UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

STAYED

Case No. **CV 14-2765 DMG (PJWx)** Date May 25, 2016

Title ***Tracie Tribendis, et al. v. Life Care Centers of America, Inc., et al.*** Page 1 of 9

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS - ORDER RE DEFENDANTS' MOTION TO COMPEL ARBITRATION AND MOTIONS TO DISMISS [96, 97, 99]

I. PROCEDURAL BACKGROUND

On December 14, 2015, Plaintiffs Tracie Tribendis, Jose Flores, and Fernando Sanchez filed their Third Amended Complaint ("TAC") against Defendants Life Care Centers of America, LLC ("Life Care Center") and La Mirada Healthcare, LLC ("La Mirada") alleging violations of the (1) California Health and Safety Code section 1430(b); (2) California Consumer Legal Remedies Act ("CLRA"), Civil Code section 1750 *et seq.*; and (3) California Business and Professions Code section 17200 *et seq.* for unfair and deceptive business practices. [Doc. # 82.]

On January 25, 2016, Defendant La Mirada filed a motion to compel arbitration of Flores' claims ("MTC")[1] and a motion to dismiss Plaintiffs' TAC ("La Mirada's MTD"). [Doc. ## 96, 97.] On February 26, 2016, Plaintiffs filed their oppositions to La Mirada's MTD ("MTD Opp.") and MTC ("MTC Opp."). [Doc. # 105, 107.] On March 4, 2016, La Mirada filed their replies to Plaintiffs' oppositions. [Doc. # 110, 111.]

On January 25, 2016, Defendant Life Care Centers filed a motion to dismiss Plaintiffs' TAC ("Life Care Center's MTD"). [Doc. # 99.] On February 26, 2016, Plaintiffs filed a notice of non-opposition to Life Care Centers' MTD. [Doc. # 106.] On March 4, 2016, Life Care Centers filed a reply. [Doc. # 109.] The Court conducted a hearing on March 18, 2016. At that time, the Court granted Plaintiffs leave to file a supplemental brief in response to the motion to compel arbitration. Plaintiffs filed their supplemental brief on March 25, 2016 and La Mirada filed its supplemental brief on April 8, 2016.

Having duly considered the parties' written submissions and oral argument, the Court now renders its decision.

[1] Defendant has styled this filing as a "petition" but the Court will treat it as a motion for the purpose of ruling on it.

II.
FACTUAL BACKGROUND[2]

Defendant Life Care Centers has owned and operated Imperial Convalescent Hospital since at least 2004. (TAC ¶ 25). In October 2014, Life Care Centers sold the hospital to Defendant La Mirada, which was subsequently renamed Imperial Healthcare Center. (*Id.* at ¶ 12a., n.5). Life Care Centers also owned and operated Bel Tooren Villa Convalescent Hospital. (*Id.* ¶ 11).

Plaintiffs Tracie Tribendis, Jose Flores, and Fernando Sanchez ("Sanchez") are guardians *ad litem* for their relatives Robert Wightman, Guadalupe Moreno, and Magdalena Franco De Sanchez ("De Sanchez"), respectively. (*Id.* ¶¶ 6-8). Wightman and De Sanchez are former residents of the Bel Tooren Villa Convalescent Hospital. (*Id.*). Moreno is a former resident of both Bel Tooren Villa Convalescent Hospital and the Imperial Healthcare Center. (*Id.* ¶ 7). The Plaintiffs allege that Defendants "systematically and continuously failed to comply" with minimum staffing requirements of 3.2 hours of direct nursing care per day and failed to provide an adequate number of qualified nursing personnel. (*Id.* ¶¶ 28-36).

La Mirada alleges that Flores (as representative for Moreno) entered into a California Long-Term Care Arbitration Agreement ("Agreement") on May 2, 2015. (MTC ¶ 5). The Agreement requires residents to arbitrate "[a]ny and all claims or controversies arising out of or *in any way* relating to this agreement, the Admission Agreement or any of the resident's stays at this Facility . . . shall be submitted to binding arbitration." (MTC, Exh. B ("Agreement"), § B) (emphasis in original). The Agreement selects the National Arbitration Forum as the arbitrator and provides that in the event that the NAF is "unwilling or unable to serve . . ., the Parties shall agree upon another independent entity regularly engaged in providing arbitration services to serve as the Administrator[.]" (*Id.* § C1). The Agreement also contains a statutory disclaimer and a provision allowing the Agreement to be cancelled by written notice. (*Id.* at p. 1, § E).

III.
DISCUSSION

A. La Mirada's Motion to Compel Arbitration

1. Legal Standard

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

[2] The Court takes the facts alleged as true for the purpose of ruling on the motions to dismiss, and weighs the evidence in order to make a factual determination for purposes of ruling on the motion to compel.

revocation of any contract[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011). "The basic role for courts under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (internal citation and quotation marks omitted).

