

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AYANA STEVENSON, et al.,
Plaintiffs,
v.
SIRIUS XM RADIO INC.,
Defendant.

Case No. [23-cv-02367-WHO](#)

**ORDER GRANTING MOTION TO
COMPEL ARBITRATION AND
DISMISSING CASE**

Re: Dkt. No. 17

Plaintiffs Ayana Stevenson, David Ambrose, and Liza Ramirez brought this action on behalf of a putative class of California Sirius XM subscribers to challenge what they describe as a “deceptive pricing scheme whereby Sirius XM falsely advertises its music plans at lower prices than it actually charges.” First Amended Complaint (“FAC”), ¶ 1. Defendant Sirius XM Radio, Inc. (“Sirius XM”) seeks to compel plaintiffs to arbitration pursuant to the arbitration provision in the Sirius XM Customer Agreement. Plaintiffs oppose, arguing that provisions in the Customer Agreement’s “Class Action Waiver” violate California public policy, are unenforceable, and as a result trigger a “poison pill” nullifying the entire arbitration agreement. Their arguments fail because they challenge a provision of the Class Action Waiver that does not apply to them and because the Class Action Waiver does not bar them from recovering public injunctive relief in any forum. For the reasons discussed below, Sirius XM’s motion to compel arbitration is GRANTED and the case is DISMISSED.¹

¹ Plaintiffs request that if I grant the motion to compel the entire action should be dismissed without prejudice, so that plaintiffs may immediately appeal. I will do so pursuant to 9 U.S.C. § 16(a)(3) (“(a) An appeal may be taken from . . . (3) a final decision with respect to an arbitration

1 **BACKGROUND**

2 Plaintiffs allege that Sirius XM, a satellite radio service that broadcasts channels to more
3 than 33 million subscribers, including 3.8 million Californians, intentionally does not disclose the
4 “U.S. Music Royalty Fee” to its customers. *Id.* ¶ 2, 19. The fee increases the plan price by 21.4%
5 above the advertised price for the plans; plaintiffs assert that Sirius XM prevents customers from
6 learning about the additional charge by never sending period bills or payment receipts after initial
7 subscription, yet nevertheless automatically renewing their subscriptions. *Id.* ¶¶ 19-20.

8 In order to subscribe to Sirius XM, customers must agree to the Sirius XM Customer
9 Agreement; all plaintiffs did so when they signed up. The Customer Agreement states that
10 disputes will generally be resolved by binding arbitration. In a boxed, bolded, all caps statement
11 near the top of the Customer Agreement, it reads:

12 ANY DISPUTE BETWEEN US MAY BE RESOLVED BY BINDING ARBITRATION
13 ON AN INDIVIDUAL BASIS AS OUTLINED IN SECTION L BELOW. BY AGREEING
14 TO THIS AGREEMENT AND BINDING ARBITRATION YOU ARE WAIVING YOUR
RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY.

15 *See* Customer Agreement, Declaration of Diana L. Calla (Dkt. No. 17-1) ¶ 3, Ex. 1.² Sirius XM
16 argues that because no plaintiffs cancelled their subscriptions within the requisite period stated in
17 the Customer Agreement, they are bound by the terms of the agreement. Motion to Compel
18 Arbitration (“Mot.”) [Dkt. No. 17] 2:1-5; 4:21-22; 8:14-16; *see also* FAC ¶¶ 80, 97, 108.

19 In Section L, which is titled “Resolving Disputes,” the Customer Agreement describes the
20 process by which “[a]ny legal or equitable claim relating to the Service, the Site, your
21 Subscription or this Agreement (a ‘Claim’)” shall be resolved. *Id.* § L. Initially, a customer must
22 mail a notice of the claim to Sirius XM ’s General Counsel. *Id.* § L(1). A formal proceeding may
23 not be started for at least sixty days after such written notice. *Id.*

24 Next, the Customer Agreement states:

25 If we cannot resolve a Claim informally, including any dispute as to the validity or
26 applicability of this arbitration clause, then the Claims shall be resolved, upon election by

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that is subject to this title.”).

