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 II OF II – Pages 195 to 388 of 388

*JAMES A. BOWLES (SBN 89383)
CASEY L. MORRIS (SBN 238455)
ELISSA L. GYSI (SBN 281338)
HILL, FARRER & BURRILL LLP
One California Plaza
300 South Grand Avenue, 37th Floor
Los Angeles, California 90071
(213) 620-0460 Telephone
(213) 624-4840 Facsimile
jbowles@hillfarrer.com •
cmorris@hillfarrer.com
egysi@hillfarrer.com

Attorneys for Defendant and Appellant, Charter Communications, Inc.

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

TABLE OF EXHIBITS

CALIFORNIA SUPERIOR COURT CASES

EXHIBIT 24: DYLAN KROHN V. SPECTRUM GULF COAST, LLC, 3:18-CV-2722-S, 2019 WL 4572833 (U.S. DIST. CT., N.D. TEXAS, DALLAS DIVISION), SEPTEMBER 19, 2019

2019 WL 4572833
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

Dylan KROHN
v.
SPECTRUM GULF COAST, LLC and Charter Communications, LLC

CASE NO. 3:18-CV-2722-S
|
Filed 09/19/2019

Attorneys and Law Firms

Christine Neill, Neill Legler Cole PLLC, Jane Legler Byrne, Neill & Byrne PLLC, Dallas, TX, for Dylan Krohn.

Robert E. Sheeder, Aimee Martika Raimer, Morgan Lewis Bockius LLP, Michael Arthur Correll, Paulo B. McKeeby, Reed Smith LLP, Dallas, TX, for Charter Communications LLC, Time Warner Cable Texas LLC.

MEMORANDUM OPINION AND ORDER

KAREN GREN SCHOLER, UNITED STATES DISTRICT JUDGE

***1** This Order addresses Defendant Charter Communications, LLC's ("Charter") Motion to Compel Arbitration and Dismiss Plaintiff's Complaint [ECF No. 14]. For the following reasons, the Court grants the Motion in part and denies the Motion in part.

I. BACKGROUND

Charter is a telecommunications company offering telephone, internet, and cable services to customers nationwide. Br. in Supp. Mot. to Compel Arbitration ("Br.") 2. Plaintiff Dylan Krohn ("Plaintiff") has been an employee of Charter since 2012. *Id.* On October 6, 2017, Charter launched *Solution Channel*—an alternative dispute resolution program that included a binding arbitration provision governing all claims arising out of employment with Charter. *Id.* Charter alleges that on that date, notice of the new program was sent to Plaintiff via his company email account. *See id.*; Def.'s App. 03-04 ¶ 20, 15-16.

That notice—which Plaintiff opened [1] —announced the program and provided a link to a summary of the program, which, in turn, contained a link to the arbitration agreement ("Agreement"). *See* Def.'s App. 05-08, 15-16; Def.'s Reply App'x 30-31. The notice also notified Plaintiff of his eligibility to opt-out of the program. *See id.* at 06, 26.

The notice read, in relevant part, as follows:

> 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.... Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled."

Def.'s App. 05-06, 15-16. Plaintiff did not exercise his right to opt-out of the program. Def.'s App. 04.

The Agreement includes the following language:

> 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: collection of overpaid wages and commissions, recovery of reimbursed tuition or relocation expense reimbursement, damage to or loss of Charter property, recovery of unauthorized charges on company credit card; claims for unlawful termination, unlawful failure to hire or failure to promote, 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) ....

***2** *Id.*; Def.'s App. 09. Plaintiff filed this action in state court on September 11, 2018, asserting causes of action for breach of contract, quantum meruit, and fraud—all based on alleged unpaid commissions. Pl.'s Orig. Pet. ¶¶ 34-50. Defendants removed the case to this Court on October 15, 2018, *see* ECF No. 1, and Charter filed the pending Motion on March 20, 2019.

II. ANALYSIS

Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, written arbitration provisions "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 provides that a party seeking to enforce an arbitration provision may petition the court for "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* § 4.

Enforcement of an arbitration agreement involves two analytical steps. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). The first is contract formation—whether the parties entered into any arbitration agreement at all. *Id.* The second involves contract interpretation to determine whether the claim at issue is covered by the arbitration agreement. *Id.* Ordinarily, both steps are questions for the Court. *Id.* (citing *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003)). Plaintiff and Charter agree that if there is a valid arbitration agreement, Plaintiff's claims fall within the scope of the Agreement. This Order, therefore, addresses only the first step of the analysis.

A. *Existence of Valid Arbitration Agreement*

(1) *Choice of Law*

When a party seeks to compel arbitration based on a contract, courts must determine whether there is a contract between the parties at all. *Arnold v. HomeAway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018) (citing *Kubala*, 830 F.3d at 201-02). "[I]t is for

the courts to decide at the outset whether an agreement was reached, applying state-law principles of contract." *Will-Drill Res.*, 352 F.3d at 218. Federal courts look to state law to determine whether parties formed a valid arbitration agreement. *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445-46 (5th Cir. 2001). "A federal court must follow the choice-of-law rules of the state in which it sits." *See Fina, Inc. v. ARCO*, 200 F.3d 266, 269 (5th Cir. 2000) (quoting *St. Paul Mercury Ins. v. Lexington Ins.*, 78 F.3d 202, 205 (5th Cir. 1996)). Texas courts apply the "most significant relationship test" to determine which state's law to apply in a breach of contract case. *See 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)). Under this test, courts look at factors such as the place of contracting, the place of negotiating the contract, the place of performance, the location of the subject matter of the contract, and the residency of the parties. *See id.* Here, Texas law governs because Texas has the most significant relationship to this dispute. Specifically, Plaintiff and Charter entered into the Agreement in Texas, Charter employed Plaintiff in Texas, and Plaintiff resided in Texas. *See* Br. 6.

(2) *Arbitration Agreements in At-Will Employment Contracts*

Although an agreement to arbitrate may be reached via a change to an existing at-will employment contract, *see In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002), to be enforceable, the employee must (1) receive notice of the agreement to arbitrate and (2) accept it. *In re Doll. Peterbilt, Ltd.*, 196 S.W.3d 161, 162 (Tex. 2006) (per curiam) (citation omitted).

a. *Notice*

***3** Texas courts look to "all communications between the employer and employee" to determine whether the employee received adequate notice. *Id.* (citation omitted). To be sufficient, the notice must "unequivocally notif[y]" the employee of the existence of an arbitration agreement. *In re Halliburton*, 80 S.W.3d at 568 (quoting *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986)). A Central District of California case with nearly identical facts—though not binding authority on this Court—is persuasive to this analysis. *See* Statement of Decision Granting Defs.' Mot. to Compel Arbitration, *Castorena et al. v. Charter Comm'cns*, No. 2:18-cv-07981-JFW-KS (C.D. Cal. Dec. 14, 2018), ECF No. 41 [hereinafter "*Castorena* Statement of Decision"]. There, the court compelled arbitration based on the very same email that was sent to Plaintiff in this case. *Id.* at 8-9. The court reasoned that recipients of that email were "clearly instructed that if they did not 'opt out' " of the program, they would "waive the right to initiate or participate in court litigation ... involving a covered claim," and therefore, the notice was adequate. *Id.* at 9.

Similarly, the Court finds that the email sent to Plaintiff on October 6, 2017 ("Email"), constituted sufficient notice. *See* Def's App. 15-16. The Email explicitly stated that Charter had launched a new program that required "binding arbitration." *Id.* The Email further stated that Plaintiff "waive[d] the right to initiate or participate in court litigation." *Id.* The Email also explained that the full Agreement could be accessed through a link in the Email to Charter's intranet, and that the Agreement would be binding on any employee who did timely opt-out. *See id.* The Court finds those statements and explanations "unequivocally notified" Plaintiff of the existence of the Agreement. *Halliburton*, 80 S.W.3d at 568; *see also Castorena* Statement of Reason. The Email, therefore, provided Plaintiff with adequate notice.

b. *The Mailbox Rule*

Plaintiff's argument that he "does not recall receiving or having read the email," and therefore did not receive adequate notice, is unpersuasive. Resp. ¶ 7. "[W]hen there is a material question as to whether a document was actually received," courts apply the mailbox rule. *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 419 (5th Cir. 2007). Under that rule, once Charter creates a presumption of receipt of the Email, that presumption must then be rebutted by Plaintiff with credible evidence. *See id.*; *see also Mart v. Open Text Corp., No. A-10-CV-870-LY-AWA, 2013 WL 442009, at *2* (W.D. Tex. Feb. 5, 2013) (applying mailbox presumption to email absent evidence of "bounce back"). "It is not necessary that [Charter] prove actual receipt of the notice." *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 918 (N.D. Tex. 2000). Instead, Charter need only show that it sent the Email in keeping with its regular procedures. *See id.* Charter met this burden by submitting the Affidavit of Tammie Knapper, which swears that Charter sent the Email to a group of employees that included Plaintiff. *See* *Gamel v. Grant Prideco, L.P.*, 625 F. App'x 690, 694 (5th Cir. 2015) (noting a sworn statement is credible evidence of mailing for purposes of the mailbox rule); *see also* Def.'s App. 01-04. Plaintiff's bare allegation of memory loss is not credible evidence sufficient to rebut the presumption of receipt.[2] *See* *United States v. Ekong*, 518 F.3d 285, 287 (5th Cir. 2007) ("[Defendant's] affidavit of non-receipt was not supported by circumstantial evidence,"); *see also* *Douglas v. Oceanview Healthcare, Inc.*, Civ. A. No. 3:15-CV-0225, 2016 WL 4147244, at *4 (S.D. Tex. Aug. 2, 2016) (holding that statements of non-receipt were insufficient to deny a motion to compel arbitration). Plaintiff, therefore, had adequate notice of the Agreement.

(3) *Acceptance of the Agreement*

***4** The next issue is whether Plaintiff accepted the Agreement. *See Doll.* *Peterbilt*, 196 S.W.3d at 162. As explained by the Supreme Court of Texas, "[i]f [an] employee receives notice and continues working with knowledge of the modified employment terms, the employee accepts them as a matter of law." *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006); *see also Elsadig v. Luxottica Retail N. Am., Inc.*, No. 3:16-CV-02055-L, 2017 WL 3267926, at *6 (N.D. Tex. July 10, 2017), *report and recommendation adopted*, No. 3:16-CV-02055-L, 2017 WL 3234027 (N.D. Tex. July 31, 2017). It is undisputed that Plaintiff currently works for Charter. *See* Br. 2; Pl.'s Orig. Pet. ¶ 12. Therefore, Plaintiff accepted the Agreement. For the foregoing reasons, the Court finds that a valid agreement to arbitrate exists and compels this dispute to arbitration.

B. *Stay or Dismissal*

In the Motion, Charter asks that the Court dismiss the case in its entirety with prejudice if it determines that all claims should be sent to arbitration. *See* Mot. 9. The FAA "provides that when claims are properly referable to arbitration, that upon application of one of the parties, the court shall stay the trial of the action until the arbitration is complete." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (citing 9 U.S.C. § 3). 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." *Id.* (emphasis omitted). The decision of whether to stay or dismiss a case pending arbitration is within the sound discretion of the district court. *See* *Grasso Enters., LLC v. CVS Health Corp.*, 143 F. Supp. 3d 530, 542 (W.D. Tex. 2015) (citation omitted). Here, because all of Plaintiff's claims against Charter will be resolved by arbitration, the Court dismisses those claims with prejudice. Plaintiff's remaining claims against non-moving Defendant Spectrum Gulf Coast, LLC, however, are stayed pending resolution of the arbitration. *See* 9 U.S.C. § 3.

III. CONCLUSION

For the reasons discussed above, the Court grants in part and denies in part Charter's Motion to Compel Arbitration and Dismiss Plaintiff's Complaint. The Court finds that an agreement, including an arbitration provision, exists between the parties. Plaintiff's claims against Defendant Charter Communications, LLC are dismissed with prejudice. Plaintiff's remaining claims against Defendant Spectrum Gulf Cost, LLC will be stayed and administratively closed pending the outcome of arbitration. *See* 9 U.S.C. § 3. The Court directs the Clerk of Court to administratively close this case until such time as the Court orders it to be reopened.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 4572833

Footnotes

1 Although this evidence was submitted for the first time in Defendant's Reply, the Court will consider it, as it "rebut[s] Plaintiff's Response" and "bolster[s] the arguments" made in the Motion. *See Murray v. TXU Corp.*, Civ. No. Civ. A. 303CV0888P, 2005 WL 131412, at *4 (N.D. Tex. May 27, 2005); *see also Lynch v. Union Pac. R.R. Co.*, Civ. No. 3:13-CV-2701-L, 2015 WL 6807716, at *1 (N.D. Tex. Nov. 6, 2015) (considering the defendant's reply evidence without it seeking leave "[b]ecause Defendant's reply and related evidence are responsive to arguments raised and evidence relied on by Plaintiff in his summary judgment response.").

2 The Court considered Plaintiff's statement that his "company email archives do not currently reflect that he received the email." Resp. 3. That allegation, however, is ultimately self-defeating, as Plaintiff acknowledges that "the auto archive system was not always functioning and may not have been functioning during the period including the date on which the email was purportedly sent." *Id.* Thus, it does not affect the Court's analysis.

End of Document

EXHIBIT 25: ANDREW J. PRIZLER V. CHARTER COMMUNICATIONS, LLC, 3:18-CV-1724-L-MSB, 2019 WL 2269974 (U.S. DIST. CT., S.D. CALIFORNIA), MAY 28, 2019

2019 WL 2269974
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

Andrew J. PRIZLER, individually and on behalf of all others similarly situated, Plaintiff,
v.
CHARTER COMMUNICATIONS, LLC (dba Spectrum, TWC Administration, LLC, and Does 1 through 100, inclusive, Defendants.

Case No.: 3:18-cv-1724-L-MSB
|
Signed 05/27/2019
|
Filed 05/28/2019

Attorneys and Law Firms

Matthew Righetti, Michael Righetti, Righetti Glugoski PC, San Francisco, CA, for Plaintiff.

Katherine Ann Roberts, Sidley Austin LLP, Max C. Fischer, Aimee G. MacKay, Morgan Lewis & Bockius LLP, Los Angeles, CA, Wendy M. Lazerson, Sidley Austin, Palo Alto, CA, for Defendants.

ORDER ON DEFENDANT'S MOTION TO COMPEL ARBITRATION

Hon. M. James Lorenz, United States District Judge

***1** Pending before the Court is Defendants' motion to compel arbitration. For the following reasons, the Court GRANTS Defendant's motion.

I. BACKGROUND

Defendant Charter Communication ("Charter"), a telecommunications company, employed Plaintiff Andrew J. Prizler ("Prizler") as a retail sales employee in California from July 2014 until 2018. On October 6, 2017, Charter announced to its employees that it would begin using a dispute resolution program called the Solution Channel to resolve employment-based legal disputes. To that end, Charter offered mutual arbitration agreements to its candidates and employees. Paul Marchand, Charter's Executive Vice President of Human Resources, sent the Solution Channel announcement to all Charter employees' email accounts, including Prizler. The email announcement stated,

> "By participating in *Solution Channel*, you and Charter both waive the right to initiate or participate in court litigation ... 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 [ ] located on Panaroma." Doc. 29-2 at 2-3 (italics in original).

A link to the Solution Channel webpage was embedded in the email announcement. *See* Doc. 29-2. The Solution Channel webpage included a reference and link to Charter's Mutual Arbitration Agreement (the "Agreement") and the Program Guidelines. The Solution Channel webpage included instructions on how to opt out of the program and warned employees that they would be automatically enrolled if they did not opt out within designated time. The opt-out instruction included a link that routed to a opt-out webpage where an employee could enter their name and check a box stating, "I want to opt out of Solution Channel[,]" and saving this selection. Employees could print the page to save in their personal records. Prizler did not opt out of the Agreement.

The Agreement requires Charter employees to individually arbitrate all disputes arising out of their employment with Charter. The Agreement bars claims brought on a class basis or in any representative proceeding. The Agreement also requires any challenge to the validity, enforceability, or breach of the Agreement be sent to arbitration. The Agreement explicitly declares that the Agreement will be governed by the Federal Arbitration Act.

Despite the Agreement's limitations, Prizler filed a class action complaint against Charter alleging the following causes of action: (1) violation of the Fair Labor Standards Act ("FLSA"), (2) violation of the California Labor Code, (3) violation of the California Business and Professions Code, (4) failure to provide meal periods, and (5) failure to provide rest periods. Charter seeks to compel Prizler's claims to binding arbitration on an individual basis under the Agreement, dismiss Prizler's class claims, and stay Prizler's fifth cause of action for PAGA penalties.

II. LEGAL STANDARD

The parties do not dispute the fact that the Federal Arbitration Act ("FAA") governs here. Under the FAA, a Court must consider two threshold questions to determine whether to compel arbitration: (1) is there a valid agreement to arbitrate? And, if so, (2) does the agreement cover the matter in dispute? *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Since it is undisputed that the Agreement, if valid, covers the matters in dispute [Doc. 33 at 9], the Court need only consider whether the agreement is valid.

**2 An agreement to arbitrate is "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. Under California law, the elements of a valid contract are (1) parties capable of contracting; (2) mutual consent; (3) a lawful object; and (4) consideration. Cal. Civ. Code § 1550. If the court finds that an agreement to arbitrate is valid and the opposing party presents no viable defenses, the court must order arbitration in accordance with the terms of the agreement. 9 U.S.C. § 4. However, a court will not enforce an otherwise valid contract if there exists a viable defense, such as unconscionability or waiver. *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016) (waiver); *Armendariz v. Found. Health Psychcare Servs. Inc.*, 24 Cal. 4th 83, 114 (2000) (unconscionability). If there exists a genuine dispute of material fact regarding contract formation and the party opposing arbitration timely demands a jury trial of the issue, the court must submit the issue of contract formation to a jury. 4 U.S.C. § 4.

III. DISCUSSION

Prizler presents three arguments in opposition to compelled arbitration. First, Prizler contends that Charter failed to comply with their obligations under Rule 26. Second, Prizler contends that Charter failed to carry their affirmative burden of proving the parties entered into a valid arbitration agreement. Finally, Prizler contends that it is impossible to evaluate unconscionability based on the information set forth in Charter's motion. The Court will only address Prizler's two latter contentions as the first has no bearing on the ultimate issue here.

A. Valid Agreement

"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).

Prizler asserts that Charter failed to properly authenticate the Agreement. Federal Rule of Evidence 901(a) dictates, "To satisfy the requirement of authenticating for identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Prizler's contention that the declaration of Ms. Tammie Knapper

is insufficient to establish his entering into the Agreement misses the mark. Ms. Knapper submitted her affidavit as Charter's authorized corporate representative and her statements are merely the statements of Charter. Charter attached the October 6, 2017 Solution Channel Announcement email sent to Charter employees, including Prizler, to Ms. Knapper's declaration. A "proper and timely mailing of a document raises a rebuttable presumption that the document has been received by the addressee." *Schikore v. BankAmerica Supplemental Retirement Plain*, 269 F.3d 956, 961 (9th Cir. 2001). The Court finds any argument that Prizler did not receive the Solution Channel announcement unpersuasive. Charter also requested the Court take judicial notice of rulings made by other federal courts compelling arbitration based on the same arbitration agreement at issue here. [1] Moreover, Prizler's reliance on *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal.App.4th 836, 839 (2014) is misplaced as *Ruiz* court sought to establish whether an electronic signature was executed to validate the underlying arbitration agreement. However, under the instant circumstances, the Court finds the Agreement self-executing by its terms and became valid when Prizler failed to opt out of the program.

***3** Prizler also asserts that Charter failed to establish implicit consent. Mutual consent is a necessary element to contract formation. Cal. Civ. Code § 1550. Consent to an arbitration agreement can be express or implied in fact. *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 420 (2000). Charter contends Prizler impliedly consented to the Solution Channel program by failing to opt out of the program within the specified time. The Court agrees. It is undisputed that Charter sent Prizler the Solution Channel Announcement email. Under the mailbox rule, the Court finds that Prizler received the email at that time as he has not provided any evidence to the contrary. The Court also finds that Prizler impliedly consented to the Agreement as he failed to take the steps to opt out despite Charter providing the instructions on how to do so in an accessible place. The Solution Channel webpage makes clear that participation in the Solution Channel program means Charter and the employee waive any right to participate in court litigation involving covered disputes and to arbitrate those disputes. The "opt-out" acknowledgement included on the Solution Channel webpage warns employees that they are specifically consenting to participate in the Solution Channel program if they fail to opt out. Moreover, the cases Charter cites reinforce that consent is found in cases evaluating similar arbitration agreements. *See* *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002); *see also Aquino v. Toyota Motor Sales USA, Inc.*, 2016 WL 3055987, *4 (N.D. Cal. May 31, 2016) (citing *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.").

Prizler's reliance on this Court's ruling in *Folck v. Lennar Corp.*, 2018 WL 1726617, at *3 (S.D. Cal. Apr. 10, 2018) is flawed. In *Folck*, this Court rejected Defendants' argument that acceptance was shown by Plaintiff's continued employment for years after receiving a document (the ARG) containing an arbitration agreement that provides continued employment constitutes acceptance. The Court reasoned that Defendants' argument was unpersuasive because it assumed that Plaintiff was aware that his continued employment was conditioned on his acceptance of the 2011 Arbitration Agreement. While the *Folck* Plaintiff created a genuine dispute of material fact on this issue by submitting declaration testimony stating that Defendant never asked him to review or agree to the 168-page ARG document, Prizler's similar contention does not create a genuine issue where Charter has provided the time-stamped October 6, 2017 email sent to him by a Charter representative discussing the Agreement and opt-out implications. The instructions to opt out the Agreement here were accessible to Prizler through his Panorama portal during the 30-day period. It is undisputed that Prizler failed to opt out the program. Accordingly, the Court finds that the Agreement is valid.

B. Unconscionability

Plaintiff contends that Charter misrepresented the Agreement's contents and failed to include documentary evidence to conclude whether the arbitration agreements are unenforceable under the doctrine of unconscionability. Unconscionability carries both a procedural and a substantive element, and a court can refuse to enforce a contract or portion thereof as unconscionable only if both are satisfied. *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83, 114 (2000). "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 (2004). "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. To be substantively unconscionable, a contractual provision must shock the conscience." *Baker v. Osborne Dev. Corp*, 159 Cal. App. 4th 884, 894 (2008) (internal quotation marks and citations omitted).

Here, the arbitration agreement was imposed and drafted by Defendants, who, as employer, appear to be the party of superior bargaining strength. Notwithstanding, the Court finds that the Agreement was not adhesive as Prizler had the opportunity to opt out. *Circuit City Stores, Inc.*, 283 F.3d at 1199; *see Kilgore v. KeyBank, Natl. Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc). Accordingly, the Court finds the Agreement is not procedurally unconscionable.

***4** Prizler only contends that certain provisions of the Agreement are substantively unconscionable. However, the Court will not reach the question whether the Agreement was substantively unconscionable because the Agreement was not procedurally unconscionable. *See Armendariz*, 24 Cal. 4th at 114.

IV. CONCLUSION AND ORDER

For the foregoing reasons, the Court finds that the Agreement is valid and enforceable. Therefore, this dispute must proceed to arbitration. *See* 9 U.S.C. § 3. Accordingly, the Court orders as follows:

- Charter's Motion to Compel Arbitration [Doc. 29] is GRANTED;
- The parties are ordered to proceed to arbitration of plaintiff's claims;
- Prizler's PAGA claim is STAYED;
- Charter's Motion to Stay Litigation [Doc. 45] is DENIED AS MOOT;
- The Clerk of Court shall terminate this motion.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 2269974

Footnotes

1 The Court GRANTS Charter's request for judicial notice of four orders issued by other district courts pursuant to Federal Rule of Civil Procedure 201(b) because these federal proceedings directly relate to the matters at issue here in that each order evaluates the validity of the arbitration agreement at issue here.

End of Document

EXHIBIT 26: CANDACE OSBORNE V. CHARTER COMMUNICATIONS, INC., 4:18CV1801 HEA, 2019 WL 2161575 (U.S. DIST. CT., E.D. MISSOURI), MAY 17, 2019

2019 WL 2161575
Only the Westlaw citation is currently available.
United States District Court, E.D. Missouri, Eastern Division.

Candace OSBORNE, Plaintiff,
v.
CHARTER COMMUNICATIONS, INC., Defendant.

Case No 4:18CV1801 HEA
|
Signed 05/17/2019

Attorneys and Law Firms

Candace Osborne, Roxana, IL, pro se.

Anthony G. Grice, Husch Blackwell, LLP, St. Louis, MO, for Defendant.

OPINION, MEMORANDUM AND ORDER

HENRY EDWARD AUTREY, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Defendant's Motion to Dismiss and Compel Arbitration or in the Alternative, Stay Proceedings Pending Arbitration [Doc 7]. Plaintiff did not file an opposition to the Motion, however, prior to the filing of the Motion, Plaintiff filed a "Memorandum for Clerk" wherein she details her position regarding arbitration. For the reasons set forth below, the Motion to Compel Arbitration is granted.

Facts and Background

Plaintiff filed this action *pro se* against Defendant on October 23, 2018, alleging that her employment with Defendant was terminated in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et* seq., based on her sex.

Defendant has submitted the Affidavit of Tammie Knapper, Director, HR Technology for Charter Communications, LLC 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 "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. 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").

***2** 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 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.

Ms. Knapper affirms that she 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. She 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.

Ms. Knapper 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.

Defendants move to compel arbitration and dismiss, alternatively, Defendants seek a stay of this action pending arbitration. Plaintiff does not dispute Ms. Knapper's averments, but argues in her "Memorandum" that she was not given a copy of the Employee Handbook after her employment was terminated.

Under the Program, Plaintiff and Defendant "mutually agree[d] that, as a condition... of [Plaintiff's] employment, with [Defendant], any dispute arising out of or relating to [Plaintiff's]... employment with [Defendant] or the termination of that relationship, ...must be resolved through binding arbitration." These disputes include:

> All disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which [Plaintiff] or [Defendant] have 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 ...sex, ... and any other prohibited grounds), [or] claims for unlawful retaliation...

Considerations to Compel Arbitration

Before compelling arbitration, a district court must determine (1) whether there is a valid arbitration agreement and (2) whether the particular dispute falls within the terms of that agreement. *Robinson v. EOR-ARK, LLC,* 841 F.3d 781, 783 (8th Cir. 2016). Any doubts raised in construing contract language on arbitrability should be resolved in favor of arbitration. *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 795 (8th Cir. 2005).

Under Section 2 of the Federal Arbitration Act (FAA), "written arbitration agreements [are] valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract." *Anderson v. Carlisle*, 129 S.Ct. 1896, 1901 (2009). Section 2 "creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to place such agreements upon the same footing as other contracts." *Id.* (quotations omitted). "Section 3, in turn, allows litigants already in federal court to invoke agreements made enforceable by Section 2." *Id.*

***3** "Two questions are pertinent when [considering] ... a motion to compel arbitration: (1) whether the parties entered a valid arbitration agreement, and, (2) if so, whether the parties' particular 'dispute falls within the scope of the arbitration agreement.' " *Parm v. Bluestem Brands, Inc.*, 898 F.3d 869, 873 (8th Cir. 2018) (quoting *Unison Co. v. Juhl Energy Dev., Inc.*, 789 F.3d 816, 818 (8th Cir. 2015)). Arbitration is a matter of contract, and "where a valid arbitration agreement exists, [courts] must liberally construe it, resolving any doubts in favor of arbitration...." *Id.* (internal quotations omitted).

Defendant has produced the employment arbitration to which Plaintiff accepted through not opting out. Plaintiff does not challenge the validity of the agreement. The scope of that agreement includes claims by Plaintiff against Defendant unlawful discrimination or harassment including such claims based on sex. Therefore, according to the undisputed record, Plaintiff's discrimination claim is within the scope of a valid arbitration agreement. *See* *McNamara v. Yellow Transp., Inc.*, 570 F.3d 950, 957 (8th Cir. 2009) ("[W]e have recognized the permissibility of subjecting employment-related civil rights claims to arbitration.") (citing *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837-38 (8th Cir. 1997)) (holding Title VII claims could be subject to arbitration).

As such, Defendant asks the Court to dismiss this action, or stay the case. "The [Federal Arbitration Act] generally requires a federal district court to stay an action pending an arbitration, rather than to dismiss it." *Green v. Super Shuttle Intern., Inc.*, 653 F.3d 766, 779 (8th Cir. 2011) (citing 9 U.S.C. § 3) (stating the district court "shall...stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement"). In *Green*, however, the Court recognized that district courts sometimes rely upon "a judicially-created exception to the general rule which indicates district courts may, in their discretion, dismiss an action rather than stay it where it is clear the entire controversy between the parties will be resolved by arbitration." *Id.* at 669-70; *see also Seldin v. Seldin*, 879 F.3d 269, 272 (8th Cir. 2018) ("The appropriate procedure would have been for the district court to stay or dismiss the case ... pending arbitration."); *McLeod v. Gen. Mills, Inc.*, 856 F.3d 1160, 1168 (8th Cir. 2017) ("The district court may decide whether to stay this action or dismiss it pending resolution of the arbitrations.") (citing *Unison Co.*, 789 F.3d at 821).

Because it is clear the entire controversy between the parties is subject to, and must be resolved by, arbitration, the Court will dismiss this action, without prejudice.

Conclusion

For the reasons stated herein, the Court concludes the parties have entered into a valid agreement to arbitrate the claims set out in Plaintiff's Complaint. The Motion to Compel Arbitration will be granted.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss and Compel Arbitration or the Alternative Motion to Stay Proceedings Pending Arbitration, [Doc No. 7], is **GRANTED**.

IT IS FURTHER ORDERED that this matter is dismissed without prejudice.

All Citations

Not Reported in Fed. Supp., 2019 WL 2161575

End of Document

EXHIBIT 27: DARYL L. MOORMAN V. CHARTER COMMUNICATIONS, INC., 18-CV-820-WMC, 2019 WL 1930116 (U.S. DIST. CT., W.D. WISCONSIN), MAY 1, 2019

2019 WL 1930116
United States District Court, W.D. Wisconsin.

Daryl L. MOORMAN and Steven M. Dymond, on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

CHARTER COMMUNICATIONS, INC., Charter Communications, LLC, Spectrum Management Holding Company, LLC, and TWC Administration, LLC, Defendants.

18-cv-820-wmc

|

Signed 05/01/2019

Attorneys and Law Firms

Heath P. Straka, Michael J. Modl, Axley Brynelson, LLP, Robert John Gingras, Gingras, Cates & Luebke, S.C., Madison, WI, for Plaintiffs.

Aimee G. MacKay, Max C. Fischer, Sidley Austin LLP, Megan McDonough, Morgan Lewis & Bockius LLP, Los Angeles, CA, Allison W. Reimann, Kendall W. Harrison, Godfrey & Kahn, S.C., Madison, WI, Margaret Allen, Sidley Austin LLP, Dallas, TX, for Defendants.

OPINION AND ORDER

WILLIAM M. CONLEY, District Judge

***1** Plaintiffs Daryl L. Moorman and Steven Dymond assert claims on behalf of themselves and other similarly situated employees against their employer Charter Communications and related entities, asserting violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and Wisconsin wage payment and overtime laws, Wis. Stat. §§ 103, 104, 109.01. Before the court is defendants' motion to compel arbitration. (Dkt. #27.)[1] Because plaintiffs entered into an enforceable agreement, requiring the arbitration of all disputes arising out of their employment, including the wage and hour-based claims asserted here, and requiring arbitration to proceed on an individual basis, the court will now grant defendants' motion. However, the court will stay this case pending arbitration, rather than dismiss it, finding that plaintiffs have raised a question about the scope of the arbitrable issues, and whether it would cover claims pre-dating the effective date of the arbitration agreement, an issue that the arbitrator will be allowed to reach in the first instance.[2]

ALLEGATIONS OF FACT[3]

A. Allegations in Amended Complaint

Plaintiffs Moorman and Dymond are both technicians employed by Charter Communications, Inc., Charter Communications, LLC, Spectrum Management Holding Company, LLC, and/or TWC Administration, LLC (collectively referred to as "Charter" or "defendants"). Moorman's employment with Charter commenced in October 2005; Dymond's employment commenced in April 2014.

Plaintiffs allege that they were not compensated for at least 15 minutes at the start of each workday spent on the following activities: (1) checking their phones or similar devices for mapping routes to their first assignment of the day; (2) removing or returning equipment to their company vehicle; and (3) and inspecting their vehicle. Plaintiffs also allege that Charter paid them

non-discretionary, quarterly bonuses that were not include in their total compensation, resulting in an understatement of their actual, regular rate of pay for purposes of calculating overtime. Plaintiffs assert these allegations on the part of themselves, as well as a putative FLSA collective and Rule 23 classes of technicians who similarly performed work off the clock and were paid overtime without factoring the impact of non-discretionary bonuses into their regular rate of pay.

B. Solution Channel Agreement Announcement and Explanation of Arbitration Opt-out Provision for Employees

***2** In an email dated October 6, 2017, Charter announced the launch of Solution Channel to its employees. The announcement was sent by Paul Marchand, Charter's Executive Vice President of Human Resources, to employees' company email accounts. Defendants represent that all employees, including plaintiffs, received the announcement, and include as exhibits emails sent to "Moorman, Daryl L" and "Dymond, Steven M." (Knapper Aff., Ex. A (dkt. #31-1); Knapper Aff., Ex. A (dkt. #32-1).)

In part, the announcement explained that "Charter has launched *Solution Channel*, a program that allows the company to efficiently resolve covered employment-related legal disputes through binding arbitration." (Knapper Aff., Ex. A (dkt. #31-1) 3.) The announcement further explained that:

> 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.

(*Id.* (underlining added for emphasis).) The announcement included a link to the Solution Channel webpage on Panorama, which is Charter's intranet site accessible to all employees. That webpage included an "Opting out of Solution Channel" section, which also explained that:

> *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.

(Vasey Decl. (dkt. #47) ¶ 12 (italics added for emphasis); *id.*, Ex. C (dkt. #47-3).)

After following the links described above, an employee who wanted to opt out, would reach a screen containing the following language:

> 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 am subject to another arbitration agreement, I will remain subject to that agreement. I am only opting out of Solution Channel by completing this form.

(*Id.* ¶ 13; *id.*, Ex. D (dkt. #47-4).) The employee could then check a box indicating "I want to opt out of Solution Channel," electronically sign his or her name, and save the form. (*Id.*)

In response to the court's inquiry about the employees' access to this opt-out process, defendants represented that 9,091 employees who received the October 6, 2017, email, opted out of the Solution Channel agreement, totally approximately 10% of Charter's employee population. (*Id.* ¶ 19.)[4]

C. Solution Channel Agreement Provisions

The Solution Channel Arbitration Agreement (the "Agreement" or the "Arbitrating Agreement") itself provides in pertinent part that:

> ***3** You and Charter mutually agree that, as a condition of Charter considering your application for employment and/or 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 arbitration by a private and neutral arbitrator, to be jointly chosen by you and Charter.

(Knapper Decl., Ex. C (dkt. #31-3) 2.) Material to this case, the covered claims include "wage and hour-based claims including claims for unpaid wages." (*Id.*) The agreement also list fourteen excluded claims, none of which touch on the claims at issue here. (*Id.* at 3.)

The Arbitration Agreement further provides that

> You 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, or excluded claims under Section C.

(*Id.*) Under the terms of the Agreement, the employee and Charter also acknowledged "waiving their right to demand a jury trial." (*Id.* at 5.) Finally, the Agreement states that it "will be governed by the Federal Arbitration Act." (*Id.* at 6.)

Although plaintiffs did not opt-out of the Arbitration Agreement, defendants represent that both declined to stipulate to arbitration before they filed this motion.

OPINION

I. Arbitration Overview

There appears to be no dispute that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, governs defendants' motion. (*See* Knapper Decl., Ex. C (dkt. #31-3) 6 ("This Agreement will be governed by the Federal Arbitration Act.").) *See also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14 (2001) (explaining that the FAA covers "all contracts with the Congress' commerce power"); Am. Compl. (dkt. #23) (non-Wisconsin company employing Wisconsin residents, among residents of other states).

Under the Act, a court must compel arbitration where: (1) a valid agreement to arbitrate exists; (2) the dispute falls within the scope of that agreement; and (3) plaintiff has refused to proceed to arbitration in accordance with the arbitration agreement. *See* *Zurich Am. Ins. Co. v. Watts Indus.*, 466 F.3d 577, 580 (7th Cir. 2006); *Ineman v. Kohl's Corp.*, No. 14-cv-398-wmc, 2015 WL 1399052, at *3 (W.D. Wis. Mar. 26, 2015). Moreover, there is a "presumption of arbitrability" in the sense that "[a]n 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," with "[d]oubts ... resolved in favor of coverage." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (citing *United Steelworkers of Am. V. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Most recently in *Epic Systems Corporation v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court reiterated that the FAA "establishes 'a liberal federal policy favoring arbitration agreements.' " *Id.* at 1621 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

If enforceable, there is no meaningful dispute that plaintiffs' wage and hour-based claims are covered by the Solution Channel Agreement, nor that plaintiffs have refused to proceed to arbitration. Instead, plaintiffs maintain that the court should refuse to compel arbitration because the Agreement is unconscionable and, therefore, unenforceable. *See* *Lewis*, 138 S. Ct. at 1622 (providing opening to challenge validity of arbitration agreement if the agreement was "extracted, say, by an act of fraud or duress or in some other unconscionable way that would render any contract unenforceable").

II. Unconscionability Challenge

***4** Under Wisconsin law, unconscionability means "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Lewis v. Epic Sys. Corp.*, No. 15-CV-82-BBC, 2019 WL 330168, at *2 (W.D. Wis. Jan. 25, 2019) (quoting *Discount Fabric House of Racine, Inc. v. Wis. Telephone Co.*, 117 Wis. 2d 587, 601, 345 N.W.2d 417 (1984)). As this court recently explained in another employment-related case seeking to compel arbitration, under Wisconsin law, "the common law doctrine of unconscionability exists to prevent 'oppression or unfair surprise,' " not to " 'disturb[an] allocation of risks because of superior bargaining power.' " *Schultz v. Epic Sys. Corp.*, No. 16-CV-797-WMC, 2019 WL 1332580, at *4 (W.D. Wis. Mar. 25, 2019) (quoting *Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶ 32, 290 Wis.2d 514, 714 N.W.2d 155 (2006); Richard A. Lord, Williston on Contracts § 18.8, at 49-50 (4th ed. 1998)). The court must consider both procedural and substantive unconscionability. "Procedural unconscionability examines the contract's formation to determine whether there was a real and voluntary meeting of the minds." *Schultz*, 2019 WL 1332580, at *4 (quotation marks omitted) (citing *Jones*, 2006 WI 53, ¶ 34). "Substantive unconscionability refers to the reasonableness of the contract terms to which the contracting parties agreed, considered in the light of the commercial background and commercial needs." *Id.* at *7 (quoting *Villalobos v. EZCorp, Inc.*, No. 12-CV-852-SLC, 2013 WL 3732875, at *2 (W.D. Wis. July 15, 2013)); *see also* *Jones*, 2006 WI 53, ¶¶ 35, 36. "A contract is substantively unconscionable if its terms 'are unreasonably favorable to the more powerful party.' " *Id.* (quoting *Jones*, 2006 WI 523, ¶ 36*Jones*, 2006 WI 523, ¶ 36).

The court must also consider unconscionability challenges on a "case-by case-basis," mindful of the Wisconsin Supreme Court's direction that "[t]he more substantive unconscionability present, the less procedural unconscionability is required, and vice versa." *Jones*, 2006 WI 53, ¶ 33. Nonetheless, "a certain quantum" of each is required to demonstrate unconscionability. *Id.*

Here, plaintiffs offer four bases for finding the Agreement unconscionable. *First*, plaintiffs argue that the Agreement is procedurally unconscionable because plaintiffs' waiver of their rights to proceed in court on a class basis and to a jury trial was "not voluntary and knowing." (Pls.' Opp'n (dkt. #38) 6.) For support, both Moorman and Dymond submit declarations in which they each aver that they do "not recall ever receiving notice of the Solution Channel program," and were "not aware of the Solution Channel program until it was brought to [their] attention in this case." (Moorman Decl. (dkt. #39) ¶¶ 5, 7; Dymond

Decl. (dkt. #42) ¶¶ 5, 7.) While they may not *recall* receiving the email, they do not dispute receiving it, something otherwise established in the record by the email sent to plaintiffs' company email addresses. (Knapper Aff., Ex. A (dkt. #31-1); Knapper Aff., Ex. A (dkt. #32-1).) Moreover, as defendants point out, the "mailbox rule" -- which establishes a rebuttable presumption that the document in question was "sent, received and read" -- has been extended to emails. *Ball v. Kotter*, 723 F.3d 813, 830 (7th Cir. 2013).

As the Seventh Circuit explained in *Tinder v. Pinkerton Security*, 305 F.3d 728 (7th Cir. 2002), an employee cannot rebut the presumption of receipt or avoid arbitration simply by averring that she does not recall seeing or reviewing the arbitration program materials. *Id.* at 735–36 ("Tinder's only evidence that she never received notice of the program was her own affidavit in which she avers that she 'does not recall seeing or reviewing the Arbitration Program brochure that Defendant alleges was included with her payroll check in October, 1997,' and this does not raise a genuine issue of material fact.") Indeed, as defendants point out, courts routinely enforce arbitration agreements sent by email to employees with an opt-out procedure, similar to that at issue here. (*See* Defs.' Reply (dkt. #43) 5 (citing *Rivera-Colon v. AT&T Mobility Puerto Rico, Inc.*, 913 F.3d 200, 213–14 (1st Cir. 2019) ("So absent her dissent, the natural interpretation of her conduct is that she accepted. And that must stand. Thus, we agree with the district court that Rivera impliedly accepted this arbitration agreement and is bound by it."); *Friends for Health: Supporting N. Shore Health Ctr. v. PayPal, Inc.*, No. 17 CV 1542, 2018 WL 2933608, at *6 (N.D. Ill. June 12, 2018) (upholding arbitration agreement with opt-out provision)).)

