

1 Magistrate Judge also examined other key provisions of the RSA’s arbitration agreement, including an
2 opt-out provision that provided, in pertinent part:

3 Right to Opt Out: IF YOU DO NOT WISH TO BE
4 BOUND BY THIS ARBITRATION PROVISION, YOU
5 MUST NOTIFY BHN IN WRITING WITHIN 30 DAYS
6 FROM THE DATE THAT YOU FIRST RECEIVE THIS
7 AGREEMENT. . . .

8 RSA § 14(c).

9 The Magistrate Judge recommended that because Plaintiff did not receive notice that Charter
10 would seek to enforce the arbitration agreement until after this lawsuit was filed, several years after
11 Plaintiff stopped receiving services from BHN, the special notice provision was not satisfied, so the
12 arbitration agreement did not apply to Plaintiff. The F&Rs specifically reasoned that “the plain
13 language of the special notice to California customers that BHN would ‘not seek to enforce the
14 arbitration provision . . . unless we *have* notified you otherwise,’ [] indicates notice would be
15 provided prior to the customer entering the agreement or contemporaneously with it.” ECF No. 29 at
16 11-12 (emphasis in F&Rs).

17 Charter filed objections to the F&Rs, ECF No. 32, to which Plaintiff responded. ECF No. 35.
18 A district judge may “accept, reject or modify, in whole or in part, the findings and recommendations
19 made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). If objections to the findings and
20 recommendations are filed, “the court shall make a de novo determination of those portions of the
21 report or specified proposed findings or recommendations to which objection is made.” *Id.* A de novo
22 review requires the court to “consider[] the matter anew, as if no decision had been rendered.” *Dawson*
23 *v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009). The Court has carefully considered the F&Rs, the
24 objections and response, in light of the entire record and concludes that the F&Rs are well-reasoned
25 and entirely correct.

26 It is undisputed that Plaintiff is and was at all relevant times a resident of California. It is also
27 undisputed that Charter did not provide Plaintiff with notice that they intended to enforce the arbitration
28 agreement until after this lawsuit was filed. Therefore, the key dispute is how the above-quoted carve-
out/notice language operates. In the context of a motion to compel arbitration, the key legal question is

1 whether “it may be said with positive assurance that the arbitration clause is not susceptible of an
2 interpretation that covers the asserted dispute.” *AT&T Tech., Inc. v. Comme ’ns Workers of Am.*, 475
3 U.S. 643, 650 (1986). Charter argues, among other things, that the Magistrate Judge’s interpretation of
4 the contract provision would render the opt out provision superfluous, and that the only way to
5 “effectuate Section 14(c) without rendering it meaningless by Section 14(f)” is to interpret Section
6 14(f) to “to mean that a subscriber must opt-out of the Arbitration agreement within 30 days of
7 receiving the RSA, and if the subscriber does not timely opt-out, that subscriber is subject to the
8 Arbitration Provision; however, Charter may enforce that Arbitration Provision against California
9 customers only after it provides notice of such intent.” ECF No. 32 at 4-5. Plaintiff articulated the
10 absurdity of this argument succinctly by explaining that Charter’s interpretation would be tantamount
11 to reading the California notice provision as follows: “SPECIAL NOTE REGARDING
12 ARBITRATION FOR CALIFORNIA CUSTOMERS: IF YOU ARE A BHN CUSTOMER IN
13 CALIFORNIA, BHN WILL NOT SEEK TO ENFORCE THE ARBITRATION PROVISION ABOVE
14 ~~UNLESS WE HAVE NOTIFIED YOU OTHERWISE DO.~~” *See* ECF No. 35 at 7 (emphasis in
15 plaintiff’s brief, strikethrough added). The Court can say “with positive assurance” that the arbitration
16 clause is not susceptible to the absurd meaning suggested by Charter. Moreover, the interpretation
17 advanced by the F&Rs and the Plaintiff does not render the opt-out provision superfluous, as it would
18 be operative whenever BHN gave proper notice under Section 14(f). The Court finds the remaining
19 arguments in the Objections to be without merit as well.

20 Accordingly, **IT IS HEREBY ORDERED:**

- 21 1. The Findings and Recommendations dated December 14, 2017 (ECF No. 29) are
22 **ADOPTED IN FULL**; and
- 23 2. Defendant’s motion to compel arbitration (ECF No. 19) is **DENIED**.

24 IT IS SO ORDERED.

25 Dated: April 13, 2018

26 /s/ Lawrence J. O’Neill
27 UNITED STATES CHIEF DISTRICT JUDGE