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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DONEYDA PEREZ

Plaintiff,

vs.

DIRECTV GROUP HOLDINGS, LLC;
LONSTEIN LAW OFFICES, P.C.; and
JULIE COHEN LONSTEIN

Defendants.

CASE NO. 8:16-cv-1440-JLS-DFMx

**ORDER DENYING DEFENDANTS'
MOTIONS TO COMPEL
ARBITRATION (Docs. 18, 20)**

1 **I. INTRODUCTION**

2 Plaintiff Doneyda Perez brings this action alleging that DirecTV and the other
3 Defendants engaged in a scheme to defraud small, minority-owned businesses by selling
4 them commercial satellite cable television service, only to later claim that the businesses
5 were not authorized to display DirecTV in a commercial establishment, and then threaten
6 the business owners with litigation to extract a settlement payment. Defendants DirecTV
7 Group Holdings, LLC, Lonstein Law Offices, P.C., and Julie Cohen Lonstein move to
8 compel Perez to arbitrate her claims.

9
10 **II. BACKGROUND**

11 The manner in which the transaction took place between DirecTV and Perez is
12 significant in determining whether the parties entered into an agreement to arbitrate, and
13 whether that agreement is valid; therefore, the Court describes below Perez’s allegations as
14 to the nature of the transaction, a description which, for the purposes of this motion,
15 DirecTV does not materially contest.¹

16 **A. DirecTV Solicits Perez’s Business**

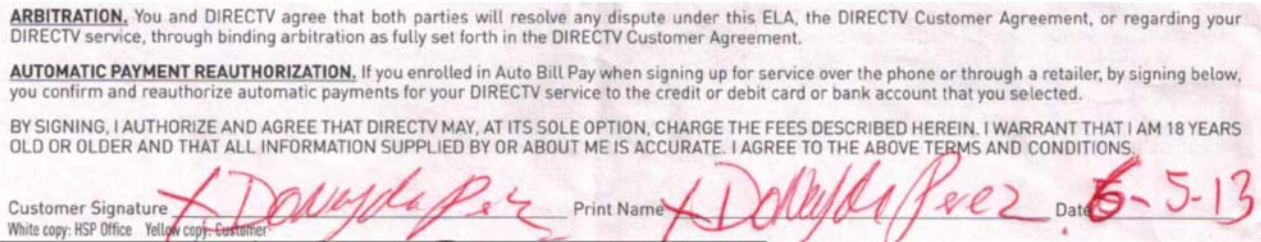
17 Perez owns Oneida’s Beauty and Barber Salon in Garden Grove, California. (Perez
18 Decl. ¶ 2, Doc. 26-3.) On June 5, 2013, a DirecTV representative came to Perez’s beauty
19 salon to offer her a promotional deal that would provide her business with satellite cable
20 television for \$35.00 per month for two years. (*Id.* ¶¶ 3–4.) Perez’s conversation with
21 DirecTV’s representative was entirely in Spanish. (*Id.* ¶ 6.) Although Perez had no prior

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23 ¹ Had there been disputed factual accounts of the manner in which the transaction took
24 place that affected the validity of the arbitration provision, the Court would have held an
25 evidentiary hearing to resolve those factual disputes. Here, however, DirecTV did not dispute the
26 nature of the transaction between Perez and the DirecTV representative, nor did Perez materially
27 dispute the manner in which DirecTV followed up with various agreements over the course of
28 time. Nor did either party request further discovery or an evidentiary hearing. At the hearing,
when the Court raised the possibility of holding an evidentiary hearing, DirecTV’s counsel
expressed that it would be unnecessary. Therefore, the Court accepted the evidence proffered in
the Declarations and attached exhibits, along with the parties’ briefs and oral argument.

1 interest in purchasing satellite cable television services from DirecTV, she agreed to the
2 promotional deal for her business based on the representative’s representations regarding
3 the terms of the deal, including access to Spanish-language channels. (*Id.* ¶ 4.) After
4 Perez agreed to the promotional deal, the DirecTV representative installed the necessary
5 equipment in her salon that very same day. (*Id.* ¶ 5.) During the installation, the DirecTV
6 representative requested Perez’s personal information, including her business bank account
7 information. (*Id.* ¶ 6.) After the installation was complete, the representative asked Perez
8 to sign a single document, the Equipment Lease Agreement (“ELA”), which was in
9 English. (*Id.*; *see* Robson Decl., Ex. 5, Doc. 18-12.) Pertinent to Perez’s claims here, the
10 ELA does not inform the customer that the service cannot be used in commercial
11 establishments. (*See* Robson Decl., Ex. 5; *see also* Robson Decl., Ex. 4 at 1, Doc. 18-11.)

12 **B. The Equipment Lease Agreement**

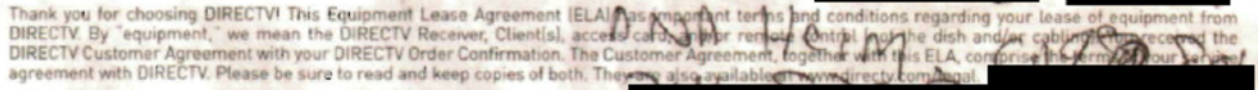
13 The ELA is typed in small print. It includes a paragraph titled “Programming
14 Agreement and Term” and tells the consumer that if she cancels before the end of a two-
15 year term, she will be charged an early cancellation fee of up to \$480. (Robson Decl., Ex.
16 5.) Towards the bottom of the page, the ELA states as follows:



22 (*Id.*)

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1 The ELA also states near the top of the page²:

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4 (*Id.*) Although the ELA states that Perez already received the DIRECTV Customer
5 Agreement, DirecTV has acknowledged that Perez would not have been provided with
6 either the Customer Agreement or an Order Confirmation at the time that her equipment
7 was installed and she signed the ELA. (Robson Decl. ¶ 11, Doc. 18-7.) It was only after
8 Perez agreed to purchase DirecTV’s services, and after DirecTV installed the necessary
9 equipment and activated service, that DirecTV mailed her a copy of an English-language
10 version of the Customer Agreement in effect at that time. (Robson Decl. ¶¶ 11–12;
11 Robson Decl., Ex. 2, Doc. 18-9; Robson Decl., Ex. 3, Doc. 18-10.) This was in
12 accordance with DirecTV’s practice of sending Customer Agreements to new customers
13 only after they order service. (Robson Decl. ¶¶ 4–5.)

14 Because Perez has difficulty reading and writing English, she could not understand
15 the contents of the ELA. (Perez Decl. ¶ 6.) Although she had been speaking with the
16 DirecTV representative in Spanish, the representative did not translate the ELA into
17 Spanish for her. (*Id.*) Nor did the representative provide her with a Spanish-language
18 version of the ELA, even though DirecTV has Spanish-language versions of the ELA
19 available. (*Id.*; Robson Decl., Ex. 4 at 2.) Perez gave the signed ELA to the DirecTV
20 representative but did not receive a copy of her own. (Perez Decl. ¶ 6.)

21 According to DirecTV, the ELA provided to Perez at the time she signed up for the
22 service was simply an “addendum” to the Customer Agreement. (Robson Decl. ¶ 8.)

