UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PATRICIA FOX, O.D., Plaintiff, v. VISION SERVICE PLAN; DOES 1-10, inclusive, Defendant.	No. 2:16-cv-2456-JAM-DB **ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Patricia Fox, O.D. ("Fox") filed suit in state court to prevent Defendant Vision Service Plan ("VSP") from enforcing its audit against Fox "due to the failure to provide Fox with a lawful dispute resolution mechanism." Compl. ¶¶ 40, 41, ECF No. 1-1. VSP removed the case to federal court. ECF No. 1. Fox filed a motion for preliminary injunction, ECF No. 16, which VSP opposed, ECF No. 18. The Court held a hearing on Fox's motion for preliminary injunction on February 7, 2017. ECF No. 21. The Court ordered simultaneous supplemental briefing. Id. Each party filed a brief, ECF Nos. 22, 23, which the Court has considered. The Court issued a minute order on February 9, 2017 granting Fox's motion for preliminary injunction. ECF No. 24.

The Court gave VSP the opportunity to file a supplemental brief on a case Fox cited only in her reply. Id. The Court has considered VSP's supplemental brief on that issue. This Order sets forth in greater detail the bases for the Court's decision to grant Fox's motion for preliminary injunction.

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Fox, a Massachusetts licensed optometrist, "was a contracted doctor" with VSP. Compl. ¶ 1. VSP, a non-profit California corporation with its principal place of business in Rancho Cordova, California, provides vision insurance plans to millions of people in the United States. Compl. ¶ 2; Answer ¶ 2, ECF No. 15.

Fox renewed her contract, the Network Doctor Agreement ("NDA"), with VSP in August 2015. Compl. ¶ 13. The NDA states:

> 11. Fair Hearing Procedure/Binding Arbitration
>
> a. Fair Hearing. In the event of a dispute as to VSP's imposition of any applicable disciplinary action against Network Doctor ["ND"], [ND] . . . may appeal such action in accordance with the provisions and requirements, including the payment of fees and costs, set forth in the VSP Peer Review Plan and Fair Hearing Policy ["FHP"], as may be amended or replaced from time to time, and incorporated herein by reference . . .
>
> b. Binding Arbitration. If the above process does not resolve the dispute, then, unless expressly disallowed by state law, any party may request final determination and resolution of the matter by mandatory binding arbitration . . .

NDA at 15, Fox Decl. Exh. 1, ECF No. 16-2.

The NDA states that it incorporates the FHP by reference, NDA at 15, but VSP did not attach the FHP, a separate twenty-page

document to the NDA, see Fox Decl. ¶ 5, Exh. 3 ("FHP"), ECF No. 16-2. The FHP, but not the NDA, indicates how a provider can obtain the FHP. Id.

In May 2016, VSP audited Fox and sent her a letter with the results. Wasylkiw Decl., Exh. E ("Audit Letter"). In the letter, VSP demanded "repayment of improper claims submitted to VSP" and repayment for the cost of the audit. Audit Letter at 2. The letter required Fox to pay $444,147 in "restitution" and terminated Fox's NDA. Id. at 2-3.

On June 6, 2016, Fox "timely requested a hearing through the VSP dispute resolution process." Compl. ¶ 35. VSP set arbitration for November 4, 2016. Id. VSP rescheduled that hearing to February 10, 2017. 10/26/2016 Stipulation at 2, ECF No. 12. The Court enjoined VSP from holding the February 10 dispute resolution hearing, and this Order sets forth the Court's reasons for granting Fox's motion for a preliminary injunction.

II. OPINION

A. Legal Standard

A court may award a preliminary injunction—an "extraordinary remedy"—only "upon a clear showing that the plaintiff is entitled to such relief." Winter v. Nat. Res. Def. Counsel, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must show: (1) she will likely succeed on the merits, (2) she will suffer irreparable harm without preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest. Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1020 (9th Cir. 2016) (quoting Winter, 555

U.S. at 20). Issuance of an injunction does not absolutely require a likelihood of success on the merits. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131–32 (9th Cir. 2011). "Rather, serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1085 (9th Cir. 2014) (internal quotation marks omitted).

Fox argues the Court should grant her motion for preliminary injunction to preserve the status quo "until the Court determines if the dispute resolution process is legal and enforceable." Mot. at 2.

