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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. 8:16-cv-1440-JLS-DFMx

Date: September 22, 2017

Title: Doneyda Perez v. DirecTV Group Holdings, LLC, et al.

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Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero  
Deputy Clerk

N/A  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:      ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DIRECTV’S  
MOTION TO STAY LITIGATION PENDING APPEAL  
(Doc. 49)**

Before the Court is a Motion to Stay Litigation Pending Appeal filed by Defendant DirecTV Group Holdings, LLC. (Mot., Doc. 49.) Defendants Lonstein Law Offices, P.C. and Julie Cohen Lonstein joined in the Motion. (Joinder, Doc. 52.) Plaintiff Doneyda Perez filed an Opposition and Defendants replied. (Opp., Doc. 62; DirecTV Reply, Doc. 64; Lonstein Reply, Doc. 65.) Having taken the matter under submission and considered the parties’ briefs and oral argument, the Court GRANTS DirecTV’s Motion.

**I. BACKGROUND**

On August 4, 2016, Perez filed this putative class action against Defendants. (Compl., Doc. 1.) On May 1, 2017, the Court denied Defendants’ motion to compel arbitration. (Order, Doc. 40.) Defendants then filed Notices of Appeal on May 30, 2017 and May 31, 2017. (Notices of Appeal, Docs. 43, 45.) DirecTV now moves to stay the action pending appeal.

**II. LEGAL STANDARD**

Under the Federal Arbitration Act (“FAA”), a party may file an interlocutory appeal from an order denying a motion to compel arbitration. *See* 9 U.S.C. § 16(a)(1)(B).

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In the Ninth Circuit, an appeal seeking review of a denial of a motion to compel arbitration does not deprive the district court of jurisdiction over other matters in the case. *See Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). In considering whether to issue a stay pending appeal of such an order, the district court considers: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The power to stay proceedings “is incidental to the power inherent in every court” to manage the schedule of cases on its docket and to promote judicial economy. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936).

**III. DISCUSSION**

**A. Likelihood of Success on the Merits**

“[T]o justify a stay, a [moving party] must show, at a minimum, that she has a substantial case for relief on the merits.” *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). This standard is formulated interchangeably as a showing of a “substantial case on the merits,” a “reasonable probability” or “fair prospect” of success on the merits, or a showing “that serious legal questions are raised.” *Id.* at 967. Although there must be “[m]ore than a mere ‘possibility’ of relief,” the moving party need not demonstrate that she is “more likely than not” to succeed on the merits. *Id.* at 966–67. After considering DirecTV’s arguments, the Court concludes that there are at least some serious legal questions that favor a stay.

For the most part, the underlying motion to compel did not raise novel or complex questions of law. And in its Motion to Stay, DirecTV advances largely the same arguments presented in its motion to compel arbitration and cites largely to the cases it referenced in its earlier motion. The Court carefully considered these arguments and cases when it ruled on Defendants’ motion to compel, and it ultimately concluded that most were unpersuasive, not because of differing analyses regarding the law and the

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appropriate legal standards, but because the factual circumstances in this case compel a different result. As a result, the issues raised in DirecTV’s motion to stay generally amount to a claim that the Court misapplied well-settled legal principles—an argument typically insufficient to carry the day. *See Guifu Li v. A Perfect Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2011 WL 2293221, at \*4 (N.D. Cal. Jun. 8, 2011) (finding no “serious legal question” where the defendants argued merely that the court “misapplied the test that all parties agree is the proper test”). At oral argument, DirecTV suggested that this Court deviated by finding that the illegality permeated the agreement even though only one provision was substantively unconscionable. This assertion misapprehends both the Court’s ruling and California’s doctrine of severability. A severability analysis does not involve a mechanical counting of the number of unconscionable provisions, but instead focuses on whether “[t]he good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good.” (Order at 26 (quoting *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1272 (9th Cir. 2017).) *See Poublon*, 846 F.3d at 1273 (observing that the number of unconscionable provisions is “only one of the relevant factors”). Here, the one-sided arbitration clause was the very vehicle through which DirecTV allegedly was able to threaten litigation to extract settlement payments while shielding its sales representatives’ fraudulent sales practices from liability. This, coupled with the high degree of procedural unconscionability—*i.e.*, convincing a Spanish-speaking beauty salon owner to sign an agreement that the sales representative knew she could not understand and withholding key terms until a consumer would have to pay steep penalties to cancel—means that “it is not possible to remove the unconscionable taint to the arbitration agreement through severance.” (Order at 27.)

Nonetheless, there were a few instances where the Court’s reasoning departed from that of other district courts considering similar issues. For instance, in *Hodsdon v. DirecTV, LLC* and *In re DirecTV Early Cancellation Fee Mktg. and Sales Practices Litigation*, the district courts held that the provision in the arbitration agreement carving out disputes for prosecution of commercial viewing and for theft of service were not unconscionable because it is “conceivable” that a customer might have a claim against DirecTV that is subject to the exception and thus, there is sufficient mutuality between

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the parties. No. C 12-02827 JSW, 2012 WL 5464615, at \*6 (N.D. Cal. Nov. 8, 2012); 810 F. Supp. 2d 1060, 1069 (C.D. Cal. 2011), *reversed on other grounds by Lombardi v. DirecTV, Inc.*, 546 F. App'x 715 (9th Cir. 2013) (same). In its order, this Court acknowledged these cases, but noted that no court has actually identified a concrete example of a claim that a customer could “conceivably” bring under DirecTV’s arbitration carve-outs.<sup>1</sup> (Order at 24 n.10.) Nor was DirecTV—the party against whom these customers would bring such claims—able to identify a concrete example. (*Id.*) These facts led the Court to determine that what may have appeared to be a sufficiently mutual contract provision was in fact nothing of the kind. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (noting, in finding an arbitration agreement unconscionable, that although “many of the terms [in the] . . . arbitration agreement appear facially neutral, the effect of these provisions is to obstruct” an employee from raising grievances against her employer (emphasis added)). To be clear, the Court did not find it necessary to resolve in the first instance whether DirecTV’s Customer Agreement is unconscionable, because the Court found that this agreement was not properly incorporated by reference and the theft-of-service and Section 1(h) exceptions plainly covered Perez’s claims. (Order at 16–18.) But, if—as DirecTV insists—the arbitration agreement extends even to Perez’s claims while excluding DirecTV’s own causes of action, the Court concluded that speculation about an unidentified “conceivable” claim is insufficient to establish a modicum of bilaterality. (*Id.* at 23–25.)

Also, in *Joaquin v. DirecTV Group Holdings, Inc.* and *G&G Closed Circuit Events, LLC v. Castillo*, the courts determined that DirecTV’s arbitration agreement’s carve-out provision for claims under the Communications Act did not encompass plaintiffs’ RICO and unfair competition claims. No. 15-8194 (MAS) (DEA), 2016 WL 4547150, at \*1, \*6 (D.N.J. Aug. 30, 2016); No. 14-CV-02073, 2017 WL 1079241, at \*6 (N.D. Ill. Mar. 22, 2017). Yet neither court addressed whether the plaintiffs’ claims might fall under the theft-of-service or Section 1(h) exceptions, *see G&G*, 2017 WL

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<sup>1</sup> To borrow loosely from Inigo Montoya in the *Princess Bride*, “I do not think that word means what you think it means.”

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1079241, at \*5; *Joaquin*, 2016 WL 4547150, at \*6, the provisions that the Court found plainly encompassed Perez’s claims. (Order at 16–17.)

Considering the low showing of success on the merits needed, the Court finds that the legal questions raised are sufficiently “serious” to favor a stay.

