THE HONORABLE BRIAN A. TSUCHIDA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KATHERINE FAMA, an individual on behalf of herself, the public, and all persons similarly situated,

Plaintiff,

v.

OPPORTUNITY FINANCIAL, LLC, a limited liability company,

Defendant.

Case No. 3:23-cv-05477-BAT

DEFENDANT OPPORTUNITY FINANCIAL LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

NOTE ON MOTION CALENDAR:
Friday, August 25, 2023
(ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

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ORRICK, HERRINGTON & SUTCLIFFE LLP
401 Union Street, Suite 3300
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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes

Other Authorities

I. INTRODUCTION

Opportunity Financial, LLC ("OppFi"), respectfully moves this Court, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), for an Order compelling Plaintiff Katherine Fama ("Plaintiff") to submit her claims to arbitration pursuant to the binding Arbitration Agreement governing her loan agreement (the "Promissory Note") forming the basis of such claims, and to stay this case pending the completion of arbitration.

Plaintiff asserts claims against OppFi arising out of loans she obtained from FinWise Bank ("FinWise"). Plaintiff claims her Promissory Note is unenforceable because the interest rate exceeds Washington's interest rate cap. This argument is meritless, and at the appropriate time OppFi will seek to have it dismissed. But this is neither the time nor the forum for that: Plaintiff expressly agreed to arbitrate these claims pursuant to a binding arbitration agreement that must be enforced under the FAA.

To obtain her loan, Plaintiff entered into a Promissory Note with FinWise that included an arbitration clause (the "Arbitration Agreement"). The Arbitration Agreement requires Plaintiff to arbitrate any claims arising from or related to the Promissory Note, including any claims against OppFi. Plaintiff does not dispute the existence of the Arbitration Agreement or that her claims fall within the Arbitration Agreement's broad scope. Instead, her Complaint anticipatorily argues that the Arbitration Agreement is "void" for four reasons. Dkt. 1, ¶ 81. Plaintiff is wrong.

Plaintiff's first theory is that the Arbitration Agreement is unconscionable. She initially argues that the Arbitration Agreement is procedurally unconscionable. It is not. The Arbitration Agreement included an opt-out provision providing Plaintiff with 60 days to opt out of the Arbitration Agreement while otherwise retaining the benefits of the Promissory Note. She chose not to exercise that option. The existence of this opt-out option negates any argument that she lacked meaningful choice and precludes a finding of procedural unconscionability. Moreover, Plaintiff's Arbitration Agreement was plainly displayed in a consumer-friendly question-and-

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answer format and referenced at the beginning and end of the Promissory Note.

Plaintiff then argues that her Arbitration Agreement is substantively unconscionable for a variety of reasons, none of which have merit:

- **Choice-of-Law**: Plaintiff challenges the Promissory Note's Utah choice-of law clause, which Plaintiff argues requires the arbitrator to apply Utah law, rather than Washington law. Plaintiff is wrong for several reasons. To start, the Utah choice-of-law clause is not part of the Arbitration Agreement and, as such, Plaintiff's argument is foreclosed by *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 440 (2006) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395 (1967). Under *Buckeye* and *Prima Paint*, "an arbitration provision is severable from the remainder of the contract" in which it appears, and in deciding a motion under the FAA, a court may only consider a challenge that is directed "specifically to the arbitration clause." *Buckeye*, 546 U.S. at 440, 445. Further, Plaintiff's challenge is premature. Neither the parties nor the Court know how an arbitrator will interpret the Utah choice-of-law provision. Under *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer* ("*Vimar Seguros*"), 515 U.S. 528, 541 (1995), choice-of-law questions are for the arbitrator in the first instance.
- **Enforcing Promissory Note "as Written"**: Plaintiff's second substantive unconscionability argument is that the Arbitration Agreement is unconscionable and against public policy because it requires the arbitrator to enforce the agreements "as they are written." This is a red herring. There is nothing untoward, much less controversial, about advising a consumer that the arbitrator will apply the cardinal principle of contract interpretation—that an arbitrator will not rewrite, modify, or add ambiguity to a contract. *Lehrer v. State, Dep't of Soc. & Health Servs*., 101 Wn. App. 509, 515 (2000) ("If the language is clear and unambiguous, the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists.") This rule applies equally in court as it does in arbitration. *See id*.
- **Preclusion**: Plaintiff's last substantive unconscionability argument claims that the portion of the Arbitration Agreements providing that "[n]o arbitration award under this