B. Analysis

1. Likelihood of Success on the Merits

Fox contends she can likely prove that VSP's dispute resolution process is unenforceable for two reasons: (1) it violates California Code of Regulations § 1300.71.38; and (2) it is unconscionable. Mot. at 2.

a. Violation of § 1300.71.38

California Health and Safety Code § 1367 states that "[a]ll contracts with providers shall contain provisions requiring a fast, fair, and cost-effective dispute resolution mechanism under which providers may submit disputes to the plan." Cal. Health & Safety Code § 1367(h)(1).

The California Code of Regulations implements § 1367. Section 1300.71.38 of the regulations further defines the phrase "fast, fair, and cost-effective dispute resolution mechanism,"

explaining that "[a]rbitration shall not be deemed a provider dispute or a provider dispute resolution mechanism." Cal. Code Regs. tit. 28, § 1300.71.38.

The Federal Arbitration Act ("FAA") conflicts with § 1300.71.38's ban on using arbitration as a dispute resolution mechanism. The FAA states that an arbitration provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA preempts contrary state law, so a court cannot apply "any state statute that invalidates an arbitration agreement." Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928, 932 (9th Cir. 2013). Fox concedes that the FAA preempts § 1300.71.38, but she argues the McCarran-Ferguson Act ("McCarran-Ferguson") "reverse-preempts" § 1300.71.38. Mot. at 7.

VSP contends § 1300.71.38 does not invalidate the FHP for three reasons: (1) § 1300.71.38 does not apply; (2) the FHP does not violate § 1300.71.38; and (3) McCarran-Ferguson does not reverse-preempt § 1300.71.38. Opp'n at 1.

i. Whether § 1300.71.38 Applies

VSP argues § 1300.71.38 does not apply to its dispute with Fox because "§ 1300.71.38 only applies to a defined subspecies of 'provider disputes.'" Opp'n at 5. Section 1300.71.38(a)(1) defines "Contracted Provider Dispute" as

> a contracted provider's written notice to the plan . . . challenging, appealing or requesting reconsideration of a claim . . . that has been denied, adjusted or contested or seeking resolution of a billing determination or other contract dispute . . . or disputing a request for reimbursement of an overpayment of a claim.

Cal. Code Regs. Tit. 28, § 1300.71.38(a)(1).

VSP argues "[t]he definition of 'provider dispute' does not include appeal of an adverse action taken or discipline imposed as a result of a fraud investigation." Opp'n at 5. VSP adds that "the FHP expressly clarifies that the FHP does not apply to the very disputes Section 1300.71.38 applies to, for which a separate 'fair, fast, and cost-effective resolution mechanism' has been established." Id. The FHP does indeed indicate that it "does not apply to ordinary provider Claim Disputes." FHP at 2.

Fox replies that California law defines "Contracted Provider Dispute," not VSP. Reply at 1. Fox argues that the fact that VSP's demand for reimbursement followed a "fraud investigation" does not make § 1300.71.38 inapplicable because the definition of "Contracted Provider Dispute" "says nothing about the nature of the investigation that led to the dispute." Id.

Fox has demonstrated a likelihood of success on this issue. First, the facts of this case track the plain language of the definition of a "Contracted Provider Dispute": Fox, a "contracted provider," sent "written notice" to VSP "seeking resolution" of VSP's demand to pay VSP over $400,000 in restitution. Fox Decl. ¶¶ 2, 9, 12.

Second, VSP provides no case law to support its argument that the fact that the dispute arose from a fraud investigation makes § 1300.71.38 inapplicable. VSP also fails to cite any authority to support the argument that the FHP falls outside § 1300.71.38's purview because the FHP states that it does not

apply to "ordinary dispute claims." For these reasons, the Court concludes that Fox will likely succeed in showing that § 1300.71.38 applies to this dispute between the parties.

ii. Whether the FHP Violates § 1300.71.38

VSP next argues that, even if § 1300.71.38 applies, the FHP does not violate the regulation. Opp'n at 6. VSP contends that the first step in the FHP cannot violate § 1300.71.38 because it is not arbitration. Id. VSP relies on Cheng-Canindin v. Renaissance Hotel Associates, 50 Cal. App. 4th 676 (1996), which states "a dispute resolution procedure is not an arbitration unless there is a third party decision maker, a final and binding decision, and a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision." Opp'n at 6 (quoting Cheng, 50 Cal. App. 4th at 687-88). VSP maintains that "[t]he fact that the hearing procedure is non-binding and subject to review is dispositive of the fact that the hearing procedure is not arbitration, and thus does not fall within the ambit of Section 1300.71.38." Id.