23
24 ² The provision, although obscured by writing, reads “Thank you for choosing DIRECTV!
25 This Equipment Lease Agreement (ELA) has important terms and conditions regarding your lease
26 of equipment from DIRECTV. By ‘equipment,’ we mean the DIRECTV Receiver, Client(s),
27 access card, and/or remote control (not the dish and/or cabling). You received the DIRECTV
28 Customer Agreement with your DIRECTV Order Confirmation. The Customer Agreement,
together with this ELA, comprise the terms of your service agreement with DIRECTV. Please be
sure to read and keep copies of both. They are also available at www.directv.com/legal.” (*See*
Robson Decl., Ex. 4 at 1.)

1 **C. DirecTV’s Later Communications**

2 **1. The Order Confirmation**

3 After the installation was complete, DirecTV mailed Perez a document DirecTV
4 calls an Order Confirmation. (Robson Decl., Ex. 2.) It is addressed to Perez and titled
5 “THANK YOU FOR YOUR ORDER.” (*Id.*) In a bolded text box, the Order
6 Confirmation tells Perez “This is Not a Bill” and provides an “estimated first bill.” (*Id.*)
7 The Order Confirmation incorrectly assumes that no installation has yet taken place and
8 tells her to “call [her] local DirecTV dealer to schedule [her] installation.” (*Id.*) It also
9 tells her to update her email address and to review her customer agreements. (*Id.*) It
10 reminds her that she agreed to a “**24-MONTH SERVICE AGREEMENT**,” and if she
11 fails to maintain the agreed-upon level of programming, DirecTV may charge her an early
12 cancellation fee. (*Id.*)

13 **2. The Customer Agreement**

14 According to DirecTV, Perez would have received the Customer Agreement in the
15 mail with the Order Confirmation after the equipment was installed. (Robson Decl. ¶ 11.)

16 Near the top of the first page, the Customer Agreement states:

17 THIS DESCRIBES THE TERMS AND CONDITIONS OF YOUR RECEIPT OF AND
18 PAYMENT FOR DIRECTV® SERVICE AND IS SUBJECT TO ARBITRATION
19 (SECTION 9) AND DISCLAIMER OF WARRANTIES (SECTION 8). IF YOU DO
20 NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE
21 WILL CANCEL YOUR ORDER OR SERVICE. IF YOU INSTEAD DECIDE TO
22 RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS
23 AND THEY WILL BE LEGALLY BINDING. IF YOU OBTAINED RECEIVING

24 (Robson Decl., Ex. 3.) Section 9, titled “**RESOLVING DISPUTES**” begins with the
25 following statement:

26 In order to expedite and control the cost of disputes, you and we agree that
27 any legal or equitable claim relating to this Agreement, any addendum, or
28 your Service (referred to as a “Claim”) will be resolved as follows:

(*Id.*) Subsection (a) then sets forth the procedure for informal resolution, and subsection
(b) provides that if informal resolution fails, “any Claim either of us asserts will be
resolved only by binding arbitration.” (*Id.*)

1 However, subsection (d) identifies two exceptions to the binding arbitration
2 requirement:

3 (d) Exceptions. Notwithstanding the foregoing: (i) any Claim based on
4 Section 1(h) above, and (ii) any dispute involving a violation of the
5 Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium
6 Copyright Act, 17 U.S.C. § 1201, the Electronic Communications
7 Privacy Act, 18 U.S.C. §§ 2510-2521 or any other statement or law
8 governing theft of service, may be decided only by a court of competent
9 jurisdiction. You may also assert an individual action in small claims
10 court in lieu of arbitration.

7 (*Id.*) Section 1(h) is the third paragraph of the fourth column on the first page of the
8 Customer Agreement. (*Id.*) It states:

9 (h) Private Viewing. We provide Service only for your private non-
10 commercial use, enjoyment and home viewing. The programming
11 may not be viewed in areas open to the public or in commercial
12 establishments. You may not rebroadcast, transmit or perform the
13 programming, charge admission for its viewing or transmit or distribute
14 running accounts of it. You may not use any of our trademarks.
15 Notwithstanding the provisions of Section 9, we or any programming
16 provider may prosecute violations of the foregoing against you and
17 other responsible parties in any court of competent jurisdiction, under
18 the rules and regulations of the Federal Communications Commission
19 and other applicable laws.

14 (*Id.*)

15 From at least September 2014 until August 2015, when Perez cancelled her
16 DirecTV service, Perez received monthly invoices in Spanish stating that the Customer
17 Agreement describes the terms and conditions of service, and telling Perez to consult that
18 Customer Agreement for complete information about billing and payment. (Kellogg Decl.,
19 Ex. 1, Doc. 18-3.) DirecTV also mailed Perez a copy of the Customer Agreement each
20 time the Agreement was updated. (Robson Decl. ¶ 14.)

21 **D. Threatened Litigation and Settlement**

22 In May 2015, Perez received a call from DirecTV advising her that the Lonstein
23 Law Office had been retained by DirecTV regarding “the unauthorized reception and
24 commercial display of DIRECTV programming” at her business. (Compl. ¶ 27, Doc. 1.)
25 In that call, DirecTV alleged that on April 8, 2015, an “independent auditor” had observed
26 and recorded Perez’s unauthorized use of DirecTV’s services. (*Id.*) Based on these
27 allegations, DirecTV threatened litigation if Perez did not contact the Lonstein Law Office
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1 within seven days to resolve the matter. (*Id.*) On June 26, 2015, Perez received a letter
2 from the Lonstein Law Office with a proposed settlement agreement. (*Id.* ¶ 28.) The
3 proposed settlement made it clear that the business where the purported unauthorized
4 reception and display took place was the very same location where the DirecTV
5 representative had installed the equipment. (Compl., Ex. B, “Settlement Agreement” at 1,
6 Doc. 1-2.) Under the terms of the proposed settlement, DirecTV would release its claims
7 against Perez in return for a \$5,000 payment. (Settlement Agreement at 2.) Pursuant to
8 the settlement agreement, Perez began making monthly payments of \$500 to DirecTV.
9 (Compl. ¶ 29.)

10 Perez later filed the instant class action on August 4, 2016, alleging violations of the
11 California Unfair Competition Law and the RICO Act. (*Id.* ¶¶ 57–99.) She alleges that
12 Defendants engage in a scheme of targeting small business owners through unsolicited
13 sales campaigns to sell satellite cable television services. (*Id.* ¶ 2.) The scheme begins
14 with DirecTV representatives targeting and soliciting small, minority-owned businesses to
15 purchase DirecTV’s satellite cable television services at a special rate. (*Id.* ¶ 60.) After
16 the business owners agree to purchase DirecTV’s services, DirecTV installs the necessary
17 equipment at their place of business. (*Id.*) DirecTV then provides services to these
18 businesses under a residential account. (*Id.*) Later, DirecTV sends “independent” auditors
19 to these businesses for a “signal audit,” whereupon it is “discovered” that the business
20 owners are “pirating” or “stealing” DirecTV’s services by using residential services for
21 commercial use. (*Id.* ¶¶ 5–6, 60.) Based on this information, DirecTV, through the
22 Lonstein Defendants, threatens these small business owners with litigation unless they
23 agree to a settlement. (*Id.* ¶¶ 6, 60.) In this way, Perez alleges, Defendants obtain money
24 from these small business owners in addition to the monthly fees they already pay for
25 DirecTV’s satellite cable television services. (*Id.* ¶ 7.)