Federal substantive law governs questions concerning the interpretation and enforceability of arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). Courts apply ordinary state law contract principles, however, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995). As long as an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," it must be enforced according to its terms. *Concepcion*, 563 U.S. at 343.

Under California law, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 842, 181 Cal. Rptr. 3d 781, 786 (2014) (internal citation omitted). "The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence[.]" *Id.* (internal citation omitted).

La Mirada moves to compel arbitration of Flores's claims on the ground that they are encompassed within their valid agreement to submit disputes to the Agreement. Plaintiffs assert that Flores was not a party to the Agreement and that, even if Flores were a party to the Agreement, the Agreement is unconscionable, and his claims are excluded from the Agreement. Plaintiffs also argue that arbitration should not be compelled because the FAA precludes class arbitration and Flores brings only class claims.

2. Flores is a Party to the Arbitration Agreement

"Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it." *Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 186 Cal.App. 4th 696, 706, 111 Cal.Rptr. 3d 876 (2010) (quoting *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.*, 129 Cal. App. 4th 759 (2005)). An individual acting with a "health care power of attorney, in selecting a long-term health care facility, has the power to execute applicable admission forms, including arbitration agreements, unless that power is restricted by the principal." *Hogan v. Country Villa Health Services*, 148 Cal. App. 4th 259, 264, 55 Cal. Rptr. 3d 450 (2007). The arbitration agreement "can [then] bind relatives who present claims arising from the patient's treatment." *Goldman v. Sunbridge Healthcare, LLC*, 220 Cal. App. 4th 1160, 1169, 164 Cal. Rptr. 3d 11 (2013).

Here, Plaintiffs concede that Flores signed the agreement as the legal representative of Moreno. (*See* MTC Opp. at 4; Agreement at 7). Plaintiffs nonetheless contend that Flores is not a party to the arbitration agreement because he only signed as a "legal representative" of Moreno. Plaintiffs' reliance on *Monschke v. Timber Ridge Assisted Living, LLC*, 244 Cal. App. 4th 583, 197 Cal. Rptr. 3d 921 (2016), is misplaced. In *Monschke*, the court held that a decedent's heirs were not bound by an arbitration agreement when bringing a suit for wrongful death. 244 Cal. App. 4th at 587. Critical to the court's decision in *Monschke*, however, was the fact that wrongful death claims are brought in either an individual capacity or on behalf of a decedent's heirs. *Id.* ("[R]ecovery in a wrongful death action belongs to the heirs, not to the decedent or the estate.")

In contrast, Flores's claims here seek redress on behalf of the decedent, Moreno. Flores is only acting in a representative capacity and the asserted claims "[arise] from the patient's treatment." *Goldman*, 220 Cal. App. 4th at 1169. Flores and Moreno are therefore bound by the arbitration agreement. *Id.*; *see also Birl v. Heritage Care, LLC*, 172 Cal. App. 4th 1313, 1322, 91 Cal. Rptr. 3d 777 (2009) ("There are significant consequences and distinctions that flow from the particular capacity in which a party sues."). Accordingly, an agreement to arbitrate exists in this case.

3. Unconscionability

Even if Flores is bound by the Agreement, however, Plaintiffs assert that it is invalid because it is unconscionable. Under California law, "the doctrine of unconscionability has both a procedural and substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133, 163 Cal. Rptr. 3d 269 (2013). Both procedural and substantive unconscionability are required to render a contract unenforceable, but they need not be present in the same degree. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745 (2000). Whether a contract or provision is unconscionable is a question of law. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 851, 113 Cal. Rptr. 2d 376 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n*, 55 Cal. 4th 223, 247, 145 Cal. Rptr. 3d 514 (2012).

"[T]he critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated[.]" *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006). In assessing procedural unconscionability, courts have considered whether a contract is one of adhesion, "i.e., a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). A

finding of procedural unconscionability also considers the factors of oppression and surprise due to unequal bargaining power. *Ferguson v. Country-wide Credit Industries, Inc.*, 298 F.3d 778, 783 (9th Cir. 2002).

Plaintiffs contend that the arbitration agreement is unconscionable because Flores did not receive a copy of the arbitration rules. They point out that some California courts have held that this type of failure supports a finding of procedural unconscionability. *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 393, 116 Cal. Rptr. 3d 804 (2010) (collecting cases). As discussed above, however, the FAA's savings clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but *not* by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 333 (internal quotation omitted) (emphasis added). General California rules of contract interpretation allow for incorporation by reference of matters "provided [1] the incorporation is clear and [2] the incorporated rules are readily available." *Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 932-33 (N.D. Cal. 2012) (citing *Williams Construction Co. v. Standard-Pacific Corp.*, 254 Cal. App. 2d 442, 454, 61 Cal. Rptr. 912 (1967)).