Fox responds that the Ninth Circuit has held that "arbitration need not be binding to fall within the scope of the [FAA]". Reply at 3 (quoting Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1209 (9th Cir. 1998)). The Court finds that VSP's argument that the FHP's first step is not arbitration because it is non-binding fails because it contradicts the Ninth Circuit's statement in Wolsey.

iii. Whether McCarran-Ferguson Reverse-Preempts § 1300.71.38

McCarran-Ferguson states that "[n]o Act of Congress shall

be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The FAA does not "specifically relate[] to the business of insurance." See Smith v. PacifiCare Behavioral Health of California, Inc., 93 Cal. App. 4th 139, 149 (2001). The Court must therefore determine whether California enacted § 1300.71.38 "for the purpose of regulating the business of insurance."

Fox argues that § 1300.71.38 regulates the "business of insurance" because it "regulates a core promise made by the plan to the insured in the insurance contract: the promise to pay a contracted provider directly on behalf of the insured." Mot. at 12. Fox contends that "[e]ven if it does not 'directly' regulate the relationship between the insurer and the insured, it surely does so indirectly . . . because the insurer-provider contract is a core promise made by the insurer to its insureds." Id. Fox also argues that "a state law regulating the claims payment practices ultimately, even if indirectly, furthers significantly the interests of VSP's members by ensuring that the doctors the members go to are paid fairly, and as a result will become and will remain contracted with VSP as in-network providers." Id. at 13.

VSP argues that McCarran-Ferguson does not reverse-preempt § 1300.71.38 because McCarran-Ferguson focuses on "the relationship between the insurer and its policyholders," not the relationship between the insurer and the provider. Opp'n at 7.

VSP contends that "[h]ere, just as in Royal Drug and Pireno, the FHP at issue . . . has nothing to do with the relationship between the insurer and the insured, but rather is between the insurer and medical providers." Id. at 10.

Fox responds that Royal Drug and Pireno dealt only with McCarran-Ferguson's second clause. Reply at 4. The Supreme Court has recognized the distinction between the first and second clauses of the McCarran-Ferguson Act and clarified that Royal Drug and Pireno dealt with only the second. The Court in U.S. Dep't of Treasury v. Fabe, 508 U.S. 491 (1993) stated:

> Both Royal Drug and Pireno . . . involved the scope of the antitrust immunity located in the *second* clause of § 2(b). We deal here with the *first* clause, which is not so narrowly circumscribed. The language of § 2(b) is unambiguous: The first clause commits laws "enacted ... for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted ... for the purpose of regulating the business of insurance" with the "business of insurance" itself . . . would be to read words out of the statute. This we refuse to do.

Fabe, 508 U.S. at 504.

VSP's reliance on Royal Drug and Pireno is misplaced given the Supreme Court's statement in Fabe. Additionally, Fox can likely show that even if § 1300.71.38 does not directly regulate the relationship between the insurer and policyholders, it indirectly regulates that relationship because the insurer's relationship with the provider is integral to the insurer's relationship with its policyholders.

The Court therefore finds that Fox can likely prove that McCarran-Ferguson reverse-preempts § 1300.71.38 and therefore she is likely to succeed on the merits of her first argument that

VSP's dispute resolution process is illegal because it violates this state regulation.

b. Unconscionability

"Like other contracts, [an arbitration agreement] may be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability." Rent-A-Center, W., Inc., v. Jackson, 561 U.S. 63, 68 (2010) (internal quotation marks omitted). "[T]he party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense, such as unconscionability." Serafin v. Balco Prop. Ltd., LLC, 235 Cal. App. 4th 165, 172 (2015). To prove that an agreement is unconscionable, a litigant must show procedural *and* substantive unconscionability. Id. at 178. "Both, however, need not be present to the same degree." Id. Courts apply "a sliding scale . . . so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." Id. (internal quotation marks omitted).

i. Procedural Unconscionability

"Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the party at the time." Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 783 (9th Cir. 2002) (internal quotation marks omitted). "Procedural unconscionability requires either of two factors: oppression or surprise." Net Global Mktg., Inc. v. Dialtone, Inc., 217 Fed. Appx. 598, 601 (9th Cir. 2007). "Oppression

arises from an inequality in bargaining power which results in no real negotiation and an absence of meaningful choice." Id. "Surprise" arises when "the allegedly unconscionable provision is hidden within a prolix printed form." Von Nothdurft v. Steck, 227 Cal. App. 4th 524, 535 (2014). Fox claims that both factors-oppression and surprise-are present in VSP's FHP. Mot. at 16.