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1 Based on the ELA and the Customer Agreement, DirecTV, Lonstein Law Offices,
2 and Julie Cohen Lonstein move to compel this action to arbitration and stay proceedings in
3 this Court. (DirecTV Mot., Doc. 18; Lonstein Mot., Doc. 20)

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5 **III. LEGAL STANDARD**

6 Congress enacted the Federal Arbitration Act “in 1925 as a response to judicial
7 hostility to arbitration.” *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012). The
8 FAA provides that an agreement to arbitrate disputes arising from “a contract evidencing a
9 transaction involving commerce” shall be “valid, irrevocable, and enforceable, save upon
10 such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.
11 “The court’s role under the Act is . . . limited to determining (1) whether a valid agreement
12 to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at
13 issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).
14 The “party seeking to compel arbitration has the burden under the FAA to show [these two
15 elements].” *Ashbey v. Archstone Property Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir.
16 2015). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor
17 of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25
18 (1983), *superseded by statute on other grounds*. However, “arbitration is a matter of
19 contract and a party cannot be required to submit to arbitration any dispute which he has
20 not agreed so to submit.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643,
21 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363
22 U.S. 574, 582 (1960)). Arbitration agreements may also “be invalidated by ‘generally
23 applicable contract defenses, such as fraud, duress, or unconscionability.’” *AT&T Mobility
24 LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor’s Assocs., Inc. v.
25 Casarotto*, 517 U.S. 681, 687 (1996)).

26 In these analyses, a court may consider evidence outside of the pleadings, such as
27 declarations and other documents filed with the court, using “a standard similar to the
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1 summary judgment standard of [Federal Rule of Civil Procedure 56].” *Concat LP v.*
2 *Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004); *see also Geographic*
3 *Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1104 n.1 (9th Cir.
4 2010) (“We take . . . facts from the First Amended Complaint, on file in the district court,
5 and declarations filed in support of and in opposition to the motion to dismiss. All are part
6 of our record.”).

7 8 **IV. DISCUSSION**

9 **A. Agreement to Arbitrate**

10 “The threshold issue in deciding a motion to compel arbitration is ‘whether the
11 parties agreed to arbitrate.’” *Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1133 (C.D.
12 Cal. 2011) (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 756 (9th
13 Cir. 1988)). “[A] party cannot be required to submit to arbitration any dispute which he
14 has not agreed so to submit.” *Knutson v. Sirius XM Radio, Inc.*, 771 F.3d 559, 565 (9th
15 Cir. 2014) (alteration in original) (quoting *United Steelworkers*, 363 U.S. at 582). “When
16 determining whether a valid contract to arbitrate exists, we apply ordinary state law
17 principles that govern contract formation.” *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093
18 (9th Cir. 2014) (citing *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 782 (9th
19 Cir. 2002)).

20 “It is undisputed that under California law, mutual assent is a required element of
21 contract formation.” *Knutson*, 771 F.3d at 565. The mutual assent necessary to form a
22 contract “is determined under an objective standard applied to the outward manifestations
23 or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not
24 their unexpressed intentions or understandings.” *Deleon v. Verizon Wireless, LLC*, 207
25 Cal. App. 4th 800, 813 (2012) (citation and internal quotation marks omitted). The
26 doctrine of mutual assent applies with particular force to contracts of adhesion. *See*
27 *Knutson*, 771 F.3d at 566. Thus, “[a]n offeree, regardless of apparent manifestation of his
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1 consent, is not bound by inconspicuous contractual provisions of which he was unaware,
2 contained in a document whose contractual nature is not obvious.” *Id.* “[T]he party
3 seeking to compel arbitration[] has the burden of proving the existence of an agreement to
4 arbitrate by a preponderance of the evidence.” *Id.* at 565 (citing *Rosenthal v. Great W.*
5 *Fin. Sec. Corp.*, 14 Cal. 4th 394, 413 (1996)).

6 Before addressing whether DirecTV has met its burden, the Court makes one initial
7 observation: the manner in which Perez was provided these documents deviates sharply
8 from the manner in which they were intended to be provided to ordinary residential
9 customers. The language of the documents reveal that, ordinarily, the consumer placed an
10 order for service with DirecTV; was mailed or emailed the operative contract—a
11 “Customer Agreement”—for review and approval before the order for service was final;
12 was instructed in a document called an “Order Confirmation” on how to arrange
13 installation of the equipment; and, at the time of installation, was provided an addendum,
14 called the “Equipment Lease Agreement,” by the installer relating to equipment and other
15 terms and conditions of service. In that context, the consumer is told upfront in the
16 Customer Agreement that the consumer is agreeing to arbitration and specifically that
17 “ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL.”
18 (Robson Decl., Ex. 3.) The consumer is also told that she cannot bring any class actions or
19 class arbitrations against DirecTV, but only individual arbitrations. (*Id.*) And the
20 consumer is told that certain claims are not subject to the arbitration provision and may be
21 litigated. (*Id.*) The consumer is further told that if she does not agree with the terms of the
22 Customer Agreement, she must notify DirecTV immediately because if she instead
23 “decide[s] to receive [DirecTV’s] service,” the terms are legally binding. (*Id.*)

24 Here, the declarations and other evidence show that DirecTV short-circuited that
25 procedure by withholding the Customer Agreement at the time the deal was made and the
26 equipment installed, and providing Perez with only the ELA. Nonetheless, DirecTV
27 contends that Perez agreed to arbitrate her claims in two different ways: (1) by signing the
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1 ELA, which contains an abbreviated arbitration provision; and (2) by later receiving the
2 Customer Agreement from DirecTV with the full explanation of the arbitration terms and
3 thereafter continuing to receive DirecTV’s service. (DirecTV Mem. at 7–10, Doc. 18-1.)

4 **1. Assent by Signing the ELA**

5 DirecTV shows that Perez signed the ELA on the date she accepted DirecTV’s
6 promotional deal. (Robson Decl., Ex. 5.) The ELA’s arbitration provision is a few
7 sections above the signature line and simply states that the customer and DirecTV “agree
8 that both parties will resolve any dispute under this ELA, the DIRECTV Customer
9 Agreement, or regarding [the customer’s] DIRECTV service, through binding arbitration
10 as fully set forth in the DIRECTV Customer Agreement.” (*Id.*) Because the arbitration
11 provision refers to terms set forth in a separate document—the Customer Agreement—the
12 first question is whether that document has been properly incorporated into the ELA by
13 reference.

14 For an agreement to incorporate the terms of another document by reference, (1)
15 “the reference must be clear and unequivocal”; (2) “the reference must be called to the
16 attention of the other party and he must consent thereto”; and (3) “the terms of the
17 incorporated document must be known or easily available to the contracting parties.”
18 *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1997).

19 As to the first element, the ELA references a “DIRECTV Customer Agreement” in
20 its arbitration provision. (Robson Decl., Ex. 5.) However, the ELA also informs Perez
21 that she has “already received” that Customer Agreement, a fact that DirecTV admits in its
22 papers is not true. (*See* Robson Decl. ¶¶ 4–5, 11.) Hence, it would not be clear to a
23 reasonable person reviewing the ELA what document is being referenced. Perez
24 undoubtedly was signing the ELA as a “customer” of DirecTV, and the ELA is clearly an
25 “agreement.” A person reviewing the arbitration provision in the context in which it was
26 provided to Perez could reasonably believe that the ELA and the Customer Agreement
27 were one and the same and the reference to a “Customer Agreement” was simply another
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1 way of describing the ELA. This is particularly true where, as here, the ELA was the only
2 agreement Perez received and could easily appear to the consumer to be the complete
3 agreement.³ Indeed—unlike its title suggests—the ELA not only discusses the terms of the
4 equipment lease, it also contains a lengthy provision titled “PROGRAM AGREEMENT
5 AND TERM,” which discusses in great detail the cost of the programming, the agreed-
6 upon term, and the early cancellation fees that will be charged. (Robson Decl., Ex. 5.)
7 Therefore, the reference to a separate Customer Agreement with additional terms was not
8 clear and unequivocal. Although the lack of a clear and unequivocal reference is sufficient
9 to find the Customer Agreement was not incorporated by reference, the Court also
10 analyzes the remaining elements.

