

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WANDA CHIN,

Plaintiff,

v.

BOEHRINGER INGELHAM
PHARMACEUTICALS, INC.,

Defendant.

Case No.17-cv-03703-JSC

**ORDER RE: DEFENDANT’S MOTION
TO COMPEL ARBITRATION**

Re: Dkt. No. 11

Plaintiff Wanda Chin worked as a sales representative for Defendant Boehringer Ingelham Pharmaceuticals, Inc. (“Boehringer”) for 30 years. Twenty-eight years into her employment, Boehringer requested that employees agree to an arbitration agreement as a condition to receiving certain incentive pay. Plaintiff alleges that two years later she involuntarily retired following repeated incidents of age discrimination. Plaintiff then exhausted her administrative remedies and filed this action for wrongful termination and discrimination. In response, Boehringer filed the now pending motion to compel arbitration pursuant to the arbitration agreement the company rolled out in 2013. (Dkt. No. 11.) Having considered the parties’ briefs and having had the benefit of oral argument on September 7, 2017, the Court GRANTS the motion to compel and stays this action.¹

¹ Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 8 & 10.)

1 **BACKGROUND**

2 Plaintiff began working for Defendant in 1985 and left in 2015. (Dkt. No. 1-1 at ¶ 6.) In
 3 2013, Boehringer introduced an Arbitration Agreement for Incentive Compensation-Eligible
 4 Employees (hereafter the “Arbitration Agreement”) for sales representatives such as Plaintiff.
 5 (Dkt. No. 11-2 ¶ 4.) As consideration for agreeing to the Arbitration Agreement, employees were
 6 eligible to earn incentive compensation. (Dkt. No. 11-2 at ¶ 5.) Plaintiff was emailed a copy of
 7 the Arbitration Agreement. (Dkt. No. 13 ¶ 3.) Plaintiff received a Certificate of Completion for
 8 successfully completing the Incentive Compensation and Arbitration Plan Acknowledgment on
 9 October 4, 2013. (Dkt. No. 11-3 at 2; Dkt. No. 11-2 ¶ 7-8.²) However, Plaintiff does not recall
 10 signing, electronically or otherwise, the Arbitration Agreement or any arbitration agreement
 11 presented to her by Defendant. (Dkt. No. 13 ¶ 7.)

12 On September 14, 2014, Boehringer notified employees, including Plaintiff, of the 2014
 13 Arbitration Agreement for Incentive Compensation-Eligible Employees by placing a copy of it on
 14 the company’s intranet. (Dkt. No. 11-2 ¶ 9.) Plaintiff does not recall seeing the 2014 version of
 15 the Arbitration Agreement during her employment.³ (Dkt. No. 12-3 ¶ 9.)

16 In 2015, after more than 30 years with Boehringer, Plaintiff involuntarily retired after
 17 experiencing pervasive and severe harassment and discrimination based on her age. (Dkt. No. 1-1
 18 at ¶¶ 24, 31, 39.) After pursuing her administrative remedies, Plaintiff filed this action in the
 19 Alameda County Superior Court alleging discrimination and harassment based on age, and
 20 wrongful termination under state law. Defendant then removed the action to this Court based on
 21 diversity jurisdiction. (Dkt. No. 1.) Shortly thereafter, Defendant filed the underlying motion to
 22 compel arbitration. (Dkt. No. 11.)

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 24
 25 ² Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the
 ECF-generated page numbers at the top of the documents.

26 ³ Both parties agree that the 2013 and 2014 versions of the Arbitration Agreement are identical
 27 with respect to all material terms. (Dkt. No. 12 at 5, n.2; Dkt. No. 15 at 2, n.1.) However, given
 28 Plaintiff’s contention that she never saw or agreed to the 2014 version, the citations herein are to
 the 2013 version of the Arbitration Agreement.

1 **LEGAL FRAMEWORK**

2 The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 2-16, provides that arbitration
 3 agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or
 4 in equity for the revocation of any contract.” Under the FAA, “arbitration agreements [are] on an
 5 equal footing with other contracts,” and therefore courts are required to enforce arbitration
 6 agreements according to their terms. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66
 7 (2010). “Like other contracts, however, they may be invalidated by ‘generally applicable contract
 8 defenses, such as fraud, duress, or unconscionability.’” *Id.* (internal citations and quotations
 9 omitted).