In determining oppression, courts consider whether the stronger party drafted the contract and whether the weaker party could negotiate the contract. Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010). "[A] contract is procedurally unconscionable under California law if it is 'a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" Id. "Although adhesion contracts often are procedurally oppressive, this is not always the case." Morris v. Redwood Empire Bancorp, 128 Cal. App. 4th 1305, 1320 (2005). Additionally, the Ninth Circuit has recently stated that "the adhesive nature of a contract, without more, would give rise to a low degree of procedural unconscionability at most." Poublon v. C.H. Robinson Co., 2017 WL 461099, at *5 (9th Cir. Feb. 3, 2017). So, a court must also "question whether there are other indications of oppression or surprise" that create procedural unconscionability. Id.

Fox first argues that the FHP is oppressive because "[t]here is *no negotiation* in this contract—it is drafted by VSP, mailed to the doctor, she is told to sign it and return it, or lose her VSP status." Mot. at 16 (emphasis in original). Fox contends that "[s]he ha[d] *no meaningful choice* but to do as VSP

instruct[ed] or lose her VSP contract, and potentially her livelihood given the overwhelming size of VSP and the number of people they insure, including about 40-50% of the patients in Dr. Fox's practice." Id. (emphasis in original).

VSP responds that "at least as early as 2010, each of Plaintiff's three successive NDAs clearly explained, with a bold heading, the two-step FHP at issue." Opp'n at 2. VSP also argues that the NDA is not an adhesion contract because Fox had "ample time to review the NDA . . . and could have, but did not, obtain a copy of the FHP prior to signing the NDA." Id. at 16. VSP emphasizes that Fox's "claim that she did not have the opportunity to negotiate is pure speculation, because she did not even try," and other doctors have proposed changes to the NDA. Id.

VSP provides no authority supporting its claim that a contract is not unconscionable if a party has previously seen or signed a similar contract. Additionally, VSP provides no evidence of any other doctors who have negotiated with VSP concerning the terms of the NDA or FHP or whether VSP has ever accepted any proposed changes to the NDA or FHP. Also, Fox could not simply reject VSP's contract because VSP dominates the vision insurance market. If Fox had rejected VSP's contract, she would have lost the 40-50% of her customers that VSP insured. The NDA's "take-it-or-leave-it" nature makes it at least somewhat procedurally unconscionable, but that alone does not render the dispute resolution provision in the NDA unenforceable. Poublon, 2017 WL 461099, at *5. The Court therefore turns its focus to whether the NDA or FHP contains additional oppression or

surprise.

The Ninth Circuit has held that an arbitration agreement contained surprise when the plaintiff "did not sign the arbitration agreement (it was incorporated by reference)." Newton v. Am. Debt Servs., Inc., 549 F. App'x 692, 694 (9th Cir. 2013); see also Pokorny, 601 F.3d at 997 (finding an arbitration agreement procedurally unconscionable in part because the defendant "failed to attach a copy of the Rules of Conduct, containing the full description of the non-binding conciliation and binding arbitration processes, to the registration forms containing the Agreement to Arbitrate"). The Pokorny court reasoned the plaintiffs "were not even given a fair opportunity to review the full nature and extent of the non-binding conciliation and binding arbitration processes to which they would be bound before they signed the registration agreements." Pokorny, 601 F.3d at 997. Additionally, a California court found procedural unconscionability where the defendant "merely referenc[ed] the . . . arbitration rules, and [did] not attach[] those rules to the contract for the customer to review. The customer [had] to go to another source to find out the full import of what she [wa]s about to sign." Harper v. Ultimo, 113 Cal. App. 4th 1402, 1406 (2003).