Agreement will affect any dispute involving any other party" is "unlawful and void" because it purportedly prevents borrowers from offensively using issue preclusion against OppFi in the event that another borrower prevails in arbitration. Dkt. 1, ¶¶ 82-84. This hypothetical concern is baseless. It is well-settled that parties can agree to limit the preclusive effect of arbitration awards.

Plaintiff's second theory is that the Arbitration Agreement is void as a prospective waiver of Plaintiff's rights under federal law because it purports to prospectively waive her right to bring a RICO claim under Washington law. Dkt. 1 ¶ 89. This is wrong. Selecting the law of another state does not waive federal law, and in any event, the Promissory Note states that it ***is*** governed by federal law. Dkt. 1-1 at 3, ¶ 17.

Plaintiff's third theory is that the Arbitration Agreement violates RCW 31.04.027(k) for reasons that the Complaint does not adequately explain, but apparently consists of "[o]btain[ing] . . . a release of future damages for usury or other damages or penalties provided by law or a waiver of the provisions of" the Washington Consumer Loan Act. Dkt. 1 ¶ 91. Not only does the arbitration clause do nothing of the sort, but this is an argument that the entire contract is void, which is foreclosed by *Buckeye*.

Plaintiff's fourth theory, that the Arbitration Agreement bars seeking public injunctions, Dkt. 1 ¶ 92, is based on California law, not Washington law and, even under California law it fails. The Arbitration Agreement does not bar "public injunctive relief," unless the FAA permits such a waiver. If it does not, the Arbitration Agreement permits a claimant to pursue public injunctive relief in court. Even under California law this is permissible.

Finally, even if this Court finds merit to any of Plaintiff's arguments, arbitration is still appropriate. State law, the FAA, and the severability clause make clear that the proper remedy is to sever any unconscionable clauses and compel arbitration.

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II. BACKGROUND

A. Plaintiff Agreed to Arbitrate

Plaintiff alleges she is a Washington resident, Dkt. 1, ¶ 13, who applied for and received a loan from FinWise. Dkt. 1-1 at 2. Plaintiff does not dispute she signed the Promissory Note, which provides that "by signing this Note . . . You acknowledge that you have read, understand, and agree to all the terms of this Note, including the **Arbitration [Agreement]**." Dkt. 1-1 at 8. The Arbitration Agreement, in turn, covers and requires arbitration of "all 'Claims' of one party against another," specifically applies to claims against OppFi, provides that "the word 'Claims' has the broadest possible meaning consistent with this Clause," and specifically "includes all claims even indirectly related to your application, the loan, this Note and your agreements with us." *Id.* at 5, ¶ 21.

The Arbitration Agreement is prominently displayed within the Promissory Note. It spans three pages of an eight-page agreement. *Id*. at 5-7. And it is referenced throughout the Promissory Note, including on the very first page, which contains an "**ARBITRATION DISCLOSURE**" advising Plaintiff that the "**Promissory Note includes an Arbitration Clause**" and that Plaintiff should "**review the Arbitration Clause carefully before signing this Note**." *Id*. at 2.

Importantly, the Arbitration Agreement also contains an opt-out provision permitting Plaintiff to opt out of the Arbitration Agreement within 60 days. *Id.* at 7, ¶ 21. The opt-out provision is prominently displayed in multiple places, including the top of the Promissory Note in bold text, and within the Arbitration Agreement itself. *Id.* at 2 ("**You can 'opt out' of the Arbitration Clause as set forth below**."); *id.* at 7, ¶ 21 (providing terms governing opt-out). Plaintiff does not allege she opted out.