11 The second element is whether the reference was called to Perez’s attention and
12 whether Perez consented to it. The reference to arbitration and the Customer Agreement is
13 set apart in its own section and the word “arbitration” is in bold, underline, and all caps.
14 (Robson Decl., Ex. 5.) Moreover, the reference is near the bottom of the page and is close
15 to the line where Perez placed her signature. (*Id.*) With respect to whether the reference
16 was called to Perez’s attention, the second element appears to be satisfied. However,
17 whether Perez consented to the referenced terms is doubtful because the third element—
18 that the terms of the incorporated document were known or easily available to the
19 contracting parties—was not met.

20 Perez was not provided with the Customer Agreement at the time she signed the
21 ELA. (Perez Decl. ¶ 6.) DirecTV has made clear that the Customer Agreement was
22 mailed to Perez after the DirecTV equipment was installed and her service was activated,
23 (Robson Decl. ¶¶ 11–12), and DirecTV has failed to show that Perez had otherwise been
24 made aware of its terms when she signed the ELA. Moreover, DirecTV has failed to show

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26 ³ Ordinarily, the Court might give some weight to an earlier reference in the ELA to the
27 DirecTV Customer Agreement that appears to describe it as a separate document. However, in the
28 present case, the facts show that the DirecTV representative handwrote account information across
that section of the ELA, and it is not at all legible. (Robson Decl., Ex. 5.)

1 that the Customer Agreement was easily available to Perez at the time she signed the ELA.
2 DirecTV does not assert that the representative who set up the DirecTV equipment for
3 Perez had a copy of the Customer Agreement to give her, but rather acknowledges that it
4 was provided on a later date. The ELA states that the Customer Agreement is available at
5 www.directv.com/legal, (Robson Decl., Ex. 4), but there is no evidence that Perez had easy
6 access to the Internet at the time the ELA was presented to her.⁴ At that time, Perez was in
7 her beauty salon, and the DirecTV representative had just finished installing the equipment
8 at her place of business. Because DirecTV has failed to meet its burden of proving that the
9 Customer Agreement was otherwise known or easily available to Perez at the time she
10 agreed to subscribe to DirecTV's services, the Customer Agreement was not properly
11 incorporated by reference into the ELA.

12 Having failed to properly incorporate the Customer Agreement into the ELA, the
13 mutual intention of the parties with respect to arbitration, and the scope thereof, becomes
14 ambiguous. Because “the intention of the parties is to be ascertained from the writing
15 alone, if possible,” Cal. Civ. Code § 1639, the failure to properly incorporate the Customer
16 Agreement by reference means there is no ascertainable, mutual intention as to what the
17 parties have agreed to arbitrate. The ELA states that “both parties will resolve any dispute
18 under this ELA, the DIRECTV Customer Agreement, or, regarding your DIRECTV
19 service, through binding arbitration as fully set forth in the DIRECTV Customer
20 Agreement.” (Robson Decl., Ex. 5.) Hence, a reasonable customer reviewing the ELA
21 would likely believe that “*both parties*” agreed to resolve “*any dispute*” under the ELA or
22 the Customer Agreement, using a binding arbitration procedure set forth in the Customer
23 Agreement. A quick review of the later-provided Customer Agreement demonstrates that
24 is not the case. As described in Section II.C.2 above, DirecTV's intent was to carve out
25 certain disputes as not subject to arbitration and—particularly relevant to this case—to

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27 ⁴ Moreover, the ELA's reference to the agreement being available on the DirecTV website
28 is not legible on the copy of the ELA signed by Perez, as the DirecTV representative handwrote
account information across that section of the ELA. (*See* Robson Decl., Ex. 5.)

1 except from arbitration disputes over commercial viewing of DirecTV programming.
2 Section 1(h) of the Customer Agreement allows DirecTV to “prosecute [commercial
3 viewing claims] against [the customer] in any court of competent jurisdiction.” (Robson
4 Decl., Ex. 3.) This significant carve-out simply illustrates that a customer reviewing the
5 ELA in the absence of the Customer Agreement could not possibly understand the scope of
6 arbitration as intended by DirecTV.

7 Accordingly, the Court finds that Perez’s signing of the ELA fails to establish a
8 clear agreement to arbitrate disputes with DirecTV.

9 2. Assent by Silence

10 DirecTV also argues that Perez accepted the arbitration terms of the later-mailed
11 Customer Agreement because that document informed her that by receiving services she
12 would be deemed to accept the terms and conditions contained therein. (DirecTV Mem. at
13 7–10.) DirecTV’s argument is unpersuasive for several reasons.

14 First, mere silence or inaction in the face of the offer of a contract does not
15 ordinarily amount to an acceptance. *Wold v. League of Cross of Archdiocese of San*
16 *Francisco*, 114 Cal. App. 474, 479 (1931). While California law identifies two exceptions
17 to this rule—inaction in the face of a duty to act or retention of a benefit offered, *Golden*
18 *Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1386 (1993)—neither applies
19 here. As to the first exception, DirecTV does not argue that Perez had a duty to act, and
20 this Court finds no basis for one.⁵ The second exception is grounded in California Civil
21 Code Section 1589, which states that “[a] voluntary acceptance of the benefit of a
22 transaction is equivalent to a consent to all the obligations arising from it, so far as the
23 facts are known, or ought to be known, to the person accepting.” The problem with
24 DirecTV’s reliance on this provision of California law is that the offer was made and
25 accepted at the time the DirecTV representative came to Perez’s place of business, sold her

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27 ⁵ A duty to act may arise from the circumstances of the relationship or a previous course of
28 dealing between the parties. See *Beatty Safway Scaffold, Inc. v. Skrable*, 180 Cal. App. 2d 650,
655 (1960). DirecTV points to no such relationship or course of dealing.

1 the 24-month package, installed the equipment, and had her sign one and only one
2 document: the ELA. The ELA does not contain any statement that the contractual terms
3 between Perez and DirecTV are subject to change in the future or that Perez agrees that
4 DirecTV can change the terms of her service without any affirmative action on her part.
5 (See Robson Decl., Ex. 4.) DirecTV has failed to show that the arbitration provisions in
6 the Customer Agreement were known to Perez or that she ought to have known of them at
7 the time of the transaction.⁶