Fox argues that the FHP is a "single-spaced 16-page legal contract, likely lawyer-prepared, and provided to an optometrist with no business or legal education whatsoever." Mot. at 16. Fox contends that the NDA does not draw attention to the arbitration provision or require the provider to initial it. Id. Fox also contends that "the failure to provide or attach the fair

hearing procedure" to the NDA constitutes surprise. Reply at 10.

Like the plaintiffs in Harper and Pokorny, Fox did not have a "fair opportunity" to review the FHP before signing the NDA because VSP did not attach the FHP to the NDA. Additionally, although the Ninth Circuit found in Poublon that the employment contract that incorporated an arbitration provision by reference but did not attach a copy was not procedurally unconscionable, the NDA differs from the contract in Poublon because there the contract indicated that the arbitration procedure was available on the company's intranet. Poublon, 2017 WL 461009, at *1. VSP instructs providers such as Fox how to obtain the FHP only in the FHP itself—the NDA, however, contains no instructions on how to obtain the FHP.

The Court finds that Fox has sufficiently demonstrated a likelihood of success on the merits of her procedural unconscionability argument. The Court, therefore, next addresses the parties' arguments regarding the substantive unconscionability of the FHP.

ii. Substantive Unconscionability

Substantive unconscionability focuses on the results and outcomes of contracts. Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000). A contract is substantively unconscionable if it creates "overly harsh" or "one-sided" results. Id. "[M]utuality is the 'paramount' consideration when assessing substantive unconscionability." Pokorny, 601 F.3d at 997.

Fox argues several FHP provisions render the contract substantively unconscionable.

> **Pre-Appeal Informal Discussion:** The FHP states:
>
> Within ten (10) days of receipt of a Notice from VSP, ND shall contact VSP at the number stated in the Notice to discuss the findings and allegations set forth in the Notice in a good faith effort to resolve the dispute without the need for a Hearing. If the parties are unable to reach a resolution of the dispute, ND may then request a Hearing.

FHP at 5.

Fox argues "[t]his process is just like" the process in Nyulassy v. Lockheed Martin Corp., 120 Cal. App. 4th 1267 (2004). In Nyulassy, the court held that an employment agreement requiring an employee "to submit to discussions with his supervisors in advance of, and as a condition precedent to, having his dispute resolved through binding arbitration" was substantively unconscionable. Id. at 1282. The court stated:

> [w]hile on its face, this provision may present a laudable mechanism for resolving employment disputes informally, it connotes a less benign goal. Given the unilateral nature of the arbitration agreement, requiring plaintiff to submit to an employer-controlled dispute resolution mechanism (i.e., one without a neutral mediator) suggests that defendant would receive a "free peek" at plaintiff's case, thereby obtaining an advantage if and when plaintiff were to later demand arbitration.

Id. at 1282-83.

The Pokorny court also analyzed an arbitration agreement requiring an individual to engage in "Informal and Formal Conciliation prior to arbitration." Pokorny, 601 F.3d at 998. The court stated that "the non-binding conciliation process amounts to little more than an exploratory evidentiary hearing for [the defendant]." Id. at 999.

VSP argues that its initial discussion is mutual because the doctor also gets a "free peek" into VSP's claims. Opp'n at

18. VSP also contends that its pre-appeal requirement differs from the procedure in Nyulassy, which required the employee to "resolve [his] [dispute] through discussions within successive levels of my supervisory chain of command, until the [dispute] [wa]s resolved." Id. (quoting Nyulassy, 120 Cal. App. 4th at 1273 n.4). Although VSP's pre-appeal discussion requirement indeed differs from the requirement in Nyulassy, the Nyulassy court's concern over that provision exists here too: Fox must "submit to an employer-controlled dispute resolution mechanism . . . without a neutral mediator." Nyulassy, 120 Cal. App. 4th at 1283. Like the provisions in Pokorny and Nyulassy, the FHP *requires* the pre-appeal meeting before beginning the next step in the appeal process. And the pre-appeal provision's language does not support VSP's argument that the informal meeting is mutual—nothing in the FHP requires VSP to provide any information to the ND.

The Court finds Fox's arguments on her claim that the pre-appeal informal discussion requirement is substantively unconscionable more persuasive than VSP's, although the Court recognizes that this case is at a very early stage of the litigation and all the evidence with respect to this issue has yet to be presented by the parties.

