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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDVARD ESHAGH, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

THE TERMINIX INTERNATIONAL
COMPANY L.P., a limited partnership;
TERMINIX INTERNATIONAL, INC.,

Defendants.

) 1:11cv0222 AWI DLB

) FINDINGS AND RECOMMENDATIONS
) REGARDING MOTION TO STAY
) LITIGATION, COMPEL ARBITRATION
) AND STRIKE CLASS CLAIMS

) (Document 35)

Defendants Terminix International, Inc. and The Terminix International Company Limited Partnership (“Defendants”) filed the instant motion to stay litigation, compel arbitration and strike class claims on August 30, 2011. The motion was heard on April 13, 2012, before the Honorable Dennis L. Beck, United States Magistrate Judge. David Creagh appeared on behalf of Defendants. Thomas Campbell and W. Scott Simpson¹ appeared on behalf of Plaintiff Edvard Eshagh.

¹At the hearing, the Court granted the petition of W. Scott Simpson for admission to practice Pro Hac Vice. Doc. 47.

1 **PROCEDURAL BACKGROUND**

2 Plaintiff Edvard Eshagh (“Plaintiff”), purportedly on behalf of himself and all others
3 similarly situated, filed this action against Defendants The Terminix International Company L.P.
4 and Terminix International, Inc. (collectively “Terminix” or “Defendants”) on February 8, 2011.

5 On April 7, 2011, Terminix filed a motion to dismiss the complaint. The Court granted
6 the motion to dismiss, ordering Plaintiff to file an amended complaint regarding certain claims
7 and dismissing with prejudice Plaintiff’s tort claims for breach of professional duty and
8 assumpsit as time barred. Docs. 27 and 30.

9 On August 16, 2011, Plaintiff filed a First Amended Complaint (“FAC”). Pursuant to the
10 FAC, Plaintiff seeks recovery for breach of a California Subterranean Termite Plan and
11 Agreement, and for violations of California’s Unfair Competition Law (“UCL”) and False
12 Advertising Law (“FAL”). Doc. 32.

13 On August 30, 2011, Terminix filed an answer to the breach of contract allegations in the
14 FAC. Doc. 33. Concurrent with the answer, Terminix also filed: (1) a motion to dismiss the
15 UCL and FAL causes of action; and (2) the instant motion to stay litigation, compel arbitration
16 and strike class claims. Docs. 34 and 35.

17 On February 20, 2012, Plaintiff filed an opposition to the motion to stay litigation,
18 compel arbitration and strike class claims. Doc. 43. Terminix replied on February 27, 2012.
19 Doc. 49. The motion was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1) for
20 Findings and Recommendations to the District Court.

21 **DISCUSSION**

22 **I. MOTION TO COMPEL ARBITRATION**

23 A. Applicable Legal Standard

24 Terminix moves to compel arbitration pursuant to the Federal Arbitration Act (“FAA”), [9](#)
25 [U.S.C. § 1 et seq.](#) In relevant part, the FAA provides:

26 A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate
27 under a written agreement for arbitration may petition any United States district

1 court which, save for such agreement, would have jurisdiction under Title 28, in a
2 civil action or in admiralty of the subject matter of a suit arising out of the
3 controversy between the parties, for an order directing that such arbitration
4 proceed in the manner provided for in such agreement. . . .The court shall hear the
5 parties, and upon being satisfied that the making of the agreement for arbitration
6 or the failure to comply therewith is not in issue, the court shall make an order
7 directing the parties to proceed to arbitration in accordance with the terms of the
8 agreement. . . .

9 [9 U.S.C. § 4.](#)

10 Plaintiff challenges the application of the FAA, arguing that the California Arbitration
11 Act (“CAA”) is the operable law. [Cal. Civ. Proc. Code § 1281.2.](#) To support this assertion,
12 Plaintiff claims that Terminix did not invoke the FAA in its motion, but instead demanded
13 arbitration based on unidentified state law. Doc. 43, p. 9. Plaintiff points to a phrase contained
14 in Terminix’s prayer for relief, which requests arbitration “pursuant to applicable California law
15 and the parties’ arbitration agreement.” Doc. 35-1, p. 6. However, it is evident from Terminix’s
16 moving papers that the demand for arbitration is based on the FAA. Doc. 35-1, p. 2.

17 Plaintiff also claims that Terminix offers no evidence to support application of the FAA.
18 Specifically, Plaintiff argues that Terminix has not met its burden of proving that the agreement
19 involves interstate commerce. The FAA provides that a

20 “written provision in any maritime transaction or a *contract evidencing a transaction*
21 *involving commerce* to settle by arbitration a controversy thereafter arising out of such
22 contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such
23 grounds as exist at law or in equity for the revocation of any contract.”