Here, the incorporation is plainly expressed in section C6 (*see* Agreement § C6). Plaintiff's counsel complains that the rules specified in the Agreement are not "readily available" because the NAF no longer arbitrates consumer disputes, and no longer posts rules applicable to consumer disputes. (Declaration of Hannah Belknap, ¶ 4 [Doc. # 108]; *see also* http://www.adrforum.com/ConsumerArbitrationNotice (stating that the NAF no longer administers arbitrations of disputes between business and consumer parties, and has not done so since 2009).) The Agreement provides, however, that "if the NAF is unwilling or unable to serve as the Administrator, the Parties shall agree upon another independent entity regularly engaged in providing arbitration services to serve as the Administrator." (Agreement § C1.) The Agreement provides that the parties shall agree on another administrator, and, presumably, abide by its official rules. Neither party is therefore bound to abide by a set of rules not available to it, and the contract is not unconscionable on this basis.

Moreover, the Agreement gave Flores the opportunity to cancel the Agreement by providing written notice to Defendant within 30 days of Moreno's admission to the Facility. (Agreement § E.) Flores's freedom to reject the contract demonstrates that it is not one of adhesion and is therefore not procedurally unconscionable. *See Ting*, 319 F.3d at 1148-49. Because both procedural and substantive unconscionability are required to render a contract unenforceable, it is unnecessary for the Court to address Flores's claims of substantive unconscionability. The Agreement is not unconscionable.

4. No Exclusion of Flores's Claims

Plaintiffs assert that, even if a valid agreement exists, Flores's claims relating to the Resident Bill of Rights are excluded. It is unclear whether Flores contends that the provision represents an agreement to exclude claims arising from the violations of the Resident Bill of Rights or Flores's waiver of the ability to sue is barred by the California Health and Safety Code section 1599.1(a). Regardless, Flores' claims are not excluded from the arbitration agreement.

Courts apply ordinary state law contract principles "[w]hen deciding whether the parties agreed to arbitrate a certain matter[.]" *First Options of Chicago*, 514 U.S. at 944. The FAA, however, requires "as a matter of federal law [that] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 46 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

"When state law prohibits outright the arbitration of a particular type of claim . . . [t]he conflicting rule is displaced by the FAA." *Concepcion*, 563 U.S. at 341 (citations omitted). Categorical rules that are "contrary to the terms and coverage of the FAA" are therefore preempted by the FAA, regardless of any state public policy behind them. *See Marmet Health Care Ctr., Inc. v. Brown*, __U.S.__, 132 S. Ct. 1201, 1204, 182 L.Ed. 2d 42 (2012) (*per curiam*).

Plaintiffs rely on an advisory provision above the arbitration agreement that states: "Residents . . . cannot waive the ability to sue for violation of the Resident Bill of Rights." (Agreement at 1.) This provision, however, is a required notice under Health and Safety Code section 1599.81(d) and Title 22 of the California Code of Regulations section 72516(d). Health and Safety Code section 1430(b) further provides that "[a]n agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue pursuant to this subdivision shall be void as contrary to public policy." Cal. Health & Safety Code § 1430(b).

In *Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016 (E.D. Cal. 2014), the court examined a challenge to the statutes at issue here, finding that section 1430(b) "effectively precludes arbitration of Patient's Bill of Rights claims" in that it "prohibits outright arbitration of a particular claim, and disproportionately impacts arbitration." *Id.* at 1041. Citing *Concepcion*, the *Valley View* court found that the last sentence of section 1430, which prohibits the waiver of a patient's right to sue, violates and is preempted by the FAA. *Id.*

The *Valley View* court also discussed the notice requirements of sections 1599.81(d) and 72516(d), finding that those two sections were "derivative of section 1430(b)[,]" and that sections 1599.81(d) and 72516(d) therefore "stand or fall with section 1430(b)'s last sentence

[prohibiting waivers of a patient's right to sue.]" 992 F. Supp. 2d at 1041. Thus, the *Valley View* court concluded that "[s]ections 1599.81(d) and 72516(d) fall as contrary to the FAA to the extent that they require notice of the bar on arbitration of Patient's Bill of Rights claims." *Id.*

Here, Plaintiffs provide no authority to show that the advisory provision of the Agreement is anything more than the statutorily required notice under sections 1599.81(d) and 72516(d). Indeed, the Agreement clearly indicates that the provision is merely advisory and is also a verbatim reproduction of the statute. *Compare* Agreement at 1 *with* Cal. Health & Safety Code §1599.81(d); 22 Cal. Code of Regs. § 72516(d). Because the relevant portions of sections 1430(b), 1599.81(d), and 72516(d) violate and are preempted by the FAA, the Court finds that this provision of the Agreement does not exclude Flores's claims. *See Valley View*, 992 F. Supp. 2d at 1041. In any event, the Court must resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Moses*, 46 U.S. at 24-25.