Confidentiality Provision: The FHP contains a confidentiality provision that states:

> All facts, records, data and information acquired in preparation for a Hearing or during the course of a Hearing or Arbitration hereunder shall be used and maintained in strict confidence and shall not be disclosed to any third parties, but may be used by the parties to the extent necessary to carry out the purposes of any final action(s), decision(s), and/or

> awards rendered. This confidential information shall be subject to subpoena or discovery as may be required by law. These confidentiality provisions shall survive final actions, decisions, awards and termination of the NDA.

FHP at 1.

Relying on Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) and Ingalls v. Spotify USA, Inc., 2016 WL 6679561, at *1 (Nov. 14, 2016 N.D. Cal), Fox argues the FHP's confidentiality requirement also renders the FHP substantively unconscionable. Mot. at 20. Ting states:

> Although facially neutral, confidentiality provisions usually favor companies over individuals. . . AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T. For these reasons, we hold that the district court did not err in finding the secrecy provision unconscionable.

Ting, 319 F.3d at 1151–52. Ingalls also found that a confidentiality provision in an arbitration contract contributed to the agreement's unconscionability. Ingalls, 2016 WL 6679561, at *7. Ingalls emphasized that "it [wa]s the pervasiveness of unconscionability, not any one source of it" that rendered the agreement unconscionable. Ingalls, 2016 WL 6679561, at *6.

The Pokorny court also found a confidentiality provision substantively unconscionable because "while handicapping the Plaintiffs' ability to investigate their claims and engage in meaningful discovery, the confidentiality provision does nothing

to prevent [the defendant] from using its continuous involvement in the [dispute resolution] process to accumulate a 'wealth of knowledge' on how to arbitrate future claims." Pokorny, 601 F.3d at 1002 (quoting Ting, 319 F.3d at 1152).

As pointed out by VSP, the Ninth Circuit has recently called Pokorny and Ting into question regarding their analyses of confidentiality provisions. VSP Second Supp. Brief at 2-3, ECF No. 26. In Poublon, the Ninth Circuit stated that Pokorny and Ting "did not rely on California law." Poublon, 2017 WL 461099, at *9. Post Pokorny and Ting, a California appellate court decided Sanchez v. CarMax Auto Superstores Cal. LLC, 224 Cal. App. 4th 398 (2014). In Sanchez, the Court found "nothing unreasonable or prejudicial" about "a secrecy provision with respect to the parties themselves." Sanchez, 224 Cal. App. 4th at 408. The Ninth Circuit decision in Poublon (which was post Sanchez) emphasized that "[n]ow that we have available data establishing what state law is regarding a closely similar confidentiality provision, we are bound to apply it, even though the state rule may have departed from prior decisions of federal courts." Poublon, 2017 WL 461099, at *9 (internal quotation marks omitted).

The confidentiality provisions in Poublon and Sanchez included an exception to the confidentiality requirement, if the "parties agree[d] otherwise." Poublon, 2017 WL 461099, at *7; Sanchez, 224 Cal. App. 4th at 408. VSP's confidentiality provision however does not provide such an exception. Also, the FHP confidentiality provision "survives final actions . . . and termination of the NDA." Simply put, the scope of the

confidentiality provision in the FHP exceeds the scope of the confidentiality provisions in Poublon and Sanchez.

VSP argues that Ting and Ingalls do not apply because the confidentiality provision here does not present the same problems as those provisions in Ingalls and Ting because "[e]ach dispute is specific to the actions of the doctor, not a repeat challenge to the same contractual provision." Opp'n at 20. But VSP's argument ignores the fact that VSP might discipline doctors across the country for the same actions. With the confidentiality provision in place, Fox does not have access to any information or any precedents set in cases involving other doctors who have gone through the same dispute resolution process. VSP, on the other hand, participates in all dispute resolution proceedings with providers and therefore has access to information and precedents set in other hearings. This is precisely the concern the Ninth Circuit expressed in Pokorny. Poublon and Sanchez do not undermine those concerns because they addressed narrower confidentiality provisions than the one here. Thus VSP's reliance on these two post Pokorny cases is not enough to overcome Fox's arguments concerning the unconscionability of this confidentiality provision.