***5** While plaintiffs are correct that defendants *could* have structured the arbitration program as an opt-in procedure, defendants were not obligated to do so under current law. To the contrary, mandatory arbitration agreements -- providing no opt-out mechanism -- have been repeatedly upheld as well. *See* *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 636 (7th Cir. 1999) ("It does not follow that this court would invalidate an arbitration agreement such as this one, when we have previously held that a nonoptional, mandatory arbitration agreement is valid."); *Schultz*, 2019 WL 1332580, at *4 (rejecting unconscionability challenges to mandatory arbitration agreement); *Lewis*, 2019 WL 330168, at *3 (same). [5]

Second, plaintiffs argue that the Agreement is substantively unconscionable because the "remedies available under the Arbitration Agreement are potentially less than those available in a court proceeding." (Pls.' Opp'n (dkt. #38) 6.) Plaintiffs further argue that the Agreement "grants to the Arbitrator the discretion to award remedies available under a particular federal or state law," and that "[s]tatutorily available remedies should not be limited by an arbitrator in the exercise of his or discretion." (*Id.* at 9.) Whether an arbitrator, a judge or a jury, *someone* has to exercise discretion in awarding remedies; in other words, there is no automatic remedy available in court that is not available in an arbitration provision. Moreover, plaintiffs fail to explain, or again offer any support, for their argument that an arbitrator necessarily would limit damages or have less remedy options available to her. Plaintiffs appear to simply be contesting arbitration as a reasonable resolution mechanism generally, but that argument has been soundly rejected in recent cases, including another decision last week by the Supreme Court. *See Lamp Plus, Inc. v. Varela*, No. 17-988, slip op. at *8 (U.S. Apr. 24, 2019) (holding that a court may not compel classwide arbitration when an agreement is silent on the availability of such agreement).

Third, plaintiffs argue that the contract is "ambiguous by its terms," representing that "[i]n one section of the program, it states that participation in a program, for existing employees, is compulsory and a condition of employment, while another section it permits any existing employee to opt-out of the program for no reason." (Pls.' Opp'n) 2.)

The second section refers to the opt-out provision previously discussed, while the first section refers to language in the Program Guidelines for the Solution Channel program, attached as an exhibit to plaintiffs' counsel's affidavit, the relevant portion of which provides: "Within limited exceptions, participation in the Solution Channel is a condition of consideration for employment with Charter and a condition of working at Charter." (*Id.* at 5 (quoting Straka Decl., Ex. 2 (dkt. #40-1) 8).) There is *no* conflict in these two provisions since the 30-day opt-out procedure is itself a "limited exception." In other words, employees who opt-out of the Agreement may maintain their employment with Charter. Regardless, in the court's review of the Agreement and the

materials explaining the Agreement, the mere possibility of "limited exceptions" in no way renders ambiguous or inaccessible the straightforward language explaining that the Solution Channel, including resolution of disputes by arbitration, is a condition of employment with Charter.

***6** *Fourth*, and finally, plaintiffs argue that the Agreement is "improperly one-sided in that it punishes employees but not the employer by requiring payment of attorney's fees only to the employer if a motion to compel arbitration is granted but not to the employees if such motion is denied." (*Id.* at 6) (citing *Jones*, 2006 WI 53, ¶ 7 (finding arbitration agreement unconscionable in part because the agreement allowed Wisconsin Auto Title Loans full access to the courts, but limited the borrower to arbitration).) This argument also rests on a flawed reading of the Agreement.

The Agreement does not distinguish between employees and Charter; instead, the referenced section of the Agreement provides:

> If any judicial action or proceeding is commenced in order to compel arbitration, and if arbitration is in fact compelled or the party resisting arbitration submits to arbitration following the commencement of the action or proceeding, 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 (dkt. #31-3) 4.) In other words, if Charter were to bring a court action against an employee subject to the Arbitration Agreement for "collection of overpaid wages," "damage to or loss of Charter property," or "recovery of unauthorized charges on company credit card" -- all "covered claims" under the terms of the Agreement -- the *employee* could compel arbitration and seek his or her attorneys' fees and costs in doing so. This provision, therefore, is mutual and not improperly one-sided.

Having rejected each of these arguments, the court concludes that plaintiffs have failed to meet their burden of establishing unconscionability. *See Villalobos*, 2013 WL 3732875, at *2 (noting that it is plaintiff's burden to establish unconscionability). Accordingly, the court will grant defendants' motion to compel arbitration.

III. Scope of Arbitration

There is one remaining issue, however. In their opposition brief, plaintiffs request that, if the motion to compel is granted, the court allow plaintiffs to amend their complaint to assert claims for the period of October 4, 2015, three years before the filing date, through November 4, 2017, the day before the Arbitration Agreement went into effect. Plaintiffs argue that the Arbitration Agreement does not apply retroactively, and, therefore, their wage and hour-based class claims preceding the Agreement should be able to continue in this court.

Reasonable though that argument would appear on its face, the Arbitration Agreement, which provides that "all disputes related to the arbitrability of any claim or controversy" are themselves arbitrable, dictates a different result. (Knapper Decl., Ex. C (dkt. #31-3).) While plaintiffs are correct, as they point out in their sur-reply, that there is a presumption that a court decides disputes about arbitrability, *see* *Wis. Local Gov't Property Ins. Fund v. Lexington Ins. Co.*, 840 F.3d 411, 414-15 (7th Cir. 2016), the case law is also explicit that parties can agree to arbitrate "gateway" questions of arbitrability. *See* *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (holding that parties can agree to arbitrate "gateway" questions of arbitrability); *see also* *Grasty v. Colo. Tech. Univ.*, 599 Fed. Appx. 596, 598 (7th Cir. 2015) ("[W]e must enforce the parties' agreement to arbitrate 'gateway' questions about arbitrability of claims and the scope of the arbitration agreement." (citation omitted)).

*7 Here, the language in the Agreement requiring that an arbitrator is to consider "all disputes related to the arbitrability of any claim or controversy" is "clea[r] and unmistakeabl[e] evidence" that the parties intended for gateway questions to be arbitrable. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT & T Techs.*, 475 U.S. at 649). As such, the question of whether the Arbitration Agreement covers any claims pre-dating its effective date is for the arbitrator to consider in the first instance. Because of this question and concerns about possible statute of limitations implications, however, the court will stay this case rather than dismiss it subject to reopening. *See Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 561 (7th Cir. 2008) (counseling generally for district courts to "stay the proceedings rather than to dismiss outright"); *Employers Ins. of Wausau v. Cont'l Cas. Co.*, No. 15-CV-226-WMC, 2016 WL 632642, at *3 (W.D. Wis. Feb. 17, 2016) (recognizing exception, and dismissing cases, where "there is nothing for the court to decide unless and until a party seeks confirmation of or challenges the arbitrators award") (internal citation and quotation marks omitted). During the stay, plaintiffs are directed to provide the court with a status update every six months.

ORDER

IT IS ORDERED that:

1) Defendants Charter Communications, Inc., Charter Communications, LLC, Spectrum Management Holding Company, LLC, and/or TWC Administration, LLC's motion to compel arbitration (dkt. #27) is GRANTED.

2) Plaintiffs Daryl L. Moorman and Steven Dymond's motion for leave to file a sur-reply brief (dkt. #44) is GRANTED.

3) Plaintiffs' motion to lift stay of discovery (dkt. #48) is DENIED.

4) The clerk's office is directed to stay this case pending arbitration.

All Citations

Not Reported in Fed. Supp., 2019 WL 1930116, 2019 Wage & Hour Cas.2d (BNA) 156,688

Footnotes

1 Also before the court is plaintiffs' motion to file a sur-reply addressing defendants' argument that an arbitrator should decide the gateway question of arbitrability. (Dkt. #44.) That motion is granted, and the court has reviewed plaintiffs' sur-reply. (Dkt. #44-1.)

2 Whether the arbitrator's ruling on scope should prove definitive is an issue not yet ripe for this court to consider.

3 A motion to compel arbitration is reviewed in a manner similar to one for summary judgment: the court considers all evidence in the record and draws all reasonable inferences in the light most favorable to the non-moving party. *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002); *Scheurer v. Fromm Family Foods LLC*, No. 15-CV-770-JDP, 2016 WL 4398548, at *1 (W.D. Wis. Aug. 18, 2016). In addition to considering plaintiffs' allegations, the court has also considered the arbitration agreement and related documents, including defendants' supplemental filing submitted at the request of the court.

4 In response to this representation, plaintiffs moved to lift the stay to allow for discovery of opt-out employees (dkt. #48), but because the court concludes that the named plaintiffs are subject to the arbitration agreement, plaintiffs fail to justify their use of the discovery procedures of this federal court to search for someone with actual standing to proceed.

5 Plaintiffs attempt to distinguish Epic's arbitration agreement on the basis that it covered "a narrow category of claims" (Pls.' Opp'n (dkt. #38) 7), but fail to direct the court to any case law or legal development that would support distinguishing the Agreement here for purposes of finding it unconscionable, especially in light of the fact that Charter employees could *opt-out* of the agreement. In stark contrast, the only choice for Epic employees who did not want their claims controlled by the arbitration agreement was to quit. *See Lewis*, 2019 WL 330168, at *3.

End of Document

EXHIBIT 28: MARTIN CASTORENA V. CHARTER COMMUNICATIONS, LLC, 2:18-CV-07981-JFW-KS (U.S. DIST. CT., C.D. CALIFORNIA), DECEMBER 14, 2018

2018 WL 10806903
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Martin CASTORENA and Emmanuel Sanchez, individually and on behalf of all other persons similarly situated, Plaintiff,
v.
CHARTER COMMUNICATIONS, LLC, a Delaware limited liability company doing business in California; and Does 1 through 100, inclusive, Defendant.

Case No. 2:18-cv-07981-JFW-KS
|
Signed 12/14/2018

Attorneys and Law Firms

Christian J. Petronelli, Dayna Christine Carter, Petronelli Law Group PC, Long Beach, CA, for Plaintiff.

Wendy M. Lazerson, Sidley Austin LLP, Palo Alto, CA, Katherine Ann Roberts, Sidley Austin LLP, Los Angeles, CA, for Defendant.

STATEMENT OF DECISION GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION

JOHN F. WALTER, District Judge

I. INTRODUCTION

***1** On November 26, 2018, Defendant Charter Communications, LLC ("Defendant") filed a Motion to Compel Plaintiff Martin Castorena's and Plaintiff Emmanuel Sanchez's (collectively, "Plaintiffs") individual claims to private arbitration and dismiss Plaintiffs' class claims ("Motion"). Defendant's Motion is based on Plaintiff's agreement to arbitrate all disputes arising out of their employment with Defendant. Motion, pp. 3-5. Plaintiffs filed an Opposition on November 27, 2018. On November 29, 2018, Defendant filed a Reply. [1] The Court hereby **GRANTS** Defendant's Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant is a national telecommunications company that provides telephone, internet, and cable services. Plaintiffs were employed by Defendant as Fulfillment Support Technicians ("FSTs") at its Long Beach facility. Plaintiff Castorena was employed by Defendant from May 15, 2017 through June 4, 2018, and Plaintiff Sanchez was employed by Defendant from March 2016 until July 5, 2018. Plaintiffs assert the following claims against Defendant on behalf of themselves and others similarly situated: (1) Failure to Pay Regular and Overtime Wages (Labor Code §§ 510, 1194, 1198); (2) Failure to Pay Minimum Wage (Labor Code §§ 1194, 1194.2, 1197); (3) Failure to Pay Wages (Labor Code § 204); (4) Waiting Time Penalties (Labor Code §§ 201-203); (5) Failure to Provide Accurate Itemized Wage Statements (Labor Code § 226); (6) Fraudulent Inducement; (7) Fraud by False Promise; (8) Promissory Estoppel; (9) Unfair Business Practices (Business & Professions Code §§ 17200 *et seq.*) Complaint, Docket No. 10-3.

A. Plaintiffs Received The Arbitration Agreement.

Defendant launched its dispute resolution program, Solution Channel, on October 6, 2017. November 26, 2018 Declarations of Tammie Knapper ("Knapper Decls. I and II"), ¶ 5. Defendant announced the launch of Solution Channel to its employees via an

email sent by the company's Vice President of Human Resources on October 6, 2017 (the "Solution Channel Announcement"). *Id.*, ¶ 6 and Exh. A. Employees, including Plaintiffs, received the Solution Channel Announcement at their company email addresses. *Id.* The Solution Channel Announcement clearly explained that "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) ... Unless you opt out of participating in *Solution Channel* within the next 30 days, you will be enrolled. *Id.*, ¶ 8 and Exh. A. Instructions for opting out of *Solution Channel* are also located on Panorama." *Id.*, ¶ 11 and Exh. A.

Plaintiffs deny that they received or read the Solution Channel Announcement email, and therefore, claim that they could not have accepted the agreement to arbitrate. Opposition, pp. 6-7. Plaintiffs assert that they did not have remote access to their company email addresses and did not have regular access to their company email accounts. *Id.* They also assert that they were never instructed to regularly check their company email. *Id.* Defendant's witnesses proffered credible evidence to the contrary. Defendant demonstrated that Plaintiffs did have remote access to their company email accounts, and did use their company email accounts. November 29, 2018 Declaration of Dan Vasey ("Vasey Decl."), ¶¶ 3-5 and Exh. A-B. Defendant's evidence also demonstrates that Plaintiffs sent hundreds of emails during their employment, including in the immediate hours and days following the Solution Channel Announcement. *Id.* Defendant's Employee Handbook and Code of Conduct also contained provisions informing Plaintiffs that they were expected to regularly monitor their company email accounts. *Id.*, Exh. C-D.

B. Plaintiffs Did Not Opt Out of The Arbitration Agreement And Continued Their Employment With Defendant.

***2** Plaintiffs were provided 30 days to opt out of the Solution Channel Agreement and were provided with clear and precise information and instructions regarding how to do so. Knapper Decls. I and II, ¶¶ 8 and 11-15. Specifically, a link to the Solution Channel web page was included in the Solution Channel Announcement, and employees had access to that web page through Charter's intranet site. *Id.* Employees who wanted to opt out of the program could do so at an internal web page by checking a box next to the phrase, "I want to opt out of Solution Channel," entering their name in an adjacent text field, and clicking "SAVE." *Id.* It is undisputed that Plaintiffs did not opt out of the Solution Channel Agreement and that Plaintiffs continued their employment with Defendant for several months after the expiration of the opt out period. *Id.*, ¶¶ 19-21.

C. The Arbitration Agreement And Its Terms.

The plain language of the Arbitration Agreement requires Plaintiffs to individually arbitrate all disputes arising out of their employment with Charter. *See* Knapper Decls. I and II, Ex. C, p. 1. The Arbitration Agreement 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 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)[.]

Id. at pp. 1-2. The Arbitration Agreement also provides that any challenges to the validity, enforceability or breach of the Arbitration Agreement must be resolved in arbitration. *Id.* at pp. 1. The Arbitration Agreement contains a class action waiver, which provides that Plaintiffs must pursue any claims in arbitration solely on an individual basis, and not on a class basis. *Id.* at pp. 1-2. The Arbitration Agreement states that it shall be "governed by the Federal Arbitration Act." *Id.* at pp. 5.

D. Plaintiff Castorena Entered Into A Predecessor Agreement.

Prior to entering into the Solution Channel Arbitration Agreement, Plaintiff Castorena entered into a prior agreement to arbitrate when he applied for and accepted the online offer for his employment with the company in April of 2017. November 26, 2018 Declaration of Chance Cassidy ("Cassidy Decl."), ¶¶ 16-17. Plaintiff Castorena electronically accepted and acknowledged the predecessor agreement (the "JAMS Agreement"), which also covers all employment-related disputes and contains a class action waiver. *Id.*, Exh. B, pp 1-2. Because the Court concludes that the Solution Channel Arbitration Agreement is valid and enforceable, the Court need not discuss the enforceability of the JAMS Agreement. However, if the Solution Channel Arbitration Agreement was determined to be invalid, the Court concludes that the JAMS Agreement would still bar Plaintiff Castorena's individual and class claims.

III. LEGAL STANDARD

The Federal Arbitration Act (the "FAA") "provides that written agreements to arbitrate controversies arising out of an existing contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' " *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (quoting 9 U.S.C. § 2). The FAA establishes "a liberal federal policy favoring arbitration agreements.' " *Epic Sys. Corp., v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Thus, under the FAA, the Court's role is limited to determining: (1) whether the arbitration agreement is valid and enforceable; and (2) whether the claims asserted are within the purview of the arbitration agreement.[2] *See* *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

***3** "The party opposing arbitration bears the burden of showing that the agreement is not enforceable." *Oakley v. GMRI, Inc.*, No. CV-13-042-RHW, 2013 WL 5433350, at *2 (E.D. Wash. Sept. 27, 2013); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). The "party resisting arbitration [also] bears the burden of proving that the claims at issue are unsuitable for arbitration[,]" *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 91 (2000), with "any doubts ... resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. If the party resisting arbitration cannot meet its burden, the Court must order the parties to arbitrate disputes covered by a valid agreement to arbitrate. *Dean Witter Reynolds, Inc.*, 470 U.S. at 218.

IV. DISCUSSION

A. Defendant Did Not Waive Its Right To Arbitrate.

"A determination of whether 'the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements.' Because waiver of the right to arbitration is disfavored, 'any party arguing waiver of arbitration bears a heavy burden of proof.' " *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016) (internal citations omitted). In the Ninth Circuit, a party can waive its right to compel arbitration only after an extended period of silence and delay and engaging in other conduct inconsistent with an intent to arbitrate. *Martin*, 829 F.3d at 1125. Plaintiffs must also show prejudice to prove waiver. *Shinto Shipping Co. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978); *see also* *Martin*, 829 F.3d at 1126.

Plaintiffs devote the majority of their Opposition to their contention that Defendant waived its right to compel arbitration due to delay. Specifically, Plaintiffs argue that Defendant delayed by removing this action to federal court; meeting and conferring regarding case management, scheduling, and discovery issues; making multiple filings in federal court; and waiting over three months after the removal to bring a motion to compel arbitration. Opposition, pp. 9-11. The Court concludes that Defendant

did not act inconsistently with its right to compel arbitration and that Defendant was justified in refusing to participate in any activity that might be considered inconsistent with that right. Defendant's removal of the case to federal court is insufficient to constitute a waiver. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1126 (9th Cir. 2008) (no waiver where defendant moved to compel after removing case to federal court); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) (noting "removal prior to compelling arbitration is neither uncommon nor inconsistent with the right to arbitrate"). In addition, Defendant's "delay" in bringing its Motion was due in large part to the parties' informal attempts to resolve the arbitration issue by stipulation, including Plaintiffs' review of two arbitration agreements and supporting documents. November 29, 2018 Declaration of Max C. Fischer ("Fischer Decl."), Exh. A-B.

Plaintiffs have also failed to demonstrate they have suffered any prejudice. Plaintiffs' argument that the costs they expended in meeting and conferring and filing joint stipulations constitute prejudice borders on the frivolous. Costs and expenses incurred in early litigation before a motion to compel "do not support a finding of waiver or prejudice." *Cox*, 533 F.3d at 1126. If anything, these costs are "self-inflicted wounds" and cannot support their claim of wavier. *Martin*, 829 F.3d at 1126 ("To prove prejudice, plaintiffs must show more than 'self-inflicted' wounds that they incurred as a direct result of suing in ... court contrary to the provisions of an arbitration agreement.") Thus, Plaintiffs have failed to meet their burden of proving waiver in this case.

B. The Arbitration Agreement Is Valid And Enforceable.

***4** "[A]rbitration is a matter of contract," *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960), and thus, the existence of a valid arbitration agreement is determined under generally applicable state law on contract formation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also* *Armendariz v. Foundation Health Psycare Services, Inc.*, 24 Cal. 4th 83, 98 (2000) ("under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). California's public policy is equally as strongly in favor of arbitration agreements as the federal policy. *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1079 (2003); *Madden*, 17 Cal. 3d at 706-07 (1976) ("[A]rbitration has become an accepted and favored method of resolving disputes ... praised by the courts as an expeditious and economical method of relieving overburdened civil calendars.")

The acceptance of an arbitration agreement may be express or implied. *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223, 236 (2012). For example, an employee's decision to continue his or her employment when an arbitration agreement is a condition of that employment constitutes acceptance of the arbitration agreement. *See e.g.* *Craig*, 84 Cal. App. 4th at 420 (finding an enforceable agreement to arbitrate where the employer mailed information regarding the ADR program to the employee's home, and the employee continued to work for the employer, which constituted acceptance); *Romero v. GE Betz, Inc.*, No. CV 16-1356 FMO (JCX), 2016 WL 9138054, at *4 (C.D. Cal. June 28, 2016) (granting motion to compel arbitration where plaintiff received a copy of the arbitration procedure as part of a training course and continued his employment with defendant and thereby impliedly accepted the arbitration agreement).

In this case, Plaintiffs consented to individually arbitrate all employment-related disputes with Defendant when they failed to opt out and continued their employment with Defendant. Employees were clearly instructed that if they did not "opt out of participating in Solution Channel within the next 30 days," they would be enrolled in the program and would "waive the right to initiate or participate in court litigation...involving a covered claim." Knapper Decl. I and II, ¶ 7, Exh. A, p. 2. Apart from the announcement, the ability to opt out and the consequences of electing not to do so was communicated to Plaintiffs in several other ways, including in the Arbitration Agreement itself and the program's web page on the Company-wide intranet. *Id.*, Exh. A-D. Contrary to Plaintiffs' assertion, they were given more than a "meaningful opportunity" to opt out of the Arbitration Agreement, and simply chose not to do so.

The Court finds Plaintiffs' argument that they allegedly did not read or otherwise were not aware of the Solution Channel program and Arbitration Agreement unpersuasive. Opposition, p. 6. Plaintiffs' claims that they did not use their email accounts and had limited access to those accounts, is belied by the overwhelming evidence demonstrating that they sent hundreds of emails on their accounts, including on the days immediately following the Solution Channel announcement using mobile devices with remote access. Vasey Decl., ¶¶ 3-5 and Exh. A-B. The evidence also demonstrates, contrary to their sworn declarations, that each Plaintiff had remote access to their email accounts via a handheld device and sent and received emails using that device. *Id.*

Plaintiffs' failure to read their company email does not negate the sufficiency of the notice provided by Defendant announcing the roll-out of the arbitration program. *Aquino v. Toyota Motor Sales U.S., Inc.*, No. 15-cv-05281-JST, at *6 (N.D. Cal. May. 31, 2016); *see also Lovig v. Best Buy Stores LP*, No. 18-cv-02807-PJH, at *9 (N.D. Cal. Aug. 28, 2018). Plaintiffs' argument ignores the mailbox rule, which provides that "the proper and timely mailing of a document raises a rebuttable presumption that the document has been received by the addressee in the usual time." *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 961 (9th Cir. 2001). A simple denial of receipt is insufficient to rebut the presumption. *See, e.g.*, *Craig*, 84 Cal. App. 4th at 421 (upholding order compelling arbitration where plaintiff claimed she never received a copy of the arbitration agreement); *Winfrey*, 2016 WL 6666810, at *3 (same); *Hill*, 2014 WL 10100283, at *3 (noting "mere statements of denial are not sufficient").

1. The Arbitration Agreement Is Not Procedurally Unconscionable.

***5** Plaintiffs take issue with the standard-form and adhesive nature of the Arbitration Agreement. Opposition, p. 17. However, it is well-established that, absent any additional indication of oppression or surprise, the "degree of procedural unconscionability of an adhesion agreement is low," and accordingly, such agreements will be enforceable so long as there is not a high degree of substantive unconscionability. *Serpa v. California Surety Investigations, Inc.*, 215 Cal. App. 4th 695, 703 (2013) ("[The] adhesive aspect of an agreement is not dispositive.")

Plaintiffs also claim that the Solution Channel Announcement was "purposefully misleading," and take issue with Defendant's failure to attach the Arbitration Agreement or a copy of the AAA rules to the announcement email. However, the email was written in plain and unambiguous language: "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)." Knapper Decls. I and II, Exh. A. Finally, the Arbitration Agreement was easily accessible to employees at all times on the company-wide intranet site. *Id.* at ¶ 9.

2. The Arbitration Agreement Is Not Substantively Unconscionable.

"Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create an 'overly harsh' or 'one-sided' result.... Substantive unconscionability 'may take various forms,' but typically is found in the employment context when the arbitration agreement is 'one-sided' in favor of the employer without sufficient justification...." *Serpa*, 215 Cal. App. 4th at 703 (internal citations omitted). The Court concludes that the Arbitration Agreement is mutual, and does not contain any one-sided provisions. Instead, it applies broadly to all claims either party has against the other arising from the employment relationship. In addition, the claims excluded from arbitration may be pursued by either party in litigation. The terms of the agreement are balanced: employees are not deprived of the opportunity to conduct discovery and employees are not restricted in the types of remedies they can pursue. Thus, Plaintiffs failed to meet their burden of establishing that the Arbitration Agreement is procedurally and substantively unconscionable. *See* *Arguelles–Romero v. Superior Court*, 184 Cal. App. 4th 825 (2010) ("It is the plaintiff's burden to introduce sufficient evidence to establish unconscionability.")

C. The Arbitration Agreement Covers Plaintiffs' Claims.

Plaintiffs' Complaint alleges claims that are squarely within the scope of the Arbitration Agreement. Pursuant to the terms of the Arbitration Agreement, Plaintiffs agreed to resolve "any dispute arising out of or relating to [their] pre-employment application and/or employment with Charter or the termination of that relationship" through binding individual arbitration. Knapper Decls. I & II, ¶ 10 and Exh. C. Plaintiffs also 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)," which are exactly the type of claims Plaintiffs have brought on a class-wide basis in this Court. *Id.*

D. Plaintiffs Agreed To Waive Class Claims.

Class action waivers are enforceable under both federal and California law. [3] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (upholding the enforceability of arbitration agreements containing class and collective action waivers of wage and hour disputes); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 359-60 (2014) (enforcing class waiver and finding that California law to the contrary is preempted by the FAA). In this case, the Court concludes that the Arbitration Agreement contains a valid class action waiver. Specifically, the Arbitration Agreement contains an "Individual Claims Limitation and Representative, Collective, and Class Action Waiver," which provides in part: "[Plaintiffs] 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[.]" Knapper Decls. I & II, Exh. C, pp. 1-2. Thus, the Court will dismiss Plaintiffs' class claims and will order the parties to arbitrate all nine causes of action alleged in Plaintiffs' Complaint solely on an individual basis.

V. CONCLUSION

***6** For the foregoing reasons, the Court **GRANTS** Defendant's Motion to Compel Arbitration in its entirety. The Court hereby **DISMISSES without prejudice** Plaintiffs' class claims. Plaintiffs' remaining claims are ordered to arbitration in accordance with the Arbitration Agreement. This action is **STAYED** pending the outcome of those arbitrations, and the Clerk is ordered to administratively close this case. The parties shall file a joint status report with the Court every 120 days regarding the status of the arbitration proceedings, with the first joint status report due on April 9, 2019.

All Citations

Slip Copy, 2018 WL 10806903

Footnotes

1 Defendant's Request for Judicial Notice in Support of Motion to Compel Arbitration, filed December 11, 2018 (Docket No. 39), is improper and untimely and, thus, it is **DENIED**.

2 The FAA applies here given that Defendant is engaged in interstate commerce as an out-of-state company employing California residents and the Arbitration Agreement itself provides that it will be "governed by the Federal Arbitration Act." *See* Defendant's Notice of Removal (Dkt. No. 1, pp. 7); Plaintiffs' Complaint (Dkt. No. 10-3). *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001).

3 The four-factor analysis under *Gentry v. Superior Court*, 42 Cal.4th 443 (2007) is inapplicable here, as *Gentry* applies to agreements exempted from the FAA entirely.

End of Document

EXHIBIT 29: MICHAEL SCARPITTI V. CHARTER COMMUNICATIONS, INC., 18-CV-02133-REB-MEH, 2018 WL 10806905 (U.S. DIST. CT., D. COLORADO), DECEMBER 7, 2018

2018 WL 10806905
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Michael SCARPITTI, Plaintiff,
v.
CHARTER COMMUNICATIONS, INC., Defendant.

Case No. 18-cv-02133-REB-MEH
|
Signed 12/07/2018

Attorneys and Law Firms

Karl Nelson Hoffman, Steven M. Feder, Feder Law Firm, Denver, CO, for Plaintiff.

Elizabeth M. Froehlke, Joshua B. Kirkpatrick, Littler Mendelson PC, Denver, CO, for Defendant.

ORDER GRANTING MOTION TO COMPEL ARBITRATION

Blackburn, J.

***1** The matter before me is **Defendant's Motion To Compel Arbitration** [#7], [1] filed August 28, 2018. I grant the motion.

I. JURISDICTION

I putatively have jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 (federal question) and 1367 (supplemental jurisdiction).

II. STANDARD OF REVIEW

" '[A]rbitration 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.' " ***Beltran v. AuPairCare, Inc.***, 907 F.3d 1240, (10th Cir. 2018) (quoting ***Howsam v. Dean Witter Reynolds, Inc.***, 537 U.S. 79, 83, 123 S.Ct. 588, 591,154 L.Ed.2d 491 (2002)). Conversely, the court is "require[d] ... to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." ***Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University***, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

The court's primary task, therefore, is to determine whether the parties agreed to arbitrate their dispute. [2] ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth***, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985); ***Beltran***, 907 F.3d at 1251. That determination focuses on two considerations: (1) whether there is a valid agreement to arbitrate; and (2) whether the dispute falls within the scope of that agreement. ***See*** ***National American Insurance Co. v. SCOR Reinsurance Co.***, 362 F.3d 1288, 1290 (10th Cir. 2004); ***Via Fone, Inc. v. Western Wireless Corp.***, 106 F.Supp.2d 1147, 1150 (D. Kan. 2000). Plaintiff here attacks the arbitration agreement on only the first of these two prongs.

III. ANALYSIS

This case arises from the termination of plaintiff's employment with defendant on or about May 11, 2018.[3] Plaintiff has brought claims under Colorado law for wrongful termination and intentional infliction of emotional distress. Defendant maintains these claims are subject to arbitration. I concur, and therefore grant defendant's motion.

On October 6, 2017, defendant distributed to all active employees an email bearing the subject line "Charter's Code of Conduct and Employee Handbook." (**Reply App.**, Exh. A.) The email informed all non-union employees of defendant's intention to implement a program called "Solution Channel," described as allowing employees "and the company to efficiently resolve covered employment-related legal disputes through binding arbitration." (***Id.***) A hyperlink within the email directed employees to a webpage where they could find a copy of the Solution Channel document. (***See*** **Motion App.**, Exh. A ¶ 9 at 2; Exh. B.)

***2** The document itself describes Solution Channel as the exclusive means of resolving employment-related disputes covered under its terms. Under the heading "Covered and Excluded Claims," the document stated generally:

> 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), are covered by and must be resolved through Solution Channel, unless expressly excluded below.

(***Id.***, Exh. A at 5.) Included "without limitation" in a specifically denominated list of covered claims were claims for unlawful termination. (***Id.***)

Both the email sent to employees and the Solution Channel document itself also informed recipients they would be enrolled in and subject to the policy unless they opted out of the program within 30 days of implementation. (**Id.**, Exh. A at 3; **Reply App.**, Exh. A.) Otherwise, "participation in Solution Channel is a condition of consideration for employment with" defendant. (**Motion App.**, Exh. A at 3.) In case these provisions were insufficiently explicit, the document confirmed that participants in Solution Channel waived any right "to initiate or pursue a covered claim against [defendant] ... in a court of law or equity" or "to have a covered claim heard by a court, judge, or jury[.]" (***Id.*** at 4.)

Plaintiff maintains the motion must fail because there is no proof he received or reviewed this email. This argument borders on specious, both factually and legally. The affidavit of defendant's Vice President of Human Resources Technology attesting to the fact that plaintiff was included on the distribution list for the email informing employees about Solution Channel is entirely competent to sustain its burden of proof to show the existence of a valid arbitration agreement.[4]

As plaintiff himself recognizes (***see*** **Resp.** at 3), the burden thus shifts to him to raise a genuine dispute of material fact as to the making of the agreement, "using evidence comparable to that identified in Fed. R. Civ. P. 56." ***Stein v. Burt-Kuni One, LLC***, 396 F.Supp.2d 1211, 1213 (D. Colo. 2005). Nevertheless, he apparently could not manage to commit his suggestion that he did not receive the email to an affidavit or declaration. Yet his mere *ipse dixit* is evidence of nothing. ***See*** ***Martinez v. TCF National Bank***, 2015 WL 854442 at *2 (D. Colo. Feb. 25, 2015) ("[P]laintiff's assertion that she never received the [arbitration contract] is insufficient to overcome the presumption of delivery.").

Plaintiff's further suggestion that there is no evidence he opened this email or read its contents – another purported "fact" for which he provides no actual evidence – likewise is baseless. Although the Tenth Circuit appears not to have addressed this

issue, numerous federal courts have afforded the same presumption of delivery applicable to mail sent through traditional postal channels to email communications. ***See, e.g.***, ***Ball v. Kotter***, 723 F.3d 813, 830 (7th Cir. 2013); ***American Boat Co., Inc. v. Unknown Sunken Barge***, 418 F.3d 910, 914 (8th Cir. 2005); ***Gupta v. Morgan Stanley Smith Barney, LLC***, 2018 WL 2130434 at *3 (N.D. Ill. May 9, 2018); ***Johnson v. Harvest Management Sub TRS Corp. – Holiday Retirement***, 2015 WL 5692567 at *3 (S.D. Ind. Sept. 25, 2015); ***Corbin v. Affiliated Computer Services, Inc.***, 2013 WL 3804862 at *6 (M.D. Fla. July 19, 2013); ***Dempster v. Dempster***, 404 F.Supp.2d 445, 449 (E.D.N.Y. 2005). Now well into the second decade of the twenty-first century, in which email has become ubiquitous, I have no hesitancy in adopting this position and acknowledging the presumption that plaintiff received the email. Plaintiff fails utterly to rebut that presumption

3** Having 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[.]" ***Morris v. Milgard Manufacturing, Inc., 2012 WL 6217387 at *3 (D. Colo. Dec. 13, 2012). ***See also*** ***Elsken v. Network Multi–Family Security Corp.***, 49 F.3d 1470, 1473-74 (10th Cir. 1995). His failure to opt out within the time specified while continuing to work for defendant manifested his acceptance of the terms of the agreement. ***See*** ***Frymire v. Ampex Corp.***, 61 F.3d 757, 769-70 (10th Cir. 1995) (interpreting Colorado law), ***cert. dismissed***, 116 S.Ct. 1588 (1996); ***Morris***, 2012 WL 6217387 at *3.

Plaintiff does not argue, nor could he, that his claims are not encompassed within the scope of that agreement. His unlawful termination claim is specifically referenced as subject to arbitration. (**Motion App.**, Exh. A at 5.) His intentional infliction of emotional distress claim is plainly "related to" his employment. (***Id.***) Those claims thus both are referable to arbitration. Defendant's motion therefore must be granted.

The Federal Arbitration Act provides that "[i]f 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 the suit is pending ... shall on application of one of the parties stay the trial of the action ..." 9 U.S.C. § 3. I therefore will stay this action. Nevertheless, pursuant to D.C.Colo.LCivR. 41.2, because no matters remain for this court to address while arbitration proceeds, I will administratively close this case, subject to reopening for good cause.

Finally, defendant seeks to recover, under the authority of Fed. R. Civ. P. 54(d)(1), the costs incurred in bringing this motion. Pursuant to the rule, "[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." **FED. R. CIV. P.** 54(d)(1). The rule thus "codifies a venerable presumption that prevailing parties are entitled to costs." ***Marx v. General Revenue Corp.***, 568 U.S. 371, 377, 133 S.Ct. 1166, 1172, 185 L.Ed.2d 242 (2013) (footnote omitted). "Notwithstanding this presumption, the word 'should' makes clear that the decision whether to award costs ultimately lies within the sound discretion of the district court." ***Id.*** Nevertheless, if it decides to deny costs, the court must provide a valid reason. ***Zeran v. Diamond Broad., Inc.***, 203 F.3d 714, 722 (10th Cir. 2000).

I perceive no valid reason for denying defendant its costs in this instance. Defendant indisputably is the prevailing party in this matter, and its success is not partial or qualified. Moreover, defendant has presented evidence demonstrating that, in response to a demand letter received from plaintiff's counsel prior to the filing of this lawsuit (***see*** **Motion App.**, Exh. B), defense counsel informed plaintiff's counsel that plaintiff's claims were subject to arbitration and that it intended to insist on its rights under the agreement (***id.***, Exh. C). In a subsequent email, counsel for defendant laid out in detail, with citation to legal authority, its arguments, which mirror those advanced in this motion. (***See id.***, Exh. D.) Later that same day, plaintiff filed this lawsuit. His weak and wholly unsubstantiated response to the motion demonstrates he had little factual or legal basis for doing so. His failure to even address this aspect of the motion in his response similarly evidences that he has no arguments in contravention of awarding costs. I therefore will exercise my discretion to award defendant its costs. ***See*** ***Stephan v. Brookdale Senior Living Communities, Inc.***, 2012 WL 4097717 at *6 (D. Colo. Sept. 17, 2012).

*4 **THEREFORE, IT IS ORDERED** as follows:

1. That **Defendant's Motion To Compel Arbitration** [#7], [5] filed August 28, 2018, is granted;

2. That the parties are ordered to proceed to arbitration of plaintiff's claims;

3. That this case is stayed pending the outcome of arbitration;

4. That defendant is awarded its costs, to be taxed by the clerk of the court pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1;

5. That under D.C.COLO.LCivR 41.2, this action is closed administratively; and

6. That under D.C.COLO.LCivR 41.2, the clerk is directed to close this civil action administratively, subject to reopening for good cause.

All Citations

Slip Copy, 2018 WL 10806905

Footnotes

1 "[#7]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

2 In some cases, the court also may be called on to consider whether any statute or policy renders the claims non-arbitrable. *Mitsubishi Motors Corp.*, 105 S.Ct. at 3355; *Williams*, 203 F.3d at 764. As plaintiff presents no argument to this effect, I do not consider the matter further.

3 The parties dispute whether plaintiff was terminated or resigned. However, that fact is irrelevant for purposes of this motion.

4 Nevertheless, defendant's production of the actual email sent to plaintiff removes any doubt as to this question.

5 "[#7]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

End of Document

EXHIBIT 30: AMULFO ESQUIVEL V. CHARTER COMMUNICATIONS, LLC, CV 18-7304-GW (MRWX), 2018 WL 10806904 (U.S. DIST. CT., C.D. CALIFORNIA), DECEMBER 6, 2018

2018 WL 10806904
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Arnulfo ESQUIVEL
v.
CHARTER COMMUNICATIONS, INC., et al.

Case No. CV 18-7304-GW(MRWx)
|
Filed 12/06/2018

Attorneys and Law Firms

Jeff D. Neiderman, Jay S. Rothman, Jay S. Rothman and Associates, Woodland Hills, CA, for Arnulfo Esquivel.

James Allen Bowles, Casey Lee Morris, Elissa L. Gysi, Erika A. Silverman, Hill Farrer and Burrill LLP, Los Angeles, CA, for Charter Communications, Inc., et al.

PROCEEDINGS: DEFENDANT CHARTER COMMUNICATIONS, INC.'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION PENDING ARBITRATION [15]

The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

***1** Court hears oral argument. The Court's Tentative Ruling is circulated and attached hereto. The Court will grant the motion. This action will be stayed pending completion of the arbitration.

The Court sets a status conference re arbitration for February 25, 2019 at 8:30 a.m., with a joint status report to be filed by February 20, 2019.

All previously set deadlines and dates are vacated and taken off-calendar.

Esquivel v. Charter Commc'ns, Inc., Case No. 2:18-cv-07304-GW-(MRWx)

Tentative Ruling on Motion to Compel Arbitration and to Stay Action Pending Arbitration

I. Background

On August 1, 2018, Arnulfo Esquivel ("Plaintiff") sued Charter Communications, Inc. ("Defendant") in Los Angeles County Superior Court. The Complaint contained fifteen causes of action, for: 1) wrongful termination/retaliation in violation of public policy (California Government Code § 12940, et seq.); 2) wrongful termination/retaliation in violation of public policy (California Labor Code § 1102.5, et seq.); 3) discrimination based upon disability (California Government Code § 12940, et seq.); 4) failure to accommodate (California Government Code § 12940(k), (m)); 5) failure to engage in the interactive process (California Government Code § 12926.1(e)); 6) failure to take all reasonable steps to prevent discrimination and retaliation (California Government Code § 12940, et seq.); 7) violation of California Family Rights Act; 8) intentional infliction of emotional distress; 9) violation of rest period law (Industrial Welfare Commission Wage Orders; California Labor Code § 226.7); 10) violation of meal period law (California Labor Code §§ 226.7, 512); 11) violation of wage

and hour laws – unpaid overtime wages (California Labor Code §§ 510, 1194); 12) violation of wage and hour laws – waiting time penalties (California Labor Code §§ 202, 203); 13) failure to pay wages (California Labor Code §§ 204, 207); 14) failure to provide accurate wage statements/failure to keep records (California Labor Code §§ 210, 226); and 15) unfair competition in violation of Business and Professions Code § 17200, et seq. Defendant removed the case to this Court on August 20, 2018, citing complete diversity as a basis for this Court's federal subject matter jurisdiction.

Plaintiff worked as a non-exempt senior service technician for Defendant beginning in or about March 2015. *See* Complaint ¶ 2. On or about July 19, 2017, Plaintiff sustained an injury on the job, suffering several bites when he was required to go underneath a house that was infested with fleas and ticks. *See id.* ¶ 3. Following the incident, Plaintiff's doctor requested that Plaintiff be placed on light duty. *See id.* ¶ 4. Told that there was no light duty available for technicians, Defendants sent Plaintiff home and placed him on leave for approximately 30 days. *See id.* ¶ 5.

When Plaintiff returned to work on or about August 29, 2017, he picked up his work van and began driving it. *See id.* ¶ 6. Immediately upon entering the vehicle, Plaintiff noticed a strange odor and called his supervisor. *See id.* His supervisor informed him that it was nothing – when in fact Plaintiff later learned that Defendant had fumigated his vehicle with a pesticide after Plaintiff's flea-and-tick report – and that he should just turn on the air conditioner to air out the van. *See id.* ¶¶ 6, 15. That did not successfully remove the odor. *See id.* ¶ 6. Shortly thereafter, Plaintiff began experiencing medical symptoms, including severe headaches and blurry vision. *See id.* ¶ 7. Plaintiff reported this to his supervisor. *See id.*

***2** Due to his condition and the severity of his headaches, Plaintiff sought medical treatment and was rendered disabled. *See id.* ¶ 8. Due to his condition, he was required to take a medical leave of absence for approximately three weeks, after which his doctor returned Plaintiff to work with restrictions. *See id.* Defendant never engaged in the interactive process or accommodated Plaintiff's restrictions. *See id.* ¶ 9.