28 ² Sirius XM seeks to enforce the version of the Customer Agreement that was last updated on
October 14, 2021. Plaintiffs do not dispute that is the version that governs their claims.

1 either party, exclusively and finally by binding arbitration. The party initiating arbitration
2 must follow the rules and procedures of the American Arbitration Association (‘AAA’) in
effect at the time the Claim is filed, and the parties agree that the arbitration shall be
administered by the AAA.

3 *Id.* § L(2). It adds, the “arbitration agreement is made pursuant to a transaction involving
4 interstate commerce and shall be governed by the Federal Arbitration Act . . . and not by any state
5 law concerning arbitration.” *Id.*

6 Notwithstanding the provisions just discussed, customers may opt out of arbitration. They
7 may send a timely “Opt-Out Notice” to Sirius XM. *Id.* § L(6). None of the Plaintiffs exercised
8 that option. *See generally* FAC.

9 The Customer Agreement also contains a provision addressing class actions and
10 severability, the “Class Action Waiver.” Customers may not opt out of it. I quote it in full in the
11 Discussion section, below.

12 Plaintiffs filed this lawsuit in California Superior Court for Contra Costa County and it was
13 removed to this court. They are bringing suit individually and as private attorneys general seeking
14 public injunctive relief “to protect the general public by putting an end to SiriusXM’s unlawful
15 advertising scheme.” FAC ¶¶ 147, 153, 165.³ They also seek declaratory relief and restitution on
16 behalf of themselves and on behalf of a Class and Subclasses of California Sirius XM subscribers.
17 *Id.* ¶¶ 10, 125.⁴

18 LEGAL STANDARD

19 The Federal Arbitration Act (“FAA”) governs the motion to compel arbitration. 9 U.S.C.
20 §§ 1 *et seq.* The FAA provides that written arbitration agreements are “valid, irrevocable, and
21 enforceable, save upon such grounds as exist at law or in equity for the revocation of any
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23 _____
24 ³ Plaintiffs sought leave to file a supplemental brief in support of their opposition to Sirius XM’s
25 motion to compel arbitration. Dkt. No. 32. They included a copy of the proposed supplemental
26 brief. Dkt. No. 32-1. Sirius XM opposed this motion. Dkt. No. 35. The supplemental brief
27 raised issues regarding defendant’s alleged conduct in its arbitration proceedings with other
28 consumers. Those allegations do not implicate the legal questions before me on this motion.
Therefore, the motion for leave is denied.

⁴ Defendant Sirius XM filed an unopposed motion to file under seal, seeking to seal personal
information of Sirius XM customers. Dkt. No. 16. The motion is granted for compelling
justifications shown.

1 contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011). Under the FAA, a
2 district court determines: (i) whether a valid agreement to arbitrate exists and, if it does, (ii)
3 whether the agreement encompasses the dispute at issue.” *Nguyen v. Barnes & Noble Inc.*, 763
4 F.3d 1171, 1175 (9th Cir. 2014). “To evaluate the validity of an arbitration agreement, federal
5 courts should apply ordinary state-law principles that govern the formation of contracts.” *Ingle v.*
6 *Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (internal quotation marks and
7 citation omitted). A court ruling on a motion to compel arbitration reviews the evidence on the
8 same standard as for summary judgment under Rule 56. *See Navarro v. SmileDirectClub, Inc.*,
9 No. 22-CV-00095-WHO, 2022 WL 1786582, at *5 (N.D. Cal. Jun. 1, 2022).

10 If the court is satisfied “that the making of the arbitration agreement or the failure to
11 comply with the agreement is not in issue, the court shall make an order directing the parties to
12 proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4. “[A]ny
13 doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses*
14 *H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

15 **DISCUSSION**

16 If a valid arbitration clause exists, arbitration is mandatory. *See Volt Info. Sciences, Inc. v.*
17 *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). Plaintiffs do
18 not contest that they each accepted and agreed to the Customer Agreement, and that if the
19 Customer Agreement’s arbitration clause is enforceable, then their claims would fall within the
20 scope of the arbitration clause. Mot. 8:25-15:16.

