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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL SONG,

Plaintiff,

v.
CHARTER COMMUNICATIONS, INC.;
CHARTER COMMUNICATIONS
HOLDING COMPANY, LLC; TIME
WARNER INC.; TIME WARNER
CABLE INFORMATION SERVICES
(CALIFORNIA), LLC,

Defendants.

Case No.: 17cv325 JM (JLB)

**ORDER GRANTING DEFENDANTS’
MOTION TO COMPEL
ARBITRATION AND STAY
PROCEEDINGS**

Defendants Charter Communications, Inc., Charter Communications Holding Company, LLC, Time Warner Cable Inc., and Time Warner Cable Information Services (California), LLC (collectively, “Defendants” or “Charter”) move the court, pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq., to compel arbitration and stay proceedings in this matter. (Doc. No. 6.) Plaintiff opposes the motion. The court finds the matter appropriate for decision without oral argument pursuant to Local Rule 7.1(d)(1) and, for the following reasons, grants Defendants’ motion.

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BACKGROUND

Defendants operate one of the nation’s largest cable companies. (Doc. No. 1-3 at 7, ¶ 11.) Plaintiff has subscribed to Defendants’ television, internet, and voice services for approximately two years. (*Id.* at 30, ¶ 74.) When Plaintiff switched to Defendants’ services, he entered into a subscriber agreement (“the Agreement”).

The first page of the Agreement states, in capitalized text: “THIS AGREEMENT CONTAINS A BINDING ‘ARBITRATION CLAUSE,’ WHICH SAYS THAT YOU AND [DEFENDANTS] AGREE TO RESOLVE CERTAIN DISPUTES THROUGH ARBITRATION . . . YOU HAVE THE RIGHT TO OPT OUT OF THESE PORTIONS OF THE AGREEMENT.” (*Id.* at 42.)

In section 15, entitled “**Unless you Opt Out, You are Agreeing to Resolve Certain Disputes Through Arbitration,**” the Agreement states, “Only claims for money damages may be submitted to arbitration; claims for injunctive orders or similar relief must be brought in a court (other than claims relating to whether arbitration is appropriate, which will be decided by an arbitrator, not a court). You may not combine a claim that is subject to arbitration under this Agreement with a claim that is not eligible for arbitration under this Agreement.” (*Id.* at 52 (emphasis in original).)

Plaintiff did not opt out.

On November 9, 2016, Plaintiff filed a complaint in San Diego Superior Court alleging that Defendants unlawfully charge California customers a surcharge of \$8.75 per customer per month. The complaint contains five causes of action: (1) breach of contract; (2) for declaratory and injunctive relief; (3) violation of California’s unfair competition law, Cal. Bus. & Prof. Code § 17200 *et seq.*; (4) violation of California’s false advertising law, Cal. Bus. & Prof. Code § 17500 *et seq.*; and (5) violation of California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* Plaintiff seeks preliminary and permanent injunctions against the misconduct alleged, declaratory relief, attorneys’ fees, costs, and all other further relief the court deems necessary, just, and proper. (Doc. No. 1-3 at 39.)

1 language of the contract . . . defines the scope of disputes subject to arbitration, E.E.O.C.
2 v. Waffle House, Inc., 534 U.S. 279, 289 (2002), and “any doubts concerning the scope
3 of arbitrable issues should be resolved in favor of arbitration,” Moses H. Cone Mem’l
4 Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

5 If the court refers the matter to arbitration, it must then stay the proceedings
6 pending the outcome of that arbitration. 9 U.S.C. § 3.

7 DISCUSSION

8 According to Defendants, Plaintiff’s complaint is a clever attempt to evade the
9 Agreement’s arbitration clause. Rather than seek money damages at this stage, Plaintiff
10 has limited his demand to injunctive and declaratory relief, as well as attorneys’ fees and
11 costs. Defendants argue that, despite his cabined prayer for relief, four of Plaintiff’s five
12 claims are actually legal rather than equitable in nature, and once he successfully
13 sidesteps arbitration, Plaintiff can and will seek to amend his complaint to “conform to
14 proof to add prayers for monetary relief” on those claims. In response, Plaintiff contends
15 that because he only seeks injunctive and similar relief “at this stage,” (Doc. No. 13 at
16 17), his claims are properly before the court. He argues that he may draft his complaint
17 however he sees fit.²