Following the August 29, 2017 incident, Plaintiff filed for workers' compensation benefits, but his disability was held against him, and he was discriminated and retaliated against. *See id.* ¶ 10. For instance, Defendant refused his requests for accommodation and taking time off, it falsely criticized his performance, and it changed his schedule and increased his workload in order to overwhelm Plaintiff. *See id.* Plaintiff complained about this conduct to managerial and supervisory employees, but nothing was done. *See id.* ¶ 11.

Then, on or about March 2, 2018, Defendant informed Plaintiff that it was terminating him for an alleged violation of company policy. *See id.* ¶ 12. Specifically, Defendant asserted that Plaintiff had given out his personal telephone number to a customer and also charged a customer to run a line in her home. *See id.* Notwithstanding the fact that the company maintained a progressive discipline policy and the fact that Plaintiff had no prior record of discipline, Defendant summarily terminated Plaintiff. *See id.*

At some point in time after Plaintiff returned to work on August 29, 2017, but before he was terminated, Plaintiff filed a report with the California Department of Agriculture regarding his pesticide exposure (due to Defendant's fumigation of his work vehicle), which he believed had resulted from pesticide use in violation of federal, state and local regulations. *See id.* ¶¶ 16, 45. Plaintiff also ties the foregoing assertions of retaliation to this report. *See id.* ¶ 17.

While employed with Defendant, Plaintiff worked overtime hours, but was not paid overtime, and was never provided with rest and meal periods or, when such periods were provided, Defendant required Plaintiff to work through them. *See id.* ¶ 18. Defendant also required Plaintiff to clock-out at the end of his shift, but to continue working, and Plaintiff was never paid for his post-clock-out work. *See id.* ¶ 19.

Plaintiff seeks compensatory and punitive damages, medical and related expenses, lost earnings and related expenses, wages, interest, damages and penalties, attorneys' fees and costs, prejudgment interest, civil penalties, and other just and proper relief. *See* Complaint at 31:6-32:1. Plaintiff does not explicitly seek injunctive relief, including with respect to his claim under

Business and Professions Code § 17200. *See id.* ¶¶ 194-200. However, the final paragraph alleged under that claim could be seen as an implicit request for such relief: "Unless restrained, Defendants will continue in the acts and conduct set forth above, to Plaintiff's great and irreparable injury, for which damages will not afford adequate relief." *Id.* ¶ 200.

Defendant now moves to compel arbitration and to stay this litigation until the completion of that arbitration.

II. Analysis

"A party seeking to compel arbitration has the burden under the [Federal Arbitration Act] to show (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). [1] This is in recognition of the rule that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002) (omitting internal quotation marks). [2]

A. Existence of the Agreement to Arbitrate

***3** The parties do not dispute that on October 6, 2017, Defendant e-mailed to all of its employees [3] an announcement that it was implementing a "Solution Channel Program" ("the Program") that "allows [the employee] and the company to efficiently resolve covered employment-related legal disputes through binding arbitration." *See* Affidavit of Tammie Knapper ("Knapper Aff."), Docket No. 15-1, ¶¶ 4-7 & Exh. A at pg. 21 of 61. The announcement stated that "[b]y participating in [the Program], [the employee] and [Defendant] 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," and further indicated that an employee would be enrolled in the Program unless he or she opted out within 30 days. *See id.* The announcement also advised that "[m]ore detailed information about [the Program] is located on Panorama" – Defendant's intranet site accessible to employees – along with "[i]nstructions for opting out," *id.*, and provided a link to the Panorama page devoted to the Program, *see* Knapper Aff., ¶ 9. [4]

There is no dispute that the e-mail including the announcement of the Program was sent to Plaintiff's work e-mail address and that Plaintiff did not opt out of the Program. [5] *See* Knapper Aff., ¶¶ 5-6, 20-21. The actual arbitration provision (a link to which was listed on Panorama under the heading "Key Documents," identified as "Mutual Arbitration Agreement," *see* Exh. B (Docket No. 15-1), at pgs. 23-24 of 61) covers "any dispute arising out of or relating to your ... employment with [Defendant] or the termination of that relationship." Declaration of Lillian Gomez, Docket No. 15-1, Exh. C at pg. 26 of 61. It then provided a specific paragraph under the heading "Covered Claims" that listed "the following disputes, claims, and controversies" that would be "submitted to arbitration in accordance with this Agreement," including:

> all disputes, claims, and controversies that could be asserted in court ... for which you or [Defendant] have an alleged cause of action related to ... 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, ... 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); 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, claims for unlawful denial of accommodation or failure to engage in the

> interactive process, whistleblower claims, ... [and] claims for violations of Occupational Safety and Health Administration or other safety or occupational health, whether arising before, during or after the termination of your employment.

***4** *Id.* Also included are "all disputes related to the arbitrability of any claim or controversy." *Id.* Preceding all of this was a "NOTICE" which, in all-capital letters, stated:

> PLEASE READ THE FOLLOWING MUTUAL ARBITRATION 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 [DEFENDANT] 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.

Id. Plaintiff offers no argument that any of his claims fall outside the scope of the arbitration provision. [6]

What Plaintiff does argue, however, is that there was never any enforceable agreement to arbitrate to begin with because he was not working at the time of the October 6, 2017, e-mail due to the fact that he was out on leave. [7] He asserts that he never opened or read the e-mail, never received the arbitration agreement and never "acknowledged" it.

In further support of his argument, Plaintiff explains that he would routinely receive over 100 e-mails each day on his work e-mail account, meaning that he had hundreds of e-mails in his inbox when he returned from his periods of leave. *See* Declaration of Arnulfo Esquivel ("Esquivel Decl."), Docket No. 17-1, ¶¶ 5-6. Given the "time constraints and demands" of his job, "which required that Plaintiff be out in the field constantly responding to customer calls," he notes that he simply did not always have the time to "open and immediately review" all of the e-mails. Docket No. 17, at 5:26-6:1; Esquivel Decl., ¶ 5. He does not recall seeing any e-mail marked "high importance" from Defendant (Defendant does not assert that the October 6, 2017, e-mail was sent marked as "high importance"). *See id.* ¶ 7. He also notes that he was never sent – or at least Defendant does not assert that it sent – a follow-up e-mail advising of the upcoming deadline for opting-out. *See id.* ¶ 8.

***5** Plaintiff relies upon the district court decision in *Narez v. Macy's W. Stores, Inc.*, No. 16-cv-00936-LHK, 2016 WL 4045376 (N.D. Cal. July 28, 2016), to support his proposed rule that "[w]here ... a company attempts to deprive its employees of their Constitutional right to a jury trial based on an opt out arbitration agreement, it should be able to, at minimum, show that the employee actually received and had knowledge of the purported agreement before it is allowed to strip that employee or former employee of his/her Constitutional rights." Docket No. 17, at 2:4-15. He relies upon the same decision for the proposition that "where, as here, the purported agreement contains a so-called 'opt-out provision,' 'the Ninth Circuit has held that opt-out arbitration provisions in the employment context are enforceable where ... the employee acknowledges the agreement in writing and has thirty days in which to opt out of the arbitration agreement.' " *Id.* at 8:7-13 (quoting *Narez*, 2016 WL 4045376, at *4); *see also id.* at 11:13-15. [8]

Plaintiff has creatively tried to draw from the facts of *Narez* hard-and-fast requirements, but the decision – issued by a district court, in any event – made no such attempt to establish minimal enforceability standards. While *Narez* did state that "the Ninth Circuit has held that opt-out arbitration provisions in the employment context are enforceable where, as here, the employee acknowledges the agreement in writing and has thirty days in which to opt out of the arbitration agreement," 2016 WL 4045376, at *4, it did not characterize that holding as indicating those are the *only* circumstances, or the *minimal* circumstances, that would suffice for enforceability. The Ninth Circuit decision *Narez* cites in that regard, *Circuit City Stores, Inc. v. Najd*, 294

F.3d 1104 (9th Cir. 2002), also did not attempt to set out any requirements. It simply concluded that it was permissible to infer that an employee had assented by failing to opt-out when, among other things, he had signed an acknowledgment form and had thirty days to review the agreement, not that those factors were *prerequisites* to concluding an employee had assented. *See id.* at 1109.

In addition, Plaintiff cites another district court decision – *Carmax Auto Superstores Cal. LLC v. Hernandez*, 94 F.Supp.3d 1078, 1098 (C.D. Cal. 2015) – for that decision's statement that "[b]efore a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." But that language in *Carmax* appears only in a parenthetical quotation from the Third Circuit's 1980 decision in *Par-Knit Mills, Inc. v. Stockbridge Fabrics Company, Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980), a case that is obviously non-binding here (and which itself cites to no decision, under any state's law, establishing or suggesting that rule). Moreover, the Third Circuit itself has walked-back that standard. *See Aliments Krispy Kernels, Inc. v. Nichols Farms*, 851 F.3d 283, 287-89 (3d Cir. 2017); *see also Pellegrino v. Morgan Stanley Smith Barney LLC*, No. 17-CV-7865 (RA), 2018 WL 2452768, *4 (S.D.N.Y. May 31, 2018) (rejecting plaintiff's reliance on cases requiring arbitration agreements be established by "clear, explicit, and unequivocal" agreement because "[f]ederal courts ... have consistently rejected any heightened standard for proving arbitration agreements").

Relying on *Campbell v. General Dynamics*, 407 F.3d 546, 557 (1st Cir. 2005), Plaintiff also more generally asserts that "as Plaintiff had no knowledge of any arbitration agreement presented to him, there cannot have been a meeting of the minds," a precondition to an enforceable contract. Docket No. 17, at 10:8-11. The First Circuit's analysis in that regard stemmed from its preliminary conclusion that "[w]hen a party relies on the [Federal Arbitration Act] to assert a contractual right to arbitrate a claim arising under a federal employment discrimination statute, the court must undertake a supplemental inquiry" because "some federal statutory claims may not be appropriate for arbitration." *Id.* at 552. It relied on its earlier decision in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 19 (1st Cir. 1999), a case considering a Title VII claim, *see Campbell*, 407 F.3d at 553 n.4, which it noted had "determined that the employer must afford 'some minimal level of notice to the employee that statutory claims are subject to arbitration' in order for arbitration to be deemed appropriate." *Id.* at 554 (quoting *Rosenberg*, 170 F.3d at 21). Thus, *Campbell* (which assumed the validity of the contract under Massachusetts law, *see id.* at 555) defined its inquiry as determining "whether General Dynamics's e-mail announcement of the Policy provided sufficient notice to the plaintiff that his continued employment would constitute a waiver of his right to litigate any employment-related ADA claim, thereby rendering judicial enforcement of that waiver appropriate." *Id.* at 554. Plaintiff has advanced no federal statutory claims here. *Campbell*, therefore, does not serve his purpose.

***6** Finally, Plaintiff directs the Court to a district court decision from the District of New Jersey which he says "held that an employer could not enforce its arbitration agreement, which its former employee said he never saw, simply because the employer e-mailed it to him once and inferred that, by continuing his employment, he had consented to arbitration." Docket No. 17, at 11 n.1 (citing *Schmell v. Morgan Stanley & Co., Inc.*, No. 17-13080, 2018 WL 1128502 (D.N.J. Oct. 3, 2018)). *Schmell* applied New Jersey law to the effect that "an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it." 2018 WL 1128502, at *2 (D.N.J. Mar. 1, 2018) (omitting internal quotation marks) (quoting *Leodori v. CIGNA Corp.*, 814 A.2d 1098, 1106 (N.J. 2003)). Notwithstanding its recognition that, under New Jersey law, where an arbitration agreement stated an employee would accept its terms through continued employment, such an agreement would bind an employee who continues employment beyond the agreement's effective date, *see id.* at *3, the district court simply determined – at least initially – that because there was a genuine dispute of material fact as to whether the plaintiff was on notice of the agreement to arbitrate, and a genuine dispute "as to whether the alleged assent through continued employment without opt-out was knowing and voluntary," it could not find that Plaintiff was bound to

arbitrate. *See id.* at *4. However, after the parties took limited discovery on the question of whether the plaintiff had notice of the agreement, the Court *granted* the motion to compel arbitration. *See Schmell v. Morgan Stanley & Co., Inc.*, No. 17-13080, 2018 WL 4961469 (D.N.J. Oct. 15, 2018). It concluded that the plaintiff had notice because:

> [t]he parties do not dispute that the email was sent to Plaintiff, in the sense that the email appeared in Plaintiff's inbox. Plaintiff was required to review all work email as a condition of his employment, was working the day the email was sent, responded to other emails that day, and answered emails that were sent both before and after the one in question. All of these facts establish that Plaintiff had notice of the email.
>
> Plaintiff claims that he never read the email in which the Agreement was sent, and does not recall reviewing it. He also states that he could receive many, possibly hundreds, of emails in a single day. But whether Plaintiff specifically recalls the email in question is beside the point. The fact that the email appeared in Plaintiff's inbox, combined with the expectation that Plaintiff would read his email, is sufficient to indicate that Plaintiff had notice of the Agreement.

Id. at *2 (omitting internal record citations). The only factual distinction with our case is that Plaintiff here was out on leave on the day the e-mail was sent (but then worked for much of the period provided for him to opt-out).

A case by case refutation of these authorities is sufficient, but may not, in the end, be necessary. If what Plaintiff is attempting to do by (unsuccessfully, in the end) relying upon these authorities is to fashion a special rule for contractual enforceability that applies solely in the context of arbitration agreements – or even more specifically, solely in the context of employer-employee arbitration agreements – such an approach runs contrary to the repeated message on this topic from the Supreme Court. Arbitration agreements are not to be placed on an unequal footing with other contracts. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

In its Reply, Defendant states that "the law is clear that where, as here, an employee does not deny that he received an email containing information related to an opt-out arbitration program, the failure to opt out evidences a valid agreement to arbitrate, notwithstanding the fact that the employee was absent from work during part of the opt-out period, did not sign an acknowledgement of receipt of the arbitration agreement, and never read the email." Docket No. 18, at 6:13-18. Defendant cites to at least a few district court decisions appearing to support the critical points of that contention – that the agreement can be binding notwithstanding the fact that an employee does not read it or acknowledge its receipt. *See Bolden v. AT & T Servs., Inc.*, No. 18-2306-JWL, 2018 WL 4913901, *5 (D. Kan. Oct. 10, 2018); *Marchand v. Northrop Grumman Corp.*, No. 16-cv-06825-BLF, 2017 WL 2633132, *5 (N.D. Cal. June 19, 2017) ("A party's failure to read or understand what she was signing does not impact the enforceability of the arbitration agreement."); *Rogers v. Nelson*, No. 16CV955-L (RBB), 2017 WL 1711155, *3 (S.D. Cal. May 3, 2017) ("The argument implies that Plaintiff did not read the documents he received in connection with his accounts. This is not sufficient to avoid arbitration."). But in both *Marchand* and *Rogers* there were written acknowledgments of receipt.

***7** On the other hand, *Bolden* is – except with respect to the fact of Plaintiff being out on leave for parts of the opt-out period and with the employer in that case sending "reminder" e-mails – indistinguishable from the situation involved here. *See Bolden*, 2018 WL 4913901, at * 2. *Bolden* also cites numerous cases coming to the same conclusion on materially indistinguishable facts. *See id.* at *4-5. The only reason to find the decision not entirely conclusive on the point is that it is not based on California law. But Plaintiff has not given the Court any reason to conclude that California law is any different in these respects. Certainly it is true that terms in contracts (or amended terms), including arbitration agreements, are frequently accepted through inaction. To apply a different rule here would be to treat arbitration agreements (or arbitration agreements in the employment context) differently than other contracts, an impermissible approach to the issue of enforceability (as mentioned above).

Plaintiff does not contest that Defendant and his supervisor expected and required Plaintiff to check his work e-mails when he was at work and, if they were absent, to read their unread e-mails when they returned to work. *See* Declaration of Arthur

Williams, Docket No. 15-1, ¶¶ 2-5. He also does not contest that he actually responded to numerous other e-mails sent to his work e-mail account during the 30-day opt-out period. *See id.* ¶ 7 & Exh. H. Indeed, Plaintiff acknowledges that while he was out on leave for part of that 30-day period, he was also at work for approximately two weeks during that period. *See* Esquivel Decl. ¶¶ 3-4; *see also* Gomez Decl., ¶ 8 & Exh. F.

That Plaintiff was off work for part of the opt-out period is immaterial to the question of the agreement's enforceability, according to Defendant. It cites *Clearfield v. HCL Am. Inc.*, No. 17-CV-1933 (JMF), 2017 WL 2600116, *2 (S.D.N.Y. June 15, 2017) and *Pelligrino* as supporting that proposition. Indeed, in *Clearfield*, the employee returned from leave only *one day* before the opt-out period expired, and the agreement was still found to exist. *See* 2017 WL 2600116, at *2. Defendant also notes that several district courts in California have rejected the notion that the Ninth Circuit's *Najd* decision requires acknowledgement of the agreement in writing for the arbitration agreement to be enforceable. *See Winfrey v. Kmart Corp.*, EDCV 15-01873-VAP (SPx), 2016 WL 6666810, at *3-4 (C.D. Cal. Jan. 6, 2016); *Hicks v. Macy's Dep't Stores, Inc.*, No. C 06-02345 CRB, 2006 WL 2595941, *3 (N.D. Cal. Sept. 11, 2006).

In the end, the Court is persuaded by Defendant's position. The evidence supports the conclusion that Plaintiff was sent the e-mail announcing the implementation of the arbitration agreement and the opportunity to opt-out. The pre-existing employer-employee relationship made it reasonable for Defendant to make silence (in the form of a failure to opt-out) a permissible expression of assent. *See* *Najd*, 294 F.3d at 1109 ("[W]here circumstances or the previous course of dealing between the parties places the offeree under a duty to act or be bound, his silence or inactivity will constitute his assent."); *Winfrey*, 2016 WL 6666810, at *4. While Plaintiff may have been out on leave for part of the opt-out period, he had ample time in which to review the e-mail and the arbitration agreement's terms. His failure to do so does not impact the existence of the resulting agreement. The evidence is also clear that he was expected to keep abreast of his work e-mails and that he was actively using his work e-mail account when he was at work during the opt-out period. Under these circumstances and the relevant case law outlined above, the Court finds that the parties did reach an agreement to arbitrate.

B. Defense to Enforceability

In the event the Court concludes – as it tentatively has – that the parties did indeed reach an agreement to arbitrate, Plaintiff further attempts to argue that the agreement is unenforceable because it is unconscionable. "The [Federal Arbitration Agreement] provides that any contract to settle a dispute by arbitration shall be valid and enforceable, 'save upon such grounds as exist at law or in equity for the revocation of any contract.' " *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 921 (9th Cir. 2013) (quoting 9 U.S.C. § 2). "Like other contracts, arbitration agreements can be invalidated for fraud, duress, or unconscionability." *Id.* With respect to unconscionability, "[u]nder California law, a contract must be both procedurally and substantively unconscionable to be rendered invalid. California law utilizes a sliding scale to determine unconscionability – greater substantive unconscionability may compensate for lesser procedural unconscionability." *Id.* at 922 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 (2000)). "Procedural unconscionability focuses on... 'the factors of surprise and oppression in the contracting process.' " *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1063 (9th Cir. 2013) (quoting *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010)). Substantive unconscionability focuses on "overly harsh" or "one-sided" results. *See* *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal.4th 83, 114 (2000). The burden in demonstrating unconscionability rests upon Plaintiff, not Defendant. *See* *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 483 (1989); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1158 (9th Cir. 2008); *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1099 (2002).

***8** Plaintiff contends that the agreement is procedurally unconscionable because he was not given sufficient notice of, or a reasonable opportunity to negotiate or reject the terms of, the agreement, relying on *CrossTalk Productions, Inc. v. Jacobson*,

65 Cal.App.4th 631, 644 (1998), *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1106 (9th Cir. 2003), and *Fitz v. NCR Corp.*, 118 Cal.App.4th 702, 722 (2004). He notes that he was out on leave for 16 days during the 30-day opt-out period provided. Nevertheless, given the foregoing discussion of how the agreement was communicated to him and his ability to consider it, the Court easily concludes that Plaintiff was provided a "meaningful opportunity" to review the arbitration agreement. It also agrees with Defendant that participation in the Program and its arbitration agreement was optional and that the terms of the agreement were clear. *See* *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) ("[T]his case lacks the necessary element of procedural unconscionability. Ahmed was not presented with a contract of adhesion because he was given the opportunity to opt-out of the Circuit City arbitration program by mailing in a simple one-page form."). Plaintiff has no hope of making out procedural unconscionability by way of a theory of insufficient notice or opportunity to negotiate/reject the terms.

Plaintiff then takes the position that the agreement is also unconscionable because it fails to make specific reference to, and fails to attach, the arbitration rules.[9] Here, Plaintiff relies again on *Fitz*, and also on *Zullo v. Superior Court*, 197 Cal.App.4th 477, 485-86 (2011). On this point, Defendant responds that *Baltazar v. Forever 21, Inc.*, 62 Cal.4th 1237 (2016), *Peng v. First Republic Bank*, 219 Cal.App.4th 1462 (2013) and *Lane v. Francis Capital Management LLC*, 224 Cal. App. 4th 676 (2014) all weaken the import of *Fitz* and *Zullo*. Indeed, *Baltazar* appears to have redirected this strain of unconscionability analysis towards focusing on whether the plaintiff actually challenges "some element of the ... rules [in question] of which [he] had been unaware," dismissing such a challenge when it actually has "nothing to do with the AAA rules." 62 Cal.4th at 1246; *see* *Nguyen v. Applied Med. Resources Corp.*, 4 Cal.App.5th 232, 248-49 (2016) (discussing impact of *Baltazar*); *see also* *Ramos v. Superior Court*, 28 Cal.App.5th 1042, —— (2018) ("[W]e do not subject employment contracts 'to the same degree of scrutiny as [c]ontracts of adhesion that involve surprise or other sharp practices.' ") (quoting *Baltazar*, 62 Cal.4th at 1246).

Even if that is, for some reason, an inaccurate reading of *Baltazar, Peng* held that the failure to attach the rules of an adjudicating body contributes to surprise only if the rules are found to contain unexpected provisions that limit the scope of the plaintiff's claims or otherwise affect the relief available. *See* *Peng*, 219 Cal.App.4th at 1471-72. Plaintiff has not identified any rules Defendant asserts are applicable to the arbitration that will be held in this case that limits the scope of his *claims* or otherwise affects the *relief* available to him. And the AAA's rules are easily accessible on the Internet. In any event, both *Peng* and *Lane* commented that any failures with respect to identification/ attachment of applicable arbitration rules were, in the end, of only minor significance to the overall unconscionability analysis.

Finally, Plaintiff argues that the agreement is unconscionable because it imposes a penalty for challenging the enforceability of the agreement. Specifically, Plaintiff points to the following language in the agreement:

> If any judicial action or proceeding is commenced in order to compel arbitration, and if arbitration is in fact compelled or the party resisting arbitration submits to arbitration following the commencement of the action or proceeding, 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 attorney's fees.

***9** Docket No. 15-1, Exh. C, at pg. 29 of 61. Plaintiff quickly acknowledges that "the terms of the clause are, on their face, applicable to both parties," but nevertheless argues that "[t]he clause can only ever benefit Defendant." Docket No. 17, at 14:25-15:2.

Defendant agrees that the provision is mutual, and argues that this precludes Plaintiff from arguing that it is substantively unconscionable. The Court concurs. Indeed, this is not a case involving an agreement that "require[es] arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1285-86 (9th Cir. 2006) (omitting internal quotation marks) (citing *Armendariz*, 24 Cal.4th at 119). It may be true that the majority, or even the vast majority, of disputes that might arise between an employee and employer and thereafter be litigated in one forum or another would be actions filed by an employee (or employees) or someone on their behalf. But this does not make the agreement non-mutual. The Court therefore concludes that this term does not contribute to any type of unconscionability, and therefore has no need to consider whether the provision could or should be severed. [10]

Lastly, Plaintiff argues that, pursuant to *Broughton v. CIGNA Healthplans of California*, 21 Cal.4th 1066, 1079-80 (1999), his claim under Business and Professions Code § 17200 is not arbitrable because it seeks equitable relief. As Defendant notes, however, Plaintiff's present allegations do not clearly request injunctive relief in connection with his Section 17200 claim (though the Court believes paragraph 22 of the Complaint could be read to inartfully request such relief). In any event, even assuming the question of arbitrability of a Section 17200 claim would be for the Court to decide (notwithstanding the seemingly clear language of the arbitration agreement to the contrary), the Ninth Circuit has held that the *Broughton* rule is preempted by the Federal Arbitration Act. *See* *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 933-37 (9th Cir. 2013). Plaintiff may not, therefore, employ this argument (at least in this forum) to avoid arbitration of any aspect of his case.

Even if the Court were to agree with Plaintiff that a failure to attach the applicable arbitration rules contributed to a finding of unconscionability, this would be the only aspect of his unconscionability argument that he would prevail on. Because he must demonstrate both procedural and substantive unconscionability, *see* *Chavarria*, 733 F.3d at 921, Plaintiff's attempt to invalidate the agreement by way of an unconscionability showing necessarily comes up short.

III. Conclusion

***10** The Court has determined that the parties reached an agreement to arbitrate, and it rejects Plaintiff's attempt to challenge the enforceability of the agreement through an unconscionability argument. As such, the Court will grant the motion to compel arbitration. "The Federal Arbitration Act requires a court to stay an action whenever the parties to the action have agreed in writing to submit their claims to arbitration." *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1048 (9th Cir. 1996); *see also* 9 U.S.C. § 3 ("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, 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...."). As a result, this action will be stayed pending completion of the arbitration.

All Citations

Slip Copy, 2018 WL 10806904

Footnotes

1 Although he denies that there is an enforceable arbitration agreement, Plaintiff does not contest that the Federal Arbitration Act applies here, a point Defendant makes in its opening brief when it asserts that not only is it "clearly

engaged in interstate commerce," but the arbitration agreement itself provides that it "will be governed by the Federal Arbitration Act." *See* 9 U.S.C. § 2 ("A written provision in any ... 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."); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1154 (9th Cir. 2008) ("The Supreme Court has concluded that contracts 'evidencing a transaction involving ... commerce' include employment contracts."); *see also* Docket No. 15, at 15:10-12; Exh. C (Docket No. 15-1), at pg. 30 of 61.

2 Both parties believe that the Court is to apply a summary judgment-like standard to the question of whether Plaintiff agreed to an arbitration agreement. *See, e.g.*, *Lopez v. Terra's Kitchen, LLC*, 331 F.Supp.3d 1092, 1096-97 (S.D. Cal. 2018); *Omstead v. Dell, Inc.*, 533 F.Supp.2d 1012, 1037 (N.D. Cal. 2008).

3 In reality, the evidence is that the e-mailed announcement was made "to all non-union employees below the level of Executive Vice President, who were active, *or who were not on a leave of absence*" on October 6, 2017. Affidavit of Tammie Knapper ("Knapper Aff."), Docket No. 15-1, ¶ 5 (emphasis added). The evidence is that Plaintiff *was* on a leave of absence on that date. *See* Declaration of Arnulfo Esquivel, Docket No. 17-1, ¶¶ 3-4. However, the evidence also indicates that Plaintiff was included on the distribution list for the e-mail and that the e-mail was sent to his work e-mail address. *See id.* ¶ 20; Declaration of Lillian Gomez ("Gomez Decl."), Docket No. 15-1, ¶¶ 4-5 & Exh. E. The answer to this curiosity may come in the Declaration of Lillian Gomez, which indicates that the e-mail was not delivered to those employees who were on "a *long-term* leave of absence." Gomez Decl. ¶ 4 (emphasis added).

4 While supporting affidavits assert that the Panorama page included specific information about opting out, *see* Knapper Aff., ¶¶ 11-12 and Gomez Decl., ¶ 7, that information is not actually reflected in the Panorama page attached to Defendant's papers as an exhibit, *see* Docket No. 15-1, Exh. B. There is, however, no apparent dispute that a 30-day opt-out period was provided to employees.

5 Defendant does not offer evidence of actual receipt (in the form of, for instance, Plaintiff's actual work e-mail inbox), but Plaintiff likewise does not offer evidence demonstrating non-receipt. Plaintiff's failure to contest the evidence that the e-mail was addressed to his work e-mail address means that, application of a "mailbox rule" presumption or not, the Court has no reason to conclude that the e-mail was not, in fact, received in the "inbox" of Plaintiff's work e-mail account.

6 As a result, Defendant's arguments concerning a) doubts about arbitrability being resolved in favor of arbitration and b) the issue of arbitrability being properly reserved for the arbitrator need not be addressed here (though the Court has no reason to disagree with Defendant's positions on those points), except for perhaps in connection with any claim for injunctive relief under Business and Professions Code § 17200.

7 While Plaintiff also asserts that there could not have been a contract because there was "no consideration" ("Plaintiff was asked to assume a legal obligation without Defendant suffering a legal detriment," Docket No. 17, at 10:15-17), Defendant correctly points out that the agreement is a mutual one, meaning that *both parties* gave up rights to litigate in court. There was, thus, clearly adequate consideration for an enforceable agreement. *See* *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002) ("Circuit City's promise to be bound by the arbitration process itself serves as adequate consideration.").

Plaintiff also baldly states – *i.e.*, without citation to any supporting authority – that "the existence of the opt-out provision in and of itself reflects that the parties had not agreed on the terms of the contract." Docket No. 17, at 10:20-22. Absent any case law support for this proposition, the Court rejects the suggestion that the mere existence of an opt-out provision precludes the enforceability of an agreement where assent is to be signaled by not exercising the opt-out right.

8 Plaintiff asserts at the outset of his Opposition brief that "[m]otions to compel arbitration are universally based upon received and acknowledged written agreements." Docket No. 17, at 1:4-5. But he offers no citation for that broad proposition.

9 Defendant's argument that the agreement "expressly incorporates the AAA rules" because it refers to selection of an arbitrator "who is a current member of the American Arbitration Association (AAA) and is listed on the Employment Dispute Resolution Roster" is unconvincing. *See* Docket No. 15, at 25:18-20; Docket No. 15-1, Exh. C. at pg. 28 of 61.

10 The Court takes no position on whether this motion to compel arbitration amounts to the "commence[ment]" of a "judicial action or proceeding" for purposes of application of this term of the agreement.

End of Document

EXHIBIT 31: BRAVO ET AL. V. CHARTER COMMUNICATIONS, LLC ET AL. (CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION FOUR, CASE NO. B303179), MARCH 23, 2021

2021 WL 1101145
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

Court of Appeal, Second District, Division 4, California.

BRAVO et. al., Plaintiffs and Respondents,

v.

CHARTER COMMUNICATIONS, LLC et. al., Defendants and Appellants.

B303179
|
Filed 3/23/2021

APPEAL from an order of the Superior Court of Los Angeles County, Gregory Wilson Alarcon, Judge. Reversed and remanded with directions. Los Angeles County Super. Ct. No. 19STCV28846

Attorneys and Law Firms

Hill, Farrer & Burrill, James A. Bowles and Erika A. Silverman, for Defendants and Appellants.

Guerra & Casillas, Ruben Guerra and Tizoc Perez-Casillas for Plaintiffs and Respondents.

CURREY, J.

INTRODUCTION

***1** Charter Communications, LLC (Charter), Noe Florin, Debone Markham, and Cheryl Doe (collectively, "Employers") challenge the trial court's order denying their motion to compel arbitration of employment-related claims asserted against them by former Charter employees Claudia Bravo, Rhonda Lackey, Khaliah Farwell, Crystal Glass, Michael Washington, Angelica Gomez, and Tamekia Newman (collectively, "Employees"). The trial court determined no valid arbitration agreements existed between the parties, having found: (1) the Employees did not assent to their enrollment into Charter's arbitration program; and (2) the purported arbitration agreements failed for lack of consideration. On appeal, the Employers contend both findings were error. We agree and reverse.

BACKGROUND

Charter provides cable television, telephone, and internet services to customers throughout the United States. As of October 6, 2017, the Employees were employed by Charter as telephone service representatives. Glass was on medical leave at the time. She returned to work on November 20, 2017.

On October 6, 2017, Paul Marchland, Charter's Executive Vice President of Human Resources, sent an e-mail to all active Charter employees' work e-mail addresses announcing the company's establishment of an "employment-based legal dispute resolution program" called "Solution Channel." The e-mail described Solution Channel as a "program that allows [the recipient]

and the company to efficiently resolve covered employment-related legal disputes through binding arbitration." The e-mail also 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." (Italics omitted.) Marchland's e-mail contained a link to a webpage located on Panorama, Charter's "intranet site accessible to [its] [e]mployees," which provided more information about Solution Channel ("Solution Channel Webpage").

The Solution Channel Webpage provided additional information about the program's purpose, the "tangible benefits" employees would enjoy by participating in the program, and how employees could submit a claim to invoke the dispute-resolution process. The Solution Channel Webpage also stated the following: "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 phase of the process." Employees could access Solution Channel's Program Guidelines and the Mutual Arbitration Agreement setting forth the program's terms via links on the Solution Channel Webpage.

***2** The Solution Channel Webpage also told employees how to opt-out of the program, stating: "**Opting Out of Solution Channel.** [¶] If you do not opt out of Solution Channel within the designated time, you will automatically be 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 clicked on the link embedded in the passage above and followed the specified steps were directed to the webpage where they could opt out of Solution Channel. ("Opt Out Webpage").

Upon landing on the Opt Out Webpage, employees could check a box next to the following phrase: "I want to opt out of Solution Channel[.]"After doing so, employees could enter their name into an adjacent text field and click "SAVE." Those who completed these steps received an e-mail confirming they had opted out of Solution Channel.

Employees who were on a leave of absence on October 6, 2017, such as Glass, were sent an e-mail informing them of Charter's implementation of Solution Channel 10 days after they returned from leave. This e-mail described Solution Channel as "an arbitration program that allows you to efficiently resolve employment-related legal disputes by submitting a written claim for internal review and, if necessary, to binding arbitration, where claims can be heard by a neutral arbitrator that you and Charter select." The e-mail informed returning employees they could access Solution Channel's Program Guidelines and the Mutual Arbitration Agreement governing the program's terms on Panorama, and contained a link to the Solution Channel Webpage. [1] The e-mail further stated: "You will be automatically enrolled in Solution Channel unless you choose to opt out of the program within the next 30 days. You can learn more about opting out of Solution Channel by clicking here. By agreeing to arbitrate disputes under this Program, you and Charter are giving up any right to a jury trial and any right to bring covered claims in a court of law. You should review the Mutual Arbitration Agreement and Program Guidelines carefully." (Bolding omitted.) Those who clicked on the link embedded in the passage above were directed to a webpage where they were asked to "sign[ ] in using their regular network credentials." From there, the employee could access the Opt Out Webpage.

None of the Employees opted out of Solution Channel during the 30-day timeframe provided. Consequently, the Employees were enrolled in Solution Channel the day after their opt-out period expired.

On August 16, 2019, the Employees filed a complaint against the Employers, asserting nine claims for relief based upon the Employers' alleged violations of the Fair Employment and Housing Act and the California Family Rights Act during the course of their employment.

In response, on October 2, 2019, the Employers filed a motion to compel arbitration and stay the action pursuant to the Federal Arbitration Act (FAA). The Employees opposed the motion, arguing the Employers failed to demonstrate the existence of valid arbitration agreements between the parties because: (1) the purported arbitration agreements were invalid under California's

Uniform Electronic Transactions Act (UETA), as the Employees did not consent to transact by electronic means as required by statute; and (2) the Employers could not demonstrate the Employees received or reviewed the e-mails notifying them of their enrollment in Solution Channel, and therefore could not prove they received notice of Charter's incorporation of an agreement to arbitrate into the terms of their employment contracts.

***3** The trial court denied the Employers' motion to compel on November 27, 2019. In issuing its ruling, the court first noted the parties did not dispute the FAA's applicability, and therefore found that the FAA governs. [2]

Subsequently, the trial court rejected both of the arguments raised in the Employees' opposition. First, regarding the Employees' UETA argument, the trial court determined the statute and the case on which the Employees relied, *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974 (*J.B.B.*), were inapposite.

With respect to the Employees' second argument, the trial court found the Employers' evidence was insufficient to demonstrate the Employees clicked on and read the e-mails announcing Charter's implementation of Solution Channel. Ultimately, however, the trial court found the Employees "did in fact receive the emails," and that "[w]hether [they] chose to read the emails or not is not of importance in finding whether an implied-in-fact agreement to arbitrate exists." Nevertheless, the court determined "no valid agreement to arbitrate exists," because "acceptance of the arbitration agreement was voluntary." Specifically, the court emphasized the Employees "could continue to be employed without agreeing to the arbitration agreement," and therefore found "an absence of acceptance and consideration."

Charter timely appealed.

DISCUSSION

I. General Principles and Standard of Review

Pursuant to section 2 of the FAA, an agreement to arbitrate is "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.) "This statute stands as a 'congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 235 (*Pinnacle*), fn. omitted.) "Nonetheless, it is a cardinal principle that arbitration under the FAA 'is a matter of consent, not coercion.' [Citation.] Thus, " 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " [Citations.]" (*Id.* at p. 236.)

Accordingly, " '[w]hen considering a motion to compel arbitration, the court must initially "determine whether the parties agreed to arbitrate the dispute in question." [Citation.] "This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." [Citation.]' [Citations.]" (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1283.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration. [Citations.] [¶] In California, '[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.' [Citations.]" (*Pinnacle, supra*, 55 Cal.4th at p. 236.)

***4** "There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's

denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

II. Analysis [3]

The Employers contend the trial court erred by finding: (1) the Employees did not impliedly assent to their enrollment into Solution Channel by continuing to work for Charter and failing to opt out of the program after receiving notice of its establishment; and (2) the agreements to arbitrate were unsupported by consideration. In response, the Employees largely rely on the same arguments they raised before the trial court. Specifically, they: (1) maintain the arbitration agreements were invalid because the UETA's requirements had not been satisfied; (2) continue to "deny ever having received or reviewed the e-mail[s]" informing them that they would be enrolled in Solution Channel; and (3) assert the trial court correctly found that they "failed to provide the adequate consideration in that their acceptance was voluntary."

As discussed below, we agree with the Employers, and conclude the Employees' arguments are unavailing.

A. Applicability of UETA

The Employees "maintain that the UETA applies" in this case because "the purported arbitration agreement was an electronic transaction." Accordingly, relying on *J.B.B., supra*, 232 Cal.App.4th 974, the Employees contend the agreements were invalid because the Employees did not "consent to transact electronically [with Charter] prior to the electronic transaction," as required by the statute. We disagree.

The UETA concerns "electronic records and electronic signatures relating to a transaction." (Civ. Code, § 1633.3, subd. (a).) Under the UETA, "[i]f a law requires a record to be in writing, an electronic record satisfies the law[,]" and "[i]f a law requires a signature, an electronic signature satisfies the law." (§ 1633.7, subds. (c) & (d).) The UETA further provides that "[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form[,]" and "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." (§ 1633.7 subds. (a) & (b).) The UETA, however, "applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means." (§ 1633.5, subd. (b).)

In *J.B.B.*, the Court of Appeal held the parties' written settlement agreement failed to satisfy the "strict signature requirements" of Code of Civil Procedure section 664.6, [4] and therefore was not enforceable under that statute. (*J.B.B., supra*, 232 Cal.App.4th at pp. 990-993.) In support of its holding, the Court of Appeal emphasized that "an agreement to settle cannot be enforced under [the statute] unless it is signed by *all* of the litigating parties. [Citations.]" (*Id.* at p. 985.) The Court of Appeal then determined the trial court erred by finding the plaintiff's printed name on the bottom of an e-mail expressing agreement to the proposed settlement was a valid signature under the UETA for purposes of satisfying this requirement, because the record did not "demonstrate ... that the parties ever agreed to conduct transactions by electronic means [as required by Civil Code section 1633.5, subdivision (b)], or that [the plaintiff] intended with his printed name at the end of his e-mail to sign electronically ... the [settlement] offer." (*Id.* at p. 989)

***5** As the trial court aptly observed, this case does not involve the enforceability of a settlement agreement under Code of Civil Procedure section 664.6. Nor does it require us to evaluate the validity of an electronic signature, or whether an electronic record satisfies any law requiring a written instrument. Rather, we must address: (1) whether the Employees' conduct manifested implied assent to their participation in Charter's arbitration program; and (2) whether their agreements to arbitrate were supported by consideration. Accordingly, we agree with the trial court that the UETA and *J.B.B.* do not apply.

B. Implied Assent

As noted above, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate. [Citation.]" (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 420 (*Craig*).) "Under California's law of contracts, a contract may be express (that is, either written or oral) or implied in fact (that is, one whose 'existence and terms ... are manifested by conduct'). [Citations.]" (*Douglass v. Serenivision, Inc.* (2018) 20 Cal.App.5th 376, 387.) Thus, "parties may enter into an implied in fact agreement to arbitrate through their conduct .... [Citation.]" (*Ibid.*) "Whether a party's conduct constitutes consent is necessarily fact specific[.]" (*Id.* at p. 388.)

"[I]t is settled that an employer may unilaterally alter the terms of an employment agreement, provided such alteration does not run afoul of the Labor Code[,]" or any other statute or contractual agreement. (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 619-620 (*Schachter*).) "An 'employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.' [Citation.]" (*Id.* at p. 620.) Accordingly, an employee's continued employment may constitute implied-in-fact acceptance of an arbitration agreement proposed by his or her employer as a new term or condition of employment. (See *Harris v. 1AP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 383-384 (*Harris*); see also *Craig, supra*, 84 Cal.App.4th at p. 420.)

The Employees contend they could not have impliedly accepted Charter's proposed arbitration agreement because they were not given prior notice of its intention to incorporate the agreement into the terms of their employment. Specifically, they argue that they did not receive the e-mails informing them they would be enrolled in Solution Channel unless they opted out within the 30-day period provided. In so doing, the Employees essentially challenge the trial court's factual finding that they "did in fact receive the e-mails." We review this finding for substantial evidence. (See *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 63-65 (*Avery*) [reviewing trial court's finding regarding employee's receipt of employee handbook containing arbitration agreement for substantial evidence].)

