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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KISHAN N. CHAND,
Plaintiff,
v.
CHECKSMART FINANCIAL LLC,
Defendant.

Case No. [17-cv-03895-JSC](#)**ORDER GRANTING MOTION TO
COMPEL ARBITRATION**

Re: Dkt. No. 9

Plaintiff Kishan N. Chand sues his former employer Defendant Checksmart Financial, LLC for disability discrimination and retaliation. Defendant moves to compel arbitration per the Mutual Dispute Arbitration Agreement (the “Arbitration Agreement”) signed by both parties. (Dkt. No. 9.) Plaintiff did not file an opposition and has not otherwise communicated with the Court. After considering the moving papers, the Court concludes that oral argument is unnecessary, see Civ. L.R. 7-1(b), and VACATES the August 24, 2017 hearing. Because Plaintiff agreed to arbitrate his claims and the arbitration policy is not unconscionable, the Court grants Defendant’s motion to compel arbitration and stays the action.

BACKGROUND

On February 2, 2015, Plaintiff began working for Checksmart as a district manager. (Dkt. No. 9-1 at 1.) On this same day, both parties signed the Arbitration Agreement. (*Id.* at 8.) The Arbitration Agreement states:

1. The parties mutually agree to “submit to binding arbitration all covered disputes and claims” arising out of Plaintiff’s employment or any legal dispute of any type, including but not limited to state or federal laws against discrimination such as Title VII of the Civil Rights Act, the California Fair Housing and Employment Act (“FEHA”), and the Americans with Disabilities Act (“ADA”). (Dkt. No. 9-1 at 4 ¶ 1.)

- 1 2. The arbitration shall be conducted consistent with the American Arbitration
2 Association (“AAA”) rules. (*Id.* at 5 ¶ 7.)
- 3 3. The arbitration may be heard by the AAA, the Judicial Alternatives and Mediation
4 Service (“JAMS”), or any other arbitration forum. (*Id.* at 5 ¶ 5.)
- 5 4. During the arbitration both parties “have the right to take written discovery and
6 depositions as well as to subpoena witnesses and documents for discovery and
7 arbitration.” (*Id.* at 5 ¶ 7.)
- 8 5. The arbitrator shall issue a written decision with a statement of the findings and
9 reasons for the arbitration award within 30 days of the hearing. (*Id.* at 5 ¶ 6.)
- 10 6. Both parties may request any remedy or relief that is allowed by applicable law. The
11 AAA rules also permit the arbitrator to grant relief that would have been available to
12 the parties had the matter been heard in court. (*Id.* at 5 ¶¶ 6,7.)
- 13 7. Defendant bears the costs for the arbitrator’s fee and arbitration expenses. (*Id.* at 6 ¶ 8.)
- 14 8. Neither Defendant nor Plaintiff is entitled to a trial. (*Id.* at 10.)

15 On August 7, 2015, Plaintiff submitted a notice concerning an injury he sustained at work.
16 (Dkt. No. 9-1 at 7.) Plaintiff subsequently submitted a doctor’s note explaining his work
17 restrictions. (*Id.*) On January 27, 2016, Plaintiff submitted a second note from his doctor to
18 Wendy Right, an employee in the human resources department. (*Id.*) On February 5, 2016,
19 Plaintiff’s supervisor Mayra Ochoa wrote Plaintiff up, stating Plaintiff was not performing his
20 duties as district manager. (*Id.*) Plaintiff contested the write up as Plaintiff was ranked #3 out of
21 40 district managers. (*Id.*) Plaintiff submitted a complaint to the human resources director stating
22 the write up did not reflect his actual performance. (*Id.*) Human resources later contacted Plaintiff
23 to inform him that the write up would be “invalidated.” (*Id.*)

24 Ms. Ochoa’s demeanor towards Plaintiff changed after his complaint to HR. (*Id.*) Ms.
25 Ochoa told Plaintiff that if he filed an EEOC complaint he would be fired. (*Id.*) On March 18,
26 2016, Plaintiff reached out to Ms. Ochoa for help while on work restrictions per his doctor note.
27 (*Id.*) Ms. Ochoa did not help Plaintiff. On March 30, 2016, Plaintiff was constructively
28 terminated. (*Id.*)

On June 9, 2017, Plaintiff submitted a complaint to the California Department of Fair
Housing and Employment alleging disability discrimination and retaliation by Checksmart. (Dkt.