The Agreement requires arbitration of "[a]ny and all claims or controversies arising out of or in any away relating to . . . any of the resident's stays at this Facility," and therefore encompasses the disputes at issue in this case, all of which relate to Moreno's stay at La Mirada's facilities. (Agreement § B.)

Because a valid agreement to arbitrate exists and the agreement encompasses the dispute at issue, the Court next considers Plaintiffs' assertion that the FAA does not permit the arbitration of Flores' class claims.

5. Arbitrability of Flores's Class Action Claims

Plaintiffs also argue that the FAA precludes arbitration of class actions because the Agreement does not expressly permit class arbitration. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (emphasis in original).

> [C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator. In [individual] arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution. . . . But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration.

Id. at 685-86. Courts have limited *Stolt-Nielsen*, however, to cases where an arbitration agreement is "silent in the sense that [the parties] had not reached any agreement on the issue of

class arbitration, not simply . . . that the clause made no express reference to class arbitration." *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1011 (N.D. Cal. 2011) (internal citations and quotations omitted). "[F]ailure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in *Stolt-Nielsen*." *Vazquez v. ServiceMaster Global Holding, Inc.*, 2011 WL 2565574 at *3 n.1 (N.D. Cal. June 29, 2011).

In this case, Section B of the Agreement requires that "[a]ny and all claims or controversies arising out of or *in any way* relating to this agreement, the Admission Agreement or any of the resident's stays at this Facility . . . shall be submitted to binding arbitration." Agreement, § B (emphasis in original). While there is no explicit mention of class arbitration, the mere failure to mention class arbitration does not necessarily constitute the "silence" contemplated in *Stolt-Nielsen*, especially given the expansive language of Section B. Nevertheless, many courts have hesitated in compelling class arbitration where the arbitration agreement is unclear. *See Martinez v. Leslie's Poolmart, Inc.*, 2014 WL 5604974 at *3-4 (C.D. Cal. Nov. 3, 2014) (incorporation of arbitration rules regarding class actions insufficient to infer an agreement to arbitrate on a class-wide basis) (citing *Lopez v. Ace Cash Express, Inc.*, 2012 WL 1655720 (C.D. Cal. May 4, 2012)); *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298 (N.D. Cal.) (2013) (finding no evidence to support an agreement permitting class arbitration). At least one court, however, has concluded that such ambiguity requires a threshold determination of "whether the arbitrability of class claims should be determined by the court or the arbitrator." *Yahoo*, 836 F. Supp. 2d at 1011.

The Court finds *Yahoo* persuasive. Although questions of arbitrability are usually reserved for the court, there is "clear and unmistakable" evidence that the parties in this case intended to arbitrate the arbitrability of class claims. *First Options*, 514 U.S. at 944; *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003) (whether an arbitration contract with "sweeping language" forbids class arbitration is a "matter of contract interpretation . . . for the arbitrator, not the courts, to decide) (Breyer, J., plurality). Section B of the Agreement explicitly provides that disputes "regarding the . . . scope [and] interpretation . . . of this Agreement . . . shall be submitted to binding arbitration." Agreement, § B. Thus, whether the Agreement allows class arbitration is a question the arbitrator must decide.

B. La Mirada's Motion to Dismiss

La Mirada's motion to dismiss is premised upon its position that the claims of Flores and Moreno are subject to arbitration. *See* La Mirada's MTD. Given the Court's ruling granting the motion to compel arbitration as to arbitrability, all of Flores and Moreno's claims against La Mirada are stayed pending arbitration.

C. Life Care Center's Motion to Dismiss

Life Care Center filed a motion to dismiss pursuant to Rule 12(b)(6) on the ground that Plaintiffs lack standing to bring any claims as to Life Care Center's Imperial Convalescent Hospital, as no named Plaintiff was ever a resident of that facility. Plaintiffs filed a notice of non-opposition to Life Care Center's motion. Accordingly, Life Care Center's MTD is **GRANTED**.

V. CONCLUSION

In light of the foregoing, La Mirada's motion to compel arbitration as to the arbitrability of the class claims of Flores and Moreno is **GRANTED** and La Mirada's motion to dismiss is **DENIED** as moot. The parties shall file a joint status report within 10 days after the conclusion of the arbitration and issuance of a decision on arbitrability. Life Care Center's motion to dismiss all claims relating to issues with Life Care's Imperial Convalescent Hospital is **GRANTED** without prejudice.

IT IS SO ORDERED.