UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 16-01688 JVS (JCGx) Date June 1, 2017

Title **Paul Wright v. Sirius XM Radio Inc.**

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Presednt	Not Present

Proceedings: **(IN CHAMBERS) Order GRANTING Defendant's Motion to Dismiss and Compel Compliance with Dispute Resolution Procedures**

Defendant Sirius XM Radio Inc. ("Sirius") has moved to dismiss the complaint and compel compliance with the dispute resolution procedures in the parties' agreement. Mot. Docket No. 32. Plaintiff Paul Wright ("Wright") opposed. Opp'n, Docket No. 43. Sirius replied. Reply, Docket No. 45.

At the hearing, the Court requested further briefing as to whether the California Supreme Court's recent ruling in McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017), impacted this case. Wright submitted a supplemental opposition brief. Supp. Opp'n, Docket No. 57. Sirius submitted a supplemental brief in further support of its motion. Supp. Br., Docket No. 58.

For the following reasons, the Court **grants** the motion.

BACKGROUND

I. Wright's Allegations

Sirius is a satellite radio service that broadcasts numerous types of programming on a subscription fee basis. Compl., Docket No. 1, ¶ 9; Decl. of Catherine Petras ("Petras Decl.") ¶ 3. Consumers may subscribe on an annual, semi-annual, quarterly, or monthly basis. Compl. ¶ 11; Petras Decl. ¶ 4. Consumers may also subscribe through prepaid subscription plans, including "lifetime" subscriptions. Compl. ¶¶ 11, 13; Petras Decl. ¶ 4. The parties dispute whether "lifetime" refers to the consumer's lifetime or the lifetime of the receiver equipment. Compl. ¶ 13; Petras Decl. ¶ 4; Mot. at 2. The subscription allows

the customer to change receivers three times for a $75 fee each time. Petras Decl. Ex. A (" 2006 Agreement") § 5(b)(4).

In December 2006, Wright purchased a Sirius lifetime subscription directly from Sirius via telephone for about $400. Compl. ¶ 15. He alleges that he did not receive any service or written agreement at the time of purchase. Id. He also alleges that he did not receive any verbal or written notice that the subscription was contingent upon other terms to be presented at a later date. Id.

In January 2016, Wright attempted to transfer his lifetime subscription to a new receiver device, but Sirius refused the transfer. Id. Wright alleges that, at the time of purchase, he understood "lifetime" to mean "his lifetime." Id. Wright now seeks to represent a class of consumers who purchased a lifetime subscription and whose subscription Sirius failed to honor. Id. ¶ 17.

II. The Customer Agreement

Sirius submits evidence that Wright's subscriptions were, and continue to be, governed by a Customer Agreement. Petras Decl. ¶ 5. The 2006 Agreement includes Terms and Conditions. It states that a failure to cancel the agreement within 3 days will bind the customer:

> IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY (OUR ADDRESS AND PHONE NUMBER ARE BELOW) AND WE WILL CANCEL YOUR SUBSCRIPTION. IF YOU DO NOT CANCEL YOUR SUBSCRIPTION WITHIN 3 DAYS, IT WILL MEAN THAT YOU AGREE TO THESE TERMS AND THAT THEY WILL BE LEGALLY BINDING ON YOU.

2006 Agreement. The Agreement further specifies that Sirius "reserve[s] the right to change these Terms, including our fees and charges from time to time." Id. § 2(b). But in the event of any changes, the Agreement stated that Sirius would send "a notice describing them and their effective date . . . ." Id. In that case, the consumer's failure to cancel the subscription within 30 days and continued receipt of the service would

"constitute acceptance of the changed Terms." Id. The Agreement further stated that notice might be sent via mail, email, or telephone. Id. § 10(a).

Finally, the Agreement included an alternative dispute resolution clause. First, it stated that neither party "may start a formal proceeding . . . for at least 60 days after one of us notifies the other of a Claim in writing." Id. § 9(a). Then, if the parties cannot resolve the dispute, the Agreement requires arbitration:

> If we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules") that are in effect at the time the arbitration is initiated and under the rules set forth in these Terms. If there is a conflict between the AAA Rules and these Terms, these Terms will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL.

Id. § 9(b). The 2009 and 2016 versions of the Agreement contain essentially identical provisions. Petras Decl. Ex. F, I.