Settlement Provision: Fox's third argument in support of her substantive unconscionability claim focuses on the FHP settlement provision which provides:

> After requesting Arbitration but before selection of an Arbitrator, Claimant shall propose final and binding terms of settlement ("Settlement Proposal") to the other party ("Respondent"). Respondent shall accept or reject the Settlement Proposal. If the Settlement Proposal is accepted by Respondent, the

> parties shall proceed to execute the terms of the settlement, forthwith. If the settlement terms cannot be performed in three (3) days of acceptance, the parties shall reduce the settlement to a writing and sign the settlement agreement. If Respondent rejects the Settlement Proposal, the case shall proceed to Arbitration. If Claimant obtains an arbitration award at Arbitration that is greater than the Settlement Proposal, the Claimant shall be deemed the prevailing party for purposes of an award of arbitration costs, plus an award of attorneys' fees, which fees shall not exceed $15,000. (California Civil Code Section 1717 shall not apply for purposes of determining the prevailing party.) If the Arbitrator's Award at Arbitration is less than the Settlement Proposal, Respondent shall be deemed the prevailing party for purposes of an award of arbitration costs, plus an award of attorneys' fees, which fees shall not exceed $15,000. If Claimant fails or refuses to make a Settlement Proposal pursuant to this Section, Claimant shall be deemed to have waived his/her/its right to recovery of any attorney fees or arbitration costs regardless of the terms contained in the NDA or the fact that the Arbitration Award awards Claimant greater relief than Respondent.

FHP at 13-14.

Fox argues that because VSP is a "vastly more powerful entity financially, and has its own in-house litigation attorneys, it incurs no actual out-of-pocket legal expenses in arbitration." Mot. at 21. Fox further contends that "[t]he doctor, on the other hand, incurs actual attorneys' fees, and is limited in the amount of those fees she can recover even if she prevails completely." Id. Fox argues that "[t]his procedure is not only a complete surprise, but profoundly favors VSP and works, along with the seriously inconvenient forum, to chill and create a disincentive for any provider to challenge a fair hearing award through arbitration." Id.

A court may find a fee-shifting provision in an arbitration agreement substantively unconscionable if it creates the "risk of [plaintiffs] incurring greater costs than they would bear if

they were to litigate their claims in federal court." Pokorny, 601 F.3d at 1004. The FHP requires a provider to submit a "Settlement Proposal" before proceeding to arbitration. FHP at 13. If the provider does not, she waives her "right to recovery of any attorney fees or arbitration costs" regardless of the arbitration's outcome. Id. at 14. Also, even if Fox "wins" at arbitration and receives an award from VSP, she would still have to pay VSP's arbitration fees and costs if the arbitration award did not exceed any settlement offered by VSP. These rules would not apply if Fox could simply litigate her claim in court. The settlement provision, like the fee-shifting provision in Pokorny, exposes Fox to an increased risk of bearing greater costs than if she brought the claim in court, therefore rending the provision substantively unconscionable.

Fox argues that the FHP is substantively unconscionable for at least four more reasons. The Court need not address these reasons because, for purposes of her motion for a preliminary injunction, Fox has shown that she is likely to prevail on the issue of whether the FHP is substantively unconscionable. The Court emphasizes however that its Order herein is not a final decision on the merits of any claim at issue in this case. Rather, the Court has simply concluded at this early stage of the litigation that Fox has satisfied her likelihood of success burden on this issue.

iii. Severability

"Under California law, a court has discretion to either sever an unconscionable provision from an agreement, or refuse to enforce the agreement in its entirety." Pokorny, 603 F.3d at

1005. "In exercising this discretion, courts look to whether the central purpose of the contract is tainted with illegality or the illegality is collateral to its main purpose." Id. (internal quotation marks omitted). A court may refuse to sever unconscionable portions of an arbitration agreement if the agreement is "simply too tainted to be saved through minor adjustments." Id.

VSP argues the Court should sever any unconscionable provisions and enforce the rest of the FHP. Opp'n at 21. Fox can likely show the pre-appeal informal discussion, the confidentiality, and the settlement provisions are unconscionable. Fox also likely can prove that unconscionability permeates this agreement, so much so that severing certain clauses would not cure the illegality. The Court finds that the offending provisions are likely not severable and denies VSP's request.

2. Irreparable Harm

Litigants "may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction." Cottrell, 632 F.3d at 1135. "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." Caribbean Marine Serv. Co., Inc. v. Baldrige, 844 F.2d 668 (9th Cir. 1988). "[M]onetary injury is not normally considered irreparable." L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980).