"Under the substantial evidence standard of review, 'we must consider all of the evidence in the light most favorable to the [trial court's findings], giving [it] the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the [findings at issue].... [Citations.]' [Citation.]" (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266 (*ASP Properties*).)

***6** The Employers submitted the following evidence: (1) declarations by John Fries, Charter's Vice President of HR Technology, in which he states each of the Employees, except Glass, was on the distribution list for the e-mail sent by Marchland on October 6, 2017 regarding Charter's implementation of Solution Channel; (2) copies of the e-mails Marchland sent to each of those Employees, which showed their names in the recipient field; and (3) a declaration by Fries, in which he stated Glass was on the list of employees who were sent the e-mail regarding Charter's adoption of Solution Channel following their return from leave, and that he confirmed the e-mail was sent on December 2, 2017. On this record, the trial court could reasonably infer the Employees received the e-mails above. Thus, the trial court could appropriately conclude the Employees were given notice of Charter's implementation of Solution Channel, their ability to opt-out of the program if they so desired within 30 days, and the consequences of their failure to do so. [5]

To the extent the Employees suggest evidence of the e-mails being sent cannot constitute evidence of their receipt because Evidence Code section 641 is inapplicable to e-mail, we are not persuaded. Pursuant to that statute: "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641.) As an initial matter, we note the Employees did not cite, and we could not find, any California appellate court decisions holding this presumption

does not apply to e-mail correspondence. In any event, the trial court did not rely on Evidence Code section 641 in making the factual finding at issue; rather, the record reflects the court "[f]ollow[ed] logic" to infer the e-mails were received based on the evidence above showing they had been sent. Giving the Employer's evidence " 'the benefit of every reasonable inference,' " as we must (*ASP Properties*, 133 Cal.App.4th at p. 1266), we discern no error in the court's analysis on this point.

In addition, we reject the Employees' contention that, even if they received the e-mails, they lacked requisite notice of Charter's adoption of Solution Channel because they did not read or review them. As the trial court correctly acknowledged, the fact that the Employees "either chose not to read or take the time to understand [the e-mails] is legally irrelevant. [Citations.]" (*Harris*, 248 Cal.App.4th at p. 383.) This is so because "an employee may [not] avoid an employer's arbitration policy imposed as a condition of employment by remaining willfully, or even negligently, ignorant of the policy[,]" such as by "failing to read a notice the employer sent to notify the employee about the employer's arbitration policy. [Citation.]" (*Avery*, *supra*, 218 Cal.App.4th at pp. 65-66; see also *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215.)

The question therefore remains whether the Employees' conduct constituted implied assent to their enrollment into Solution Channel and, consequently, their agreement to arbitrate employment-related claims per the program's terms. On this point, we find *Craig*, *supra*, 84 Cal.App.4th 416, instructive.

In *Craig*, the plaintiff had been employed by the defendant for 12 years, when the defendant implemented an arbitration program "to resolve 'all employee disputes.' " (*Craig*, *supra*, 84 Cal.App.4th at pp. 418-419.) The defendant mailed the plaintiff a memorandum announcing the arbitration program, which stated the purpose of its establishment, and that it applied to the plaintiff. (*Id.* at p. 419.) The memorandum was accompanied by a brochure containing further information about the program's terms, process, and logistics. (*Ibid.*) The defendant mailed copies of these materials to the plaintiff a second time a few months later, and then a third time in the following year. (*Id.* at p. 421.) Following the arbitration program's implementation, the plaintiff worked for the defendant for another four years, at which point she was terminated. (*Id.* at p. 419.)

***7** The plaintiff sued, asserting her termination was improper based on "a variety of tort and contract theories[.]" (*Craig*, *supra*, 84 Cal.App.4th at p. 419.) In response, the defendant filed a petition to compel arbitration. (*Id.* at pp. 419-420) The plaintiff opposed, arguing the defendant failed to show she agreed to arbitrate her claims because it did not present evidence demonstrating the plaintiff received or had knowledge of the arbitration program, such as a signed acknowledgment of the materials' receipt. (*Id.* at p. 420.) The trial court granted the motion, and subsequently confirmed the arbitration award in favor of the defendant. (*Ibid.*)

The Court of Appeal affirmed the judgment. (*Craig*, *supra*, 84 Cal.App.4th at p. 423.) In support of its holding, the Court of Appeal first determined substantial evidence supported the trial court's finding that the plaintiff received the memorandum and brochure concerning the defendant's implementation of the arbitration program, which informed her the program applied to her. (*Id.* at p. 422.) Accordingly, because the evidence also established the plaintiff continued to work for the defendant after receiving those materials, the Court of Appeal determined she impliedly agreed to be bound by program's terms, including the provision for binding arbitration. (See *id.* at pp. 420, 422)

As discussed above, here, as in *Craig*, the record contains substantial evidence to support the trial court's finding that the Employees received the e-mails announcing Charter's adoption of Solution Channel. Those e-mails informed the Employees that they would be automatically enrolled in Solution Channel, and thereby agreed to resolve employment-related disputes through binding arbitration under the program's terms, unless they opted out within 30 days. Further, the e-mails provided

the Employees access to webpages where they could find more information about opting out, and do so if they so desired. Similar to the *Craig* defendant's inclusion of an informational brochure alongside the memorandum, Charter's e-mails also gave the Employees direct access to a webpage containing more details about the program's terms, logistics, and processes, which reiterated the consequences of their participation in the program. In effect, by providing these materials to the Employees, Charter notified them it was unilaterally modifying the terms of their employment agreements by requiring their participation in an arbitration program to resolve employment-related disputes, which would become effective and apply to them in 30 days unless they took appropriate steps to opt out.

As noted above, however, none of the Employees opted out within the time provided. Consequently, when the 30-day period expired, Charter's changes to the terms of their employment agreements took effect. At that point, the Employees were enrolled in Solution Channel and, consequently, agreed to arbitrate their employment-related disputes under the program's terms. Subsequently, like the plaintiff in *Craig*, the Employees continued to work for Charter after receiving notice of, and becoming participants in, their employer's arbitration program. On these facts, we conclude the Employees' conduct (i.e., failing to opt out of Solution Channel and continuing to work for Charter after their enrollment in the program), constituted implied acceptance of Charter's addition of an agreement to arbitrate as a new term of their employment contracts, and the trial court erred by concluding otherwise.

C. Consideration

Next, the Employers contend the trial court erred by finding the arbitration agreements were not supported by adequate consideration. We agree. The e-mails announcing Charter's implementation of Solution Channel and the Solution Channel Webpage provide that, by virtue of the Employees' participation in Solution Channel, both they and Charter agreed to resolve employment-related disputes through binding arbitration, and to waive their rights to resolve those types of disputes by court litigation. "Where an agreement to arbitrate exists, the parties' mutual promises to forego a judicial determination and to arbitrate their disputes provide consideration for each other." (*Strotz v. Dean Witter Reynolds* (1990) 223 Cal.App.3d 208, 216, overruled on other grounds by *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 407.)

DISPOSITION

***8** The order denying the motion to compel arbitration is reversed. The trial court shall vacate its order denying the motion to compel arbitration and enter a new order granting that motion. Appellants shall recover their costs on appeal.

We concur:

MANELLA, P.J.

WILLHITE, J.

All Citations

Not Reported in Cal.Rptr., 2021 WL 1101145, 2021 IER Cases 103,847

Footnotes

1 The record is unclear whether, like the version of the Solution Channel Webpage accessible to employees who were active when Marchland initially announced Charter's adoption of Solution Channel, the version of the Solution Channel Webpage available to employees returning from leave also contained a link to the Opt Out Webpage and/or reiterated they would be automatically enrolled in Solution Channel if they did not opt out in the time provided.

2 The trial court also found, for purposes of the Employers' motion, the arbitration agreements were not unconscionable, as the parties did not appear to dispute the matter.

3 The Employers' Request for Judicial Notice in Support of their Reply Brief, filed on December 21, 2020 and corrected as of that date, is granted. (See Evid. Code, §§ 452, subd. (a); 459, subd. (a).)

4 Code of Civil Procedure section 664.6, subdivision (a) provides, in pertinent part: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

5 As noted above, although the trial court found the Employees received the e-mails, it determined the Employers' evidence was insufficient to support a finding that they had clicked on or opened the e-mails. The Employers did not contend this finding was error in their opening brief. Instead, they present the argument for the first time in their reply brief via footnote. It is well-settled, however, that " '[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' [Citation.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

End of Document

EXHIBIT 32: SERGIO WITRAGO V. CHARTER COMMUNICATIONS, LLC, ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 21STCV44796), RE DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION, AUGUST 23, 2022

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

DEPARTMENT 53

SERGIO WITRAGO, Plaintiff, vs. CHARTER COMMUNICATIONS, LLC., et al., Defendants.	Case No.: 21STCV44796 Hearing Date: August 23, 2022 Time: 10:00 a.m. ~~[TENTATIVE]~~ **ORDER RE:** DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY ACTION

MOVING PARTY: Defendant Charter Communications, LLC

RESPONDING PARTY: Plaintiff Sergio Witrago

Motion to Compel Arbitration and Dismiss Action or, Alternatively, to Stay Action

The court considered the moving, opposition, and reply papers filed in connection with this motion.

REQUEST FOR JUDICIAL NOTICE

The court grants Defendant's request for judicial notice. (Evid. Code, § 452, subd. (d).)

The court grants Plaintiff's request for judicial notice. (Evid. Code, § 452, subd. (d).)

EVIDENTIARY OBJECTIONS

The court overrules Plaintiff's March 28, 2022 evidentiary objection.

The court sustains Defendant's evidentiary objections, filed on August 16, 2022.

DISCUSSION

On December 8, 2021, plaintiff Sergio Witrago ("Plaintiff") filed this employment discrimination and retaliation action against defendant Charter Communications, LLC ("Defendant").

Defendant now moves the court for an order (1) compelling Plaintiff to submit all his claims to binding arbitration under the terms of an arbitration agreement and the Federal Arbitration Act, and (2) dismissing, or, in the alternative, staying this action pending completion of arbitration.

1. Existence of a Written Agreement to Arbitrate the Controversy

A written provision in any 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 Federal Arbitration Act ("FAA") requires courts to direct parties to proceed to arbitration on issues covered by an arbitration agreement upon a finding that the making of the arbitration agreement is not in issue. (9 U.S.C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys.* (9th Cir. 2000) 207 F.3d 1126, 1130.) "The court's role under the [FAA] is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (*Chiron Corp.*, *supra*, 207 F.3d at p. 1130.) The FAA reflects "both a 'liberal federal policy favoring arbitration,' [citation], and the 'fundamental principle that arbitration is a matter of contract,' [citation]." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.)

A party seeking to compel arbitration bears the burden of proving a written agreement to arbitrate exists. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The burden of production as to this finding shifts in a three-step process. (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165.) First, the moving party bears the burden of producing prima facie evidence of a written agreement to arbitrate, which can be met by attaching a copy of the arbitration agreement purporting to bear the opponent's signature or by setting forth the agreement's provisions. (*Ibid.*) If the moving party meets this burden, the opposing party bears, in the second step, the burden of producing evidence to challenge its

authenticity. (*Ibid.*) If the opposing party produces evidence sufficient to meet this burden, the third and final step requires the moving party to establish, with admissible evidence, a valid arbitration agreement between the parties. (*Ibid.*)

Defendant bases its motion on the terms set forth in its Mutual Arbitration Agreement, contending that the parties entered into the agreement following Defendant's launch of its Solution Channel legal dispute resolution and arbitration program and Plaintiff's failure to opt out of the program. (Fries Decl., ¶ 5.)

Defendant announced its Solution Channel program on October 6, 2017 by email to all non-union employees below the level of Executive Vice President, who were active and not on a leave of absence on that date. (Fries Decl., ¶ 6.) The October 6, 2017 announcement stated (1) the Solution Channel program would permit the employee and Defendant "to efficiently resolve covered employment-related legal disputes through binding arbitration" and (2) that participation in the Solution Channel program meant that both the employee and Defendant would "waive the right to initiate or participate in court litigation...involving a covered claim and/or the right to a jury trial involving such claim." (Fries Decl., Ex. A, p. 2; Fries Decl., Ex. E.) The announcement also stated that, unless the recipient opted out of participating within the following 30 days, the employee would be automatically enrolled. (*Ibid.*) The announcement included a link to the Solution Channel webpage entitled "Panorama," which explained that participation in the Solution Channel program meant that the parties agreed to waive any right to participate in court litigation and instead agreed to arbitrate those disputes. (Fries Decl., ¶ 10; Fries Decl., Ex. B, pp. 1-2.) The Panorama page also included a link to the Mutual Arbitration Agreement. (Fries Decl., ¶ 10; Fries Decl., Ex. B, p. 2.)

The Mutual Arbitration Agreement contains a mutual agreement that all disputes, claims, and controversies that could be asserted in court or before an administrative agency or for which the employee or Defendant has an alleged cause of action related to pre-employment, employment, employment termination, or post-employment-related claims, whether denominated as tort, contract, common law, or statutory claims, would be submitted to binding arbitration. (Fries Decl., Ex. C, Mutual Arbitration Agreement, § B, subd. (1).) The covered claims

specifically include claims for unlawful discrimination, harassment, and retaliation. (*Ibid.*) The Mutual Arbitration Agreement became effective as of the date of consent to participate in Solution Channel (i.e., upon the expiration of the final date to opt out of the program). (*Id.* at p. 5, § V.)

Defendant presents evidence that (1) Plaintiff was included in the distribution list for the October 6, 2017 Solution Channels announcement, (2) Plaintiff did not opt out of the program during the allotted time period, and (3) Plaintiff was a participant in the program as of November 6, 2017. (Fries Decl., ¶¶ 21-23; Fries Decl., Ex. E [email announcement from Paul Marchand, Executive Vice President, to Plaintiff]; Fries Decl., Ex. F [Solution Channel page indicating that Plaintiff is a participant of the program].)

The court finds that Defendant has met its burden to establish that a valid agreement to arbitrate exists between Plaintiff and Defendant. As set forth above, Defendant has presented evidence that the parties agreed to enter into the Mutual Arbitration Agreement after Plaintiff received the Solution Channel announcement and declined to opt out of the program, thereby entering into the agreement.

The court finds that Plaintiff has not met his burden of demonstrating that the Mutual Arbitration Agreement is invalid because Plaintiff has not demonstrated that there was a lack of mutual consent to its terms.

Plaintiff contends that there exists no mutual assent because Plaintiff (1) did not sign the Mutual Arbitration Agreement; (2) has no recollection of receiving the October 6, 2017 email; (3) "neither read nor saw anything regarding an arbitration agreement" from Defendant; and (4) never received a copy of the Mutual Arbitration Agreement. (Fries Decl., Ex. C [Mutual Arbitration Agreement, unsigned by Plaintiff]; Witrago Decl., ¶¶ 3-5.) Plaintiff argues that Defendant failed to present evidence that Plaintiff received a copy of the agreement, signed it, or acknowledged his receipt of the agreement or its terms, and therefore has failed to establish that both Plaintiff and Defendant consented to its terms.

"To form a valid contract there must be a meeting of the minds, i.e., mutual assent." (*Moritz v. Universal City Studios LLC* (2020) 54 Cal.App.5th 238, 246; Civ. Code, §§ 1550,

subd. (2), 1565.) "'Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.'" (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 422.) Consent is not mutual unless the parties "all agree upon the same thing in the same sense." (*Sieck v. Hall* (1934) 139 Cal.App. 279, 291.)

The court finds that Plaintiff has not met his burden to establish that there was no meeting of the minds. Defendant has produced evidence establishing that Plaintiff received the October 6, 2017 email containing the Solution Channel announcement. (Fries Decl., Ex. E.) While Plaintiff states in declaration that he has "no recollection of receiving an email dated October 6, 2017" from Defendant's Paul Marchand, Plaintiff does not meaningfully dispute Defendant's proffered evidence—a copy of the announcement that was emailed to "Witrago, Sergio L"—and does not state that he did not actually receive the announcement, only stating that he does not recall receiving it. (Witrago Decl., ¶ 3.)

Plaintiff also argues that there is no evidence that he opened or acknowledged the Mutual Arbitration Agreement, and that the October 6, 2017 email is inconsistent because it contains both permissive and mandatory language when describing the agreement to arbitrate. As to the first point, "a party's acceptance of an agreement to arbitrate may be express [citations] or implied-in-fact where, as here, the employee's continued employment constitutes [his] acceptance of an agreement proposed by [his] employer [citations]." (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 420.) Defendant's evidence establishes that Plaintiff received the October 6, 2017 email.

As to the second point, the court acknowledges that the October 6, 2017 email appears to contain conflicting language. The email states that Defendant has launched Solution Channel, "a program that *allows* you and the company to efficiently resolve covered employment-related legal disputes through binding arbitration," and appears to set forth the *option* to submit to arbitration. (Fries Decl., Ex. E [emphasis added].) Following this statement, however, is language that makes clear that arbitration is binding: "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." (Fries Decl., Ex. E [emphasis added].)

Finally, the court notes that Plaintiff contends that there was no consideration presented to Plaintiff since he was already an employee at the time that Defendant sent its October 6, 2017 email. However, the Mutual Arbitration Agreement states that the parties agree that the recipient has been offered sufficient consideration in the form of consideration of applications for employment, the recipient's employment with Defendant, and/or Defendant's mutual agreement to arbitrate disputes. (Fries Decl., Ex. C, Mutual Arbitration Agreement, p. 5, § S.) The court finds this to be sufficient evidence of consideration.

The court finds (1) that the evidence establishes that Plaintiff received the October 6, 2017 email announcing the launch of the Solution Channel program; (2) that the email announcement sufficiently advised Plaintiff that, unless he opted out, he would be "enrolled" in the Solution Channel program and would therefore waive the right to initiate or participate in court litigation and the right to a jury trial involving covered employment-related legal disputes; and (3) that Plaintiff did not opt out within the requisite time period. (Fries Decl., Exs. E-F.) The court therefore finds that Plaintiff's continued employment and failure to opt out of the Mutual Arbitration Agreement evidences his acceptance of the Mutual Arbitration Agreement. (*Craig*, *supra*, 84 Cal.App.4th at p. 420.)

The court finds that Plaintiff's claims fall within the scope of the claims the parties have agreed to arbitrate in the Mutual Arbitration Agreement. The Mutual Arbitration Agreement applies to causes 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 claims for unlawful termination, unlawful discrimination or harassment, and claims for unlawful retaliation. (Fries Decl., Ex. C, Mutual Arbitration Agreement, p. 1, § B, subd. (1).) Plaintiff brings claims

for physical disability harassment, discrimination, and retaliation, violation of the California Family Rights Act, and wrongful termination, and requests a declaration that Defendant committed acts of harassment, discrimination, and retaliation. All of these employment-related causes of action fall within the scope of the Mutual Arbitration Agreement.

The court therefore finds that (1) a valid agreement to arbitrate exists, and (2) the agreement encompasses each of Plaintiff's claims.

2. Unconscionability

Plaintiff contends that the Mutual Arbitration Agreement is unconscionable and therefore unenforceable.

Arbitration agreements are subject to all defenses to enforcement that generally apply to contracts, and state contract law is applied to determine the validity of an arbitration agreement. (*Ingle v. Circuit City Stores, Inc.* (2003) 328 F.3d 1165, 1170; 9 U.S.C. § 2.) "The burden of proving unconscionability rests upon the party asserting it." (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 (*Kho*).) "'[U]nconscionability 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." (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 [citations omitted].) "As a matter of general contract law, California courts require both procedural and substantive unconscionability to invalidate a contract." (*Torrecillas v. Fitness International, LLC* (2020) 52 Cal.App.5th 485, 492 (*Torrecillas*).) California courts "apply a sliding scale, meaning if one of these elements is present to only a lesser degree, then more evidence of the other element is required to establish overall unconscionability. In other words, if there is little of one, there must be a lot of the other." (*Ibid.*)

a. Procedural Unconscionability

"Procedural unconscionability pertains to the making of the agreement . . . ." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795.) Procedural unconscionability """focuses on two factors: 'oppression' and 'surprise.' [Citations.] 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'

[Citations.] 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms."'" (*Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 484 [citations omitted].)

i. *Oppression*

"Oppression generally 'takes the form of a contract of adhesion, "'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.'"'" [Citation.]" (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 84 (*Carmona*).) "'[A] predispute arbitration agreement is not invalid *merely* because it is imposed as a condition of employment. [T]he mandatory nature of an agreement does not, by itself, render the agreement unenforceable.' [Citation.] But the adhesive nature of a contract is one factor that the courts may consider in determining the degree of procedural unconscionability." (*Id.* at p. 84, fn. 4.)

As discussed above, "[o]pression . . . occurs when there is a lack of negotiation and meaningful choice." (*Torrecillas, supra,* 52 Cal.App.5th at p. 493.) "Adhesion contracts are form contracts a party with superior bargaining power offers on a take-it-or-leave-it basis." (*Ibid.*) "Arbitration contracts imposed as a condition of employment are typically adhesive . . . ." (*Kho, supra,* 8 Cal.5th at p. 126.) Plaintiff presents evidence that the Mutual Arbitration Agreement is an adhesion contract because it was offered in exchange for Plaintiff's continued employment with Defendant, and because Plaintiff was not permitted to change its terms. (Fries Decl., Ex. C, Mutual Arbitration Agreement, p. 5, § S; Witrago Decl., ¶ 6.)

ii. *Surprise*

As discussed above, "[s]urprise is when a prolix printed form conceals the arbitration provision." (*Torrecillas, supra,* 52 Cal.App.5th at p. 493.)

Plaintiff argues that the October 6, 2017 email presents a "highly distorted picture" of the arbitration agreement, because (1) the email was entitled "Charter's Code of Conduct and Employee Handbook;" (2) the email announcement uses language that is both permissive and mandatory, as described above; and (3) although the announcement referenced the ability to opt out of Solution Channel, it did not expressly state that, unless a recipient opts out, he will be

required to submit all employment-related disputes through arbitration. The court finds that these attributes, at most, indicate only a low level of surprise. Although the email subject line did not make reference to arbitration, and although the language appears to use both permissive and mandatory language in a somewhat awkward manner, the court finds that the announcement itself made clear that (1) by participating in the Solution Channel, Plaintiff would be waiving his right to initiate and participate in court litigation and would be waiving his right to a jury trial, and (2) unless Plaintiff opted out of participating in Solution Channel, Plaintiff would be enrolled in the program. (Fries Decl., Ex. E.)

Plaintiff next contends that the Mutual Arbitration Agreement does not state that the AAA Rules are applicable, and that Defendant did not provide Plaintiff with a copy of any arbitration rules. (Witrago Decl., ¶ 6.)

The courts that have held that the failure to provide a copy of the arbitration rules "depended in some manner on the arbitration rules in question." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246.) The failure to attach the governing arbitration rules "standing alone, is insufficient grounds to support a finding of procedural unconscionability." (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472.) Accordingly, the court finds that Defendant's failure to attach or transmit the AAA Rules does not establish that the agreement is procedurally unconscionable.

The court finds that Plaintiff has established that there is a low level of procedural unconscionability based on the adhesive nature of the Mutual Arbitration Agreement. (*Ajamian, supra*, 203 Cal.App.4th at p. 796 ["Where there is no other indication of oppression or surprise, the degree of procedural unconscionability of an adhesion agreement is low"].)

"For [Plaintiff] to invalidate his agreement, then, minimal procedural unconscionability means [Plaintiff] would have to demonstrate a high degree of substantive unconscionability." (*Torrecillas, supra*, 52 Cal.App.5th at p. 496.)

b. Substantive Unconscionability

"'Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is

not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.'"" (*Carmona, supra*, 226 Cal.App.4th at p. 85.) ""[T]he paramount consideration in assessing [substantive] unconscionability is mutuality."" (*Ibid.*)

Plaintiff contends that the Mutual Arbitration Agreement is substantively unconscionable because (1) it curtails Plaintiff's FEHA remedies; (2) it does not provide for adequate discovery; and (3) the repeat player effect disadvantages Plaintiff.

First, Section K of the Mutual Arbitration Agreement states that Defendant will pay the AAA administrative fees and the arbitrator's fees and expenses, but that "[a]ll other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses." (Fries Decl., Ex. C, Mutual Arbitration Agreement, § K.) The court finds that this provision, in "requiring each party to bear its own attorney fees[,] deprives an employee of his or her statutory right to recovery attorney fees if the employee prevails on a FEHA claim." (*Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365, 376, fn. 6.) Section K further states that, if arbitration is 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." (Fries Decl., Ex. C, Mutual Arbitration Agreement, § K.) The court notes that, while this provision does impermissibly conflict with FEHA's fee-shifting statute, Defendant has not sought attorney's fees in connection with this motion.

The court therefore finds that Section K deprives Plaintiff of his right to recover attorney's fees if he prevails on his FEHA claims and is therefore unconscionable for conflicting with FEHA's fee-shifting provision. (See Gov. Code, § 12965, subd. (c)(6).) The court, however, finds that this term may be severed.

Second, Plaintiff argues that the Mutual Arbitration Agreement does not provide for adequate discovery. The Mutual Arbitration Agreement states that the arbitrator will decide all discovery disputes related to the arbitration. (Fries Decl., Ex. C, Mutual Arbitration Agreement, p. 3, § I.) In addition, the Solution Channel Guidelines provide that parties will have 90 days to

exchange information and take depositions, and that each party will be permitted (1) to take up to four depositions; (2) to propound up to 20 total interrogatories, including subparts; and (3) to propound up to 15 total requests for documents. (Fries Decl., Ex. C, Solution Channel Program Guidelines, pp. 17-18.) The guidelines further provide that "[a]ny disagreements regarding the exchange of information or depositions will be resolved by the arbitrator to allow a full and equal opportunity to all parties to present evidence that the arbitrator deems material and relevant to the resolution of the dispute." (*Id.* at p. 18.) "[A]dequate discovery is indispensable for the vindication of FEHA claims." (*Armendariz, supra*, 24 Cal.4th at p. 104.) However, parties to an arbitration agreement are "permitted to agree to something *less than* the full panoply of discovery...." (*Id.* at p. 105.)

The court finds that the provisions regarding discovery do not render the Mutual Arbitration Agreement substantively unconscionable because (1) the discovery permitted by the Solution Channel Program Guidelines is adequate, and (2) the arbitrator has the ability to resolve discovery disputes in order to facilitate "a full and equal opportunity to all parties to present evidence" and therefore has the ability to permit more discovery if necessary to establish Plaintiff's FEHA claims.

Finally, Plaintiff argues that the "repeat player" effect on the arbitration process confers a benefit on Defendant and renders the agreement unconscionable as to Plaintiff. "While our Supreme Court has taken notice of the 'repeat player effect,' the court has never declared this factor renders the arbitration agreement unconscionable per se." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 178.) The court finds that Plaintiff has not presented evidence indicating that Defendant's participation in arbitration renders the Mutual Arbitration Agreement unconscionable as to Plaintiff.

The court finds that Plaintiff has established that the terms set forth in Section K are unconscionable for the reasons set forth above, but that this section may be severed without affecting its other provisions or the main purpose of the agreement. The court therefore orders the following terms set forth in Section K to be severed from the Mutual Arbitration Agreement: (1) "All other costs, fees and expenses associated with the arbitration, including without

limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses" and (2) "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." (Civ. Code, § 1670.5, subd. (a).)

Because the court has ordered the substantively unconscionable terms to be severed from the Mutual Arbitration Agreement, the court finds that there is a low level of substantive unconscionability which is remedied by the court's order severing those terms.

As set forth above, both procedural and substantive unconscionability must be shown for the defense of unconscionability to be established. (*Kho, supra*, 8 Cal.5th at p. 125.) Although Plaintiff has established a low level of procedural unconscionability due to the Mutual Arbitration Agreement being a contract of adhesion, Plaintiff has not established that the level of substantive unconscionability is so high that the Mutual Arbitration Agreement is unconscionable and should not be enforced.

The court finds that the Mutual Arbitration Agreement is not permeated by unconscionability or a lack of mutuality, and that the unenforceable terms in Section K are collateral to the main purpose of the agreement and may be severed without affecting the main purpose of the agreement. The court therefore finds that Plaintiff has not met his burden of proving that the Mutual Arbitration Agreement is unconscionable and unenforceable.

ORDER

The court grants defendant Charter Communications, LLC's motion to compel arbitration and to stay the action.

The court orders that the following terms set forth in Section K are severed from the Mutual Arbitration Agreement: (1) "All other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses" and (2) "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." (Civ. Code § 1670.5, subd. (a).)

The court orders (1) plaintiff Sergio Witrago and defendant Charter Communications, LLC to arbitrate the claims alleged in plaintiff Sergio Witrago's complaint in this action, and (2) this action is stayed until arbitration is completed.

The court sets an Order to Show Cause re completion of arbitration for hearing on March 28, 2023, at 11:00 a.m., in Department 53.

The court orders defendant Charter Communications, LLC to give notice of this order.

IT IS SO ORDERED.

DATED: August 23, 2022

Robert B. Broadbelt III
Judge of the Superior Court

08/25/2022

EXHIBIT 33: ZIREN COELHO V. CHARTER COMMUNICATIONS, LLC, ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 21STCV12694), ORDER RE MOTION TO COMPEL ARBITRATION AND STAY ACTION, AUGUST 2, 2022

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 53

21STCV12694
ZIREN COELHO vs CHARTER COMMUNICATIONS, INC.,, et al.

August 2, 2022
2:02 PM

Judge: Honorable Robert B. Broadbelt
Judicial Assistant: None
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter;

The Court, having taken the matter under submission on 06/14/2022 for Hearing on Motion to Compel Arbitration and Dismiss Action filed by Defendants Charter Communications, Inc. and Marco Sprague on 07-14-2021;, now rules as follows: The Motion to Compel Arbitration and Dismiss Action filed by Defendants Charter Communications, Inc. and Marco Sprague on 07-14-2021; filed by Marco Sprague, CHARTER COMMUNICATIONS, INC., on 07/14/2021 is Granted. The Court makes further orders as fully reflected in its specially-prepared written order signed and filed this day.

An Order to Show Cause Re: completion of arbitration is scheduled for 03/28/23 at 11:00 AM in Department 53 at Stanley Mosk Courthouse.

On the Court's own motion, the Case Management Conference scheduled for 08/22/2022 is advanced to this date and vacated .

Clerk is directed to give notice.

Certificate of Mailing is attached.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

DEPARTMENT 53

ZIREN COELHO, Plaintiff, vs. CHARTER COMMUNICATIONS, INC., et al., Defendants.	Case No.: 21STCV12694 Hearing Date: June 14, 2022 Time: 10:00 a.m. ~~[TENTATIVE]~~ **ORDER RE:** MOTION TO COMPEL ARBITRATION AND STAY ACTION

MOVING PARTY: Defendants Charter Communications, Inc., and Marco Sprague

RESPONDING PARTY: Plaintiff Ziren Coelho

Motion to Compel Arbitration and Stay Action

The court considered the moving, opposition, and reply papers filed in connection with this motion.

REQUEST FOR JUDICIAL NOTICE

The court grants Defendants' request for judicial notice. (Evid. Code, § 452, subd. (d).)

DISCUSSION

On April 1, 2021, plaintiff Ziren Coelho ("Plaintiff") filed this employment discrimination action against defendants Charter Communications, Inc., d/b/a Charter Communications (CCI), Inc. ("Charter") and Marco Sprague (collectively, "Defendants").

Defendants move the court for an order (1) compelling Plaintiff to submit all his claims to binding arbitration under the terms of an arbitration agreement and the Federal Arbitration

Act, and (2) dismissing or, in the alternative, staying this action pending completion of arbitration.

1. Existence of a Written Agreement to Arbitrate the Controversy

Under the Federal Arbitration Act (FAA), a "court shall…upon being satisfied that the making of the agreement for arbitration…is not in issue.... make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." (9 U.S.C. § 4.) The FAA mandates that courts shall direct the parties to proceed to arbitration on issues covered by an arbitration agreement. (*Chiron Corp. v. Ortho Diagnostic Sys.* (9th Cir. 2000) 207 F.3d 1126, 1130.) "The court's role under the [FAA] is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (*Ibid.*) The FAA reflects "both a 'liberal federal policy favoring arbitration,' [citation], and the 'fundamental principle that arbitration is a matter of contract,' [citation]." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.)

A party seeking to compel arbitration bears the burden of proving a written agreement to arbitrate exists. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The burden of production as to this finding shifts in a three-step process. (*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165.) First, the moving party bears the burden of producing prima facie evidence of a written agreement to arbitrate, which can be met by attaching a copy of the arbitration agreement purporting to bear the opponent's signature or by setting forth the agreement's provisions. (*Ibid.*) If the moving party meets this burden, the opposing party bears, in the second step, the burden of producing evidence to challenge its authenticity. (*Ibid.*) If the opposing party produces evidence sufficient to meet this burden, the third and final step requires the moving party to establish, with admissible evidence, a valid arbitration agreement between the parties. (*Ibid.*)

Defendants present the application submitted by Plaintiff for the position of Assistant Store Manager. (Fries Decl., Ex. D.) The application includes an agreement to be bound by Charter's Mutual Arbitration Agreement. (Fries Decl., Ex. D, p. 7 ["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"].) An applicant may save his application to review the terms of the Mutual Arbitration Agreement before returning to the application. (Fries Decl., ¶ 14.) The Mutual Arbitration Agreement contains a mutual agreement that, as a condition of Charter considering an application for employment or 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…." (Fries Decl., Ex. B, ¶ A.) The covered claims specifically include "related to pre-employment, employment, employment termination or post-employment-related claims…." (Fries Decl., Ex. B, ¶ B.)

Plaintiff's application contains the typed statement "I agree" next to the paragraph requiring any applicant to be bound by Charter's Mutual Arbitration Agreement. (Fries Decl., Ex. D, at p. 7.) Although no signature appears on this application, Defendants assert that Plaintiff submitted the application to Charter on December 18, 2019. (Fries Decl., ¶ 16.)

The court finds that Defendants have met their burden to establish that a valid agreement to arbitrate exists between Plaintiff and Charter. The application submitted by Plaintiff contains an agreement to be bound by Charter's Mutual Arbitration Agreement.

The court finds that Plaintiff has not met his burden of demonstrating that the Mutual Arbitration Agreement is invalid because Plaintiff has not demonstrated that there was a lack of mutual consent to its terms.

Plaintiff does not dispute that he agreed to be bound by the Mutual Arbitration Agreement as part of his application. Plaintiff's own declaration confirms that he clicked "agree" to the terms of the arbitration agreement. (Coelho Decl., ¶ 10.) Plaintiff instead contends that the parties did not come to a meeting of the minds as to (1) the rules governing arbitration and (2) whether the Mutual Arbitration Agreement applies to claims involving Plaintiff's "prior" employment.

"To form a valid contract there must be a meeting of the minds, i.e., mutual assent." (*Moritz v. Universal City Studios LLC* (2020) 54 Cal.App.5th 238, 246; Civ. Code, §§ 1550,

subd. (2), 1565.) "'Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.'" (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 422.) Consent is not mutual unless the parties "all agree upon the same thing in the same sense." (*Sieck v. Hall* (1934) 139 Cal.App. 279, 291.)

Plaintiff was hired by Insight Communications, Inc., now defendant Charter. (Coelho Decl., ¶ 2.) Charter launched a program allowing it and its employees to resolve legal disputes through binding arbitration. On October 6, 2017, Plaintiff received an email from Charter offering to opt-out of the arbitration agreement. (Coelho Decl., ¶ 4.) Plaintiff timely opted out. (Coelho Decl., ¶¶ 5-7.) Thereafter, on December 18, 2019, Plaintiff agreed to the instant Arbitration Agreement as part of his application for a new position. (Coelho Decl., ¶ 10.) Plaintiff was not hired for the position for which the application was submitted. (Coelho Decl., ¶ 12.) Plaintiff did not believe he was agreeing to arbitrate his disputes relating to his prior employment with Charter, and believed the arbitration agreement in the application would become operative only if he was hired for that position. (Coelho Decl., ¶ 11.) Plaintiff thus contends that the Arbitration Agreement does not require binding arbitration of disputes arising from Plaintiff's "prior" employment; that he never believed that he would be forfeiting the right to pursue legal claims from a prior employment in applying for a new position he never received; and that the text and context of the Arbitration Agreement confirm this interpretation.

The court finds that the broad language of the Arbitration Agreement demonstrates that the parties agreed to submit to arbitration any claims arising out of Plaintiff's employment. The application states that the parties agree to be bound by Charter's Mutual Arbitration Agreement. (Fries Decl., Ex. D, p. 7.) The Mutual Arbitration Agreement includes a prefatory notice stating that, if a party "accept[s] the terms of the agreement (whether [the party is] an applicant, current employee, or former employee), [the party is] agreeing to submit any covered employment-related dispute" to binding arbitration. (Fries Decl., Ex. B, Mutual Arbitration Agreement, p. 1, Notice.) The Mutual Arbitration Agreement contains the following agreement:

> 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….

(Fries Decl., Ex. B, Mutual Arbitration Agreement, p. 1, § A.)

The Mutual Arbitration Agreement establishes the parties' agreement to arbitrate all claims arising out of, or related to, Plaintiff's employment with Charter. Moreover, mutual assent is determined through consideration of outward manifestations or expressions of the parties, "and not their unexpressed intentions or understandings." (*Chicago Title Ins. Co., supra*, 188 Cal.App.4th at p. 422.) Plaintiff's declaration states that it was his subjective belief that the Mutual Arbitration Agreement would be enforced only if he was hired for the new position for which he had applied. (Coelho Decl., ¶ 11.) It is well-settled that "unexpressed subjective intentions are irrelevant to the issue of mutuality." (*Martinez v. BaronHR, Inc.* (2020) 51 Cal.App.5th 962, 970.) The terms of the Mutual Arbitration Agreement, to which Plaintiff does not dispute he agreed, demonstrate the outward manifestation of Plaintiff to submit all employment-related claims to binding arbitration.

Therefore, the court finds that Plaintiff's contention that there was no mutual assent as to the arbitration of Plaintiff's pre-application employment claims is without merit because (1) the plain language of the Mutual Arbitration Agreement states the parties' agreement to arbitrate such claims, and (2) Plaintiff has presented insufficient evidence as to the lack of mutual assent, because Plaintiff's declaration is based on his unexpressed, subjective belief that the Mutual Arbitration Agreement would be enforced only if he was hired for the new position.

The court finds that Plaintiff's claims fall within the scope of claims the parties have agreed to arbitrate in the Mutual Arbitration Agreement. The Mutual Arbitration Agreement applies to causes 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," including claims for unlawful termination, wage and hour-based claims, unlawful discrimination or harassment, and unlawful retaliation. (Fries Decl., Ex. B, p. 1, § B, subd. (1).) Plaintiff has brought causes of action alleging disability and race

discrimination, retaliation, failure to accommodate, failure to engage in the interactive process, wrongful termination, defamation, intentional infliction of emotional distress, and wage and hour claims. Each of Plaintiff's causes of action arises from his employment and termination of employment with Charter. Plaintiff does not meaningfully dispute that the Mutual Arbitration Agreement applies to his employment law claims, instead arguing that there was no meeting of the minds as to whether the agreement applied to Plaintiff's "prior" employment. The court has found that Plaintiff's contentions in that regard lack merit.

Plaintiff argues that Charter has forfeited its right to seek arbitration by failing to satisfy a condition precedent. (Opposition, pp. 21:22-22:9.) Plaintiff points to the last sentence of Section F in the Mutual Arbitration Agreement, which states: "In the event that Charter intends to seek arbitration of a dispute under this Agreement, it must send by certified mail to the individual's last known address, a written claim that meets the requirements of this Section F." The court finds that the second sentence of Section F, when read together with the first sentence of Section F and the other terms of the agreement requiring the parties to submit any dispute arising out of or relating to Plaintiff's employment with Charter to arbitration, means that, if Charter pursues a claim against Plaintiff in arbitration, Charter must send a written claim that meets the requirements of Section F to Plaintiff. The requirements of Section F are (1) to describe the nature and basis of the claim or dispute, (2) to set forth the specific relief sought, and (3) to include a sworn verification that the dispute is covered by the agreement and that the information submitted in the notice is accurate. Thus, it would not make sense to interpret the second sentence of Section F to require Charter to send the claim described in Section F when Charter is not bringing a claim or seeking relief against Plaintiff. The court therefore finds that Plaintiff's argument that Charter has forfeited its right to seek arbitration by failing to satisfy a condition precedent is without merit.

The court therefore finds that (1) a valid agreement to arbitrate exists, and (2) the agreement encompasses each of Plaintiff's claims.

2. Unconscionability

Plaintiff contends that the Mutual Arbitration Agreement is unconscionable and therefore unenforceable.

Arbitration agreements are subject to all defenses to enforcement that generally apply to contracts, and state contract law is applied to determine the validity of an arbitration agreement. (*Ingle v. Circuit City Stores, Inc.* (2003) 328 F.3d 1165, 1170; 9 U.S.C. § 2.) "The burden of proving unconscionability rests upon the party asserting it." (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 (*Kho*).) "'[U]nconscionability 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." (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 [citations omitted].) "As a matter of general contract law, California courts require both procedural and substantive unconscionability to invalidate a contract." (*Torrecillas v. Fitness International, LLC* (2020) 52 Cal.App.5th 485, 492 (*Torrecillas*).) California courts "apply a sliding scale, meaning if one of these elements is present to only a lesser degree, then more evidence of the other element is required to establish overall unconscionability. In other words, if there is little of one, there must be a lot of the other." (*Ibid.*)

a. Procedural Unconscionability

"Procedural unconscionability pertains to the making of the agreement . . . ." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 795.) Procedural unconscionability ""'focuses on two factors: 'oppression' and 'surprise.' [Citations.] 'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.' [Citations.] 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.'"'" (*Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 484 [citations omitted].)

i. *Oppression*

"Oppression generally 'takes the form of a contract of adhesion, "'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.'"'" [Citation.]" (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 84 (*Carmona*).) "'[A] predispute arbitration agreement is not invalid *merely* because it is imposed as a condition of employment. [T]he mandatory nature of an agreement does not, by itself, render the agreement unenforceable.' [Citation.] But the adhesive nature of a contract is one factor that the courts may consider in determining the degree of procedural unconscionability." (*Id.* at p. 84, fn. 4.)