24 [9 U.S.C. § 2](#) (emphasis added). Plaintiff suggests that this action does not involve interstate
25 commerce. This argument is unpersuasive in light of [Allied-Bruce Terminix Companies, Inc. v.](#)
26 [Dobson, 513 U.S. 265 \(1995\).](#) In [Allied-Bruce](#), the United States Supreme Court reaffirmed that
27 the FAA’s “interstate commerce” provision is interpreted broadly and that the FAA’s reach
28 coincides with that of the Commerce Clause. Considering the broad interpretation, the Supreme
Court concluded that a termite protection contract “involved commerce” under the FAA based on
the multi-state nature of Terminix and the shipping of materials from out-of-state. [Allied-Bruce,](#)
[513 U.S. at 282.](#)

1 Plaintiff does not reference Allied-Bruce and instead argues that state law controls
2 because the parties entered the agreement in California, the contract is expressly designated
3 “California Subterranean Termite Plan and Agreement” and California maintains a regulatory
4 scheme regarding structural pest control services. Cal. Civ. Code § 1646; Cal Bus. & Prof. Code
5 §§ 8505 et seq.; Cal. Bus. & Prof. Code §§ 8525 et seq.; Cal. Food & Agric. Code §§ 15201 et
6 seq. However, these facts alone do not remove this transaction from interstate commerce.
7 Courts construing the “transaction involving commerce” language of section 2 have focused on
8 the nature of the defendant’s business. See, e.g., Nicholson v. Labor Ready, Inc., 1997 WL
9 294393, *3 (N.D. Cal. 1997). The interstate nature of Terminix is enough to satisfy the interstate
10 commerce element of the FAA. See Allied-Bruce, 513 U.S. at 281-82; Terminix Intern. Co. Ltd.
11 P’ship v. Jackson, 669 So.2d 893, 895-96 (Ala. 1995); Baer v. Terminix Intern. Co., Ltd. P’ship
12 (975 F.Supp. 1272, 1278 (D. Kan. 1997)). Therefore, the FAA is applicable to the request for
13 arbitration in this case.

14 B. FAA

15 The FAA creates "a body of federal substantive law of arbitrability." Moses H. Cone
16 Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983). Thus, unless the agreement
17 provides otherwise, all questions regarding interpretation of arbitration agreements are
18 determined by federal standards. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445
19 (2006); Moses H. Cone Mem. Hosp., 460 U.S. at 22-24. Any question concerning arbitrability
20 must be addressed with a healthy regard for the federal policy favoring arbitration. Simula, Inc.
21 v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999).

22 "[A]rbitration is a matter of contract and a party cannot be required to submit to
23 arbitration any dispute which he has not agreed so to submit." AT & T Techs., Inc. v. Commc’ns
24 Workers of America, 475 U.S. 643, 648 (1986) (citations omitted); Three Valleys Mun. Water
25 Dist. v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1139 (9th Cir. 1991). As with any contract, the
26 parties' intentions control. Three Valleys Mun. Water Dist., 925 F.2d at 1139. However, the

1 parties' intentions are generously construed as to issues of arbitrability. [Mitsubishi Motors Corp.](#)
2 [v. Soler Chrysler-Plymouth, Inc.](#), 473 U.S. 614, 626 (1985).

3 The FAA "leaves no place for the exercise of discretion by a district court, but instead
4 mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which
5 an arbitration agreement has been signed." [Dean Witter Reynolds, Inc. v. Byrd](#), 470 U.S. 213,
6 [218 \(1985\)](#) (emphasis in original). The court's role is limited to determining: "(1) whether a valid
7 agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at
8 issue." [Chiron Corp. v. Ortho Diagnostic Systems, Inc.](#), 207 F.3d 1126, 1130 (9th Cir. 2001). If
9 both questions are answered in the affirmative, then the FAA requires the court to enforce
10 arbitration. *Id.*

11 1. Existence of Arbitration Agreement

12 Plaintiff and Terminix entered into a "California Subterranean Termite Plan and
13 Agreement" ("CSA") on or about September 20, 1999. Exhibit A to FAC. Terminix argues that
14 Plaintiff's claims are the subject of a valid and enforceable arbitration agreement. Terminix cites
15 Section 10 of the CSA, which states:

16 **10. ARBITRATION.** The Purchaser and Terminix agree that all matters in
17 dispute between them, including but not limited to any controversy or claim
18 between them arising out of or relating to this agreement or the identified property
19 in any way, whether by virtue of contract, tort or otherwise shall be settled
20 exclusively by arbitration. Such arbitration shall be conducted in accordance with
21 the Commercial Arbitration Rules then in force of the American Arbitration
22 Association. The arbitrator(s) shall be bound by rules of substantive law and shall
23 not be bound by the rules of evidence, whether or not set out by statute, except for
24 provisions relating to privileged communications. Any award of damages
pursuant to such arbitration shall be included in a written decisions which shall
state the reasons upon which the award was based, including all the elements
involved in the calculation of any award of damages. The decision of the
arbitrator shall be a final and binding resolution of the disagreement which may be
entered as a judgment by any court of competent jurisdiction. Neither party shall
sue the other except for enforcement of the arbitrator's decision. In no event shall
either party be liable to the other for indirect, special or consequential damages or
loss of anticipated rents and/or profits.