III. Evidentiary Objections

Sirius submits a declaration from Catherine Petras, a Sirius vice president, and attached exhibits to prove that Wright received the customer agreement and is bound by its terms. See generally Petras Decl. Wright has objected to various parts of this declaration on the grounds of foundation, personal knowledge, speculation, and hearsay. Evid. Obj., Docket No. 44. Sirius opposes the objections. Evid. Opp'n, Docket No. 46. For the reasons stated below, the Court **overrules** these objections.

First, Petras has sufficient knowledge to testify regarding Sirius and its vendors' business practices. Federal Rule of Evidence 602 permits a witness to "testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." Here, Petras manages various customer-retention programs,

including those dealing with third-party vendors' communications to subscribers. Petras Decl. ¶ 2. As a result, she is familiar with the procedures for mailing and emailing subscribers their Welcome Kits, which contain copies of the Customer Agreement. Id. ¶ 8. She also reviewed both Sirius's and third-party vendors' business records in preparation of her declaration. Id. ¶ 1. This properly lays foundation and establishes her personal knowledge under Rule 602. It also allows her to lay foundation for the third-party vendors' exhibits.

_____Second, Petras's testimony does not constitute speculation under Federal Rule of Evidence 701. Rule 701 limits lay opinion testimony to opinion that is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Here, Petras only testifies from her personal knowledge of Sirius's and its vendors' business practices and records.

Third, Petras's testimony does not constitute hearsay because she is not relying on any out-of-court statements. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Petras limits her testimony to her own observations and does not testify to any out-of-court statement.

Therefore, the Court **overrules** Wright's objections.

IV. Sirius's Evidence that Wright Received the Customer Agreement

Sirius submits several pieces of evidence suggesting that Wright received the Customer Agreement.

First, Sirius submits evidence that it informed Wright of the Agreement's Terms and Conditions when he first purchased the subscription. Sirius's notes from Wright's November 18, 2006, call (when he first activated the account) state "[P]aul [W]right called/act new acct w/1yr plan . . . advised of terms&cond./signal confirmed/may call back to change to lifetime plan[.]" Petras Decl. Ex. P.

Second, on November 20, 2006, Sirius instructed Clicktactics, a third-party vendor, to email Wright a Welcome Kit at Wright's provided email address. Petras Decl. Ex. C. Sirius also submitted a copy of the form email used at that time, which included a link to

the then-current Customer Agreement. Petras Decl. Ex. B.

Third, on December 21, 2006, Wright called Sirius and upgraded his account to a lifetime subscription. Petras Decl. ¶¶ 25–26. Sirius's records show that Wright paid $499 for the lifetime subscription, but Sirius prorated the charge to reflect a credit for his earlier payment. Id. Ex. O.

Fourth, on December 22, 2006, Sirius instructed Fidelis, another third-party vendor, to mail Wright a paper Welcome Kit. Id. ¶ 27, Ex. C; Decl. of William Cooper ("Cooper Decl.") ¶ 7, Ex. B. Fidelis fulfilled the order on December 27, 2006, and mailed the Kit to Wright's Huntington Beach, California address. Petras Decl. ¶ 27, Ex. C; Cooper Decl. ¶ 7, Ex. B. The Welcome Kit included another form letter and copy of the Terms and Conditions. Petras Decl. Ex. D. United States Postal Service records also confirm that the December 27, 2006, order was actually sent. Id. Ex. E; Cooper Decl. ¶ 7, Ex. C.

Fifth, on September 20, 2009, Wright called Sirius to transfer his subscription to another device. Petras Decl. ¶ 29, Ex. P (screenshot of the call record). The financial records from Wright's account show that he paid a $75 fee for the transaction. Id. Ex. O. On September 22, 2009, another third-party vendor, CheetahMail, emailed Wright a third Welcome Kit. Id. Ex. H. The form letter at that time also included a link to the Terms and Conditions. Id. Ex. G.

Finally, on January 23, 2016, Wright requested another transfer and a copy of the Customer Agreement applicable to his latest subscription. Id. ¶ 36, Ex. M. On January 29, 2016, another third-party vendor (IWCO Direct) mailed Wright another Welcome Kit. Id. Exs. K, L.

On January 24, 2016, Wright called and requested another transfer. Id. Ex. N. Sirius declined the transfer because he had already transferred it more than the contractually-permitted three transfers. Id. Wright then brought suit. Sirius has now moved to compel compliance with the Customer Agreement's informal dispute resolution and arbitration procedures.