1 No. 9-2 at 7.) On this same day, Plaintiff also filed a discrimination lawsuit in Alameda County
2 Superior Court. (Dkt. No. 9-2 at 4.) Checksmart removed the action to federal court asserting
3 diversity jurisdiction, and then moved to compel arbitration and dismiss or stay the action. (Dkt.
4 No. 9.) Plaintiff did not file an opposition to the motion.

5 DISCUSSION

6 I. The Arbitration Agreement Encompasses Plaintiff's Claims

7 Under the Federal Arbitration Act, a written provision, "in any contract...involving
8 commerce to settle by arbitration a controversy thereafter arising...shall be valid, irrevocable, and
9 enforceable, save upon such grounds as exist at law or in equity for the revocation of any
10 contract." 9 U.S.C. § 2. "The Arbitration Act establishes that, as a matter of federal law, any
11 doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether
12 the problem at hand is the construction of the contract language itself or an allegation of waiver,
13 delay, or a like defense to arbitrability." *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d
14 1126, 1131 (9th Cir. 2000) (citing *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460
15 U.S. 1, 24–25 (1983)).

16 Under the FAA, any party bound to an arbitration agreement that falls within the scope of
17 the FAA may bring a motion in federal district court to compel arbitration and dismiss or stay the
18 proceedings. 9 U.S.C. §§ 3, 4. The role of the federal courts in these circumstances is limited to
19 determining whether the arbitration clause at issue is valid and enforceable under § 2 of the
20 FAA. *Chiron Corp.*, 207 F.3d at 1130. That is, whether: (1) there is an agreement to arbitrate
21 between the parties; and (2) whether the agreement covers the dispute. *Howsam v. Dean Witter*
22 *Reynolds*, 537 U.S. 79, 83–84 (2002). A district court may compel arbitration of employment
23 discrimination claims under Title VII and the Americans with Disabilities Act when the statutory
24 claims are covered by an agreement and the agreement is no unconscionable. *Dittenhafer v.*
25 *Citigroup*, 467 Fed.Appx. 594, 595 (9th Cir. 2012). FEHA claims are also arbitrable. *Armendariz*
26 *v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 97 (2000).

27 The Arbitration Agreement is covered under the FAA. There is an agreement to arbitrate
28 between the parties – both parties signed the Arbitration Agreement on Plaintiff's first day of

1 work, February 2, 2015. The Arbitration Agreement covers disputes that arise out of Plaintiff's
2 employment including claims of disability discrimination under state and federal law, such as
3 FEHA and Title VII. Plaintiff brings a FEHA claim, which is specifically identified in clause one
4 of the Arbitration Agreement. As such, the Arbitration Agreement is valid and enforceable under
5 § 2 of the FAA.

6 **II No Procedural or Substantive Unconscionability Exists to Prevent Enforcement.**

7 Once a court concludes there is an agreement to arbitrate, it must compel arbitration unless
8 it determines there are grounds for revocation. 9 U.S.C. § 2. The grounds under which an
9 arbitration agreement may be revoked is governed by state law. *Perry v. Thomas*, 482 U.S.
10 483, 493, n. 9 (1987). Under California law, "the party opposing arbitration bears the burden of
11 proving any defense, such as unconscionability." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.*
12 *Dev. (US), LLC*, 55 Cal.4th 223, 236 (2012). "In order to establish such a defense, the party
13 opposing arbitration must demonstrate that the contract as a whole or a specific clause in the
14 contract is both procedurally and substantively unconscionable." *Poublon v. C.H. Robinson*
15 *Company*, 846 F.3d 1251, 1260 (9th Cir. 2017). Procedural and substantive unconscionability
16 "need not be present in the same degree." *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899,
17 910 (2015). Rather, there is a sliding scale: "the more substantively oppressive the contract term,
18 the less evidence of procedural unconscionability is required to come to the conclusion that the
19 term is unenforceable, and vice versa." *Id.* (quoting *Armendariz*, 24 Cal.4th at 114). We
20 therefore must consider procedural and substantive unconscionability.

21 **1. Procedural Unconscionability**

22 An agreement or any portion thereof is procedurally unconscionable if "the weaker party is
23 presented the clause and told to 'take it or leave it' without the opportunity for meaningful
24 negotiation." *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1100 (2002). Thus, a contract is
25 procedurally unconscionable under California law if it is "a standardized contract, drafted by the
26 party of superior bargaining strength, that relegates to the subscribing party only the opportunity to
27 adhere to the contract or reject it." *Ting v. AT & T*, 319 F.3d 1126, 1148 (9th Cir. 2003).
28 California courts have found that "the adhesive nature of the contract is sufficient to establish