25 Exhibit A to FAC, p. 2. Terminix argues that this arbitration agreement is sufficiently broad to
26 encompass the instant dispute, noting that the FAC seeks recovery for breach of the CSA and for

1 violations of the UCL and FAL for promises regarding termite services outlined in the CSA.
2 FAC ¶ 170 (First Cause of Action); ¶¶ 180-83 (Second Cause of Action); ¶ 186 (Third Cause of
3 Action); and ¶¶ 191-96 (Fourth Cause of Action).

4 Plaintiff does not challenge Terminix's assertion that the arbitration agreement
5 encompasses the instant dispute.² Instead, Plaintiff contends that Terminix has waived the right
6 to compel arbitration. In so arguing, Plaintiff urges this Court to apply a state law standard for
7 waiver because it is a contract defense. However, in [Sovak v. Chugai Pharmaceutical Co., 280](#)
8 [F.3d 1266 \(9th Cir. 2002\)](#), the Ninth Circuit clearly stated that "waiver of the right to compel
9 arbitration is a rule for arbitration, such that the FAA controls" and "supplies the standard for
10 waiver." [Id. at 1270](#).

11 During the course of oral argument, Plaintiff again invited the Court to depart from Ninth
12 Circuit precedent, arguing that such standard derives from a waiver of legal rights, not a waiver
13 of contract rights. Plaintiff attempted to bolster his argument by reference to [Gonsalves v.](#)
14 [Infosys Technologies, Ltd., 2010 WL 3118861, *2 \(N.D. Cal. Aug. 5, 2010\)](#). [Gonsalves](#),
15 however, provides no basis to depart from Ninth Circuit precedent. In [Gonsalves](#), the district
16 court considered a motion to compel arbitration under the FAA, but applied a state law standard
17 to determine if there had been a waiver of the right to arbitrate. The district court elected to
18 apply state law because the terms of the underlying employment contract stated that California
19 law governed the dispute. [Id. at *2](#). Here, the CSA does not expressly provide that the
20 arbitration question should be resolved according to state law. As Plaintiff admits, there is no
21 choice of law clause contained in the CSA. Doc. 43, pp. 9-10. Thus, the FAA supplies the
22 standard for waiver. [See, e.g., Isaac v. Morgan Stanley DW, Inc. 2005 WL 2655828, *5 \(E.D.](#)

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24 ² Plaintiff does assert that there has been no showing that Terminix International, Inc. is subject to the
25 Arbitration Agreement. Doc. 43, p. 6 and n. 4. Plaintiff's argument is curious given that his breach of contract
26 action refers to "Defendant," which Plaintiff defines to include "Terminix as well as all persons and entities listed
27 and named as a Defendant in the caption of this complaint or any amendment thereto." Doc. 32, ¶¶ 8-13, 191-98. In
28 other words, Plaintiff does not make a distinction in his breach of contract action between Terminix International,
Inc. or The Terminix International Company L.P. Defendants invited Plaintiff to dismiss his claims against Terminix
International, Inc.

1 [Cal. Oct. 17, 2005](#)) (district court concluded that FAA supplied the standard for waiver where
2 agreements at issue did not expressly state that pre-arbitration questions of waiver were subject
3 to state law).

4 In determining waiver, the Ninth Circuit has stated that a party seeking to prove waiver of
5 an existing right to compel arbitration must demonstrate: “(1) knowledge of an existing right to
6 compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party
7 opposing arbitration resulting from such inconsistent acts.” [Fisher v. A.G. Becker Paribas Inc.,](#)
8 [791 F.2d 691, 694 \(9th Cir. 1986\)](#). The second and third prongs are dispositive.