As discussed above, "[o]pression . . . occurs when there is a lack of negotiation and meaningful choice." (*Torrecillas, supra,* 52 Cal.App.5th at p. 493.) "Adhesion contracts are form contracts a party with superior bargaining power offers on a take-it-or-leave-it basis." (*Ibid.*) "Arbitration contracts imposed as a condition of employment are typically adhesive . . . ." (*Kho, supra,* 8 Cal.5th at p. 126.) Plaintiff presents evidence that the Mutual Arbitration Agreement is an adhesion contract because it is a form contract that was offered on a take-it-or-leave-it basis as part of the job application process. (Coelho Decl., ¶ 10.) However, Plaintiff has not shown any oppression other than the adhesive nature of the Mutual Arbitration Agreement.

ii. *Surprise*

As discussed above, "[s]urprise is when a prolix printed form conceals the arbitration provision." (*Torrecillas, supra,* 52 Cal.App.5th at p. 493.) Plaintiff does not argue that the arbitration provision was concealed. Plaintiff contends, however, that the Mutual Arbitration Agreement neither specified which version of the AAA rules would be used, nor provided the rules, such that the agreement is unconscionable.

The courts that have held that the failure to provide a copy of the arbitration rules "depended in some manner on the arbitration rules in question." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246.) Plaintiff does not argue that the reference to the AAA rules were "artfully hidden," or that any particular rule or rules are substantively unconscionable. (See *ibid.*) The failure to attach the governing arbitration rules "standing alone, is insufficient grounds to support a finding of procedural unconscionability." (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472.) Accordingly, the court finds that Charter's failure to attach the governing AAA rules does not establish that the agreement is procedurally unconscionable.

The court finds that Plaintiff has established that there is a low level of procedural unconscionability based on the adhesive nature of the Mutual Arbitration Agreement. (*Ajamian, supra*, 203 Cal.App.4th at p. 796 ["Where there is no other indication of oppression or surprise, the degree of procedural unconscionability of an adhesion agreement is low"].)

"For [Plaintiff] to invalidate his agreement, then, minimal procedural unconscionability means [Plaintiff] would have to demonstrate a high degree of substantive unconscionability." (*Torrecillas, supra*, 52 Cal.App.5th at p. 496.)

b. Substantive Unconscionability

"'Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.'"'" (*Carmona, supra*, 226 Cal.App.4th at p. 85.) '"'[T]he paramount consideration in assessing [substantive] unconscionability is mutuality.'"' (*Ibid.*)

Plaintiff takes the position that the Mutual Arbitration Agreement is substantively unconscionable based on (1) Section K's fee-shifting provision; (2) Section K's award of attorney's fees to the party compelling arbitration; (3) the provision precluding PAGA claims; (4) the lack of adequate discovery; and (5) the pre-dispute contractual jury trial waiver in Section L.

First, Plaintiff takes issue with separate mandates within Section K of the Mutual Arbitration Agreement. The first portion of Section K provides that, although Charter agrees to pay the AAA administrative fees and arbitrator's fees, that "[a]ll other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses." (Fries Decl., Ex. B, Mutual Arbitration Agreement, p. 4, § K.) Plaintiff contends that this provision conflicts with the FEHA's fee-shifting statute.

Defendant contends that the Mutual Arbitration Agreement does not impermissibly shift fees and costs to a FEHA plaintiff based on the following. The agreement provides that

arbitration hearings will be conducted pursuant to the Solution Channel Program Guidelines as attached to the terms of the agreement. (Fries Decl., Ex. B, Mutual Arbitration Agreement, p. 3, § I, subd. (1).) The Guidelines indicate that an arbitrator, in his discretion, may order that the prevailing party may recover "any remedy that the party would have been allowed to recover had the dispute been brought in court." (Fries Decl., Ex. B, Guidelines, p. 9, ¶ 13.) Defendant argues that this provision establishes that the arbitrator may award attorney's fees to Plaintiff if he were the prevailing party.

The court acknowledges that the arbitrator may have the discretion to order the recovery of attorney's fees consistent with FEHA. However, the plain language of Section K requires the parties to bear their own attorney's fees and costs. The court is not required "to read these two provisions together so as to require each party to be responsible for their own attorney fees unless a statute otherwise allows the prevailing party to recover its attorney fees." (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 251.) The unambiguous language of Section K provides for each party to bear his or its own attorney's fees and costs. This is inconsistent with FEHA and seeks to limit Plaintiff's statutory rights to recover attorney's fees if he prevails on a FEHA claim.

Accordingly, the court finds that the provision requiring each party to pay its own attorney's fees "deprives an employee of his or her statutory right to recover attorney fees if the employee prevails on a FEHA claim" and is therefore unconscionable. (*Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365, 376, fn. 6 ("*Ramirez*").)

The second portion of Section K requires "the party that resisted arbitration to pay to the other party all costs, fees and expenses that they incur in compelling arbitration, including, without limitation, reasonable attorneys' fees." (Fries Decl., Ex. B, Mutual Arbitration Agreement, p. 4, § K.) Plaintiff contends that this provision is similarly unconscionable. Defendants, in reply, assert that the Court of Appeal, in *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473 ("*Patterson*"), has recently held that the same section of the Mutual Arbitration Agreement is not unconscionable. The *Patterson* Court considered this section of Charter's Mutual Arbitration Agreement in a writ of mandate proceeding and concluded that an allowance

of attorney fees for a successful motion to compel arbitration in a pending FEHA lawsuit would deny the plaintiff of the rights guaranteed by section 12965. (*Patterson, supra*, 70 Cal.App.5th at p. 489.) Despite this conclusion, the court construed the provision "to impliedly incorporate the FEHA asymmetric rule for awarding attorney fees and costs." (*Id.* at 490.)

Both *Patterson* and Section K of Charter's Mutual Arbitration Agreement were recently evaluated by the Court of Appeal in *Ramirez*. The *Ramirez* Court concluded not only that this section is unconscionable and unenforceable as being in violation of the FEHA's fee-shifting statute, but that it cannot "be saved by impliedly incorporating the FEHA asymmetrical attorney fee standard into its unambiguous language." (*Ramirez, supra*, 75 Cal.App.5th at p. 382.)

The court declines to follow *Patterson* and instead adopts the reasoning set forth in *Ramirez*. The court therefore finds that Section K of the Mutual Arbitration Agreement conflicts with FEHA's fee-shifting statute which provides that a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, and is therefore unconscionable. (Gov. Code § 12965, subd. (c)(6).)

The court finds that, while the terms discussed above are unconscionable, they can be severed from the agreement.

Second, the Mutual Arbitration Agreement provides 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 or excluded claims. (Fries Decl., Ex. B, Mutual Arbitration Agreement p. 2, § D.) The court notes that Plaintiff has not filed a PAGA claim in this action. However, it is settled that where "an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384.) The court finds that, while the PAGA waiver provision is substantively unconscionable, it can be severed from the Mutual Arbitration Agreement and does not affect the claims Plaintiff has filed in this action.

Third, Plaintiff contends that the Mutual Arbitration Agreement does not provide for adequate discovery. The Guidelines provide that the parties have 90 days to exchange

information and to take depositions, and that each party is permitted (1) to take up to four depositions; (2) to serve up to 20 total interrogatories, including subparts; and (3) to serve up to 15 total requests for documents to the other party. (Fries Decl., Ex. B, Guidelines, p. 18.) Any disagreements relating to the exchange of information or depositions are to be resolved by the arbitrator "to allow a full and equal opportunity to all parties to present evidence that the arbitrator deems material and relevant to the resolution of the dispute." (*Ibid.*) It is true "that adequate discovery is indispensable for the vindication of FEHA claims." (*Armendariz, supra*, 24 Cal.4th at p. 104.) However, parties to an arbitration agreement are "permitted to agree to something *less than* the full panoply of discovery...." (*Id.* at p. 105.) The court finds that this provision does not render the Mutual Arbitration Agreement substantively unconscionable because (1) the discovery permitted by the Guidelines is adequate, and (2) the arbitrator has the ability to resolve discovery disputes in order to facilitate "a full and equal opportunity to all parties to present evidence" and therefore has the ability to permit more discovery if necessary to establish Plaintiff's claims.

Finally, Plaintiff contends that the pre-dispute jury trial waiver is unconscionable. (Fries Decl., Ex. B, Mutual Arbitration Agreement, p. 4, § L ["in the event a dispute between you and Charter is not arbitrable...you and Charter agree to waive any right to a jury trial that might otherwise exist"].) "[P]redispute contractual jury trial waivers are unenforceable under California law." (*Dougherty v. Roseville Heritage Partners* (2020) 47 Cal.App.5th 93, 107.) The court therefore finds that this provision is unconscionable and unenforceable.

The court finds that Plaintiff has established that the following terms are substantively unconscionable: (1) the provisions in Section K that require (a) each party to pay their own attorney's fees and costs and (b) the party resisting arbitration to pay the other party's costs, fees, and expenses, including attorney's fees; (2) the preclusion of representative claims in Section D; and (3) the pre-dispute jury trial waiver in Section L. The court finds that these provisions may be severed from the Mutual Arbitration Agreement without affecting its other provisions or the main purpose of the agreement. The court therefore orders those provisions to be severed from the Mutual Arbitration Agreement. (Civ. Code, § 1670.5, subd. (a).)

Because the court has ordered the substantively unconscionable terms to be severed from the Mutual Arbitration Agreement, the court finds that there is a low level of substantive unconscionability which is remedied by the court's order severing those terms.

As set forth above, both procedural and substantive unconscionability must be shown for the defense of unconscionability to be established. (*Kho, supra*, 8 Cal.5th at p. 125.) Although Plaintiff has established a low level of procedural unconscionability, Plaintiff has not established that the level of substantive unconscionability is so high that the entire Mutual Arbitration Agreement is unconscionable and should not be enforced. The court finds that the Mutual Arbitration Agreement is not permeated by unconscionability or a lack of mutuality, and that the unenforceable terms are collateral to the main purpose of the agreement and may be severed without affecting the main purpose of the agreement. The court therefore finds that Plaintiff has not met his burden of proving that the Mutual Arbitration Agreement is unconscionable and unenforceable.

The court therefore grants defendants Charter Communications, Inc. and Marco Sprague's motion to compel arbitration and stay action.

ORDER

The court grants defendants Charter Communications, Inc. and Marco Sprague's motion to compel arbitration and stay action.

The court orders the following terms are severed from the Mutual Arbitration Agreement: (1) the provisions in Section K that require (a) each party to pay their own attorney's fees and costs and (b) the party resisting arbitration to pay the other party's costs, fees, and expenses, including attorney's fees; (2) the preclusion of representative claims in Section D; and (3) the pre-dispute jury trial waiver in Section L. The court finds that these provisions may be severed from the Mutual Arbitration Agreement without affecting its other provisions. The court therefore orders those provisions to be severed from the Mutual Arbitration Agreement. (Civ. Code § 1670.5, subd. (a).)

The court orders (1) plaintiff Ziren Coelho and defendants Charter Communications, Inc. and Marco Sprague to arbitrate the claims alleged in Plaintiff's complaint in this action, and (2) this action is stayed until arbitration is completed.

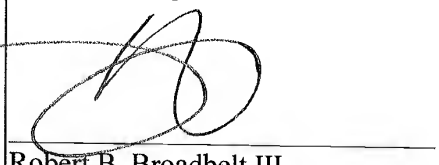
The court sets an Order to Show Cause re completion of arbitration for hearing on March 28, 2023, at 11:00 a.m., in Department 53.

The court orders that the Case Management Conference set for August 22, 2022, is vacated.

The court directs the clerk to give notice of this order.

IT IS SO ORDERED.

DATED: August 2, 2022



Robert B. Broadbelt III
Judge of the Superior Court

EXHIBIT 34: ERIC BROWN V. THOMAS RUTLEDGE, ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 21TRCV00314), RULING GRANTING CHARTER COMMUNICATIONS, LLC'S MOTION TO COMPEL ARBITRATION, JUNE 13, 2022

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Southwest District, Torrance Courthouse, Department B

21TRCV00314 June 13, 2022
ERIC BROWN vs THOMAS RUTLEDGE, et al. 9:50 AM

Judge: Honorable Gary Y. Tanaka
Judicial Assistant: C. Morales
Courtroom Assistant: M. Fondon

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 06/08/2022 for Hearing on Motion to Compel Arbitration, now rules as follows: 1. Charter Communications, LLC's Motion to Compel Arbitration

RULING

Charter Communications, LLC's Motion to Compel Arbitration is granted.

Background

Plaintiff filed the Complaint on April 23, 2021. Plaintiff alleges the following facts. Plaintiff is a former employee of Defendant. Plaintiff alleges that he was wrongfully terminated, and that Defendant failed to pay Plaintiff all wages owed. Plaintiff alleges the following causes of action: 1. Failure to Provide Overtime Compensation; 2. Failure to Pay Wages; 3. Failure to Indemnify/Reimburse Expenses to Employee; 4. Failure to Provide Accurate Itemized Wage Statements; 5. Waiting Time Penalties; 6. Discrimination on the Basis of Disability; 7. Discrimination Based on Perceived Disability; 8. Work Environment Harassment; 9. Retaliation [Government Code Section 12940(h)]; 10. Failure to Prevent Harassment, Discrimination, and Retaliation; 11. Retaliation [Labor Code Section 1102.5]; 12. Retaliation [Labor Code Section 246.5] ; 13. Failure to Provide Reasonable Accommodation; 14. Failure to Engage in Good Faith Interactive Process; 15. Unfair and Unlawful Business Practices; 16. Wrongful Termination [In Violation of Public Policy].

Request for Judicial Notice

Defendant's request for judicial notice is granted pursuant to Evidence Code Section 452(c) and (d).

Motion to Compel Arbitration

"California law reflects a strong public policy in favor of arbitration as a relatively quick and inexpensive method for resolving disputes. [Citation.] To further that policy, [Code of Civil Procedure] section 1281.2 requires a trial court to enforce a written arbitration agreement unless one of three limited exceptions applies. [Citation.] Those statutory exceptions arise where (1) a party waives the right to arbitration; (2) grounds exist for revoking the arbitration agreement; and (3) pending litigation with a third party creates the possibility of conflicting rulings on common factual or legal issues. (§ 1281.2, subds. (a)–(c).)" Acquire II, Ltd. v. Colton Real Estate Group (2013) 213 Cal.App.4th 959, 967.

"The petitioner 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. In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal.App.4th 1276, 1284.

"The party opposing arbitration has the burden of demonstrating that an arbitration clause cannot be interpreted to require arbitration of the dispute. Nonetheless, this policy does not override ordinary principles of contract interpretation. [T]he contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration: Although [t]he law favors contracts for arbitration of disputes between parties, there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate." Rice v. Downs (2016) 247 Cal.App.4th 1213, 1223 (internal citations and quotations omitted).

In Rowe v. Exline (2007) 153 Cal.App.4th 1276, 1286, the Court of Appeal found that "a nonsignatory sued as an agent of a signatory may enforce an arbitration agreement." Id. at 1286. In addition, "a nonsignatory who is the agent of a signatory can even be compelled to arbitrate claims against his will." Id. at 1285, citing Harris v. Superior Court (1986) 188 Cal.App.3d 475, 477–78. Further, "in many cases, nonparties to arbitration agreements are allowed to enforce those agreements where there is sufficient identity of parties." Valley Casework, Inc. v. Comfort Construction, Inc. (1999) 76 Cal.App.4th 1013, 1021. This includes nonparties as agents of a party as well as "a third party beneficiary of an arbitration agreement." Ibid.

The Court first addresses the precedential value of Ramirez v. Charter Communications, Inc.

(2022) 75 Cal.App.5th 365. On June 1, 2022, the California Supreme Court granted the petition for review. The California Supreme Court stated as follows: "Pending review, the opinion of the Court of Appeal, which is currently published at 75 Cal.App.5th 365, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115(e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion, Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)" Therefore, with this statement in mind, the instant Court rules as follows.

Defendant moves for an order compelling arbitration and a stay of proceedings. The motion is made pursuant to Code of Civil Procedure §1281 et seq. and 9 USC 3-4 ("FAA"), on the grounds Plaintiff is bound by a written agreement to arbitrate the subject matter of the Complaint. Defendant argues that a valid arbitration agreement exists between the parties that requires arbitration of all disputes. Defendants also move pursuant to Code of Civil Procedure § 1281.4 to stay all proceedings.

Code Civ. Proc., § 1281.2 states, in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists[. . .]" "Generally, an arbitration agreement must be memorialized in writing. A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact or be effectuated by delegated consent. An arbitration clause within a contract may be binding on a party even if the party never actually read the clause." Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236 (internal citations omitted).

Defendant has established the existence of a valid arbitration agreement between Plaintiff and Defendant. (Decl., John Fries, Ex. C.) The first agreement was completed in December 2016 through an on-board web-based process. The second agreement was completed in October 2017 through Defendant's Solution Channels Program. The agreement states that the parties agree to submit, "any dispute arising out of or relating to [Plaintiff's] pre-employment application and/or employment with Charter or the termination of that relationship, except as specifically excluded," to arbitration. (Id. § A.) The agreement specifies that "covered claims" include "all disputes, claims, and controversies . . . related to pre-employment, employment, employment

termination or post-employment related claims." (Id. § B.1.) Plaintiff's claims relate to his employment, termination, and post-employment claims. In addition, Defendant has established Plaintiff's refusal to arbitrate. (Decl., J. Scott Carr, ¶¶ 2–6.)

Plaintiff contends that the agreement was hidden in a link in an email, that he never received the email, that he never read the email, that he never read the arbitration clause, and that he never consented to the arbitration agreement. (Decl., Brown, ¶ 4-5.) Thus, Plaintiff argues that there was no valid completed arbitration agreement because there was no mutual consent and meeting of the minds with respect to the agreement. As noted, Plaintiff states that he does not recall receiving the Solutions Channels Program announcement, and, in any event, that Plaintiff did not read the agreement. However, simply because Plaintiff cannot recall receiving the announcement does not establish that he never received the announcement. The classic "mailbox rule" is analogous here: "a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." Craig v. Brown & Root, Inc. (2000) 84 Cal.App.4th 416, 421. Plaintiff's self-serving statement that he does not recall receiving the announcement does not meet his burden to show that it was never received.

Plaintiff's assertion that he never viewed the agreement also fails to negate the existence of the agreement. An employee cannot avoid an arbitration agreement by choosing to ignore or by negligently remaining ignorant of the agreement. 24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199, 1215. "A party cannot use his own lack of diligence to avoid an arbitration agreement." Id. Likewise, a party cannot avoid the terms of a contract on the ground that he or she did not read it. See, Metters v. Ralphs Grocery Co. (2008) 161 Cal.App.4th 696, 701. Plaintiff argues extensively that the Solutions Channels Program was confusing and misleading, that the arbitration provision should have been more clearly set forth, and that the opt-out procedure was not sufficient to bind Plaintiff to the arbitration clause. However, Plaintiff has not cited authority which holds that such an opt-out system does not establish mutual consent. Plaintiff did not cite to a case in which the Court found that an employee cannot be found to have consented to the terms of an arbitration agreement under similar factual circumstances. Notably, the Ramirez Court did not make any such statements.

Therefore, the burden shifts to Plaintiff to show that the arbitration clause should not be enforced. Rice, supra, 247 Cal.App.4th at 1223. Plaintiff did not meet his burden to show that the arbitration agreement should not be enforced.

Plaintiff argues that the arbitration clause is both procedurally and substantively unconscionable. A court can invalidate an arbitration agreement when it is unconscionable or against public policy. See, Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 99.

Unconscionability contains two elements: procedural unconscionability and substantive unconscionability.

"[U]nconscionability 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. The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, 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." See Armendariz, 24 Cal.4th at 114.

"The traditional standard of unconscionability . . . is that the inequality amounting to fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. Subsequent decisions have defined an unconscionable contract in varying but similar terms, such as a contract that no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." See California Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205, 214-15 (internal citations omitted).

Procedural unconscionability may be established by showing oppression and surprise. Oppression occurs where the parties have unequal bargaining power and the contract is not the result of meaningful negotiations. Surprise recognizes the extent to which the agreed upon terms were hidden. Here, Plaintiff has not provided sufficient evidence to show procedural unconscionability.

"In many cases of adhesion contracts, the weaker party lacks not only the opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or forego the needed service." Madden v. Kaiser Foundation Hospitals (1976) 17 Cal.3d 699, 711. Simply because a contract may have elements of an adhesion contract does not render the agreement procedurally unconscionable. "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." Sanchez v. Valencia Holding (2015) 61 Cal.4th 899, 912.

To support his procedural unconscionability argument, Plaintiff states that he could not negotiate

the terms of the arbitration agreement. Further, here, Plaintiff repeats his earlier argument that he does not recall receiving the announcement and that he did not find the arbitration agreement because of the difficulty in negotiating the webpage. Significantly, however, Ramirez did not find that the agreement was procedurally unconscionable because of the manner it was laid out and provided to the employees. In Ramirez, the Court found a minimal level of procedural unconscionability because: "Here, it is undisputed that the arbitration agreement is an adhesion contract because it was a mandatory condition of employment." Ramirez v. Charter Communications, Inc. (2022) 75 Cal.App.5th 365, 373. However, in this regard, Ramirez is easily distinguishable. The arbitration agreement was not a condition of employee with respect to the Plaintiff in the instant action. Plaintiff was an existing employee at the time he received the announcement and was free to opt-out of the Solution Channel Program. There is no showing that Plaintiff or any other employee would suffer adverse employment action if the employee decided to opt-out of the program. Plaintiff submitted no evidence to indicate he or another employee was subjected to such action. Therefore, the Court finds that the arbitration was not procedurally unconscionable.

As noted above, both procedural and substantive unconscionability must exist for the Court to exercise its discretion to refuse to enforce the arbitration provision. Because the Plaintiff must establish both procedural and substantive unconscionability, the instant Court declines to analyze whether the arbitration clause is substantively unconscionable.

Therefore, the Motion to Compel Arbitration is granted. The action is stayed pending completion of arbitration.

The Court, having taken the matter under submission on 06/08/2022 for Case Management Conference, now rules as follows: Case Management Conference is placed off caleandar.

Order to Show Cause Re: Status of Arbitration is scheduled for 12/05/22 at 08:30 AM in Department B at Torrance Courthouse.

The Clerk gives notice.

Certificate of Mailing is attached.

EXHIBIT 35: ANGELA SESTRICH V. CHARTER COMMUNICATIONS, INC., ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 21STCV33717), RE RULING ON MOTION TO COMPEL ARBITRATION, MARCH 17, 2022

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 14

21STCV33717 March 17, 2022
ANGELA SESTRICH vs CHARTER COMMUNICATIONS, INC DOING BUSINESS IN CALIFORNIA AS, CHARTER COMMUNICATIONS (CCI), INC., et al. 8:45 AM

Judge: Honorable Terry Green
Judicial Assistant: M. Ventura
Courtroom Assistant: P. Cortez

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Niral Rajnikant Patel

For Defendant(s): Casey Lee Morris

NATURE OF PROCEEDINGS: Hearing on Motion to Compel Arbitration

The matter is called for hearing.

Court after reading and considering all moving party papers, makes the following ruling:

The Motion to Compel Arbitration filed by CHARTER COMMUNICATIONS, INC doing business in California as, CHARTER COMMUNICATIONS (CCI), INC. on 01/13/2022 is Granted.

The Court orders the second sentence of Section E and the second sentence of section K of the arbitration agreement STRICKEN.

The case is ordered stayed pending binding arbitration as to the entire action.

Post-Arbitration Status Conference is scheduled for 01/25/23 at 08:45 AM in Department 14 at Stanley Mosk Courthouse.

Notice is waived.

EXHIBIT 36: ALBARO IBARRA V. CHARTER COMMUNICATIONS HOLDING COMPANY, LLC, ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 21STCV36249)
RE COURT ORDER ON MOTION TO COMPEL ARBITRATION, JANUARY 18, 2022

COURT ORDER

Ibarra v. Charter Communications Holding Company, LLC, et al.
21 STCV 36249

TYPE OF MOTION:	Motion to Compel Arbitration.
MOVING PARTY:	Defendant, Charter Communications, LLC.
RESPONDING PARTY:	Plaintiff, Albaro Ibarra.
HEARING DATE:	Tuesday, January 18, 2022

Plaintiff alleges that he was fired from his job because he is disabled.

On September 30, 2021 Plaintiff filed his Complaint for (1) Disability Discrimination; (2) Failure to Accommodate; (3) Failure to Engage; (4) Failure to Provide Medical Leave; (5) Retaliation; (6) Wrongful Termination; (7) Wrongful Termination in Violation of Public Policy; and (8) Harassment against Defendants Charter Communications Holding Company, LLC; Charter Communications, LLC; Charter Communications Holdings, LLC; Charter Communications, Inc.; Charter Communications Operating, LLC; Jack Koche ("Koche"); Maria Lopez ("Lopez"); and DOES 1-20.

The instant motion is the only responsive pleading on file. Defendants Koche and Lopez have yet to be served.

No trial date has yet been set.

Defendant Charter Communications, LLC ("Defendant") now moves this court for an order staying this case and compelling Plaintiff to arbitrate his claims, on the basis that the parties have entered into a binding arbitration agreement.

Defendant's Objections to the Declaration of Albaro Ibarra are SUSTAINED as to Nos. 1-4 and 6-7, and OVERRULED as to No. 5. Defendant's Objections to the Declaration of Malalai Anbari are OVERRULED.

Defendant's Request for Judicial Notice ("RJN") is DENIED. Defendant's RJN consists of a list of other cases in which other courts have enforced an arbitration agreement with terms like this one. Records of those other cases are not relevant here except insofar as they constitute binding or persuasive case law; if that is so, they should simply be cited in the same manner as other case law. Judicial notice is not required.

Plaintiff's RJN is DENIED on the same basis.

Defendant's motion is GRANTED. The second sentence of Section E of the arbitration agreement should be SEVERED. The case is STAYED.

Code of Civil Procedure § 1281.2 states, in pertinent part, as follows:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
> (a) The right to compel arbitration has been waived by the petitioner; or
> (b) Grounds exist for the revocation of the agreement.
> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact .
> . . .

Code of Civil Procedure § 1281.4 states in part that:

> If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

Facts

On October 5, 2017, Plaintiff was an Account Executive in the employ of Defendant. On that date, Defendant sent Plaintiff an email at his work account, announcing the implementation of a new program called "Solution Channel" for resolving legal disputes between Defendant and its employees. (Declaration of John Fries ¶¶ 6-8, 21, Exhibits A & E). The announcement indicated that:

> "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." (Id. Exhibits A & E).

The announcement contained direct links to more information about "Solution Channel," as well

as instructions on where to go to find out how to opt out. (Id.).

Following either the direct links or the written instructions included in the email announcement would take an employee to an information web page. That page contained a direct link to the text of the arbitration agreement that Defendant planned to enforce if an employee failed to opt out. (Id. ¶¶ 9-11, Exhibit C). The page also contained the following directions:

> **"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." (Id. ¶ 12) (emphasis in original).

By selecting the "click here" hyperlink and following the directions, an employee would arrive at a page where they could check a box, type their name, and click a button. (Id. ¶¶ 13-15, Exhibit D). If they did so, they would be opted out of the arbitration agreement and provided with a confirming email. (Id. ¶ 16).

Plaintiff did not follow this opt-out process. (Id. ¶ 22). Thus, he was "enrolled" in the Solution Channel program, and in Defendant's eyes became subject to an Arbitration Agreement, quoted in relevant part below:

> **"MUTUAL ARBITRATION AGREEMENT**
>
> A. **Arbitration Requirement**. 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 preemployment 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.
>
> ...
>
> E. **Time Limits**. The aggrieved party must give written notice of the claim, in the manner required by this Agreement, within the time limit established by the applicable statute of limitations for each legal claim being asserted. To be timely, any claim that must be filed with an administrative agency or body as a precondition or prerequisite to filing the claim in court, must be filed with Solution Channel within the time period by which the charge, complaint or other similar document would have had to be filed with the agency or other administrative body. Whether a demand for arbitration is untimely is an affirmative defense, and will be decided by the arbitrator before any hearing on the merits of the aggrieved party's claim...
>
> ...
>
> G. **Location**. Any arbitration hearing conducted under this Agreement will take place within 100 miles of the Charter office to which you last reported during your employment as of the date of the filing of the Notice, or the Charter office at which you sought

employment, unless another location is mutually selected by the parties.

H. **Selection of Arbitrator**. The arbitration shall be held before one arbitrator who is a current member of the American Arbitration Association (AAA) and is listed on the Employment Dispute Resolution Roster. Within 45 days after submission of the claim, Charter will request from the AAA a list of at least five arbitrators willing to hear and decide the dispute. Within 20 days after receipt of the list from the AAA, the parties will select an arbitrator to hear and resolve the dispute and will notify the AAA of the selection of an arbitrator.

I. **Conduct of Arbitration**.

1. *Rules*. Arbitration hearings will 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.

2. *Authority of the Arbitrator*. The arbitrator will decide all discovery disputes related to the arbitration. Unless the parties agree to submit written arguments in lieu of a hearing on the merits of the claim[s], the arbitrator will schedule and conduct an evidentiary hearing, at which the arbitrator will hear testimony and receive evidence. The arbitrator shall apply the governing law applicable to any substantive claim asserted, including the applicable law necessary to determine when the claim arose and any damages.

3. *Waiver of Hearing*. The parties may, at any time prior to a hearing, mutually agree to forego a hearing, and instead submit all evidence and argument to the arbitrator in writing.

4. *Burden of Proof*. The arbitrator will apply the burdens of proof and law applicable to the claim, had the claim been adjudicated in court.

5. *Decision*. The arbitrator will issue a decision within 30 days after the close of an arbitration hearing, or at a later time on which the parties agree. The decision will be signed and dated by the arbitrator, and will contain express findings of fact and the legal reasons for the decision and any award, except as otherwise provided for under the Federal Arbitration Act.

J. **Enforcement of the Decision**. Judgment on the arbitrator's decision may be entered in any court having jurisdiction over the matter, within 45 days following its issuance.

K. **Arbitration Costs**. Charter will pay the AAA administrative fees and the arbitrator's fees and expenses. All other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses. 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 or the party resisting arbitration submits to arbitration following the commencement of the action or proceeding, 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.

...

P. **Entire Agreement**. 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; provided, however, 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.

Q. **Severability**. The parties explicitly acknowledge and agree that the provisions of this Agreement are both reasonable and enforceable. However, if any portion or provision of this Agreement (including, without implication of 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 and enforceable to the fullest extent permitted by law, and said illegal, invalid, or unenforceable portion or provision shall be deemed not to be a part of this Agreement...

R. **Federal Arbitration Act**. This Agreement will be governed by the Federal Arbitration Act." (Id. Exhibit C) (Emphasis in original).

Existence of Agreement

California procedural rules govern the determination of a party's motion to compel arbitration, unless the parties clearly and unambiguously elect to use federal procedural rules or those of another state. See Cronus Investments, Inc. v. Concierge Services (2005) 35 C.4th 376, 394; Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal.App.4th 434; see also Peleg v. Neiman Marcus Group, Inc. (2012) 204 C.A.4th 1425, 1442. And even if the parties elect to use the rules of the Federal Arbitration Act, courts apply state law to determine whether the arbitration clause is binding and enforceable. McGill v. Citibank, N.A. (2017) 2 Cal.5th 945, 964. "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." United Steelworkers of America v. Warrior & Gulf Nav. Co. (1960) 363 U.S. 574, 582. A party petitioning to compel arbitration has the burden of establishing the existence of a valid agreement to arbitrate and the party opposing the petition has the burden of proving, by a preponderance of the evidence, any fact necessary to its defense. Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal.App.4th 348, 356-57.

In this case, the Defendant employer sent Plaintiff employee an agreement by email. The email informed Plaintiff that he will waive any future right to sue his employer unless he opts out within 30 days. The email did *not* give Plaintiff direct instructions on how to opt out. To discover the opt-out method, Plaintiff had to navigate to an informational webpage, which in turn would send him to yet another webpage, where Plaintiff could actually opt out.

There is nothing illegal about an opt-out process. Assent to a contract need not be by signature. Assent may also be implied by conduct. In the employment context, an employee manifests assent to a contract by conduct where (1) the employer notifies the employee of the new agreement and (2) the employee continues her employment without comment. Craig v. Brown & Root, Inc. (2000) 84 Cal.App.4th 416, 418-420 (arbitration agreement was binding

where new arbitration policy was circulated by interoffice memorandum and mailed directly to employee's home).[1] The question here, then, is whether Plaintiff received adequate notice of this arbitration agreement.

Plaintiff contends that he did not. He does not remember receiving or reviewing Defendant's email notice. Nor is there affirmative evidence that Plaintiff opened the email. On the other hand, Defendant clearly sent the email, and it appears to have been "delivered" properly to Plaintiff's email account. Defendant argues that they have no obligation to prove that Plaintiff physically opened the email and looked at it with his own two eyes. They are correct.

Defendant relies on the "Mailbox Rule," codified in California law as Evidence Code § 641: "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." Plaintiff responds, correctly, that no reported California case has applied the Mailbox Rule to email.[2] However, the same principles that gave rise to the Mailbox Rule in the context of letters also apply in the context of an email.

The Mailbox Rule exists because it is incredibly difficult to prove, as an affirmative fact in a civil case, that an opposing party actually received and read a letter. One cannot search the opposing party's house or trash for the unfolded document or a torn envelope. And an inordinate number of things *might* happen to a letter: it might be lost in transit in the vast mass of papers shuffled around by the postal service, or destroyed in a rainstorm because of a leak in the mailbox, or tossed out inadvertently as junk mail, or opened and discarded by another member of the household or office. The list is endless.

Much the same is true of an email. It might get overlooked in the mass of other emails that many citizens receive on a daily basis. Or it might get shunted into a spam folder by an automatic filter. It might even be deleted by pure accident, as the recipient attempts to clear their inbox.

Everyone has experienced instances of the mail being delayed, mis-delivered, or otherwise lost. Everyone has experienced instances of emails disappearing or going where they were not meant to. No system works 100% of the time. Yet in the case of both mail and email, the vast majority of items arrive as addressed. Most members of society rely on both the mail and email systems to work, and treat them as if they actually do work. There is nothing more Defendant can do to prove that Plaintiff received this email, short of producing surveillance photos of Plaintiff looking at it. And evidence of that nature would be a little disturbing, for other reasons.

[1] See also Schachter v. Citigroup, Inc. (2009) 47 Cal.4th 610, 619 ("it is settled that an employer may unilaterally alter the terms of an employment agreement, provided such alteration does not run afoul of the Labor Code"); Harris v. TAP Worldwide, LLC (2016) 248 Cal.App.4th 373, 383-384.

[2] Defendant responds that the federal courts apply this presumption to emails. However, this federal court presumption appears to arise from federal case law addressing "reliable means" of transmission, rather than from any specific rule or statute. See Kennell v. Gates (8th Cir. 2000) 215 F.3d 825, 829-830; Ball v. Kotter (7th Cir. 2013) 723 F.3d 813, 830. There is no clear reason why these federal cases should govern the application of a California statute.

In sum, this court is faced with Defendant's affirmative evidence that the email was sent, and Plaintiff's lack of memory of the subject. This pits, essentially, some evidence against none – a paper record against a failure to remember one way or another. In that circumstance, Mailbox Rule or not, the court must choose Defendant's evidence. Plaintiff had notice of this agreement. Therefore, his silence conveyed assent. There is a valid agreement to arbitrate between the parties.

The agreement clearly covers this dispute. The only defense to enforcement Plaintiff offers is unconscionability.

Unconscionability

"The procedural element of unconscionability focuses on whether the contract is one of adhesion. Procedural unconscionability focuses on whether there is "oppression" arising from an inequality of bargaining power or "surprise" arising from buried terms in a complex printed form. The substantive element addresses the existence of overly harsh or one-sided terms. An agreement to arbitrate is unenforceable only if *both* the procedural and substantive elements are satisfied. However...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." McManus v. CIBC World Markets Corp. (2003) 109 Cal.App.4th 76, 87 (internal quotations and citations omitted).

Procedural Unconscionability

Contracts of adhesion are procedurally unconscionable as a matter of law. Lane v. Francis Capital Management LLC (2014) 224 Cal.App.4th 676, 689. However, this was no contract of adhesion. While the contract was mandatory for new employees and applicants (Opposition p. 7:24-27), it was not mandatory for existing employees like Plaintiff. Those employees clearly had the option to reject the agreement.

Plaintiff also argues that the agreement was sprung on him by surprise. This contention is not supported by the evidence. The announcement email is a 1 ½ page document that clearly warns employees that they will waive their civil trial rights and be compelled to arbitration unless they opt out. It also tells them where to go for more information. If they go to that webpage, they receive a further explanation, a copy of the arbitration agreement, and instructions for opting out. Could the process have been easier or clearer? Perhaps. But it was not wildly convoluted or otherwise marked by the normal indicia of surprise.

There is no procedural unconscionability here.

Substantive Unconscionability

Even if the agreement were procedurally unconscionable, it is not substantively unconscionable.

An arbitration agreement is generally enforceable, if it (1) provides for neutral arbitrators,

(2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require the parties to pay unreasonable costs and fees as a condition of access to an arbitration forum. See Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 102.

Statute of Limitations

The most serious issue raised here is the statute of limitations provision. FEHA is subject to a two-step statute of limitations: one year to file an administrative complaint with the DFEH, then another year after that to file a civil case. The Agreement at Section E appears to collapse those two steps into one, requiring that arbitration be filed within the time for filing an administrative claim and thus cutting the ultimate limitations period in half. Reducing the limitations period in that fashion is not permitted. Baxter v. Genworth North America Corp. (2017) 16 Cal.App.5th 713, 731.

However, this issue can easily be dealt with by severing that provision from the contract. Severance is the preferred method of dealing with minor problematic terms and is the remedy called for by Section Q of the Agreement. Ramos v. Superior Court (2018) 23 Cal.App.5th 1042, 1068. Therefore, the second sentence of Section E of the Agreement should be SEVERED.[3]

Discovery

Plaintiff complains that the Guidelines limit the parties to 4 depositions, 20 interrogatories, and 15 requests for production. (Defense Exhibit C, p. 18). Defendant points out that the Guidelines, as well as the AAA rules, empower the arbitrator to resolve any discovery disputes in a manner that allows both parties "a full and equal opportunity" to present "material and relevant evidence." (Id.). In other words, it is the Defense position that the agreement permits the arbitrator full discretion to allow discovery in whatever amount they feel is necessary for a full hearing of the case. Defense appears to be correct.

An arbitration agreement may put initial caps on discovery so long as it also allows the arbitrator the flexibility to lift those caps. See Torrecillas v. Fitness International, LLC (2020) 52 Cal.App.5th 485, 497-498. The court "must presume the arbitrator will behave reasonably." Id. at 497. Since this agreement leaves the arbitrator the flexibility to allow further discovery, the initial limitation on discovery is not unconscionable.

Other Objections

Plaintiff objects that the Defendants, by incorporating their "Solution Channel Program Guidelines" have "unilaterally" created their own arbitration rules. This does not appear to be a fair reading of the agreement, which expressly provides at Section M that the express terms of the Agreement prevail over the Guidelines. Nor do the Guidelines do much more than generally explain the arbitration process in layman's terms. But even more to the point, there is nothing

[3] Since the first sentence of Section E provides generally that the limitations period shall be the same as set by law, and Section L preserves the parties' rights to file administrative complaints, this should ensure that the FEHA limitations period goes into the arbitration unchanged.

improper about an arbitration agreement creating or containing its own rules. Those rules are part of the contract, to which both parties have agreed.

Plaintiff also suggests that the Guidelines require employees to obtain Defendant's permission before filing arbitration. No such requirement appears. Page 17 of the Guidelines (Defense Exhibit C) indicates that Defendant will communicate whether it thinks the claim is arbitrable, and that Plaintiff then has a certain amount of time to elect to proceed anyway. And, as Defendants point out on reply, the Agreement expressly reserves the final word on arbitrability for the arbitrator.

Next Plaintiff complains that the Agreement requires an initial presentation of his claim to Defendant, *in advance* of his arbitration filing. The requirement that a party follow internal grievance procedures in advance of arbitration is generally considered "reasonable and laudable." Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 710. Such procedures only become unconscionable when the requirement is not mutual and the employee has to sit for personal discussions with his supervisors without a neutral present. See Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal.App.4th 1267, 1282-83.

Section E of the Agreement also contains a provision that Defendant's participation in any administrative enforcement proceeding will not be a waiver of Defendant's right to arbitrate any related civil claims. Plaintiff claims that this removes a "defense" that Plaintiff might assert. It does not. It prevents Plaintiff from making a particular argument in response to a motion to compel arbitration. It does not affect his substantive rights at all.

Finally, Plaintiff targets Section K of the Agreement, which permits any party who is required to file a motion to compel arbitration to recover the fees and costs associated with that motion. There is nothing inappropriate about a fee provision of this type. Prevailing party fee provisions are normal parts of a contract. See Patterson v. Superior Court (2021) 70 Cal.App.5th 473, 786. And Plaintiff can take comfort in the fact that, should Defendant file a fee motion based on this provision, they would have to meet the stringent standard for obtaining reverse FEHA fees. See Id. at 786ff. So in fact, if this provision favors anyone, it favors Plaintiff.

Conclusion

Some evidence always beats no evidence. And that is what Plaintiff's lack of memory about this Agreement is – a lack of evidence. Therefore, Defendant's evidence that it gave Plaintiff notice of the Arbitration Agreement by email must carry the day. Defendant need not affirmatively prove that Plaintiff personally read the email. It need only prove what it has proven: that the email was properly sent to a valid address assigned to Plaintiff and that no observable error occurred. The Arbitration Agreement is valid.

The defense of unconscionability does not apply here. The Agreement was not a contract of adhesion or the product of surprise; the process for opting out of the Agreement was not perfect, but perfection is not required. And the only substantively unconscionable provision is the second sentence in Section E. Therefore, that second sentence is SEVERED from the Agreement. Defendant's motion is GRANTED. The case is STAYED pending the outcome in

arbitration.