21 But arbitration clauses “may be invalidated by generally applicable contract defenses, such
22 as fraud, duress, or unconscionability.” *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010)
23 (citations and quotations omitted). Plaintiffs contend that the arbitration agreement is not
24 enforceable because of the Class Action Waiver, which states:

25 7. Class Actions and Severability: You do not have the right to act
26 as a class representative or participate as a member of a class of
27 claimants with respect to any Claim submitted to arbitration or
28 litigation (to the extent you elect to Opt-Out of Arbitration) (“Class
Action Waiver”). A “Claim” does not include any challenge to the
validity and effect of the Class Action Waiver, which must be
decided by a court. There shall be no right or authority for any

1 claims to be arbitrated on a class action basis or on bases involving
2 Claims brought in a purported representative capacity on behalf of
3 the general public, as a private attorney general, or other
4 Subscribers, or other persons similarly situated. The parties
5 acknowledge and agree that under no circumstances will a class action
6 be arbitrated.

7 The Class Action Waiver is material and essential to the arbitration of
8 any dispute between the parties and is non-severable from this
9 agreement to arbitrate Claims. **If the Class Action waiver is limited,
10 voided or cannot be enforced, then the parties' agreement to
11 arbitrate (except for this sentence) shall be null and void**, subject
12 to the right to appeal any limitation or invalidation of the Class Action
13 Waiver.

14 Cust. Agr. § L(7) [Dkt. No. 17, Ex. 1 at 20] (emphasis added).

15 Plaintiffs assert that the Class Action Waiver contains two unlawful provisions: (1) an
16 unlawful waiver of the right to pursue class litigation in court for Sirius XM customers who
17 choose to “opt-out” of the arbitration agreement, and (2) an unlawful waiver of the right to pursue
18 public injunctive relief in arbitration for those who did not opt-out of arbitration. They argue that
19 either or both provisions trigger the non-severability clause in the second paragraph, also known
20 as the poison pill (in bold), rendering the arbitration agreement unenforceable. I will address each
21 argument below.⁵

22 **I. PLAINTIFFS LACK STANDING TO CHALLENGE THE CLASS ACTION
23 WAIVER ON BEHALF OF CONSUMERS WHO HAVE OPTED-OUT**

24 In evaluating the validity of the arbitration agreement, I apply the California state-law
25 principles that govern the formation of contracts. *Circuit City*, 328 F.3d at 1170. To assert a right
26 or challenge a violation of a right under a particular provision of a contract, the individual must
27 have been affected by or interacted with the particular provision. In *Smith, Valentino & Smith,
28 Inc. v. Superior Court*, the California Supreme Court explained that a party seeking to set a
contractual provision aside must “establish[] that enforcement of the present clause would be
unreasonable” in that party’s case. 17 Cal. 3d 491, 496 (1976)⁶; *see also Sanchez v. Valencia*

⁵ The arbitration agreement states that all “Claims” must be arbitrated, Cust. Agr., § L(2) (first paragraph), but a challenge to an aspect or portion of the Class Action Waiver is specifically carved out as not a “Claim.” *Id.*, § L(7). Accordingly, I and not the arbitrator have the authority to determine whether the Class Action Waiver is valid.

⁶ While *Smith, Valentino & Smith* considered forum selection clauses, the Supreme Court has recognized arbitration agreements as “a specialized kind of forum-selection clause” that controls

1 *Holding Co., LLC*, 61 Cal. 4th 899, 920 (2015) (arbitration provision cannot be held
2 unconscionable without a showing that it would be unconscionable as to the party asserting
3 unconscionability).