9 As to the second prong, Plaintiff contends that Terminix acted inconsistently with a right
10 to arbitrate by filing a motion to dismiss all of Plaintiff’s claims. The Court disagrees. The only
11 litigation activity that occurred before the instant motion to compel arbitration was the filing of a
12 motion to dismiss the original complaint. The Ninth Circuit has rejected the argument that the
13 mere filing of a motion to dismiss is sufficient to waive the right to arbitrate.³ See [Sovak, 280](#)
14 [F.3d at 1270-71 \(9th Cir. 2002\)](#) (plaintiff failed to meet burden because he had not shown how he
15 was prejudiced by defendant’s filing of a motion to dismiss for failure to state a claim); [Brown v.](#)
16 [Dillard’s, Inc., 430 F.3d 1004, 1012 \(9th Cir. 2005\)](#) (noting that filing motion to dismiss does not
17 waive right to move to compel arbitration); [Lake Commc’ns, Inc. v. ICC Corp., 738 F.2d 1473,](#)
18 [1477 \(9th Cir. 1984\)](#), *overruled on other grounds*, [Mitsubishi Motors Corp. v. Soler Chrysler-](#)
19 [Plymouth, Inc., 473 U.S. 614, 632-35 \(9th Cir. 1985\)](#) (defendant filed motion to dismiss and did
20 not seek arbitration until more than one year after suit was filed; court found no waiver of
21 arbitration, noting lack of prejudice and limited discovery); see also [Williams v. Cigna Fin.](#)
22 [Advisors, 56 F.3d 656, 661-62 \(5th Cir. 1995\)](#) (no waiver where Cigna filed a motion to dismiss
23

24 ³Plaintiff again relies on [Gonsalves, 2010 WL 3118861 at *3](#) to support his argument regarding waiver.
25 Doc. 43, p. 13. In [Gonsalves](#), the court found the defendant had engaged in judicial litigation of the merits of
26 arbitrable issues by filing a second motion to dismiss, which led to the dismissal of several of plaintiff’s claims with
27 prejudice, and thus the defendant had waived its right to arbitration. *Id.* [Gonsalves](#) is distinguishable from the
28 instant case because the court applied a state law standard regarding waiver and the defendant prosecuted more than
one motion to dismiss.

1 and a motion to stay proceedings, answered the complaint, asserted a counterclaim and
2 exchanged discovery); [Rush v. Oppenheimer & Co., 779 F.2d 885, 888 \(2d Cir. 1985\)](#) (motion to
3 dismiss did not waive right to arbitrate; court indicated that where “a plaintiff files an intricate
4 complaint . . . he should not be altogether surprised that a defendant takes the protective step of
5 filing a motion to dismiss . . .”) (internal quotation marks and citations omitted).

6 In contrast, the type of conduct found to constitute waiver is illustrated by [Van Ness](#)
7 [Townhouses v. Mar Industries Corp., 862 F.2d 754, 759 \(9th Cir. 1989\)](#). In that case, the Ninth
8 Circuit determined that a securities brokerage waived the right to arbitrate when it actively
9 litigated a matter through initial pleading and motion practice stages, and approved a pretrial
10 conference order before seeking arbitration more than two years after the action was filed.
11 Terminix’s conduct here does not approach the [Van Ness](#) level of litigation. Terminix filed a
12 motion to dismiss and when the court ruled that the entire action was not subject to dismissal,
13 Terminix filed its motion to compel arbitration. Terminix has not litigated the matter through the
14 motion practice stages, and there has been no scheduling conference, discovery or pretrial
15 conference order. The Court finds that Plaintiff has not met its burden of establishing that
16 Terminix’s litigation efforts were inconsistent with the right to arbitrate.⁴

17 As to the third prong, Plaintiff also has not demonstrated that he suffered prejudice. [See](#)
18 [ATSA of California, Inc. v. Continental Insurance Co., 702 F.2d 172, 175 \(9th Cir. 1983\)](#)
19 (inconsistent behavior alone is not sufficient; the party opposing arbitration must have suffered
20 prejudice). Plaintiff claims he suffered prejudice by the court’s dismissal with prejudice of
21 counts three and five of the original complaint. According to the record, these claims were
22 dismissed as time-barred. This outcome would not have changed if the matter was in arbitration.

23 Plaintiff also asserts prejudice by litigating this action for seven months and incurring
24 fees and expenses in excess of \$277,000. According to the declaration of Plaintiff’s counsel,
25 Plaintiff incurred \$142,000 in attorney’s fees and costs in responding to the motion to dismiss,
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1 drafting the amended complaint and drafting the opposition to the motion to stay and compel
2 arbitration. Plaintiff also incurred more than \$135,000 for trial preparation. See Declaration of
3 Thomas F. Campbell, Doc. 43-2, ¶¶ 10-11. Plaintiff's response to the motion to dismiss and the
4 decision to incur litigation expenses do not demonstrate prejudice. The self-imposed burden of
5 participating in pre-trial civil litigation is not, in and of itself, sufficient evidence of prejudice.
6 See Fisher, 791 F.2d at 698 (rejecting plaintiffs' "surprising contention" that they were prejudiced
7 because they "willingly incurred the substantial expense involved in their litigation in order to
8 benefit from a full jury trial" because that "wound was self-inflicted"); Lake Comm., Inc., 738
9 F.2d at 1477 (holding that plaintiff suffered no prejudice from being required to respond to
10 defendant's motion to dismiss and limited discovery).

11 Further, and contrary to Plaintiff's assertion, there is no indication that the claimed
12 expenses would have been significantly different if Terminix filed the motion to compel
13 arbitration before filing a motion to dismiss. There is no dispute that Terminix could challenge
14 the substantive merits of Plaintiff's action in arbitration. Additionally, a substantial portion of
15 the claimed expenses were for property inspections, consultations with witnesses, and arranging
16 for work by consulting experts. See Declaration of Thomas F. Campbell, Doc. 43-2, ¶ 10. There
17 is no indication that such expenses would not be incurred in arbitration. Following inquiry from
18 the Court, Plaintiff failed to identify any difference between the actual expenses incurred and the
19 amount of expenses that would have been incurred in preparing solely for arbitration.

20 For these reasons, the Court finds that Terminix has not waived its right to arbitration
21 under the FAA.

22 Plaintiff fares no better even if the Court were to apply California state law to the issue of
23 waiver. Under California law, a court considers the following factors when determining whether
24 waiver has occurred:

- 25 (1) whether the party's actions are inconsistent with the right to arbitrate; (2)
26 whether "the litigation machinery has been substantially invoked" and the parties
27 "were well into preparation of a lawsuit" before the party notified the opposing
28 party of an intent to arbitrate; (3) whether a party either requested arbitration

1 enforcement close to the trial date or delayed for a long period before seeking a
2 stay; (4) whether a defendant seeking arbitration filed a counterclaim without
3 asking for a stay of the proceedings; (5) “whether important intervening steps
4 [e.g., taking advantage of judicial discovery procedures not available in
5 arbitration] had taken place”; and (6) whether the delay “affected, misled, or
6 prejudiced’ the opposing party.”

7 [Saint Agnes Med. Center v. PacifiCare of Cal., 31 Cal.4th 1187, 82 P.3d 727, 733 \(Cal. 2003\).](#)

8 The record demonstrates that the majority of factors do not suggest waiver.

9 As to the first two factors, Plaintiff contends that Terminix has acted inconsistent with
10 the right to arbitrate and substantially invoked the litigation machinery by filing a motion to
11 dismiss. Doc. 43, pp. 12-13. The Court does not find that Terminix has acted inconsistent with
12 the right to arbitrate by filing its motion to dismiss. Moreover, such a filing does not qualify as
13 “substantially invoc[ing]” the district court’s litigation machinery. See, e.g., Law Offices of
14 [Dixon R. Howell v. Valley, 129 Cal. App.4th 1076, 29 Cal.Rptr.3d 499, 516 \(2005\)](#) (litigation
15 machinery substantially invoked where “the parties engaged in discovery, submitted the case to
16 judicial arbitration, had the court consider Law Firm’s summary judgment motion, participated
17 in a mandatory settlement conference, and allowed the case to proceed to the brink of trial.”);
18 [Quevedo v. Macy’s, Inc., 798 F.Supp.2d 1122, 1131 \(C.D. Cal. Jun. 16, 2011\)](#) (court doubted
19 that the litigation machinery had been substantially invoked where court entertained a motion to
20 dismiss, a motion for class certification and some discovery had occurred); Cf. Gonsalves, 2010
21 [WL 3118861 at *5](#) (court found waiver of right to enforce arbitration clause where defendant
22 waited to file its motion to compel arbitration until after it filed two separate motions to dismiss
23 for failure to state a claim which ultimately resulted in dismissal, with prejudice, of certain
24 claims).

25 As to the third factor, Terminix did not move to compel arbitration close to the trial or
26 delay for a long period before seeking arbitration. Although Plaintiff cites cases suggesting that a
27 seven-month delay favors a waiver, the Court notes that the passage of some portion of time in
28 this case occurred while the initial motion to dismiss was pending. As to the fourth factor,
Terminix did not file any counterclaim without asking for a stay of the proceedings. As to the

1 fifth factor, Plaintiff contends that Terminix took advantage of procedures not otherwise
2 available in arbitration by filing the motion to dismiss. As stated above, however, neither party
3 disputes that Terminix would be entitled to challenge the substantive merits of Plaintiff's claims.
4 As to the sixth and final factor, any delay in seeking to compel arbitration did not affect, mislead
5 or prejudice Plaintiff. Pursuant to the discussion at the hearing and the record presented to the
6 Court, Plaintiff's counsel has been involved in at least one other action in which Terminix
7 invoked an arbitration agreement. Further, the legal expenses incurred by Plaintiff do not suffice
8 to show prejudice. Quevedo, 798 F.Supp.2d at 1132.