1 some degree of procedural unconscionability” in a range of circumstances, *Sanchez*, 61 Cal.4th at
2 915, however, “the California Supreme Court has not adopted a rule that an adhesion contract is
3 per se unconscionable.” *Poublon*, 846 F.3d at 1260-1261 (citing cases). “Although adhesion
4 contracts often are procedurally oppressive, this is not always the case.” *Morris v. Redwood*
5 *Empire Bancorp*, 128 Cal.App.4th 1305, 1320 (2005). In the employment context, if an employee
6 must sign a non-negotiable employment agreement as a condition of employment but “there is no
7 other indication of oppression or surprise,” then “the agreement will be enforceable unless the
8 degree of substantive unconscionability is high.” *Poublon*, 846 F.3d at 1260-1261 (citing *Serpa v.*
9 *Cal. Sur. Investigations, Inc.*, 215 Cal.App.4th 695, 704 (March 21, 2013), *as modified* (Apr. 19,
10 2013), *as modified* (Apr. 26, 2013)).

11 Here, the Arbitration Agreement was signed by both parties on Plaintiff’s first day of
12 work. Presumably, because it was Plaintiff’s first day, the contract was presented on a take-it-or
13 leave it condition of employment. However, this alone is not sufficient to render the entire
14 Arbitration Agreement unconscionable. As discussed above, when there is “no indication of
15 oppression or surprise” the agreement is enforceable unless there is a high degree of substantive
16 unconscionability. There is no evidence of oppression or surprise, therefore the Arbitration
17 Agreement is enforceable absent a finding of substantive unconscionability.

18 **2. Substantive Unconscionability**

19 “Substantive unconscionability addresses the fairness of the term in dispute.” *Szetela*, 97
20 Cal.App.4th at 1100. Courts have held that the agreement must be “overly harsh,” “unduly
21 oppressive,” “unreasonably favorable,” or must “shock the conscience” to be substantively
22 unconscionable. *Sanchez*, 61 Cal.4th at 911. Mutuality is the “paramount” consideration when
23 assessing substantive unconscionability. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 998 (9th Cir.
24 2010). Agreements to arbitrate must contain at least “a modicum of bilaterality” to avoid
25 unconscionability. *Armendariz*, 24 Cal.4th at 119.

26 There is no evidence of substantive unconscionability. None of the Agreement terms are
27 overly harsh or unduly repressive. Neither Defendant nor Plaintiff is entitled to a trial. Both
28 parties may conduct written discovery, take depositions, and subpoena witnesses and documents.

1 Both parties may request and are entitled to any relief permissible under the law. Furthermore,
2 Defendant must bear the costs associated with the arbitration, including paying the arbitrator. As
3 such, there is no substantive unconscionability and the Arbitration Agreement is enforceable.

4 **III. The Armendariz Requirements Are Satisfied.**

5 Defendant also asserts that the Arbitration Agreement satisfies the requirements
6 established by the California Supreme Court in *Armendariz v. Foundation Health Psychcare*
7 *Servs., Inc.* as it (a) requires a neutral arbitrator; (b) provides for more than adequate discovery; (c)
8 requires a written arbitration award; (d) provides for a wide range of remedies; and (e) provides
9 that the Company shall bear the costs of arbitration. *Id.*, 24 Cal.4th at 90.

10 The Court agrees. The Arbitration Agreement provides for a neutral arbitrator as the
11 arbitration may be heard by the American Arbitration Association, “JAMS”, or any other
12 arbitration forum. (Dkt No. 9-1 at 5 ¶ 5.) During the arbitration both parties “have the right to
13 take written discovery and depositions as well as to subpoena witnesses and documents for
14 discovery and arbitration.” (*Id.* at 5 ¶ 7.) The arbitrator must issue a written decision with a
15 statement of the findings and reasons for the arbitration award within 30 days of the hearing. (*Id.*
16 at 5 ¶ 6.) Both parties may request any remedy or relief that is allowed by applicable law. (*Id.*)
17 The arbitrator may grant relief that would have been available to the parties had the matter been
18 heard in court. (*Id.* at 5 ¶¶ 6,7.) Defendant bears the costs for the arbitrator’s fee and arbitration
19 expenses. (*Id.* at 6 ¶ 8.) The *Armendariz* requirements are met.

20 **CONCLUSION**

21 For the reasons stated above, Defendant’s motion to compel arbitration is GRANTED.
22 The federal court proceedings are stayed. This Order disposes of Docket No. 9.

23 **IT IS SO ORDERED.**

24 Dated: August 22, 2017

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26 
27 JACQUELINE SCOTT CORLEY
28 United States Magistrate Judge