4 Courts in this District follow that limitation on standing and routinely decline to reach the
5 legality of contractual provisions that do not apply to the plaintiff in front of them. *See e.g. Tan v.*
6 *Grubhub*, 15-CV-05128-JSC, 2016 WL 4721439, at *6 (N.D. Cal. Jul. 19, 2016), *aff'd sub nom.*
7 *Lawson v. Grubhub, Inc.*, 13 F.4th 908 (9th Cir. 2021) (in determining whether common
8 questions of law existed sufficient for class certification, the court declined to consider challenges
9 to “the applicability or enforceability of the arbitration and class action waiver provisions” as
10 plaintiff lacked standing to “challenge those provisions himself because, in light of his decision to
11 opt out, they do not apply to him”); *see also Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994,
12 1003 (N.D. Cal. Sep. 32, 2011) (because plaintiff “has not shown how the modification clause [in
13 the arbitration agreement] has been applied to her,” she “thus lacks standing to challenge the
14 provision”); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1362165-WA, at *5 (N.D. Cal. Apr. 11,
15 2011) (“[p]laintiff does not have standing to challenge the change-in-terms provision, because it
16 has never been applied to her[.]”); *Wright v. Sirius XM Radio Inc.*, 2017 WL 4676589, at *8 (C.D.
17 Cal. Jun. 1, 2017) (a provision allowing Sirius XM to sue for non-payment did not apply to the
18 plaintiff, so plaintiff could not challenge the arbitration agreement on the basis of that provision).
19 These cases are on point. Plaintiffs lack standing to assert claims about provisions of arbitration
20 agreements that do not apply to them.

21 Plaintiffs counter that unconscionability should be assessed prospectively, from the time of
22 contracting. This would give plaintiffs here – who did not opt out – standing to challenge the class
23 action waiver in court on behalf of those who opted out. *Oppo.* 20-21. They contend that because
24 the poison pill “does not contain language stating that it can only be enforced by a plaintiff who is
25 subject to one of the arbitration agreement’s unlawful clauses,” that omission means that they can
26 enforce the poison pill themselves. *Id.*

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28 forum but also the procedures applied to resolve disputes. *See, e.g., Viking River Cruises, Inc. v.*
Moriana, 142 S. Ct. 1906, 1919, reh'g denied, 143 S. Ct. 60 (2022).

1 But the authority that plaintiffs cite does not support their position that any party may
2 challenge any provision in a contract, even if that provision does not apply to them. For example,
3 in *American Software, Inc. v. Ali*, the court held that a contract could not become unconscionable
4 over time, not that the effect of a contract should be assessed “prospectively.” 46 Cal. App. 4th
5 1386, 1392 (1996). *MacClelland v. Cellco Partnership* is also inapposite. 609 F. Supp. 3d 1024
6 (N.D. Cal. Jul. 1, 2022) (Chen, J.), *appeal pending*, No. 22-16020 (9th Cir.). There, Judge Chen
7 considered whether an arbitration clause in a Verizon customer agreement was substantively
8 unconscionable. *Id.* at 1036. The defendant wanted to limit the unconscionability analysis to only
9 the plaintiffs in the case, rather than considering the agreement’s effect on several thousand other
10 Verizon customers to whom the provision also applied and were clients of the plaintiffs’ law firm
11 but had not yet filed suit. *Id.* at 1041. Judge Chen found that it would be inappropriate to limit the
12 unconscionability analysis to only those plaintiffs who had proven that the provision harmed them.
13 *Id.* This is not the same thing as allowing a plaintiff to challenge provisions of a contract that does
14 not apply to her. *MacClelland* does not stand for the principle that a contract may be assessed for
15 unconscionability concerning individuals who are not subject to its terms.

16 At oral argument, plaintiffs relied on *Subcontracting Concepts (CT) LLC v. De Melo* as
17 support for their position that California courts determine unconscionability based on provisions
18 that do not apply to the signing party. 34 Cal. App. 5th 201, 205 (2019). In *CT LLC*, the
19 respondent signed an employment contract that included a mandatory arbitration provision. He
20 subsequently filed a wage claim with the Labor Commissioner and the company moved to compel
21 arbitration. In determining substantive unconscionability, the court considered the arbitration
22 agreement’s waiver of the right to pursue claims under the Labor Code Private Attorneys General
23 Act of 2004 (§ 2698 *et seq.*, “PAGA”), even though plaintiff did not assert PAGA claims in his
24 administrative action. *Id.* at 212. The court explained why:

25 The question in determining unconscionability, however, does not
26 involve comparing the terms of the arbitration clause with the
27 nonarbitration claims respondent is pursuing. Rather, under Civil
28 Code section 1670.5, subdivision (a), we review the arbitration clause
for substantive unconscionability at the time the agreement was made.