9 Based on the foregoing, the Court concludes that Plaintiff has not met his burden to show
10 that Terminix has waived the right to enforce the arbitration agreement.

11 2. Enforceability of Arbitration Agreement

12 Plaintiff next argues that the arbitration agreement is unenforceable because it is illusory.
13 Plaintiff claims that under California law, a contract is illusory in two circumstances: (1) if a
14 party assumes no obligation whatsoever, or (2) if a party can perform or withdraw at his pleasure.
15 Mattei v. Hopper, 330 P.2d 625, 626 (Cal. 1958). Plaintiff contends that because the CSA
16 provides that "[i]n the event of a change in existing law as it pertains to the services herein,
17 Terminix reserves the right to terminate this agreement," there is no real promise to arbitrate.
18 Exhibit A to FAC, p. 2, ¶ 7. Plaintiff believes that this language means that "Terminix is free to
19 perform, or not, at its pleasure because it can point to any change in any tangentially related law
20 whatsoever as a reason for unilateral termination." Doc. 43, p. 22. Plaintiff concludes that the
21 CSA and the Arbitration Agreement are entirely illusory and unenforceable under state law.

22 Plaintiff's argument is without merit and his citation to Carey v. 24 Hour Fitness, USA,
23 Inc., 669 F.3d 202, 206-09 (5th Cir. 2012) is not instructive. In Carey, the Fifth Circuit found
24 that an arbitration agreement set forth in an employee handbook that could be unilaterally
25 changed by the employer was illusory and unenforceable. Such an arbitration agreement is not
26 present here. Indeed, Plaintiff does not point to any language in the arbitration agreement itself
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1 to demonstrate that it is illusory. There also is no support for Plaintiff's claim that the
2 termination provision in the CSA renders the arbitration agreement illusory. Indeed, Plaintiff
3 provides an overbroad reading of the termination provision, suggesting that a "simple refinement
4 to the law of negligence causation or the enforceability of a damages disclaimer in decisional law
5 would trigger Terminix's right to terminate." Doc. 43, p. 20. By its terms, the termination
6 provision is limited to a change in existing law regarding the *services* contemplated by the CSA,
7 which are services to control or to protect the relevant structure if attacked by Subterranean
8 Termites. Exhibit A to FAC, p. 1, A. The Court finds that the arbitration agreement set forth in
9 the CSA is not illusory.

10 As a final argument against arbitration, Plaintiff contends that the CSA and the
11 Arbitration Agreement are unenforceable because they are unconscionable. The Ninth Circuit
12 has stated that when the crux of the complaint challenges the validity or enforceability of the
13 agreement containing the arbitration provision, then the question of whether the agreement, as a
14 whole, is unconscionable must be referred to the arbitrator. [Nagrampa v. MailCoups, Inc., 469](#)
15 [F.3d 1257, 1264 \(9th Cir. 2006\)](#). When the crux of the complaint is not the invalidity of the
16 contract as a whole, but rather the arbitration provision itself, then the federal courts must decide
17 whether the arbitration provision is invalid and unenforceable under the FAA. [Id.](#)

18 Here, although Plaintiff argues that the CSA is unenforceable, the FAC does not
19 challenge the validity of the contract as whole. Instead, Plaintiff seeks to enforce the validity of
20 the contract by asserting a breach of contract action against Terminix. Plaintiff only challenges
21 the validity of the arbitration provision in opposition to Terminix's motion to compel arbitration.
22 Accordingly, this court properly determines the issue of arbitrability. See [Cox v. Ocean View](#)
23 [Hotel Corp., 533 F.3d 1114 \(9th Cir. 2008\)](#); [Roberts v. Synergistic Intern., LLC, 676 F.Supp.2d](#)
24 [934, 947 \(E.D. Cal. 2009\)](#).

25 If a contract is unconscionable, under California law courts may refuse to enforce it.
26 [Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170 \(9th Cir. 2003\)](#). To be unenforceable, the
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1 arbitration clause must be both procedurally and substantively unconscionable. [Ting v. AT&T,](#)
2 [319 F.3d 1126, 1148 \(9th Cir. 2003\).](#) The Court considers procedural and substantive
3 unconscionability in turn.

