

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: 2:20-cv-08299-SB (ASx)

Date: October 16, 2020

Title: *Michael Gonzales, et al. v. Charter Communications, LLC*

Present: The Honorable **STANLEY BLUMENFELD, JR., U.S. District Judge**

Victor Cruz
Deputy Clerk

N/A
Court Reporter

Attorney(s) Present for Plaintiff(s):
None Appearing

Attorney(s) Present for Defendant(s):
None Appearing

**Proceedings: [TENTATIVE] ORDER GRANTING DEFENDANT’S MOTION
TO DISMISS AND COMPEL ARBITRATION (DKT. NO. 22)**

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

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

Plaintiffs commenced this action on April 17, 2020 in the Northern District of California. (Compl., [Dkt. No. 1](#).) Plaintiffs filed the operative First Amended

Complaint (“FAC”) on June 11, 2020, adding two additional Plaintiffs. (FAC, Dkt. No. 17.) On July 2, Charter filed the instant motion concurrently with a Motion to Transfer Venue. (Mot. to Transfer, Dkt. No. 25.) Judge Edward Chen held a hearing on both motions on August 13, 2020. (Dkt. No. 44.) On August 24, 2020, Judge Chen granted Charter’s Motion to Transfer Venue and referred the instant motion to the Central District for resolution. (Transfer Order, [Dkt. No. 45.](#)) The case was transferred to the Central District on September 10, 2020 (Dkt. No. 47) and was reassigned to this Court on September 28, 2020 (Dkt. No. 55).

A. CHARTER ESTABLISHES SOLUTION CHANNEL

On October 6, 2017, Charter sent out a company-wide email that included an announcement of a new employment-based dispute resolution program, called the Solution Channel Program (“Solution Channel”). (Mot. at 2.) The email states:

By participating in Solution Channel, you and Charter both waive the right to initiate or participate in court litigation (including class, collective and representative actions) Unless you opt out of participating in Solution Channel within the next 30 days, you will be enrolled. Instructions for opting out of Solution Channel are also located on Panorama.

(Decl. of John Fries (“Fries Decl.”), ¶ 8, Ex. A ([Dkt. No. 23](#)); Decl. of Michael Gonzales (“Gonzales Decl.”), ¶ 2, Ex. A ([Dkt. No. 31-2](#))).) The email included a link to the Solution Channel web page, located on Charter’s intranet site called “Panorama.” (Fries Decl. ¶¶ 8-9, Exs. A, B.) The Solution Channel web page included information about the program and a link to Charter’s Mutual Arbitration Agreement (the “Agreement”), and again noted that employees who did not timely opt out would be automatically enrolled in Solution Channel. (*Id.* ¶¶ 9-10, Ex. B.) At the bottom of the web page on Panorama, employees could find information on how to opt out of Solution Channel and a link to do so. (*Id.* ¶¶ 11-13, Ex. B.) By clicking on the hyperlink to opt out of Solution Channel, the employee would then be directed to a page confirming the desire to opt out (or not opt out), requiring the employee to check a box indicating his or her decision to opt out. (*Id.* ¶ 14, Ex. D.) The opt-out page also included a notice, in all capitals: “I ALSO UNDERSTAND THAT IF I DO NOT OPT OUT, I AM SPECIFICALLY CONSENTING TO PARTICIPATION IN SOLUTION CHANNEL.” (*Id.*)

B. FIFTEEN PLAINTIFFS DID NOT OPT OUT OF THE AGREEMENT

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

C. TERMS OF THE AGREEMENT

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

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

You and Charter mutually agree that the following disputes, claims, and controversies (collectively referred to as “covered claims”) will be submitted to arbitration in accordance with this Agreement: all disputes, claims, and controversies that could be asserted in court or before an administrative agency...including without limitation...wage and hour-based claims including claims for unpaid wages, commissions, or other compensation or penalties (including meal and

rest break claims, claims for inaccurate wage statements, claims for reimbursement of expenses)[.]