8 The cases DirecTV cites do not compel a contrary finding. In *Brown v. DirecTV,*
9 *LLC*, the plaintiff placed an order for DirecTV service online and he could easily access
10 the Customer Agreement through a hyperlink presented to him at checkout. No. CV 12-
11 08382 DMG (Ex), 2013 WL 3273811, at *1–2, *4 (C.D. Cal. Jun. 26, 2013). In other
12 cases cited by DirecTV, the plaintiff placed an order for DirecTV service, was
13 immediately mailed the contract thereafter, and then later installed the equipment and
14 began service. See *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 761–62 (N.D. Ohio
15 2009) (plaintiff placed order over the phone, contract was mailed the next day, and
16 equipment and service was installed over a month later); *Ferrie v. DirecTV, LLC*, No.
17 3:15-CV-409 (JCH), 2016 WL 183474, at *2–3 (D. Conn. Jan. 12, 2016) (plaintiff placed
18 order over the phone on June 25, the contract was emailed immediately after the call and
19 also mailed to plaintiff the next day, and equipment and service was installed on July 1).
20 In yet other cases, the issue of acceptance by inaction or silence is not discussed at all. See
21 generally *Joaquin v. DirecTV Group Holdings, Inc.*, No. 15-8194 (MAS) (DEA), 2016
22 WL 4547150 (D.N.J. Aug. 30, 2016); *Murphy v. DirecTV, Inc.*, No. 2:07-cv-06465-JHN-
23 VBKx, 2011 WL 3319574 (C.D. Cal. Aug. 2, 2011). Although the court in *Truitt v.*

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25
26 ⁶ Indeed, DirecTV tacitly acknowledges this problem by attempting to rearrange the
27 chronology of events in its brief. Having already acknowledged that the Customer Agreement was
28 provided to Perez after the deal was struck and the equipment installed, DirecTV’s “acceptance by
silence” argument rests on the incorrect factual premise that Perez received the Customer
Agreement first, then had the equipment installed and began service. (See DirecTV Mem. at 8.)

1 *DirecTV, Inc.* raised the issue of acceptance by silence or inaction, the court in that case
2 was applying Louisiana civil law. No. 08-3782, 2008 WL 5054570, at *3 (E.D. La. Nov.
3 21, 2008).

4 Finally, the court in *Bischoff v. DirecTV, Inc.* cited “practical business realities” in
5 finding the delayed delivery of the DirecTV Customer Agreement permissible. 180 F.
6 Supp. 2d 1097, 1105 (C.D. Cal. 2002). Relying on *Hill, et al. v. Gateway 2000*, 105 F.3d
7 1147 (7th Cir. 1997), the *Bischoff* court determined that it was “unrealistic to expect
8 DirecTV . . . to negotiate all of the terms of [its] customer contracts, including arbitration
9 provisions, with each customer before initiating service.” However, there are two
10 fundamental problems with a “business practicalities” argument. First, at least in
11 California, the legislature has not carved out a “business practicalities” exception to the
12 rules governing contract formation. *See Norcia v. Samsung Telecommunications America,*
13 *LLC*, 845 F.3d 1279, 1290 (9th Cir. 2017). In other words, while California law
14 recognizes that the more powerful party may impose a contract of adhesion (*i.e.*, a “take-it-
15 or-leave-it” contract) on the weaker party, it has yet to decide that the more powerful party
16 may do so at some time after the deal has been struck simply because it serves a “practical
17 business reality.” Hence, District Court decisions citing to the Seventh Circuit *Hill*
18 decision in reliance on such a standard are of little persuasive value.⁷

19 Second, DirecTV can point to no such practical business reality here. This was an
20 old-fashioned, face-to-face transaction between Perez and a DirecTV representative.
21 DirecTV has offered no valid business reason why the DirecTV representative—who not
22 only installed the equipment, but also sold Perez on the terms of service—had the ELA
23 available for Perez to review and sign but could not have had the Customer Agreement
24

25 ⁷ For the same reason, the Court finds unpersuasive the recent decision in the Northern
26 District of Illinois that DirecTV brings to the Court’s attention. *See G&G Closed Circuit Events,*
27 *LLC v. Castillo*, No. 14-CV-02073, 2017 WL 1079241, at *7 (N.D. Ill. Mar. 22, 2017) (citing
28 *Bischoff* and other Seventh Circuit cases and concluding third-party claimants assented to the
terms of the Customer Agreement because at some point while receiving DirecTV services, they
were “sent notice pointing to the Customer Agreement”).

1 available for Perez’s review as well. Accordingly, the Court finds that Perez’s inaction
2 after receiving DirecTV’s Customer Agreement fails to establish a clear agreement to
3 arbitrate disputes with DirecTV.

4 In sum, the Court concludes that the parties did not enter into a valid agreement to
5 arbitrate.

6 **B. Scope of the Agreement**

7 Even assuming, arguendo, one could find a clear agreement to arbitrate, Perez’s
8 claim would fall outside the scope of the arbitration agreement. Where an agreement to
9 arbitrate exists, the party seeking to compel arbitration must demonstrate that the
10 arbitration agreement encompasses the dispute at issue. *Chiron Corp.*, 207 F.3d at 1130.
11 “[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should
12 be resolved in favor of arbitration, whether the problem at hand is the construction of the
13 contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”
14 *Moses H. Cone*, 460 U.S. at 24–25. “Absent some ambiguity in the agreement, however, it
15 is the language of the contract that defines the scope of disputes subject to arbitration. . . .
16 For nothing in the statute authorizes a court to compel arbitration of any issues, or by any
17 parties, that are not already covered in the agreement.” *EEOC v. Waffle House, Inc.*, 534
18 U.S. 279, 289 (2002) (citation omitted).

19 Here, Section 9(d) of the Customer Agreement creates an exception to arbitration
20 for any claim based on Section 1(h) of the Agreement, or for “any dispute involving . . .
21 any . . . statement . . . governing theft of service.” (Robson Decl., Ex. 3.)

22 Section 1(h) sets forth the terms and conditions of Perez’s subscription as it relates
23 to her use of DirecTV’s services and where and how she can view DirecTV programming.
24 (*Id.*) Specifically, Section 1(h) prohibits the customer from allowing DirecTV
25 programming to be viewed in a commercial establishment. (*Id.*) The terms and conditions
26 of Section 1(h) are at the core of Perez’s claims against DirecTV. Perez alleges that
27 DirecTV targets small business owners through unsolicited sales campaigns to sell satellite
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1 cable television services, and then it provides satellite cable television services to those
2 businesses under a residential account that prohibits the use of DirecTV in commercial
3 establishments. (Compl. ¶¶ 2, 60.) Based on this “misuse,” DirecTV threatens these small
4 business owners with litigation unless they agree to a settlement. (*Id.* ¶¶ 6, 60.) Section
5 1(h) is the only term in the Customer Agreement that pertains to the use of DirecTV
6 services in public or commercial spaces. (*See* Robson Decl., Ex. 3.) In fact, DirecTV was
7 able to threaten Perez with litigation (as opposed to arbitration) over commercial use only
8 because of the Section 1(h) exception.

9 DirecTV’s carve-out from arbitration of any disputes “involving . . . any . . .
10 statement . . . governing theft of service” is even broader and also directly applicable.
11 Indeed, Perez’s Complaint alleges that DirecTV’s scheme consisted of manufacturing a
12 “finding that Plaintiff had ‘pirated’ or ‘stolen’ satellite cable television services from
13 DirecTV” and then using that manufactured finding to threaten Plaintiff with prosecution
14 for the purported theft of service in order to extort a settlement from Plaintiff. (Compl.
15 ¶ 60.) Ignoring the alleged scope of the scheme, DirecTV attempts to recast Perez’s claims
16 as based solely on DirecTV’s solicitation of Perez’s business and the classification of her
17 account. (*See* DirecTV Mem. at 1.) Then, based on that strawman version of her claims,
18 DirecTV argues that the claims fall directly within the scope of the arbitration provision.
19 (*See id.* at 2.) However, the gravamen of Perez’s allegation is not simply that DirecTV
20 improperly sells residential service to minority-owned businesses—it is that DirecTV
21 conducts a scheme that positions it to falsely claim theft of service, then extort settlements
22 from minority-owned businesses through threats of prosecution. As such, Perez’s claim
23 turns on “statement[s] . . . governing theft of service.”