**B. Irreparable Injury**

To warrant a stay, DirecTV must show on an individualized level that irreparable injury is “probable” if the case were to proceed. *See Leiva-Perez*, 640 F.3d at 968. DirecTV argues that it “would suffer irreparable harm if forced to engage in further proceedings, including discovery, in this Court.” (Mem. at 7, Doc. 49-1.) If the Ninth Circuit determines that Perez must bring her claims in arbitration, she may not be able to proceed on a classwide basis. Not only would class discovery consume significant time and resources, but most of it would prove useless if the action were ultimately compelled to arbitration on an individual basis.<sup>2</sup> Likewise, any rulings on substantive motions would be rendered moot if Defendants’ appeals are successful. The costs of defending a class action are also significantly greater than those involved in two-party litigation. Finally, if a “party must undergo the expense and delay” of litigating a case through a trial, “the advantages of arbitration—speed and economy—are lost forever.” *Alascom, Inc. v. ITT North Electric Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) (citations omitted). The Ninth Circuit has described this potential consequence as “serious, perhaps, irreparable.” *Id.* Accordingly, this factor favors a stay.

**C. Balancing of Equities**

DirecTV urges the Court to find that this case falls within the “general rule” that “[w]hen a defendant appeals an order refusing to compel arbitration, the general disadvantage to plaintiff caused by delay of proceedings is usually outweighed by the

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<sup>2</sup> Of course, whether Perez’s claims would proceed on an individual or classwide basis in arbitration would depend in part on whether the class waiver in the Customer Agreement were properly incorporated by reference into the Equipment Lease Agreement.

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potential injury to defendant from proceeding in district court during pendency of appeal.” (Mot. at 8, *citing Bridge Fund Capital Corp. v. FastBuck Franchise Corp.*, No. 2:08-cv-00767-MCE-EFB, 2009 WL 1325823, at \* (E.D. Cal. May 12, 2009) (citation omitted)). DirecTV also claims that any monetary harm can be fully redressed in litigation should the plaintiff ultimately prevail. (*Id.*)

Perez, on the other hand, asserts that she and the putative class will suffer substantial injury because of the delay the stay would cause. (Opp. at 14.) In particular, she argues that the delay would increase the risk of loss of evidence and allow Defendants to continue to harm other business owners through their alleged scheme. (*Id.* at 14–15.) As for the loss of evidence, Perez fails to offer any concrete basis for her argument, and the Court finds it to be speculative. *See Murphy v. DirecTV, Inc.*, No. 2:07-CV-06465-FMC, 2008 WL 8608808, at \*3 (C.D. Cal. July 1, 2008); *see also Bridge Fund*, 2009 WL 1325823, at \*3 (“[A] plaintiff may be able to show prejudice by citing particular witnesses or documents that may be adversely affected by a stay.” (citation omitted)). Perez’s better argument is the allegation of continuing harm to minority-owned businesses arising out of this scheme. (Opp’n at 15.) To the extent that Perez alleges an ongoing scheme to extract settlements by threatening prosecution for theft of services, a delay could cause harm beyond that which is monetarily compensable. Hence, this factor weighs slightly against a stay.

**D. Public Interest**

DirecTV argues that the public interest favors a stay in light of “the strong public policy favoring arbitration” and “the interests of judicial efficiency and conservation of resources.” (Mem. at 9.) It is well-settled that the FAA reflects a “liberal federal policy favoring arbitration.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). Perez essentially reiterates her balance-of-equities argument; namely, that in actions involving ongoing fraud, any delay harms the public interest because putative class members “are likely unaware of the harm being caused to them by Defendants’ continuing efforts to extract money from them.” (Opp’n at 15.) In light of the competing interests, the Court finds that the public interest favors neither party.

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**IV. CONCLUSION**

In sum, the Court concludes that DirecTV has made a showing of a substantial question on the merits and irreparable injury. The balance of equities and public interest are less clear cut, but the factors considered as a whole support a stay. Accordingly, the Court GRANTS DirecTV's Motion and STAYS the action pending the release of the mandate in Defendants' appeals.

Initials of Preparer: tg