LEGAL STANDARD

Under the Federal Arbitration Act (the "FAA"), a party to an arbitration agreement may bring a motion in federal district court to compel arbitration and stay the proceeding pending resolution of the arbitration. 9 U.S.C. §§ 3–4. Ambiguities as to the scope of the arbitration provision must be interpreted in favor of arbitration. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); see also AT&T Techs. Inc. v. Commc'n Workers of Am., 475 U.S. 643, 650 (1986). The FAA also requires "district courts to compel arbitration even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 698 (9th Cir. 1986).

A district court may not review the merits of the dispute when determining whether to compel arbitration. Cox v. Ocean View Hotel, Corp., 533 F.3d 1114, 1119 (9th Cir. 2008). Instead, the FAA limits the district court's role "to determining (1) whether a valid agreement to arbitrate exists and, if it does (2) whether the agreement encompasses the dispute at issue." Id. (internal citation and quotation omitted). If a valid arbitration agreement exists, a district court must enforce the arbitration agreements according to its terms. Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004). A district court applies state contract law to determine whether the parties agreed to arbitrate and may consider state-law challenges, such as unconscionability, to the arbitration agreement's validity. Cox, 533 F.3d at 1121. A court may consider evidence beyond the complaint in ruling on a motion to compel. See Guadagno v. E*Trade Bank, 592 F. Supp. 2d 1263, 1266–69 (C.D. Cal. 2008) (examining declarations and exhibits in ruling on a motion to compel arbitration under the FAA). The party seeking to compel arbitration must prove the existence of an agreement to arbitrate by a preponderance of the evidence standard. Knutson v. Sirius XM Radio Inc., 771 F.3d 559, 565 (9th Cir. 2014)

ANALYSIS

I. The parties created a valid and enforceable arbitration agreement.

Under California law, parties must mutually assent to a contract. Id. They may assent via writing, spoken words, or conduct, including inaction. Id. "Thus, 'an offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains.'" Id. (quoting Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 991 (1972)). The

issue is "whether the outward manifestations of consent would lead a reasonable person to believe the offeree has assented to the agreement." Id. Although silence or inaction does not generally constitute acceptance, "[a]n offeree's silence may be deemed to be consent to a contract when the offeree has a duty to respond to an offer and fails to act in the face of this duty." Norcia v. Samsung Telecommunications Am., LLC, 845 F.3d 1279, 1284–85 (9th Cir. 2017) (discussing California law). Likewise "[a]n offeree's silence may also be treated as consent to a contract when the party retains the benefit offered." Id. at 1285.

As a result, courts have found that contracts are valid where the contract's terms are sent to the consumer after purchase and not objected to within a specified period. For instance, in Carnival Cruise Lines, Inc. v. Shute, two passengers purchased tickets for a seven-day cruise. 499 U.S. 585, 587 (1991). The cruise line mailed the passengers their tickets, which included a forum-selection clause. Id. The Court held that economic realities rendered the clause enforceable: "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line." Id. at 593. Likewise, in Hill v. Gateway 2000, Inc., the Seventh Circuit enforced an arbitration clause when a customer purchased a computer over the phone and was later sent the computer and its contract terms, including an arbitration clause. 105 F.3d 1147, 1151 (7th Cir. 1997). The terms stated that they would govern unless the customer returned the computer within 30 days. Id. at 1148. The court found that the plaintiff accepted the contract, including the arbitration clause, by keeping the computer for more than 30 days. Id. at 1151.

Relying on Carnival, Hill, and related cases, California district courts have also enforced arbitration clauses when a customer purchased a product over the phone, subsequently received a customer agreement containing the clause, and did not return the product within a specified time period. See Lozano v. AT & T Wireless, 216 F. Supp. 2d 1071, 1074 (C.D. Cal. 2002), vacated on other grounds, No. CV02-00090WJRAJWX, 2003 WL 25548566 (C.D. Cal. Aug. 18, 2003); Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1105–06 (C.D. Cal. 2002). Likewise, at least one California Court of Appeal has enforced an arbitration agreement when the defendant mailed the terms after the initial transaction. Chau v. Pre-Paid Legal Servs., Inc., No. B270277, 2017 WL 604721, at *3 (Cal. Ct. App. Feb. 15, 2017) (citing Hill, 105 F.3d at 1148).