Dated: January 18, 2022

Hon. Terry Green

01/31/2022

EXHIBIT 37: JESSICA CARRANZA V. CHARTER COMMUNICATIONS, LLC, ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 21STCV08223), RE HEARING ON MOTION TO COMPEL ARBITRATION; CASE MANAGEMENT CONFERENCE, SEPTEMBER 15, 2021

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 37

21STCV08223 September 15, 2021
JESSICA CARRANZA vs CHARTER COMMUNICATIONS, LLC, et al. 8:30 AM

Judge: Honorable Richard J. Burdge Jr. CSR: None
Judicial Assistant: L. Garcia ERM: None
Courtroom Assistant: E. Avena Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Elizabeth M. Votra for Babak B. Saadian (Telephonic)

For Defendant(s): Elissa L. Gysi for James A. Bowles (Telephonic)

NATURE OF PROCEEDINGS: Hearing on Motion to Compel Arbitration; Case Management Conference

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, Rule 2.956, Cesar Rodriguez, CSR #13269, certified shorthand reported is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. Order signed and filed this date.

The court's tentative ruling is posted online and for parties to review.

The matter is called for hearing and argued. After argument, the Court adopts its tentative ruling as the final order of the Court as follows:

Charter's motion is granted. Plaintiff is ordered to arbitrate his claims against Charter. This action is stayed pending completion of arbitration or further order of the court. Charter's request for attorney fees is denied. An Order to Show Cause re commencement of the arbitration proceedings is set for November 17, 2021, at 8:30 a.m. in this department. Charter is to give notice.

Background

This action arises out of Plaintiff, Jessica Carranza's ("Plaintiff") employment with Defendant, Charter Communications, LLC, dba Spectrum Business. ("Charter") Plaintiff worked for Charter from November 2010 until her termination on August 15, 2019. According to the Complaint, Plaintiff informed her supervisor and Defendant Christopher Arnone that she was pregnant around July 2018. Arnone then allegedly began discriminating against her because of her

pregnancy, and Plaintiff was placed on medical leave in August 2018. Plaintiff made additional complaints in February 2019 about Arnone's conduct, but these complaints allegedly were also ignored. Plaintiff then went on approved baby bonding leave in July 2019. Prior to returning from leave, Plaintiff received a letter of termination on August 15,2019.

Plaintiff's Complaint alleges the following causes of action: (1) pregnancy discrimination in violation of the Fair Housing Employment Act ("FEHA"), (2) gender discrimination in violation of FEHA, (3) disability discrimination in violation of FEHA, (4) failure to provide reasonable accommodation in violation of FEHA, (%) failure to engage in a timely, good faith interactive process in violation of FEHA, (6) retaliation in violation of FEHA, (7) harassment in violation of FEHA, (8) failure to prevent discrimination, harassment and/or retaliation in violation of FEHA, (9) wrongful termination and/constructive discharge in violation of public policy, (10) retaliation and/or unlawful denial of leave in violation of California Family Rights Act ("CFRA"), (11) retaliation and/or unlawful denial of leave in violation of Family Medical Leave Act, (12) [erroneously numbered 11] retaliation in violation of Labor Code section 1102.5.

The seventh cause of action is alleged against all defendants, while the remaining causes of action are alleged as to all defendants except Arnone.

Charter now moves to compel arbitration and for a stay of this action pending completion of arbitration. Plaintiff opposes the motion.

Request for Judicial Notice

Charter requests that the court take judicial notice of the following in support of its motion:

Moorman v. Charter Communications, Inc., No. 3:18-cv-820-wmc (Exh. 1)

Scarpitti v. Charter Communications, Inc., D. Co. Case No. 1:18-cv-02133-REBMEH, 2018 WL 10806905 (D. Colo. Dec. 7, 2018) (Exh. 2)

Esquivel v. Charter Communications, Inc., C.D. Cal. Case No. 2:18-cv-07304-GW (MRWX), 2018 WL 10806904 (C.D. Cal. Dec. 6, 2018) (Exh 3)

Castorena v. Charter Communications, LLC, C.D. Cal. Case No. 2:18-cv-07981- JFW-KS, 2018 WL 10806903 (C.D. Cal. Dec. 14, 2018) (Exh 4)

Krohn v. Spectrum, United States District Court Case No. 3:18-CV-2722-S, (Exh 5)

Bray v. Charter, Los Angeles Superior Court Case No. BC721229 (Exh 6)

Martinez v. Charter, Los Angeles Superior Court Case No. 19CHCV00275 (Exh 7)

Dukes v. Charter Communications LLC, Case No. 19STCV30853 (Exh 8)

Prizler v. Charter Commc'ns, LLC, No. 3:18-CV-1724-L-MSB, 2019 WL 2269974 (S.D. Cal. May 28, 2019) (Exh. 9)

Osborne v. Charter Commc'ns, Inc., No. 4:18CV1801 HEA, 2019 WL 2161575 (E.D. Mo. May 17, 2019) (Exh. 10)

Booker v. Charter Communications, LLC, Los Angeles Superior Court Case No. 20STCV07680 (Exh 11)

Lasser v. Charter Communications, Inc., No. 19-cv-02045-RM-MEH, 2020 WL 1527333 (D. Colo. Mar. 31, 2020) (District Court's adoption of Magistrate Judge's recommendations) and Lasser v. Charter Communications, Inc., No. 19-CV-02045-RM-MEH, 2020 WL 2314985, at *1 (D. Colo. Feb. 10, 2020), report and recommendation adopted, No. 19- CV-02045-RM-MEH, 2020 WL 1527333 (D. Colo. Mar. 31, 2020) (Magistrate Judge's recommendation) (Exh 12)

Patterson v. Charter Communications, LLC, Los Angeles Superior Court Case No. 20STCV14987 (Exh 13)

Patterson v. Charter Communications, LLC, Los Angeles Superior Court Case No. 20STCV14987, Minute Order granting Charter's Motion for Attorneys' Fees (Ex 14)

Gonzales v. Charter Communications, LLC, No. 220CV08299SBASX, 2020 WL 6536902 (C.D. Cal. Oct. 26, 2020) (Exh 15)

Additionally, Plaintiff requests that the court take judicial notice of the following in support of her opposition:

Booker v. Charter Communications, LLC, Case No. 20STCV07680 Notice of Motion and Motion to Compel Arbitration; Points and Authorities in Support of Motion (Exh A)

Patterson v. Charter Communications, LLC, Case No. 20STCV14987, Notice of Motion and Motion to Compel Arbitration and Stay Action; Points and Authorities in Support of Motion (Exh B)

Patterson v. Charter Communications, LLC, Case No. 20STCV14987, Defendant Charter Communications, Inc.'s Notice of Motion and Motion for Attorney's Fees; Memorandum of Points and Authorities; Declaration of Casey L. Morris (Exh C)

Komorowski v. Charter Communications, LLC., Case No. 19STCV11497, Minute Order denying Motion to Compel Notice Of Motion And Motion To Compel Arbitration And Stay Action filed by Charter Communications. (Exh D)

Discussion

Legal Standard

"California law reflects a strong public policy in favor of arbitration as a relatively quick and inexpensive method for resolving disputes. To further that policy, Code of Civil Procedure, section 1281.2 requires a trial court to enforce a written arbitration agreement unless one of three limited exceptions applies. Those statutory exceptions arise where (1) a party waives the right to arbitration; (2) grounds exist for revoking the arbitration agreement; and (3) pending litigation with a third party creates the possibility of conflicting rulings on common factual or legal issues." (Code of Civ. Proc., § 1281.2; Acquire II, Ltd. v. Colton Real Estate Group (2013) 213 Cal.App.4th 959, 967.) Similarly, public policy under federal law favors arbitration and the fundamental principle that arbitration is a matter of contract and that courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. (AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333, 339.)

In deciding a motion or petition to compel arbitration, trial courts must first decide whether an enforceable arbitration agreement exists between the parties and then determine whether the

claims are covered within the scope of the agreement. (Omar v. Ralphs Grocery Co. (2004) 118 Cal.App.4th 955, 961.) The opposing party has the burden to establish any defense to enforcement. (Gatton v. T-Mobile USA, Inc. (2007) 152 Cal.App.4th 571, 579 ["The petitioner ... bears the burden of proving the existence of a valid arbitration agreement and the opposing party, plaintiffs here, bears the burden of proving any fact necessary to its defense."].)

Existence of an Arbitration Agreement

A motion to compel arbitration or stay proceedings must state verbatim the provisions providing for arbitration or must have a copy of them attached. (Cal. Rules of Court, rule 3.1330.)

A party may demonstrate express acceptance of the arbitration agreement in order to be bound (e.g., Mago v. Shearson Lehman Hutton Inc. (9th Cir. 1992) 956 F.2d 932 [agreement to arbitrate included in job application]; Nghiem v. NEC Electronic, Inc. (9th Cir. 1994) 25 F.3d 1437 [agreement to arbitrate included in handbook executed by employee]; Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105 [employer may terminate employee who refuses to sign agreement to arbitrate]) or implied-in-fact in fact acceptance (Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 11 [implied acceptance of changed rules regarding job security]; DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 635 [implied acceptance of changed compensation rules]). (Craig v. Brown & Root (2000) 84 Cal.App.4th 416, 420 (Craig).)

"A signed agreement is not necessary, however, and a party's acceptance [of an agreement to arbitrate] may be implied in fact…." (Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC (2012) 55 Cal.4th 223, 23 (Pinnacle), 6.) "An arbitration clause within a contract may be binding on a party even if the party never actually read the clause." (Ibid.)

Charter contends that a valid arbitration agreement exists because Plaintiff was notified by email of Charter's optional Solution Channel Program (the "Program"), which required that all employees resolve disputes regarding their employment pursuant to Charter's Mutual Arbitration Agreement unless they opt out within 30 days. (Motion, 10.) According to Charter, Plaintiff did not opt out within 30 days and as such, has consented to arbitration. (Id.) Charter submits the declaration of John Fries ("Fries Decl.") in support of its motion.

Fries attests that he is the Vice President, HR Technology for Charter Communications, LLC and

has been employed in that capacity since February 2019. (Fries Decl. ¶ 1.) Prior to February 2019, Fries was employed as a Senior Director, HR Technology. (Id.)

According to Fries, the Charter announced the Program on October 6, 2017 by email to all non-union employees below the level of Executive Vice President who were active or not on a leave of absence. (Fries Decl. ¶ 6.) Employees received the email announcement from Paul Marchand, Executive Vice President at the Charter work email address assigned to them. (the "Announcement") (Fries Decl. ¶¶ 7-8, Exh. A.) The Announcement provided in pertinent part:

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. 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.

(Fries Decl. ¶ 9.) The Announcement included a link to a webpage which provided additional information on the Program. (Fries Decl. ¶ 10.) The webpage includes the following additional 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.

In order to opt out of the Program, employees could sign onto PeopleSoft using their regular network credentials and access the PeopleSoft Solution Channel Page. (Fries Decl. ¶ 14, Exh. D.) The employee would then have to check a box next to "I want to opt out of Solution Channel," enter their name, and click "SAVE." (Fries Decl. ¶¶ 15-16.) After November 5, 2017, employees could not longer opt out by using the PeopleSoft Solution Channel Page. (Fries Decl. ¶ 18.) Finally, Fries attests that according to Charter's records, Plaintiff was emailed the

Announcement and did not follow these procedures to opt out of the Program. (Fries Decl. ¶¶ 18-23, Exhs. E-F.)

In opposition, Plaintiff contends that a valid arbitration agreement does not exist because Charter never provided Plaintiff a copy of the arbitration agreement. (Opposition, 7-9.) According to Plaintiff, the Fries Declaration was insufficient to establish that Plaintiff was provided the arbitration agreement because no agreement was attached to the Announcement and Plaintiff does not independently recall receiving the Announcement. (Opposition, 7.) Additionally, Plaintiff contends that she never signed the arbitration agreement and therefore never consented to arbitration. (Opposition, 9-10.) Finally, Plaintiff argues that there is no valid arbitration agreement because there was no consideration. (Opposition, 11.) Plaintiff submits her own declaration in support of her opposition.

Specifically, Plaintiff attests that she has "no independent recollection" of receiving the Announcement. (Plaintiff Decl. ¶ 2.) According to Plaintiff, the Announcement does not have her work e-mail address and thus "I cannot verify that it was actually sent to my then work e-mail address." (Id.) Additionally, Plaintiff attests that she has "no independent recollection" of logging into Panorama to read the arbitration agreement or logging into PeopleSoft to learn about opting out of the agreement. (Plaintiff Decl. ¶ 3.) As such, Plaintiff attests that it is her best recollection that she did not log into either. (Id.) Plaintiff further attests that she never signed an arbitration agreement, and that no one at Charter explained to her what arbitration entailed. (Plaintiff Decl. ¶¶ 5-7.)

In reply, Charter contends that a valid agreement to arbitrate exists because Plaintiff's statement that she does not remember receiving the Announcement is insufficient to rebut the presumption of receipt created by the Fries Declaration. (Reply, 6-8.) Additionally, Charter contents that there was adequate consideration because the arbitration agreement was mutual. (Reply, 10-11.)

Charter has demonstrated that it informed all employees of the Program, of the fact that employees would be deemed to have accepted the Program if they did not opt out, and of a means to opt-out of the Program if they chose. Charter has also demonstrated that Plaintiff received the Announcement and that Plaintiff did not opt out of the Program. In opposition, Plaintiff does not contend that she did not receive the Announcement, but only contends that she does not recall receiving it. Plaintiff also does not dispute Charter's contention that she did not opt out of the Program pursuant to the procedures described in the Fries Declaration. Pursuant to Craig, acceptance of an arbitration agreement may be implied in fact, such as by continuing to work after receiving notice of the employer's arbitration procedures. (Craig, supra, 84

Cal.App.4th at 420 ["the employee's continued employment constitutes her acceptance of an agreement proposed by her employer."])

Thus, the court finds that a valid arbitration agreement exists.

Defenses to Enforcement

Pursuant to Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114 (Armendariz) both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a valid arbitration agreement. Additionally, in Armendariz, the California Supreme Court recognized that it is more appropriate to sever and restrict illegal terms that are collateral to the main purpose of a contract than to find the entire contract invalid. (Armendariz, supra, 24 Cal.4th at 124 ["Courts are to look to the various purposes of the contract. 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."].)

Additionally, "[t]he arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." (Id. at 90-91.)

Procedural Unconscionability

The finding that [an] arbitration provision was part of a non-negotiated employment agreement establishes, by itself, some degree of procedural unconscionability." (Ajamian v. CantorCO2e, L.P. (2012) 203 Cal.App.4th 771, 796; Roman v. Superior Court (2009) 172 Cal.App.4th 1462, 1470 ["adhesion contracts in the employment context typically contain some measure of procedural unconscionability"].)

Plaintiff contends that the Mutual Arbitration Agreement is procedurally unconscionable because it is an adhesion contract, presented to Plaintiff on a take it or leave it basis. (Opposition, 12-13.) Additionally, Plaintiff argues that the Mutual Arbitration Agreement is procedurally unconscionable because the Announcement did not attach a copy, which forced Plaintiff to "jump through hoops" to find a copy online. (Opposition, 13.) Finally, Plaintiff contends that the Mutual Arbitration Agreement is procedurally unconscionable because it did not attach a copy of the arbitration rules and it is unclear which arbitration rules apply. (Opposition, 14-15.) Plaintiff cites to Carbajal v. CWPSC, Inc. (2016) 245 Cal.App.4th 227 (Carbajal) for this argument.

In Carbajal, the Court of Appeal found that the arbitration agreement at issue contained "at least some degree of procedural unconscionability" because it was undisputed that the agreement was an adhesion contract. (Id. at 243.) Additionally, the employer at issue had "superior bargaining power" and the arbitration agreement is part of a standard form all of its interns were required to sign if they wanted to work. (Id. at 243.) Further, the Carbajal court also noted that Plaintiff in this instance was not required to show that she attempted to negotiate the agreement because "the imbalance of bargaining power" in this instance was apparent from the fact that Plaintiff was "one of many college students" seeking a job. (Id. at 243-244.) Additionally, the court found the arbitration agreement at issue moderately procedurally unconscionable because it did not identify which of the AA's "nearly 100 different sets of active rules" applied and moreover, the employer's Person Most Knowledgeable also could not identify which set of rules applied during deposition. (Id. at 244.)

In reply, Charter contends that the Mutual Arbitration Agreement is not procedurally unconscionable because it was presented as an opt-out agreement, and contracts of adhesion are valid. (Reply, 11-12.) Charter also argues that Plaintiff was not subject to surprise or oppression given that the Announcement clearly explained how to access all relevant documents. (Reply, 12-14.) Finally, Charter agues that it was not required to provide a copy of the arbitration rules. (Reply, 13.) Charter cites to Baltazar v. Forever 21, Inc. (2016) 62 Cal.4th 1237 (Baltazar) for this argument. In Baltazar, the California Supreme Court held that failure to attach a copy of the arbitration rules did not increase the arbitration agreement's procedural unconscionability

because Plaintiff only challenged the arbitration agreement on portions that were delineated in the agreement, not the arbitration rules. (Id. at 1246.)

The court finds that the Mutual Arbitration Agreement is not procedurally unconscionable. Plaintiff was not required to sign or agree to the Mutual Arbitration Agreement as a condition of employment but rather, was notified of the Program and was given 30 days to opt out. Thus, the Program and Mutual Arbitration Agreement are not contracts of adhesion.

Because both procedural and substantive unconscionability are required before the court can refuse to enforce a valid arbitration agreement, Charter's motion is granted.

Substantive Unconscionability

Plaintiff contends that the Mutual Arbitration Agreement is substantively unconscionable because it deprives her of her right to recover attorney's fees and costs if she prevails on her FEHA claims. (Opposition, 15-17.) Plaintiff points to the following provision as evidence that the Mutual Arbitration Agreement is substantively unconscionable: ""All other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses." (Exhibit C to Fries Decl, ¶ K. Arbitration Costs, at p. 4). Additionally, Plaintiff contends that the "Repeat Player Effect" gives Charter an unfair advantage because Charter's "repeated appearances" before AAA gives an unfair advantage and "calls into question the neutrality of any AAA arbitrator selected." (Opposition, 16-17.)

In reply, Charter contends that the Mutual Arbitration Agreement does not contain an improper cost shifting provision because the Solution Channel Guidelines states that the prevailing party may recover any remedies it would have been entitled to in court. (Reply, 14.) The Solution

Channel Guidelines provide in pertinent part as follows:

"At the discretion of the arbitrator, the prevailing party may recover any remedy that the party would have been allowed to recover had the dispute been brought in court."

(Exh. C, Guidelines, p. 9, ¶13). Charter also argues that Plaintiff's "repeat player effect" argument fails because the agreement provides that both parties participate in selection of the arbitrator and Plaintiff has presented no evidence that Charter is a repeat player. (Reply, 14-15.) The Solution Channel Guidelines provide in pertinent part regarding selection of an arbitrator:

Once a party is notified of a claimant's desire to proceed to arbitration to resolve the dispute, the AAA will be notified by Charter and an arbitrator will be jointly selected by the parties.

(Exh. C, Guidelines, p. 11, ¶1).

The court finds that the Mutual Arbitration Agreement is not substantively unconscionable. The Mutual Arbitration Agreement by its terms does not limit Plaintiff's recovery of attorney's fees because it states that the prevailing party may recover any remedy it would have been allowed had the dispute been brought in court. Additionally, the Mutual Arbitration Agreement states on its face that selection of the arbitrator is done by both parties. Finally, Plaintiff has not made a showing that Charter is a "repeat player," other than statements to this effect.

Request for Attorney Fees

Charter requests an award of attorney's fees pursuant to section K of the Mutual Arbitration Agreement, which provides in pertinent part as follows:

"If any judicial action or proceeding is commenced in order to compel arbitration, and if arbitration is in fact compelled or the party resisting arbitration submits to arbitration following the commencement of the action or proceeding, 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."

(Exh. C pg. 4). According to Charter, it has an immediate right to make a claim for attorney's fees if a fee provision in an arbitration agreement provides for attorneys' fees to the prevailing party compelling arbitration. (Motion, 23-24; Acosta v. Kerrigan (2007) 150 Cal.App.4th 1124, 1132 (Acosta).)

In opposition, Plaintiff contends that Charter's request should be denied because courts routinely request such interim requests for attorney fees. Plaintiff cites to cases, including Frog Creek Partners, LLC v. Vance Brown, Inc. (2012) 206 Cal.App.4th 515 (Frog Creek) in support of this argument.

In Frog Creek, two parties entered into a contract with an arbitration clause and a separate attorney fees provision. (Id. at 520.) A dispute arose, and defendant petitions to compel arbitration. (Id.) The Court of Appeal concluded that a Plaintiff that defeats the petition to compel arbitration is not entitled to recover attorney fees because under Civil Code section 1717, "there may only be one prevailing party entitled to attorney fees on a given contract in a given lawsuit." (Id.) The Frog Creek court considered the holding in Acosta, and rejected the rationale that "specific contract language may justify a separate attorney fee award." (Id. at 544.) According to the Frog Creek court, the rationale in Acosta "threatens to significantly undermine" the policy behind Civil Code section 1717. (Id. at 544-545.)

The court is persuaded by Plaintiff's citation to Frog Creek and its rationale that there may only

be one prevailing party entailed to attorney fees under Civil Code section 1717. For these reasons, the court declines to award Charter attorney's fees.

Conclusion

Charter's motion is granted. Plaintiff is ordered to arbitrate his claims against Charter. This action is stayed pending completion of arbitration or further order of the court. Charter's request for attorney fees is denied. An Order to Show Cause re commencement of the arbitration proceedings is set for November 17, 2021, at 8:30 a.m. in this department. Charter is to give notice.

The case is ordered stayed pending binding arbitration as to the entire action.

All other scheduled hearings set in this department are ordered vacated.

Order to Show Cause Re: the commencement of the arbitration process is scheduled for 11/17/2021 at 08:30 AM in Department 37 at Stanley Mosk Courthouse.

EXHIBIT 38: VICTOR BECERRA V. CHARTER COMMUNICATIONS, INC., ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 21STCV14283), RE RULING ON MOTION TO COMPEL ARBITRATION, SEPTEMBER 9, 2021

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 37

21STCV14283 September 9, 2021
VICTOR BECERRA vs CHARTER COMMUNICATIONS, INC., et al. 8:30 AM

Judge: Honorable Richard J. Burdge Jr. CSR: K. Shepherd #13756
Judicial Assistant: L. Garcia ERM: None
Courtroom Assistant: E. Avena Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Armando Galvan and Michael Chang for David R. Denis (Telephonic)

For Defendant(s): Erika A. Silverman for James Allen Bowles (Telephonic)

NATURE OF PROCEEDINGS: Hearing on Motion to Compel Arbitration

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, Rule 2.956, Kylie Shepherd, CSR #13756, certified shorthand reported is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. Order signed and filed this date.

The court's tentative ruling is posted online for parties to review.

The matter is called for hearing and argued. After argument, the Court's tentative ruling is adopted as the final order of the court as follows:

Defendants' motion is granted. Plaintiff is ordered to arbitrate his claims against Defendants. This action is stayed pending completion of arbitration or further order of the court. The court sets an order to show cause re commencement of the arbitration process for November 22, 2021, at 8:30 a.m. in this department. Defendants are to give notice.

Background

This action arises out of Plaintiff, Victor Becerra's ("Plaintiff") employment with Defendants, Charter Communications, Inc., Charter Communications, LLC and Charter Communications Holding Company, LLC. ("Defendants") Plaintiff alleges that he began employment with Defendants on June 15, 2018 as a Sales Representative. On March 26, 2019, Plaintiff allegedly tripped on the sidewalk while performing his job duties, injuring his left shoulder. Plaintiff was permitted to return to work on September 4, 2019 on modified duty and gave Defendants notify of his need for accommodation. Plaintiff returned to work on September 16, 2019 and was terminated on September 17, 2019. Plaintiff alleges that his termination was due to his request

for accommodation and need to take medical leave for his disability.

Plaintiff's Complaint alleges the following causes of action: (1) discrimination based on disability in violation of the Fair Housing Employment Act ("FEHA"), (2) retaliation for conduct that is protected by FEHA, (3) failure to participate in the interactive process in determining reasonable accommodation in violation of the FEHA, (4) failure to provide reasonable accommodation in violation of the FEHA, (5) failure to take reasonable steps to prevent discrimination, harassment and retaliation in violation of the FEHA, (6) wrongful termination in violation of public policy.

Defendants now move to compel arbitration and for a stay of this action pending completion of arbitration. Plaintiff opposes the motion.

Request for Judicial Notice

Defendants request that the court take judicial notice of the following in support of their motion:

Moorman v. Charter Commc'ns, Inc., United States District Court, Western District of Wisconsin, Case No. 3:18-cv-820-wmc, 2019 WL 1930116 (W.D. Wis. May 1, 2019) (Exh. 1)

Scarpitti v. Charter Commc'ns, Inc., United States District Court, Colorado, Case No. 18-CV-02133-REB-MEH, 2018 WL 10806905 (D. Colo. Dec. 7, 2018) (Exh 2)

Esquivel v. Charter Commc'ns, Inc., United States District Court, Central District, Case No. CV 18-7304-GW(MRWX), 2018 WL 10806904 (C.D. Cal. Dec. 6, 2018) (Exh 3)

Castorena v. Charter Commc'ns, LLC, United States District Court, Central District, Case No. 2:18-CV-07981-JFW-KS, 2018 WL 10806903 (C.D. Cal. Dec. 14, 2018) (Exh 4)

Bray v. Charter Communications, Inc., Los Angeles Superior Court Case No. BC721229 (Exh. 5)

Martinez v. Spectrum, Los Angeles Superior Court Case No. 19CHCV00275 (Exh 6)

Booker v. Charter Communications, LLC, Los Angeles Superior Court Case No. 20STCV07680 (Exh 7)

Lasser v. Charter Communications, Inc., United States District Court, Colorado, Case No. 19-cv-02045-RM-MEH, 2020 WL 1527333 (D. Colo. Mar. 31, 2020) (District Court's adoption of Magistrate Judge's recommendations) and Lasser v. Charter Communications, Inc., United States District Court, Colorado, Case No. 19-CV-02045-RM-MEH, 2020 WL 2314985, at *1 (D. Colo. Feb. 10, 2020), report and recommendation adopted, No. 19-CV-02045-RM-MEH, 2020 WL 1527333 (D. Colo. Mar. 31, 2020) (Magistrate Judge's recommendation) (Exh 8)

Bene v. Charter Communications, Inc., Los Angeles Superior Court Case No. 19STCV02194 (Exh 9)

Stephens v. Charter Communications Holdings, LLC, United States District Court, W.D. Kentucky, Louisville Division, Case No. 3:17-cv-00354, 2017 WL 4273307 (W.D. Ky. Sept. 26, 2017) (Exh 10)

Landry v. Time Warner Cable, Inc., United States District Court, New Hampshire, Case No. 16-cv-507-SM, 2017 WL 3431959 (D.N.H. Aug. 9, 2017) (Exh 11)

Christmas v. Charter Communications, LLC, Los Angeles Superior Court Case No. 19STCV45265 (Exh 12).

Plaintiff requests judicial notice of the following in support of his opposition:

Order Denying Defendant's Motion to Compel Arbitration and Stay Proceedings, Angelica Ramirez v. Charter Communications Holdings Company, LLC et al., Case No. 20STCV25987, dated November 25, 2020, signed by the Honorable David J. Cowan from the Superior Court of California, County of Los Angeles (Exh A)

Order Denying Defendant's Motion to Compel Arbitration and Stay Proceedings, Adrian Komorowski v. Charter Communications, LLC et al., Case No. 19STCV11497, dated March 2, 2020, signed by the Honorable Elizabeth R. Peffer from the Superior Court of California, County of Los Angeles. (Exh B)

Order Denying Defendant's Motion to Compel Arbitration and Stay Proceedings, Claudia Bravo v. Charter Communications Holdings Company, LLC et al., Case No. 19STCV28846, dated November 27, 2019, signed by the Honorable Gregory W. Alarcon from the Superior Court of

California, County of Los Angeles. (Exh C)

The operative Complaint in this action, Becerra v. Charter Communications, Inc. et al., Case No. 21 STCV14283 filed on April 14, 2021 in the Superior Court of California, County of Los Angeles.

Defendants additionally request that the court take judicial notice of the following in connection with their reply:

Notice of Appeal in Komorowski v. Charter Communications, LLC et al., LASC Case No. 19STCV11497, Court of Appeal Case No. B305904, and the Court of Appeal docket in that matter. (Exh F)

Notice of Appeal in Ramirez v. Charter Communications Holding Company, LLC et al., LASC Case No. 20STCV25987, Court of Appeal Case No. B309408, and the Court of Appeal docket in that matter (Exh G)

Court of Appeal's decision in Bravo v. Charter Communications, LLC et. al., LASC Case No 19STCV29946, Court of Appeal Case No. B303179, reversing the trial court's denial of Charter's motion to compel arbitration with instructions to grant Charter's motion (Exh H).

Both parties' requests are granted. The existence and legal significance of these documents are proper matters for judicial notice. (Evidence Code § 452, subds. (d), (h).)

Evidentiary Objections

Plaintiff's Objections to Declaration of John Fries

Overruled: 1-10

Sustained: 11

Plaintiff's Objections to Declaration of Erika Silverman

Sustained: 12:

Discussion

Legal Standard

"California law reflects a strong public policy in favor of arbitration as a relatively quick and inexpensive method for resolving disputes. To further that policy, Code of Civil Procedure, section 1281.2 requires a trial court to enforce a written arbitration agreement unless one of three limited exceptions applies. Those statutory exceptions arise where (1) a party waives the right to arbitration; (2) grounds exist for revoking the arbitration agreement; and (3) pending litigation with a third party creates the possibility of conflicting rulings on common factual or legal issues." (Code of Civ. Proc., § 1281.2; Acquire II, Ltd. v. Colton Real Estate Group (2013) 213 Cal.App.4th 959, 967.) Similarly, public policy under federal law favors arbitration and the fundamental principle that arbitration is a matter of contract and that courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. (AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333, 339.)

In deciding a motion or petition to compel arbitration, trial courts must first decide whether an enforceable arbitration agreement exists between the parties and then determine whether the claims are covered within the scope of the agreement. (Omar v. Ralphs Grocery Co. (2004) 118 Cal.App.4th 955, 961.) The opposing party has the burden to establish any defense to enforcement. (Gatton v. T-Mobile USA, Inc. (2007) 152 Cal.App.4th 571, 579 ["The petitioner ... bears the burden of proving the existence of a valid arbitration agreement and the opposing party, plaintiffs here, bears the burden of proving any fact necessary to its defense."].)

Existence of an Arbitration Agreement

A motion to compel arbitration or stay proceedings must state verbatim the provisions providing for arbitration or must have a copy of them attached. (Cal. Rules of Court, rule 3.1330.)

A party may demonstrate express acceptance of the arbitration agreement in order to be bound (e.g., Mago v. Shearson Lehman Hutton Inc. (9th Cir. 1992) 956 F.2d 932 [agreement to arbitrate included in job application]; Nghiem v. NEC Electronic, Inc. (9th Cir. 1994) 25 F.3d 1437 [agreement to arbitrate included in handbook executed by employee]; Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105 [employer may terminate employee who refuses to sign agreement to arbitrate]) or implied-in-fact in fact acceptance (Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 11 [implied acceptance of changed rules regarding job security]; DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 635 [implied acceptance of changed compensation rules]). (Craig v. Brown & Root (2000) 84 Cal.App.4th 416, 420.)

"A signed agreement is not necessary, however, and a party's acceptance [of an agreement to arbitrate] may be implied in fact…." (Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC (2012) 55 Cal.4th 223, 23 (Pinnacle), 6.) "An arbitration clause within a contract may be binding on a party even if the party never actually read the clause." (Ibid.)

Defendants contend that Plaintiff should be ordered to arbitrate his claims because Plaintiff agreed as such on the following instances: (1) submitting his application for employment on May 29, 2018, which included an acknowledgement that he agreed to arbitrate, and (2) on June 1, 2018, when Plaintiff allegedly logged into Defendants' website and expressly acknowledged the Arbitration Agreement. (Motion, 1.) Defendants submit the declaration of John Fries ("Fries") in support of their motion.

Fries attests that he is the Vice President, HR Technology for Charter Communications, LLC and has been employed in that capacity since February 2019. (Fries Decl. ¶ 1.) Prior to February 2019, Fries was employed as a Senior Director, HR Technology. (Id.)

ccording to Fries, individuals who apply for employment with Charter must do so through a "web-based" system called BrassRing and are also required to be bound by "the Program's Mutual Arbitration Agreement" in order to submit their application. (Fries Decl. ¶¶ 6-7.) According to Fries, Plaintiff's application demonstrates that he agrees to participate in Solution Channel, Charter's employment-based legal dispute resolution and arbitration program. (Fries Decl. ¶¶ 5, 8; Exh. A.)

Additionally, Fries attests that individuals who receive an offer of employment are required to

complete a web-based onboarding process through Charter's Onboarding System before they can become employed. (Fries Decl. ¶¶ 9-11.) According to Fries, individuals are "prompted to review various policies and agreements" after logging into the system, one of which is the Mutual Arbitration Agreement, the same one presented during the application process. (Fries Decl. ¶ 14.) Each individual who accesses the Onboarding System has a unique login and temporary password, and Fries attests that Plaintiff used this unique login and password to access the Onboarding System. (Fries Decl. ¶ 12.) Further, Plaintiff changed his login information after logging into the Onboarding System and accepted the offer of employment. (Fries Decl. ¶ 13.) In order to acknowledge the Mutual Arbitration Agreement, the individual must click the link in the Onboarding System. (Fries Decl. ¶ 15, Exh. C.) If the individual acknowledged the terms of the Mutual Arbitration Agreement, he or she checked the check box and then clicked "submit." (Fries Decl. ¶ 17.) According to Fries, the Onboarding System shows that Plaintiff acknowledged the Mutual Arbitration Agreement. (Fries Decl. ¶ 19, Exh. B.)

Plaintiff's employment application includes 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.

Next to this statement, "I agree" is indicated.

(Fries Decl., Exh. A.)

Exhibit C to the Fries Declaration is the Mutual Arbitration Agreement. Exhibit C provides in pertinent part as follows:

"MUTUAL ARBITRATION AGREEMENT

A. Arbitration Requirement. 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 preemployment 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."

Additionally, Exhibit B to the Fries Declaration lists "Arbitration Agreements" under "Required Acknowledgments." The status for this document indicates "accepted."

In opposition, Plaintiff contends that a valid agreement to arbitrate does not exist because Defendants have failed to demonstrate that Plaintiff signed the Mutual Arbitration Agreement or agreed to its terms. (Opposition, 10-12.) According to Plaintiff, the Fries Declaration is insufficient to authenticate Plaintiff's agreement to arbitrate because Fries does not even attest, for example, that he knows of Plaintiff. (Id.) Plaintiff submits his own declaration in support of the opposition.

Plaintiff attests that prior to being shown the exhibits in support of Defendant's motion, he had never "saw any arbitration agreement from Charter" or specifically Exhibit C to the Fries Declaration. (Plaintiff Decl. ¶ 2.) Additionally, Plaintiff attests that he did not and "never would have" agreed to arbitrate any employment disputes with Charter. (Id.) Plaintiff further attests that he has "no recollection of affixing my signature to the purported arbitration agreement(s)" attached to the Fries Declaration. (Plaintiff Decl. ¶ 4.) moreover, Plaintiff attests that at no time was he informed about the arbitration agreement or receive from Charter "online or otherwise" or see "online or otherwise" an arbitration agreement or "any written text talking about arbitration. (Plaintiff Decl. ¶ 6.) Further, Plaintiff attests that he was also never approached to "negotiate an arbitration term or provision" or given any such opportunity. (Id.)

Additionally, Plaintiff contends that Defendants' evidentiary showing is insufficient to establish the existence of an arbitration agreement for the same reasons that the evidence presented in Ruiz v. Moss Bros. Auto Group, Inc. (2014) 232 Cal.App.4th 836 (Ruiz) was found to be insufficient.

In Ruiz, the employer petitioned for arbitration of an employee's employment claims. (Id. at 838.) In support of this petition, the employer submitted a declaration of its business manager, who was "required to be familiar with the generation and maintenance." (Id. at 839.) The business manager "summarily asserted that Ruiz "electronically signed" the 2011 agreement "on or about September 21, 2011," and that the same agreement was presented to "all persons who seek or seek to maintain employment." (Id.) The Court of Appeal found that the employer's authentication was insufficient because Plaintiff claimed that he did not recall signing the arbitration agreement at issue. (Id. 846.) According to the Ruiz court, the business manager's

declaration is insufficient to authenticate the arbitration agreement given these facts. (Id.)

In reply, Defendants contend that the Fries Declaration is sufficient to establish the existence of an arbitration agreement because Fries attests that Plaintiff was provided a unique login information and that Plaintiff used the login information and then changed the password. (Reply, 5-8.) According to Defendant, this makes the instant action unlike Ruiz, where the motion to compel arbitration was supported by a more conclusory declaration. Additionally, Defendants contend that the Fries Declaration is more like the evidence found to be sufficient in Espejo v. Southern California Permanente Medical Group (Espejo) 246 Cal.App.4th 1047, 1060-62 (Espejo)

In Espejo, the Court of Appeal found that an employer's authentication of an employee's electronic signature was sufficient because it was supported by a declaration that detailed the "security precautions regarding transmission and use of an applicant's unique username and password, as well as the steps an applicant would have to take to place his or her name on the signature line of the employment agreement." (Id. at 1062.)

The court finds that a valid arbitration agreement exists. Specifically, the court agrees with Defendants that the Fries Declaration is similar to the declaration highlighted in Espejo because it outlines security precautions regarding transmission and use of the applicant's username and password as well as steps that would have to be taken to place a signature on the arbitration agreement. The Fries Declaration details the fact that Plaintiff was given unique login and password, that Plaintiff used this login and password, and the steps Plaintiff would have to take to submit his acknowledgement of the Mutual Arbitration Agreement. Although Plaintiff contends that he never signed an arbitration agreement, he does not dispute that he took those steps.

Thus, the court will proceed to analyze the parties arguments regarding defenses to enforcement.

Defenses to Enforcement

Pursuant to Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114 (Armendariz) both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a valid arbitration agreement. Additionally, in Armendariz, the California Supreme Court recognized that it is more appropriate to sever and

restrict illegal terms that are collateral to the main purpose of a contract than to find the entire contract invalid. (Armendariz, supra, 24 Cal.4th at 124 ["Courts are to look to the various purposes of the contract. 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."].)

Additionally, "[t]he arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." (Id. at 90-91.)

Procedural Unconscionability

The finding that [an] arbitration provision was part of a non-negotiated employment agreement establishes, by itself, some degree of procedural unconscionability." (Ajamian v. CantorCO2e, L.P. (2012) 203 Cal.App.4th 771, 796; Roman v. Superior Court (2009) 172 Cal.App.4th 1462, 1470 ["adhesion contracts in the employment context typically contain some measure of procedural unconscionability"].)

Plaintiff contends that the Mutual Arbitration Agreement is procedurally unconscionable because it was presented as a condition of employment and Plaintiff was never given an opportunity to negotiate its terms. (Opposition, 14-15.)

In reply, Defendants contend that the Mutual Arbitration Agreement is not procedurally unconscionable because mandatory arbitration agreements are valid and enforceable. (Reply, 8-9.)

The court finds that there is some degree of procedural unconscionability. The parties do not dispute that the Mutual Arbitration Agreement was mandatory and that Plaintiff was not given an opportunity to negotiate its terms.

Substantive Unconscionability

Plaintiff contends that the Mutual Arbitration Agreement is also substantively unconscionable for the following reasons: (1) the agreement imposes an impermissible limited statute of limitations provision, (2) the agreement permits Defendant to recover attorney fees if Plaintiff's FEHA claims "fail but are non-frivolous," and (3) the agreement impermissibly permits the prevailing party to recover attorney fees. (Opposition, 15-19.)

In reply, Defendants contend that the Mutual Arbitration Agreement is not substantively unconscionable for the following reasons: (1) contrary to Plaintiff's interpretation, the Mutual Arbitration Agreement does not limit the statute of limitations on Plaintiff's claims, (2) the Mutual Arbitration Agreement provides the prevailing party the same remedies available as if the matter was brought in court, and (3) a provision entailing the prevailing party in compelling arbitration to attorney fees is mutual and not unconscionable, and (4) any offensive provisions may be severed. (Reply, 9-11.)

The court agrees with Defendants that the Mutual Arbitration Agreement is not substantively unconscionable.

First, the court agrees with Defendants that there is no limited statute of limitations. The Mutual Arbitration Agreement provides as follows with regard to the statute of limitations:

Time Limits. The aggrieved party must give written notice of the claim, in the manner required by this Agreement, within the time limit established by the applicable statute of limitations for each legal claim being asserted. To be timely, any claim that must be filed with an administrative agency or body as a precondition or prerequisite to filing the claim in court, must be filed with Solution Channel within the time period by which the charge, complaint or other similar document would have had to be filed with the agency or other administrative body. Whether a demand for arbitration is untimely is an affirmative defense, and will be decided by the arbitrator before any hearing on the merits of the aggrieved party's claim. If you file a charge or complaint with an administrative agency or body, any participation by Charter in the proceeding shall not be deemed a waiver of your obligation to arbitrate your claims pursuant to this Agreement. You agree not to assert, and agree to waive, any argument that Charter's participation in such a proceeding acts as a waiver or modification of the parties' agreement to arbitrate.

(Fries Decl., Exh. C, p. 3, section E.) Thus, the Mutual Arbitration Agreement does not impose an additional time limit not otherwise provided for by law.

Second, the court agrees that the Mutual Arbitration Agreement does not impermissibly grant attorney fees in connection with FEHA claims. Plaintiff points to the following provision as evidence that the Mutual Arbitration Agreement includes such a provision: "At the discretion of the arbitrator, the prevailing party may recover any remedy that the party would have been allowed to recover had the dispute been brought in court." (Fries Decl., Exh C, p. 13.) However, this provision by its terms allows the prevailing party to "recover any remedy" that it would have been permitted by law. Thus, there is no additional limitation which can be considered impermissible.

Third, the court agrees that the Mutual Arbitration Agreement does not impermissibly grant the prevailing party attorney fees. Plaintiff points to the following provision in support of this argument:

Arbitration Costs. Charter will pay the AAA administrative fees and the arbitrator's fees and

expenses. All other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses. 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 or the party resisting arbitration submits to arbitration following the commencement of the action or proceeding, 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.