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

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

II. LEGAL STANDARD

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

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

III. DISCUSSION

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

¹ Ninth Circuit law appears to support the validity of the Agreement, *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (failure to exercise opt out within 30-day period resulted in consent to arbitration agreement), and even recognizes that an employer may unilaterally implement an arbitration agreement for an at-will employee under California law, *Davis v. Nordstrom, Inc.*, 755 F.3d

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

A. THE THRESHOLD QUESTION: WHO DECIDES?

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

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

Paragraph 3 does not unambiguously delegate the unconscionability question to the arbitrator. Taken in context, Paragraph 3 reasonably can be interpreted to delegate only questions whether a specific claim is “covered” within the meaning of Paragraph 1. *See American Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1245 (2006) (“We consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation.”). Charter’s broader interpretation, which calls for the delegation of any gateway arbitrability issue whatsoever, fails to consider the more limited context of the language. *Compare Mohamed v. Uber Technologies*, 848 F.3d 1201, 1209 (9th

1089, 1093 (9th Cir. 2014). (*See* Fries Decl., ¶ 10, Ex. C at § O (noting the Agreement’s application to at-will employees).) But the Court need not reach that issue because it has not been raised. *Stichting Pensioenfonds ABP v. Countrywide Fin.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (failure to oppose “constitutes waiver or abandonment”).

Cir. 2016) (enforcing a provision that delegates “issues relating to the ‘enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision’”). Because Paragraph 3 does not “clearly and unmistakably” delegate the question of unconscionability to the arbitrator, this Court will decide the issue.

B. THE UNCONSCIONABILITY CHALLENGE

Arbitration Plaintiffs bear the burden of proving that the Agreement is unconscionable. *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1158 (9th Cir. 2008); see *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 126 (2019) (“The burden of proving unconscionability rests upon the party asserting it.”) To carry their burden, they must demonstrate that the Agreement was both procedurally and substantively unconscionable. *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83, 114 (2000). Both are required because the doctrine “is meant to ensure that in circumstances indicating an absence of meaningful choice, contracts do not specify terms that are ‘overly harsh,’ ‘unduly oppressive,’ or ‘so one-sided as to shock the conscience.’” *De La Torre v. CashCall*, 5 Cal.5th 966, 982 (2018) (quoting *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015).) However, both need not be present in the same degree—courts invoke a sliding scale, such that “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Armendariz*, 24 Cal. 4th at 114. The unconscionability analysis does not single out arbitration agreements for special treatment; on the contrary, the analysis is the same for any contract so challenged. *Sanchez*, 61 Cal. 4th at 912. “In particular, the standard for substantive unconscionability—the requisite degree of unfairness beyond merely a bad bargain—must be as rigorous and demanding for arbitration clauses as for any contract clause.” *Id.*

1. No Procedural Unconscionability

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

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

Faced with this fundamental impediment, the Arbitration Plaintiffs contend that this was no ordinary opt-out provision. They argue that Charter presented the Agreement in such a distorted and pressured way that they were deprived of any meaningful choice. This argument fails for two reasons.

First, the Arbitration Plaintiffs have not satisfied their burden of proving facts necessary to show unconscionability. *Engalla v. Permanente Med. Grp.*, 15 Cal. 4th 951, 972 (1997) (“[A] party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense”). In fact, the only declaration they submit is from Michael Gonzales, a plaintiff *who opted out* of the Agreement – and that declaration relies largely on incompetent evidence stated upon “information and belief” and on argument taken from the points and authorities in opposition to the arbitration motion. Not a single Arbitration Plaintiff has submitted a declaration to explain whether he read the

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

email and Agreement, whether he had any difficulty understanding them, whether he consulted anyone about them, whether he believed the Agreement was advantageous to him, whether he considered the purportedly disadvantageous provisions and their significance to him, and whether he felt any pressure not to opt out.

In the absence of any meaningful evidence, the Arbitration Plaintiffs' challenge must fail. The issue of unconscionability is not an abstract one, but rather requires an examination of the actual facts. *See Arguelles-Romero v. Superior Court*, 184 Cal. App. 4th 825, 843 (2010) ("It is the plaintiff's burden to introduce sufficient evidence to establish unconscionability."). Even the classic form of procedural unconscionability loses its shape if the facts show that the buyer was a contract professor who carefully reviewed the arbitration clause and fully understood and approved of it. *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489 (noting that "numerous factual inquiries bear upon th[e] question" of unconscionability and that "generalizations are always subject to exceptions and categorization is rarely an adequate substitute for analysis"). The point is: facts matter; the Arbitration Plaintiffs have provided almost no material facts; and they bear the burden of proof. *See id.*

Second, the Arbitration Plaintiffs' reliance on *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007) is misplaced. (Opp. at 8-9.) In *Gentry*, the California Supreme Court found that, despite a 30-day opt-out period, a class arbitration waiver provision contained "some degree of procedural unconscionability" because of the "markedly one-sided" explanation of the waiver. *Id.* at 470. While touting the benefits of arbitration, the relevant handbook neglected to disclose the "significant disadvantages that *this particular arbitration agreement* had compared to litigation," including a substantially reduced statute of limitations and substantially reduced rights to compensatory, punitive, and ancillary damages. *Id.* (emphasis in original).