4 a. Procedural Unconscionability

5 Procedural unconscionability “concerns the manner in which the contract was negotiated
6 and the circumstances of the parties at that time.” [Kinney v. United HealthCare Servs., Inc., 70](#)
7 [Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348 \(1999\).](#) The procedural element of
8 unconscionability focuses on two factors: oppression or surprise. [Stirlen v. Supercuts, Inc., 51](#)
9 [Cal.App.4th 1519, 1531, 60 Cal.Rptr.2d 138 \(1997\).](#) Oppression “arises from an inequality in
10 bargaining power which results in no real negotiation and an absence of meaningful choice.” [Id.](#)
11 [at 1531, 60 Cal.Rptr.2d 138.](#)

12 Plaintiff asserts that the CSA is a contract of adhesion because it was issued on a “take it
13 or leave it” basis, he was given no opportunity to alter the agreement, which was a pre-printed,
14 boilerplate form and there was inherently unequal bargaining power of the parties. [See Geoffroy](#)
15 [v. Washington Mut. Bank, 484 F.Supp.2d 1115, 1118 \(S.D. Cal. 2007\);](#) [see also, Circuit City](#)
16 [Stores v. Adams, 279 F.3d 889, 893 \(9th Cir. 2002\)](#) (citing [Stirlen, 51 Cal.App.4th at 1533-34,](#)
17 [60 Cal.Rptr.2d 138](#)); [Armendariz v. Found. Health Psychcare Servs., 24 Cal.4th 83, 115, 99 Cal.](#)
18 [Rptr.2d 745, 6 P.3d 669 \(2000\)](#) (preemployment arbitration contract found procedurally
19 unconscionable because it was a condition of employment and there was no opportunity to
20 negotiate). Terminix counters that “Plaintiff says nothing regarding the circumstances
21 surrounding the transaction between Mr. Eshagh and Terminix such as whether he read,
22 understood or had any knowledge regarding the arbitration provision and other terms of the
23 agreement.” Doc. 49, p. 8. Terminix’s counterargument is unpersuasive and does not address
24 Plaintiff’s assertions regarding the respective bargaining power of the parties, Plaintiff’s
25 (in)ability to alter the agreement and the pre-printed, boilerplate nature of the CSA. Thus, the
26 Court finds that Plaintiff has established procedural unconscionability.

1 b. Substantive Unconscionability

2 Substantive unconscionability focuses “on overly harsh or one-sided results.”
3 [Armendariz, 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669](#). An arbitration clause is
4 substantively unconscionable if “the terms of the agreement ... are so one-sided as to *shock the*
5 *conscience*.” [Kinney, 70 Cal.App.4th at 1329, 83 Cal.Rptr.2d 348](#) (emphasis in original).
6 California courts “look beyond facial neutrality and examine the actual effects of the challenged
7 provision.” [Ting, 319 F.3d at 1149](#) (agreement is unconscionable unless the arbitration remedy
8 contains a “modicum of bilaterality”).

9 Substantively, Plaintiff contends that the contract “does not fall within the reasonable
10 expectations of the weaker or ‘adhering’ party” and it is “unduly oppressive.” [Graham v. Scissor-](#)
11 [Tail, Inc., 623 P.2d 165, 173 \(Cal. 1981\)](#). Plaintiff cites five provisions within the contract that
12 he alleges are substantively unconscionable, only one of which is contained in the arbitration
13 agreement. Plaintiff believes that the arbitration agreement’s limitation regarding liability for
14 indirect, special or consequential damages or loss of anticipated rents and/or profits means that
15 Terminix is disavowing any element of damage it may cause. Doc. 43, p. 26.

16 There is no support for Plaintiff’s broad-sweeping assertion that the arbitration agreement
17 wholly prevents Plaintiff from recovering any element of damages against Terminix. Plaintiff’s
18 citations to [Harper v. Ultimo, 7 Cal.Rptr.3d 418 \(Ct. App. 2003\)](#), [Armendariz](#) and [Lhotka v.](#)
19 [Geographic Expeditions, Inc., 104 Cal.Rptr.3d 844, 852 \(Ct. App. 2010\)](#) are not persuasive.
20 [Harper](#) involved an arbitration agreement that precluded the consumers from obtaining *any*
21 damages. [Harper, 7 Cal.Rptr.3d at 421](#). [Armendariz](#) involved a one-sided arbitration agreement
22 that did not permit the full recovery of damages for employees, while placing no such restrictions
23 on the employer. [Armendariz, 6 P.3d at 694](#). Finally, [Lhotka](#) involved an arbitration provision
24 capping the maximum amount of recovery. [Lhotka, 104 Cal.Rptr.3d at 847](#). These elements are
25 not contained in the arbitration agreement at issue here. Thus, the Court finds that Plaintiff fails
26 to establish that the arbitration agreement is substantively unconscionable.