The court agrees with Defendants that this provision is mutual and thus not unconscionable. This provision states on its face that if "the party resisting arbitration" is subsequently compelled to arbitrate then the party will be required to pay the other party all costs, fees, and expenses. Thus, this provision on its face applies to either party if they refuse to arbitrate pursuant to the Mutual Arbitration Agreement. Further, Plaintiff has cited to no authority in support of his argument that such a provision is substantively unconscionable.

Because both procedural and substantively unconscionability are required before the court may exercise its discretion and refuse to enforce a valid arbitration agreement, Defendants' motion is granted.

Conclusion

Defendants' motion is granted. Plaintiff is ordered to arbitrate his claims against Defendants. This action is stayed pending completion of arbitration or further order of the court. The court sets an order to show cause re commencement of the arbitration process for November 22, 2021, at 8:30 a.m. in this department. Defendants are to give notice.

The case is ordered stayed pending binding arbitration as to the entire action.

All other scheduled hearings set in this department are ordered vacated.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 37

21STCV14283 September 9, 2021
VICTOR BECERRA vs CHARTER COMMUNICATIONS, INC., et al. 8:30 AM

Judge: Honorable Richard J. Burdge Jr. CSR: K. Shepherd #13756
Judicial Assistant: L. Garcia ERM: None
Courtroom Assistant: E. Avena Deputy Sheriff: None

Order to Show Cause Re: commencement of the arbitration is scheduled for 11/22/2021 at 08:30 AM in Department 37 at Stanley Mosk Courthouse.

EXHIBIT 39: JOSEPH TRIBBY V. CHARTER COMMUNICATIONS, LLC (ORANGE COUNTY SUPERIOR COURT CASE NO. 30-2021-01181057-CU-WT-CJC), RE HEARING ON MOTION TO COMPEL ARBITRATION, JULY 1, 2021

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 07/01/2021 TIME: 01:30:00 PM DEPT: C18

JUDICIAL OFFICER PRESIDING: Theodore Howard
CLERK: Kathy Peraza
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Susan New

CASE NO: **30-2021-01181057-CU-WT-CJC** CASE INIT.DATE: 01/26/2021
CASE TITLE: **Tribby vs. Charter Communications, LLC**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Wrongful Termination

EVENT ID/DOCUMENT ID: 73524485

EVENT TYPE: Motion to Compel Arbitration
MOVING PARTY: Charter Communications Holding Company, LLC
CAUSAL DOCUMENT/DATE FILED: Motion to Compel Arbitration, 04/22/2021

APPEARANCES
Keith Rasher, from Thompson Coburn LLP, present for Defendant(s) telephonically.

Tentative Ruling posted on the Internet .

The Court **CONFIRMS** the tentative ruling as follows:

Defendants' Motion to Compel Arbitration of Plaintiff Tribby's 1st through 17th causes of action in the Complaint is **GRANTED**.

The case is stayed pending completion of arbitration. (*CCP 1281.4*; *see 9 USC § 3*.)

Defendants' request for attorney fees is **DENIED** without prejudice.

The Court will set a Status Conference Re Arbitration, at this time.

Defendants are to give notice.

Initial Burdens

Under both federal law and California law, arbitration agreements are enforceable. (*Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1621; *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125. See *9 USC § 2* and *CCP § 1281*.) When presented with a petition to compel arbitration, the initial issue before the court is whether an agreement has been formed. (*Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 129.) The party seeking to compel arbitration bears the burden of proving the existence of the agreement. Then, the burden shifts to the party opposing arbitration to demonstrate the agreement cannot be enforced. (*Id*. at 129, 131–132; see *Green Tree Financial Corp.-Alabama v. Randolph* (2000) 531 U.S. 79, 90.)

The Federal Arbitration Act Governs

The FAA can apply when the parties agree that it applies (see *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 394; *Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438,

446-47), or it can apply based on the application of principles of interstate commerce. (See *9 U.S.C. § 2; Allied–Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 273–274; *Cable Connection, Inc. v. DIRECTV, Inc*. (2008) 44 Cal.4th 1334, 1351.)

Here, there is a clear expression that the Mutual Arbitration Agreement (MAA) is governed by the FAA. (See Moving Fries Dec., exhibit C, MAA, p.5 § R.) Further, there is unrefuted evidence that the employment relationship is between interstate parties, and that Defendants' employees rely on materials and equipment that are procured through interstate channels to provide telecommunication services to customers. (See Compl. ¶ 2-5, 14 and Fries Dec ¶ 4.) Hence, the FAA governs here.

Plaintiff states in passing that California Assembly Bill 51 has outlawed the use of mandatory arbitration provisions in employment contracts in California. (Opp. Brf. p. 3.) But this did not provide a discussion of the law. To the extent that *Labor Code section 432.6* is involved, the statute does *not* apply when the FAA governs (see *Lab. Code § 432.6(i)*). The statute does not seem to apply retroactively either. (*id*., subd.(h).) In addition, as per the US Supreme Court, the FAA preempts state laws which are hostile to arbitration on their face (see *Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 137 S.Ct. 1421, 1426). The California labor statute has been held to be in conflict with the FAA in this regard. (See *Chamber of Commerce of United States v. Becerra* (E.D. Cal. 2020) 438 F.Supp.3d 1078, 1099, 1105, 1108 (determining "AB 51 is preempted by the FAA…"), appeal filed, 9th Circuit, Feb. 24, 2020.)

From the evidence before the Court, the Court finds the Plaintiff accepted the terms of the MAA, in the employment application process and the "onboarding" process. While Plaintiff may have elected at the time to no review the available material closely, the time, place and instrument of his review (computer) appear to have been of his choosing. (Opp.Plff. Declaration ¶ 6-7). While it may have seemed time consuming to read forms, this in itself would not undo an objective acceptance of the terms. Generally, a legal duty is not imposed to explain the terms of a contract to the other party (see *Ramos v. Westlake Servs. LLC* (2015) 242 Cal. App. 4th 674, 686). "[A]n arbitration clause within a contract may be binding on a party even if the party never actually read the clause." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) As a general rule, "a party who signs a document is presumed to have read it and to understand its contents." (*Baker v. Italian Maple Holdings, LLC* (2017) 13 Cal.App.5th 1152, 1163 n.6.).

Plaintiff's objections are best addressed in the context of the issue of unconscionability.

Defendants argue that the arbitrator, not the court, must decide the enforceability of the MAA. The Court respectfully disagrees.

"[T]he question who has the power to decide the availability of …arbitration turns upon what the parties agreed about the allocation of that power." (*Sandquist v. Lebo Automotive, Inc*. (2016) 1 Cal.5th 233, 243; see *Henry Schein, Inc. v. Archer and White Sales, Inc.* (2019) 139 S.Ct. 524, 529-30.) But "[C]ourts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (*Henry Schein, Inc*., 139 S.Ct. 524, 531.)

Here, while Section B.3 and I of the MAA express that any disputes about the "arbitrability" of claims, will be decided by an arbitrator, it is less clear what is being delegated - what does the term "arbitrability" mean? It appears to be undefined. Therefore, this isn't a "clear and unmistakable" statement that the parties were delegating away the issue of unconscionability, to an arbitrator.

"Arbitrability" can mean whether a particular cause of action fits within the scope of the arbitration clause (see *Henry Schein, Inc*., 139 S.Ct. 524, 527, 528, 529 (referring to "arbitrability" in this sense). But an unconscionability defense is not of this character, it is more fundamental, going to contract formation. (See *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 71 n.2; *Arnold v. Homeaway, Incorporated* (5th Cir. 2018) 890 F.3d 546, 550 ("[W]here the 'very existence of a contract' containing the

relevant arbitration agreement is called into question, the federal courts have authority and responsibility to decide the matter."); *Eiess v. USAA Federal Savings Bank* (N.D. Cal. 2019) 404 F.Supp.3d 1240, 1248.)

Certainly, if the Defendants had intended to delegate disputes about the enforceability of the agreement to the arbitrator, then the language could have been more clear. (See *Gonzales v. Charter Communications, LLC* (C.D. Cal. 2020) 497 F.Supp.3d 844, 849) ("Paragraph 3 [of the Charter Agreement] does not unambiguously delegate the unconscionability question to the arbitrator… [it] reasonably can be interpreted to delegate only questions whether a specific claim is 'covered' within the meaning of Paragraph 1"); and see MAA, p. 4 § Q (stating court will decide issue of partial invalidity and severance of terms).)

Therefore, the Court will decide the issue.

Whether the Agreement Is Unconscionable.
The burden of proving unconscionability rests with the person asserting it. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126.) Both procedural and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on a sliding scale. '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. (Pinnacle, 55 Cal.4th at 247; Sanchez, 61 Cal.4th 899, 910.)

a. Procedural Unconscionability.

"The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*OTO*, 8 Cal.5th 111, 126–127.)

Here, after considering the totality of the information before the Court, a great deal of procedural unconscionability was not demonstrated by the Plaintiff. Plaintiff expresses having felt pressured to complete the forms quickly. But the written letter provided by the employer did not appear to impose any hard and mandatory deadline. The contents of the letter indicate that the documents could be saved electronically for further review, and the Plaintiff could contact a representative regarding questions. Primarily, it appears that Plaintiff was in control of the timing and location of review of the material as well as its completion. This differentiates the present case, from *Oto v. Kho* (see 8 Cal.5th at 127-9 and Plffs Opp. Dec. and Exhibit A p.1-2, see also Fries Dec. and Exs. A to D.)

The employer's Solution Channel Guideline was made available for review. (Fries Dec and Mov. Ex. B and C.) The document is evidently an effort to explain to a candidate or employee, in a fairly simple way, what arbitration is. (See Mov. Ex. C.) Hence, this different than the illegible fine print that was referenced in the *Oto* case (see 8 Cal.5th at 128). The material here is colorful, easy to read, in somewhat laymen's terms to a good degree, and organized. (See Mov. Ex. C.) There are visual images provided to try to promote understanding. (See *id*.; compare *Oto* at 127-28.)

The Plaintiff does not appear to have difficulty reading documents in the English language. It appears that Plaintiff has achieved community college coursework as well as having work experience in marketing and quality assurance with industrial companies, according to the materials provided in moving Exhibits A and B. The evidence suggests that Plaintiff was in a position to have read the documents, to have acquired the basic understanding of the agreement, as well as was provided with the opportunity to inquire about it.

Under the circumstances, the weight of the evidence persuades the Court that there is a low degree of procedural unconscionability here.

b. Substantive Unconscionability

Regarding the waiver of a speedy Berman hearing, it does not appear as if the Plaintiff sought to engage this avenue before, or at this time. In addition, many of the causes of action would be outside of the scope of the Berman scheme, i.e. non-wage claims. While the waiver can be considered as part of the overall unconscionability evaluation, "It is important to stress that the waiver of Berman procedures does not, in itself, render an arbitration agreement unconscionable." (*Oto*, at 130.) In this case, the absence of a high degree of overreaching (of procedural/ substantive unconscionability otherwise), are also relevant information.

Next, the waiver of the right to make representative claims (see MAA § D) is less relevant where the Plaintiff is not pursuing PAGA claims in the case. The term may be collateral to the main commitment of arbitration and may be fairly severed. (See *Mohamed v. Uber Technologies, Inc*. (9th Cir. 2016) 848 F.3d 1201, 1213 ("The PAGA waiver is severable from the remainder of the arbitration provision in the 2013 Agreement, however. In Section 14.1, the agreement provided that "[i]f any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent under law."); see also *Correia v. NB Baker Electric, Inc*. (2019) 32 Cal.App.5th 602, 621 ("we are satisfied that the parties agreed (through the agreement's severance clause) that if any provision (such as the representative claim waiver in all forums) is found to be invalid, the finding does not preclude the enforcement of any remaining portion of the agreement"); see MAA here, § Q (a severance clause).)

Therefore, the Court finds that the MAA is not unconscionable.

Defendants' Request for Attorney Fees and Costs is **DENIED**.

This request is premature and is denied without prejudice.

Under *Civil Code section 1717*, there is only one prevailing party in an action on the contract and the issue is decided upon a final disposition of the merits of the contract claims. Thus, where a party "only succeeded at moving a determination on the merits from one forum to another" it is not a final victory upon which to assess attorney fees. (See *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 974-6.)

As a general rule, parties may not "contract around" the definitions within the statute. (See *Exxess Electronixx v. Heger Realty Corp*. (1998) 64 Cal.App.4th 698, 707.) Therefore, the Defendants' request for attorney fees is denied at this time.

EXHIBIT 40: MICHAEL PATTERSON V. CHARTER COMMUNICATIONS, INC. (LOS ANGELES SUPERIOR COURT CASE NO. 20STCV14987), RE HEARING ON MOTION TO COMPEL ARBITRATION; CASE MANAGEMENT CONFERENCE, OCTOBER 20, 2020

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 55

20STCV14987 October 20, 2020
MICHAEL PATTERSON vs CHARTER COMMUNICATIONS, INC., A CORPORATION OPERATING UNDER THE LAWS OF CALIFORNIA , et al. 10:00 AM

Judge: Honorable Malcolm Mackey
Judicial Assistant: S. Ontiveros
Courtroom Assistant: M Kinney

CSR: Veronica Rodriguez #12215
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Samantha Elizabeth Johnson (Telephonic); Kyle James Todd (Telephonic)

For Defendant(s): Casey Lee Morris (Telephonic)

NATURE OF PROCEEDINGS: Hearing on Motion to Compel Arbitration filed by Defendant Charter Communication, Inc.,; Case Management Conference

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Veronica Rodriguez #12215, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Matter is called for hearing.

The Court has read and considered all documents filed hereto regarding the above-captioned Motion. The court hears argument from both sides.

After argument the Motion of Defendant to Compel Arbitration is GRANTED. The court does not find the agreement to be procedurally unconscionable and that there was sufficient notice to plaintiff by Charter as more fully detailed in the notes of the court reporter.

The case is ordered stayed pending binding arbitration as to the entire action.

All other scheduled hearings set in this department are ordered vacated.

Moving party is to give notice.

EXHIBIT 41: MAKEDA CHRISTMAS V. CHARTER COMMUNICATIONS, LLC, ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 19STCV45265), RE CASE MANAGEMENT CONFERENCE; HEARING ON MOTION TO COMPEL ARBITRATION, AUGUST 12, 2020

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 56

19STCV45265 August 12, 2020
MAKEDA CHRISTMAS vs CHARTER COMMUNICATIONS, LLC, et al. 8:30 AM

Judge: Honorable Holly J. Fujie
Judicial Assistant: O.Chavez
Courtroom Assistant: C. Randle

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): David Hiller (Telephonic) & Jonathan Moon

For Defendant(s): James A Bowles C. Morris (Telephonic)

NATURE OF PROCEEDINGS: Case Management Conference; Hearing on Motion to Compel Arbitration

The matter is held.

The Court hears oral argument.

The Motion to Compel Arbitration filed by CHARTER COMMUNICATIONS, LLC, DIEGO VALDIVIESO on 02/13/2020 is Granted.

MOVING PARTIES: Defendants Charter Communications, LLC ("CCL") and Diego Valdivieso ("Valdivieso")

RESPONDING PARTY: Plaintiff Makeda Christmas ("Christmas")

The Court has considered the moving, opposition, and reply papers.

BACKGROUND

Plaintiff's complaint arises from alleged wrongful actions during her employment with CCL. Plaintiff filed a complaint against Defendants alleging causes of action for: (1) wrongful termination in violation of public policy pursuant to California Government Code, Section 12940(a); (2) discrimination based on disability pursuant to California Government Code, Section 12940 et seq.; (3) retaliation pursuant to California Government Code, Section 12940(h); (4) failure to take reasonable steps to prevent discrimination pursuant to California Government Code, Section 12940(k); (5) failure to provide reasonable accommodation pursuant to California Government Code, Section 12940(m); (6) failure to engage in a good faith interactive process pursuant to California Government Code, Section 12940(n); (7) discrimination based on sex and

gender pursuant to California Government Code, Section 12900 et seq.; and (8) workplace harassment in violation of the California Fair Employment and Housing Act ("FEHA") pursuant to California Government Code, Section 12900 et seq.

Declaration of John Fries

According to the declaration of John Fries ("Fries") who is the Vice President of HR Technology for CCL: (1) he has been employed as the Vice President of HR Technology for CCL since February 2019 (Fries Decl. at ¶ 1); (2) Solution Channel is the employment-based legal dispute resolution and arbitration program (the "Solution Channel Program") that CCL uses and was implemented on October 6, 2017 (Id. at ¶ 4); (3) individuals who apply for employment with CCL must do so through a web-based system called BrassRing (Id. at ¶ 5); (4) as of October 6, 2017, all external applicants who apply for a position with CCL are required to agree to participate in the Solution Channel Program, and to be bound by the Solution Channel Program's Mutual Arbitration Agreement in order to submit their application for consideration (Id. at ¶ 6); (5) CCL maintains a record of applicants who have agreed to participate in the Solution Channel Program and who have submitted an application through BrassRing (Id. at ¶ 7); and (6) he has confirmed that Plaintiff agreed to participate in the Solution Channel Program on October 3, 2018. (Id. at ¶ 7 and Exhibit A.)

Fries further declares that: (1) individuals who successfully submit an application and who receive a verbal offer of employment from CCL are required to complete a web-based onboarding process through CCL's onboarding system before they can become employed by CCL (Id. at ¶ 8); (2) individuals access the onboarding system using a unique login ID and temporary confidential access code, which CCL emails to the individual using the personal email address provided by the individual (Id. at ¶ 9); (3) he personally accessed and reviewed CCL's records related to Plaintiff's onboarding status, which have been maintained in the ordinary course of business (Id. at ¶ 10); (4) these records show that CCL sent a unique login ID and temporary confidential access code to Plaintiff's email address, who used this unique login ID and temporary confidential access code to log into CCL's onboarding system (Id. at ¶ 11); (5) Plaintiff was the only individual with access to this confidential access code and no one at CCL had access to it (Id.); (6) after logging into the onboarding system, Plaintiff changed the temporary confidential access code and electronically accepted CCL's offer of employment (Id. at ¶ 12 and Exhibit B); (7) after changing the access code and accepting the offer of employment electronically, individuals are prompted to review various policies and agreements (Id. at ¶ 13); and (8) one of the agreements to which individuals must agree and acknowledge is the Mutual Arbitration Agreement, which is the same Mutual Arbitration Agreement that was presented to

the individual during the application process. (Id.)

Fries further declares that: (1) in order to agree and to acknowledge the Mutual Arbitration Agreement, the individual must click the Mutual Arbitration Agreement link contained in the onboarding system (Id. at ¶ 14); (2) the individual may also review and/or download the Program's guidelines by selecting the link associated with that document (Id.); (3) true and correct copies of the Mutual Arbitration Agreement and Program guidelines are available through their respective onboarding system links (Id. at ¶ 14 and Exhibit C); (4) at the end of the Mutual Arbitration Agreement, the individual is presented with a radio button and an acknowledgment in capitalized text (Id. at ¶ 15 and Exhibit B); (5) if the individual acknowledged the terms of the Mutual Arbitration Agreement in the onboarding system, he or she selected the radio button next to the acknowledgement and then clicked "Submit" (Id. at ¶ 16); (6) if the individual does not acknowledge the Mutual Arbitration Agreement, the employee cannot complete the onboarding process and the individual cannot become a CCL employee until the onboarding process is complete (Id. at ¶ 17); (7) the BrassRing Application shows that Plaintiff agreed to be bound by the Mutual Arbitration Agreement (Id. at ¶ 18 and Exhibit A); and (8) the onboarding system records show that Plaintiff acknowledged the Mutual Arbitration Agreement. (Id. at ¶ 19 and Exhibit B.)

The Current Motion

Defendants filed a motion to compel arbitration and to stay this action on the grounds that all of Plaintiff's claims in this lawsuit are subject exclusively to resolution through final and binding arbitration with the American Arbitration Association ("AAA") as required by the Mutual Arbitration Agreement, which requires the parties to arbitrate all employment disputes arising out the employment relationship with CCL. Defendants assert that the Mutual Arbitration Agreement is required to be enforced by this Court pursuant to the Federal Arbitration Act ("FAA").

Defendants contend that: (1) the FAA controls this motion; (2) the FAA requires enforcement of the Mutual Arbitration Agreement; (3) the Court should not allow Plaintiff to confuse the issues by virtue of any boilerplate unconscionability claims in opposition to their motion; (4) any dispute over arbitrability must be determined by the arbitrator; (5) any allegedly offensive provision may be severed; and (6) the Court should dismiss this action.

Plaintiff opposes Defendants' motion to compel arbitration on the grounds that: (1) Defendants have not established that an arbitration agreement exists; (2) arbitrability of her claims should be

determined by this Court; (3) Defendants' agreement is unenforceable because it is both substantively and procedurally unconscionable; and (4) Defendants' arbitration agreement is permeated with unconscionability and may not be cured through severability, reformation, or augmentation . To the extent that Plaintiff failed to address Defendants' arguments about the application of the FAA, the Court finds that Plaintiff has conceded to such arguments. (Heglin v. F.C.B.A. Market (1945) 70 Cal.App.2d 803, 806.) The crux of Plaintiff's opposition is that: (1) Defendants have not established the existence of an arbitration agreement; (2) if an arbitration agreement does in fact exist it is unenforceable due to its unconscionability; and (3) no remedy, such as severance or reformation, can cure the unconscionability that is present in the arbitration agreement.

Pertinent Language of the Mutual Arbitration Agreement

Defendant seek to compel arbitration pursuant to the Mutual Arbitration Agreement, which is attached as Exhibit C to the declaration of Fries. (Fries Decl. at ¶ 14 and Exhibit C.)

The Mutual Arbitration Agreement states the following:

1."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."

2."You and Charter mutually agree that the following disputes, claims and controversies . . . will be submitted to arbitration in accordance with this [a]greement: 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, claims arising under the Family Medical Leave Act, Americans with Disabilities Act or similar state laws, including . . . claims for unlawful denial of accommodation or failure to engage in the interactive process."

3."You and Charter mutually agree that the following disputes, claims and controversies . . . will be submitted to arbitration in accordance with this [a]greement: all disputes related to the arbitrability of any claim or controversy."

4."You 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, or excluded claims under Section C. Additionally, the arbitrator shall not be permitted to order consolidation of claims or a representative, class, or collective, arbitration."

5."The arbitration shall be held before one arbitrator who is a current member of the American Arbitration Association (AAA) and is listed on the Employment Dispute Resolution Roster. Within 45 days after submission of the claim, Charter will request from the AAA a list of at least five arbitrators willing to hear and decide the dispute. Within 20 days after receipt of the list from the AAA, the parties will select an arbitrator to hear and resolve the dispute and will notify the AAA of the selection of an arbitrator."

6."Arbitration hearings will 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."

7."Charter will pay the AAA administrative fees and the arbitrator's fees and expenses. All other costs, fees and expenses associated with the arbitration, including without limitation each party's attorneys' fees, will be borne by the party incurring the costs, fees and expenses."

JUDICIAL NOTICE

The Court GRANTS Defendants' request for judicial notice.

EVIDENTIARY OBJECTIONS

The Court OVERRULES Plaintiff's evidentiary objections to Defendants' request for judicial notice.

DISCUSSION

The purpose of the Federal Arbitration Act ("FAA") is "to move the parties in an arbitrable

dispute out of court and into arbitration as quickly and easily as possible." (Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp. (1983) 460 U.S. 1, 23.) The FAA is "consistent with the federal policy to ensure the enforceability, according to their terms, of private agreements to arbitrate." (Mastrobuono v. Shearson Lehman Hutton, Inc. (1995) 514 U.S. 52, 57.) "When the FAA applies, it preempts any contrary state law and is binding on state as well as federal courts." (Mastick v. TD Ameritrade, Inc. (2012) 209 Cal.App.4th 1258, 1263.) "The FAA requires courts to enforce arbitration provisions." (Id.) "It does not authorize courts to stay arbitration pending resolution of litigation, or to refuse to enforce a valid arbitration provision to avoid duplicative proceedings or conflicting rulings." (Id.) California Code of Civil Procedure, Section 1281 says "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract." "California law, like federal law, favors enforcement of valid arbitration agreements." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 97.) In the context of a contract containing an arbitration provision "there is a presumption of arbitrability in the sense that [a]n 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. Doubts should be resolved in favor of coverage." (AT&T Technologies, Inc. v. Communications Workers of America (1986) 475 U.S. 643, 650.)

Issue No.1: Existence of the Mutual Arbitration Agreement

Plaintiff contends that Defendants have not established that an arbitration agreement exists and as such Defendants' motion should be denied. Plaintiff asserts that Defendants have failed to provide a single exhibit carrying her signature and there is no evidence that Plaintiff consented to the Mutual Arbitration Agreement.

"Public policy favors contractual arbitration as a means of resolving disputes." (Espejo v. Southern California Permanente Medical Group (2016) 246 Cal.App.4th 1047, 1057.) "[T]hat policy does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (Id.) "In determining whether an enforceable arbitration agreement exists, the initial burden is on the party petitioning to compel arbitration." (Villacreses v. Molinari (2005) 132 Cal.App.4th 1223, 1230.) "A party who claims there is a written agreement to arbitrate may petition the superior court for an order to compel arbitration." (Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal.App.4th 348, 356.) "Code of Civil Procedure section 1280 et seq. provides a procedure for the summary determination of whether a valid agreement to arbitrate exists, and such summary procedure satisfies both state and federal law." (Id.) "Under this procedure, the

[moving party] bears the burden of establishing the existence of a valid agreement to arbitrate, and a party opposing the [motion] bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (Id.) "The trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination on the issue of arbitrability." (Id. at 356-357.) "[E]ven if one of the parties contends that the FAA applies to their agreement to arbitrate, the FAA does not apply until the existence of an enforceable arbitration agreement is established under state law principles involving formation, revocation, and enforcement of contracts generally." (Id. at 357.)

In the context of a motion to compel arbitration, where the validity of an arbitration agreement is challenged by a plaintiff "[a] defendan[t] [is] . . . required to establish by a preponderance of the evidence that the signature [on an arbitration agreement] was authentic." (Espejo v. Southern California Permanente Medical Group (2016) 246 Cal.App.4th 1047, 1060.) "Under Civil Code section 1633.7 . . . an electronic signature has the same legal effect as a handwritten signature." (Id. at 1061.) "[A]ny writing must be authenticated before it may be received in evidence." (Id.) "An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." (Id.) "[W]hen presented with a [motion] to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute." (Romo v. Y-3 Holdings, Inc. (2001) 87 Cal.App.4th 1153, 1158.)

Defendants' Evidence

The Court incorporates its recitation of Fries' declaration from above and applies it to its discussion of the existence of a Mutual Arbitration Agreement between Plaintiff and CCL.

Plaintiff's Evidence in Opposition to Defendants' Motion

In her declaration opposing Defendants' motion, Plaintiff declares that: (1) on or about December 2018, she began her employment with CCL as an Inbound Sales Representative (Christmas Decl. at ¶ 2); (2) at the commencement of her employment with CCL, she recalls participating in an application process and reviewing documents through CCL's web-based program (Id. at ¶ 3); (3) she has no recollection of ever viewing or electronically signing any arbitration agreement, including the "Mutual Arbitration Agreement" or "Solution Channel Program Guidelines" that CCL has attached as Exhibit C to its motion (Id. at ¶ 4); (4) on or

about September 3, 2019, her pre-existing condition of scoliosis deteriorated, which required her to go on a medical leave of absence (Id. at ¶ 5); (5) shortly after notifying CCL of her medical leave, she was terminated from her employment (Id. at ¶ 6); and (6) she has never had a single arbitration or mediation through AAA. (Id. at ¶ 7.)

Analysis

The Court finds that Plaintiff's citation to Romo for the proposition that she did not sign the Mutual Arbitration Agreement is not persuasive. The Romo court found that there was no arbitration agreement between an employee and employer because the employee handbook, which served as the basis for the employer's motion to compel arbitration, contained two separate agreements which were severable. (Romo v. Y-3 Holdings, Inc. (2001) 87 Cal.App.4th 1153, 1159.) Thus, the Romo court's holding was premised on the arbitration agreement being contained within the employee handbook. (Id. at 1155.)

The Court finds the facts here are similar to those in Espejo. In Espejo, plaintiff denied ever seeing the arbitration agreement at issue and denied ever signing the arbitration agreement at issue when he signed his employment contract whether electronically or otherwise. (Espejo v. Southern California Permanente Medical Group (2016) 246 Cal.App.4th 1047, 1054.) The issue is Espejo was whether defendant had properly authenticated the arbitration agreement. (Id. at 1062.) The Espejo court held that the declaration provided by defendant properly authenticated the arbitration agreement. (Id.) In ruling that the declaration offered by defendant was sufficient to authenticate that it was plaintiff who signed the arbitration agreement, the Espejo court examined the security process for signing documents. (Id.) The Espejo court indicated that the supplemental declaration provided by defendant which "detailed [defendant's] security precautions regarding transmission and use of an applicant's unique username and password, as well as the steps an applicant would have to take to place his or her name on the signature line of the employment agreement and the [arbitration agreement]" was sufficient to authenticate the arbitration agreement and to conclude that an arbitration agreement existed. (Id.)

Here, the Court finds that the declaration of Fries sets forth sufficient facts for the Court to conclude that a signed Mutual Arbitration Agreement between Plaintiff and CCL exists despite Plaintiff declaring that she does not recall ever viewing or electronically signing the Mutual Arbitration Agreement. Fries' declaration clearly indicates that as a condition of applying for a position with CCL, an applicant must participate in the Program and must agree to be bound by the Mutual Arbitration Agreement in order to submit an employment application. (Fries Decl. at ¶ 6.) Defendant presents evidence that Plaintiff agreed to be bound by the Mutual Arbitration

Agreement when submitting her employment application with CCL. (Id. at Exhibit A.) Moreover, Plaintiff participated in an onboarding process after receiving an offer of employment from CCL. (Id. at ¶¶ 8-9.) Plaintiff received a unique login ID and temporary confidential access code and used such credentials, to which only she had access and no one at CCL had access, to log into CCL's onboarding system, change her temporary confidential access code, and electronically accept CCL's offer of employment. (Id. at ¶¶ 11-12 and Exhibit B.) Plaintiff had to acknowledge and accept the Mutual Arbitration Agreement[1] in order to complete the onboarding process and become an employee of CCL, to which Defendant provides evidence that Plaintiff acknowledged and accepted the Mutual Arbitration Agreement. (Id. at ¶¶ 13-19 and Exhibit D.)

Therefore, the Court finds that Defendants have met their burden and established the existence of a signed arbitration agreement between CCL and Plaintiff.

Issue No. 2: Arbitrability of Plaintiff's Claims

Defendants assert that any dispute of the arbitrability of Plaintiff's claims must be determined by the arbitrator. Plaintiff contends that the arbitrability of her claims should be determined by the Court because the Mutual Arbitration Agreement is ambiguous and not a clear and unmistakable agreement with respect to arbitrability.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [she] has not agreed to submit." (Dream Theater, Inc. v. Dream Theater (2004) 124 Cal.App.4th 547, 552.) Where an arbitration agreement is silent or ambiguous on the scope of claims it covers "the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide." (Id.) "Although the scope of an arbitration clause is generally a question for judicial determination, the parties may, by clear and unmistakable agreement, elect to have an arbitrator, rather than the court, decide which grievances are arbitrable." (Rodriguez v. American Technologies, Inc. (2006) 136 Cal.App.4th 1110, 1123.) Where relevant rules are incorporated into an arbitration agreement, "parties clearly evidenced their intention to accord the arbitrator the authority to determine the issues of arbitrability." (Id.) "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so." (Greenspan v. LADT, LLC (2010) 185 Cal.App.4th 1413, 1440.)

The Mutual Arbitration Agreement states that "[a]rbitration hearings will be conducted pursuant the Solution Channel Program Guidelines and the arbitrator shall have the sole authority to

determine whether a particular claim or controversy is arbitrable." (Fries Decl., Exhibit C at ¶ i (1).) Thus, the Mutual Arbitration Agreement indicates that arbitration is to take place pursuant to the Solution Channel Program guidelines. (Id.) The Mutual Arbitration Agreement states that in the event of a conflict between terms of the Mutual Arbitration Agreement and the Solution Channel Program, the terms of the Mutual Arbitration Agreement will control. (Fries Decl., Exhibit C at ¶ M.) The causes of action asserted in the complaint come within the scope of the Mutual Arbitration Agreement. (Id. at ¶ B.)

Therefore, Plaintiff's claims come within the scope of the Mutual Arbitration Agreement.

Issue No. 3: Unconscionability

Plaintiff asserts that the Mutual Arbitration Agreement is both procedurally and substantively unconscionable. Plaintiff contends that Defendants' Mutual Arbitration Agreement is substantively unconscionable because it fails to: (1) provide for a neutral arbitrator; (2) allow for more than minimal discovery; (3) allow for all types of relief otherwise available in court and requires the employee to pay unreasonable costs. Plaintiff asserts that the Mutual Arbitration Agreement is procedurally unconscionable because it is an oppressive contract of adhesion.

"Unconscionability is a judicially created doctrine." (Carbajal v. CWPSC, Inc. (2016) 245 Cal.App.4th 227, 242.) "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 doctrine applies to arbitration agreements, even those governed by the FAA." (Id.) "Under California law, the doctrine of unconscionability has a procedural and a substantive element. Both elements must appear in order to invalidate a contract or one of its individual terms." (Mercuro v. Superior Court (2002) 96 Cal.App.4th 167, 174.) "The party resisting arbitration bears the burden of proving unconscionability." (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 247.) "Courts use a sliding scale approach in assessing the two elements [of unconscionability]." (Carbajal v. CWPSC, Inc. (2016) 245 Cal.App.4th 227, 242.) "[T]he two elements need not be present in the same degree." (Id.)

Procedural Unconscionability

"Procedural unconscionability addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (Id. at 243.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." (Id.) "Surprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party in a superior bargaining position." (Id.) "[P]rocedural unconscionability requires either oppression or surprise." (Id.) "It is well settled that adhesion contracts in the employment context, that is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." (Id.) "Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound, supported a finding of procedural unconscionability." (Id.)

The Court finds that a discussion of Carbajal is instructive on the issue of procedural unconscionability. In Carbajal, plaintiff argued that the arbitration agreement she signed was procedurally unconscionable because it was a contract of adhesion and also failed to identify which of the AAA's many different rules would govern the arbitration. (Id. at 242-243.) In Carbajal, the plaintiff contended that she was not provided with a copy of the governing rules or given the opportunity to review any arbitration rules before signing her employment agreement which contained an arbitration provision. (Id. at 243.) The Carbajal court held that the agreement plaintiff signed possessed a moderate level of procedural unconscionability because the agreement did not state which set of AAA rules would apply to any arbitration of plaintiff's claims. (Id. at 244.) The Carbajal court also indicated that the failure of defendant to: (1) provide plaintiff with a copy of the rules it thought would govern the arbitration; (2) tell plaintiff where she could find a copy of the rules; (3) offer to explain the arbitration provision; and (4) give plaintiff an opportunity to review any arbitration rules, were all factors that impacted the court's finding with respect to the moderate procedural unconscionability. Thus, the Carbajal court held that "the [a]greement has a moderate level of procedural unconscionability based on its adhesive nature, the employment context in which it arose, failure to identify the governing AAA rules, and [defendant's] failure to provide [plaintiff] with a copy of the governing rules or the opportunity to review any rules before she was required to sign the [a]greement." (Id. at 247.)

The Court incorporates the declaration of Plaintiff and the declaration of Fries from above and applies it to its discussion of procedural unconscionability. The Court finds that the Mutual Arbitration Agreement possesses a moderate degree of procedural unconscionability and that the facts here are similar to those in Carbajal. Plaintiff had to accept the terms of the Mutual Arbitration Agreement in order to become employed by CCL. (Fries Decl. at ¶¶ 13-15, 17.) Additionally, a review of the Mutual Arbitration Agreement indicates that arbitration hearings

are to be conducted "pursuant to the Solution Channel Program Guidelines." (Fries Decl., Exhibit C at ¶ i (1).) The Mutual Arbitration Agreement does not indicate whether or not AAA rules will apply to arbitrations arising from the Mutual Arbitration Agreement and only indicates that "[t]he arbitration shall be held before one arbitrator who is a current member of the American Arbitration Association (AAA) and is listed on the Employment Dispute Resolution Roster." (Id., Exhibit C at ¶ H.) A review of the Solution Channel Program guidelines shows that it does not indicate which AAA rules will apply to such arbitration and only indicates that "[s]hould a covered claim proceed to arbitration, the American Arbitration Association (AAA) will be the administrator of the claim." (Id. at Exhibit C.) Defendants provided the Court with the current AAA Employment Arbitration Rules and Mediation Procedures as Exhibit E in support of their motion to compel arbitration. Defendants, however, did not authenticate such exhibit via a declaration and did not indicate in any declaration that Plaintiff had access to such rules when signing the Mutual Arbitration Agreement or was given some other means to access such rules.

Therefore, the Court finds that the Mutual Arbitration Agreement possesses a moderate degree of procedural unconscionability.

ubstantive Unconscionability

Plaintiff contends that the Mutual Arbitration Agreement is substantively unconscionable because: (1) it does not provide for adequate discovery; (2) it does not provide for a neutral arbitrator; and (3) it bars Plaintiff from all types of relief otherwise available in court and requires Plaintiff to bear unreasonable costs.

Substantive unconscionability is "generally described as unfairly one-sided. One such form of substantive unconscionability exists where only one party's claim against another party is subject to arbitration and there exists "a modicum of bilaterality." (Sonic-Calabasas A, Inc. v. Moreno (2013) 57 Cal.App.4th 1109, 1133.) "A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather the term must be so one-sided as to shock the conscience." (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246.) Where one-sidedness exists with respect to an arbitration agreement, "business realities that create the special need for such advantage" must either be explained in the contract or "must be factually established." (Armendariz v. Foundation Health Psychare Services, Inc. (2000) 24 Cal.4th 83, 117.) "The California Supreme Court has stated that an arbitration agreement between an employer and employee cannot be made to serve as a vehicle for the waiver of statutory rights." (Fitz v. NCR Corp. (2004) 118 Cal.App.4th 702, 712.) "In order to ensure that mandatory arbitration agreements are not used to curtail an employee's

public rights, the California Supreme Court in Armendariz set forth five minimum requirements." (Id. at 712.) "Arbitration agreements in the employer-employee context must provide for: (1) neutral arbitrators, (2) more than minimal discovery, (3) a written award, (4) all types of relief that would otherwise be available in court, and (5) no additional costs for the employee beyond what the employee would incur if he or she were bringing the claim in court." (Id. at 712-713.)

Adequate Discovery

"Adequate discovery is indispensable for the vindication of statutory claims." (Id. at 715.) "[A]dequate discovery does not mean unfettered discovery." (Id.) "And parties may agree to something less than the full panoply of discovery." (Id.) "[T]he desire for simplicity must be balanced with the need for adequate enforcement of FEHA claims." (Id. at 716.) "Employees are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by he arbitrator(s) and subject to limited judicial review." (Id.) "[A]rbitration agreements must ensure minimum standards of fairness so employees can vindicate their public rights." (Id.) "Granting the arbitrator discretion to determine whether additional discovery is necessary . . . is an inadequate safety valve." (Id. at 717.) In the FEHA context where there exist limitations on discovery pursuant to an arbitration "although equally applicable to both parties, [the limitations] work to curtail the employee's ability to substantiate any claim against [their employer]" because the employer is likely in possession of the majority of evidence relevant to the claims against it. (Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1332.) "[I]t is undisputed that some discovery is often necessary for vindicating a FEHA claim." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 106.) In the context of arbitration in connection with a FEHA claim an employee is "at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review." (Id.) By agreeing to arbitrate a FEHA claim, an employer "has already impliedly consented to such discovery." (Id.) "California courts do not by any means require that an arbitration agreement permit unfettered discovery." (Sanchez v. Carmax Auto Superstores California, LLC (2014) 224 Cal.App.4th 398, 404.) "Parties may certainly agree to something less than the full panopoly of discovery provided in [a civil action]." (Id.) "[A]rbitration is meant to be a streamlined procedure. Limitations on discovery . . . is one of the ways streamlining is achieved." (Id. (discovery was adequate where arbitration agreement allowed for three depositions, 20 interrogatories, and the exchange of documents in a FEHA action).)

The Court finds that the Mutual Arbitration Agreement and the Solution Channel Program Guidelines do provide for adequate discovery. The Mutual Arbitration Agreement states that "[t]he arbitrator will decide all discovery disputes related to the arbitration." (Fries Decl., Exhibit C at ¶ i (2).) The Solution Channel Program Guidelines indicate that with respect to arbitration "[e]ach party will be permitted to take up to four (4) depositions and allowed up to 20 total interrogatories (including subparts) and up to 15 total requests for documents to the other party, whether the interrogatories and requests for documents are sent at one time or in increments." (Fries Decl., Exhibit C at pg. 18.) Furthermore "[a]ny disagreements regarding the exchange of information or depositions will be resolved by the arbitrator to allow a full and equal opportunity to all parties to present evidence that the arbitrator deems material and relevant to the resolution of the dispute." (Id.)

The Court finds that Plaintiff's citation to Kinney for the proposition that the Mutual Arbitration Agreement does not provide for adequate discovery is not persuasive. Unlike in the instant action, the arbitration agreement in Kinney only allowed interrogatories for the purpose of seeking the identification of potential witnesses. (Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1326.) Moreover, the arbitration agreement at issue in Kinney did not provide for an arbitrator to resolve disputes with respect to the exchange of information or depositions. (Id.)

The Court finds that Plaintiff's citation to Fitz for the proposition that the Mutual Arbitration Agreement does not provide for adequate discovery is also not persuasive. Unlike in the instant action, the arbitration agreement in Ftiz only allowed the parties two depositions each and, in addition, any expert witnesses who were expected to testify at the arbitration. (Fitz v. NCR Corp. (2004) 118 Cal.App.4th 702, 709.) Moreover, the arbitration agreement at issue in Fitz prohibited any discovery unless the arbitrator found a compelling need for such discovery. (Id.) Here, there is no compelling need requirement for discovery in connection with the Mutual Arbitration Agreement. Thus, the arbitration agreement in Fitz was much more restrictive than the Mutual Arbitration Agreement. Also, the discovery limitations in the Mutual Arbitration Agreement apply to both parties and such limitations do not "shock the conscience."

Neutral Arbitrator

Plaintiff contends that by limiting the scope of arbitrator selection to AAA, CCL will be able to gain an advantage as a "repeat player."

