

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 IVONNETH CRUZ,
5 Plaintiff,

6 v.

7 REDFIN CORPORATION,
8 Defendant.

Case No. 14-cv-05234-TEH

**ORDER DENYING PLAINTIFF'S
MOTION FOR CURATIVE NOTICE**

9
10 Before the Court is Plaintiff's Motion for Curative Notice (Miscellaneous Relief).
11 Docket No. 34. Having carefully considered the parties' written arguments, the Court
12 finds this matter suitable for resolution without oral argument. See Civ. L.R. 7-1(b). For
13 the reasons set forth below, the Court hereby DENIES Plaintiff's motion.

14
15 **BACKGROUND**

16 Plaintiff Ivonneth Cruz ("Plaintiff") worked as a Field Agent for Defendant Redfin
17 ("Defendant") after signing a Field Agent Independent Contractor Agreement (the
18 "Agreement") which contained an arbitration clause. Compl. ¶4 (Docket No. 1-1); Ex. A.
19 to Fenn Decl. at 5 (Docket No. 19-1). In the instant putative class action, Plaintiff alleges
20 that Defendant misclassified her as an independent contractor. On December 1, 2015, the
21 Court granted Defendant's motion to compel arbitration, but in doing so, found that three
22 provisions in the Agreement were unconscionable: the fee-shifting provision, the forum
23 selection clause, and the choice of law clause. Compel Order at 16-18 (Docket No. 32).
24 The Court severed the unconscionable provisions, but found the remainder of the
25 Agreement valid and enforceable, including the Agreement's delegation of the issue of
26 arbitrability to the arbitrator. Id. at 19. The Court stayed the action pending arbitration.
27 Plaintiff filed the instant Motion for Curative Notice on April 11, 2016. Defendant timely
28 opposed, and Plaintiff timely replied. Docket Nos. 36, 37.

1 **DISCUSSION**

2 “Because of the potential for abuse, a district court has both the duty and the broad
3 authority to exercise control over a class action and to enter appropriate orders governing
4 the conduct of counsel and parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

5 “The prophylactic power accorded to the court presiding over a putative class action under
6 [Federal Rule of Civil Procedure] 23(d) is broad; the purpose of Rule 23(d)’s conferral of
7 authority is not only to protect class members in particular but to safeguard generally the
8 administering of justice and the integrity of the class certification process.” *O’Connor v.*
9 *Uber Techs., Inc.*, No. 13-CV-3826-EMC, 2014 WL 1760314, at *3 (N.D. Cal. May 2,
10 2014). Accordingly, “[c]ourts may prohibit and correct communication that is misleading,
11 coercive, or discourage[s] participation in the lawsuit.” *Talamantes v. PPG Indus., Inc.*,
12 No. 13-CV-4062-WHO, 2014 WL 4145405, at *2 (N.D. Cal. Aug. 21, 2014) (citing
13 *Billingsley v. Citi Trends, Inc.*, 560 Fed. App’x. 914, 922 (11th Cir. 2014); see also *Parks*
14 *v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002).

15 Plaintiff argues that putative class members who have signed agreements containing
16 the same arbitration clause as Plaintiff’s Agreement are unaware that this Court found
17 certain provisions unconscionable and severable, and were therefore given misinformation
18 as to their rights which may affect future decisions regarding whether to bring claims
19 against Defendant. Mot. at 3-5; Reply at 2. Plaintiff states that “California federal district
20 courts routinely require the issuance of curative notice in situations where putative class
21 members have received misinformation which may affect not only their rights but their
22 understanding of those rights.” Mot. at 4. As a general proposition, Plaintiff’s position is
23 sound. However, in opposition to Plaintiff’s motion, Defendant makes several arguments
24 that the Court ultimately finds persuasive.

25 First, Defendant argues that Plaintiff’s requested notice would be premature,
26 because no class certification motion has been filed, and the class period in the Complaint
27 was left to be determined by the Court. Opp’n at 2, 4; see Compl ¶10; cf. *Belt v. Emcare,*
28 *Inc.*, 299 F. Supp. 2d 664 (E.D. Tex. 2003) (class preliminarily certified and notice to

1 absent class members approved by court; curative notice appropriate). Notably here, the
2 only substantive motion that has been resolved by this Court has been the motion to
3 compel arbitration. Furthermore, the majority cases cited by Plaintiff involved separate
4 coercive communications by the defendant to potential class members for the purpose of
5 urging the potential class members to opt out or not participate in the lawsuit. See, e.g.,
6 *Cty. of Santa Clara v. Astra USA, Inc.*, No. 05-CV-3740-WHA, 2010 WL 2724512, at *1
7 (N.D. Cal. July 8, 2010) (defendant sent refund checks with accompanying letter stating
8 that cashing the checks constituted accord and satisfaction); *Guifu Li v. A Perfect Day*
9 *Franchise, Inc.*, 270 F.R.D. 509, 512 (N.D. Cal. 2010) (putative class members coerced to
10 sign opt-out forms in individual meetings during business hours); *Wright v. Adventures*
11 *Rolling Cross Country, Inc.*, No. 12-CV-0982-EMC, 2012 WL 2239797, at *5 (N.D. Cal.
12 2012) (communication presented skewed view of litigation for purpose of discouraging
13 participation); *Mevorah v. Wells Fargo Home Mortgage, Inc.*, No. 05-CV-1175-MHP,
14 2005 WL 4813532, at *4 (N.D. Cal. Nov. 17, 2005) (communication gave incorrect
15 impression that compensation structure would change if lawsuit was successful).