Fox argues that "California law promises and requires, a 'fair, fast and cost-effective' process for resolving these kinds of disputes, and it singles out arbitration as being prohibited, because it is not a fast or cost-effective way to resolve provider billing disputes." Mot. at 3.

Courts disagree on "whether being subjected to incur the expense associated with an otherwise non-arbitrable dispute constitutes 'irreparable injury' in and of itself, or whether the party opposing the arbitration must demonstrate that it will suffer unrecoverable economic damages." Morgan Stanley & Co., LLC v. Couch, 134 F. Supp. 3d 1215, 1235 (E.D. Cal. 2015). The Ninth Circuit has indicated, however, that "irreparable injury presumptively . . . exist[s] if a party is required to expend resources participating in an arbitration in which it has no duty to participate." Id. (citing LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distrib., Teamsters Local 63, 849 F.2d 1236, 1241 n. 3 (9th Cir. 1988)). Another California district court has found irreparable harm in requiring an individual to engage in a likely unenforceable arbitration agreement, stating that "a party should not be required to incur the legal expense of opposing or seeking to vacate an arbitration award that should never have been rendered in the first place." World Grp. Sec. v. Tiu, 2003 WL 26119461, at *7 (C.D. Cal. Jul. 22, 2003). Additionally, as to an action taken by VSP that likely violated a Kentucky law, a federal court stated the provider "has a right to the benefits of statutory compliance . . . [i]njunctive relief is an appropriate remedy where one clearly threatens to violate the provisions of a state

statute." Dr. Mark Lynn & Assocs. PLLC v. Vision Serv. Plan Ins. Co., 2005 WL 2739160, at *2 (W.D. Ky. Oct. 21, 2005).

Based on these authorities, the Court finds that Plaintiff has established that she will suffer irreparable harm if she must participate in a dispute resolution process which the Court may later find illegal.

3. Balance of Equities

Fox argues that "while [she] faces the substantial inconvenience and expense of traveling across the U.S. and preparing for a hearing that may well be illegal, and which California does not want her to engage in, VSP faces no harm by delaying the hearing until it is determined if VSP's process is legal and enforceable." Mot. at 23.

VSP argues that the balance of equities tips in VSP's favor because "[i]ssuance of a preliminary injunction in this case is nearly certain to inhibit VSP's ability to engage in the mandatory dispute resolution process that has been approved by the California Department of Managed Health Care, and that to which VSP's Network Doctors have agreed." Opp'n at 24.

Fox makes the stronger argument here because by granting the preliminary injunction, the Court only temporarily prevents the dispute resolution process from proceeding while the Court determines the legality of that process. Granting an injunction will not harm VSP: VSP will still have the opportunity to implement its dispute resolution process if the Court finds that process legal. But if the Court denies the motion for preliminary injunction, Fox will have to expend considerable time and resources to engage in a potentially illegal dispute

resolution process.

4. Public Interest

When an injunction's reach is "narrow, limited only to the parties, and has no impact on non-parties, the public interest will be at most a neutral factor in the analysis rather than one that favors granting or denying the preliminary injunction." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138–39 (9th Cir. 2009) (citations omitted). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." Id.

Fox argues that the public interest element is neutral because this case involves a private dispute between Dr. Fox and VSP. Mot. at 23. Yet, to the extent this case involves the public interest, Fox argues that participation in the dispute resolution process will preclude her from treating her patients for several days. Id.

VSP argues that "issuance of an injunction will likely disrupt the ADR mechanism developed for disputes about the imposition of discipline [and] likely result in increased costs to policyholders as VSP, a not-for-profit entity, faces increased litigation costs which it must pass on to its insureds." Opp'n at 25.

The Court finds the public interest element to be neutral because an injunction in this dispute between VSP and Fox will not likely have the drastic effects VSP suggests.

5. Bond

Fox argues that the Court should not require a bond because VSP will not suffer any monetary injury if the Court enjoins the dispute resolution hearing. Mot. at 25. VSP has not requested a bond, and the Court does not require a bond for this injunction.

III. ORDER

For the reasons set forth above, the Court GRANTS Fox's motion for preliminary injunction.

IT IS SO ORDERED.

Dated: February 23, 2017

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE