STAYED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES—GENERAL

Case No. CV-16-01273-MWF-MRW **Date: April 27, 2016**
Title: Christopher Sophinos -*v*- Quadriga Worldwide LTD, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION [13]

Before the Court is Defendant Quadriga Americas LLC's Motion to Compel Arbitration (the "Motion"), filed on March 2, 2016. (Docket No. 13). Plaintiff filed an Opposition to the Motion on April 4, 2016, and Defendant Quadriga's Reply followed on April 11, 2016. (Docket Nos. 15, 16). The Court reviewed and considered the papers on the Motion, and held a hearing on **April 25, 2016**.

The Motion is **GRANTED**. Plaintiff, an experienced corporate executive, agreed to arbitrate all claims brought in this action. Because Plaintiff failed to meet his burden to prove that the governing arbitration provision is unconscionable, the Court must enforce the parties' agreement. Accordingly, this action is **STAYED** pending arbitration.

Should the American Arbitration Association ("AAA") decline to hear the parties' dispute due to Defendants' noncompliance with AAA rules or procedures, Plaintiff may return to this Court and request appropriate relief.

I. BACKGROUND

The Complaint makes the following allegations:

Plaintiff is a "business development executive with a long history of success serving as a Chief Executive Officer or Vice President." (Declaration of James G.

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Naro ISO Notice of Removal, Ex. A ("Complaint") ¶ 7 (Docket No. 7)). Between 2011 and 2014, Plaintiff worked as Defendant Quadriga's CEO under a written employment agreement (the "Agreement"). (*Id.* ¶¶ 10-11). In 2014, Defendant Quadriga merged with The SmarTV Company, causing some friction between Plaintiff and the new leadership. (*Id.* ¶ 14). Plaintiff was eventually demoted from his executive role to a mere sales position and was told to reallocate from California to Ohio. (*Id.* ¶ 15). Plaintiff refused and exercised his right under the Agreement to end his employment for "good reason," thus triggering Defendant Quadriga's obligation to make severance payments. (*Id.* ¶ 17).

But Defendant Quadriga did not pay severance. Instead, it attempted to "terminate" Plaintiff in order to avoid complying with its obligations under the Agreement. (*Id.*¶¶ 21-22). Plaintiff made multiple demands for due wages and severance payments, but Defendant Quadriga ignored his requests. (*Id.* ¶ 28). Consequently, Plaintiff brought this action in Los Angeles Superior Court, asserting two claims for breach of contract and one claim for retaliation under California's Fair Employment and Housing Act. (*Id.* ¶¶ 30-58). Defendant Quadriga removed the action to this Court based on diversity of citizenship among the parties. (Notice of Removal at 2-3 (Docket No.1)).

II. DISCUSSION

The Federal Arbitration Act ("FAA") requires the district courts to compel arbitration on all claims subject to arbitration agreements. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.") (citing 9 U.S.C. §§ 3, 4). Every arbitration agreement is, of course, subject to generally applicable contract defenses, such as unconscionability. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) ("It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable."). But because the FAA favors arbitration, the burden is on the plaintiff to prove that the arbitration

agreement is, in fact, unconscionable. *See Mortensen v. Bresnan Commc'ns*, LLC, 722 F.3d 1151, 1157 (9th Cir. 2013) ("[T]hose parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable."). And even if the plaintiff meets that burden, the district court has the discretion to sever the unconscionable portions of the arbitration provision (if severance will cure the unconscionability). *See Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 847 (N.D. Cal. 2012) (severing problematic portions of the arbitration provision and compelling arbitration); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 122, 99 Cal. Rptr. 2d 745 (2000) (holding that severance is proper unless the arbitration agreement contains more than one unlawful provision and is "permeated by an unlawful purpose").

A. Scope of the Arbitration Provision

The Agreement contains a conspicuous arbitration provision, which provides, in relevant part, as follows:

> Executive and the Company mutually agree and understand that as an inducement for the Company to enter into this Agreement, Executive and the Company agree and consent to the resolution by arbitration of all claims or controversies, past, present or future, whether arising out of the employment relationship (or its termination) or relating to this Agreement . . . . The claims covered by this arbitration provision, include, but are not limited to, claims for wages or other compensation due, claims for breach of any contract or covenant (express or implied) . . . claims for discrimination, retaliation, or harassment . . . .
>
> Executive and the Company understand and agree that the arbitration will take place in Orange County, California , in accordance with the California Employment Dispute Resolution Rules of the American Arbitration Association . . . .

(Complaint, Ex. A at 8).

All claims asserted in this action plainly fall within the scope of this arbitration provision. Plaintiff sensibly does not argue otherwise. What Plaintiff does argue, however, is that the Court should disregard the arbitration provision because Defendant Quadriga has failed to authenticate the Agreement. That objection is meritless. Not only does the Agreement constitute the very foundation of Plaintiff's claims, it is attached as an exhibit to the Complaint. In these circumstances, the Court simply does not require a declaration from Defendant Quadriga affirming that the attached Agreement is authentic—Plaintiff has already admitted that it is. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir.1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them."); *Ohkubo v. Antara Biosciences, Inc.*, 364 F. App'x 340, 341 (9th Cir. 2010) (holding that the district court properly relied on an agreement attached to the complaint).

Plaintiff also suggests, without any analysis, that the American Arbitration Association ("AAA") could decline to hear the dispute because Defendant Quadriga may have failed to comply with some unidentified AAA requirements. (Opposition at 5). The Court cannot evaluate Plaintiff's argument without additional information regarding Defendant Quadriga's alleged conduct and AAA procedures. In any event, if the AAA declines to hear the dispute due to Defendant Quadriga's noncompliance, Plaintiff may return to this Court and request appropriate relief.

Accordingly, the Court concludes that Plaintiff's claims are subject to the arbitration provision contained in the Agreement.

B. Whether the Arbitration Provision is Unconscionable

"Unconscionability" consists of procedural and substantive components. Procedural unconscionability focuses on "oppression" or "surprise." *See Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853, 113 Cal. Rptr. 2d 376, 382 (2001) (holding that an arbitration provision was procedurally unconscionable because it was contained in a contract of adhesion presented to the plaintiff on a "take-it-or-leave-it" basis). "Oppression arises from an inequality of bargaining power that

results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Id.* Substantive unconscionability, on the other hand, is found where the arbitration provision is "one-sided." *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657, 9 Cal. Rptr. 3d 422 (2004) ("When only the weaker party's claims are subject to arbitration, and there is no reasonable justification for that lack of symmetry, the agreement lacks the requisite degree of mutuality.").

In California, procedural and substantive unconscionability need not be present to the same degree for the arbitration provision to be unenforceable. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation . . . in proportion to the greater harshness or unreasonableness of the substantive terms themselves." *See Armendariz*, 24 Cal. 4th at 114 (holding that an arbitration agreement was unconscionable because it was both adhesive and one-sided). "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

1. Procedural Unconscionability

No evidence whatsoever indicates that the arbitration provision in the Agreement is procedurally unconscionable. Plaintiff does not present any declarations showing that he was unable to negotiate the terms of the Agreement or that his employer enjoyed greater bargaining power at the negotiation table. Nor does Plaintiff testify that he was unaware of the arbitration provision and was "surprised" when he discovered its existence. Rather, Plaintiff simply states in his Opposition that the "arbitration provision is imposed on employees and does not include the right to 'opt out.'" (Opposition at 8). Such a generic statement without supporting evidence, however, is patently insufficient to carry Plaintiff's burden of proof.

The lack of evidence is particularly telling in light of Plaintiff's allegations that he is a sophisticated corporate executive with years of experience. (Complaint ¶ 7). It

is implausible at best that Plaintiff, as the highest managing officer of Defendant Quadriga, had no bargaining power or ability to influence the terms of the Agreement. Indeed, Plaintiff alleges that the parties were in the midst of negotiating the terms of a new employment contract when he was suddenly demoted and told to reallocate to Ohio. (*Id.*¶ 14 ("Quadriga informed [Plaintiff], in writing, that 'the terms of the new agreement' were still being prepared, and . . . that Quadriga and [Plaintiff] needed 'more time to agree [to] the terms of the new agreement' . . . ."). It is reasonable to infer from these allegations that Plaintiff was similarly able to negotiate the terms of the original Agreement, including the arbitration provision.