16 Here, the allegedly misleading communication at issue is the Agreement itself,
17 signed by Field Agents upon hire. The Agreement is integral to the instant action by virtue
18 of its arbitration clause, but unlike the cases cited by Plaintiff, the Agreement does not
19 communicate any – much less misleading – information to individuals about the instant
20 action. Even if the currently operative agreements contain the provisions that this Court
21 found unconscionable, such agreements were drafted before this action was filed and were
22 not drafted with the intention of discouraging participation in the lawsuit. At the time a
23 class is preliminarily certified, the Court may then approve notice to potential class
24 members clarifying their rights; however, at this time, the putative class is far too
25 undefined to do so.

26 Next, Defendant argues that Plaintiff’s requested notice would be confusing and
27 misleading for the putative class members, as well as prejudicial to Defendant. Defendant
28 contends that most of the putative class members have already signed new arbitration

1 agreements that do not contain the unconscionable terms.¹ Opp'n. at 2. There are no
2 readily apparent means – absent the parties engaging in expensive data collection – by
3 which the Court could ascertain which putative class members may be allegedly harmed
4 by the inclusion of unconscionable terms in their agreements.² Moreover, putative class
5 members who are operating under new agreements without the unconscionable provisions
6 would be confused by Plaintiff's requested notice.

7 In *Gonzalez v. Preferred Freezer Services*, the defendant sent a misleading and
8 incomplete communication to potential class members which contained a release
9 agreement. No. 12-CV-03467-ODW, 2012 WL 4466605, at *1 (C.D. Cal. Sept. 27, 2012).
10 Instead of ordering a blanket curative notice as Plaintiff requests here, the Gonzalez court
11 ordered the defendant to provide the plaintiff with contact information of the individuals to
12 whom the misleading communication was made, so that the plaintiff's counsel could
13 correct the damage. *Id.* at *3. In *Slavkov v. Fast Water Heater Partners*, the court found
14 curative notice necessary where the defendant had coercively obtained settlement
15 agreements and releases from putative class members using a misleading letter; however,
16 the Court only ordered curative notice to the recipients of the misleading communication,
17 not to the entire putative class. No. 14-CV-04324-JST, 2015 WL 6674575, at *7 (N.D.
18 Cal. Nov. 2, 2015). Here, even if the Court were to find that the agreements harm putative
19 class members who must sign them, Plaintiff's requested relief is not appropriately
20 tailored, as Plaintiff has not identified any means that the Court could use to determine
21 which putative class members have actually been harmed so that it may order notice to
22 those individuals only.

23

24 ¹ Defendant also argues that the notice itself would be confusing, misleading and
25 prejudicial because it would lead those receiving the notice to believe that Defendant had
26 engaged in some wrongdoing, or that the entire Agreement is invalid. The Court is
27 unpersuaded by this argument, however, because the notice could be worded in a way to
28 prevent such confusion.

² Plaintiff points out that Defendant has not provided the revised agreement. Reply at
2. Nor has Defendant identified which individuals are still operating under the agreement
containing unconscionable provisions. If the Court or the arbitrator were to fashion
appropriate curative notice, such information would be necessary.

1 Finally, Defendant argues that Plaintiff has requested relief in an inappropriate
2 forum. Opp'n at 8-9. In its order granting Defendant's motion to compel arbitration, the
3 Court found that the parties "clearly and unmistakably delegated the question of
4 arbitrability to the arbitrator." Compel Order at 19. The action is currently stayed in this
5 Court, as it is pending in arbitration. With this procedural posture in mind, Defendant
6 argues that the arbitrator should decide whether curative notice is necessary, and if so,
7 determine the scope, contents, and receiving parties. Id. at 8. The Court finds that the
8 action is procedurally too uncertain for the Court to intervene by ordering curative notice,
9 even if the requested notice was not premature, overbroad or confusing. The arbitrator
10 may determine as a gateway matter that the matter is not arbitrable, and send the action
11 back to this Court. On the other hand, the arbitrator may determine that the action belongs
12 in arbitration, in which case the issue of appropriate curative notice would remain with the
13 arbitrator. Therefore, at this tentative juncture, the Court finds it inappropriate to order
14 curative notice.

15

16 **CONCLUSION**

17 For the reasons stated above, the Court finds that ordering curative notice would be
18 inappropriate given the factual and procedural posture of the instant action. Accordingly,
19 the Court DENIES Plaintiff's motion. A motion for curative notice may be more proper
20 when putative class members who may be actually harmed by the clauses in the
21 Agreement can be identified, and after the arbitrator has made a decision as to arbitrability;
22 the Court may consider entertaining such a motion at that time.

23


24 **IT IS SO ORDERED.**

25

26 Dated: 05/09/16

27

28



THELTON E. HENDERSON
United States District Judge