the Central District for resolution. (Transfer Order, Dkt. No. 45.) The case was transferred to the Central District on September 10, 2020 (Dkt. No. 47) and was reassigned to this Court on September 28, 2020 (Dkt. No. 55).

A. CHARTER ESTABLISHES SOLUTION CHANNEL

On October 6, 2017, Charter sent out a company-wide email that included an announcement of a new employment-based dispute resolution program, called the Solution Channel Program ("Solution Channel"). (Mot. at 2.) Excluding the short introduction and conclusion, the email consists of four paragraphs, two of which describe the Agreement in plain English. The first of these two paragraphs briefly explains the launch of Solution Channel, and the second paragraph states:

> By participating in *Solution Channel*, you and Charter both waive the right to initiate or participate in court litigation (including class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim. More detailed information about *Solution Channel* is located on Panorama [Charter's intranet website]. Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled. Instructions for opting out of *Solution Channel* are also located on Panorama.

(Decl. of John Fries ("Fries Decl."), ¶ 8, Ex. A (Dkt. No. 23); Decl. of Michael Gonzales ("Gonzales Decl."), ¶ 2, Ex. A (Dkt. No. 31-2).)

The email included a link to the Solution Channel web page, located on Panorama." (Fries Decl. ¶¶ 8-9, Exs. A, B.) The Solution Channel web page included information about the program and a link to Charter's Mutual Arbitration Agreement (the "Agreement"), and again noted that employees who did not timely opt out would be automatically enrolled in Solution Channel. (*Id.* ¶¶ 9-10, Ex. B.) At the bottom of the web page on Panorama, employees could find information on how to opt out of Solution Channel and a link to do so. (*Id.* ¶¶ 11-13, Ex. B.) By clicking on the hyperlink to opt out of Solution Channel, the employee would then be directed to a page confirming the desire to opt out (or not opt out), requiring the employee to check a box indicating his or her decision to opt out. (*Id.* ¶ 14, Ex. D.) The opt-out page also included a notice, in all capitals: "I ALSO UNDERSTAND THAT IF I DO NOT OPT OUT, I AM SPECIFICALLY CONSENTING TO PARTICIPATION IN SOLUTION CHANNEL." (*Id.*)

B. FIFTEEN PLAINTIFFS DID NOT OPT OUT OF THE AGREEMENT

Charter maintains that the October 6, 2017 email was sent to all non-union, active employees, including Plaintiffs, who then had 30 days to review the Agreement. (*See id.* ¶¶ 5, 19-20.) Plaintiffs do not dispute that they received the email. (*See generally* Opp.) Of the eighteen Plaintiffs who brought the First Amended Complaint ("FAC"), Charter asserts (and Plaintiffs do not dispute) that fifteen Plaintiffs failed to opt out of Solution Channel and the Agreement: Sergio Rocha, Norberto Alarcon, Alberto Arena, Craig Bowlan, Ronald Flores, Sting Funez, Dennis Harmon, Julio Hernandez, Artur Kosinski, Gerald Llorence, Michael Ralston, Ricardo Ramos, Raul Romero, Raymond Ulmer, and Everardo Villa (collectively, the "Arbitration Plaintiffs"). (Mot. at 4-5 (citing Fries Decl. ***848** ¶¶ 19-20).) Three Plaintiffs—Michael Gonzales, Felipe Becerra, and Carlos Serpas—exercised their opt out. (*Id.*)

C. TERMS OF THE AGREEMENT

Under the terms of the Agreement, employees who did not opt out of Solution Channel are required to individually arbitrate all disputes arising out of their employment with Charter. In relevant part, the Agreement provides:

> You and Charter mutually agree that, as a condition of Charter considering your application for employment and/or your employment with Charter, any dispute arising out of or relating to your pre-employment application and/or employment with Charter or the termination of that relationship ... must be resolved through binding arbitration by a private and neutral arbitrator[.]
>
> ****
>
> You and Charter mutually agree that the following disputes, claims, and controversies (collectively referred to as "covered claims") will be submitted to arbitration in accordance with this Agreement: all disputes, claims, and controversies that could be asserted in court or before an administrative agency ... including without limitation ... wage and hour-based claims including claims for unpaid wages, commissions, or other compensation or penalties (including meal and rest break claims, claims for inaccurate wage statements, claims for reimbursement of expenses)[.]

(Fries Decl. ¶ 10, Ex. C at 2-3 ¶¶ A, B(1).) The Agreement also contains a collective and class-action waiver. (*Id.* Ex. C. at 3 ¶ D.)

Charter now seeks to compel arbitration against the Arbitration Plaintiffs and dismiss their claims from this action.

D. MOTION TO COMPEL ARBITRATION

Charter filed this motion to compel arbitration, asserting that the claims brought by the Arbitration Plaintiffs are covered under the Agreement. In opposing the motion, the Arbitration Plaintiffs have submitted a declaration from Michael Gonzales – a plaintiff who opted out of the Agreement. None of the Arbitration Plaintiffs has submitted a declaration explaining the facts surrounding his decision to enter into the Agreement.

II. LEGAL STANDARD

The parties do not dispute that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, applies to the Agreement. The FAA encompasses "contract[s] evidencing a transaction involving commerce to settle by arbitration." 9 U.S.C. § 2. Courts interpret the "involving commerce" language broadly to encompass transactions that are "within the flow of interstate commerce." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) (citation omitted); 9 U.S.C. § 1. Charter is undisputedly engaged in interstate commerce. (Mot. at 7.)

Under the FAA, any party bound to an arbitration agreement that falls within the scope of the FAA may bring a motion in federal district court to compel arbitration and stay the proceeding pending resolution of the arbitration. 9 U.S.C. §§ 3, 4. The FAA requires a court to compel arbitration of issues covered by the arbitration agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). A district court's role is limited to determining whether a valid arbitration agreement exists and whether the agreement encompasses the disputes at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

*849 III. DISCUSSION

When a party seeks to compel arbitration, the court must first determine if there is a valid contract between the parties under principles of state contract law. *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev.*, 55 Cal. 4th 223, 236, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012). The Arbitration Plaintiffs do not dispute the existence of a valid contract. [1] Instead, they contend

that the motion to compel arbitration should be denied because the Agreement is (1) unconscionable and (2) does not apply to collective claims. Neither contention has merit.

A. THE THRESHOLD QUESTION: WHO DECIDES?

The question of arbitrability is for the court to decide, unless the parties "clearly and unmistakably provide otherwise." *AT & T Techs. v. Commun. Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). That is, the parties may delegate arbitrability issues to the arbitrator, and a court must respect their plainly and freely expressed choice. However, when a party specifically challenges the delegation provision as being unconscionable, calling into question its validity, then a court must consider the challenge. *Rent-A-Ctr., W. v. Jackson*, 561 U.S. 63, 74, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (holding that a district court may consider a specific unconscionability challenge to the delegation provision itself but not a general unconscionability challenge to the entire agreement).

Charter claims that the Agreement contains a delegation provision in Section B, which addresses the subject of "Covered Claims" in three numbered paragraphs. Paragraph 1 defines the scope of the claims subject to arbitration; and Paragraph 2 specifies that those covered claims extend to claims against Charter affiliates. Paragraph 3, the purported delegation provision, then extends the "Covered Claims" clause to include "all disputes related to the arbitrability of any claim or controversy." (Fries Decl., ¶ 10, Ex. C, at § B(3).)

Paragraph 3 does not unambiguously delegate the unconscionability question to the arbitrator. Taken in context, Paragraph 3 reasonably can be interpreted to delegate only questions whether a specific claim is "covered" within the meaning of Paragraph 1. *See* *American Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1245, 37 Cal.Rptr.3d 918 (2006) ("We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation."). Charter's broader interpretation, which calls for the delegation of any gateway arbitrability issue whatsoever, fails to consider the more limited context of the language. *Compare* *Mohamed v. Uber Technologies*, 848 F.3d 1201, 1209 (9th Cir. 2016) (enforcing a provision that delegates "issues relating to the 'enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision' "). Because Paragraph 3 does not "clearly and unmistakably" delegate the ***850** question of unconscionability to the arbitrator, this Court will decide the issue.

B. THE UNCONSCIONABILITY CHALLENGE

Arbitration Plaintiffs bear the burden of proving that the Agreement is unconscionable. *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1158 (9th Cir. 2008); *see* *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 126, 251 Cal.Rptr.3d 714, 447 P.3d 680 (2019) ("The burden of proving unconscionability rests upon the party asserting it.") To carry their burden, they must demonstrate that the Agreement was both procedurally and substantively unconscionable. *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). Both are required because the doctrine "is meant to ensure that in circumstances indicating an absence of meaningful choice, contracts do not specify terms that are 'overly harsh,' 'unduly oppressive,' or 'so one-sided as to shock the conscience.' " *De La Torre v. CashCall*, 5 Cal. 5th 966, 982, 236 Cal.Rptr.3d 353, 422 P.3d 1004 (2018) (quoting *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910, 190 Cal.Rptr.3d 812, 353 P.3d 741 (2015).) However, both need not be present in the same degree—courts invoke a sliding scale, such that "the 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*, 24 Cal. 4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. The unconscionability analysis does not single out arbitration agreements for special treatment; on the contrary, the analysis is the same for any contract so challenged. *Sanchez*, 61 Cal. 4th at 912, 190 Cal.Rptr.3d 812, 353 P.3d 741. "In particular,

the standard for substantive unconscionability—the requisite degree of unfairness beyond merely a bad bargain—must be as rigorous and demanding for arbitration clauses as for any contract clause." *Id.*

1. No Procedural Unconscionability

The procedural element of unconscionability focuses on "oppression" or "surprise" due to unequal bargaining power and "generally takes the form of a contract of adhesion." *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979 (2003). A classic example is a sales contract that contains an arbitration clause written in tiny font, buried midway through a lengthy document, and presented moments before signing with little opportunity to read and no opportunity to negotiate.

This is not to say that every case of procedural unconscionability must take the classic form. But it is a useful comparison to demonstrate how far the concept of procedural unconscionability would have to be stretched to encompass the claim made here. The Arbitration Plaintiffs were sent an email that generally described the arbitration agreement in plain and readable language and allowed the recipient 30 days to consider whether to participate in Solution Channel. *Castorena v. Charter Communications, LLC* (C.D. Cal., Dec. 14, 2018, No. 2:18-CV-07981-JFW-KS), 2018 WL 10806903, at *5 (finding that "the email was written in plain and unambiguous language" and "the Arbitration Agreement was easily accessible to employees"). The only burden imposed on the recipient who wished to decline was the need to opt out, using a clear and simple opt-out procedure. This is not the type of procedure that smacks of unconscionability. Indeed, the Ninth Circuit repeatedly has rejected claims to the contrary. *See* *Circuit City Stores v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) (30-day opt-out right defeated claim of procedural unconscionability); *see also* *Najd*, 294 F.3d at 1108 (applying ***851** *Ahmed*); *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc) (same). District courts analyzing this Agreement have reached a similar conclusion. [2]

Faced with this fundamental impediment, the Arbitration Plaintiffs contend that this was no ordinary opt-out provision. Drawing primarily on the decision in *Gentry v. Superior Court*, 42 Cal. 4th 443, 64 Cal.Rptr.3d 773, 165 P.3d 556 (2007), they argue that Charter presented the Agreement in such a distorted and pressured way that they were deprived of any meaningful choice. This argument fails for two reasons.

First, the Arbitration Plaintiffs have not satisfied their burden of proving facts necessary to show unconscionability. *Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 972, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997) ("[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense ...."). In fact, the only declaration they submit is from Michael Gonzales, a plaintiff *who opted out* of the Agreement – and that declaration relies largely on incompetent evidence stated upon "information and belief" and on argument taken from the points and authorities in opposition to the arbitration motion. Not a single Arbitration Plaintiff has submitted a declaration to explain whether he read the email and Agreement, whether he had any difficulty understanding them, whether he consulted anyone about them, whether he believed the Agreement was advantageous to him, whether he considered the purportedly disadvantageous provisions and their significance to him, and whether he felt any pressure not to opt out.

In the absence of any meaningful evidence, the Arbitration Plaintiffs' challenge must fail. The issue of unconscionability is not an abstract one, but rather requires an examination of the actual facts. *See* *Arguelles-Romero v. Superior Court*, 184 Cal. App. 4th 825, 843, 109 Cal.Rptr.3d 289 (2010) ("It is the plaintiff's burden to introduce sufficient evidence to establish unconscionability."). Even the classic form of procedural unconscionability loses its shape if the facts show that the buyer was a contract professor who carefully reviewed the arbitration clause and fully understood and approved of it. *See* *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489, 186 Cal.Rptr. 114 (noting that "numerous factual inquiries bear upon

th[e] question" of unconscionability and that "generalizations are always subject to exceptions and categorization is rarely an adequate substitute for analysis"). The point is: facts matter; the Arbitration Plaintiffs have provided almost no material facts; and they bear the burden of proof. *See* *id.*

Second, the Arbitration Plaintiffs' reliance on *Gentry* is misplaced. (Opp. at 8-9.) In *Gentry*, the California Supreme Court found that, despite a 30-day opt-out period, a class arbitration waiver provision contained "some degree of procedural unconscionability" because of the "markedly one-sided" explanation of the waiver. *Id.* at 470, 64 Cal.Rptr.3d 773, 165 P.3d 556. While touting the benefits of arbitration, the relevant handbook neglected to disclose ***852** the "significant disadvantages that *this particular arbitration agreement* had compared to litigation," including a substantially reduced statute of limitations and substantially reduced rights to compensatory, punitive, and ancillary damages. *Id.* (emphasis in original). The California Supreme Court also found that the employees likely "felt at least some pressure not to opt out," knowing their employer's preference for arbitration. *Id.* at 472, 64 Cal.Rptr.3d 773, 165 P.3d 556.

The Arbitration Plaintiffs construct their argument of procedural unconscionability around *Gentry.* But their broad reading of that decision has been rejected by the Ninth Circuit. *See* *Mohamed*, 848 F.3d at 1210. In *Mohamed*, the district court acknowledged that "the existence of a meaningful right to opt-out ... necessarily renders ... [arbitration clauses] procedurally conscionable as a matter of [Ninth Circuit] law ...." 109 F. Supp. 3d 1185, 1215 (N.D.Cal. 2015) (referring to *Ahmed*; *Nc.jd*; and *Kilgore*). Nevertheless, the district court rejected *Ahmed,* *Nc.jd*, and *Kilgore* because they "failed to apply California law as announced by the California Supreme Court [in *Gentry*]." The district court found Uber's arbitration agreement procedurally unconscionable because Uber failed to disclose the disadvantages of that agreement, and because drivers may have "[felt] pressure [not to opt out] to appease their putative employer" (*id.* at 1215-16) – arguments identical to those made here. The Ninth Circuit reversed, concluding that "[t]he district court [did] not have the authority to ignore circuit court authority." 848 F.3d at 1211. The Arbitration Plaintiffs invite this Court to take the same impermissible path here.

Gentry is also distinguishable. The Agreement does not contain the type of substantive curtailment of rights found in the *Gentry* agreement, and the Arbitration Plaintiffs have not shown that any omission had any bearing on their decision not to opt out. The email announcing Solution Channel describes the program and its significance at a high-level of generality and refers the employee to a company website for detailed information. It states that participation in the program "allows [the employee] and the company to efficiently resolve covered employment-related legal disputes through binding arbitration" and "waive[s] the right to initiate or participate in court litigation (including class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim." (Fries Decl., ¶ 7, Ex. A, at 3.) There does not appear to be anything misleading about these general statements; and the Arbitration Plaintiffs have provided no evidence that they were misled by them.

At the hearing, the Arbitration Plaintiffs' counsel emphasized one point that they found particularly unconscionable – namely, the purported waiver of a right to a jury trial for noncovered claims. Section L of the Agreement states:

> You and Charter understand that, by agreeing to arbitration, both parties are waiving their right to demand a jury in any claim that is subject to arbitration under this Agreement. In addition, in the event a dispute between you and Charter is not arbitrable under this Agreement for any reason and is pursued in court, you and Charter agree to waive any right to a jury trial that might otherwise exist.

(Fries Decl. ¶10, Ex. C, at 4.)

The second sentence above, taken alone, is susceptible of the interpretation offered by the Arbitration Plaintiffs in that it fails to expressly limit its scope to a ***covered*** dispute. Contract language, however, is not read in isolation. Cal. Civ. Code § 1641 (West) ("The whole of a contract ***853** is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *see* *Gonzalez v. Fire Ins. Exch.*, 234 Cal. App. 4th 1220, 1232, 184 Cal.Rptr.3d 394 (2015) (applying the interpretive principle). The primary intent of this provision is to recognize that an arbitration agreement results in a jury waiver of covered claims – a point made clear in the first sentence. The second sentence, though inartfully drafted, should be read to provide for a jury waiver if a covered claim is determined not to be arbitrable. This is apparent from other parts of the Agreement, especially the "Notice" in the beginning of the Agreement, which explains more clearly the scope of the agreed-upon waiver:

> YOU ARE AGREEING TO SUBMIT ANY COVERED EMPLOYMENT-RELATED DISPUTE BETWEEN YOU AND CHARTER COMMUNICATIONS (CHARTER) TO BINDING ARBITRATION. YOU ARE AGREEING TO WAIVE ANY RIGHT TO LITIGATE THE DISPUTE IN A COURT AND/OR HAVE THE DISPUTE DECIDED BY A JURY.

(Fries Decl. ¶10, Ex. C, at 1 (emphasis in original).)

The rest of the Agreement supports a more limited reading of the second sentence in Section L. *Id.* § P, at 4 (describing the scope of the Agreement in the integration clause as extending to "the covered disputes"); *id.* § B(3), at 1 (providing that "all disputes related to the arbitrability of any claim or controversy" are "covered claims" subject to arbitration). Moreover, Charter has represented that it does not interpret and has never applied the Agreement to extend to noncovered claims. The Arbitration Plaintiffs have not shown that Charter has ever taken a contrary position. The dispute over the scope of the Agreement, therefore, appears to be more abstract than real.

Thus, the Arbitration Plaintiffs have failed to satisfy their burden of proving procedural unconscionability. That is, they have not shown that their ability to make a meaningful choice about whether to agree to arbitration was impaired.

2. No Substantive Unconscionability

The failure to prove procedural unconscionability is fatal to the Arbitration Plaintiffs' claim. *See Prizler v. Charter Comms.*, No. 3:18-cv-1724, 2019 WL 2269974 (S.D. Cal. May 28, 2019) (declining to reach question of substantive unconscionability absent procedural unconscionability). But even assuming some degree of procedural unconscionability, the Arbitration Plaintiffs have not demonstrated the requisite substantive unconscionability here. That is, any measure of procedural unconscionability is so slight that the Arbitration Plaintiffs would have to show significant substantive unconscionability. They have not done so here. *See* *Armendariz*, 24 Cal. 4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (describing sliding-scale analysis).