B. Plaintiff's Complaint

On May 25, 2023, Plaintiff filed a Complaint against OppFi. Dkt. 1. Plaintiff alleges she obtained a loan "for an unlawful interest rate at more than double Washington's statutory

maximum" interest rate. Dkt. 1, ¶ 94. Plaintiff attached the Promissory Note to her Complaint. Dkt. 1-1. The Promissory Note identifies FinWise as the "Lender," *id.* at 1, provides that FinWise will formally "extend credit" to Plaintiff, *id.* at 1, and makes clear that Plaintiff "promise[d] to pay [FinWise] . . . until the loan is fully paid." *Id.* ¶ 3. The Promissory Note also identifies OppFi as the servicer on the loan. *Id.* ¶ 4.

Notwithstanding the language in the Promissory Note stating that FinWise is the party extending her credit, Plaintiff alleges OppFi is the "true lender" because it "holds the predominant economic interest" in the loan transaction. Dkt. 1, ¶ 7. Plaintiff asserts that because OppFi is the true lender, it is subject to interest rate caps under Washington law, which the interest rate on her loan purportedly exceeds. *Id.* ¶¶ 30-32, 119-124. As a result, Plaintiff contends that her loan agreement is "void and unenforceable," *id.* ¶ 12, and that OppFi violated Washington's usury law and the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, *et seq.*; *id.* ¶¶ 119-125, 130-158. Plaintiff also seeks declaratory relief. *Id.* ¶¶ 126-129.

Finally, the Complaint raises four challenges to arbitration. Plaintiff argues that the Arbitration Agreement is procedurally (Dkt. 1, ¶ 82) and substantively (*id.* ¶¶ 83-87) unconscionable, prospectively waives her rights under federal law (*id.* ¶ 89), violates RCW 31.04.027(k) (*id.* ¶ 91), and bars seeking public injunctions in violation of the Washington Consumer Protection Act (*id.* ¶ 92).

As explained below, none of these challenges preclude enforcement of the Arbitration Agreement.

C. Actions in Other States

Plaintiff's Complaint is the latest in a series of materially identical actions brought by Plaintiff's counsel. Prior cases were filed in California, Texas, and Virginia. The Texas and Virginia matters involved materially identical challenges to FinWise's Arbitration Agreements, while the California case involved an idiosyncratic challenge based on the unique experience of

the California plaintiffs.

1. The Eastern District of Virginia Grants OppFi's Motion to Compel Arbitration, Rejecting the Same Arguments Plaintiff Makes Here.

In Virginia, in *Johnson v. Opportunity Fin., LLC*, No. 3:22-cv-190, 2023 WL 2636712 (E.D. Va. Mar. 24, 2023), plaintiff Sherie Johnson, a Virginia resident, alleged that she obtained a loan through OppFi made by a Utah-chartered bank, which exceed Virginia's interest rate limits for non-bank entities. 2023 WL 2636712, at *1. She further alleged that because OppFi is the "true lender" on her loan, rather than the Utah-chartered bank, the loan violated Virginia law. *Id*. OppFi moved to compel arbitration of her claims pursuant to the arbitration agreement in her promissory note, which is identical to the Arbitration Agreement at-issue here. *Id*. Like the Plaintiff here, Johnson argued that the Utah choice-of-law clause in the loan agreement waived her Virginia statutory claims regarding her interest rate and, as a result, also prospectively waived her federal RICO claims. She also argued that the loan was procedurally unconscionable because it was a contract of adhesion and written in 4.5-font. *Id*. The *Johnson* court rejected all of these arguments. *Id*.

With respect to the Utah choice-of-law clause governing the Agreement as a whole, the court explained that "it is premature to decide that issue due to the rule of severability." 2023 WL 2636712, at *5. "As articulated in *Buckeye*, it is a matter of federal substantive law that, 'unless the challenge is to the arbitration clause itself, the issue of a contract's validity is considered by the arbitrator in the first instance.'" *Id*. (citing *Buckeye*, 546 U.S. at 445). Ultimately, the *Johnson* court concluded that "[c]ourts have repeatedly reaffirmed that, under the rule of severability, challenges to contract-wide choice-of-law provisions should be heard by arbitrators, not courts." *Id*. (*citing Vimar Seguros*, 515 U.S. at 541, which explains that courts should "reserve judgment on the choice-of-law question" when considering a motion to compel arbitration, "as [the choice-of-law question] must be decided in the first instance by the arbitrator").

The *Johnson* court also rejected Johnson's concerns about the provision of the arbitration agreement providing that the "Arbiter must enforce your agreements with us, as they are written." The *Johnson* the court explained that "this provision merely re-states settled black letter law." *Id*. *6 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) ("The FAA . . . requires courts to enforce [arbitration agreements] according to their terms").

With respect to procedural unconscionability, the *Johnson* court rejected Johnson's concerns explaining, among other things, that (1) "even after having decided to accept Opportunity Financial's loan terms, Johnson had the option to opt-out of the arbitration provision" for 60 days, and (2) that the arbitration agreement "is hardly hidden [as] it takes multiple pages and is formatted as a table." *Id*. *10.

2. The Western District of Texas Grants OppFi's Motion to Compel Arbitration, Rejecting the Same Arguments Plaintiff Makes Here.

In *Michael*, plaintiff Kristen Michael, a Texas resident, alleged she obtained a loan through OppFi made by a Utah-chartered bank, which exceeded Texas's interest rate limits for non-bank entities. *Michael v. Opportunity Financial, LLC*, No. 1:22-CV-00529-LY, 2022 WL 14049645, at *1-*2 (W.D. Tex. Oct. 2, 2022). She further alleged that because OppFi is the "true lender" on her loan, rather than the Utah-chartered bank, it violated Texas law. *Id*. OppFi moved to compel arbitration. *Id*. Like the Plaintiff here, Michael claimed the arbitration agreement was unconscionable because it waived her claims under federal and Texas law, because the arbitrator was required to enforce the agreement "as written." The *Michael* court rejected these arguments.

The *Michael* court explained that the "[Utah] [c]hoice of [l]aw provision and the Arbitration [Agreement] do not mandate that the arbiter apply Utah law," as the Utah choice-of-law provision actually excepts from its coverage the arbitration agreement. Specifically, it states that the "Note is governed by federal law and the laws of the State of Utah, ***except*** that the

Arbitration Clause is governed by the Federal Arbitration Act ('FAA')." *Id*. at *5 (emphasis added). As such, citing *Vimar Seguros*, the court explains that "[i]t will be for the arbitrator to determine whether choice-of-law principles require the application of Texas law rather than Utah law." *Id*.

3. The Central District of California Denies OppFi's Motion Based on Idiosyncratic "Technical Glitches" and OppFi Appeals the Decision.

Unlike the plaintiffs in *Michael* and *Johnson*, the plaintiffs in *Carpenter v. Opportunity Fin., LLC*, No. 221CV09875FLAEX, 2023 WL 2960327, at *3 (C.D. Cal. Mar. 29, 2023) claimed they could not review their respective arbitration agreements due to "technical glitches" that they allegedly experienced while signing their Promissory Notes.[1] In blatant disregard for California law—which prohibits a party from avoiding the terms of a contract they voluntarily executed even if they could not read them—the *Carpenter* court found that these technical issues along with ***alleged*** "legibility" concerns established a "strong degree of procedural unconscionability." *Id*. The *Carpenter* court also held that the provision advising borrowers that arbitrators enforce the promissory note "as written" required an arbitrator to enforce the Utah choice-of-law provision, which amounted to a waiver of California law. *Id*. at *6. The *Carpenter* court did not cite any authority for that conclusion and failed to address *Vimar Segurous*, which prohibits a court from engaging in a guessing game over how an arbitrator may apply a choice-of-law provision. After the *Carpenter* court denied OppFi's Motion for Reconsideration, on June 21, 2023, OppFi filed a timely notice of appeal. The appeal is ongoing.

III. LEGAL STANDARD

The FAA "creates a body of federal substantive law" that is applicable in both state and

[1] The plaintiffs in *Carpenter* claimed, in opposition to OppFi's motion to compel arbitration, that their arbitration agreements were in 4.5 size font. Those allegations, which the *Carpenter* court accepted as established fact, are untrue and meaningless in the context of an electronic document where the size of the text scales to the size of the viewing window and can be enlarged or shrunken. Should Plaintiff in this case make similar allegations, OppFi will establish that they are meritless.

federal courts. *Southland Corp. v. Keating,* 465 U.S. 1, 12 (1984). It reflects a "liberal federal policy favoring arbitration," and the primary purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms. *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339, 344-45 (2011). In evaluating a motion to compel under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The party seeking to avoid arbitration has the burden of showing that the arbitration provision is unenforceable. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). The FAA "leaves no room for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 213 (1985).

IV. ARGUMENT

A. The FAA Applies to the Arbitration Agreement.

The FAA governs this Court's review of the Arbitration Agreement for two reasons. ***First***, the Arbitration Agreement explicitly selects the FAA as the governing law. Dkt. 1-1 at 4, ¶ 17 ("[T]he Arbitration Clause is governed by the Federal Arbitration Act"); *id.* at 5, ¶ 21 (providing that "the FAA governs" any arbitration and "[t]he Arbiter must apply substantive law consistent with the FAA"). The FAA applies when such a selection is made. *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 662-63 (9th Cir. 2012) (applying FAA where arbitration agreement provided it would be "governed by the Federal Arbitration Act").

Second, the FAA governs contracts involving interstate commerce, 9 U.S.C. §§ 1-2, which is the case here. The individual transaction at issue need not have any "specific effect on interstate commerce" to meet this threshold requirement. *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56-58 (2003). Instead, it is sufficient that the "general practice . . . bear[s] on interstate commerce in a substantial way." *Citizens Bank,* 539 U.S. at 57. This case satisfies the FAA's minimal interstate commerce requirement. *See Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052,

1055, 1057 (9th Cir. 2013) (applying FAA to arbitration clause between national bank and consumer); *Jenkins v. First Am. Cash Advance of Georgia., LLC,* 400 F.3d 868, 874 (11th Cir. 2005) (holding the "FAA's broad interstate commerce requirement is satisfied" because "[t]he lending transactions were between . . . a Georgia resident, and . . . a national bank located in South Dakota"). Plaintiff is a Washington resident who obtained a loan from a Utah bank (FinWise) that would be serviced by OppFi, a limited liability company with its principal place of business in Illinois. Dkt. 1, ¶¶ 13-19. As such, the FAA governs.

B. Plaintiff's Challenges to Arbitration Fail.

1. Plaintiff's Unconscionability Challenges Fail.

The burden of demonstrating a contract is unconscionable lies with the party attacking it—here, Plaintiff. *See Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 898 (2001). "Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301 (2004).

Washington recognizes two forms of unconscionability: "(1) substantive unconscionability, involving those cases where a clause or term in the contract is alleged to be one-sided or overly harsh[;] and (2) procedural unconscionability, relating to impropriety during the process of forming a contract." *Id*. "In Washington, either substantive or procedural unconscionability is sufficient to void a contract." *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603 (2013). The Arbitration Agreement is not unconscionable by either measure.

a. Plaintiff's Arbitration Agreements Are Not Procedurally Unconscionable.

Procedural unconscionability is nothing less than "blatant unfairness in the bargaining process and a lack of meaningful choice." *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 518 (2009), *as corrected* (July 16, 2009). In considering a procedural unconscionability challenge, courts look to the totality of the circumstances, including: "(1) the manner in which

the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms, and (3) whether the terms were hidden in a maze of fine print." *Id*. at 518-19. The key inquiry in analyzing procedural unconscionability is "whether [the claimant] lacked meaningful choice." *Zuver*, 153 Wn.2d at 305.

Here, Plaintiff had meaningful choice—she had 60 days after agreeing to the Arbitration Agreement to opt out of the Arbitration Agreement, while retaining the other benefits of the Promissory Note. Dkt. 1-2 at 6, ¶ 21. Indeed, this district's case law recognizes that other Washington borrowers who obtained loans from FinWise have, in fact, opted out of arbitration. *Sanh v. Opportunity Fin., LLC*, No. C20-0310RSL, 2021 WL 100718, at *2 (W.D. Wash. Jan. 12, 2021) (recognizing that the plaintiff successfully opted out of FinWise's arbitration agreement). This example belies any suggestion that Plaintiff, here, lacked a meaningful opportunity to reject arbitration.

Moreover, courts in this district routinely find opt out provisions, like the one in Plaintiff's Arbitration Agreement, sufficient to defeat a claim of procedural unconscionability. *A.C. by and through Carbajal v. Nintendo of Am. Inc.*, No. C20-1694 TSZ, 2021 WL 1840835, at *3 (W.D. Wash. Apr. 29, 2021) (finding no procedural unconscionability where the plaintiff "had a meaningful choice to accept the delegation provision, to opt out of the arbitration clause" or "to reject the entire [contract]"); *Stone v. Mid Am. Bank & Trust Company*, No. 2:18-CV-87-RMP, 2018 WL 4701843, at *6 (E.D. Wash. Aug. 31, 2018) (same); *Permison v. Comcast Holdings Corp.* No. C12-5714 BHS, 2013 WL 594304, at *5 (W.D. Wash. Feb. 15, 2013) (same).

Further, as *Sanh* implicitly recognizes, there is nothing about the Arbitration Agreement or the opt out option that was hidden. The terms of the Arbitration Agreement were clearly disclosed. The very first page of the Promissory Note includes, in all-caps and bold font, an **"ARBITRATION DISCLOSURE**," notifying Plaintiff of both the Arbitration Agreement and her ability opt out. Dkt. 1-1 at 2. The Arbitration Agreement is not hidden or buried in the text,

but laid out in a consumer-friendly table across three of the eight pages of the Promissory Note. *Id*. at 5-7; *Tjart*, 107 Wn. App. at 899 (arbitration provision was not unconscionable because it was "obvious in the fairly short contract"). The average borrower "could not miss" these terms, if she read the contract. *Bonjorni v. Wells Fargo Bank, N.A.*, No. C11-1841RSL, 2012 WL 836381 at *5 (W.D. Wash. Mar. 9, 2012) (rejecting procedural unconscionability challenge where "the critical terms of the contract . . . were disclosed in such a way that the average borrower could not miss them if he read the contract."). Under these circumstances, procedural unconscionability does not exist. *Zuver*, 153 Wn.2d at 304 (rejecting procedural unconscionability argument based on unequal bargaining power and the existence of an adhesion contract).

b. Plaintiff's Substantive Unconscionability Challenges Fail.

The road is no smoother for Plaintiff's substantive unconscionability arguments, which all fail.

(1) *Prima Paint* and *Buckeye* Foreclose Plaintiff's Challenges to the Utah Choice-of-Law Clause.

As explained above, the Complaint purports to identify a series of reasons why the Arbitration Agreement is substantively unconscionable. However, binding Supreme Court case law precludes this Court from even considering Plaintiff's first substantively unconscionability challenge, which questions the validity of the Promissory Note's Utah choice-of-law clause. Dkt. 1, ¶ 83. That provision is not found in the Arbitration Agreement and does not specifically apply to arbitration. Indeed, the Utah choice-of-law clause makes clear that the "Note is governed by federal laws and the law of the State of Utah," whereas the **"Arbitration Clause is governed by the Federal Arbitration Act**." Dkt. 1-1, ¶ 17 (emphasis added). Under *Prima Paint* and *Buckeye,* such challenges can be heard only by an arbitrator.

In *Prima Paint,* the Supreme Court established a substantive federal "rule of severability" under which challenges specific to an arbitration clause are heard by a court, while

challenges that apply to an agreement as a whole are reserved for the arbitrator. *Buckeye,* 546 U.S. at 446. The Supreme Court applied the *Prima Paint* rule in *Buckeye,* where borrowers brought a putative class action against their lender, alleging the lender charged usurious interest rates. *Buckeye,* 546 U.S. at 442-43. The lender moved to compel arbitration, which the borrowers resisted on the grounds that the usurious interest rendered the entire loan agreement—including the arbitration clause—void *ab initio. Id.* at 443-44. On appeal, the Supreme Court noted that there are two types of challenges to an arbitration agreement:

> One type challenges specifically the validity of the agreement to arbitrate. . . . The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.,* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.

Id. at 444 (citations omitted). The Supreme Court concluded the *Buckeye* challenge was the second type that must be heard by the arbitrator, because "[t]he crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge." *Id.* The Supreme Court also reiterated that under *Prima Paint,* "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id.* at 440 (quoting *Prima Paint*).

The division of labor between courts and arbitrators is clear after *Buckeye*: if a plaintiff's challenge is predicated on the argument that an arbitration clause is void merely because the entire contract is invalid, only an arbitrator may resolve it. *See, e.g., Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp.,* 622 F.3d 996, 1000 (9th Cir. 2010) ("[W]hen a plaintiff's legal challenge is that a contract as a whole is unenforceable, the arbitrator decides the validity of the contract, including derivatively the validity of its constituent provisions (such as the arbitration clause)."); *Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1226 (9th Cir. 2022) ("Questions regarding the *validity* or *enforceability* of a contract, unless they relate specifically to the arbitration clause, are for the arbitrator to decide."). Applying this principle, Plaintiff's

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unconscionability challenge to the Promissory Note's Utah choice-of-law clause is for the arbitrator.

Courts routinely reject challenges to arbitration agreements based on choice-of-law clauses that govern the contract as a whole. Indeed, as noted above, two federal district courts recently rejected this exact challenge to the exact same arbitration provisions.

In *Sherie Johnson v. Opportunity Financial, LLC*, a plaintiff, represented by the same counsel as Plaintiff here, challenged her arbitration agreement on the same ground set forth here, *i.e.*, that the Utah choice-of-law provision required the arbitrator to apply Utah law, without conducting a choice-of-law analysis. No. 3:22CV190, 2023 WL 2636712, at *8 (E.D. Va. Mar. 24, 2023). The *Johnson* court correctly rejected this argument, explaining that "Johnson's argument inherently involves an attack on the Utah choice-of-law provision," but under *Buckeye*, "the Court must not take into account the choice-of-law provision because it is separate from the [Arbitration Agreement] . . . . [i]t is located on a different page and presented in a different format from the [Arbitration Agreement]." *Id*. Accordingly, the *Johnson* court could "not consider the choice-of-law clause in deciding the validity of the [Arbitration Agreement]." *Id*. at *9. Instead, "challenges to contract-wide choice-of-law provisions should be heard by arbitrators, not courts." *Id.* at *5 (citing *Vimar Seguros*, 515 U.S. at 541).

In *Michael*, the plaintiff, also represented by the same counsel as Plaintiff here, asserted the same challenge based on the Utah choice-of-law clause and, again, the court rejected it, explaining that "[p]laintiff's concern that the arbiter may apply Utah law goes to the merits of her claims and is not properly before this Court." 2022 WL 14049645, at *5 (W.D. Tex. Oct. 24, 2022).

The decisions in *Michael* and *Johnson* follow directly from controlling Supreme Court precedent, including *Buckeye*, *Prima Paint*, and *Vimar Seguros*, which holds that a "choice-of-law question . . . must be decided in the first instance by the arbitrator." *Vimar Seguros*, 515 U.S. at 541.