10 The FAA espouses a general policy favoring arbitration agreements. *AT&T Mobility v.*
 11 *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1745-46, (2011). Federal courts are required to
 12 rigorously enforce an agreement to arbitrate. *See Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S.
 13 576, 582 (2008). The court must direct parties to proceed to arbitration should it determine: (1)
 14 that a valid arbitration agreement exists, and (2) that the agreement encompasses the dispute at
 15 issue. *Kilgore v. KeyBank, Nat’l Ass’n*, 718 F.3d 1052, 1058 (9th Cir. 2013). If the Court is
 16 “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not
 17 in issue, the court shall make an order directing the parties to proceed to arbitration in accordance
 18 with the terms of the agreement.” 9 U.S.C. § 4. Where the claims alleged in a complaint are
 19 subject to arbitration, a court may stay the action pending arbitration. *Id.* § 3.

20 **DISCUSSION**

21 There is no dispute here that the 2013 Arbitration Agreement encompasses Plaintiff’s
 22 claims in this action. However, Plaintiff maintains that the Arbitration Agreement has three fatal
 23 flaws which render it unenforceable: (1) it is contrary to public policy because the it limits
 24 Plaintiff’s recovery of attorney’s fees; (2) it is procedurally unconscionable because it is a contract
 25 of adhesion; and (3) it is substantively unconscionable because it lacks mutuality by compelling
 26 arbitration of claims typically brought by employees while allowing claims typically brought by
 27 employers to be litigated.

1 **A. The Agreement is Not Contrary to Public Policy**

2 “It is indisputable that an employment contract that required employees to waive their
3 rights under the FEHA to redress sexual harassment or discrimination would be contrary to public
4 policy and unlawful.” *Armendariz*, 24 Cal. 4th 83, 100-01. In *Armendariz*, the court set forth five
5 requirements for a lawful arbitration agreement: it must “(1) provide[] for neutral arbitrators, (2)
6 provide[] for more than minimal discovery, (3) require[] a written award, (4) provide[] for all of
7 the types of relief that would otherwise be available in court, and (5) [] not require employees to
8 pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the
9 arbitration forum.” *Id.* at 102.

10 Plaintiff contends that the Arbitration Agreement is contrary to public policy because it
11 requires employees to waive their rights under FEHA. *See id.* at 101 (“an arbitration agreement
12 cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA”).
13 In particular, Plaintiff contends that the Agreement mandates that a successful plaintiff cannot
14 recover attorney’s fees or expenses pursuant to her statutory rights to do so under FEHA. In
15 support of this argument, Plaintiff cites to Paragraph 16 of the Arbitration Agreement which reads
16 as follows:

17 **16. Fees and Expenses**

18 *Unless otherwise precluded by applicable law, fees and*
19 *expenses shall be allocated as follows:*

20 a. Filing fees – the Company shall pay any filing fee
21 required by the AAA.

22 b. Discovery costs (e.g., court reporter fees for original
23 transcripts) shall be paid by the party initiating the
24 discovery. The cost of copies of deposition transcripts
25 or other discovery shall be paid by the party
26 ordering the copy.

27 c. The fees and expenses of experts, consultants and
28 others retained or consulted by a party shall be paid
29 by the party utilizing those services, unless otherwise
30 agreed by the parties or as provided under applicable
31 law.

32 d. Hearing fees and arbitrator fees – the Company
33 shall pay the hearing fee and arbitrator fee for the
34 hearing.

1 e. Postponement/cancellation fees - postponement
2 and cancellation fees shall be payable, at the
3 discretion of the arbitrator, by the party causing the
postponement or cancellation.

4 f. Other expenses - the expenses of witnesses shall
5 be paid by the party requiring the presence of
6 such witness, except as otherwise provided by
7 law. All other ordinary and reasonable expenses of
the arbitration, including hearing room expenses,
travel expenses of the arbitrator, and any witnesses
produced at the arbitrator's direction, shall be paid
by the Company.

8 ***g. Legal fees and expenses – each side shall pay its
9 own legal fees and expenses subject to Paragraphs
10 16a through 16f above.***

11 ***The allocation of expenses as provided for in Paragraphs 16a
12 through 16g above may not be disturbed by the arbitrator
13 except where the arbitrator determines that a party's claims
14 were frivolous or were asserted in bad faith.***

15 (Dkt. No. 12-2 at 5-6 (emphasis added).) While the last two paragraphs—those on which Plaintiff
16 relies—state that each side shall pay its own legal fees and expenses, the introductory paragraph
17 makes clear that this is the allocation “unless otherwise precluded by applicable law.” Thus, the
18 applicable law—FEHA—controls.