24 DirecTV’s briefing buttresses the conclusion that Perez’s claims fall within the
25 “theft of service” carve-out. In attempting to illustrate the mutuality of the carve-out,
26 DirecTV declares that Section 9(d) “permits both DIRECTV and Ms. Perez to *litigate the*
27 *same range* of disputes related to the theft of DIRECTV service.” (DirecTV Reply at 12
28

1 (emphasis added).) In 2015, DirecTV threatened Perez with litigation over “theft of
2 services” based on the carve-out, (Compl. ¶ 27), and any counterclaim by Perez alleging
3 that DirecTV’s theft-of-service claim was part of an extortionate scheme would have been
4 a compulsory counterclaim within the “same range of disputes.” *See* Fed. R. Civ. P. 13(a).
5 The plain meaning of the arbitration carve-out is no different merely because of the
6 procedural posture of this case.

7 Accordingly, even if there were an agreement to arbitrate between Perez and
8 DirecTV, Perez’s claims in this action would fall within the scope of the arbitration carve-
9 out provision.

10 **C. Validity of the Agreement**

11 A contrary interpretation of the Section 9(d) exceptions would render the arbitration
12 agreement unconscionable. “[A]rbitration agreements are valid, irrevocable and
13 enforceable except upon grounds that exist for revocation of the contract generally.” *Serpa*
14 *v. Cal. Surety Investigations, Inc.*, 215 Cal. App. 4th 695, 701–02 (2013) (citations
15 omitted). The party challenging the validity of the arbitration agreement bears the burden
16 of proof. *See Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1099 (2002) (citing
17 *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 972 (1997)). Under
18 California law, a contract is not enforceable if it is found to be unconscionable. *See id.*

19 “Unconscionability under California law ‘has both a procedural and a substantive
20 element,’” and “[c]ourts use a ‘sliding scale’ in analyzing these two elements.” *Kilgore v.*
21 *KeyBank, N.A.*, 673 F.3d 947, 963 (9th Cir. 2012) (quoting *Armendariz v. Found. Health*
22 *Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000), *abrogated on other grounds by AT&T*
23 *Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). “[T]he more substantively oppressive
24 the contract term, the less evidence of procedural unconscionability is required to come to
25 the conclusion that the term is unenforceable, and vice versa.” *Armendariz*, 24 Cal. 4th at
26 114. “No matter how heavily one side of the scale tips, however, both procedural and
27 substantive unconscionability are required for a court to hold an arbitration agreement
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1 unenforceable.” *Kilgore*, 673 F.3d at 963 (emphasis omitted) (citing *Armendariz*, 24 Cal.
2 4th at 114).

3 1. Procedural Unconscionability

4 Under California law, “[p]rocedural unconscionability concerns the manner in
5 which the contract was negotiated and the respective circumstances of the parties at that
6 time, focusing on the level of oppression and surprise involved in the agreement.”
7 *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) (citing *Ferguson*, 298
8 F.3d at 783). “Oppression addresses the weaker party’s absence of choice and unequal
9 bargaining power that results in ‘no real negotiation.’” *Id.* (quoting *A & M Produce Co. v.*
10 *FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982)). “Surprise involves the extent to which the
11 contract clearly discloses its terms as well as the reasonable expectation of the weaker
12 party.” *Id.* (citing *Parada v. Super. Ct.*, 176 Cal. App. 4th 1554, 1571 (2009)).

13 “Unconscionability analysis begins with an inquiry into whether the contract is one
14 of adhesion.” *Armendariz*, 24 Cal. 4th at 113 (citation omitted). A contract is
15 procedurally unconscionable under California law if it is “a standardized contract, drafted
16 by the party of superior bargaining strength, that relegates to the subscribing party only the
17 opportunity to adhere to the contract or reject it.” *Pokorny v. Quixtar, Inc.*, 601 F.3d 987,
18 996 (9th Cir. 2010) (citation omitted), *abrogated on other grounds as recognized in*
19 *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251 (9th Cir. 2017). Here, DirecTV’s ELA and
20 Customer Agreement qualify as contracts of adhesion. There is no indication that Perez or
21 any other potential DirecTV customer can negotiate the terms of either contract if they
22 want to subscribe to DirecTV’s services. Rather, both the ELA and Customer Agreement
23 are form contracts that are presented to potential subscribers on a take-it-or-leave-it basis.

24 Although the contract is adhesive, without more, the degree of procedural
25 unconscionability is low. *Poublon*, 846 F.3d at 1261–62 (citing *Baltazar v. Forever 21,*
26 *Inc.*, 62 Cal. 4th 1237, 1245 (2016)). Accordingly, the Court considers whether other
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1 “other indications of oppression or surprise [exist] that would lead California courts to
2 conclude that the degree of procedural unconscionability is high.” *Id.* at 1262.

3 a. The Terms of the Deal Were Discussed in Spanish, the Arbitration
4 Agreement was Presented in English, and the Terms of the Arbitration
5 Agreement Were Not Otherwise Explained to Perez.

6 DirecTV argues that an agreement is not unenforceable simply because it is
7 presented in a language other than the one spoken by Perez. *See* DirecTV Reply at 4. That
8 is correct as far as it goes; one cannot disclaim assent to the terms of a contract on the
9 ground that one could not read it. *See Randas v. YMCA of Metro. L.A.*, 17 Cal. App. 4th
10 158, 163 (1993); *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW (SSx), 2014 WL
11 5088240, at *6 (C.D. Cal. Oct. 7, 2014); *Molina v. Scandinavian Designs, Inc.*, No. 13-cv-
12 04256 NC, 2014 WL 1615177, at *3 (N.D. Cal. Apr. 21, 2014). However, the issue is not
13 contract formation; it is whether the manner in which the agreement was negotiated
14 elevates its procedural unconscionability. Although inability to read an agreement does
15 not prevent contract formation, it is still a factor that increases procedural
16 unconscionability when other indications of oppression and surprise are present. *See, e.g.*,
17 *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 420 (N.D. Cal. 2015) (finding procedural
18 unconscionability, in part, because the agreements were “written in English although [the
19 defendant] knew that [the plaintiff’s] comprehension of English was limited”); *Chico*,
20 2014 WL 5088240, at *8 (stating that if the defendants had not given the plaintiff “an
21 opportunity to . . . obtain a Spanish translation . . . it would further support Plaintiff’s claim
22 of procedural unconscionability”).

23 Here, Perez’s conversation with the DirecTV representative was completely in
24 Spanish from the moment he walked into her beauty salon until he completed the
25 equipment installation, activated her service, and handed her the ELA. (Perez Decl. ¶ 6.)
26 Although the representative had been speaking with Perez in Spanish, and DirecTV had
27 Spanish-language versions of the ELA, the representative provided Perez with an ELA
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1 printed in English, a language she had difficulty reading. (*Id.*; Robson Decl., Ex. 4 at 2;
2 Robson Decl., Ex. 5.) Even though Perez could not understand the terms of the ELA, the
3 DirecTV representative did not explain those terms to her. (Perez Decl. ¶ 6.) Moreover,
4 the representative gave Perez the ELA to sign at the end of their encounter; after the
5 DirecTV equipment had been installed, after Perez had provided her business bank account
6 information, and after the service had been activated. (*Id.*; Robson Decl. ¶ 12.) There is
7 no indication that Perez had a realistic opportunity to obtain a Spanish translation or
8 otherwise ask for an explanation of the ELA’s terms. The Court finds these circumstances
9 increase the level of oppression and surprise in Perez’s interactions with DirecTV and
10 therefore increase the level of procedural unconscionability.