Gentry is distinguishable. The Agreement does not contain the type of substantive curtailment of rights found in the *Gentry* agreement, and the Arbitration Plaintiffs have not shown that any omission had any bearing on their decision not to opt out. The email announcing Solution Channel describes the program and its significance at a high-level of generality and refers the employee to a company website for detailed information. It states that participation in the program "allows [the employee] and the company to efficiently resolve covered employment-related legal disputes through binding arbitration" and "waive[s] the

right to initiate or participate in court litigation (including class, collective and representative actions) involving a covered claim and/or the right to a jury trial involving any such claim.” (Fries Decl., ¶ 7, Ex. A, at 3.) There does not appear to be anything misleading about these general statements; and the Arbitration Plaintiffs have provided no evidence that they were misled by them.

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

2. No Substantive Unconscionability

The failure to prove procedural unconscionability is fatal to the Arbitration Plaintiffs’ claim. *See Prizler v. Charter Comms.*, No. 3:18-cv-1724, 2019 WL 2269974 (S.D. Cal. May 28, 2019) (declining to reach question of substantive unconscionability absent procedural unconscionability). But even assuming some degree of procedural unconscionability, the Arbitration Plaintiffs have not demonstrated the requisite substantive unconscionability here.

The Arbitration Plaintiffs argue that the Agreement is substantively unconscionable on several grounds. (Opp. at 16-23.) First, they claim that it imposes one-sided obligations by forcing employees to arbitrate “likely” claims, while exempting Charter’s “likely” claims. However, the excluded claims are not manifestly one-sided (i.e., they exclude claims favoring both sides), and the Arbitration Plaintiffs have provided no evidence that Charter excluded claims that “likely” would be asserted against (or of any concern to) them. Second, they claim that the Agreement limits statutory attorney’s fees. This is inaccurate. The Agreement requires the arbitrator to “apply the governing law applicable to any substantive claim asserted, including the applicable law necessary to determine when the claim arose and any damages.” (Fries Decl., ¶ 10, Ex. C, at § I(2); *see also id.* at § I(4).) Third, the Arbitration Plaintiffs complain that the Agreement limits each party to four depositions, 20 interrogatories, and 15 document requests. Discovery limitations, however, are a common feature of arbitration that can be beneficial to all parties. *See, e.g., Mercurio v. Superior Court*, 96 Cal. App. 4th 167, 183-84 (2002) (finding a total of 30 discovery requests to be conscionable). There is nothing unusual or unfair about the limitation imposed here. Fourth, the Arbitration Plaintiffs claim that the Agreement bans recovery in administrative proceedings for unemployment benefits and worker’s compensation claims. However, the Agreement excludes those claims entirely and appears to limit

administrative relief for covered claims. Fifth, the Arbitration Plaintiffs challenge as improper the waiver of collective actions as it applies to claims brought under the Private Attorney General Act (PAGA) and False Claims Act (FCA), but they have not shown the relevance of these claims to this case. *See Dauod v. Ameriprise Fin. Servs., Inc.*, No. 8:10-cv-00302-CJC (MANx), 2011 WL 6961586, at *5 (C.D. Cal. Oct. 12, 2011) (finding the presence of a PAGA waiver to be irrelevant to substantive unconscionability analysis when the plaintiff was not attempting to bring a PAGA action).

In short, the Arbitration Plaintiffs have not shown that the terms of the Agreement are “so one-sided as to ‘shock the conscience.’” *Sanchez*, 61 Cal. 4th at 910 (citation omitted). The Court has considered all the challenged provisions, including but not limited to the ones discussed above. Many of the challenges are based on a misreading of the Agreement, *see* discussion *supra*; and others have not been shown to be relevant here. *See id.* at 921 (rejecting unconscionability claim challenging the cost of a filing fee in the absence of any record evidence that the plaintiff was unable to afford them). Moreover, any measure of procedural unconscionability is so slight that the Arbitration Plaintiffs would have to show significant substantive unconscionability. They have not done so here. *See Armendariz*, 24 Cal. 4th at 114 (describing sliding-scale analysis).

C. THE ARBITRABILITY OF COLLECTIVE CLAIMS

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

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

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

(Fries Decl., ¶ 10, Ex. C., at § Q.)

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

IV. CONCLUSION

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