The Arbitration Plaintiffs argue that the Agreement is substantively unconscionable on several grounds. (Opp. at 16-23.) First, they claim that it imposes one-sided obligations by forcing employees to arbitrate "likely" claims, while exempting Charter's "likely" claims. However, the excluded claims are not manifestly one-sided (i.e., they exclude claims favoring both sides), and the Arbitration Plaintiffs have provided no evidence that Charter excluded claims that "likely" would be asserted against (or would have been any concern to) them.[3] Second, they claim that the ***854** Agreement limits statutory attorney's fees. This is inaccurate. The Agreement requires the arbitrator to "apply the governing law applicable to any substantive claim

asserted, including the applicable law necessary to determine when the claim arose and any damages." (Fries Decl., ¶ 10, Ex. C, at § I(2); *see also id.* at § I(4).) Third, the Arbitration Plaintiffs complain that the Agreement limits each party to four depositions, 20 interrogatories, and 15 document requests. Discovery limitations, however, are a common feature of arbitration that can be beneficial to all parties. *See, e.g.,* *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 183-84, 116 Cal.Rptr.2d 671 (2002) (finding a total of 30 discovery requests to be conscionable). There is nothing unusual or unfair about the limitation imposed here. Fourth, the Arbitration Plaintiffs claim that the Agreement bans recovery in administrative proceedings for unemployment benefits and worker's compensation claims. However, the Agreement excludes those claims entirely and appears to limit administrative relief for covered claims. Fifth, the Arbitration Plaintiffs challenge as improper the waiver of collective actions as it applies to claims brought under the Private Attorney General Act (PAGA) and False Claims Act (FCA), but they have not shown the relevance of these claims to this case. *See* *Dauod v. Ameriprise Fin. Servs., Inc.*, No. 8:10-cv-00302-CJC (MANx), 2011 WL 6961586, at *5 (C.D. Cal. Oct. 12, 2011) (finding the presence of a PAGA waiver to be irrelevant to substantive unconscionability analysis when the plaintiff was not attempting to bring a PAGA action).

In short, the Arbitration Plaintiffs have not shown that the terms of the Agreement are "so one-sided as to 'shock the conscience.' " *Sanchez*, 61 Cal. 4th at 910, 190 Cal.Rptr.3d 812, 353 P.3d 741 (citation omitted). The Court has considered all the challenged provisions, including those discussed above. Many of the challenges are based on a misreading of the Agreement, *see* discussion *supra*; and others have not been shown to be relevant here. *See* *id.* at 921, 190 Cal.Rptr.3d 812, 353 P.3d 741 (rejecting unconscionability claim challenging the cost of a filing fee in the absence of any record evidence that the plaintiff was unable to afford them). To set aside a contract, a party must do more than identify potential ambiguities and interpret them to favor the other party, who denies the favorable construction. Ambiguities in contracts are commonplace; unconscionability rarely follows – especially when the purportedly favored party denies the favor. Adopting the approach suggested by the Arbitration Plaintiffs conflicts with the federal policy favoring arbitration, *Epic Sys. Corp. v. Lewis*, —— U.S. ——, 138 S. Ct. 1612, 1621, 200 L.Ed.2d 889 (2018), and would entangle federal courts in the questionable business of scrutinizing every potentially ambiguous contract provision – even those not in controversy – for the purpose of defeating arbitration.

C. THE ARBITRABILITY OF COLLECTIVE CLAIMS

The claims brought by the Arbitration Plaintiffs are unquestionably covered by the Agreement. The Arbitration Plaintiffs agreed to resolve "any dispute arising out of or relating to [their] pre-employment ***855** application and/or employment with Charter or the termination of that relationship." (Fries Decl., ¶ 10, Ex. C, at § A.) They specifically agreed to individually arbitrate "wage and hour-based claims including claims for unpaid wages, commissions, or other compensation or penalties (including meal and rest break claims, claims for inaccurate wage statements, claims for reimbursement of expenses)," the precise type of claims brought here. (*Id.*, Ex. C, at § B(1).)

The Arbitration Plaintiffs argue, however, that the severability provision in the Agreement excludes collective claims. More specifically, they contend that the following exception in the severability provision has the effect of excluding such claims:

> The only exception to this severability provision is, should the dispute involve a representative, collective or class action claim, and the representative, collective, and class action waiver (Section D) is found to be invalid or unenforceable for any reason, then this Agreement (except for the parties' agreement to waive a jury trial) shall be null and void with respect to such representative, collective, and/or class claim only, and the dispute will not be arbitrable with respect to such claim(s).

(Fries Decl., ¶ 10, Ex. C., at § Q.)

The Arbitration Plaintiffs then argue that the waiver is indeed invalid for some reason – namely, it cannot lawfully be applied to PAGA and FCA claims, rendering all representative, collective, and class-action claims subject to arbitration. This argument is based on a misreading of the exception, which applies when the waiver "is found to be invalid or unenforceable" – a plain reference to a finding in a particular case based on particular facts. There are no PAGA or FCA claims being asserted in this case, and thus there is no occasion to make any finding about those hypothetical claims.

IV. CONCLUSION

For the foregoing reasons, Charter's Motion is **GRANTED**. The Arbitration Plaintiffs are **ORDERED** to arbitrate their claims on an individual basis as set forth in the Agreement. Because the Arbitration Plaintiffs' claims are subject to arbitration in their entirety, and the resolution of those claims will have no impact on the three remaining Plaintiffs, the Court **DISMISSES** the Arbitration Plaintiffs from this action **without prejudice**.[4] *See* *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1073-74 (9th Cir. 2014) (citation omitted).

All Citations

497 F.Supp.3d 844

Footnotes

1 Ninth Circuit law appears to support the validity of the Agreement, *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (failure to exercise opt out within 30-day period resulted in consent to arbitration agreement), and even recognizes that an employer may unilaterally implement an arbitration agreement for an at-will employee under California law, *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014). (*See* Fries Decl., ¶ 10, Ex. C at § O (noting the Agreement's application to at-will employees).) But the Court need not reach that issue because it has not been raised. *Stichting Pensioenfonds ABP v. Countrywide Fin.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (failure to oppose "constitutes waiver or abandonment").

2 *Castorena v. Charter Comms.*, No. 2:18-cv-07981, 2018 WL 10806903 (C.D. Cal. Dec. 14, 2018) (rejecting unconscionability challenge to the Charter Agreement); *Esquivel v. Charter Comms.*, No. 18-7304, 2018 WL 10806904 (C.D. Cal. Dec. 6, 2018) (same); *Harper v. Charter Comms.*, No. 2:19-cv-01749, 2019 WL 6918280 (E.D. Cal. Dec. 19, 2019) (same); *Prizler v. Charter Comms.*, No. 3:18-cv-1724, 2019 WL 2269974 (S.D. Cal. May 28, 2019) (same); *Moorman v. Charter Comms.*, No. 18-820, 2019 WL 1930116 (W.D. Wis. May 1, 2019) (same).

3 At the hearing, the Arbitration Plaintiffs argued that the Agreement is unconscionable under *Armendariz*, 24 Cal. 4th at 120, 99 Cal.Rptr.2d 745, 6 P.3d 669, because they would be required to arbitrate a wrongful termination claim arising out of an alleged theft of trade secrets while Charter could pursue its corresponding trade secrets claim against them in court. This argument overlooks the context in which the court in *Armendariz* condemned such lack of mutuality – namely, when "imposed in an adhesive context." *Id.* The arbitration agreement here is no adhesion contract.

4 At the hearing, the Arbitration Plaintiffs agreed with Charter that the proper course is dismissal if they are required to arbitrate their claims.

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EXHIBIT 17: PETER W. ANDERSON, JR. V. CHARTER COMMUNICATIONS, INC., ET AL., 3:20-CV-5-CRS, 2020 WL 3977664 (U.S. DIST. CT., WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE), JULY 13, 2020

2020 WL 3977664
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
at Louisville.

Peter W. ANDERSON, Jr., Plaintiff
v.
CHARTER COMMUNICATIONS and Christopher Cornett, Defendants

CIVIL ACTION NO. 3:20-CV-5-CRS
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Signed 07/13/2020
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MEMORANDUM OPINION

Charles R. Simpson III, Senior Judge

***1** This matter is before the Court on Defendant's motion to dismiss and compel arbitration or, in the alternative, to stay proceedings pending arbitration. DN 5. Plaintiff filed a response. DN 15. Defendant filed a reply wherein it also requested attorney's fees and costs. DN 17. This matter is now ripe for adjudication. For the following reasons, Defendant's motion to dismiss and compel arbitration will be granted, and Defendant's request for attorney's fees and costs will be denied.

I. Background

Defendant Charter Communications ("Defendant" or "Charter") is a national telecommunications company that provides telephone, internet, and cable services. DN 5-1 at 2. Charter employed Plaintiff Peter Anderson ("Plaintiff" or "Anderson") from sometime in late 2001 or early 2002 [1] until December 20, 2018. DN 1 at 3. On December 2, 2019, Anderson filed 14-count complaint against Defendant in Jefferson Circuit Court, Kentucky for events related to his termination. DN 1-2.

In October, 2017, Charter implemented an employee Arbitration Agreement through a program called Solution Channel, which it provided to all active, non-union employees. DN 5-2 at 1. Charter described Solution Channel to its employees as "a program that allows you and the company to efficiently resolve covered employment-related legal disputes through binding arbitration." *Id.* at 6. Charter's Executive Vice President of Human Resources, Paul Marchand, sent the Solution Channel Announcement to employees' company email accounts. *Id.* at 2. The Solution Channel Announcement stated:

> By participating in Solution Channel, you and Charter both waive the right to initiate or participate in court litigation (including class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim. More detailed information about Solution Channel is located on Panorama. Unless you opt out of participating in Solution Channel within the next 30 days, you will be enrolled. Instructions for opting out of Solution Channel are also located on Panorama.

DN 5-2 at 6. The Solution Channel Announcement included a blue hyperlink to the Solution Channel web page located on Panorama, Charter's intranet site that is accessible to all employees. *Id.* at 6.

The Solution Channel web page provided information regarding the Solution Channel arbitration program and contained links to the Arbitration Agreement and Program Guidelines. DN 5-2 at 8. Charter's Vice President of HR Technology, John Fries, affies that the Solution Channel web page also provided instructions for opting out of the Solution Channel arbitration program as well as a link to a web page where employees could opt out of the program. *Id.* at 2–3. Fries states that employees who followed the link were presented with the following notice: "I ALSO UNDERSTAND THAT IF I DO NOT OPT OUT, I AM SPECIFICALLY CONSENTING TO PARTICIPATION IN SOLUTION CHANNEL." *Id.* at 3; DN 5-2 at 38 (emphasis in original). Charter enrolled employees who did not opt out of Solution Channel on or before November 5, 2017. *Id.* Charter states (and Plaintiff does not contend otherwise) that Anderson did not opt out of the Solution Channel arbitration program. *Id.* at 4.

II. Legal standard

***2** Charter moves the Court to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), which provides that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Section 2 of the FAA states that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration ... [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23–24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Although federal law governs the arbitrability of disputes, state law principles resolve issues related to the formation of contracts. *Glazer v. Lehman Bros.*, 394 F.3d 444, 451 (6th Cir. 2005).

"[D]istrict courts in Kentucky evaluate a motion to compel arbitration as one for summary judgment under Fed. R. Civ. P. 56(c)." *Wilson v. CPB Foods, LLC*, No. 3:18-CV-014-CHB, 2018 WL 6528463, at *2 (W.D. Ky. Dec. 12, 2018) (citations omitted). In order to defeat a motion to compel arbitration, the plaintiff bears the burden of "show[ing] a genuine [dispute] of material fact as to the validity of the agreement to arbitrate." *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002). This "showing mirrors that required to withstand summary judgment in a civil suit." *Id.*

Before compelling an unwilling party to arbitrate, courts must ordinarily "engage in a limited review to determine whether ... a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Javitch v. First Union Sec., Inc.* 315 F.3d 619, 624 (6th Cir. 2003). However, "[w]here the parties have clearly and unmistakably agreed to arbitrate arbitrability, a court's role is narrowed from deciding whether there is an applicable arbitration agreement to only deciding whether there is a valid delegation clause." *Stumbo, Inc. v. Data*, No. 1:19-CV-00168-

GNS, 2020 WL 1542342, at *4, 2020 U.S. Dist. LEXIS 56369, at *11 (W.D. Ky. Mar. 31, 2020) (citing *Rent-A-Ctr.*, 561 U.S. at 68, 130 S.Ct. 2772).

III. Discussion

Defendant urges this court to dismiss Anderson's suit and compel arbitration because a valid arbitration agreement exists between the parties and all matters in dispute are within the scope of that agreement. DN 5-1 at 5–12. Plaintiff responds that the arbitration agreement is invalid and that, even if the agreement itself were valid, the dispute falls outside the scope of the agreement by the agreement's own terms. DN 15. Because the parties clearly and unmistakably agreed to arbitrate Plaintiff's claims, the Court finds that Anderson's objections are for the arbiter, not the Court, to decide. Accordingly, Plaintiff's claims will be dismissed.

Parties to a contract may agree to arbitrate "gateway" questions of arbitrability. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (noting that this "reflects the principle that arbitration is a matter of contract"). A challenge to the "validity of the agreement to arbitrate" (or, in other words, a challenge to an arbitration clause within a underlying employment contract) is generally for a court to resolve, whereas a challenge to "the contract as a whole" is generally for an arbitrator to decide. *Id.* at 86, 130 S.Ct. 2772. When "the underlying contract is itself an arbitration agreement," challenges to the validity of the contract as a whole are for the arbitrator to decide. *Id.*

Here, the underlying contract is itself an arbitration agreement, not simply an arbitration clause within a broader employment contract. Therefore, if the parties consented to the Agreement, any challenge to its validity are for the arbitrator to decide. Plaintiff does not dispute that he failed to opt out of the Solution Channel arbitration program, nor that such failure constituted consent. Accordingly, the Court finds that Anderson is bound by the Arbitration Agreement's terms.

***3** Under the Arbitration Agreement, Plaintiff and Charter: "mutually agree[d] that, as a condition of ... [Plaintiff's] employment with Charter, any dispute arising out of or relating to [Plaintiff's] ... employment with Charter or the termination of that relationship, ... [would] be resolved through binding arbitration." DN 5-2 at 9. The Agreement also states the parties agreed arbitration hearings would be "conducted pursuant to the Solution Channel Program Guidelines and the arbitrator shall have the sole authority to determine whether a particular claim or controversy is arbitrable." DN 15-1 at 5. By Plaintiff's own admission, "the Arbitration Agreement delegates the determination of interpretation, applicability, enforceability, or formation of the arbitration agreement to the arbitrator." DN 15 at 2.

Plaintiff now argues the entire arbitration agreement is invalid on three grounds: (1) "it is unconscionable because the Arbitration Agreement delegates the determination of interpretation, applicability, enforceability, or formation of the arbitration agreement to the arbitrator," (2) there was no new consideration for the Arbitration Agreement, [2] and (3) "it is unconscionable because the Arbitration Agreement places such limitations upon discovery that Plaintiff's rights to due process, equal protection and to a jury trial are violated." DN 15 at 2. Because Plaintiff consented to delegate questions of arbitrability to the arbiter and Plaintiff now challenges the validity of the entire agreement, Plaintiff's objections are for the arbiter, not this Court, to decide. *Rent-A-Center*, 561 U.S. at 72, 130 S.Ct. 2772 ("leaving any challenge to the validity of the Agreement as a whole for the arbitrator").

Plaintiff also argues his claims are excluded by the Arbitration Agreement's own terms:

> Section C (9) of the agreement that excludes claims older than the statute of limitations applicable to such claims. The statute of limitations in Kentucky for this type of claim is one-year. Therefore, pursuant to the Charter Arbitration Agreement, arbitration is not applicable to this case.

DN 15 at 3. Plaintiff's argument is without merit. Should the arbitrator determine that the Agreement is valid, the Agreement delegates to the arbitrator "the determination of interpretation, applicability, [and] enforceability" of its terms. DN 15 at 2. Therefore, the parties have delegated to the arbitrator the authority to determine whether Plaintiff's claims fall within the scope of the Arbitration Agreement. *See* *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 765, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) (finding that "the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator.").

Having determined that Plaintiff's objections are not properly before this Court, the Court must now determine whether the instant action should be dismissed entirely or stayed pending arbitration. Plaintiff argues that the "Federal Arbitration Act requires the lawsuit to be stayed pending arbitration." DN 15 at 2. To support his position, Plaintiff points to cases from the First, Eighth, Ninth, and Tenth Circuits. DN 15 at 4. Plaintiff's argument is without merit. The Sixth Circuit, by whose precedent this Court is bound, has repeatedly upheld the dismissal of "litigation in which all claims are referred to arbitration." *Hensel v. Cargill, Inc.*, 198 F.3d 245, at *4 (6th Cir. 1999) (table); *see* *Ozormoor v. T-Mobile USA, Inc.*, 354 F. App'x 972, 975 (6th Cir. 2009) (upholding dismissal of case where all claims were referred to arbitration); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (same). As this Court will refer all Plaintiff's claims to arbitration, dismissal is appropriate.

***4** Finally, Plaintiff argues "This case should not be dismissed on the ground the Plaintiff's theories of recovery have a one-year statute of limitations and the end result of a dismissal would be a dismissal of the entire case." DN 15 at 1. While Plaintiff's statement may be true, this provides no basis for the Court to undermine the parties' intent as demonstrated through the Arbitration Agreement. Anderson and Charter intended to mutually bind themselves to arbitrate disputes arising out of Anderson's employment. The Arbitration Agreement states that "[i]f an individual or entity files a claim beyond [the statute of limitations], the claim will not be covered by Solution Channel and the claimant will be notified that the claim has been closed." DN 5-2 at 36. Despite such language, Plaintiff chose to file the instant lawsuit instead of bringing his claim through Solution Channel. Plaintiff cannot now use his intentional breach as a basis for the Court to decline enforcement of the parties' Agreement. To do so would render the binding power of the Arbitration Agreement void because any party seeking to circumvent it could do so by filing a lawsuit shortly before the expiration of the statute of limitations. Thus, Plaintiff's argument provides no bar to the dismissal of this action.

In its reply, Charter requests attorney's fees and costs associated with the instant action. DN 17 at 11. Attorney fees are ordinarily only awarded to the prevailing party if authorized by "specific and explicit provisions," *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), or where parties maintain "a meritless claim or defense ... in bad faith." *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1230 (6th Cir. 1984). The FAA does not contain any provisions providing attorney fees to prevailing parties. *Menke v. Monchecourt*, 17 F.3d 1007, 1009 (7th Cir. 1994). Therefore, the award of attorney's fees and costs is only appropriate if Anderson has maintained his claims and defenses in bad faith.

The Court adopts the following analysis by the Western District of Michigan:

> The Court understands Defendant's frustration for being forced to file a Motion to Dismiss or Compel Arbitration given that Plaintiff--on his own free will--entered into the arbitration agreement with Defendant. Plaintiff's refusal to arbitrate his claims teeters on the brink of frivolousness and wastes not only the time of defense counsel, but also valuable judicial resources. Plaintiff has thrown into the hodgepodge almost every argument known to the Court for invalidation of an arbitration agreement. To reasonable attorneys, it should have been obvious most of these arguments presented no tenable issue. Nevertheless, attorney fees are not advisable in this instance. Therefore, Defendant's request for attorney fees and costs will be denied. This holding does not seek to prevent Defendant from recovering attorney fees in arbitration, if such fees are available.

Moore v. Ferrellgas, 533 F. Supp. 2d 740, 752–53 (W.D. Mich. 2008). While Plaintiff's counsel should have known that bringing the instant action outside of arbitration would be fruitless, particularly in light of the notice sent from Defendant's counsel stating as much on December 17, 2019, the Court does not find that Plaintiff's actions rise to the level of "bad faith." DN 5-3 at 1. Accordingly, Charter's request for attorney's fees and costs will be denied.

IV. Conclusion

For the reasons stated above, the Court will grant Defendant's motion to dismiss and compel arbitration. DN 5. A separate order will be entered this date in accordance with this memorandum opinion.

All Citations

Slip Copy, 2020 WL 3977664

Footnotes

1 Charter alleges Anderson began working for the company on March 1, 2002, but Plaintiff alleges he began work in July, 2001. DN 1-2 at 2. The exact date is irrelevant for the purposes of the instant motion.

2 To the extent that Plaintiff alleges a lack of consideration means the parties never executed a valid contract, his arguments are without merit. The parties' mutual agreement to arbitrate disputes arising out of Anderson's employment relationship constitutes adequate consideration. *See* *Energy Homes, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013)("an arbitration clause requiring both parties to submit equally to arbitration constitutes adequate consideration.")(quoting *Kruse v. AFLAC Intern., Inc.*, 458 F. Supp. 2d 375, 385 (E.D. Ky. 2006)).

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EXHIBIT 18: SCOTT P. COLLINS V. CHARTER COMMUNICATIONS, LLC, 1:19 CV 2774 (U.S. DIST. CT., N.D. OF OHIO, EASTERN DIVISION), JUNE 18, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SCOTT P. COLLINS,	)	Case No.: 1:19 CV 2774
	)	
Plaintiff	)	JUDGE SOLOMON OLIVER, JR.
	)	
v.	)	
	)	
CHARTER COMMUNICATIONS, LLC,	)	
	)	
Defendant	)	ORDER

Currently pending before the court in the above-captioned case is Defendant Charter Communications, LLC's ("Charter" or "Defendant") Motion to Compel Arbitration and Dismiss or, in the Alternative, to Stay Proceedings Pending Arbitration ("Motion"). (ECF No. 5.) For the following reasons, the court grants Defendant's Motion to Compel Arbitration and dismisses this action at Plaintiff's cost; however, Defendant's request for attorney's fees is denied.

I. BACKGROUND

A. Factual Background

This case arises from Charter's termination of Plaintiff Scott Collins ("Plaintiff" or "Collins") in May 2019. (*See* Mem. in Supp. at PageID #37, ECF No. 6; *see also* Compl. ¶¶ 3–34, ECF No. 1-1.) Charter is a telecommunications company that provides internet, cable, and telephone services to business and residential customers. (Compl. ¶ 1, ECF No. 1-1.) Collins was employed by Charter, through its operations as Time-Warner Cable and Spectrum, as a Director of Sales for the region

including Northeast Ohio until his termination on May 11, 2019. (*Id.* ¶¶ 2, 4.) In his Complaint, Collins alleges state law claims for sex discrimination (Claim I) and age discrimination (Claim III), as well as a federal claim for unlawful retaliation in violation of the Family and Medical Leave Act ("FMLA") (Claim II). (*Id.* ¶¶ 3–34.) Charter has not answered Plaintiff's Complaint. Instead, Charter moves the court to compel arbitration in accordance with the parties' Mutual Arbitration Agreement. (*See* Mot., ECF No. 5.)

On October 6, 2017, Charter instituted its Mutual Arbitration Agreement through a program called Solution Channel. (Mem. in Supp. at PageID #39, ECF No. 6; Fries Decl. ¶ 5, ECF No. 6-2.) Charter announced the program in an email sent to all active, non-union employees with the subject line "Charter's Code of Conduct and Employee Handbook." (Mem. in Supp. at PageID #39, ECF No. 6; Fries Decl. ¶¶ 5–6, ECF No. 6-2; Ex. E, Fries Decl. at PageID #117, ECF No. 6-2.) In pertinent part, the email stated:

> Even with clearly articulated standards, guidelines and policies, we understand that workplace conflicts arise from time to time. . . . [W]e also recognize that some employment-based disputes may be better addressed through a more structured and formal resolution process . . . . Charter has launched *Solution Channel*, a program that allows you and the company to efficiently resolve covered employment-related legal disputes through binding arbitration.
>
> By participating in *Solution Channel*, you and Charter both waive the right to initiate or participate in court litigation (including class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim. More detailed information about *Solution Channel* is located on Panorama.[1] Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled. Instructions for opting out of Solution Channel are also located on Panorama.

---

[1] Panorama is Charter's company-wide intranet site. (Fries Decl. ¶ 9, ECF No. 6-2.)

(Ex. E, Fries Decl. at PageID #118, ECF No. 6-2.) The email included a link to Solution Channel, which contained detailed information about the Mutual Arbitration Agreement and the process employees could use to opt out. (Fries Decl. ¶¶ 9–14, ECF No. 6-2.)

The Mutual Arbitration Agreement on Solution Channel stated:

> PLEASE READ THE FOLLOWING MUTUAL ARBITRATION AGREEMENT ("AGREEMENT") CAREFULLY. IF YOU ACCEPT THE TERMS OF THE AGREEMENT (WHETHER YOU ARE AN APPLICANT, CURRENT EMPLOYEE, OR FORMER EMPLOYEE), YOU ARE AGREEING TO SUBMIT ANY COVERED EMPLOYMENT-RELATED DISPUTE BETWEEN YOU AND CHARTER COMMUNICATIONS (CHARTER) TO BINDING ARBITRATION. YOU ARE ALSO AGREEING TO WAIVE ANY RIGHT TO LITIGATE THE DISPUTE IN A COURT AND/OR HAVE THE DISPUTE DECIDED BY A JURY.
>
> MUTUAL ARBITRATION AGREEMENT
>
> A. **Arbitration Requirement.** You and Charter mutually agree that . . . any dispute arising out of or relating to your preemployment application and/or employment with Charter or the termination of that relationship . . . must be resolved through binding arbitration by a private and neutral arbitrator, to be jointly chosen by you and Charter.
>
> B. **Covered Claims.** You and Charter mutually agree that the following disputes, claims, and controversies (collectively referred to as "covered claims") will be submitted to arbitration in accordance with this Agreement:
>
> 1. all disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which you or Charter have an alleged cause of action related to pre-employment, employment, employment termination or post-employment-related claims, whether the claims are denominated as tort, contract, common law, or statutory claims (whether under local, state or federal law), including without limitation claims for: . . . unlawful discrimination or harassment (including such claims based upon race, color, national origin, sex,

> pregnancy, age, religion, sexual orientation, disability, and any other prohibited grounds), claims for unlawful retaliation, claims arising under the Family Medical Leave Act, Americans with Disabilities Act or similar state laws, including unlawful denial of or interference with a leave of absence, . . . [and]
>
> 3. all disputes related to the arbitrability of any claim or controversy.

(Ex. C, Fries Decl. at PageID #109, ECF No. 6-2.)

Solution Channel also explained how employees could opt out:

> **Opting Out of Solution Channel**
>
> If you do not opt out of Solution Channel within the designated time, you will be automatically enrolled in Solution Channel and considered to have consented to the terms of the Mutual Arbitration Agreement at that time. To opt-out of Solution Channel, please click here.

(Fries Decl. ¶ 11, ECF No. 6-2.) After clicking the link, employees needed to check the box next to the phrase, "I want to opt out of Solution Channel," enter their name, and click "SAVE." (*Id.* ¶¶ 10–15.) The opt-out page contained the following notice:

> After having carefully considered its components, I am opting out of Solution Channel. By opting out, I understand and agree that I am not required to participate in Solution Channel. . . .
>
> I ALSO UNDERSTAND THAT IF I DO NOT OPT OUT, I AM SPECIFICALLY CONSENTING TO PARTICIPATION IN SOLUTION CHANNEL.

(Ex. D, Fries Decl. at PageID #115, ECF No. 6-2.) Thus, employees who did not opt out of Solution Channel before November 5, 2017, were automatically enrolled in the program and subject to the terms of the Mutual Arbitration Agreement. (Fries Decl. ¶¶ 16–17, ECF No. 6-2.)

Although Collins did not opt out of Solution Channel, (*id.* ¶¶ 20–21; Mem. in Supp. at

PageID #40, ECF No. 6), he argues that he is not subject to the Mutual Arbitration Agreement (Opp'n at PageID #129–30, ECF No. 8). Collins contends he never received (and therefore did not access) the email regarding Solution Channel and the Mutual Arbitration Agreement, (*id.*), despite Charter's records indicating that he opened the email twice between October 6, 2017, and November 5, 2017, (Mem. in Supp. at PageID #46, ECF No. 6; Vasey Decl. ¶ 4, ECF No. 6-4).

B. Procedural History

Plaintiff sued Defendant in state court on October 23, 2019. (*See* Compl., ECF No. 1-1.) On November 25, 2019, Defendant removed the case to this court pursuant to 28 U.S.C. §§ 1331, 1441, and 1446. (Notice of Removal at PageID #2, ECF No. 1.) Defendant then filed the instant Motion on December 2, 2019, asking the court to compel arbitration and dismiss or, alternatively, stay this action pending the arbitration proceedings. (Mem. in Supp. at PageID #37, ECF No. 6.) Defendant also requests an award for attorney's fees and costs it incurred with respect to this Motion. (*Id.* at PageID #49.) Plaintiff filed a Response in Opposition on January 2, 2020, (ECF No. 8), and Defendant filed a Reply on January 16, 2020, (ECF No. 10).

II. STANDARD OF REVIEW

The Federal Arbitration Act ("FAA") provides that "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may seek an order compelling arbitration from any district court, "which, save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Federal law requires that courts "rigorously enforce agreements to arbitrate," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal citation omitted), and examine contract language in light of the strong federal policy favoring

arbitration, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985); *Arnold v. Arnold*, 920 F.2d 1269, 1281 (6th Cir. 1990); *see also Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000) ("[A]ny ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration.").

When considering whether to compel arbitration, the district court must determine whether the parties agreed to arbitrate the dispute at issue. If the district court is satisfied that the agreement to arbitrate is not "in issue," it must compel the parties to arbitrate. *Great Earth Cos. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002). However, "if the validity of the agreement to arbitrate is 'in issue,' the court must proceed to a trial to resolve the question." *Id.*; *see also* 9 U.S.C. § 4. To place the arbitration agreement at issue, the party opposing arbitration must show a genuine issue of material fact as to the agreement's validity. *Great Earth*, 288 F.3d at 889. This standard mirrors the showing needed to withstand summary judgment in a civil suit. *Id.* Also like summary judgment, the court must view facts and draw inferences in the light most favorable to the non-moving party. *Id.*

The Sixth Circuit has articulated a four-part test to assess motions to compel arbitration:

> [F]irst, [the court] must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be non-arbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

Stout, 228 F.3d at 714.

III. LAW AND ANALYSIS

A. Motion to Compel Arbitration

Because the FAA applies, the court must decide whether a valid agreement to arbitrate exists

between the parties and whether the claims in Plaintiff's Complaint fall within the scope of that agreement. The court addresses each question in turn.

1. Agreement to Arbitrate

In this Circuit, courts "review the enforceability of an arbitration agreement according to the applicable state law of contract formation." *Morrison v. Circuit City Stores*, 317 F.3d 646, 666 (6th Cir. 2003). Under Ohio law, which governs here, arbitration agreements must meet the essential elements of a contract—offer, acceptance, consideration, and a manifestation of mutual assent. *Williams v. Ormsby*, 966 N.E.2d 255, 258 (Ohio 2012).

Charter asserts that these elements are met. (Mem. in Supp. at PageID #44–48, ECF No. 6.) First, Charter argues that it offered, via its October 6, 2017, email to employees, to enter into a mutual agreement to arbitrate employment-related claims and that Collins accepted the offer by failing to opt out of Solution Channel. (*Id.* at PageID #45–46.) Charter maintains that it gave Collins (1) "ample notice of his right to opt out," (2) "detailed instructions on how to opt out," (3) "a reasonable deadline by which to opt out," and (4) notice regarding the consequences of failing to do so. (*Id.* at PageID #45.) As Charter points out, this court has compelled arbitration in cases with similar facts. *See Uszak v. AT&T*, No. 1:14-CV-2800, 2015 WL 13037500, at *2 (N.D. Ohio, Oct. 6, 2015); *Rupert v. Macy's Inc.*, No. 1:09-CV-2763, 2010 WL 2232305, at *8 (N.D. Ohio June 2, 2010). Second, Charter contends that its mutual promise with employees to arbitrate employment-related disputes constitutes consideration for the Mutual Arbitration Agreement. (Mem. in Supp. at PageID #46–47, ECF No. 6); *see also Dantz v. American Apple Group, LLC*, 123 F. App'x 702, 708 (6th Cir. 2005) (holding that mutual promise to arbitrate employment-related disputes constitutes consideration under Ohio law).

However, Collins counters that (1) he did not receive the email and therefore did not assent to the terms of the Mutual Arbitration Agreement and, in any event, (2) his silence cannot constitute acceptance. (Opp'n at PageID #134–37, ECF No. 8.) In support, Plaintiff quibbles with the dates that appear on Defendant's exhibits. Specifically, Plaintiff claims that he could not have agreed to Solution Channel's terms because they were not promulgated until April 30, 2018, as indicated by the date stamp on the bottom of each page of Exhibit B. (*See id.* at PageID #131; Ex. B, Fries Decl. at PageID #106–07, ECF No. 6-2.) Similarly, Plaintiff challenges the November 5, 2017, opt-out deadline because the date stamp on Exhibit D indicates that the web page was updated on January 11, 2018. (*See* Opp'n at PageID #131, ECF No. 8; Ex. D, Fries Decl. at PageID #115, ECF No.6-2.) Plaintiff also argues that the wording of Solution Channel and the Mutual Arbitration Agreement show that employees are bound only if they gave affirmative acceptance. (Opp'n at PageID #134–37, ECF No. 8; *see also* Ex. E, Fries Decl. at PageID #118, ECF No. 6-2 (explaining employees agree to be bound "[b]y participating in Solution Channel").)

After reviewing these Exhibits, the court finds Plaintiff's date-related arguments unpersuasive. The April 30, 2018 date, at the bottom of Exhibit B appears to be an automatically generated timestamp reflecting when the document was printed or downloaded. There is nothing to suggest that this is the date on which Charter published Solution Channel's terms. Likewise, the court finds that there is nothing to suggest the January 2018 timestamp on Exhibit D reflects the deadline Charter set for Collins to opt out.

The court also finds unavailing Collins's argument that the Mutual Arbitration Agreement requires affirmative assent. Plaintiff correctly notes the general rule of contract formation that silence does not constitute acceptance; but that does not mean silence *never* conveys acceptance. *See*

Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co., 375 N.E.2d 410, 414 (Ohio 1978) ("Although in the usual situation an offeror cannot cause the silence of the offeree to constitute an acceptance, where the relation between the parties justifies the offeror's expectation of a reply, such silence may constitute an acceptance on the part of the offeree."). Here, the parties had an employer-employee relationship. Charter employed Collins when Solution Channel was launched, and Charter communicated information about Solution Channel to Collins's company-provided email address. The court finds that Charter is justified in expecting that its employees, such as Collins, read official email correspondence from the company and promptly respond as required.

Despite Plaintiff's arguments to the contrary, the record here demonstrates the formation of a valid arbitration agreement. Charter provides a copy of the email it sent to Collins on October 6, 2017, (Ex. E, Fries Decl, at PageID #117–18, ECF No. 6-2), as well as an affidavit from its Senior Director of Records Management and eDiscovery, which indicates that Collins opened the email twice before the November 5, 2017, opt-out deadline, (Vasey Decl. ¶ 4, ECF No. 6-4). Plaintiff does not dispute the authenticity of Charter's records or assert that the email was sent to the wrong address. Nor does he argue that anyone else had access to his account during the relevant time period. Instead, Plaintiff merely offers his naked assertion that he did not receive the email. This claim, without more, is insufficient. *See Charles v. Air Enterprises, LLC*, 244 F. Supp. 3d 657, 661 (N.D. Ohio 2017) ("Without more, self-serving affidavits are not enough to create issue of fact sufficient to survive summary judgment.") Indeed, Plaintiff's representation that he never received the email is strongly undercut by his acknowledgment that he "receive[d] approximately 500 emails each week," he only "devote[d] his time and attention to reviewing" some of them, and "[h]e frequently deleted emails which came from individuals other than his senior leaders or teammates."

(Opp'n at PageID #130, ECF No. 8.) Thus, while Collins may have ignored the email detailing Solution Center and describing the method and deadline for opting out, the court finds based on the record that Collins did in fact receive it. Accordingly, the court concludes that Collins's failure to opt out constitutes acceptance of the Mutual Arbitration Agreement.

Finally, although not binding, the court also notes that other courts have consistently enforced Charter's Mutual Arbitration Agreement under virtually identical circumstances. (*See* Ex. 1 at PageID #88–95, ECF No. 6-1; Reply at PageID #170–71, ECF No. 10); *see also Osborne v. Charter Commc'ns, Inc.*, No. 4:18-CV-1801, 2019 WL 2161575, at *3 (E.D. Mo. May 17, 2019); *Moorman v. Charter Commc'ns, Inc.*, No. 18-CV-820, 2019 WL 1930116, at *2 (W.D. Wis. May 1, 2019); *Prizler v. Charter Commc'ns, LLC*, No. 3:18-CV-1724, 2019 WL 2269974, at *3 (S.D. Cal. May 28, 2019); *Krohn v. Spectrum Gulf Coast, LLC*, No. 3:18-CV-2722, 2019 WL 4572833, at *3 (N.D. Tex. Sept. 19, 2019); *Harper v. Charter Commc'ns, LLC*, No. 2:19-CV-1749, 2019 WL 6918280, at *4 (E.D. Cal. Dec. 18, 2019).

Consequently, the court finds the Mutual Arbitration Agreement valid and enforceable.

2. Scope of Arbitration Agreement

The Sixth Circuit held in *Solvay Pharms. v. Duramed Pharms., Inc.*, 442 F.3d 471 (6th Cir. 2006), that:

> [w]hen faced with a broad arbitration clause, such as one covering any dispute arising out of an agreement, a court should follow the presumption of arbitration and resolve doubts in favor of arbitration. . . . Indeed, in such a case, only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators.

Id. at 482 (cleaned up); *see also Simon v. Pfizer, Inc.,* 398 F.3d 765, 773 n.12 (6th Cir. 2005)

("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.") (citations omitted). Here, there is no doubt—and, indeed, neither party disputes—that the broad language of the Mutual Arbitration Agreement encompasses all of Plaintiff's claims.

3. FMLA Claims

If the plaintiff asserts federal statutory claims, the court "must consider whether Congress intended those claims to be non-arbitrable." *Stout*, 228 F.3d at 714; *see also Rose v. Volvo Const. Equip. N. Am., Inc.*, No. 1:05-CV-168, 2007 WL 846123, *13 (N.D. Ohio Mar. 20, 2007). This court has recognized that "[e]mployment-related statutory claims, such as FMLA claims, may be validly subject to an arbitration agreement enforceable under the FAA." *Van Hauter v. First Watch Restaurants, Inc.*, No. 5:19-CV-1827, 2019 WL 4918685, at *3 (N.D. Ohio Oct. 4, 2019) (quotation omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Because "there is no provision in the FMLA suggesting that agreements to arbitrate are unenforceable nor is there legislative history to support that contention," *Van Hauter*, 2019 WL 4918685, at *3 (quotation omitted), Plaintiff's FMLA claim is arbitrable.

4. Whether to Stay or Dismiss

The court concludes that this matter should be dismissed because all of Plaintiff's claims must be submitted to arbitration. *See Green v. Ameritech Corp.*, 200 F.3d 967, 973 (6th Cir. 2000) ("The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration."). Staying the action and retaining jurisdiction serves no purpose because any post-arbitration remedy sought by the parties would entail noting more than a limited review of the arbitrator's award, and not "renewed consideration and adjudication of the merits of the controversy." *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). Therefore, the court dismisses this action.

B. Attorney's Fees and Costs

Charter also seeks costs, pursuant to Federal Rule of Civil Procedure 54(d)(1), and attorney's fees, pursuant to 28 U.S.C. § 1927. Charter argues that Collins's refusal to arbitrate his claims, even after Charter reminded him of his obligation to do so, constitutes vexatious litigation. (Mem. in Supp. at PageID #49, ECF No. 6.) Collins counters that his suit is not vexatious because he raises a legitimate challenge regarding the enforceability of the Mutual Arbitration Agreement. (Opp'n at PageID #137–38, ECF No. 8.)

1. Costs

Federal Rule of Civil Procedure 54(d)(1) provides: "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." A party "'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Willacy v. Marotta*, 683 F. App'x 468, 476 (6th Cir. 2017) (internal citations omitted). However, the decision to award costs lies within the sound discretion of the district court. *Marx v. General Revenue Corp.*, 568 U.S. 371, 377 (2013).

Here, the court agrees that Charter is entitled to costs because it clearly prevailed. *See Scarpitti v. Charter Commc'ns, Inc.*, No. 18-CV-2133, 2018 WL 10806905, at *3 (D. Colo. Dec. 7, 2018) (granting costs because defendant "indisputably" prevailed when court granted motion to compel arbitration). However, Charter is entitled to recover only costs that are reasonable and necessary. *See Hartford Fin. Servs. Grp., Inc. v. Cleveland Pub. Library*, No. 1:99-CV-1701, 2007 WL 963320, at *1 (N.D. Ohio Mar. 28, 2007). At this time, Charter has not submitted an accounting or explanation of its costs, which leaves the court unable to determine how much to award.

2. Attorney's Fees

Under 28 U.S.C. § 1927, "[a]ny attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." In the Sixth Circuit, § 1927 sanctions are appropriate only when the offending conduct "amounts to more than simple inadvertence or negligence that has frustrated the court." *Mys v. Mich. Dep't of State Police*, 736 F. App'x 116, 117 (6th Cir. 2018) (cleaned up). Section 1927's purpose is to "deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Id.* Thus, the Sixth Circuit has approved attorney's fees awards "when an attorney knows or should know that a claim pursued is frivolous." *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986). Ultimately, however, the decision to award fees is discretionary. *See Basista Holdings, LLC v. Ellsworth Twp.*, 710 F. App'x 698, 699 (6th Cir. 2018).

Upon careful review of the relevant law and the facts of this case, the court declines to award attorney's fees. While the argument Collins raises—that he is not bound by the terms of the Mutual Arbitration Agreement—clearly is incorrect, the court sees no conduct here that is sufficiently vexatious or unreasonable as to justify an award of fees.

IV. CONCLUSION

For the foregoing reasons, the court grants Defendant's Motion. (ECF No. 5.) The court hereby orders Plaintiff to submit his claims to arbitration, dismisses this action, and awards Defendant costs. However, Defendant's request for attorney's fees is denied.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

June 17, 2020

EXHIBIT 19: MARK LASSER V. CHARTER COMMUNICATIONS, INC., 19-CV-02045-RM-MEH, 2020 WL 1527333 (U.S. DIST. CT., D. COLORADO), MARCH 31, 2020

2020 WL 1527333
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Mark LASSER, Plaintiff,
v.
CHARTER COMMUNICATIONS, INC., and Peter Brown, Defendants.

Civil Action No. 19-cv-02045-RM-MEH
|
Signed 03/31/2020

Attorneys and Law Firms

David J. Marcus, Jason Bryan Wesoky, Darling Milligan PC, Denver, CO, for Plaintiff.

Grace LaVance McGuire, Joshua B. Kirkpatrick, Littler Mendelson PC, Denver, CO, for Defendants.

ORDER

RAYMOND P. MOORE, United States District Judge

***1** This matter is before the Court on the following matters: (1) the Recommendation of United States Magistrate Judge (ECF No. 31) to grant Defendants' Motion to Compel Arbitration (ECF No. 11); and (2) the Recommendation of United States Magistrate Judge (ECF No. 30) to grant Defendant Peter Brown's Motion to Dismiss (ECF No. 10) for failure to exhaust administrative remedy and to deny without prejudice his request for attorney's fees and costs. Plaintiff has filed objections to both Recommendations, to which Defendants have filed responses. The matters are ripe for resolution. Upon consideration of the Recommendations and related filings, and the applicable law, and being otherwise fully advised, the Court finds and orders as follows.

I. BACKGROUND

Plaintiff is blind. He was formerly employed by Defendant Charter Communications, Inc. as its "Senior Director, Accessibility," tasked with improving Charter's accessibility for disabled customers and employees. On October 6, 2017, while employed by Charter, Plaintiff was sent, via email, notice of "Solution Channel" which "allows you [Plaintiff] and the company" to resolve covered employment-related legal disputes "through binding arbitration." (ECF No. 11-6, at. 6.) The email notified employees they would be enrolled in the legal dispute resolution program unless they opted out within 30 days, i.e. by November 5, 2017. The email stated in relevant part: "Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled. Instructions for opting out of *Solution Channel* are also located on Panorama." *Id.* (italics in original). Panorama is Charter's intranet site accessible to employees.

After his discharge from Charter, Plaintiff filed this lawsuit alleging seven claims related to his discharge. Defendants move to compel arbitration based on the Mutual Arbitration Agreement. Plaintiff resists, challenging whether he agreed to arbitrate his claims but not whether his claims fall within the scope of the arbitration agreement or whether there are other legal constraints to arbitration. Based on the record presented by Defendants of Plaintiff's ability to "read" and navigate emails during the 30-day opt-out period which included Plaintiff sending and responding to hundreds of work-related emails and reaching out to a Charter employee to assist with Charter's annual enrollment for health benefits, the Magistrate Judge found no genuine issue of material fact which prevented recommending granting Defendants' Motion to Compel. Plaintiff's objection followed.

Concurrent with recommending granting the Motion to Compel, the Magistrate Judge recommends granting Defendant Brown's Motion to Dismiss based on failure to exhaust administrative remedies. Because the Court agrees the parties are to arbitrate their dispute, the Court finds the Motion to Dismiss is moot and, accordingly, on that basis, declines to accept the recommendation as to this motion.

II. LEGAL STANDARD

A. Objections to Recommendation

***2** Pursuant to Fed. R. Civ. P. 72(b)(3), this Court reviews de novo any part of the magistrate judge's recommendation that is properly objected to. An objection is proper only if it is sufficiently specific "to focus the district court's attention on the factual and legal issues that are truly in dispute." *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996). "In the absence of a timely objection, the district court may review a magistrate's report under any standard it deems appropriate." *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991).

B. Motions to Compel Arbitration

"[A] motion to compel arbitration sets in motion a summary trial procedure." *BOSC, Inc. v. Bd. of Cty. Commissioners*, 853 F.3d 1165, 1176 (10th Cir. 2017). This procedure "is similar to summary judgment practice: the party moving to compel arbitration bears the initial burden of presenting evidence sufficient to demonstrate the existence of an enforceable agreement ...; if it does so, the burden shifts to the nonmoving party to raise a genuine dispute of material fact regarding the existence of an agreement." *Id.* at 1177 (internal quotation marks omitted). *See* *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1261 (10th Cir. 2012) ("framework is similar to summary judgment practice"). "[I]f material disputes of fact do exist, the FAA calls for a summary trial." *Id.* (internal quotation marks and citation omitted). In the Court's review, it "view[s] the facts in the light most favorable to the party opposing arbitration." *Id.* (quoting *Howard v. Ferrellgas Partners*, 748 F.3d 975, 978 (10th Cir. 2014)).

III. DISCUSSION

Plaintiff raises four bases in support of his objection. The Court examines these arguments below, although not in the order raised.

Dated and Signed Declaration. The Magistrate Judge concluded that Plaintiff failed to sign or date the declaration attached to his response brief, not realizing that a signed and dated declaration was subsequently filed. (ECF No. 15.) Such error, however, was harmless because the Magistrate Judge found that even if he did consider Plaintiff's declaration, he would still find Plaintiff failed to raise a genuine dispute of material fact. And, in this Order addressing Plaintiff's objection, the Court has considered Plaintiff's declaration and, as stated herein, also finds it insufficient to withstand the Motion to Compel.

Valid and Enforceable Agreement and the Case Law. Plaintiff's objection isn't that he didn't receive the opt-in email. (*See* Objection.)[1] Instead, he argues the Magistrate Judge erred because there are significant differences between conducting "[b]asic email tasks"[2] and navigating the Panorama intranet site in order to opt-out of the Solution Channel program. That, as to the latter, it was essentially "practically impossible"[3] to do without help, such as hardware and software like JAWS and Kurzweil. The Court is not persuaded.

***3** First, as Defendants argue, Plaintiff presents no evidence that he even attempted to opt-out of the Solution Channel but was unable to do so. And, further, that Plaintiff only needed to read the email to be informed of the arbitration agreement.

Next, the Magistrate Judge did not rely only on Plaintiff's receipt and responses to hundreds of work-related emails during the opt-out period to support his recommendation. On the contrary, the Magistrate Judge also relied on Defendants' undisputed showing that Charter provided Plaintiff a resource which he was fully aware of and used for assistance – Jen Bilger. Plaintiff does not dispute Ms. Bilger was a member of Charter's human resources department assigned to assist Plaintiff with navigating Charter's internal employee resources. And, on October 11, 2017, during the opt-out period, Plaintiff utilized this resource. On that date, Plaintiff received a lengthy Charter email which included information about enrollment in annual benefits and hyperlinks; Plaintiff thereafter emailed Ms. Bilger stating "Will probably want your help on this"; and Ms. Bilger replied "Ok. I will be back Tuesday and we will sync on a time to meet about this for open enrollment."[4] Plaintiff fails to dispute that he could have used this resource to assist him with the opt-out email and, inexplicably, fails to explain why he did not do so. On this record, the Court finds Plaintiff fails to raise a genuine dispute of material fact regarding the existence of a valid and enforceable Mutual Arbitration Agreement to which he is bound.

Plaintiff's challenge to the Magistrate Judge's reliance on *Martinez v. TCF Nat'l Bank*, No. 13-cv-03504-PAB, 2015 WL 854442 (D. Colo. Feb. 25, 2015) and *Scarpitti v. Charter Communications, Inc.*, No. 18-cv-02133-REB-MEH (D. Colo. Dec. 7, 2018) (ECF No. 15) fares no better. Plaintiff argues those cases are distinguishable and fail to show Defendants met their initial burden because those plaintiffs were either able to access the arbitration clause (Martinez) or failed to provide evidence they did not receive, open, or was unable to access the email (Scarpitti). But, Defendants provide evidence such facts do exist here:[5] Plaintiff received the opt-out email, had the ability to "read" emails including the one at issue here, and had the resource to access – and open, read, and understand – the Solution Channel agreement. Plaintiff's declaration is insufficient to create a material factual dispute. In light of the objective evidence, Plaintiff is bound to arbitrate.

*4 ***Defendants' Request for Attorney's Fees and Costs.*** The Magistrate Judge recommends dismissing Defendants' request for fees and costs without prejudice. Plaintiff raises two arguments here. First, Plaintiff contends that if this Court rejects the recommendation to grant the Motion to Compel, the recommendation as to fees and costs should also be rejected. But, the Court rejects Plaintiff's objection, not the recommendation. Second, Plaintiff asserts that even if the Court adopts the recommendation to compel arbitration, the request for fees and costs should be denied with prejudice for failure to confer. Plaintiff cites no authority for this proposition; the Court declines to adopt such a result.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED** that

(1) That Plaintiff's Objections to the Magistrate Judge's Proposed Findings andRecommendations re: Defendants' Motion to Compel Arbitration (ECF No. 32) is OVERRULED;

(2) That the Recommendation of United States Magistrate Judge (ECF No. 31) to grant Defendants' Motion to Compel Arbitration (ECF No. 11) is ACCEPTED and ADOPTED as an order of this Court;

(3) That Defendants' Motion to Compel Arbitration (ECF No. 11) is GRANTED;

(4) That, based on the order compelling arbitration of the Plaintiff's claims, the following are DENIED WITHOUT PREJUDICE AS MOOT:

(a) Plaintiff's Objections to the Magistrate Judge's Proposed Findings and Recommendations re: Defendants' Motion To Dismiss Peter Brown (ECF No. 33);

(b) The Recommendation of United States Magistrate Judge (ECF No. 30) to grant in part and deny without prejudice in part Defendant Peter Brown's Motion to Dismiss (ECF No. 10); and

(c) The Motion to Dismiss Peter Brown (ECF No. 10);

(5) That pursuant to Fed. R. Civ. P. 54(d)(2) and D.C.COLO.LCiv.R 54.3, and after meaningful conferral, Defendants may file a compliant motion for attorney's fees and costs within 30 days of the date of this Order; and

(6) That pursuant to D.C.COLO.LCivR 41.2 this action is ADMINISTRATIVELY CLOSED subject to reopening for good cause.

All Citations

Not Reported in Fed. Supp., 2020 WL 1527333

Footnotes

1 Though, if Plaintiff did, this argument is rejected as stated in *Scarpitti v. Charter Communications, Inc.*, No. 18-cv-02133-REB-MEH (D. Colo. Dec. 7, 2018) at ECF No. 15. Namely, the presumption that Plaintiff did receive the opt-in email applies especially in light of the hundreds of work-related emails he received and responded to during that time period; Plaintiff's conclusory affidavit to the contrary fails to create a material factual issue. "As with any motion for summary judgment, when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts." *York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008) (internal quotation marks, brackets, and citations omitted).

2 ECF No. 32, p. 5.

3 ECF No. 32, p. 6.

4 ECF No. 18-1.

5 Assuming, arguendo, those were the bases upon which the *Martinez* and *Scarpitti* courts compelled arbitration. For example, Scarpitti suggested there was no evidence that he opened or read the email concerning the arbitration agreement. Judge Blackburn rejected this argument, finding there was a presumption that he received the email and, moreover, "[h]aving received notice of the arbitration agreement, plaintiff's 'purported ignorance of the policy, whether willful or otherwise, does not absolve him from being bound by the agreement.' " *Scarpitti*, ECF No. 15, pp. 4-5 (original brackets omitted) (quoting *Morris v. Milgard Manufacturing, Inc.*, 2012 WL 6217387 at *3 (D. Colo. Dec. 13, 2012)). Thus, there was no requirement that Scarpitti must have opened and read the arbitration email in order to bind him.

End of Document

EXHIBIT 20: VANESSA HUGHES V. CHARTER COMMUNICATIONS, INC., C/A NO. 3:19-01703-SAL, 2020 WL 1025687 (U.S. DIST. CT., D. SOUTH CAROLINA, COLUMBIA DIVISION), MARCH 2, 2020

2020 WL 1025687
Only the Westlaw citation is currently available.
United States District Court, D. South Carolina, Columbia Division.

Vanessa HUGHES, Plaintiff,
v.
CHARTER COMMUNICATIONS, INC., d/b/a Spectrum, Defendant.

C/A No. 3:19-cv-01703-SAL
|
Signed 03/02/2020

Attorneys and Law Firms

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OPINION & ORDER

Sherri A. Lydon, United States District Judge

***1** Through this action, Plaintiff Vanessa Hughes ("Plaintiff") alleges sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and retaliation in violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.*, against Defendant Charter Communications, Inc. d/b/a Spectrum ("Defendant"). This matter is before the court on Defendant's motion to dismiss and compel arbitration or, in the alternative, to stay proceedings pending arbitration (the "motion"). [ECF No. 13.] For the reasons outlined herein, the court is compelling the case to arbitration and dismissing the matter.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a former employee of Defendant who claims she was subjected to sexual harassment and retaliation in violation of Title VII and the FMLA. According to the allegations in the Amended Complaint, Plaintiff began working for Spectrum in its customer service department in December 2011 and, from 2013 until her resignation in June 2018, served as a retention representative. [ECF No. 10.] She alleges that she was subjected to unwanted and harassing conduct by the retention supervisor, beginning in January 2018. Plaintiff claims that once she reported the inappropriate conduct, she received disparate treatment by her supervisors and co-workers. Plaintiff resigned in June 2018 and filed this lawsuit.

On June 13, 2019, Defendant removed the action to this court pursuant to 28 U.S.C. §§ 1331, 1332. [ECF No. 1.] On July 2, 2019,[1] Defendant filed the motion that is the subject of this Order. Defendant asks the court to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA") and dismiss or, in the alternative, stay the proceedings. Defendant argues that a valid and enforceable agreement to arbitrate exists between the parties and that the dispute falls within the scope of the agreement. [ECF No. 13.]

1. Implementation of the Arbitration Agreement.

Defendant implemented its employee arbitration agreement through a program called Solution Channel. [ECF No. 13-1.] On October 6, 2017, the program was announced to employees via email from Paul Marchand, Executive Vice President, Human Resources, sent to the employees' company email accounts. [ECF No. 13-2, Aff. of Tammie Knapper, at ¶¶ 5–7.][2] The email's subject line was "Charter's Code of Conduct and Employee Handbook." *Id.* at Ex. A. The text of the email included a discussion of a "refresh" to the employee handbook, as well as the implementation of a new dispute resolution process—arbitration. With respect to arbitration, it stated that "[b]y participating in *Solution Channel*, you and Charter both waive the right to initiate or participate in court litigation ... involving a covered claim and/or the right to a jury trial involving any such claim" and that "[u]nless you opt out of participating in *Solution Channel* within 30 days, you will be enrolled." *Id.* at ¶¶ 7–8; Ex. A. The email further informed employees that "[i]nstructions for opting out of *Solution Channel* are also located on Panorama."[3] *Id.* at ¶ 8; Ex. A.[4] The email also included a link to the Solution Channel webpage, which was likewise accessible to employees via Panorama. *Id.* at ¶¶ 9–10. The Solution Channel webpage included a link to a copy of the arbitration agreement. *Id.* at ¶ 10. Panorama also included the opt out information. *Id.* at ¶ 11; *see also* Ex. A ("More detailed information about *Solution Channel* is on Panorama. Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled.").

***2** To opt out of the program, employees would select a box next to the phrase "I want to opt out of Solution Channel" and then enter their name in the text field. *Id.* at ¶ 14; *see also* Ex. D. Employees who did not opt out of the program by November 5, 2017, were enrolled. *Id.* at ¶ 16. According to the Affidavit of Tammie Knapper, Plaintiff was on the list of email recipients for the October 6, 2017 email announcement, Plaintiff was employed on October 6, 2017, and Plaintiff did not opt out of the program by November 5, 2017. *Id.* at ¶¶ 20–21. According to Defendant, because Plaintiff failed to timely opt out of the program, she is bound by the arbitration agreement.

2. Scope of the Arbitration Agreement.

The arbitration agreement provides that the parties "mutually agree that, as a condition of ... employment with [Defendant], any dispute arising out of or relating to ... employment with [Defendant] or the termination of that relationship, ... must be resolved through binding arbitration." *Id.* at Ex. C, ¶ A. The arbitration agreement further provides that it covers:

> all disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which [Plaintiff] or [Defendant] have an alleged cause of action related to pre-employment, employment, employment termination or postemployment-related claims, whether the claims are denominated as ... unlawful discrimination or harassment (including such claims based upon ... sex, ... and any other prohibited grounds), [or] claims for unlawful retaliation, [or] claims arising under the Family Medical Leave Act[.]

Id. at ¶ B. Defendant further argues that Plaintiff's claims fall within the scope of the agreement.

3. Arguments of Plaintiff.

Here, Plaintiff does not dispute the fact that her claims fall within the scope of the arbitration agreement. The sole issue is whether the parties made an agreement to arbitrate. Plaintiff argues that the arbitration agreement is not "valid under state contract law due to lack of actual notice and lack of mutual assent." [ECF No. 16 at p.8.] As to "lack of actual notice," Plaintiff argues that the company-wide email is insufficient to establish that she was on notice of the agreement given her affidavit testimony that she does not "remember receiving or reviewing that email during [her] employment with [Defendant]." [ECF No. 16-2, Aff. of Vanessa Hughes, at ¶¶ 8–9.] Plaintiff also claims there is no "mutual assent" or "meeting of the minds" regarding arbitration.