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20 ² Plaintiff also argues that the Agreement’s arbitration clause is downright unenforceable.
21 In support, Plaintiff notes that “generally applicable contract defenses, such as . . .
22 unconscionability, may be applied to invalidate arbitration agreements.” See Doctor’s
23 Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Cal. Civ. Code § 1670.5. But under
24 California law a “finding of unconscionability requires a procedural and a substantive
25 element, the former focusing on oppression or surprise due to unequal bargaining power,
26 the latter on overly harsh or one-sided results.” AT&T Mobility LLC v. Concepcion, 563
27 U.S. 333, 340 (2011). Because he was free to choose another service provider, or even to
28 opt out of the arbitration provision altogether, Plaintiff cannot demonstrate the first
element, see Bruni v. Didion, 160 Cal. App. 4th 1272, 1288 (2008) (stating that
oppression arises from “no real negotiation and an absence of meaningful choice”), and
thus his claim must fail. While the analysis necessarily ends there, the court also
recognizes that another federal court recently determined that the exact same arbitration

1 Put simply, the parties dispute the arbitrability of Plaintiff’s claims—specifically
2 his first, third, fourth, and fifth causes of action.³

3 The question, then, is “who has the primary power to decide arbitrability” of
4 Plaintiff’s claims? See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943
5 (1995). That answer “turns upon what the parties agreed about that matter. Did the
6 parties agree to submit the arbitrability question itself to arbitration?” Id. (emphasis in
7 original). If the parties “clearly and unmistakably” agreed to submit the question to the
8 arbitrator, “the court[] will be divested of [its] authority and an arbitrator will decide in
9 the first instance whether a dispute is arbitrable.” United Bhd. of Carpenters & Joiners of
10 Am., Local No. 1780 v. Desert Palace, Inc., 94 F.3d 1308, 1310 (9th Cir. 1996).

11 Here, the Agreement states: “Only claims for money damages may be submitted to
12 arbitration; claims for injunctive orders or similar relief must be brought in a court (other
13 than claims relating to whether arbitration is appropriate, which will be decided by an
14 arbitrator, not a court.” (Doc. No. 1-3 at 52 (emphasis added).) Though it could be
15 reworded slightly, the Agreement is clear and unmistakable that “claims relating to
16 whether arbitration is appropriate . . . will be decided by an arbitrator, not a court.”
17 Consequently, under binding Ninth Circuit precedent, this court can proceed no further.

18 In sum, the court agrees with Defendants that if “Plaintiff is correct that his claims
19 are not arbitrable, then the arbitrator will so decide.” (Doc. No. 16 at 8.) But “Plaintiff’s
20 confidence in his own creative drafting does not permit him [or the court] to stand in the
21 shoes of the arbitrator or ignore the parties’ arbitration agreement.” (Id.) Thus, the court
22 will not rule that Plaintiff’s claims are legal in nature and belong in court, as Defendants
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25 provision was not substantively unconscionable. See Damato v. Time Warner Cable,
26 Inc., 2013 WL 3968765, at *13 (E.D.N.Y. July 31, 2013).

27 ³ The court is aware that resolving this dispute may give rise to another, as the Agreement
28 prohibits either party from combining “a claim that is subject to arbitration under this
Agreement with a claim that is not eligible for arbitration under this Agreement.” (Doc.
No. 1-3 at 52.)

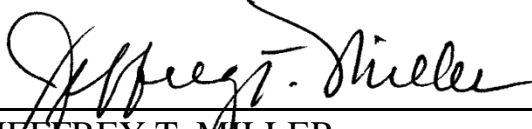
1 argue, or that Plaintiff successfully drafted his complaint to avoid arbitration, as Plaintiff
2 argues. Given the language of the Agreement, that determination must be left to the
3 arbitrator.

4 **CONCLUSION**

5 For the foregoing reasons, the court grants Defendants’ motion to compel
6 arbitration and stay the proceedings in this case. The arbitrator must determine whether
7 Plaintiff’s first, third, fourth, and fifth causes of action belong in court or arbitration. If
8 the arbitrator determines that those claims belong in court, this case will proceed at that
9 time. If the arbitrator determines that those claims belong in arbitration, the court will
10 continue to stay the proceedings on Plaintiff’s second cause of action until the arbitration
11 concludes, because the result of that arbitration will “streamline subsequent proceedings
12 before this court.” Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 567 (N.D. Cal. 1984)
13 (holding that district court “has discretion whether to proceed with the non-arbitrable
14 claims before or after the arbitration and has authority to stay proceedings in the interest
15 of saving time and effort for itself and litigants”). Accordingly, the parties shall notify
16 the court immediately upon the arbitrator’s decision.

17 IT IS SO ORDERED.

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19 DATED: March 28, 2017

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22 JEFFREY T. MILLER
23 United States District Judge
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