In contrast, the Ninth Circuit has found clauses unenforceable when the customer was not on notice of the arbitration provision. Knutson, 771 F.3d at 566–67. For instance, Knutson found the same arbitration clause at issue here unenforceable when the customer received Sirius through his purchase of a Toyota and only later received the customer agreement. Id. Although he received the contract in the mail, the customer was unaware of his contractual relationship with Sirius; therefore he lacked notice of the arbitration clause. Id. Similarly, the Second Circuit, applying California law, held that an email did not create inquiry notice of an arbitration clause when it came from a business that the customer did not know he had a relationship with. Schnabel v. Trilegiant Corp., 697 F.3d 110, 123 (2d Cir. 2012).

Therefore, to determine the arbitration provision's enforceability, this Court must determine if Wright had notice of the provision. This requires the Court to determine (1) if Wright received the contract and (2) if the agreement itself put Wright on notice.

A. The Court finds that Wright received the Customer Agreement because Sirius presents substantial documentary evidence that it mailed Wright the contract and Wright's recollections do not overcome that evidence.

Sirius argues that Wright's receipt of the contract via mail established a binding contract between the parties. Mot. at 12–15. Wright argues that he did not receive the Customer Agreement and was thus never informed of the arbitration agreement. Opp'n at 9.

The parties agree that, under California law, proof of mailing creates a rebuttable presumption of receipt. Mot. at 12–13; Opp'n at 10; Reply at 4; see also In re Bucknum, 951 F.2d 204, 207 (9th Cir. 1991) ("Mail that is properly addressed, stamped and deposited into the mails is presumed to be received by the addressee."). But that presumption does not apply if the adverse party denies receipt. Craig v. Brown & Root, Inc., 84 Cal. App. 4th 416, 422 (2000). In that case, the court must weight the conflicting evidence. Id.

Here, Sirius has presented substantial evidence — from both its own and its subcontractor's records — that its third-party vendors mailed Wright a Welcome Kit that included a Customer Agreement. In particular, Sirius has presented evidence that (1) Sirius instructed its direct mail subcontractor to mail the kit to Wright at his Huntington

Beach home and (2) the subcontractor actually fulfilled this request. See Petras Decl. ¶¶ 25–28, Exs. C, D, E, O; Cooper Decl. A, B, C. Wright argues that this evidence is only "vague, generalized testimony" that cannot prove receipt. But other courts have accepted similar evidentiary showings on a motion to compel. See, e.g., Craig, 84 Cal. App. 4th at 422 (company's evidence that memorandum mailed to plaintiff's house credited over her denial of receipt); Boomer v. AT & T Corp., 309 F.3d 404, 415 n.5 (7th Cir. 2002) (sufficient that company presented an employee declaration that it followed proper mailing procedures); Meckel v. Cont'l Res. Co., 758 F.2d 811, 817 (2d Cir. 1985) ("[U]nder New York law personal knowledge is required only to establish regular office procedure, not the particular mailing. Here, the presence of such proof establishes prima facie evidence of the mailing . . . .").

Compared to Sirius's evidence, Wright's declarations — which rely only on Wright or other putative class members' recollections — do not support his denial of receipt. Instead, the parties' combined evidence suggests that Wright received the Welcome Kit but no longer recalls receipt. Furthermore, Wright's authority is distinguishable. See Acher v. Fujitsu Network Commc'ns, Inc.,354 F. Supp. 2d 26, 36 (D. Mass. 2005). In Acher, the party seeking to compel arbitration claimed that it circulated its arbitration clause, but failed to proffer any evidence that its employee received the clause or knew that it was available on the company intranet. Id. In contrast, here Sirius's evidence supports an inference that Wright received the Customer Agreement.

Therefore, the Court finds by a preponderance of the evidence that Wright received the policy.[1]

B. The Court finds that the Agreement's terms were sufficiently conspicuous because they were separated via headings and contained a capitalized disclaimer that arbitration waived Wright's entitlement to a jury trial.

[1] The analysis is the same as is the result, despite the presentation of numerous third-party statements that they did not receive notice. See Trimbach Decl. and attached evidentiary declarations. Their rote declarations proffer only "To the best of my knowledge," which is far short of Sirius's evidence. E.g., Whitson Decl. ¶¶ 3, 4, 5.