Instead of challenging this inference with evidence, Plaintiff argues that the provision is procedurally unconscionable because a copy of the applicable AAA rules was not attached to the Agreement. But as the California Supreme Court has explained, an employer's failure to provide a copy of the AAA rules is relevant to the unconscionability analysis only where the employee challenges arbitration terms "that were 'artfully hidden' by the simple expedient of incorporating [the arbitration rules] by reference." *Baltazar v. Forever 21, Inc.*, 2016 WL 1176599, at *15, 200 Cal. Rptr. 3d 7 (2016) (rejecting the plaintiff's contention that the employer's failure to attach the AAA rules to the employment agreement was unconscionable because the plaintiff's challenge did not concern those rules). Because Plaintiff does not argue that some specific rule of the AAA is unconscionable, the fact that the AAA rules were not attached to the Agreement is irrelevant.

In sum, the Court concludes that Plaintiff failed to meet his burden in proving procedural unconscionability.

2. Substantive Unconscionability

Plaintiff claims that the arbitration provision is substantively unconscionable for three reasons:

First, Plaintiff suggests that the provision is "one-sided" because it was imposed on him as a condition for employment. (Opposition at 9). This argument, however,

goes to procedural, not substantive, unconscionability. And as the Court already explained, nothing in the record indicates that Plaintiff was forced to accept the arbitration provision without an opportunity for negotiation.

Second, Plaintiff argues that employment arbitration with the AAA disproportionately advantages the employers due to the "repeat player effect." (Opposition at 10 (citing Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 Journal of Empirical Studies at 1-23 (2011)). Although California courts have taken notice of the repeat player effect, they have concluded that it is insufficient to render the arbitration agreement unconscionable. *See, e.g., Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 178, 116 Cal. Rptr. 2d 671 (2002) (holding that the repeat player effect was insufficient to invalidate the arbitration agreement); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006) ("[M]erely raising the 'repeat player effect' claim, without presenting more particularized evidence demonstrating impartiality, is insufficient under California law to support an unconscionability finding."). Precedent aside, Plaintiff's argument is particularly weak because no evidence indicates that Defendant Quadriga is a "repeat player" in AAA arbitration or is likely to be perceived as one. The very study that Plaintiff cites, moreover, suggests that employees with salaries above $250,000—a group that includes Plaintiff, whose base salary alone was $275,000 (*see* Complaint, Ex. A)—experience far less variation in outcomes between arbitration and litigation. Colvin, *supra*, at 9-11. The Court is therefore unconvinced that Plaintiff would be subject to bias and unfair rulings if the Motion were granted.

Third, Plaintiff points out that the Agreement permits Defendant Quadriga, but not Plaintiff, to pursue "injunctive and/or other equitable relief" in court. (Opposition at 9; Complaint, Ex. A). It is true that such one-sided terms are substantively unconscionable under California law. *See Nagrampa*, 469 F.3d at 1287 ("[T]his provision [permitting the employer but not the employee to seek injunction in court] is clearly one-sided, effectively giving [the employer] the right to choose a judicial forum and eliminating such a forum for [the employee]. California courts consistently have found such arbitration provisions [substantively] unconscionable."). But because

Plaintiff has provided no evidence of procedural unconscionability, the Court cannot conclude that this term is unenforceable. Indeed, it is entirely possible, in the absence of evidence to the contrary, that Plaintiff successfully bargained for greater employment benefits in exchange for waiving his right to seek injunctive relief in a judicial forum.

In any event, even if Plaintiff had successfully proven the unconscionability of the injunctive relief term, the Court would simply have severed that one tangential term. Where the agreement to arbitrate is not "permeated with unconscionability," courts have not hesitated to sever unconscionable terms and compel arbitration in accordance with the remaining provisions. *See, e.g.*, *Lara*, 896 F. Supp. 2d at 848 ("[O]nly the injunctive relief provision is substantively unconscionable. And, because this provision is collateral to the main purpose of the contract, it is easily severable.") (internal quotation marks omitted); *Martin v. Ricoh Americas Corp.*, No. C-08-4853 EMC, 2009 WL 1578716, at *6 (N.D. Cal. June 4, 2009) ("Because there is only one substantively unconscionable provision easily capable of severance . . . the Court shall sever and compel arbitration.").

Neither party here is seeking injunctive relief in a judicial forum. For both that reason and the lack of procedural unconscionability, the Court need not address the severance of the one arguably unconscionable term.

III. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED** and this action is **STAYED**.

The Court retains jurisdiction over this action, including for the purposes of entertaining a motion to confirm an arbitration award. The parties are directed to file a joint status report with the Court within 90 days of the date of this Order, and every 90 days thereafter until such time that there is a decision by the arbitrator.

IT IS SO ORDERED.