19 That the arbitrator is bound by state law—which would include FEHA's attorney's fees
20 provisions—is affirmed elsewhere in the Agreement, including in the section of the Arbitration
21 Agreement actually addressing any “Award.” That section states that

22 “[t]he arbitrator shall be governed by applicable federal, state,
23 and/or local law...The arbitrator shall have the authority to award
24 any damages including compensatory damages, punitive or
25 exemplary damages and injunctive relief to the extent permitted by
26 applicable law. The arbitrator shall not have the authority to award
27 to the Company the costs of the arbitration that it is otherwise
28 required to bear under this Arbitration Plan.”

(Dkt. No. 12-1 at 4 (¶ 9.b).) Further, Paragraph 13 of the Agreement states that “the arbitrator
shall be bound by and shall apply applicable law including that related to the allocation of the
burden of proof as well as substantive law. The arbitrator shall not have the authority either to
abridge or enlarge substantive rights available under applicable law.” (Dkt. No. 12-2 at 5.) Thus,
the Agreement requires the arbitrator to apply FEHA, including its fee shifting provision.

1 In *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251 (9th Cir. 2017), for example, the Ninth
2 Circuit held that “because the sanctions provision [wa]s silent on whether an arbitrator can award
3 attorneys’ fees to a prevailing employee, it is not inconsistent with [the statute awarding fees to a
4 prevailing employee on a misclassification claim]. Rather, the Arbitration Procedure requires the
5 arbitrator to comply with applicable California law, which would include [this statute] to the
6 extent applicable.” *Id.* at 1268; *see also Serpa v. California Sur. Investigations, Inc.*, 215 Cal.
7 App. 4th 695, 709 (2013), as modified (Apr. 19, 2013), as modified (Apr. 26, 2013) (holding that
8 an agreement requiring each side to bear its own attorney’s fees in violation of FEHA was
9 substantively unconscionable, but noting that “[h]ad the agreement to arbitrate been silent on the
10 question of attorney fees, or provided for the recovery of attorney fees in an appropriate
11 circumstance or in accordance with applicable law, we might agree [that the agreement was not
12 unconscionable]”).

13 The same reasoning applies here. The Agreement does not explicitly state that the
14 arbitrator can award a prevailing plaintiff fees, but is not inconsistent with FEHA’s fee-shifting
15 provision as it requires the arbitrator to comply with California law. Plaintiff’s lament that the last
16 paragraph of section 16 prohibits the arbitrator from awarding a prevailing plaintiff costs is
17 unpersuasive as that paragraph is subject to the caveat “unless prohibited by applicable law.”
18 Here, the applicable law—FEHA—allows for an award of fees and costs to a prevailing plaintiff.
19 Thus, paragraph 16 does not violate California public policy. Further, Defendant stated on the
20 record at oral argument that it agrees that the Agreement does not preclude the arbitrator for
21 awarding a prevailing plaintiff legal fees and costs.

22 **B. The Agreement is Not Unconscionable**

23 Once a court concludes there is an agreement to arbitrate, it must compel arbitration unless
24 it determines there are grounds for revocation. 9 U.S.C. § 2. The grounds under which an
25 arbitration agreement may be revoked are governed by state law. *Perry v. Thomas*, 482 U.S. 483,
26 493, n. 9 (1987). Under California law, “the party opposing arbitration bears the burden of
27 proving any defense, such as unconscionability.” *Pinnacle Museum Tower Ass’n v. Pinnacle Mkt.*
28 *Dev. (US), LLC*, 55 Cal.4th 223, 236 (2012). “In order to establish such a defense, the party

1 opposing arbitration must demonstrate that the contract as a whole or a specific clause in the
 2 contract is both procedurally and substantively unconscionable.” *Poublon*, 846 F.3d at 1260.
 3 Procedural and substantive unconscionability “need not be present in the same degree.” *Sanchez*
 4 *v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 910 (2015). Rather, there is a sliding scale: “the
 5 more substantively oppressive the contract term, the less evidence of procedural unconscionability
 6 is required to come to the conclusion that the term is unenforceable, and vice versa.” *Id.* (quoting
 7 *Armendariz*, 24 Cal.4th at 114). The Court must therefore consider procedural and substantive
 8 unconscionability.

9 ***1) Procedural Unconscionability***

10 Plaintiff contends that the Arbitration Agreement is procedurally unconscionable because it
 11 is a contract of adhesion. Plaintiff identifies language in the Agreement stating that “For IC Plan
 12 Participants who did not agree to the Arbitration Plan as a condition of employment with the
 13 Company, your eligibility to participate in the Company’s 2014 Sales Incentive Compensation
 14 Plan (commencing in the Performance Period after you acknowledged the Arbitration Plan) shall
 15 constitute consideration for your obligations under the Arbitration Plan.” (Dkt. No. 12-2 at 2 (¶
 16 A.1⁴)). Plaintiff insists this provision renders the Agreement unenforceable because it was not the
 17 product of a negotiation between the parties and if she did not agree to the terms, she would no
 18 longer receive the incentive compensation that generally constituted 25 percent of her total annual
 19 compensation. The Court disagrees.