11 b. The Terms of the Arbitration Agreement Were Withheld.

12 The ELA does not include what DirecTV now argues is the complete arbitration
13 agreement. The Court has addressed this issue in the context of the validity of the
14 arbitration agreement, but it also applies in determining procedural unconscionability.
15 Namely, among other things, the ELA did not advise Perez that she was waiving her
16 Seventh Amendment right to a jury trial, that she agreed to forego any right to proceed as a
17 class, and that she agreed that DirecTV could carve out certain claims from the arbitration
18 agreement and pursue those in court. Nor has DirecTV provided any valid reason for
19 withholding the complete terms of the arbitration agreement. DirecTV’s manner of
20 presenting the complete arbitration agreement at a later date results in just the kind of
21 unfair surprise that courts have held results in an increased degree of procedural
22 unconscionability.⁸ *See Chavarria*, 733 F.3d at 923 (“[T]he degree of procedural
23 unconscionability is enhanced when a contract binds an individual to later-provided
24 terms.”); *Pokorny*, 601 F.3d at 997 (stating that the failure to attach a “full description of
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26 ⁸ Unlike in *Poublon v. C.H. Robinson Co.*, this is not a case where surprise or oppression is
27 absent because the terms were properly incorporated by reference. *See* 846 F.3d at 1262 (stating
28 that “incorporation by reference, without more, does not affect the finding of procedural
unconscionability”).

1 the non-binding conciliation and binding arbitration processes” increased the degree of
2 procedural unconscionability); *Milliner v. Bock Evans Fin. Counsel, Ltd.*, 114 F. Supp. 3d
3 871, 879 (N.D. Cal. 2015) (finding increased procedural unconscionability where the
4 arbitration agreement did not provide the applicable arbitration rules and did not otherwise
5 indicate where the plaintiffs could find them); *Fox v. Vision Service Plan*, No. 2:16-cv-
6 2456-JAM-DB, 2017 WL 735735, at *6 (E.D. Cal. Feb. 23, 2017) (finding that failure to
7 attach terms to the contract increased procedural unconscionability where the contract
8 contained no instructions on how to obtain the omitted terms); *cf. Merkin v. Vonage*
9 *America, Inc.*, 639 Fed. Appx. 481, 482 (9th Cir. 2016) (quoting *Chavarria*’s text that
10 procedural unconscionability is enhanced when a contract binds an individual to later-
11 provided terms). That is particularly true in this instance because the ELA informs Perez
12 that if she subsequently cancels her service, she is subject to a hefty cancellation fee.
13 (Robson Decl., Ex. 5.) DirecTV points to nothing in any agreement that would allow
14 Perez to avoid that fee if she were to discontinue service based on the later-provided terms
15 of arbitration.

16 c. The Early Cancellation Fee Term in the ELA Exerts Additional
17 Pressure on Perez to “Accept” Terms of the Arbitration Agreement.

18 The manner in which DirecTV provided Perez with the ELA and the Customer
19 Agreement exerted additional pressure on Perez to “accept” the terms of the arbitration
20 agreement. At the installation of her DirecTV equipment, DirecTV provided Perez with
21 only the ELA. (Perez Decl. ¶ 6; Robson Decl., Ex. 5; Robson Decl. ¶ 8.) The ELA
22 includes a paragraph that tells the consumer that if she cancels service before the end of a
23 two-year term, she will be charged an early cancellation fee of up to \$480. (Robson Decl.,
24 Ex. 5.) By the time Perez received the Customer Agreement and its additional terms, she
25 was already receiving DirecTV programming. (*See* Robson Decl. ¶¶ 11–12.) To the
26 extent Perez was dissatisfied with the terms of the Customer Agreement, the early
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1 cancellation fee provision in the ELA would exert pressure on Perez to maintain service
2 unless she was willing to potentially pay up to \$480 to get out of her contract.⁹

3 In light of all the aforementioned factors, the Court finds that the arbitration
4 agreement here has a high degree of procedural unconscionability.

5 2. Substantive Unconscionability

6 “Substantive unconscionability addresses the fairness of the term in dispute.”
7 *Pokorny*, 601 F.3d at 997 (quoting *Szetela*, 97 Cal. App. 4th at 1100). Under California
8 law, “[a] provision is substantively unconscionable if it ‘involves contract terms that are so
9 one-sided as to ‘shock the conscience,’ or that impose harsh or oppressive terms.’”
10 *Parada*, 176 Cal. App. 4th at 1573 (quoting *Morris v. Redwood Empire Bancorp*, 128 Cal.
11 App. 4th 1305, 1322 (2005)). “Thus, mutuality is the ‘paramount’ consideration when
12 assessing substantive unconscionability.” *Pokorny*, 601 F.3d at 997–98 (quoting
13 *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657 (2004)). In the context of
14 arbitration agreements, “it is unfairly one-sided for [a party] with superior bargaining
15 power to impose arbitration on the [other party] as plaintiff but not to accept such
16 limitations when it seeks to prosecute a claim against [that party], without at least some
17 reasonable justification for such one-sidedness.” *Armendariz*, 24 Cal. 4th at 117.

18 Here, DirecTV has crafted the agreement to exempt from arbitration its claim under
19 Section 1(h) alleging that Perez improperly allowed commercial viewing of DirecTV
20 programming. However, according to DirecTV, Perez must arbitrate any claim that the
21 prohibition on commercial viewing in Section 1(h) was part of DirecTV’s scheme to
22 defraud small business owners. Under this interpretation, the lack of mutuality is
23 abundantly clear: DirecTV can sue—or as alleged here, threaten suit—against customers
24 for permitting commercial viewing of DirecTV programming in violation of Section 1(h),
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27 ⁹ This case differs from *Castillo* in that respect. There, the court found that the plaintiffs
28 had failed to identify any extra costs they would have incurred had they chosen to cancel their
DirecTV service. 2017 WL 1079241, at *8.

1 but any customer counterclaim alleging that Section 1(h) is invalid as part of a fraudulent
2 scheme must be arbitrated.