Wright argues that the contract's arbitration terms were too inconspicuous to provide notice. Opp'n at 13–15. Specifically, Wright argues that the arbitration clause is "slipped into the middle of a lengthy, complicated Customer Agreement, in an extremely small font type, addressing numerous other, more benign issues."

The Court finds that the arbitration clause is not too inconspicuous to provide notice. Although the arbitration clause appears on the Agreement's fifth page, the Agreement contains only six pages. 2006 Agreement. The clause also has a bolded and capitalized title — "**RESOLVING DISPUTES**." Id. Its paragraphs contain sufficient white space and subheadings to make the clause readable. Id. And the clause includes the capitalized disclaimer "ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL." Id. Finally, it is not overly lengthy, consisting of only a few short paragraphs. Therefore, it is distinguishable from the 5.5 point fine print in Wright's cited authority, Conservatorship of Link, 158 Cal. App. 3d 138, 142 (1984).

C. The Court finds that Wright assented to the arbitration agreement because he initiated the relationship and continued to use his Sirius subscription after receiving the Customer Agreement.

Sirius argues that Wright's conduct shows his understanding of and intent to be bound by the Customer Agreement. Mot. at 13–14. Wright argues that his conduct suggests he never assented to the arbitration provision. Opp'n at 16–17.

The evidence shows that Wright assented to his contractual relationship with Sirius under the Customer Agreement. Wright called Sirius and purchased a subscription. Petras Decl. Ex. P. At that time he also received notice that Terms and Conditions would be forthcoming. Id. He then continued the relationship after receiving the Customer agreement in the mail. Id. He even called again and upgraded his subscription. Id. ¶ 26, Ex. O.

Wright's contact with Sirius distinguishes this case from Knutson and Norcia. Knutson rejected Sirius's argument that the customer's use of its service constituted assent because the Knutson customer did not even know he was in a contractual relationship with Sirius. 771 F.3d at 566. Norcia applied similar reasoning: there Samsung attempted to compel arbitration based on an in-box brochure, even though the plaintiff had purchased the phone from Verizon. 845 F.3d at 1282–83. Therefore, the

plaintiff did not have a duty to opt-out of the brochure's arbitration provision because he was not on notice of the offer. Id. at 1286–87. In contrast, here Wright knew of the relationship from the beginning and actively continued the relationship for years — he repeatedly contacted Sirius to discuss his subscription and transfer it to other devices. Petras Decl. ¶¶ 29, 32–35, 36, Ex. O.

Therefore, this case is more like Bischoff. In Bischoff, the customer purchased DirecTV and continued his relationship after DirecTV mailed him his customer agreement; the court compelled arbitration because "[t]he nature of the business . . . make it unrealistic to expect DirecTV . . . to negotiate all of the terms of their customer contracts, including arbitration provisions, with each customer before initiating service." 180 F. Supp. 2d at 1105; see also Carnival, 499 U.S. at 593. Similarly, this Court would not expect Sirius to negotiate its terms or read lengthy provisions over the phone. Instead, it is reasonable for Sirius to mail the provisions and give Wright an opportunity to object.

In sum, the Court finds that Wright received the Customer Agreement — including the arbitration clause — and had sufficient notice of the arbitration provision. The Court also finds that Wright's conduct constituted assent to the contract.

II. This dispute falls within the arbitration clause's scope.

After determining that a valid arbitration agreement exists, the Court analyzes whether the arbitration clause encompasses the dispute at issue. Cox, 533 F.3d at 1119. Here, the arbitration clause applies to "any claim," excluding inapplicable exceptions. 2006 Customer Agreement. Wright does not argue that the current dispute exceeds the Agreement's scope. Therefore, the Court finds that the dispute is arbitrable.

III. The arbitration clause is not unconscionable.

Wright argues that, even if a valid arbitration agreement exists, it is unenforceable because it procedurally and substantively unconscionable. Opp'n at 20.

In California, unconscionability has both a procedural and a substantive element. Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 114 (2000). Procedural unconscionability "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power."

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Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev., LLC, 55 Cal. 4th 223, 246 (2012). Substantive unconscionability, on the other hand, is present if the contract terms are "overly harsh" or "one-sided." Id. While both procedural and substantive unconscionability must exist for a contract to be unenforceable, they need not be present to the same degree. Id. at 247. The more substantively oppressive the terms are, the less evidence of procedural unconscionability is required to find that the contract is unenforceable, and vice versa. Id. The party challenging the arbitration agreement must establish unconscionability. Id.