"The fact an employer repeatedly appears before the same group of arbitrators conveys distinct

advantages over the individual employee." (Mercuro v. Superior Court (2002) 96 Cal.App.4th 167, 178.) "These advantages include knowledge of the arbitrators' temperaments, procedural preferences, styles and the like and the arbitrators' cultivation of further business by taking a split the difference approach to damages." (Id.) "In Armendariz, the court acknowledged [v]arious studies that arbitration is advantageous to employers . . . because it reduces the size of the award that the employee is likely to get, particularly if the employer is a repeat player in the arbitration system." (Id.) "While our Supreme Court has taken notice of the repeat player effect, the court has never declared this factor renders the arbitration agreement unconscionable per se." (Id.)

According to the Solution Channel Program Guidelines: (1) the parties will jointly select an arbitrator; (2) CCL will obtain from the AA a list of five potential arbitrators deemed by AAA to have significant experience arbitrating employment claims; (3) CCL will e-mail the employee the list of arbitrators and the employee will have the first opportunity to strike the name of an arbitrator that the employee does not wish to preside over the arbitration; (4) CCL will then have the opportunity to strike one name from the list and will e-mail the employee such decision; and (5) the parties will continue to take turns striking names until there is just one arbitrator name left on the list. (Fries Decl., Exhibit C at p. 17-18.) The Solution Channel Program Guidelines state that "[t]he remaining arbitrator on the list will serve as the arbitrator, so long as he or she is available within the timeless required by this Program. [CCL] will notify AAA of the parties' choice for arbitrator, and will notify you by email when the arbitrator has been confirmed to preside over the claim." (Id., Exhibit C at p. 18.)

The Mutual Arbitration Agreement explicitly states that the arbitrator will be "private and neutral . . . [and] be jointly chosen by [Plaintiff] and [CCL]." The Court finds that Plaintiff's citation to Mercuro is not persuasive. (Mercuro v. Superior Court (2002) 96 Cal.App.4th 167, 179.) In Mercuro, the arbitration agreement at issue indicated that the arbitrator would be selected by the arbitration service. Here, however, the parties jointly participate in choosing the arbitrator and the AAA has no role in selecting an arbitrator. Moreover, even considering that the AAA was a "repeat player," under Mercuro that would not render the Mutual Arbitration Agreement as unconscionable. The Mutual Arbitration Agreement provides for a neutral process for selecting an arbitrator.

Therefore, the Court finds that the Mutual Arbitration Agreement provides for a neutral arbitrator.

Barring Plaintiff from Relief Otherwise Available and Imposing Unreasonable Costs

Plaintiff contends that the Mutual Arbitration Agreement requires Plaintiff to bear her own costs, fees, and expenses, and thus bars her from seeking all types of relief available to her in court.

"[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 110-111.) "This rule will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer." (Id. at 111.) "[A] mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration." (Id. at 113.) An arbitration agreement "must be interpreted to implicitly include an agreement to proportion costs in a manner that is reasonable for the employee/claimant." (Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1081.)

The Court incorporates its recitation of the Mutual Arbitration Agreement from above and applies it to the Court's discussion of unlawful costs. The Mutual Arbitration Agreement provides that CCL will bear the costs of arbitration such as the AAA administrative fees and the arbitrator's fees and expenses. Despite Plaintiff's argument, nothing in the Mutual Arbitration Agreement prohibits Plaintiff from receiving attorneys' fees if she prevails in the arbitration. (Fries Decl., Exhibit C at ¶ K.) The Solution Channel Program Guidelines gives the arbitrator discretion to award "the prevailing party . . . any remedy that the party would have been allowed to recover had the dispute been brought in court." (Fries Decl., Exhibit C at p. 9.) While the Mutual Arbitration Agreement controls over the Solution Channel Program Guidelines in instances of conflicting provisions (Fries Decl., Exhibit C at ¶ M), the Mutual Arbitration Agreement does not take away the arbitrator's discretion to award remedies that may be awarded in court. Under Armendariz, the Mutual Arbitration Agreement impliedly reads that CCL must pay all types of costs unique to arbitration.

The Court finds that the Mutual Arbitration Agreement does not impose unlawful costs on Plaintiff or bar Plaintiff from any type of relief otherwise available in court.

The Mutual Arbitration Agreement meets all of the Armendariz requirements. Based on the discussion above with respect to substantive unconscionability, the Court finds that the Mutual Arbitration Agreement does not evidence any substantive unconscionability. The Mutual

Arbitration Agreement does not shock the conscience in order to be indicative of substantive unconscionability pursuant to Pinnacle.

The Court need not address the severance argument raised by the parties due to the lack of substantive unconscionability being present in the Mutual Arbitration Agreement.

The Court therefore GRANTS Defendants' motion to compel arbitration. The Court orders that arbitration shall proceed with the AAA presiding over such arbitration and pursuant to the current AAA rules with respect to arbitration. The Court STAYS this action pending the completion of arbitration. (Code Civ. Proc. § 1281.4.) The Court sets a status conference for Wednesday, May 12, 2021 at 8:30 a.m. in this department. The parties are ordered to file a joint status report at least seven days prior to the status conference.

Dated this 12th day of August 2020

HOLLY J. FUJIE

_____
Hon. Holly J. Fujie
Judge of the Superior Court

[1] Fries declares that: (1) in order to agree to and acknowledge the Mutual Arbitration Agreement, an individual must click the Mutual Arbitration Agreement link contained in the onboarding system (Fries Decl. at ¶ 14); (2) at the end of the Mutual Arbitration Agreement, an individual is presented with a radio button and acknowledgement language in all capitalized text (Id. at ¶ 15 and Exhibit D); (3) if an individual acknowledged the terms of the Mutual Arbitration Agreement during the onboarding process, he or she would select the radio button next to the acknowledgement and then click "Submit" (Id. at ¶ 16); (4) Plaintiff agreed to be bound by the Mutual Arbitration Agreement (Id. at 18 and Exhibit A); and (5) the onboarding system records show that Plaintiff acknowledged the Mutual Arbitration Agreement (Id. at ¶ 19 and Exhibit B.)

Moving parties are ordered to give notice of this ruling.

Post-Arbitration Status Conference is scheduled for 05/12/2021 at 08:30 AM in Department 56 at Stanley Mosk Courthouse.

Joint Status Report seven court days before the next hearing.

EXHIBIT 42: MICHELLE BOOKER V. CHARTER COMMUNICATIONS, LLC., A DELAWARE LIMITED LIABILITY COMPANY, (LOS ANGELES SUPERIOR COURT CASE NO. 20STCV07680), RE RULING ON SUBMITTED MATTER, JULY 17, 2020

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 19

20STCV07680 July 17, 2020
MICHELLE BOOKER vs CHARTER COMMUNICATIONS, LLC, A DELAWARE LIMITED LIABILITY COMPANY 3:11 PM

Judge: Honorable Stephanie M. Bowick CSR: None
Judicial Assistant: R. Duarte ERM: None
Courtroom Assistant: None Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 07/10/2020, now rules as follows:
RULING

After consideration of the briefing filed and oral argument at the hearing, Defendant Charter Communications LLC's Motion to Compel Arbitration is GRANTED.

Defendant's request for $4,455.00 in reasonable attorney's fees is GRANTED, payable by Plaintiff Michelle Booker within 30 days through Defendant's counsel of record.

The case is stayed in its entirety pending binding arbitration of the claims set forth in Plaintiff Michelle Booker's Complaint.

A Status Conference Re: Arbitration is scheduled for March 1, 2021 at 8:30 a.m. A Joint Status Report is ordered to be filed by February 19, 2021.

Order entered this date.

Counsel for Defendant to give notice.

STATEMENT OF THE CASE

This case arises in an employment dispute. Plaintiff Michelle Booker ("Plaintiff") brings suit against Defendant Charter Communications LLC ("Defendant") for:

1. Discrimination in Violation of Gov't Code §§12940 et seq.;

2. Retaliation in Violation of Gov't Code §§12940 et seq.;
3. Failure to Prevent Discrimination and Retaliation in Violation of Gov't Code §12940(k);
4. Failure to Provide Reasonable Accommodations in Violation of Gov't Code §§12940 et seq.;
5. Failure to Engage in A Good Faith Interactive Process in Violation of Gov't Code §§12940 et seq.;
6. Violation of Gov't Code §12945 (Pregnancy Disability Leave);
7. Violation of California Family Rights Act, Gov't Code §§12945.2 et seq.;
8. Wrongful Termination in Violation of Public Policy; and
9. Declaratory Judgment.

GROUNDS FOR MOTION

Defendant Charter Communications, LLC moves the Court for an order compelling Plaintiff Michelle Booker to submit her claims against Defendant to final and binding arbitration in the manner specified in the Arbitration Agreement. Defendant further moves for an order to stay further proceedings pending completion of arbitration. Defendant moves on the grounds that all of Plaintiff's claims are subject exclusively to resolution through final and binding arbitration as required by the parties' written agreement to arbitrate all employment-related disputes arising out of the employment relationship with Defendant. Defendant moves on the grounds that the parties' written agreement to arbitrate is required to be enforced by this Court under the Federal Arbitration Act ("FAA").

Defendant further requests an order that Plaintiff pay Defendant's attorneys' fees in the amount of $4,455.00.

REQUEST FOR JUDICIAL NOTICE

Defendant's unopposed request for judicial notice is GRANTED. (Evid. Code § 452(d).)

PLAINTIFF'S EVIDENTIARY OBJECTIONS

Declaration of John Fries

1. Entire Declaration. OVERRULED.

2. ¶ 1. OVERRULED.
3. ¶ 3. OVERRULED.
4. ¶ 5. OVERRULED.
5. ¶ 6. OVERRULED.
6. ¶ 7. OVERRULED.
7. ¶ 8. OVERRULED.
8. ¶ 9. OVERRULED.
9. ¶ 10. OVERRULED.
10. ¶ 11. OVERRULED.
11. ¶ 12. OVERRULED.
12. ¶ 13. OVERRULED.
13. ¶ 14. OVERRULED.
14. ¶ 15. OVERRULED.
15. ¶ 16. OVERRULED.
16. ¶ 18. OVERRULED.
17. ¶ 19. OVERRULED.
18. ¶ 20. OVERRULED.
19. ¶ 21. OVERRULED.
20. ¶ 22. OVERRULED.
21. Ex. A. OVERRULED.
22. Ex. B. OVERRULED.
23. Ex. C. OVERRULED.
24. Ex. D. OVERRULED.
25. Ex. E. OVERRULED.
26. Ex. F. OVERRULED.

Declaration of Daniel Vasey

27. Entire Declaration. OVERRULED.
28. ¶ 2. OVERRULED.
29. ¶ 4. OVERRULED.
30. ¶ 5. OVERRULED.
31. ¶ 6. OVERRULED.
32. ¶ 7. OVERRULED.
33. ¶ 8. OVERRULED.
34. Ex. A. OVERRULED.
35. Ex. B. OVERRULED.

Declaration of Pamela Brown

36. Entire Declaration. OVERRULED.
37. Portions of ¶ 2. OVERRULED.
38. ¶ 4. OVERRULED.
39. ¶ 5. OVERRULED.
40. ¶ 7. OVERRULED.
41. ¶ 8. OVERRULED.
42. ¶ 10. OVERRULED.
43. ¶ 11. OVERRULED.
44. Ex. G. OVERRULED
45. Ex. G. OVERRULED. [this objection appears to duplicate No. 44.]

Declaration of Erika Silverman

46. Entire Declaration. OVERRULED.
47. Portions of ¶ 2. OVERRULED.
48. ¶ 3. OVERRULED.
49. ¶ 4. OVERRULED.
50. ¶ 5. OVERRULED.

DISCUSSION

"California law reflects a strong public policy in favor of arbitration as a relatively quick and inexpensive method for resolving disputes. To further that policy, section 1281.2 requires a trial court to enforce a written arbitration agreement unless one of three limited exceptions applies. Those statutory exceptions arise where (1) a party waives the right to arbitration; (2) grounds exist for revoking the arbitration agreement; and (3) pending litigation with a third party creates the possibility of conflicting rulings on common factual or legal issues." (Acquire II, Ltd. v. Colton Real Estate Group (2013) 213 Cal.App.4th 959, 967 [citations omitted]; Code Civ. Proc. § 1281.2.)

A. THRESHOLD PROCEDURAL REQUIREMENTS
Procedurally, a motion to compel arbitration or stay proceedings must state verbatim the provisions providing for arbitration, or must have a copy of them attached. (Cal Rules of Court,

Rule 3.1330.) Defendant complies with this requirement. (Fries Decl. ¶ 10-17; Ex. C, ps. 1-2; Ex. D.)

A party seeking to compel arbitration must also "plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement." (Mansouri v. Superior Court (2010) 181 Cal.App.4th 633, 640-41.) Counsel for Defendant sets forth evidence that a prior demand for arbitration was made and subsequently refused. (Erika Silverman Decl. ¶ 2, Ex. I.)

B. FEDERAL ARBITRATION ACT
As an initial matter, Defendant argues that the Federal Arbitration Act ("FAA") governs the agreement. (Motion at 2.) Plaintiff does not contest that the FAA governs. (See generally, Opp.) The Court concludes that the FAA governs here. (See Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal.App.4th 1276, 1284-1288.)

C. DEFENDANT'S BURDEN: WHETHER AN ENFORCEABLE ARBITRATION AGREEMENT COVERS PLAINTIFF'S CLAIMS

In deciding a petition to compel arbitration, trial courts must decide first whether an enforceable arbitration agreement exists between the parties, and then determine the second gateway issue of whether the claims are covered within the scope of the agreement. (Omar v. Ralphs Grocery Co. (2004) 118 Cal.App.4th 955, 961; see also Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236 ["[g]eneral principles of contract law govern whether parties have entered a binding agreement to arbitrate"].) The opposing party has the burden to establish any defense to enforcement. (Gatton v. T—Mobile USA, Inc. (2007) 152 Cal.App.4th 571, 579 ["The petitioner, T—Mobile here, bears the burden of proving the existence of a valid arbitration agreement and the opposing party, plaintiffs here, bears the burden of proving any fact necessary to its defense"].)
"[I]t is settled that an employer may unilaterally alter the terms of an employment agreement, provided such alteration does not run afoul of the Labor Code. " (Davis v. Nordstrom, Inc. (9th Cir. 2014) 755 F.3d 1089, 1093 [citing Schachter v. Citigroup, Inc. (2009) 47 Cal.4th 610, 619].) "Where an employee continues in his or her employment after being given notice of the changed terms or conditions, he or she has accepted those new terms or conditions." (Id.; see also Avery v. Integrated Healthcare Holding, Inc. (2013) 218 Cal.App.4th 50, 63; 84 Cal. App. 4th 416; Craig v. Brown & Root, Inc. (2000) 84 Cal.App.4th 416, 420.)

Further, under the mailbox rule, "a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Craig v. Brown & Root, Inc. (2000) 84 Cal.App.4th 416, 421.)

Defendant has submitted evidence of the following:

1. On October 6, 2017, Charter implemented a mandatory arbitration agreement through Solution Channel, Charter's employment-based dispute resolution program. (John Fries Decl. ¶¶ 4-5.) The Solution Channel was announced by email to all non-union employees below the level of Executive Vice President who were active or who were not on leave of absence on that date (the "Solution Channel Announcement"). (Id. ¶ 5.) Employees received the Solution Channel Announcement from the Executive Vice President of Human Resources at the Charter work email address assigned to them. (Id. ¶ 6.) A copy of the email is provided as Defendant's Exhibit A. (Id. ¶ 7, Ex. A.) The Solution Channel Announcement indicated to employees that they would be enrolled in the Solution Channel and subject to binding arbitration unless they opted out in 30 days; the 30-day period ended on November 5, 2017. (Id. ¶ 8.). The Solution Channel Announcement stated: "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.)

2. Defendant sets forth evidence that Plaintiff received the Solution Channel Announcement and opened the email. (Daniel Vassey Decl. ¶¶ 4-7, Exhibits A, B.) The Announcement contained a link to the Charter intranet site named Panorama; Panorama contained additional information about the Solution Channel. (John Fries Decl. ¶ 9, Ex. B.) The Solution Channel webpage on Panorama included a reference and link to Charter's Mutual Arbitration Agreement. (Id. ¶ 10, Ex. C.) The Mutual Arbitration Agreement requires any dispute arising out of Plaintiff's employment with Charter to be resolved through binding arbitration. (See Id. ¶ 10, Ex. C, p. 1 ["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."; see also Ex. C. pp. 1-2.) The Solution Channel webpage on Panorama included information and a "click here" link that allowed employees to opt out of the Solution Channel Program by launching a program called PeopleSoft (Id. ¶¶ 11-12.) From PeopleSoft, employees

could select "Self Service" and then select "Solution Channel," at which they could opt out of the Solution Channel Program by checking a box next to the phrase "I want to opt out of Solution Channel," enter their name, and click "SAVE." Employees had the option to print the page. (Id. ¶¶ 13, 14, Ex. D.) Employees who opted out received a confirmation email. (Id. ¶ 15.) Employees who did not opt out on or before November 5, 2017, were enrolled in the Program, and could view their enrollment status in PeopleSoft. (Id. ¶ 16.) Plaintiff was an employee on October 6, 2017, and was sent the Solution Channel Announcement. (Id. ¶ 20, Ex. E.) Plaintiff did not appear on the list of Charter employees who opted out of the Solution Channel Program. (Id. ¶¶ 18, 21.)

The Court finds that Defendant meets its evidentiary burden in showing that Defendant sent Plaintiff the Solutions Channel Announcement on October 6, 2017, which changed the terms of Plaintiff's employment. (See Fries Decl. ¶ 20, Ex. E.) Defendant was permitted to change the terms of Plaintiff's employment through the unilateral implementation of the Solutions Channel and by sending employees, including Plaintiff, the Solutions Channel Announcement. Moreover, Plaintiff's actions in continuing to work for Defendant constituted Plaintiff's acceptance of changes to her terms of employment. (See Davis, supra, 755 F.3d at 1093.)

Further, as explained above, under the mailbox rule, "a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Craig, supra, 84 Cal.App.4th at421.) Once evidence is presented showing that the letter was sent, the burden shifts to the opposing party to show that it was not received. (Id.) As discussed above, Defendant has shown that the Announcement was emailed to Plaintiff on October 6, 2017. The Court overruled Plaintiff's evidentiary objections to Defendant's evidence, as set forth above. Plaintiff fails to submit any admissible evidence establishing that she did not receive the Solution Channel Announcement on her work email account during the 30-day opt out period. Plaintiff's declaration states that she does not remember reading the email and did not have time to review all company-wide emails (Michelle Booker Decl. ¶ 4.) Plaintiff admits to having received approximately 10 emails per hour in her position working in a customer call center. (Id. ¶ 4.) Plaintiff does not conclusively state that she never received an email regarding the Solution Channels Announcement. (See id.) Defendant has submitted evidence that she opened the Announcement three times. The Court concludes that Plaintiff received the Solutions Channel Announcement, sent on October 6, 2017, and had the opportunity to opt-out within the 30-day time period.

The Court also find that the Solution Channel Announcement clearly explains the issue of arbitration. Specifically, it states, in pertinent part, as follows:

"By 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. 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." (Fries Decl. Ex. E, p. 2.)

The Court finds that this language sufficiently shows the nature of the agreement and the terms were not hidden.

The Court disagrees with Plaintiff's reliance on OTO, L.L.C. v. Kho (2019) 8 Cal.5th 111 [cert. denied sub nom. OTO, L.L.C. v. Ken Kho (U.S., June 8, 2020, No. 19-875) 2020 WL 3038293].) OTO is distinguishable. Further, as explained above, the Solution Channel Announcement clearly explains the arbitration in plain language, (Fries Decl. Ex. E, p. 2) and the arbitration agreement itself contains language in all capital letters that clearly states the nature of the agreement. (Ex. C, p. 1.)

For the reasons set forth above, the Court finds that Defendant meets its burden in showing the existence of a valid arbitration agreement by a preponderance of the evidence and that Plaintiff agreed to the Solutions Channel Program's Mutual Arbitration Agreement. The Court finds that Plaintiff's claims set forth in the Complaint fall within the scope of the Agreement. Therefore, the burden shifts to Plaintiff to set forth a defense to enforcement.

D. PLAINTIFF'S BURDEN: WHETHER PLAINTIFF CAN ESTABLISH ANY DEFENSE TO ENFORCEMENT

It is well-established that "arbitration agreements are valid, irrevocable, and enforceable, except upon grounds that exist for the revocation of a contract generally." (Ajamian v. CantorCO2e, L.P. (2012) 203 Cal.App.4th 771, 781.)

As explained above, Plaintiff's failure to read the email announcement does not affect the enforceability of the Arbitration Agreement. Moreover, the terms of the Arbitration Agreement were not hidden.

"The party resisting arbitration bears the burden of proving unconscionability." (Pinnacle

Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 247.) "Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (Id. at. 246.) Substantive unconscionability addresses overly harsh or one-sided results. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114.) Both procedural unconscionability and substantive unconscionability must be shown, but ' they need not be present in the same degree' and are evaluated on 'a sliding scale.'" (Pinnacle at 247.) "[P]rocedural unconscionability requires oppression or surprise." Oppression occurs "where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." (Id. at 247; see also Carmona v. Lincoln Millennium Car Wash, Inc. (2014) 226 Cal.App.4th 74, 83–84 [surprise where enforceability clause was "hidden" by failing to translate that portion in English only, where companies knew plaintiffs required Spanish translations because they provided some translation].)

Plaintiff argues that the arbitration agreement fails because it does not provide for adequate discovery. (Opp. at 11-12.) The Court disagrees with these arguments. The agreement provides for four depositions, twenty interrogatories, and fifteen requests for production. (Defendant's Ex. C at p. 18.) The amount of discovery provided is adequate. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 104-105 [parties to arbitration agreement are permitted to agree to something less than the full panoply of discovery]; Sanchez v. Carmax Auto Superstores California, LLC, 224 Cal. App. 4th 398, 404 (2014) [3 depositions and 20 interrogatories sufficient].) Further, the agreement provides as follows: "Any disagreements regarding the exchange of information or depositions will be resolved by the arbitrator to allow a full and equal opportunity to all parties to present evidence that the arbitrator deems material and relevant to the resolution of the dispute." (Ex. C. p. 18.) Hence, the Court would expect that the arbitrator could decide and order what discovery is necessary for full and fair exploration of the issues in dispute. Accordingly, the Court does not find that the discovery provisions are unconscionable.

Plaintiff further, argues that the agreement is silent as to whether judicial review of the arbitrator's award is available. (Opp. at 11-12.) However, the agreement specifically provides that any decision by the arbitrator will contain findings of fact and the legal reasons for the decision and any award (Exh. C, pp. 3-4.) Accordingly, the Court agrees with Defendant that the findings would provide an adequate mechanism for judicial review.

Plaintiff also argues that the agreement fails to provide for all types of relief. (Opp. at 11-12.)

The Court agrees with Defendant that the provision is not one-sided. (Ex. C., p. 2.) Further, even if the agreement exempts unfair competition, theft, or embezzlement claims, none of these claims are alleged in the instant Complaint. Therefore, the arguments by Plaintiff on this point are irrelevant. Additionally, no Private Attorney General Act ("PAGA") claim is asserted in Plaintiff's Complaint.

As to Plaintiff's arguments that the agreement is procedurally unconscionable because it was presented as a condition of employment, the Court does not find them persuasive. As explained above, the evidence shows that Plaintiff was provided the opportunity to "opt-out" of the agreement. (See Ex. E, p. 2.) Thus, the agreement was not presented on a "take it or leave it" basis. (See, e.g., Circuit City Stores, Inc. v. Najd (9th Cir. 2002) 294 F.3d 1104, 1108.) Further, the Court notes that Defendant has set forth evidence that approximately ten percent of Charter employees opted out of the agreement; this evidence gives credibility to Defendant's argument that the agreement to arbitrate was completely voluntary. (See Vasey Decl. ¶ 8). In addition, "cases uniformly agree that a compulsory pre-dispute 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." (Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal.App.4th 1105, 1127.)

In addition, with respect to Plaintiff arguments that the arbitration rules are unclear and were not attached, the Court finds that Plaintiff could easily access the guidelines for dispute resolution set forth in the Solutions Channel. (See Fries Decl. ¶¶ 12, 13, Ex. D.) Further, any failure to attach arbitration rules is, standing alone, insufficient grounds to find procedural unconscionability. (Peng v. First Republic Bank (2013) 219 Cal.App.4th 1462, 1472.)

Finally, the Court finds that 30 days is sufficient time for Plaintiff to have opted-out. (See, e.g., Circuit City, supra, 294 F.3d 1104 at 1109.) Therefore, the agreement was voluntary. (Armendariz, supra, 24 Cal.4th at 97-99). However, by failing to opt-out, Plaintiff consented to arbitration.

The Court finds that Plaintiff has not sufficiently shown that the agreement was procedurally or substantively unconscionable.

For all of the reasons articulated above, the Court finds that Plaintiff has not met her burden to show any defense to enforcement of the parties' arbitration agreement.

Accordingly, Defendant Charter Communications LLC's Motion to Compel Arbitration is GRANTED. The case is STAYED in its entirety pending binding arbitration of the claims set forth in Plaintiff's Complaint.

E. ATTORNEY'S FEES

Defendant requests reasonable attorney's fees for the expense of bringing the instant motion. Defendant's request for $4,455.00 in attorney's fees is GRANTED. The Court finds that the Arbitration Agreement specifically provides for reasonable attorney's fees if a motion to compel arbitration is successful. Defendant is the prevailing party on this motion. Accordingly, the award of attorney's fees are appropriate here. (Roberts v. Packard, Packard & Johnson (2013) 217 Ca. App. 4th 822, 842-843).

The Court also finds that the requested hourly rate and number of hours spent are reasonable considering the nature of the case, the issues presented in this motion, the experience and background of counsel, and the going market rates in the Los Angeles legal community. "The reasonableness of attorney fees is within the discretion of the trial court, to be determined from a consideration of such factors as the nature of the litigation, the complexity of the issues, the experience and expertise of counsel and the amount of time involved. [citation] The court may also consider whether the amount requested is based upon unnecessary or duplicative work." (Wilkerson v. Sullivan (2002) 99 Cal.App.4th 443, 448.) The Court does not find the request excessive or unwarranted.

Certificate of Mailing is attached.

EXHIBIT 43: STACY DUKES V. CHARTER COMMUNICATIONS, LLC, ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. 19STCV30853), RE HEARING ON MOTION TO COMPEL ARBITRATION; CASE MANAGEMENT CONFERENCE, JANUARY 16, 2020

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 52

19STCV30853 January 16, 2020
STACY DUKES vs CHARTER COMMUNICATIONS LLC, A DELAWARE LIMITED LIABILITY COMPANY, et al. 8:31 AM

Judge: Honorable Susan Bryant-Deason
Judicial Assistant: Maria C. Faune
Courtroom Assistant: M. Isunza

CSR: Tracy Dyrness, CSR#12323
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Ruben Guerra

For Defendant(s): Kate Juvinall

NATURE OF PROCEEDINGS: Hearing on Motion to Compel Arbitration; Case Management Conference

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Tracy Dyrness, CSR#12323, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The matter is called for hearing.

The court having read the papers and heard the arguments rules as follows:

Plaintiff Stacy Dukes' ("Plaintiff") evidentiary objections are all OVERRULED.

The court finds that Plaintiff agreed to arbitration of the causes of action asserted in this action. Defendant Charter Communications, LLC ("Defendant") presented the declaration of John Fries, who is currently Vice President, HR Technology and worked in HR technology and reporting since 2003. Fries Decl., ¶ 1. Fries presented an email clearly discussing the arbitration agreement and how to opt out of the arbitration agreement. The email included the effect of the arbitration agreement, the process and timeframe for opting out, and the effect of failing to opt out. Fries Decl., Ex. A.

Plaintiff's claim that it never saw the email announcing the arbitration agreement is wholly unsupported. Defendant supports its claim that Plaintiff saw the email by providing declarations of two Charter Communications employees responsible for electronic records. Vasey Decl., ¶ 7, Ex. B; Fries Decl., ¶ 10.

Plaintiff's claim that the parties never entered into an arbitration agreement because of the Uniform Electronic Transactions Act (UETA) is misguided. The UETA is inapplicable in this case. The UETA addresses the legal effect and enforceability of an electronic record, signature, or contract. The current case is not about an electronic signature, but about implied assent. Civil Code §§1633.1 et seq..

Plaintiff's argument that J.B.B. Inv. Partners, Ltd. v. Fair (2014) 232 Cal.App.4th 974, 989 requires that Defendant produce explicit proof that Plaintiff agreed to conduct business electronically is similarly misguided. The holding in J.B.B. Inv. Partners, where a court held that it would not enforce a settlement agreement absent a showing of an agreement to transact electronically, is not applicable to the current case. Id. The relevant agreement in J.B.B. Inv. Partners was a settlement agreement, which must be in writing to be valid. Id. , at 985 The current litigation is about an arbitration agreement, which may be accepted without a writing. Marenco v. DirecTV LLC, 233 Cal. App. 4th 1409, 1417 (2015). Here, Defendants sufficiently argue that Plaintiff agreed to the arbitration agreement through implied assent, which would not require a writing.

The motion to compel arbitration is GRANTED and the proceedings are dismissed pursuant to CCP 1285.4. Counsel may return for confirmation or vacation of any award.

Moving Party is ordered to give notice.

EXHIBIT 44: LUCILA MARTINEZ V. SPECTRUM FORMALLY TIME WARNER CABLE (LOS ANGELES SUPERIOR COURT CASE NO. 19CHCV00275), RE HEARING ON MOTION TO COMPEL ARBITRATION, NOVEMBER 25, 2019

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

North Valley District, Chatsworth Courthouse, Department F49

19CHCV00275 November 25, 2019
LUCILA MARTINEZ vs SPECTRUM FORMALLY TIME WARNER CABLE 8:30 AM

Judge: Honorable Stephen P. Pfahler
Judicial Assistant: Daisy Vallin
Courtroom Assistant: Patricia Reynoso

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Lucila Martinez by Miguel A. Muro

For Defendant(s): James Allen Bowles by Elissa L. Gysi

NATURE OF PROCEEDINGS: Hearing on Motion to Compel Arbitration

The matter is called for hearing.

The Court reads and considers the moving papers in support of, in opposition to and reply to the motion.

After oral argument the Court takes the matter under submission.

LATER:

The Court having taken the above entitled matter under submission now rules as follows:

RULING: Granted.
Defendant Charter Communications, Inc. dba Spectrum moves to compel arbitration and stay the action.

"A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement." (Code Civ. Proc., § 1281.2.)

The law creates a general presumption in favor of arbitration. The subject agreement is enforceable pursuant to the Federal Arbitration Act (FAA). (Aviation Data, Inc. v. American

Express Travel Related Services Co., Inc. (2007) 152 Cal.App.4th 1522, 1535.) California law also requires arbitration.

Plaintiff does not deny execution of the agreement, and that all claims arise during the time of employment. Plaintiff only challenges the agreement on grounds of unconscionability, a contract of adhesion, and/or unequal bargaining positions.

Unconscionability claims have both a "'procedural'" and "'substantive'" element. (Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1531.) "'Procedural unconscionability'" concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. (Kinney v. United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1329.) "'The procedural element focuses on two factors: "oppression" and "surprise." "Oppression" arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. "Surprise" involves the extent to which the supposedly agreed upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.'" (Stirlen v. Supercuts, Inc., supra, 51 Cal.App.4th at p. 1532.) "Substantive unconscionability" involves contracts leading to "'"overly harsh"'" or "'"one-sided"'" results.'" … "[U]nconscionability turns … on an absence of 'justification "for it…" [and therefore] must be evaluated as of the time the contract was made.'" (Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1532.)

In the employment context, a mandatory arbitration agreement is enforceable, if it "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 102 ("Armendariz.") Required execution of an arbitration agreement as a condition of employment may constitute an unconscionable provision, where the contract lacks mutuality and/or imposes a disadvantage on the employee. (Armendariz, supra, 24 Cal.4th at pp. 114-118; Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1071-1072.)

Plaintiff argues the agreement constitutes an improper adhesion contract, as it was provided on a "take it or leave it" basis, and without the opportunity to negotiate. The argument lacks any factual support establishing that the "business realities" of the situation imposed an unjustified disadvantage on plaintiff. (Armendariz, supra, 24 Cal.4th at p. 117; O'Hare v. Municipal Resource Consultants (2003) 107 Cal.App.4th 267, 283-284.) The arbitration agreement fully

complies with the requirements of an employment agreement, and therefore protects Plaintiff from any disadvantaged position. (Armendariz, supra, 24 Cal.4th at pp. at pp. 117-118.) [Declaration of Fries.] The arbitration agreement is therefore enforceable.

"If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.4.) The court orders the action stayed.

Moving party to give notice.

On the Court's own motion, the Final Status Conference scheduled for 05/28/2020, and Jury Trial 4 Days scheduled for 06/08/2020 are advanced to this date and vacated .

In light of the Court's granting the motion, the Court hereby sets the following:

Order to Show Cause Re: Arbitration Status is scheduled for 03/25/20 at 08:30 AM in Department F49 at Chatsworth Courthouse. All parties are ordered to separately file in Department F49 and serve a status report informing the Court of the following:
a) The current status of the arbitration, including any future dates;
b) The anticipated date of final resolution; and
c) How the parties wish to proceed with their civil action.

The status report must be filed and served at least 10 calendar days prior to the next OSC date on 03/25/20. Any failure to file a status report in violation of the Court's order may result in sanctions. The case is stayed pending resolution of the arbitration. the present case is placed on the civil inactive list.

The Court hereby stays the case in its entirety.

Clerk to give notice.

Certificate of Mailing is attached.

EXHIBIT 45: ANGELO BRAY, ET AL. V. CHARTER COMMUNICATIONS, INC., ET AL. (LOS ANGELES SUPERIOR COURT CASE NO. BC721229), RULING RE DEFENDANTS' MOTION TO COMPEL ARBITRATION, MARCH 14, 2019

Superior Court of California

County of Los Angeles

Department 36

ANGELO BRAY, et al. Plaintiffs, v. CHARTER COMMUNICATIONS, INC, et al. Defendants.	Case No.: BC721229 Hearing Date: 3/14/2019 **[~~TENTATIVE~~] RULING RE: Defendants' Motion to Compel Arbitration**

The motion is granted. The action is ordered to arbitration.

All proceedings in this matter are stayed pending completion of the arbitration.

Legal Authority

CCP § 1281.2 permits a party to file a petition to request that the court order the parties to arbitrate a controversy. A proceeding to compel arbitration is essentially a suit in equity to compel specific performance of the arbitration agreement. *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 479.

The trial court first determines whether an enforceable arbitration agreement exists between the parties and then whether the plaintiff's claims are covered by the agreement. *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 961. In performing its duty to determine if the parties have agreed to arbitrate, the court is necessarily required to examine and, to a limited extent, construe the underlying agreement. *Eng'rs. & Architects Assn. v. Cmty. Dev. Dept.*

(1994) 30 Cal.App.4th 644, 652-653. "California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration." *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 686.

The party seeking to enforce the arbitration agreement bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence. *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284. The party opposing the petition to compel arbitration bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. *Id.* In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. *Id.*

Discussion

A court must grant a motion to compel arbitration unless it finds either (1) no agreement to arbitrate exists; (2) the right to compel arbitration has been waived; (3) grounds exist for revocation of the agreement; or (4) litigation is pending that may render the arbitration unnecessary or create conflicting rulings on common issues. CCP §1281.2; see *Condee v. Longwood Mgmt. Corp.* (2001) 88 Cal.App.4th 215, 218-19.

Requests for Judicial Notice

Defendants' requests for judicial notice is granted.

Plaintiff Angelo Bray ("Bray")

Agreement to Arbitrate

Defendant Charter Communications ("Charter") provides evidence of the Arbitration Agreement ("Agreement") via the declaration of Chance Cassidy ("Cassidy"). Cassidy states that she was the Senior Director of HR during the time period when Bray began his employment. Cassidy Decl. ¶ 3. Prospective employees were required to log onto a webpage and undergo an "onboarding process", which included agreeing to the Agreement. *Id.* ¶¶ 8,11.

Bray was provided with a unique login ID and password to access the site. *Id.* ¶ 10. Once Bray logged in, he assented to the Agreement. *Id.* ¶ 16.

The court finds that Defendant has met its burden of proving the existence of an arbitration agreement. Bray argues the evidence is insufficient but provides no contrary evidence for the court to make such a finding. Plaintiff also argues that the Agreement provides an exclusion for his claims in this action and that Defendants have waived any right to seek arbitration.

The exception cited here is the Agreement's exclusion of class actions (if Plaintiff's right to such is found not to be waived) from arbitration. *Id.*, Ex. B, 2. Plaintiff's action is not a class action and the exception is not applicable.

The Agreement provides that "all claims" related to Plaintiff's employment are to be determined under arbitration. *Id.*, Ex. B, 1. Here, Plaintiff's claims are related to his employment and thus an agreement to arbitrate his claims exists.

Waiver

The law favors arbitration, and waiver will not be "lightly inferred." The party claiming the other waived the right to arbitrate "bears a heavy burden of proof." *Saint Agnes Med. Ctr. v. PacifiCare of Calif.* (2003) 31 Cal.4th 1187, 1195.

Plaintiff argues that Defendants waived arbitration because Defendants requested additional time to respond to Plaintiff's initial complaint, thus causing a six month delay.

"[T]he court views the litigation as a whole in determining whether the parties' conduct is inconsistent with a desire to arbitrate." *Bower v. Inter-Con Security Systems, Inc.* (2014) 232 Cal.App.4th 1035, 1042.

Here, a review of the court's docket shows nothing to indicate Defendants have acted inconsistent with a desire to arbitrate. No pleadings other than a stipulation to extend time has been filed by Defendants. Plaintiff's reliance on *Sprunk v. Prisma LLC* is misguided, as the Defendant there waited four years to compel arbitration. (2017), 14 Cal. App. 5th 785, 809.

Therefore, the court finds that a waiver has not occurred.

Plaintiffs Andrew Collins; Staci Janisse;

Janene Skillern; and Jacqueline Wright (collectively "CJSW")

Agreement to Arbitrate

Defendants provide evidence of the arbitration agreement via the declaration of Tammie Knapper ("Knapper"). Knapper states she is the Director of HR Technology for Charter. Knapper Decl. ¶ 1. In October 2017, Charter employees were notified by email of the implementation of "Solution Channel", an employment legal dispute resolution program. *Id.* ¶¶ 4-5. The terms of Solution Channel included an arbitration agreement. *Id.* ¶ 4. Employees were given a 30 day option to opt out of the arbitration agreement. *Id.* ¶ 8. Plaintiffs CJSW did not opt out. *Id.* ¶ 20-21.

Unilateral implied contracts are permissible when employees accept them by continuing their employment. *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 63 (citing *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 11).

Plaintiffs make the same arguments as above but, instead of one exclusion, cite to two exclusions. For waiver, as explained above, Defendants have not waived arbitration.

The exceptions referenced by Plaintiffs are, like above, a class action exception but also, an exception for claims "related to corrective action or other performance management that does not result in termination of employment." *Id.*, Ex. D, 2.

With respect to a class action exception, the Agreement does not contain one and the argument is without merit. As to the other exception, Plaintiffs' seventh cause of action is for Wrongful Termination. Further, the "Covered Claims" provision of the Agreement states that "unlawful discrimination or harassment" claims fall under the Agreement.

Therefore, Plaintiffs' claims are not excepted and an agreement to arbitrate exists.

Stay of Proceedings

Upon motion of a party, a court shall stay an action or proceeding pending before it until an arbitration is had in accordance with the order to arbitrate. CCP § 1281.4. Thus, the court

grants Defendants' request and stays the entire action pending the outcome of the arbitration.

Dated: 3/14/19

GREGORY W. ALARCON

Gregory Alarcon

Superior Court Judge

State of California)
County of Los Angeles)
)

Proof of Service by:
US Postal Service
Federal Express

I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

On 9/13/2022 declarant served the within: Appellant's Request to Take Judicial Notice in Support of Opening Brief on the Merits; Exhibits **upon:**

Copies FedEx USPS

ELECTRONICALLY SERVED VIA TRUEFILING:

Eric A. Panitz
PANITZ LAW GROUP APC
18000 Studebaker Road, Suite 700
Cerritos, California 90703
eric@panitzlaw.com
Attorneys for Respondent Angelica Ramirez

Copies FedEx USPS

Copies FedEx USPS

Copies FedEx USPS

the address(es) designated by said attorney(s) for that purpose by depositing **the number of copies indicated above,** of same, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California, or properly addressed wrapper in an Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California

I further declare that this same day the **original and** copies has/have been hand delivered for filing OR the **original and** copies has/have been filed by third party commercial carrier for next business day delivery to:

ELECTRONICALLY FILED VIA TRUEFILING:

SUPREME COURT OF CALIFORNIA
350 McAllister Street
Room 1295
San Francisco, California 94102-4797

I declare under penalty of perjury that the foregoing is true and correct:

Signature: /s/ Stephen Moore, Senior Appellate Paralegal, Counsel Press Inc.; ca@counselpress.com

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RAMIREZ v. CHARTER COMMUNICATIONS**
Case Number: **S273802**
Lower Court Case Number: **B309408**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **jbowles@hillfarrer.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Opening Brief on the Merits
REQUEST FOR JUDICIAL NOTICE	Appellant's Request for Judicial Notice
ADDITIONAL DOCUMENTS	Exhibits to Appellant's Request for Judicial Notice Volume 1 of 2
ADDITIONAL DOCUMENTS	Exhibits to Appellant's Request for Judicial Notice Volume 2 of 2

Service Recipients:

Person Served	Email Address	Type	Date / Time
Elissa Gysi Hill Farrer & Burrill LLP 281338	egysi@hillfarrer.com	e-Serve	9/13/2022 1:48:04 PM
Eric Panitz Panitz Law Group APC 243877	eric@panitzlaw.com	e-Serve	9/13/2022 1:48:04 PM
Casey Morris Hill Farrer & Burrill, LLP 238455	cmorris@hillfarrer.com	e-Serve	9/13/2022 1:48:04 PM
James A. Bowles 89383	jbowles@hillfarrer.com	e-Serve	9/13/2022 1:48:04 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/13/2022
Date

/s/James A. Bowles
Signature

Bowles, James A. (89383)
Last Name, First Name (PNum)

Hill, Farrer & Burrill, LLP

Law Firm