20 “While California courts have found that ‘the adhesive nature of the contract is sufficient
 21 to establish some degree of procedural unconscionability’ in a range of circumstances, the
 22 California Supreme Court has not adopted a rule that an adhesion contract is per se
 23 unconscionable. *Poublon*, 846 F.3d at 1261 (quoting *Sanchez*, 61 Cal. 4th at 915). “The adhesive
 24 nature of the employment contract requires us to be particularly attuned to her claim of
 25 unconscionability, but we do not subject the contract to the same degree of scrutiny as contracts of
 26 adhesion that involve surprise or other sharp practices.” *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th

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 28 ⁴ Plaintiff again cites to the wrong paragraph of the Agreement. This language is found in
 Paragraph 1 of Section A, not in Paragraph 3.

1 1237, 1245 (2016) (internal citations and quotation marks omitted). That is, “the adhesive nature
2 of a contract, without more, would give rise to a low degree of procedural unconscionability at
3 most.” *Poublon*, 846 F.3d at 1262.

4 For example, in *Poublon*, the Ninth Circuit considered a similar clause and held that it was
5 not enough that the agreement based the plaintiff’s receipt of bonuses on signing the arbitration
6 agreement (entitled the Incentive Bonus Agreement) and instead required there to be “other
7 indications of oppression or surprise.” *Poublon*, 846 F.3d at 1262. The *Poublon* agreement was
8 similar to that here and provided that “In consideration for Your continued employment, Your
9 eligibility for a bonus incentive, and the mutual promises set forth in this Agreement, You and the
10 Company hereby agree as follows.” *Id.* The Ninth Circuit rejected the plaintiff’s argument that
11 the failure to sign the agreement would have resulted in her termination concluding that there was
12 no evidence to that effect; instead, this “boilerplate language merely establishes that there is
13 consideration for the agreement.” *Id.* at 1262-63. However, the court noted that even if there
14 were evidence that signing the agreement was a condition of her employment, the plaintiff “had
15 not established any other element of oppression or surprise associated with the employment
16 agreement, and therefore under California law, ‘the degree of procedural unconscionability of
17 [such] an adhesion agreement is low, and the agreement will be enforceable unless the degree of
18 substantive unconscionability is high.’” *Id.* (quoting *Serpa*, 215 Cal. App. 4th at 704)).

19 Plaintiff’s reliance on *Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267, 1283
20 (2004), is misplaced. *Nyulassy* did not hold that contracts of adhesion are per se unenforceable as
21 procedurally unconscionable; rather, such a contract is unenforceable if accompanied by
22 oppression and surprise. *Nyulassy*, 120 Cal. App. 4th at 1281 (holding that procedural
23 unconscionability “focuses on factors of oppression and surprise”). Likewise, contrary to
24 Plaintiff’s suggestion, *Fitz v. NCR Corp.* does not hold that a take it or leave it offer is sufficient in
25 and of itself to establish procedural unconscionability. *See Fitz*, 118 Cal. App. 4th 702, 713
26 (2004) (holding that “[i]f the contract is found to be adhesive, the court then determines whether
27 other factors limit its enforceability under established legal principles” including “oppression” and
28 “surprise”); *see also Baltazar*, 62 Cal. 4th at 1245 (rejecting procedural unconscionability

1 argument because there was no evidence of “any oppression or sharp practices”).

2 Because Plaintiff has failed to point to any additional factors which would render the
3 Arbitration Agreement procedurally improper, the mere fact that it was a contract of adhesion is
4 insufficient to show unconscionability unless Plaintiff can make a high showing of substantive
5 unconscionability.