3 As interpreted by DirecTV, one-sidedness also exists with respect to the “theft of
4 service” exception in Section 9(d) of the Customer Agreement. Because DirecTV is the
5 service provider in this relationship, any claim involving “theft of service” would be
6 brought by DirecTV against Perez. Moreover, any claim DirecTV might conceivably
7 bring against Perez that relates to the Customer Agreement, any addendum, or DirecTV’s
8 services, would involve Perez’s misuse of or non-payment for (*i.e.*, theft of) those services.
9 As such, it is hard to conceive of claims that DirecTV has against Perez that would *not* be
10 exempt from arbitration.¹⁰

11 DirecTV first argues that one-sidedness is permissible because a contract can
12 provide a “margin of safety” to the party with superior bargaining power. (DirecTV Reply
13 at 11–12.) *See Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1031–32 (9th Cir. 2016);
14 *Baltazar*, 62 Cal. 4th at 1250; *Armendariz*, 24 Cal. 4th at 117. However, in *Tompkins*, the
15 provision at issue allowed 23andMe’s *customers* to retain intellectual property rights,
16 including rights in user-generated content and genetic information, and to bring suit in
17 court against 23andMe to vindicate those rights. *Id.* There was nothing about the
18 provision that obviously favored the drafting party. In fact, the plaintiffs in *Tompkins* did
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20 ¹⁰ The court in *Castillo* noted that “[d]istrict courts have upheld § 9 of DirecTV’s
21 Customer Agreement against substantive unconscionability challenges because “‘it is conceivable
22 that a [customer] might have a claim against’ DirecTV for . . . claims’ under the laws listed in §
23 9(d).” 2017 WL 1079241, at *9 (citing cases). Tellingly, however, the *Castillo* court could not
24 provide any concrete examples of such a claim, and acknowledged in a footnote that “[t]he cases
25 interpreting DirecTV’s [Customer] Agreement cited in the text do not offer any concrete examples
26 of the sort of claim a consumer could bring under the exception in § 9(d).” *Id.* at *9 n.3. Nor has
27 this Court found any concrete examples in the cases it has reviewed. At oral argument, DirecTV’s
28 counsel stated that plaintiffs bring “a lot” of cases under the Electronic Communications Privacy
Act, but “not necessarily against us.” Such a vague statement fails to articulate any claim that a
customer could bring *against DirecTV* under the exceptions listed in Section 9(d). The lack of any
concrete examples despite the plethora of cases involving DirecTV’s Customer Agreement
suggests there may not be any claims that a customer could litigate against DirecTV under
DirecTV’s interpretation of Section 9(d).

1 not identify any intellectual property claims that 23andMe was likely to bring against its
2 customers. *Id.* Given these facts, the intellectual property provision contained “more than
3 [the] ‘modicum of bilaterality’” required for a valid contract. *Id.* (quoting *Armendariz*, 24
4 Cal. 4th at 117). To the extent that *Tompkins* also validated a “margin of safety” doctrine,
5 that doctrine does not swallow the rule. One searches DirecTV’s arguments in vain to see
6 how its sweeping exemptions from arbitration are consistent with retaining some limited
7 margin of safety. Indeed, DirecTV has proffered no limiting principle.

8 Instead of explaining the contours of the “margin of safety,” DirecTV pivots to its
9 argument that requiring mutuality of obligation within an arbitration provision would
10 impermissibly burden agreements to arbitrate and conflict with the federal policy favoring
11 arbitration. (DirecTV Reply at 13.) This is simply an argument that DirecTV should not
12 be limited to a “margin of safety” when drafting one-sided arbitration provisions. In short,
13 under DirecTV’s interpretation, there would be little difference between the exceptions as
14 drafted and a provision in the Customer Agreement that explicitly requires only Perez to
15 arbitrate her claims. A one-sided provision of such breadth and scope goes beyond simply
16 preserving a “margin of safety” for DirecTV.

17 DirecTV intimates that the FAA preempts any examination of the bilaterality of an
18 arbitration agreement in evaluating a contract’s substantive unconscionability. (*See*
19 DirecTV Reply at 12–13.) Not so. California courts routinely consider mutuality not just
20 of the one-sidedness of an arbitration provision, but also in considering other contractual
21 provisions in contracts of adhesion that affect the vindication of substantive rights. For
22 instance, California also deems unconscionable one-sided fee-shifting provisions in favor
23 of the drafter of a contract of adhesion. *See, e.g., Carmona v. Lincoln Millennium Car*
24 *Wash, Inc.*, 226 Cal. App. 4th 74, 88 (2014), *Samaniego v. Empire Today LLC*, 205 Cal.
25 App. 4th 1138, 1143 (2012), *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 799–
26 800 (2012). California’s substantive unconscionability doctrine, if it has any
27 pronounceable effect, encourages arbitration by preventing a party with superior
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1 bargaining power from exempting itself entirely from the arbitration provision it imposes
2 on its customers. And the doctrine does not evince a judicial hostility to arbitration; to the
3 contrary, where a drafter of a contract of adhesion believes that arbitration is “good
4 enough” for *all* consumer claims but not for *any* claims it may bring, it is the drafter who
5 holds an aversion to arbitration.

6 Accordingly, under DirecTV’s interpretation of its arbitration provisions, the Court
7 would find the arbitration agreement so one-sided and lacking in mutuality as to be
8 substantively unconscionable. When considered with the strong showing of procedural
9 unconscionability discussed above, the Court finds that, if the arbitration carve-out is
10 interpreted as advocated by DirecTV, the arbitration agreement between DirecTV and
11 Perez is unenforceable. *See Armendariz*, 24 Cal. 4th at 114 (“[T]he more substantively
12 oppressive the contract term, the less evidence of procedural unconscionability is required
13 to come to the conclusion that the term is unenforceable, and vice versa.”).

14 3. Severability

15 In California, when a court finds that a contract or any clause in the contract was
16 unconscionable at the time it was made, the court “may refuse to enforce the contract, or it
17 may enforce the remainder of the contract without the unconscionable clause, or it may so
18 limit the application of any unconscionable clause as to avoid any unconscionable result.”
19 Cal. Civ. Code § 1670.5(a). “A court may ‘refuse to enforce the entire agreement’ only
20 when it is “‘permeated’ by unconscionability.’” *Poublon*, 846 F.3d at 1272 (quoting
21 *Armendariz*, 24 Cal. 4th at 122). A contract is permeated by unlawfulness when “[t]he
22 good cannot be separated from the bad, or rather the bad enters into and permeates the
23 whole contract, so that none of it can be said to be good.” *Id.* (quoting *Keene v. Harling*,
24 61 Cal. 2d 318, 322 (1964)) (internal quotation marks omitted). “If the central purpose of
25 the contract is tainted with illegality, then the contract as a whole cannot be enforced. If
26 the illegality is collateral to the main purpose of the contract, and the illegal provision can
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1 be extirpated from the contract,” then severance is appropriate. *Marathon Entm’t, Inc. v.*
2 *Blasi*, 42 Cal. 4th 974, 996 (2008) (quoting *Armendariz*, 24 Cal. 4th at 124).

3 Here, the Court has already noted that (1) the agreement was presented in English to
4 a known Spanish-speaker at the end of a transaction conducted in Spanish; (2) although
5 there was no reason to withhold the full terms of the arbitration agreement at the time the
6 contract was entered, DirecTV nonetheless withheld them; (3) the manner in which
7 DirecTV exempted itself from arbitration allowed it to threaten litigation for “theft of
8 service” claims, but relegated (per DirecTV’s interpretation) Perez to arbitration to argue
9 that the “theft of service” claims are part of a scheme. For these reasons, it is not possible
10 to remove the unconscionable taint to the arbitration agreement through severance. *See*
11 *Armendariz*, 24 Cal. 4th at 124–25 (“[P]ermeation is indicated by the fact that there is no
12 single provision a court can strike or restrict in order to remove the unconscionable taint
13 from the agreement.”).

14

15 **V. CONCLUSION**

16 For the reasons stated above, the Court DENIES Defendants’ Motions to Compel
17 Arbitration.¹¹

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20 DATED: May 1, 2017

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JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

27 ¹¹ In light of the Court’s denial of Defendants’ Motions on the grounds set forth in this
28 Order, the Court does not reach those arguments relating solely to the ability of the Lonstein
Defendants to enforce the DirecTV arbitration provision.