A. The clause is procedurally unconscionable because Wright lacked bargaining power and could only accept or reject the contract.

Procedural unconscionability requires oppression or surprise. Pinnacle, 55 Cal. 4th at 247. "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." Id. (internal quotations omitted).

California district courts have found similar consumer contracts to be contracts of adhesion. See Lozano, 216 F. Supp. 2d at 1075 ("The Welcome Guide that accompanied delivery of Plaintiff's phone is a contract of adhesion."); Bischoff, 180 F. Supp. 2d at 1107 (customer agreement that accompanied DirecTV purchase was adhesion contract.). As a result, they found these agreements procedurally unconscionable because the businesses had superior bargaining power and the customers lacked the ability to negotiate. Lozano, 216 F. Supp. 2d at 1075; Bischoff, 180 F. Supp. 2d at 1107. The same circumstances exist here: Sirius had significantly greater bargainin g power and Wright could not negotiate the terms — his only remedy was to cancel the contract and give up his lifetime subscription.

Sirius argues that Wright had the ability to bargain because he convinced Sirius to waive the transfer fees. Reply at 19. But this is irrelevant because it occurred after the contract's formation. Pinnacle, 55 Cal. 4th at 246 (procedural unconscionability focuses on the contract's formation).

Therefore, the Court finds that the contract is procedurally unconscionable. But, to find an arbitration clause invalid, substantive unconscionability must also exist.

B. The arbitration agreement is not substantively unconscionable because its provisions are not so one-sided as to shock the conscience.

"A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to shock the conscience." Pinnacle, 55 Cal. 4th at 246 (internal quotations omitted).

Wright argues that the arbitration clause is substantively unconscionable because (1) its fee-shifting provision could potentially make Wright responsible for numerous fees, (2) it lacks mutuality, and (3) it allows Sirius to unilaterally modify the contract. Opp'n at 24–25.

First, the fee-shifting provision is not substantively unconscionable. A fee provision is only substantively unconscionable if it imposes prohibitively high fees that effectively lock the plaintiff out of the arbitral forum. Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1026 (9th Cir. 2016) (applying Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 921 (2015)). Here, the agreement provides for the following distribution of fees:

> If you initiate an arbitration, you agree to pay a fee of $125 or, if less and you tell us in writing, the amount that you would pay to initiate a lawsuit against us in the appropriate court of your state. We agree to pay any additional fee or deposit required by the American Arbitration Association in excess of your filing fee. We also agree to pay the costs of the arbitration proceeding up to a maximum of one-half day (four hours) of hearings. Other fees, such as attorney's fees, expenses, travel to the arbitration and the costs of a proceeding that goes beyond one-half day, will be paid in accordance with the AAA rules. The arbitration will be held at a location within 100 miles of your residence unless and we both agree to another location.

2006 Customer Agreement § 9(b).

This provision is not unconscionable because (1) it requires only $125 (or potentially less) to begin an arbitration, (2) Sirius agrees to pay for one-half day of

arbitration, and (3) the arbitration will be held within 100 miles of the plaintiff's residence. These terms are all favorable to the plaintiff; therefore, they show that the clause is not one-sided. Furthermore, a $125 initiation fee and a requirement that other fees be paid according to AAA rules does not practically block Wright from pursuing an arbitral remedy. See Tompkins, 840 F.3d at 1026.

Second, the arbitration clause is mutual. Wright argues that it is unconscionable for an agreement to exclude claims that Sirius is most likely to bring against customers. Opp'n at 25. Although the Agreement reserves Sirius's right to sue customers for non-payment, this does not apply to Wright because he paid for a lifetime subscription with an upfront fee. Petras Decl. ¶ 26. Wright also argues that the Agreement unconscionably exempts disputes over Sirius's intellectual property. Opp'n at 25. But this exemption applies to both parties. Furthermore, Wright does not explain how such claims might arise and how his inability to bring these claims in arbitration might harm him. See Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1031 (9th Cir. 2016) ("[The provision in the Terms of Service in this case excluding intellectual property claims from mandatory arbitration is not unconscionable.").