Id.

1 *CT LLC* is a different case. The respondent there did not attempt to bring a PAGA claim.
2 But if he had tried, the arbitration agreement would have barred him from doing so in violation of
3 then-applicable California Supreme Court law. In contrast, here plaintiffs did not opt-out of
4 arbitration; they will never be subject to a provision of the Customer Agreement that only applies
5 to Sirius XM customers who did.

6 In short, plaintiffs cannot trigger the poison pill based on a provision that does not and
7 cannot apply to them.

8 **II. THE CLASS ACTION WAIVER DOES NOT PROHIBIT PUBLIC INJUNCTIVE**
9 **RELIEF**

10 In *McGill v. Citibank, N.A.*, the California Supreme Court held that an arbitration
11 agreement that prohibited plaintiffs from seeking a public injunction was invalid because it
12 “seriously compromise[d] the public purposes [the laws] were intended to serve.” 2 Cal. 5th 945,
13 962 (2017); *see also Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 831 (9th Cir. 2019) (“the FAA does
14 not preempt the *McGill* rule”). Plaintiffs argue that the Class Action Waiver’s prohibition of
15 claims seeking public injunctive relief violates public policy and is invalid, triggering the poison
16 pill. I disagree.

17 **A. *McGill* and Public Injunctive Relief**

18 Among the statutory remedies provided by the UCL, CLRA, and FAL is “public injunctive
19 relief, i.e., injunctive relief that has the primary purpose and effect of prohibiting unlawful acts
20 that threaten future injury to the general public.” *McGill*, 2 Cal. 5th at 951, 956; *see also Lee v.*
21 *Postmates Inc.*, No. 18-CV-03421-JCS, 2018 WL 4961802, at *8 (N.D. Cal. Oct. 15, 2018).
22 Plaintiffs’ complaint includes a request for such relief in the claims for false advertising under the
23 CLRA, FAL, and UCL. *See* Counts I to III, FAC ¶¶ 127-185.

24 Under California law, a dispute resolution provision must allow a claimant to seek the
25 remedy of public injunctive relief from either a court or an arbitrator. *McGill*, 2 Cal. 5th at 952.
26 Plaintiffs argue that the Class Action Waiver violates the *McGill* rule by preventing them from
27 seeking public injunctive relief from either a court or an arbitrator. *Oppo*. 9:25-28; 10:1-2. They
28 are not satisfied by Sirius XM’s concession that the arbitrator can award public injunctive relief.

1 See Defendants' Reply ("Repl.") [Dkt. No. 28] 11:4-9. They contend that the Class Action
2 Waiver fails the three-part analysis that I laid out in *Brown v. Madison Reed, Inc.* to determine
3 whether *McGill* has been violated.⁷ They ask that I recognize this failure and respond by limiting
4 or otherwise holding the Class Action Waiver to be unenforceable, triggering the poison pill and
5 freeing plaintiffs from their agreement to arbitrate.

6 **B. The Court Determines Whether Public Injunctive Relief is Prohibited**

7 Before I address that issue, I must decide whether I have the authority to do so. Sirius XM
8 argues that the general delegation clause in § 2 of the Customer Agreement delegates it to the
9 arbitrator. The plaintiffs oppose, relying on the exception to the broad delegation provision within
10 § 7 that allows a court to determine the scope and validity of the Class Action Waiver provision.

11 I agree with the plaintiffs. Section 7 of the Arbitration Agreement, titled "Class Actions
12 and Severability," contains an exception to Section 2's more general delegation provision. That
13 provision specifically allows the court to determine a "challenge to the validity and effect of the
14 Class Action Waiver." That is exactly what plaintiffs are challenging here. Sirius XM attempts to
15 avoid the more specific exception by arguing that the "Class Action Waiver" is limited to the first
16 sentence of Section 7 and does not encompass the remainder of Section 7. Repl. 6-8. But that
17 interpretation is not persuasive, given: (1) the title of Section 7 ("Class Actions and Severability")
18 and (2) the discussion through both paragraphs of Section 7 describing the prohibition on "class
19 actions" in the first and third sentences of the first paragraph and outlining the materiality of "The
20 Class Action Waiver" and the poison pill provision in the first and second sentences of the second
21 paragraph.

22 The whole of Section 7 discusses the Class Action Waiver, confers on the court the ability
23 to hear challenges to the validity and effect of the Waiver, and describes what happens if a court
24 determines that the scope of the Waiver is limited, voided or cannot be enforced. I have authority

26 ⁷ The analysis in question asks (1) whether the claims carry public injunctive remedies that fall
27 within the scope of *McGill*, (2) whether the arbitration agreement prohibits the claimant from
28 seeking a public injunction in any forum and therefore is invalid under *McGill*, and (3) whether
the entire arbitration agreement is null and void because a "poison pill" provision in the agreement
has been triggered as a result of the claimant seeking public injunctive relief. See *Brown v.*
Madison Reed, 2021 WL 3861457-WHO (N.D. Cal. Aug 30, 2021).

1 to determine whether Section 7 prohibits public injunctive relief and therefore is invalid.

2 **C. Whether Public Injunctive Relief is Precluded**

3 Turning to the substance of the plaintiffs’ challenge to the scope of the Class Action
4 Waiver, I conclude that the Class Action Waiver does not preclude an arbitrator granting “public
5 injunctive relief” in arbitration. Therefore, the poison pill is not triggered and this matter must
6 proceed in arbitration.

7 To constitute public injunctive relief, the requested relief must “by and large” benefit the
8 general public. *McGill*, 2 Cal. 5th at 955. Public injunctive relief does not include relief from
9 which there is “no real prospective benefit to the public at large from the relief sought.” *Kilgore v.*
10 *Keybank, N.A.*, 718 F.3d 1052, 1061 (9th Cir. 2013) (en banc). “Merely declaring that a claim
11 seeks a public injunction ... is not sufficient to bring that claim within the bounds of the rule set
12 forth in *McGill*.” *Blair v. Rent-A-Ctr., Inc.*, No. C 17-02335 WHA, 2017 WL 4805577, at *2
13 (N.D. Cal. Oct. 25, 2017), aff’d in part, appeal dismissed in part, 928 F.3d 819 (9th Cir. 2019).

14 Here, plaintiffs are clearly seeking public injunctive relief, despite Sirius XM’s contention
15 to the contrary. Plaintiffs are bringing this lawsuit individually and as private attorneys general
16 seeking public injunctive relief “to protect the general public by putting an end to SiriusXM’s
17 unlawful advertising scheme.” FAC ¶¶ 147, 153, 165. They allege that SiriusXM has violated the
18 CLRA, FAL, and California’s UCL by making false and misleading statements of fact concerning
19 price reductions that “deceive and have a tendency to deceive the general public,” and that
20 defendants conduct has “caused substantial injury to Plaintiffs, Class members, and the general
21 public.” FAC ¶¶ 127-144. They seek permanent public injunction against SiriusXM under all
22 three statutes. *Id.* ¶¶ 144-185. These requests for relief mirror the requests plaintiffs made in
23 *McGill*, which the California Supreme Court understood as requests for public injunctive relief.
24 Plaintiffs pass the first prong of the analysis that I followed in *Brown*.