6 2) *Substantive Unconscionability*

7 Plaintiff argues that the Arbitration Agreement is substantively unconscionable because the
8 agreement is unfairly one-sided and lacks mutuality in three respects. First, Plaintiff argues that
9 while the Agreement requires the parties to arbitrate any dispute “arising out of or in any way
10 related to employment based on legally protected rights (i.e., statutory, regulatory, contractual or
11 common law rights) that may arise between an employee or former employee and the Company,”
12 it “*exempts* from arbitration all claims typically brought by an employer (e.g. claims involving
13 trade secrets, confidential information, unfair competition).” (Dkt. No 12 at 8:14-19 (emphasis
14 added).) Not so. The Agreement requires the parties to arbitrate “all disputes” “arising out of or
15 in any way related to employment based on legally protected rights” **and** allows either party to
16 seek “an emergency temporary restraining order or other like injunctive relief where such relief is
17 required to permit the dispute to proceed to arbitration without one party incurring irreparable
18 harm which may not be remedied monetarily, e.g., to prevent the disclosure of a trade secret.”
19 (Dkt. No. 12-2 at 2 (¶ 2), 3 (¶ 4).) An employer’s trade secret, theft of confidential information,
20 or unfair competition claims are common law and statutory claims which are compelled to
21 arbitration; however, to the extent that an employer seeks injunctive relief to prevent irreparable
22 harm following theft of a trade secret, for example, the employer may pursue that relief in court,
23 but these claims are still within the scope of the Arbitration Agreement.

24 Second, Plaintiff insists that injunctive relief is most frequently sought by employers and
25 notes that an “agreement may be unfairly one-sided if it compels arbitration of the claims more
26 likely to be brought by the weaker party but exempts from arbitration the types of claims that are
27 more likely to be brought by the stronger party.” *Fitz*, 118 Cal. App. 4th at 724. Plaintiff’s
28 argument regarding the carve-out from mandatory arbitration of injunctive relief claims is

1 unpersuasive. The Agreement states that the arbitrator may award any relief (monetary or
 2 injunctive) to the extent permitted by applicable law, and also provides that the Agreement does
 3 not prohibit the parties from going to court to seek injunctive relief. California law implicitly
 4 authorizes a provision of this sort, providing that “[a] party to an arbitration agreement may file in
 5 the court in the county in which an arbitration proceeding is pending ... an application for a
 6 provisional remedy in connection with an arbitrable controversy ... upon the ground that the award
 7 to which the applicant may be entitled may be rendered ineffectual without provisional relief.”
 8 Cal. Code Civ. Proc. § 1281.8(b). When an injunctive relief carve-out provision “merely confirms,
 9 rather than expands, rights available to the parties under” California law, it does not render an
 10 arbitration agreement substantively unconscionable. *See Baltazar*, 62 Cal.4th at 1247 (upholding
 11 injunctive relief carve-out provision in arbitration agreement). Although the injunctive relief
 12 carve-out in the Agreement here does not mirror the precise language of Section 1281.8, it has the
 13 same effect and does not expand the rights of either party. Accordingly, the carve-out provision is
 14 not substantively unconscionable. *See id.* at 1248 (“[A]n arbitration agreement is not
 15 substantively unconscionable simply because it confirms the parties’ ability to invoke undisputed
 16 statutory rights.”).

17 Third, Plaintiff contends that the Agreement is unfairly one-sided because it provides
 18 Defendant with the unilateral right to terminate, amend, or otherwise revise and modify the
 19 agreement.⁵ This argument is likewise unavailing. Plaintiff’s argument is apparently premised on
 20 Paragraph 7 of the Agreement which provides that “[t]he Company reserves the right to revise,
 21 amend, modify or discontinue this Arbitration Plan at any time in its sole discretion with thirty
 22 (30) calendar days’ written notice. Such amendments may be made by publishing them on the
 23 Company intranet or by separate release to employees...” (Dkt. No. 12-2 at 3 (¶ 7).) *Poublon*
 24 addressed a similar provision which allowed the employer to unilaterally change the terms and
 25 rules by changing them on the corporate internet. *Poublon*, 846 F.3d at 1268-69. The Ninth
 26 Circuit rejected a claim of substantive unconscionability noting that “even had [the employer]

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 28 ⁵ Plaintiff concedes that the 2014 Arbitration Agreement eliminates Defendant’s right to
 unilaterally amend, revise, or modify the agreement. (Dkt. No. 12 at 9 n.4.)

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included a unilateral modification clause, “California courts have held that the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable.” *Id.* at 1229; *see also Casas v. Carmax Auto Superstores California LLC*, 224 Cal. App. 4th 1233, 1237 (2014) (“Under California law, however, even a modification clause not providing for advance notice does not render an agreement illusory, because the agreement also contains an implied covenant of good faith and fair dealing.”).

The Agreement is thus not substantively unconscionable.


CONCLUSION

For the reasons stated above, Defendant’s motion to compel arbitration is GRANTED. This action is stayed pending the results of that arbitration. Within 30 days of a final decision in the arbitration action, the parties shall file a joint status report.

This Order disposes of Docket No. 11.

IT IS SO ORDERED.

Dated: September 11, 2017


JACQUELINE SCOTT CORLEY
United States Magistrate Judge