1 Both procedural and substantive unconscionability must be present for a court to refuse to
2 enforce an arbitration agreement under the doctrine of unconscionability. [Armendariz, 24](#)
3 [Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669](#). As discussed, the Court finds that the contract is
4 procedurally unconscionable, but Plaintiff has failed to establish substantive unconscionability.
5 Moreover, under the FAA, any doubts concerning the scope of arbitrable issues should be
6 resolved in favor of arbitration. [Three Valleys Mun. Water Dist., 925 F.2d at 1139](#) (“any doubts
7 concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the
8 problem at hand is the construction of the contract language itself or an allegation of waiver,
9 delay, or a like defense to arbitrability”). Accordingly, the Court recommends that Terminix’s
10 motion to compel arbitration be GRANTED.

11 **II. Motion to Strike Class Allegations**

12 Terminix also moves to strike Plaintiff’s class claims. The Supreme Court has held that
13 non-consensual class arbitration is inconsistent with the FAA, and that parties cannot be deemed
14 to consent to class arbitration where the agreement is silent on the issue. [AT&T Mobility LLC v.](#)
15 [Concepcion, 131 S.Ct. 1740 \(2011\)](#); [Stolt-Nielsen S.A. v. Animalfeeds Intern. Corp. 130 S.Ct.](#)
16 [1758, 1775 \(2010\)](#) (“a party may not be compelled under the FAA to submit to class arbitration
17 unless there is a contractual basis for concluding that the party *agreed* to do so”). As the
18 arbitration agreement between Plaintiff and Terminix is silent regarding class arbitration,
19 Terminix asserts that Plaintiff’s class action allegations must be stricken.

20 In a footnote, Plaintiff argues that arbitration agreements cannot be used to waive
21 statutory rights, [Armendariz, 24 Cal.4th at 101, 6 P.3d at 681](#), and the right to bring a class action
22 lawsuit under California unfair competition laws is based on statute. However, Plaintiff has not
23 offered any legal authority showing that non-consensual class arbitration is permitted. Plaintiff
24 contends that pursuant to [Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S.Ct. 2402](#)
25 [\(2003\)](#), the question of whether he has a right to bring a class in arbitration is a question of
26 procedural arbitrability for the arbitrator, not the Court. However, [Bazzle](#) did not yield a
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1 majority decision on this question. [Stolt-Nielsen, 130 S.Ct. at 1772](#). Given the Supreme Court's
2 subsequent determination in [Stolt-Nielsen](#) that a party may not be compelled to submit a dispute
3 to class arbitration where there is no agreement to do so, the Court recommends that the motion
4 to strike class allegations be GRANTED.

5 **III. DISMISSAL**

6 In the event of a recommendation to arbitrate, Plaintiff requested that the Court also
7 recommend dismissal without prejudice, making it a final decision subject to appeal. At the
8 hearing, Terminix did not contest this request. Where a dispute is subject to arbitration under the
9 terms of a written agreement, a district court shall "stay the trial of the action until such
10 arbitration has been had in accordance with the terms of the agreement." [9 U.S.C. § 3](#).
11 Nevertheless, courts have discretion under [9 U.S.C. § 3](#) to dismiss claims that are subject to an
12 arbitration agreement. [Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 638 \(9th Cir.1988\)](#);
13 [Thinket Ink Info. Resources, Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 \(9th Cir.2004\)](#)
14 (finding dismissal, rather than a stay, of plaintiffs' claims that were subject to arbitration proper).
15 Here, the Court has found that all of Plaintiff's individual claims properly are subject to
16 arbitration and that the remaining class allegations should be stricken. As such, the Court finds
17 that recommending dismissal of Plaintiff's claims is appropriate.

18 **RECOMMENDATION**

19 Based on the above, this Court HEREBY RECOMMENDS as follows:

- 20 1. Terminix's motion to compel arbitration be GRANTED;
- 21 2. Terminix's motion to strike class allegations be GRANTED; and
- 22 3. The action be DISMISSED without prejudice.

23 These findings and recommendations are submitted to the Honorable Anthony W. Ishii
24 pursuant to [Title 28 of the United States Code section 636\(b\)\(1\)\(B\)](#) and this Court's Local Rule
25 304. Within **thirty (30) days** of service of this recommendation, any party may file written
26 objections to these findings and recommendations with the Court and serve a copy on all parties.

1 Such a document should be captioned “Objections to Magistrate Judge’s Findings and
2 Recommendations.” Any reply to the objections shall be served and filed within **twenty-one**
3 **(21) days** after service of the objections. The District Judge will then review these findings and
4 recommendations pursuant to [28 U.S.C. § 636\(b\)\(1\)](#). The parties are advised that failure to file
5 objections within the specified time may waive the right to appeal the District Court’s order.
6 [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

7 IT IS SO ORDERED.

8 **Dated: May 10, 2012**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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