Plaintiff argues that without evidence that she received, opened, and read the arbitration agreement, the opt-out provision is unenforceable. [ECF No. 16 at pp. 10–11.]

4. Report and Objections.

On October 24, 2019, United States Magistrate Judge Shiva V. Hodges entered a Report and Recommendation ("Report") on the motion in accordance with 28 U.S.C. § 636(b) and Local Civ. Rule 73.02(B)(2)(g) (D.S.C.). The Report applied the two-part test to determine whether the dispute is arbitrable. [ECF No. 18.] Specifically, the Report inquired as to (1) whether a valid agreement to arbitrate existed between the parties; and (2) whether the specific dispute fell within the scope of the agreement. *Id.* (referencing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937–38 (4th Cir. 1999)). The Report looked to South Carolina law to determine whether Plaintiff had sufficient notice to establish a meeting of the minds under South Carolina law and whether Plaintiff's failure to opt out of the arbitration agreement indicated her acceptance of the terms.

The Report found that an email is deemed received when it enters the recipient's email system in a readable format. *Id.* at pp. 5–6 (citing S.C. Code Ann. § 26-6-150). Further, just as evidence of mailing constitutes a rebuttable presumption of receipt, the Report concluded that the undisputed evidence that the email was sent from an employer to the employee's company email address also would create a rebuttable presumption of receipt. *Id.* at p.6. The Report further found that Plaintiff's affidavit, stating that she did not remember receiving the email, was insufficient to rebut the presumption. *Id.* at pp. 6–7. And, because Plaintiff continued her employment with Defendant after receipt of the email and failing to opt out, the Report found that she assented to the terms of the arbitration agreement.

***3** For the reasons outlined above, the Report recommends that the court grant the motion and retain jurisdiction over the parties for all matters relating to the action after arbitration. The Magistrate Judge advised the parties of the procedures and requirements for filing objections to the Report and the serious consequences if they failed to do so. Plaintiff filed objections to the Report on November 7, 2019 [ECF No. 21], and Defendant filed a response on November 21, 2019 [ECF No. 23]. The matter is now ripe for resolution.

STANDARD

1. Review of a Magistrate Judge's Report.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight and the responsibility to make a final determination remains with this court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

2. Standard Applicable to Motions to Compel Arbitration.

Section 4 of the FAA provides that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The FAA reflects "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "Courts will compel arbitration under Section 4 if: (1) the parties entered into a valid agreement to arbitrate claims; and (2) the dispute or claims in question fall within the scope of the arbitration agreement." *Oyekan v. Education Corp. of Am.*, No. 4:18-cv-1785, 2019 WL 978865, at *2 (D.S.C. Feb. 28, 2019).

"Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate." *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997). Section 4 requires the district court to "decide whether the parties have formed an agreement to arbitrate." *Berkley Cnty. School Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234& n.9 (2019). The question of whether an arbitration agreement has been formed is one of contract law, and ordinary state law principles apply. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Where a party "unequivocally denies 'that an arbitration agreement exists,' that party bears the burden of coming forward with "sufficient facts" to support her position." *Berkley County School District*, 944 F.3d at 234. The standard to decide whether the party has presented "sufficient facts" is "akin to the burden on summary judgment," and the court may consider matters outside the pleadings. *Chorley Enterps., Inc. v. Dickey's Barbecue Restaurants, Inc.*, 807 F.3d 553, 564 (4th Cir. 2015). The trial provision of Section 4 is invoked only where "the record reveals a genuine dispute of material fact 'regarding the existence of an agreement to arbitrate.' " *Berkley County School District*, 944 F.3d at 234. Where there is no genuine dispute of material fact regarding the existence of the agreement, the court will compel arbitration.

OBJECTIONS AND RESPONSE

***4** Plaintiff raises three specific objections [5] to the Report's recommendation to compel arbitration. The three objections may be summarized as follows:

1. The Report erroneously relies on *Bosiger v. U.S. Airways, Inc.*, 510 F.3d 442 (4th Cir. 2007) in support of the conclusion that evidence of an employer sending an email creates a rebuttable presumption of receipt by the employee. [ECF No. 21 at pp. 5–6.]

2. The Report overlooks case law that is "factually and legally in line with Plaintiff's case." *Id.* at p.6. According to Plaintiff, application of the *Lampo v. Amedisys Holding, LLC et al.* (2018-CP-22-01001)'s analysis [6] to this case would warrant denial of Defendant's motion. Further, Plaintiff argues that the facts of this case are more in line with the facts of *Mazone v. Dolgencorp, LLC* (3:17-cv-1088-JFA), in which the court ordered a jury trial on actual notice.

3. The request for a jury trial on actual notice as not addressed in the Report. [ECF No. 21 at pp. 8–9.]

In response, Defendant argues that the Report is properly supported by the evidence in the record and by established authority. [ECF No. 23 at p.2.] Further Defendant attaches an affidavit of Daniel Vasey, Senior Director of Records Management and eDiscovery, [7] in which Mr. Vasey confirms that, based on a review of Defendant's records, Plaintiff opened the announcement email. [ECF No. 23-1 at ¶ 4.] Finally, Defendant notes that the request for a jury trial is improper where, as here, the agreement provides that all disputes regarding the arbitrability of a claim must be submitted to arbitration. [ECF No. 23 at pp. 6–7.]

DISCUSSION

***5** As outlined herein, the court reviewed the record, applicable law, and Plaintiff's objections, and it finds that the matter should be compelled to arbitration.

1. Sufficiency of Notice and Report's Reliance on *Bosiger*.

"Arbitration is a matter of contract and controlled by contract law." *Smith v. D.R. Horton, Inc.*, 742 S.E.2d 37, 40 (S.C. 2013) (citation omitted); *see also Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 610 (D.S.C. 1998), *aff'd and remanded*,

173 F.3d 933, 941 (4th Cir. 1999). To resolve disputes regarding the formation of an arbitration agreement, the court looks to ordinary state-law principles. *American Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005). In this case, there is no dispute that because South Carolina is the situs of events, South Carolina law applies. *Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 85 (4th Cir. 2016) (applying law of state agreed upon by parties in deciding arbitration issues).

In South Carolina, "a contract is formed between two parties when there is, inter alia, 'a mutual manifestation of assent to [its] terms.' " *Berkeley County School District*, 944 F.3d at 236 (citing *Edens v. Laurel Hill, Inc.*, 247 S.E.2d 434, 436 (S.C. 1978)). "Such mutual manifestation 'ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party.' " *Id.* (citing Restatement (Second) of Contracts § 22 (Am. Law Inst. 1981)). Acceptance can be a return promise or performance. *See* *Sauner v. Public Serv. Auth. of S.C.*, 581 S.E.2d 161, 165–66 (S.C. 2003). In this case, Plaintiff's position is that the "unsigned[8] agreement is not valid under state contract law due to lack of actual notice and lack of mutual assent." [ECF No. 16 at p.8.]

In the motion, Defendant argued, and submitted evidence in support of, a valid and enforceable arbitration agreement between the parties. When Plaintiff responded, arguing that an arbitration agreement did not exist[9] and a trial under Section 4's trial provision was required, the burden shifted to Plaintiff to put forth "sufficient facts" in support of her position. *Berkeley County School District*, 944 F.3d at 234. Unless Plaintiff's evidence set forth "a genuine dispute of material fact 'regarding the existence of an agreement to arbitrate,' " the case was properly compelled to arbitration. *Id.* (citing *Chorley*, 807 F.3d at 564). Plaintiff's objection surrounds the Report's reliance on a presumption that arises when a document is mailed or, in this case, emailed. The court finds that the presumption was properly applied.

A. Presumption of Receipt.

***6** It is well established that evidence of mailing a properly addressed letter gives rise to a presumption of receipt under South Carolina law. *Weir v. CitiCorp Nat'l Servs., Inc.*, 435 S.E.2d 864, 868 (S.C. 1993); *Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was *actually received* by the person to whom it was addressed.") (emphasis added). To overcome the presumption, the opposing party must submit evidence that the mailing was not actually accomplished or testimony affirmatively denying receipt. *See, e.g.*, *Foster v. Ford Motor Credit Co.*, 395 S.E.2d 440 (S.C. 1990) (affirmative denial of receipt created an issue of material fact); *Burbage v. Jefferson Standard Life Ins. Co.*, 136 S.E. 230, 231 (S.C. 1926) (testimony affirmatively denying that check and note were received gave rise to a question for the jury).

By statute, an email is considered received in South Carolina when it enters the recipient's email system in a readable format. S.C. Code Ann. § 26-6-150(B)(2). The Report concludes that "South Carolina courts would find that evidence of an email from an employer to its employee's company email address also creates a rebuttable presumption of receipt."[10] [ECF No. 18 at p.6.]

Much like mail was in 1932, see *Hagner*, 285 U.S. at 430, email is a universal feature of modern life.[11] While South Carolina courts have not specifically address whether a presumption of receipt arises when an email is sent, it has considered the use of email when answering the question of what constitutes "receipt" of "notice" under the South Carolina Appellate Court Rules. *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 810 S.E.2d 856 (S.C. 2018). In that case, the South Carolina Supreme Court was presented with the "novel issue of whether an email that provides written notice of entry of an order ... triggers the time for serving a notice of appeal[.]" *Id.* at 857. It answered in the affirmative. While that case involved notice of entry of an order, as opposed to notice of an arbitration agreement, the case is instructive in assessing the objections before this court—where both "receipt" and "notice" are at issue. The decision implies that for purposes of "receipt" of "notice," the South Carolina Supreme Court considers email and mail as equals.[12] *See id.* ("All that is required to trigger the time to appeal is that the parties *receive* such notice."). Between the ubiquitous nature of email in today's workplace and everyday culture, the South Carolina

statute, and the recognition by the South Carolina Supreme Court that email can constitute "notice," this court has no hesitation in concluding that the presumption applies.

***7** At issue in Plaintiff's objection is the question whether Plaintiff's affidavit, stating she "does not recall" receiving the employee-wide email, rebuts the presumption of receipt. Plaintiff objects to the Report's reliance on *Bosiger v. U.S. Airways*, 510 F.3d 442 (4th Cir. 2007) in reaching its conclusion that Plaintiff did not rebut the presumption.

Plaintiff argues that "the court in *Bosiger* was concerned with the notice required in a bankruptcy context, which is not at issue here." [ECF No. 21 at p.5.] While *Bosiger* involved notice in a bankruptcy proceeding, it did not apply principles exclusive to bankruptcy cases. The *Bosiger* court looked to general principles regarding receipt and notice, including the presumption that arises from mailing. Because the documents at issue in that case were mailed, the court found it had to "presume, absent strong evidence to the contrary, that [the party] received the letters of notice." *Bosiger*, 510 F.3d at 452 (citing *FDIC v. Schaffer*, 731 F.2d 1134, 1137 (4th Cir. 1984)).

In *Farrow Road Dental Group, P.A. v. AT&T Corp.*, this court applied the same presumption in ruling on a similar notice argument in the context of arbitration. No. 3:17-cv-01615, 2017 WL 4216158, at *3 (D.S.C. Sept. 22, 2017). There, the plaintiff argued that it "did not consent to arbitration because there was no evidence [the defendant] had even provided [the agreement] to [the plaintiff]." *Id.* The court disagreed, finding that the defendant produced evidence of mailing the agreement and the "[e]vidence of mailing establishes a rebuttable presumption of receipt." *Id.* (citing *Bakala v. Bakala*, 576 S.E.2d 156, 163 (S.C. 2003)). The court went on to find that where the responding party fails to rebut the presumption and continues to operate under the contract, there is acceptance of the offered terms, including arbitration. *See id.* (compelling arbitration in an opt-out context after finding acceptance of arbitration by continued use of services under the contract). Accordingly, this court sees no difference between the presumption applied in *Bosiger* and the presumption applied in *Farrow Road*.

Plaintiff also argues that there was more evidence in *Bosiger* to indicate that the plaintiff in that case had "actual notice," thereby rendering the *Bosiger* court's analysis inapplicable to this case. [ECF No. 21 at p.5 (arguing "[u]nlike *Bosiger*, there is not substantial evidence in this case to indicate that Plaintiff received adequate notice").] Plaintiff's argument conflates two separate points: (1) the evidence required to give rise to the presumption of receipt versus (2) the evidence required to rebut the presumption. Once the party claiming notice submits sufficient evidence to give rise to the presumption of receipt, the burden shifts to the party claiming lack of receipt to present evidence to rebut the presumption. The issue in *Bosiger*, much like the issue here, is whether the plaintiff's evidence "effectively rebut[s] this evidence [of receipt of notice]." *Bosiger*, 510 F.3d at 452. There, the evidence submitted to rebut the presumption was a "general denial."[13] *Id.* And, just as here, the court looked to the party's "general denial" and found it "does not constitute the strong evidence needed to overcome the presumption of receipt." *Id.* In the *Bosiger* court's own words, it had to "begin" with the presumption that "Bosiger received the letters of notice mailed to him." *Id.* Having started with the evidence of mailing, which gives rise to the presumption, the *Bosiger* court then turned to the sufficiency of the rebuttal evidence. The rebuttal evidence, *i.e.*, "Bosiger's general denial," did "not constitute the strong evidence needed to overcome the presumption of receipt." *Id.* The same analysis applies here:

***8** • Defendant presented evidence of sending email notice of the arbitration policy;

• The evidence gave rise to a presumption of receipt;

• The burden shifted to Plaintiff to present evidence to rebut the presumption; and

• The question became whether the testimony that Plaintiff does "not remember receiving or reviewing that email during my employment" [ECF No. 16-2, Aff. of Vanessa Hughes, at ¶ 9] constituted an affirmative denial of receipt sufficient to rebut the presumption.

As noted above, South Carolina law requires testimony affirmatively denying receipt to rebut the presumption and create an issue of fact. The court finds that Plaintiff did not present " 'sufficient facts' [to] support [her] denial of an agreement to arbitrate." *Berkeley County School District*, 944 F.3d at 234.

B. Actual notice.

The court will also address the "actual notice" language from the employment cases [14] cited in Plaintiff's objections. [ECF No. 21 at p.6.] According to Plaintiff, even if the presumption applies, the email in this case is "insufficient to overcome the high bar of *actual notice* required by South Carolina law." *Id.* (emphasis added). The court disagrees.

The concept of "actual notice" stems from *Fleming v. Borden*, 450 S.E.2d 589 (S.C. 1994). *Fleming* involved the question of "whether an employer may modify *a contract created by an employee handbook* with a subsequent employee handbook." *Id.* at 594 (emphasis added). The South Carolina Supreme Court held that it could unilaterally modify an implied employment contract, but the employer was required to give the employee "actual notice" of the modification. *Id.* at 595–96. This specific issue most often arises in those instances where an employer is changing an implied employment contract to employment at-will through a disclaimer in a subsequently issued employee handbook. *See id.*; *see also Shelton v. Oscar Mayer Foods Corp.*, 459 S.E.2d 851, 857 (S.C. Ct. App. 1995) (applying "actual notice" requirement where subsequent employee handbook changed employment status to "at will").

In this case, Plaintiff is not arguing that Defendant's employee handbook or other policies created an implied contract of employment that Defendant then sought to unliterally modify through a subsequent employee handbook. Rather, it is apparent from the record that the arbitration agreement is a "standalone, independent agreement" that is "distinct from the handbook policies." *Oyekan*, 2019 WL 978865, at *3; [ECF No. 13-2, Aff. of Tammie Knapper, at Ex. A (providing link to "Employee Handbook" and "Code of Conduct" in third paragraph; discussion of new dispute resolution policy and link to "Solution Channel" in paragraphs four and five)]; *see also* *Cox v. Assisted Living Concepts, Inc.*, No. 6:13-00747, 2014 WL 1094394, at *12 (D.S.C. Mar. 18, 2014) (adopting report and recommendation, which noted that "defendant in this case does not contend that it has an employment contract with the plaintiff; rather, it contends that it has an arbitration contract with her"). Thus, the *Fleming* "actual notice" standard is not directly applicable to the facts before this court.

***9** Yet, in a similar scenario, the Honorable Henry M. Herlong, Jr. considered the "actual notice" requirement in determining whether an employee had notice of an arbitration agreement. *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567 (D.S.C. 1997). There, much like here, the plaintiff was "not arguing that [defendant's] employee handbook or other policies created an implied contract." *Id.* at 570. While the case did not present the *Fleming* question, [15] the court "believ[ed] that the South Carolina Supreme Court would apply the same actual notice requirement to an employer's implementation of an arbitration agreement" and applied the requirement to the facts before it. *Id.* Applying the "actual notice" requirement, the court found that the record indicated that the plaintiff "*did receive actual notice* of the Arbitration Policy" when the defendant "*mailed* the Arbitration Policy to [plaintiff] with a letter that carefully explained the new policy." *Id.* (emphasis added). The court was further persuaded by the arbitration policy stating that it made arbitration the exclusive form of resolution of employment disputes. *Id.*

South Carolina courts have not ruled on whether the "actual notice" requirement from the implied employment contract context extends to an independent arbitration agreement, *i.e.*, one existing separate and apart from an employee handbook. However, even if this court considers "actual notice," the facts before this court, much like the facts in *Reese*, support a finding of actual notice.

In finding "actual notice," the *Reese* court was persuaded by the fact that the policy was "mailed ... with a letter that carefully explained the new policy." *Reese*, 955 F. Supp. at 570. In this case, notice of implementation of the new dispute resolution

program that included "binding arbitration" was sent to Plaintiff by email. The email "carefully explain[s] the new policy." More specifically, it explains that:

- "workplace conflicts arise from time to time";
- the "vast majority of these will be appropriately resolved through informal channels (such as speaking directly to your supervisor, manager or local human resources representative)";
- some disputes "may be better addressed through a more structured and formal resolution process";
- the company is launching "*Solution Channel*, a program that allows you and the company to efficiently resolve covered employment-related legal disputes through binding arbitration";
- "[b]y participating in Solution Channel, you and Charter both waive the right to initiate or participate in court litigation (including, class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim";
- "[u]nless you opt out of participating in Solution Channel within the next 30 days, you will be enrolled"; and
- "[i]nstructions for opting out of Solution Channel are also located on Panorama."

[ECF No. 13-2.] The email included a link to the Solution Channel webpage, which included links to the arbitration agreement and the program guides under "Key Documents." [ECF No. 13-2, Ex. B.]

In addition to the explanation provided in the email, the Solution Channel page on Panorama provides an additional explanation of the dispute resolution program. *Id.* And there is no dispute that all three documents—email, Solution Channel page, and arbitration agreement—explicitly state that by agreeing to the program and to arbitration, the parties are waiving the right to participate in court litigation. [ECF No. 13-2, Ex. A (noting "employment-related legal disputes" are resolved "through binding arbitration" and by participating the parties "waive the right to initiate or participate in court litigation"); Ex. B ("Participation in Solution Channel means that you and Charter agree to waive any right to participate in court litigation involving covered disputes and to arbitrate those disputes that are not successfully resolved following the Internal review process."); Ex. C (notice in all capital letters and bold font; notes employment-related disputes are subject to binding arbitration and the parties are waiving right to litigate dispute in court).] For the same reasons identified in *Reese*, this court finds that Plaintiff received "actual notice" of the dispute resolution program, including the arbitration agreement.

2. Report's Lack of Discussion of *Lampo* and Limited Discussion of *Mazone*.

***10** Plaintiff's second objection claims the Report erred in overlooking "legally relevant caselaw," that is *Lampo* and *Mazone.* [ECF NO. 21 at p.6] According to Plaintiff, the *Lampo* case is "factually and legally in line with Plaintiff's case." *Id.* This court disagrees.

The *Lampo* decision, while short, evidences several distinct differences. First, the email in *Lampo* was only "two lines" with a link to a purported "Important Policy Change." [ECF No. 16-1 at p.1.] The email at issue in this case explains the new policy, including the option to opt-out within 30 days. Second, in *Lampo*, the link in the email opened a pop-up acknowledgement form that the employee had to "acknowledge" *before* accessing a copy of the arbitration agreement. *Id.* Here, employees were given access to the arbitration agreement and policy guidelines without having to click or sign an acknowledgment form—employees could read, analyze, take any action they desired within the 30-day period before deciding whether to opt-out. Third, to opt out of the agreement, the employees in *Lampo* had to print a separate form, complete it, and mail it to the company's corporate office. *Id.* at p.2. Defendant's opt-out form, by contrast, was available to employees online in an electronic format. This case is neither "factually" nor "legally" in line with *Lampo.*

In addition to *Lampo*, Plaintiff also relies on *Mazone*. [ECF No. 21 at p.7.] In *Mazone*, the Magistrate Judge issued an oral report and recommendation, recommending a jury trial on the limited issue of whether there was sufficient notice to establish a meeting of the minds under state law. *Mazone v. Dolgencorp*, LLC, 3:17-cv-01088, ECF No. 21. The judge adopted the oral report and recommendation by text order. *Id.* at ECF No. 30. Without a written report, order, or transcript, this court cannot identify the exact reasons why the *Mazone* court ordered a jury trial on the issue of meeting of the minds, but, based on the limited information available to it, concludes the Magistrate Judge in this case did not err in distinguishing it from *Bosiger*.

The *Mazone* agreement was circulated to employees via the employee intranet, but it included *both* a line for e-signing to agree to the arbitration agreement *and* an option to complete a form to opt-out of the arbitration agreement. [ECF No. 17-1.] For employees who failed to sign the agreement and failed to opt out with a specified time period, the employer then mailed a post card to remind the employees that they needed to sign the agreement or opt out. *Id.* This scenario of two options (opt in v. opt out) to an agreement is not before the court. The agreement presented to Plaintiff was an opt-out agreement. If Plaintiff did not opt out within the specified time, she was bound by the agreement's terms. The Report did not err in distinguishing *Mazone*.

3. Jury Trial on Issue of Arbitrability.

Plaintiff's final specific objection is that the "request for a jury trial on the issue of actual notice was not addressed in the Report[.]" [ECF No. 21 at p.8.] "[T]o obtain a jury trial, the parties must show genuine issues of material fact regarding the existence of an agreement to arbitrate." *Chorley*, 807 F.3d at 564; *see also Berkeley County School District*, 944 F.3d at 234 (A trial is only necessary "when a party unequivocally denies 'that an arbitration agreement exists,' and 'show[s] sufficient facts in support' thereof"). This opinion thoroughly examines the issues and arguments of the parties and concludes that Plaintiff's evidence was insufficient to overcome the presumption of receipt and create a genuine dispute for trial. Because Plaintiff's evidence does not give rise to a "genuine issue[ ] of material fact regarding the existence of an agreement to arbitrate," *Chorley*, 807 F.3d at 564, a jury trial is not warranted.

4. Dismissal v. Stay of Litigation.

***11** Having concluded that arbitration is proper, the court must consider whether to dismiss or stay the action. The Report recommends compelling arbitration, but also recommends that the "court retain jurisdiction over the parties for all matters relating to this action after arbitration, including enforcement of any arbitration judgment rendered." [ECF No. 18.]

There is "some tension" in the Fourth Circuit Court of Appeals over the discretion afforded a district court in dismissing rather than staying an action compelled to arbitration. *Aggarao v. Mol Ship Mgmt. Co., Ltd.*, 675 F.3d 355, n.18 (4th Cir. 2012). Section 3 of the FAA suggests that the proper course of action, upon motion by any party, is to stay the proceedings pending arbitration, rather than dismiss the case outright. 9 U.S.C. § 3. But the Fourth Circuit has concluded that dismissal is the proper remedy when *all* of the issues presented in a lawsuit are subject to arbitration. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001) ("Notwithstanding the terms of § 3, however, dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."); *see also Greenville Hosp. Sys. v. Employee Welfare Ben. Plan for Emps. of Hazelhurst Mgmt. Co.*, 628 F. App'x 842, 845–46 (4th Cir. 2015) (affirming dismissal where district court determined all issues were arbitrable). In this case, it is undisputed that all of Plaintiff's claims are subject to arbitration and, therefore, the court will dismiss the case.

5. Attorneys' Fees and Costs.

Finally, Defendant requests attorneys' fees and costs associated with the filing of the motion, arguing "plaintiff unreasonably and vexatiously filed this lawsuit" "[d]espite her knowledge and acceptance of the Arbitration Agreement." [ECF No. 13 at p.11.] The court notes that Defendant has not filed a separate motion for fees or otherwise set for the amount it is seeking to recover. *See Oyekan*, 2019 WL 978865, at *6 (denying request for attorneys' fees and costs). Further, the court is unable to

identify any bad faith or unreasonable acts by Plaintiff in her pursuit of claims in this court. *See id.* Therefore, this court denies the request for attorneys' fees and costs.

CONCLUSION

The court thoroughly reviewed the record, including all pleadings and exhibits filed in this case, as well as the applicable law. For the reasons set forth above, this court adopts in part and rejects in part the Report [ECF No. 18]. It is the judgment of this court that Defendant's motion to compel arbitration [ECF No. 13] is **GRANTED** in part and **DENIED** in part. While the parties' claims are hereby **COMPELLED** to arbitration and the case is **DISMISSED**, the court **DENIES** Defendant's request for attorneys' fees and costs.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2020 WL 1025687

Footnotes

1 Defendant initially filed a motion to dismiss and compel arbitration or, in the alternative, to stay proceedings pending arbitration on June 20, 2019. [ECF No. 8.] Shortly thereafter on June 27, 2019, Plaintiff filed an Amended Complaint, properly identifying the Defendant in the caption in accordance with Defendant's Local Rule 26.01 Answers. [ECF Nos. 10, 3.] Defendant accepted service of the Amended Complaint and filed the motion that is the subject of this Order. [ECF Nos. 11, 13.]

2 Tammie Knapper is the Director of HR Technology for Defendant. [ECF No. 13-2, Aff. of Tammie Knapper, at ¶ 1.]

3 Panorama is Defendant's intranet site and is accessible to its employees. *Id.* at ¶ 9.

4 Attached to the Tammie Knapper Affidavit is a copy of the email sent to Defendant's employees. *Id.* at ¶ 7; Ex. A. Plaintiff does not dispute the authenticity of the email.

5 To the extent the Plaintiff seeks to incorporate all arguments from her response in opposition to the motion, the arguments are construed as general objections and do not warrant de novo review. [ECF No. 21 at pp. 7, 9.] *See, e.g., Solt v. Boeing Co.*, No. 2:16-3862, 2018 WL 1583977, at *3 (D.S.C. Apr. 2, 2018) (construing arguments as general objections where plaintiff "simply repeated, in a conclusory manner, arguments that the Magistrate Judge has already considered in full"); *Addison v. CMH Homes, Inc.*, 47 F. Supp. 3d 404, 412 (D.S.C. 2014) ("[A] large majority of Plaintiff's objections merely restate, in many instances, verbatim, the numerous arguments he advanced in his memos related to the cross motions for summary judgment.... Therefore, those objections are not sufficient to require a *de novo* review of the Report by this Court."). "Because general objections do not direct the court's attention to any specific portions of the report, general objections to the magistrate judge's report are tantamount to a failure to object." *Sumter v. Jenny Craig, Inc.*, No. 3:14-cv-4460, 2016 WL 3397588, at *2 (D.S.C. June 21, 2016). As to the "incorporated" arguments, the court has reviewed the Report and finds no clear error.

6 *Lampo* is pending in the Court of Common Pleas for Georgetown County, South Carolina.

7 Defendant states that Mr. Vasey's testimony was not included with its motion because its "counsel only recently discovered the existence of this information." [ECF No. 23 at p.3, n.2.] This court may "receive further evidence" during its review of the Report and objections. 28 U.S.C. § 636. While Mr. Vasey's testimony provides further evidence of Plaintiff's "receipt" of the email at issue, the additional evidence is not necessary to support the court's conclusion that the evidence previously presented resulted in a presumption of receipt that was not rebutted by Plaintiff's affidavit. The court notes, however, that this additional evidence further supports the "actual notice" issue outlined in Section 1(B), *infra*.

8 The FAA requires an agreement in writing for arbitration to proceed, but "the overwhelming weight of authority supports the view that a signature is not required to meet the FAA's written requirement." *Goldberg v. C.B. Richard Ellis, Inc.*, No. 4:11-cv-02237, 2011 WL 6817908, at *2 (D.S.C. Dec. 28, 2011); *see also Willard v. Dollar General Corp.*, No. 3:17-cv-00675, 2017 WL 4551500, at n.3 (D.S.C. Oct. 12, 2017); *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000) ("While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate; it does not follow that under the Federal Arbitration Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.") (internal quotes and alterations omitted).

9 Plaintiff's affidavit testimony that she "do[es] not remember receiving or reviewing that email during [her] employment," [ECF No. 16-2 at ¶ 9], does not equate to an *unequivocal* denial that an arbitration agreement exists. *See Berkeley County School District*, 944 F.3d at 234 (stating a court is required to conduct a trial under the trial provision of Section 4 when (1) a party unequivocally denies the arbitration agreement exists and (2) puts forth sufficient facts in support of the denial).

10 This court notes that several other courts have extended the presumption to emails. *Ball v. Kotter*, 723 F.3d 813, 830 (7th Cir. 2013); *American Boat Co. v. Unknown Sunken Barge*, 418 F.3d 910, 914 (8th Cir. 2005); *Dixon v. Synchrony Fin.*, No. 1:15-cv-00406, 2015 WL 12720290, at *5 (N.D. Ga. Aug. 18, 2015) (extending rebuttable presumption to email in case involving an opt-out arbitration provision and finding an affidavit stating the party does "not recall ever receiving that email" insufficient to overcome the presumption of receipt); *see also Johnson v. Harvest Mgmt. Sub TRS Corp.--Holiday Retirement*, No. 3:15-cv-00026, 2015 WL 5692567, at *3 (S.D. Ind. Sept. 25, 2015) ("The court sees no principled reason why the presumption should not apply to e-mail, and Plaintiff offers no argument against this application."); *Abdullah v. American Exp. Co.*, No. 3:12-cv-1037, 2012 WL 6867675, at *5 (M.D. Fla. Dec. 19, 2012) (extending rebuttal presumption to email in case involving an arbitration provision and finding that an "affidavit stating he did not receive the email" was insufficient to create a genuine issue of fact as to whether an agreement was reached), *report and recommendation adopted*, 2013 WL 173225 (M.D. Fla. Jan. 16, 2013).

11 Courts around the country have recognized the pervasive role of email in the modern era in a variety of contexts. *See, e.g.*, *United States v. Hamilton*, 701 F.3d 404, 408–09 (4th Cir. 2012) (recognizing an "era in which email plays a ubiquitous role in daily communications" and finding district judge did not abuse its discretion in finding waiver of marital privilege when emails were sent through a work email); *Copano Energy, LLC v. Bujnoch*, No. 18-0044, 2020 WL 499765, at *5 (Tex. Jan. 31, 2020) (Email "is used by nearly everyone for nearly every type of communication, from the flippantly inconsequential to the bindingly formal."); *Rilley v. MoneyMutual, LLC*, 884 N.W.2d 321, 332 (Minn. 2016) (considering minimum contacts and finding "with ubiquitous e-commerce and electronic communication, it would be arbitrary to exclude emails from consideration in a minimum contacts analysis"); *Hall v. Sargeant*, No. 9:18-cv-80748, 2019 WL 1359485, at *1 (S.D. Fla. Mar. 26, 2019) (considering question of whether email account is a "place" for purposes of Florida's tort of invasion of privacy by intrusion; "In 1971, MIT trained electrical engineer Ray Tomlinson sent the world's first email. Just under a half century later, emails are ubiquitous" (internal citations omitted)); *Murphey v. Mid-Century Ins. Co.*, No. 13-2598, 2014 WL 2619073, at *4 (D. Kan. June 12, 2014) ("Certainly, contract negotiations by e-mail have become ubiquitous.").

12 The South Carolina Supreme Court drew a distinction between the requirements in Rule 203(b)(1) of the South Carolina Appellate Court Rules ("SCACR") and Rule 5 of the South Carolina Rules of Civil Procedure ("SCRCP"). Rule 203(b)(1), SCACR requires a notice of appeal to be served within thirty days of *receipt of written notice of entry* of an order. In contrast, Rule 5, SCRCP, requires written notices to be "*served* by mail or hand delivery." (emphasis added). Because Rule 203(b)(1), SCACR does not require service of the notice, the South Carolina Supreme Court found email notice was sufficient to trigger the time for serving the notice of appeal.

13 The plaintiff in *Bosiger* relied on his own deposition testimony that "he cannot 'recall receiving any notice of the second bankruptcy.' " 510 F.3d at 452. The *Bosiger* court deemed this testimony a "general denial."

14 *Chassereau v. Gobal-Sun Pools, Inc.*, 611 S.E.2d 305 (S.C. Ct. App. 2005) addressed the question of arbitrability of claims, not the validity of an arbitration agreement. The parties in this case agree that the claims fall within the scope of the arbitration agreement and, therefore, arbitrability of claims is not in issue. This court is conducting only a "limited review to ensure that a valid agreement to arbitrate exists between the party." *Oyekan*, 2019 WL 978865, at *3. The question of whether "the specific dispute falls within the scope of the agreement to arbitrate" is not before the court. *Id.* Therefore, *Chassereau* is inapplicable.

15 The court recognized that *Fleming* was not applicable and further noted that there was no question for the jury because the arbitration agreement was distributed directly to employees with an "explanatory letter notifying the employees of the new policy." *Reese*, 955 F. Supp. at n.2.

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EXHIBIT 21: MARK LASSER V. CHARTER COMMUNICATIONS, INC., 19-CV-02045-RM-MEH, 2020 WL 2314985 (U.S. DIST. CT., D. COLORADO), FEBRUARY 10, 2020

2020 WL 2314985
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Mark LASSER, Plaintiff,
v.
CHARTER COMMUNICATIONS, INC., and Peter Brown, Defendants.

Civil Action No. 19-cv-02045-RM-MEH
|
Signed 02/10/2020

Attorneys and Law Firms

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Grace LaVance McGuire, Joshua B. Kirkpatrick, Littler Mendelson PC, Denver, CO, for Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

***1** Before the Court is Defendants' Motion to Compel Arbitration (ECF 11). This Motion has been referred to the undersigned for recommendation pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed. R. Civ. P. 72(a) and (b). For the reasons that follow, the Court respectfully recommends that the Honorable Raymond P. Moore grant in part and deny without prejudice in part Defendants' Motion.

BACKGROUND

Plaintiff is blind. He started working for Defendant Charter Communications, Inc., ("Charter") on March 13, 2017, as "Senior Director, Accessibility." Plaintiff reported to Defendant Peter Brown ("Defendant Brown") and was tasked with improving Charter's accessibility for disabled customers and employees. Due to his blindness, Plaintiff requested several accommodations from Charter, such as a screen reader program and someone to assist him in using his computer and the programs on Charter's intranet. Plaintiff alleges he was provided with a "hobbled" version of a screen reader and was not provided someone to assist him.

On or about November 9, 2017, Charter placed Plaintiff on administrative leave and on December 19, 2017, terminated Plaintiff's employment. Thereafter, he brought a Charge of Discrimination against Charter with the Colorado Civil Rights Division ("CCRD") based on disability discrimination and wrongful discharge. On May 28, 2019, the CCRD issued a Notice of Right to Sue.

Plaintiff initiated this lawsuit on June 19, 2019 in the 2nd Judicial District Court in Denver County, Colorado, alleging seven claims for relief related to his discharge from Charter. Plaintiff asserts six claims against Charter under the Colorado Anti-Discrimination Act ("CADA"), the Americans with Disabilities Act, the Rehabilitation Act, and the common law. He asserts a single claim against Defendant Brown for discrimination in violation of CADA.

After removal to this Court, on July 22, 2019, Defendant Brown filed a motion to dismiss the sole claim against him based on Plaintiff's failure to exhaust his administrative remedies, and Defendants jointly filed the present Motion to Compel Arbitration. They argue all of Plaintiff's claims fall within the scope of a mutual arbitration agreement that went into effect during Plaintiff's employment. They seek an order compelling arbitration, a stay or administrative closure of this case pending arbitration, and costs and fees. Plaintiff responds that he cannot be bound by the terms of the arbitration agreement because he was prevented from reading and opting out of the agreement due to Charter's failure to make it accessible to blind employees.

LEGAL STANDARD

"The Supreme Court has 'long recognized and enforced a liberal federal policy favoring arbitration agreements.' " *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). Under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, ("FAA") agreements to arbitrate are "valid, irrevocable, 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** Whether to enforce an arbitration agreement involves a two-step inquiry: first, a court must determine whether there was a valid agreement to arbitrate; and second, the court must analyze whether the allegations in the complaint are within the scope of the arbitration agreement. *Cavlovic v. J.C. Penney Corp., Inc.*, 884 F.3d 1051, 1057 (10th Cir. 2018) (citing *Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1304 (10th Cir. 2017) and *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002)). The court may also be called to consider whether any legal constraints external to the parties' agreement, such as a statute, foreclose the arbitration of the claims. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).

Since arbitration is a matter of contract, *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010), in deciding whether there is an enforceable agreement to arbitrate, "courts generally ... should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). As a matter of contract law, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83 (quotation omitted). Therefore, a court must not compel arbitration if a generally applicable state contract defense invalidates the arbitration agreement. *Rent-A-Center, W., Inc.*, 561 U.S. at 68.

Where the parties dispute the existence of an agreement to arbitrate, "a court may grant a motion to compel arbitration if there are no genuine issues of material fact regarding the parties' agreement." *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1261 (10th Cir. 2012) (quotation omitted). The party seeking to compel arbitration "bears the initial burden of presenting evidence sufficient to demonstrate the existence of an enforceable agreement; if it does so, the burden shifts to the nonmoving party to raise a genuine dispute of material fact regarding the existence of an agreement." *Bellman v. i3Carbon, LLC*, 563 F. App'x 608, 612 (10th Cir. 2014).

ANALYSIS [1]

Plaintiff challenges only whether he agreed to arbitrate his claims; he does not contend that his claims do not fall within the scope of the alleged agreement or that any legal constraints external to the alleged agreement foreclose the arbitration of the claims. Therefore, the Court will focus its discussion on the first of the two analytical steps: whether there was a valid agreement

to arbitrate. As the moving parties, Defendants bear the initial burden of presenting evidence sufficient to demonstrate the existence of an enforceable agreement.

Defendants proffer a declaration from Tammie C. Knapper, Charter's "Senior Director, HR Technology," attesting to the following facts about the arbitration agreement in this case. Decl. of Tammie Knapper, ECF 11-6. On October 6, 2017, Charter sent an email to all non-union employees below the Executive Vice President level announcing a new employment-based legal dispute resolution program called Solution Channel. *Id.* at ¶¶ 4-6. The email stated in relevant part:

> ***3** In the unlikely event of a dispute not resolved through the normal channels, Charter has launched *Solution Channel*, a program that allows you and the company to efficiently resolve covered employment-related legal disputes through binding arbitration. By participating in Solution Channel, you and Charter both waive the right to initiate or participate in court litigation (including class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim.... Unless you opt out of participating in Solution Channel within the next 30 days, you will be enrolled. Instructions for opting out of Solution Channel are also located on Panorama.

Id. Ex. A., ECF 11-6 at 6. The email included a hyperlink to a webpage on Charter's internal, intranet site, called Panorama; the Panorama webpage contained additional information on the Solution Channel program, a link to the Mutual Arbitration Agreement, and a link to initiate the steps for opting out of the program. *Id.* ¶¶ 9-11 and Ex. B., ECF 11-6 at 8. Plaintiff was sent the October 6, 2017 email announcing Solution Channel, and he did not opt out of the program during the allotted time. *Id.* ¶¶ 19-21 and Ex. E, ECF 11-6 at 15.

"In the employment context, an at-will employee who is offered a new condition of employment accepts that offer through continuing the employment relationship." *Martinez v. TCF Nat'l Bank*, No. 13-cv-03504-PAB, 2015 WL 854442, at *3 (D. Colo. Feb. 25, 2015) (citing *Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1063 (Colo. 2011)). In *Martinez*, the plaintiff argued there was no valid arbitration agreement with her employer because she never received the arbitration policy in the mail and did not see the notice about it placed on the defendant's intranet site. *Id.* at *2. In ruling the arbitration agreement enforceable, the court stated:

> Defendant has presented evidence that it mailed a copy of the [agreement] to plaintiff's address of record, and that plaintiff has received mail from defendant at that address .... The evidence before the Court shows that plaintiff had reasonable notice and access to the terms and conditions of the arbitration clause. Plaintiff's claim to the contrary, unsupported by any evidence other than her own declaration, is a mere bare assertion of non-receipt. Under Colorado law, plaintiff cannot avoid contractual obligations by claiming that ... she did not read the agreement.

Id. at *3. Another recent case from this District addressed a similar argument made in opposition to Charter and the Solution Channel agreement at issue in this case. In *Scarpitti v. Charter Communications, Inc.*, the plaintiff argued the court should not compel arbitration under the Solution Channel agreement because there was no evidence he received the October 6, 2017 email introducing the program or that he opened the email and read its contents. Ex. 5 to Defs.' Mot. 4, *Scarpitti v. Charter Communications, Inc.*, No. 18-cv-02133-REB-MEH (D. Colo. Dec. 7, 2018), ECF 11-5. The court held the email provided the plaintiff with notice of the arbitration agreement, and his purported ignorance of the agreement did not absolve him from being bound to its terms. *Id.* at 5. Similar to the circumstances in *Martinez* and *Scarpitti*, Defendants' evidence in this case that Plaintiff was sent the October 6, 2017 email, did not opt out during the thirty-day opt-out period, and continued his employment with

Charter, satisfies their initial burden of demonstrating the existence of an enforceable arbitration agreement. *See also Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 F. App'x 812, 815 (10th Cir. 2008) (approving the district court's finding that an employee was placed on notice of and accepted a company's arbitration agreement where notice was provided in a single email and the employer introduced evidence that the employee habitually opened emails from management). Therefore, the burden shifts to Plaintiff to raise a genuine dispute of material fact regarding the existence of the arbitration agreement.

***4** Plaintiff concedes that "[a] non-disabled person might be bound by the arbitration agreement if she failed to opt out and continued to work for Charter because such inaction can be interpreted as an intent to be bound under Colorado law." Resp. 7. Plaintiff argues, however, that the agreement is invalid and unenforceable in this instance because he could not read and opt out of the agreement. He alleges that "[he] requested and relied upon Charter to provide him with accommodations that permitted him to perform computer-based tasks like reading and opting out of the arbitration agreement. Charter failed to provide those accommodations, preventing [his] assent." Resp. 8. He continues that because he did not assent to all essential terms, there was no "meeting of the minds" and no contract was formed.

Plaintiff's allegations fail to raise a genuine dispute of material fact regarding the existence of the agreement. "A motion to compel arbitration under the [FAA] is governed by a standard similar to that governing motions for summary judgment." *Stein v. Burt-Kuni One, LLC,* 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005). If the movant presents sufficient evidence to demonstrate an enforceable arbitration agreement, "the burden shifts to [the non-movant] to raise a genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in Fed. R. Civ. P. 56." *Id.* In this case, Plaintiff supplied a single "declaration" in support of his Response. Decl. of Mark Lasser, ECF 14-1. The document is neither dated nor signed under penalty of perjury and, consequently, does not comply with 28 U.S.C. § 1746. The Court is not obligated to treat an incomplete declaration as an affidavit for purposes of establishing factual disputes. *Cf. Hayes v. Marriott,* 70 F.3d 1144, 1148 (10th Cir. 1995) ("Unsworn affidavits do not raise factual issues precluding summary judgment." (citation omitted)); *see also McConnell v. Reilly*, No. 11-cv-02342-WJM-KLM, 2013 WL 1320774, at *1 (D. Colo. Feb. 26, 2013), *report and recommendation adopted*, No. 11-cv-02342-WJM-KLM, 2013 WL 1316136 (D. Colo. Mar. 29, 2013) (finding a complaint that did not comply with the requirements of 28 U.S.C. § 1746 was not competent evidence for consideration in ruling on a summary judgment motion).

Even considering the content of Plaintiff's unsworn declaration, the Court remains unpersuaded that Plaintiff's allegations raise a genuine dispute of material fact about the validity of the arbitration agreement, given the quality and quantity of contrary evidence supplied by Defendants. Plaintiff states: "Due to my disability, I am unable to read emails or navigate a computer screen with a mouse without hardware and software designed to aid the blind. I was not provided with hardware or software to enable me to" read and opt out of the Solution Channel agreement. Lasser Decl. ¶ 5. The three-page document restates and repeats this same allegation several times. *See id.* at ¶¶ 6-8. However, despite Plaintiff's numerous contentions that he was unable to read his emails or the Solution Channel program, Defendants have provided five emails Plaintiff sent from his Charter email account on October 6, 2017, the same day Solution Channel was announced by email. *E.g.,* Ex. 7 to Defs.' Reply, ECF 18-2. Additionally, Defendants provide evidence that during Solution Channel's thirty-day opt-out period—October 6, 2017 through November 5, 2017—Plaintiff sent more than six hundred emails from his Charter email address. Decl. of Dan Vasey ¶ 8, ECF 18-8.

Plaintiff also declares: "As a secondary measure, I requested that Charter allow another Charter employee to assist me in reading documents. Charter did not provide this accommodation." Lasser Decl. ¶ 9. Defendants reply that, in fact, Jen Bilger, a member of Charter's human resources department, was assigned to Plaintiff to assist him with navigating Charter's internal resources, and that Plaintiff not only knew about this resource but also asked for Ms. Bilger's help on a number of occasions. Defs.' Reply 5, ECF 18. They also provide an email exchange between Plaintiff and Ms. Bilger from October 11, 2017—during Solution Channel's thirty-day opt-out period—in which Plaintiff asked Ms. Bilger to help him navigate enrollment for Charter's employee health benefits. Ex. 6 to Defs.' Reply, ECF 18-1.

***5** Plaintiff's only evidence in this case is his own unsworn declaration, containing generalized statements regarding his inability to read and opt out of the arbitration agreement, which were directly contradicted by objective evidence supplied by Defendants. Plaintiff, therefore, has failed to satisfy his burden of raising a genuine dispute of material fact regarding the

existence of a valid arbitration agreement in this case. As to the second step of the analysis, Plaintiff does not dispute that his claims are within the scope of the Solution Channel agreement. Therefore, the Court recommends Judge Moore grant the motion to compel arbitration of the claims in this case.

II. Defendants' Request to Stay or Administratively Close this Case

In addition to an order compelling arbitration, Defendants request this case be stayed or administratively closed pending arbitration. Section 3 of the FAA provides, in part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, ... *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had.*

9 U.S.C. § 3 (emphasis added). The standard practice in this District is for courts to administratively close, rather than stay, cases pending resolution of the parties' claims in arbitration. *Green v. Fishbone Safety Sols., Ltd.*, 303 F. Supp. 3d 1086, 1101 (D. Colo. 2018) (denying motion to stay but administratively closing the case pending arbitration); *see also Patterson v. Santini*, 631 F. App'x 531, 534 (10th Cir. 2015) ("When a court administratively closes a case, the closure generally operates as 'the practical equivalent of a stay.' " (quoting *Quinn v. CGR*, 828 F.2d 1463, 1465 n.2 (10th Cir. 1987))). Accordingly, the Court recommends Judge Moore administratively closed this matter, subject to reopening for good cause, pursuant to D.C.COLO.LCivR 41.2.

III. Defendants' Request for Costs and Fees

Lastly, Defendants seek to recover costs and fees incurred in bringing the present Motion pursuant to language in the Solution Channel agreement and Fed. R. Civ. P. 54(d)(1). The Solution Channel agreement provides, in part, the following language:

> The parties agree and acknowledge, however, that the failure or refusal of either party to submit to arbitration as required by this Agreement will constitute a material breach of this Agreement. If any judicial action or proceeding is commenced in order to compel arbitration, and if arbitration is in fact compelled ... the party that resisted arbitration will be required to pay to the other party all costs, fees and expenses that they incur in compelling arbitration, including, without limitation, reasonable attorneys' fees.

Knapper Decl. Ex. C, Mutual Arbitration Agreement § K. Plaintiff responds that "the arbitration agreement is not valid and enforceable. Therefore, Defendants may not rely upon its terms to recover attorney fees and costs." Resp. 8. However, as discussed above, the Court finds no genuine dispute of material fact as to the existence of an arbitration agreement.

Courts are required to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Here, Defendants provide no information in their Motion as to the specific costs and fees for which they seek recovery. While the agreement's terms provide for "reasonable" attorneys' fees, for example, the Court cannot determine whether the amount Defendants seek is reasonable based on the present Motion. Additionally, the Local Rules of this District and Judge Moore's Practice Standards require a movant to confer or make a reasonable, good faith effort to confer with the opposing party before filing a motion. D.C.COLO.LCivR 7.1(a); PRACTICE STANDARDS (Judge Raymond P. Moore) (IV)(G)(2) ("Motions without a certification required by D.C.COLO.LCivR 6.1 or 7.1 may be denied without prejudice *sua sponte*."). Defendants have failed to describe

in the Motion, or a certificate attached, the specific efforts taken to fulfill this duty with respect to their request for fees and costs. Therefore, the Court recommends Judge Moore deny Defendants' request for fees and costs associated with bringing the present Motion without prejudice. Defendants may separately move for costs and fees, in accordance with all local rules, if proper to do so.

CONCLUSION

***6** In sum, the Court finds no genuine dispute of material fact as to whether there was a valid arbitration agreement in this case and the parties do not contend Plaintiff's claims are outside the scope of that agreement. Therefore, the Court recommends Judge Moore order the parties to arbitrate the claims in the case. In light of this recommendation, the Court further recommends this case be administratively closed pending arbitration pursuant to the FAA and the Court's local rules. Finally, the Court recommends Judge Moore deny the Defendants' request to recover the costs and fees associated with filing this Motion without prejudice. Accordingly, this Court respectfully RECOMMENDS that Judge Moore **grant in part and deny without prejudice in part** Defendants' Motion to Compel Arbitration [filed July 22, 2019; ECF 11]. [2]

All Citations

Not Reported in Fed. Supp., 2020 WL 2314985

Footnotes

1 Because neither party contends that threshold questions concerning the formation of the arbitration agreement have been delegated to an arbitrator, the Court proceeds with analyzing whether there was a valid arbitration agreement in this case. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

2 Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual and legal findings of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

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EXHIBIT 22: LIONEL HARPER V. CHARTER COMMUNICATIONS, LLC, 2:19-CV-01749 WBS DMC, 2019 WL 6918280 (U.S. DIST. CT., E.D. CALIFORNIA), DECEMBER 19, 2019

2019 WL 6918280
Only the Westlaw citation is currently available.
United States District Court, E.D. California.

Lionel HARPER, Plaintiff,

v.

CHARTER COMMUNICATIONS, LLC, Charter Communications, Inc., and Does 1 through 25, Defendants.

No. 2:19-cv-01749 WBS DMC
|
Signed 12/18/2019
|
Filed 12/19/2019

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ORDER RE: MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY JUDICIAL PROCEEDINGS

WILLIAM B. SHUBB, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Lionel Harper brought this action against defendants Charter Communications, LLC and Charter Communications, Inc. (collectively "Charter"), alleging, inter alia, violation of California's Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12900 et seq. Before this court is Charter's motion to compel arbitration and dismiss or stay judicial proceedings. (Mot. to Compel Arbitration (Docket No. 10).)

I. Facts & Procedural History

Plaintiff worked for Charter as a salesperson in California from September 2017 to March 2018. (Compl. ¶ 9 (Docket No. 1).) Upon hire, plaintiff signed an agreement to arbitrate "any and all claims, disputes, and/or controversies between [plaintiff] and Charter arising from or related to [plaintiff's] employment with Charter" before a single arbitrator from the Judicial Arbitration and Mediations Services, Inc. ("JAMS Arbitration Agreement"). (Decl. of Chance Cassidy ("Cassidy Decl."), Ex. B (Docket No. 10-3); Decl. of Lionel Harper ("Harper Decl.") ¶ 2 (Docket No. 22-1).) According to the agreement, JAMS Employment Arbitration Rules & Procedures and JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness would govern the arbitration of any claims between plaintiff and Charter. (Cassidy Decl., Ex. B.) Under these rules, Charter would "bear all costs unique to arbitration, except for the Case Initiation Fee, which would be split between [plaintiff] and Charter." (Cassidy Decl., Ex. B.) The agreement provided the arbitrator's decision would be "final and binding" on both parties. (Cassidy Decl., Ex. B.)

On October 6, 2017, Charter adopted a new arbitration agreement that required arbitration of claims via "Solution Channel," Charter's employment-based legal dispute resolution program. (See Decl. of John Fries ("Fries Decl."), Ex. A (Docket No. 10-2).) Unlike the JAMS Arbitration Agreement, the Solution Channel Arbitration Agreement provided for arbitration under the rules of the American Arbitration Association and instituted an internal review process before claims proceeded to arbitration. (See generally Fries Decl., Ex. C.) Charter announced this change via e-mail to all active non-Union employees below the level of Executive Vice President, plaintiff among them. (Fries Decl. ¶ 5, Ex. E.) The Solution Channel announcement email notified

employees that "[b]y participating in Solution Channel, [employees] and Charter both waive the right to initiate or participate in court litigation." (Fries Decl., Ex. A.) Additionally, the announcement warned employees that they would be enrolled into Solution Channel unless they "opt[ed] out of participating in Solution Channel within the next 30 days." (Fries Decl., Ex. A.) The email directed employees interested in opting out to go to Panorama, Charter's intranet site, for more information. (Fries Decl., Exs. A, B.) Plaintiff did not opt out. (Fries Decl. ¶ 21.)

Around January 2018, Harper allegedly developed acute pain in his lower back and was advised by a medical professional to take several days off work. (Compl. ¶ 10.) Plaintiff contends he continued to work from home during his leave. (Id. ¶ 11.) On February 14, 2018, plaintiff's manager placed plaintiff on involuntarily unpaid leave. (Id. ¶ 12.) Representatives from Charter's third-party administrator and human resources department contacted plaintiff, but plaintiff's attempts to respond allegedly went ignored. (Id. ¶¶ 12-13.) Charter terminated plaintiff on March 12, 2018. (Id. ¶ 14.) Plaintiff remained unemployed until March 2019, at which point he was able to secure part-time work at a reduced hourly rate. (Id. ¶ 17.)

***2** On November 19, 2018, plaintiff filed a Demand for Arbitration against Charter alleging various wage and hour claims pursuant to the JAMS Arbitration Agreement. (Decl. of Kathryn McGuigan ("McGuigan Decl."), Ex. 1 (Docket No. 10-1).) Although plaintiff had been enrolled in the Solution Channel Arbitration Agreement in October 2017, at all relevant times Charter relied upon the JAMS Arbitration Agreement as binding on the parties. Harper v. Charter Commc'ns, LLC, 2:19-cv-902-WBS-DMC, 2019 WL 3683706, at *8 (E.D. Cal. Aug. 6, 2019) (hereinafter Harper I). Accordingly, the parties proceeded through the JAMS process, and the JAMS arbitrator issued an Order Dismissing Arbitration after finding she had no jurisdiction over the action on April 25, 2019. (McGuigan Decl., Ex. 2.)

Following the arbitrator's order in his wage and hour claim dispute, plaintiff filed a separate Demand for Arbitration with JAMS alleging eight additional employment-related claims against Charter, including (1) discrimination and wrongful discharge under FEHA; (2) failure to make a reasonable accommodation under FEHA; (3) failure to engage in a timely and good faith interactive process under FEHA; (4) age discrimination under FEHA; (5) retaliation under FEHA; (6) wrongful termination in violation of public policy; (7) violation of Investigative Consumer Reporting Agencies Act, Cal. Civ. Code § 1786; and (8) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, (collectively, "FEHA claims") on April 30, 2019. [1] (McGuigan Decl., Ex. 3.) Pursuant to the JAMS Arbitration Agreement, plaintiff paid his share of the Case Initiation Fee to bring his FEHA claims to arbitration. (Decl. of Jamin Soderstrom ("Soderstrom Decl.") ¶ 8 (Docket No. 22-2).) Plaintiff and JAMS then asked Charter to pay its share of the fees so arbitration could commence. (Soderstrom Decl. ¶ 9, Exs. 6-9.) Charter refused. (Id.)

After the JAMS arbitrator had rendered her decision as to plaintiff's wage and hour claims but before arbitration had commenced over plaintiff's FEHA claims, Charter attempted to compel plaintiff to arbitrate his wage and hour claims under the Solution Channel Arbitration Agreement. (McGuigan Decl., Exs. 4-5.) Plaintiff refused, and instead moved to confirm the arbitrator's finding of non-arbitrability in this court. (See Mot. to Confirm Arbitration Award and Enter Judgment in Harper v. Charter Commc'ns, LLC, 2:19-cv-00902-WBS-DMC (Docket No. 9).) This court affirmed the arbitrator's finding that the wage and hour claims were not arbitrable on August 6, 2019. See Harper I, 2019 WL 3683706, at *8.

However, plaintiff's FEHA claims remained unresolved before JAMS because Charter had still not paid its portion of the filing fee. After this court's confirmation of the arbitration award, JAMS contacted the parties on August 7, 2019 and advised them if JAMS did not receive the funds by August 15, plaintiff would "ha[ve] the option to pay to proceed" on his FEHA claims. (Soderstrom Decl. ¶ 9, Ex. 7.) On August 29, 2019, JAMS demanded payment from Charter one final time, threatening to close the case's file on September 16, 2019 if it did not receive full payment. (McGuigan Decl., Ex. 6.) Unable to pay the JAMS fees on his own, plaintiff voluntarily withdrew his Demand for Arbitration on his FEHA claims on September 4, 2019. (McGuigan Decl., Ex. 7.) Plaintiff proceeded to file those claims before this court. (See Compl.) Charter now seeks to compel plaintiff to arbitrate his FEHA claims under the Solution Channel Arbitration Agreement. (Docket No. 10.)

II. Motion to Compel Arbitration

A. Arbitration Agreement Applicable to FEHA Claims

***3** In this court's previous order regarding plaintiff's wage and hour claims against Charter, the court found the JAMS Arbitration Agreement governed the dispute because the parties agreed to its use. Harper I, 2019 WL 3683706, at *4. This agreement effectively acted as a novation, replacing the parties' obligations under the Solution Channel Arbitration Agreement with those set forth under the JAMS Arbitration Agreement. Id. at *6-8. Plaintiff contends that the JAMS Arbitration Agreement should also govern the adjudication of his FEHA claims. (Soderstrom Decl. ¶ 13-14.) The court disagrees.

Charter fully arbitrated plaintiff's wage and hour claim in accordance with the JAMS Arbitration Agreement, and at all relevant times adhered to its terms to inform the resolution of plaintiff's claim. See Harper I, 2019 WL 3683706, at *4. But here, Charter did not engage with plaintiff's FEHA claims in a similar way. An arbitrator did not render a decision; indeed, arbitration had not yet commenced. Plaintiff claims he did not bring his FEHA claims in conjunction with the wage and hour action because the arbitrator said he could pursue the FEHA claims in a separate arbitration and Charter did not object. (Soderstrom Decl. ¶ 6.) But that does not change the fact that these are two separate actions. The facts supporting the novation this court found in the wage and hour action are wholly absent here. Charter did not engage in any conduct that was inconsistent with its right to arbitrate these claims under the Solution Channel Arbitration Agreement, and plaintiff suffered no prejudice from Charter's purported conduct other than a few months delay. [2] Accordingly, the Solution Channel Arbitration Agreement applies to plaintiff's FEHA claims.

B. Validity of Solution Channel Arbitration Agreement

Charter contends this court is required to compel plaintiff's claims to arbitration because the Solution Channel Arbitration Agreement's terms are governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. (Fries Decl., Ex. C at 5 ¶ R.) The FAA "limits courts' involvement to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.' " Munro v. Univ. of S. Cal., 896 F.3d 1088, 1091 (9th Cir. 2018) (internal citations omitted). If the determination is in the affirmative on both counts, the FAA "mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Id. (citing Chrion Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)). It is undisputed that the Solution Channel Arbitration Agreement encompasses plaintiff's FEHA claims. (Fries Decl., Ex. C, 1 ¶ B(1).) Consequently, the court must consider only whether a valid agreement to arbitrate exists.

***4** "The party seeking arbitration bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1005 (9th Cir. 2010) (citation omitted). "Arbitration is a matter of contract." Knutson v. Sirius XM Radio Inc., 771 F.3d 559, 565 (9th Cir. 2014) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (internal modifications omitted)). State contract law determines whether the arbitration agreement is valid. Id. In California, the essential elements of contract are: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration. Cal. Civ. Code § 1150. Plaintiff argues defendants cannot compel arbitration under the Solution Channel Arbitration Agreement because plaintiff never consented to the agreement and the agreement itself is unconscionable.

1. Adequate Notice/Consent

Plaintiff argues the Solution Channel Arbitration Agreement is not valid because he did not have adequate notice of the agreement, and therefore he could not consent to it. (Opp. to Mot. to Compel Arbitration at 15-20 (Docket No. 22).) However, it is undisputed that Charter sent, and plaintiff received, information regarding the Solution Channel Arbitration Agreement, which explicitly warned employees that their inaction would result in enrollment in the program. (Fries Decl., Ex. A.) The Ninth Circuit has found recipients of similar arbitration agreements impliedly consented to be bound by them if they did not opt out within the designated time. See Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1074 (9th Cir. 2014) ("By not opting out within the 30-day period, [employee] became bound by the terms of the arbitration agreement."); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002) (finding 30-day window to opt out of automatic enrollment in an arbitration agreement was "meaningful", "non-adhesive", and "lacked any other indicia of procedural unconscionability"). [3] Indeed, other district courts have applied that same rationale to this very policy. See, e.g., Prizler v. Charter Commc'ns, LLC, No. 3:18-cv-1724-L-MSB, 2019 WL 2269974, at *3 (S.D. Cal. May 28, 2019). Accordingly, plaintiff's arguments that he did not consent to the Solution Channel Arbitration Agreement fail.

2. Unconscionability

***5** Plaintiff also argues that the Solution Channel Arbitration Agreement is unconscionable, and therefore unenforceable. Under California law, the court must determine unconscionability at the time the contract was formed. Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109, 1134 (2013). A court will not enforce an otherwise valid contract if it is unconscionable. Armendariz v. Found. Health Psychcare Servs. Inc., 24 Cal. 4th 83, 114 (2000). However, "[t]he prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract" because "[a]rbitration is favored...as a means of resolving disputes." Id. at 114-15. Accordingly, courts require evidence of both types of unconscionability to overcome the state's policy in favor of arbitrability. Id. These two elements need not both be present in the same degree. Instead, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable." Id.

i. Procedural Unconscionability

"The procedural element generally takes the form of an adhesion contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Fitz v. NCR Corp., 118 Cal. App. 4th 702, 713 (4th Dist. 2004). While Charter had the superior bargaining power in this situation because it drafted and imposed the Solution Channel Arbitration Agreement, it was not procedurally unconscionable because plaintiff had the opportunity to opt out. See Kilgore v. KeyBank, Natl. Ass'n, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc) (citing Circuit City, 283 F.3d at 1199-2000). In Kilgore, the Ninth Circuit found an arbitration agreement binding former students of a failed flight-training school was not procedurally conscionable because the students were empowered to reject the agreement within sixty days of signing and the arbitration clause was "in its own section, clearly labeled, in boldface." 718 F.3d at 1058-59. Here, the changes to the arbitration agreement were clearly denoted in Charter's email to it employees, in its own paragraph, and the time to opt out accompanied its announcement. (See Fries Decl., Ex. A.) Accordingly, the agreement is not procedurally unconscionable.

ii. Substantive Unconscionability

"The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create overly harsh or one-sided results, that is, whether contractual provisions reallocate risks in an objectively unreasonable or

unexpected manner." Baker v. Osborne Dev. Corp, 159 Cal. App. 4th 884, 894 (4th Dist. 2008) (internal quotation marks and citations omitted). Plaintiff claims the Solution Channel Agreement has a "high degree of substantive unconscionability" on multiple grounds. (Opp. to Mot. to Compel Arbitration 26-33.) However, on the whole, plaintiff's claims lack merit.
Plaintiff most notably argues Solution Channel's internal review process is one-sided and permits Charter itself to determine whether a claim is arbitrable. (Opp. to Mot. to Compel Arbitration 26-29.) However, the internal review mechanism specified in the Solution Channel Agreement applies both to Charter and plaintiff. "Claimants" must first file their claims with an internal review process before proceeding to arbitration, and "claimants" include "current employee[s], former employee[s], applicant[s] for employment, or Charter." (Fries Decl., Ex. C.) Both Charter and employees must "acknowledge and attest to the accuracy of the information in the form and then click Submit Claim" to initiate the process -- employees alone are not held to submitting a sworn verification, as plaintiff asserts. (Compare Fries Decl., Ex. C with Opp. to Mot. to Compel Arbitration at 28.)

Furthermore, the Solution Channel Agreement does not permit Charter to conclusively decide whether a claim is arbitrable. Indeed, Solution Channel provides "[i]f [claimants] are not satisfied with Charter's decision following the internal claim review" they can still "proceed with arbitration of [the] claim," at which point both parties will "jointly select an arbitrator" from a list of five potential arbitrators selected by the American Arbitration Association. (Fries Decl., Ex. C.)

***6** Finally, the Solution Channel Agreement provides each party will bear its own attorney's fees regardless of the action brought. (Fries Decl., Ex. C.) California courts have found similar provisions unenforceable in FEHA cases. Serpa v. California Surety Investigations, Inc., 215 Cal. App. 4th 695, 709-10 (2d Dist. 2013). However, this provision "does not vitiate the underlying agreement to arbitrate ... [because] the arbitration agreement is not otherwise permeated by unconscionability." Id. Accordingly, the "the offending provision, which is plainly collateral to the main purpose of the contract," can be severed in conformity with the agreement's severability clause. Id. The Solution Channel Arbitration Agreement is not "permeated" by unconscionability and is therefore enforceable. The court will grant defendant's motion to compel arbitration.

III. Motion to Dismiss or Stay Judicial Proceedings
Because the Solution Channel Arbitration Agreement is enforceable and encompasses plaintiff's claims, the court will stay this action pending arbitration. See 9 U.S.C. § 3.

IT IS THEREFORE ORDERED that defendant's Motion to Compel (Docket No. 10) be, and the same hereby is, GRANTED.
IT IS FURTHER ORDERED that judicial proceedings are STAYED pending arbitration.

All Citations

Not Reported in Fed. Supp., 2019 WL 6918280

Footnotes

1 Plaintiff complied with FEHA's exhaustion requirements by filing a complaint with California's Department of Fair Employment and Housing and obtaining a right to sue letter on December 31, 2018. (Compl. ¶ 6; see also McGuigan Decl., Ex. 3 (incorporating plaintiff's second Demand for Arbitration in full, including a copy of the right to sue letter at Ex. 2).) Charter accepted service of plaintiff's right to sue on January 3, 2019.

(Id.)

2 Plaintiff argues that he has been prejudiced insofar as the adjudication of his claims has been delayed seven months and he has incurred extraneous filing fees and attorney's fees. (Opp. to Mot to Compel Arbitration at 14; Soderstrom Decl. ¶ 16.) In so doing, plaintiff relies on Brown v. Dillard's, Inc., 430 F.3d 1004, 1012-13 (9th Cir. 2005). However, in Brown, Dillard's breached its arbitration agreement with its employee by refusing to participate in the arbitration processes both parties had consented to use. Id. at 1010. Here, while Charter refused to participate in the outdated JAMS process, it is attempting to arbitrate under the Solution Channel Agreement. Brown is therefore inapposite.

3 In both Johnmohammadi and Circuit City, the employees received notice of their respective employer's arbitration agreements and were advised they would be automatically enrolled in the program if they failed to opt out. See 775 F.3d at 1074; 283 F.3d at 1199. Both agreements were upheld because the terms were clear and unambiguous, and neither employer conditioned the employee's continued employment on signing. See 775 F.3d at 1074 ("she made a fully informed and voluntary decision...no threats of termination or retaliation were made to influence her decision"); 283 F.3d at 1199 ("[i]f Ahmed had decided to opt-out of the arbitration program, he would have been allowed to keep his job and not participate in the program."). Plaintiff asserts the opt out right "is hardly meaningful when Charter still requires mandatory individual arbitration" under the JAMS agreement. (Soderstrom Decl. ¶ 17.) However, plaintiff consented to be bound by the JAMS agreement upon his hire. Presenting arbitration agreements on a "take it or leave it basis" is "not enough, by itself, to render the agreement unenforceable." Moreno v. Banamex USA, No. CV 14-3049 PSG (PLAx), 2014 WL 12534772, at *5 (C.D. Cal. June 20, 2014) (citing Lagatree v. Luce, Forward, Hamilton & Scripps LLP, 74 Cal. App. 4th 1105, 1127 (2d. Dist. 1999) ("[A] compulsory predispute arbitration agreement is not rendered unenforceable just because it is required as a condition of employment or offered on a 'take it or leave it' basis.")).

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EXHIBIT 23: VANESSA HUGHES V. CHARTER COMMUNICATIONS, INC., C/A NO. 3:19-1703-JFA-SVH, 2019 WL 8918750 (U.S. DIST. CT., D. SOUTH CAROLINA, COLUMBIA DIVISION), OCTOBER 24, 2019

2019 WL 8918750
Only the Westlaw citation is currently available.
United States District Court, D. South Carolina, Columbia Division.

Vanessa HUGHES, Plaintiff,
v.
CHARTER COMMUNICATIONS, INC. d/b/a Spectrum, Defendant.

C/A No. 3:19-1703-JFA-SVH
|
Signed 10/24/2019

Attorneys and Law Firms

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Patrick D. Quinn, Nelson Mullins Riley and Scarborough LLP, Columbia, SC, Anthony G. Grice, Kaytlin E. Kopen, Pro Hac Vice, Husch Blackwell LLP, St. Louis, MO, for Defendant.

REPORT AND RECOMMENDATION

Shiva V. Hodges, United States Magistrate Judge

***1** In this employment discrimination case, Vanessa Hughes ("Plaintiff") sues Charter Communications, Inc. d/b/a Spectrum ("Defendant"), alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and retaliation in violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* [ECF No. 1-1]. This matter comes before the court on Defendant's motion to compel arbitration and to dismiss or stay all claims. [ECF No. 13]. The motion having been fully briefed [ECF Nos. 16, 17], it is ripe for disposition.

All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civ. Rule 73.02(B)(2)(g) (D.S.C.). Because the motion is dispositive, this report and recommendation is entered for the district judge's consideration. For the reasons that follow, the undersigned recommends the district court grant Defendant's motion to compel arbitration.

I. Factual Background

Defendant employed Plaintiff from December 16, 2011, until her resignation on June 18, 2018. Defendant implemented its employee arbitration agreement through a program called Solution Channel. Knapper [1] Decl. at ¶ 5. Defendant announced the launch of Solution Channel to its employees on October 6, 2017, via email from Paul Marchand, Defendant's Executive Vice President of Human Resources, to employees' company email accounts. Knapper Decl. at ¶¶ 5–7. The email explained "[b]y participating in Solution Channel, you and Charter both waive the right to initiate or participate in court litigation ... involving a covered claim and/or the right to a jury trial involving any such claim." [ECF No. 13-2 at 6]. The email further stated that "[u]nless you opt out of participating in Solution Channel within the next 30 days, you will be enrolled," and that "[i]nstructions

for opting out of Solution Channel are also located on Panorama." [2] *Id.* The email also included a link to the Solution Channel web page located on Panorama. Knapper Decl. at ¶ 9.

The Solution Channel web page included additional information regarding the program and contained links to an Arbitration Agreement and Program Guidelines. Knapper Decl. at ¶¶ 9–10. [3] Employees who did not opt out of Solution Channel on or before November 5, 2017, were automatically enrolled in the program. Knapper Decl. at ¶¶ 16, 17. Plaintiff did not opt out of Solution Channel. Knapper Decl. at ¶¶ 20, 21.

II. Discussion

A. Legal Standard

***2** Defendant asks the court to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), which provides in part that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Section 2 of the FAA states that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration ... [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23–24 (1983). Although federal law governs the arbitrability of disputes, ordinary state-law principles resolve issues regarding the formation of contracts. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005).

"Motions to compel arbitration in which the parties dispute the validity of the arbitration agreement are treated as motions for summary judgment." *Rose v. New Day Fin., LLC*, 816 F. Supp. 2d 245, 251 (D. Md. 2011). "Accordingly, arbitration should be compelled where 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Erichsen v. RBC Capital Markets, LLC*, 883 F. Supp. 2d 562, 566–67 (E.D.N.C. 2012) (quoting Fed. R. Civ. P. 56). A trial is necessary if the material facts regarding the making of an agreement to arbitrate are in dispute. *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997).

In deciding a motion regarding arbitration, the court must use a limited, two-part test to ensure that the dispute is arbitrable. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 937-38 (4th Cir. 1999). The two-part inquiry consists of: (1) whether a valid agreement to arbitrate exists between the parties, and (2) whether the specific dispute is within the scope of the agreement. *Id.* at 938.

B. Analysis

Plaintiff argues there is not a valid agreement to arbitrate in this case. The formation of a binding contract requires "the parties [to] have a meeting of the minds with regard 'to all essential and material terms of the agreement.' " *Vessell v. DPS Associates of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir. 1998). The existence of an agreement is determined by reference to general principles of state contract law. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996) (" '[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally' ") (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987)) (alteration in original). In South Carolina, "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." *Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 166 (S.C. 2003).

Plaintiff argues she did not enter into an arbitration agreement with Defendant, and she lacked notice of the arbitration agreement. The question at issue here is whether Plaintiff had sufficient notice of Defendant's arbitration agreement to establish a meeting of the minds under South Carolina law. Plaintiff swears in her affidavit she was unaware of the arbitration agreement and does not recall receiving or reviewing the email Marchand sent during her employment with Defendant. [ECF No. 16-2 at ¶¶ 7, 9]. Defendant argues that "a signed acknowledgement of receipt is not necessary when *electronic documentation instead* irrefutably shows receipt." [ECF No. 17 at 7 (emphasis in original)].

In South Carolina, an email is deemed sent when it exits the sender's email system in a properly-addressed and readable format, and it is received when it enters the recipient's email system in a readable format. S.C. Code Ann. § 26-6-150. [4] Additionally, South Carolina courts have held that evidence of a mailing generally creates a rebuttable presumption of receipt. *Bakala v. Bakala*, 576 S.E.2d 146, 163 (S.C. 2003); *Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"); *Bosiger v. U.S. Airways*, 510 F.3d 442, 452 (4th Cir. 2007) (same). Therefore, the undersigned concludes that South Carolina courts would find that evidence of an email from an employer to its employee's company email address also creates a rebuttable presumption of receipt.

***3** Although Plaintiff claims she does not recall receiving or reviewing the email, Pl. Decl. at ¶¶ 7, 9, courts have found sworn statements indicating the intended recipient "does not recall" receipt are insufficient to rebut the presumption. *See Bosiger*, 510 F.3d at 452 (finding deposition testimony that plaintiff cannot recall receiving notice is insufficient to overcome substantial evidence, particularly in light of the presumption that plaintiff received notices mailed to him); *but cf., Mazone v. Dolgencorp, LLC*, Case No. 3:17-cv-01088-JFA-PJG, at ECF No. 30. [5] Plaintiff's failure to opt out of the agreement indicates she accepted the terms of the arbitration agreement. *Laidlaw Envtl. Servs., (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1409 (D.S.C. 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997) ("Pursuant to South Carolina law, conduct manifesting assent constitutes acceptance of the offered terms. Thus, compliance with the proffered terms and conditions constitutes acceptance of an offer, and assent need not be express, but may be inferred from the parties' conduct.") (citations omitted); *see also Farrow Road Dental Group. P.A. v. AT&T Corp.*, No. 3:17-1615-CMC, 2017 WL 4216158 (D.S.C. Sept. 22, 2017) (finding plaintiff's continued use of services under the contract and failure to communicate disagreement with the contract constitutes assent to the contract terms). Therefore, because Plaintiff cannot rebut the presumption that she received the email announcing the introduction of the arbitration agreement and continued her employment with Defendant without opting out, she assented to its terms. The arbitration agreement is valid, and Plaintiff has not disputed that it covers her claims.

III. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends that the district judge grant Defendant's motion to dismiss and to compel arbitration. [ECF No. 13]. The undersigned recommends the court retain jurisdiction over the parties for all matters relating to this action after arbitration, including enforcement of any arbitration judgment rendered. [6]

IT IS SO RECOMMENDED.

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the

basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.' "

Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

All Citations

Slip Copy, 2019 WL 8918750

Footnotes

1 Tammy Knapper is Defendant's Director of Human Resources Technology. Knapper Decl. at ¶ 1.

2 Panorama is Defendant's intranet site, and it is accessible to all employees. Knapper Decl. at ¶ 9.

3 According to Defendant, the Solution Channel web page provided detailed instructions for opting out of Solution Channel and provided a link to the PeopleSoft page employees could access to opt out of the program. Knapper Decl. at ¶¶ 11–14. Although the instructions for opting out have not been provided to the court, the web page with the final step for opting out has been provided. [ECF No. 13-2].

4 Defendant has provided a copy of the email from Marchand with Knapper's declaration indicating that it is a true and accurate copy of the email. Knapper Decl. at ¶ 7; Exh. 1. Plaintiff has not disputed the veracity of the email.

5 The District Court adopted the oral recommendation of the magistrate judge and the precise nature of the Recommendation is not independently expressed on the record, although it appears to turn on whether a mailing created notice sufficient to constitute a meeting of the minds. *See Mazone* at ECF No. 26.

6 In the alternative, the district court may wish to stay proceedings while the parties arbitrate.

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S273802**
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ADDITIONAL DOCUMENTS	Exhibits to Appellant's Request for Judicial Notice Volume 1 of 2
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9/13/2022
Date

/s/James A. Bowles
Signature

Bowles, James A. (89383)
Last Name, First Name (PNum)

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Law Firm