Third, although the Agreement allows Sirius to modify the terms, it allows the customer to reject any modification. 2006 Customer Agreement § 2(b). Wright relies on Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1179 (9th Cir. 2003). Ingle found a provision unconscionable when the employer could alter the agreement by providing written notice to its employees. Id. But the Ninth Circuit has also held that a unilateral modification provision — standing alone — does not automatically render an agreement unconscionable. Tompkins, 840 F.3d at 1033. Unlike the agreement in Ingle — which included many unconscionable provisions — the Agreement here does not contain other evidence of unconscionability. See 328 F.3d at 1173–79; Galvan v. Michael Kors USA Holdings, Inc., No. CV1607379BROAFMX, 2017 WL 253985, at *9 (C.D. Cal. Jan. 19, 2017) (distinguishing Ingle on this basis). Therefore, Sirius's ability to unilaterally modify the contract does not render it unconscionable.

In sum, the Court finds that the arbitration provision is not substantively unconscionable. Therefore, the provision is not unconscionable.

C. The arbitration provision is enforceable under McGill because Wright does not seek public injunctive relief.

At the hearing, Wright argued that the Agreement is unenforceable under the California Supreme Court's recent decision in McGill. McGill held an arbitration clause unenforceable when it waived the plaintiff's right to seek public injunctive relief under the UCL in "any forum." 2 Cal. 5th at 961. Wright argues that the Agreement's arbitration clause is likewise unenforceable. Supp. Opp'n at 4. Sirius argues that McGill is inapplicable because (1) Wright is not seeking a public injunction and (2) the Agreement's provision does not fall under McGill. Supp. Br. at 1, 4. The Court concludes that Wright does not seek public injunctive relief; therefore, it does not address whether the arbitration clause is unenforceable under McGill.

"[P]ublic injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has 'the primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public. Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief." McGill, 2 Cal. 5th at 955 (quoting Broughton v. Cigna Healthplans of California, 21 Cal. 4th 1066, 1077 (1999)).

The Ninth Circuit addressed this distinction in Kilgore v. KeyBank, Nat. Ass'n, 718 F.3d 1052, 1060–61 (9th Cir. 2013). In Kilgore, 120 former flight-school students brought a putative class action against the bank that originated their student loans. Id. at 1055–56. They sought to enjoin the bank from reporting loan defaults and enforcing the promissory notes against the former students. Id. at 1056. The Ninth Circuit held that they did not seek public relief under the UCL because the requested relief only related to past harms suffered by putative class members. Id. at 1060–61. The court emphasized that the defendants' alleged violations had ceased, "the class affected by the alleged practices is small," and "there is no real prospective benefit to the public at large from the relief sought." Id. at 1061. Therefore, the arbitration clause remained enforceable. Id.

Here, Wright similarly only seeks private relief. Wright seeks an injunction barring Sirius from "(1) terminating or purporting to terminate [lifetime subscriptions]; (2) failing to honor any and all 'lifetime' satellite radio subscriptions previously purchased; and (3) charging and/or purporting to charge Plaintiff and/or Class members any additional monies for any such services." Compl. ¶ 73. All of these requests solely benefit the putative class members. Wright does seek "an order enjoining Defendant from committing such unlawful, unfair, and fraudulent business practices" and "making such

material misrepresentations and failing to disclose or actively concealing its practice of regularly canceling and limiting or prohibiting transfers of lifetime subscriptions." Id. ¶¶ 46, 59.[2] But such vague, generalized allegations do not request public injunctive relief. Such relief must "by and large" benefit the general public. McGill, 2 Cal. 5th at 955 (quoting Broughton, 21 Cal. 4th at 1079. It must have the "'primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public." Id. (quoting Broughton, 21 Cal. 4th at 1077). Here, any benefit to the public is merely "incidental." Id.

In sum, Wright does not seek public injunctive relief. Therefore, McGill does not prohibit enforcement of the Agreement's arbitration clause.

CONCLUSION

For the foregoing reasons, the Court **grants** Sirius's motion to compel and **dismisses** the case. The Court dismisses without prejudice to eliminate any adverse effects such a dismissal would have on the arbitration. The Court also denies Wright leave to amend and add additional named class representatives. The Court's findings rest sufficiently on classwide allegations and the Agreement's contents that new class representatives would not change the result.

The Court DIRECTS Sirius to prepare, serve and submit a proposed order of dismissal in accordance with this ruling within seven (7) days.

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[2] Sirius further argues that Sirius no longer sells lifetime subscriptions and has not for years. Supp. Br. at 3. But it provides no evidence to support this claim.