25 The next prong is whether the Class Action Waiver prohibits plaintiffs from seeking public
26 injunctive relief in arbitration, as plaintiffs contend. The Class Action Waiver says that “there will
27 be no right for any claims to be arbitrated on a class action basis or on bases involving claims
28 brought in purported representative capacity on behalf of the general public, as a private attorney

1 general, or other Subscribers, or other persons similarly situated.” Customer Agreement § 7 (the
2 Class Action Waiver). Sirius XM argues that under these terms, the plaintiffs may still pursue
3 public injunctive relief in connection with the arbitration of each plaintiff’s individual claims and
4 note that nothing in the Class Action Waiver or the Customer Agreement more generally
5 forecloses public injunctive relief. Repl. 12:13-19. It argues that the Ninth Circuit decision
6 *DiCarlo v. MoneyLion, Inc.* reached a similar conclusion, and that case controls here. 988 F.3d
7 1148 (9th Cir. 2021). I agree.

8 In *DiCarlo*, the court understood *McGill* to mean that litigants bringing “individual
9 lawsuits” could seek “public injunctive relief” “on [their] own behalf,” not just “on behalf of the
10 general public.” *Dicarlo*, 988 F.3d at 1156 (quoting *McGill*, 2 Cal. 5th at 959). This means that
11 litigants, like plaintiffs here, are “free to seek public injunctive relief” in private arbitration
12 without acting as private attorneys general (conduct that would be barred under the terms of the
13 Class Action Waiver). *Id.*

14 Plaintiffs contend that I should not follow *DiCarlo* and instead follow *Jack v. Ring, LLC*, a
15 California Court of Appeal decision that disagreed with *DiCarlo* and held that an arbitration
16 agreement that barred the arbitration of PAGA claims unlawfully foreclosed public injunctive
17 relief. 91 Cal. App. 5th 1186 (2023). I will follow *DiCarlo*. Fundamentally, I am bound by Ninth
18 Circuit precedent interpreting California law until “the California Supreme Court resolves the
19 issue in a contrary way.” *See Citizens of Humanity, LLC v. LAB sarl*, 2013 WL 12129393, at *17
20 (C.D. Cal. Apr. 22, 2013) (collecting cases). The Ninth Circuit has held that litigants are free to
21 seek public injunctive relief in private arbitration without acting as private attorneys general. *See*
22 *DiCarlo*, 988 F.3d at 1156. That is controlling.

23 Moreover, *Jack* is readily distinguishable. It involved an arbitration agreement with
24 different, more limiting language than the Sirius XM Customer Agreement or the agreement at
25 issue in *DiCarlo*. In *Jack*, the agreement limited public injunctive relief in arbitration to awards
26 “only in favor of the individual party seeking relief and only to the extent necessary to provide
27 relief warranted by that party’s individual claim.” *Jack*, 91 Cal. App. 5th at 1205. That language
28 precluded broader “public injunctive relief.” *Id.* at 1206. There is no language in the Sirius XM

1 agreement limiting relief only to the individual or only to the extent necessary to provide relief
2 warranted by an individual claim.⁸

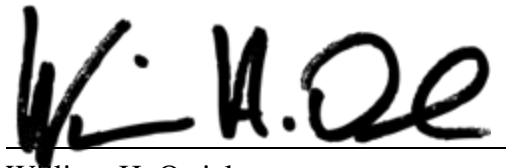
3 The Sirius XM’s Customer Agreement and Class Action Waiver does not prevent plaintiffs
4 from seeking public injunctive relief in “any forum”; they may seek public injunctive relief in
5 arbitration (as Sirius XM has conceded). The poison pill is not triggered, and plaintiffs must
6 proceed to arbitration.

7 **CONCLUSION**

8 For the foregoing reasons, Sirius XM’s motion to compel arbitration is GRANTED. This
9 case is DISMISSED.

10 **IT IS SO ORDERED.**

11 Dated: November 9, 2023



William H. Orrick
United States District Judge

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27 ⁸ My opinion in *Brown v. Madison Reed, Inc.*, is consistent. There, interpreting language more
28 similar to *Jack*, where the arbitrator was limited to awarding “injunctive relief only in favor of the
claimant and only to the extent necessary to provide relief warranted by the claimant’s individual
claim,” the agreement was invalid under *McGill* because it did not allow the plaintiff to seek
public injunctive relief in arbitration. *Brown*, at *8.