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Court in this district and elsewhere have said the same. *Washington Sch. Risk Mgmt. Pool v. Am. Re-Ins. Co.*, No. C21-0874-LK, 2022 WL 2718479, at *9 (W.D. Wash. Apr. 21, 2022), *report and recommendation adopted*, No. 21-CV-00874-LK, 2023 WL 195904 (W.D. Wash. Jan. 17, 2023) ("the issue of what law applies in the arbitration proceeding . . . is for the arbitrators to decide") (citing *Vimar*, 515 U.S. at 540–41); *Gilroy v. Seabourn Cruise Line, Ltd.*, No. C12-107Z, 2012 WL 1202343, at *5 (W.D. Wash. Apr. 10, 2012) ("Plaintiffs' argument that Seabourn's cruise contract is illusory, and thus the arbitration clause non-binding, is not a matter for this Court to decide . . . " because a '"challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.'") (citing *Buckeye*, 546 U.S. at 449); *Broussard v. FinWise Bank, Inc.*, No. SA-21-CV-01238-OLG, 2022 WL 2057488, at *3 (W.D. Tex. May 12, 2022)) ("[I]t will be for the arbitrator to determine whether choice-of-law principles require the application of Texas rather than Utah law. Plaintiff's concerns about choice-of-law are not properly before this Court as the issue 'must be decided in the first instance by the arbitrator.'" (quoting *Vimar Seguros*, 515 U.S. at 541)); *Samenow v. Citicorp Credit Servs., Inc*., 253 F.Supp.3d 197, 203 n.5 (D.D.C. 2017) ("[B]ecause the Arbitration Agreements are severable from the remainder of the Card Agreements, the Court does not discuss Plaintiff's challenges to the validity and enforceability of the choice-of-law provisions.").

Here, as in the cases cited above, Plaintiff's objections to the choice-of-law clause have nothing to do with the Arbitration Agreement. Her concern is that when it comes time to adjudicate the merits, the arbitrator will be bound to follow Utah law, and will have no discretion in determining what law applies to the claims. But the Arbitration Agreement says nothing whatsoever about an arbitrator's ability to conduct a choice-of-law analysis as between Washington and Utah law. And courts have found that it is entirely appropriate for an arbitrator to conduct a choice-of-law analysis before evaluating the substantive claims. *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 676–77 (2010) (suggesting an arbitration

panel should conduct a choice-of-law analysis to determine whether maritime law or New York state law should apply); *Vimar Seguros,* 515 U.S. at 541 (choice-of-law question "must be decided in the first instance by the arbitrator," and it was premature to argue that the arbitration agreement was unenforceable because the arbitrator might apply foreign law).

Indeed, the Arbitration Agreement specifically authorizes this analysis by permitting "[t]he Arbiter [to] apply substantive law consistent with the FAA," Dkt. 1-2 at 4, ¶ 21, because choice-of-law rules are substantive law, *REF & Assocs. v. Texaco Ref. & Mktg., Inc.*, 937 F.2d 613 (9th Cir. 1991), citing *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941).

Accordingly, it is not the case that an arbitrator *must* apply Utah law to Plaintiff's substantive claims because the Promissory Note contains a Utah choice-of-law clause. Instead, the Arbitrator is free to conduct an independent choice-of-law analysis, just as a Washington or Utah court would. And, more fundamentally, Plaintiff's challenge to the choice-of-law clause attacks the Promissory Note as a whole, not the Arbitration Agreement specifically. That type of challenge is prohibited by *Buckeye.*

(a) The Court Can Sever the Choice-of-Law Clause.

As explained above, *Buckeye* precludes consideration of Plaintiff's argument that the Utah choice-of-law clause renders the Arbitration Agreements unconscionable. But even if the Court considers this challenge, it should be rejected, because that provision can be severed without impacting the rest of the Arbitration Agreement.

Washington courts will enforce a contract, notwithstanding an unconscionable term, if the term is severable from the rest of the contract. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 359 (Wash. 2004) (striking an unconscionable provision rather than finding the entire agreement invalid). And courts have has applied that rule to choice-of-law provisions. "Even if the choice of law provision is unconscionable, it may be severed, leaving intact the agreement to arbitrate." *Allbaugh v. Perma-Bound,* No. C08-5713-JCC, 2009 WL 10676437, at *8 (W.D. Wash. Aug.

14, 2009) (stating that "a court will declare the entire arbitration agreement unenforceable only when unconscionable provisions are pervasive."). The *Allbaugh* court "sever[ed] the choice of law provision from [parties' contract] but otherwise enforce[d] the parties' agreement to arbitrate." *Id.* at *10. Washington courts recognize that "[s]everability is particularly likely when," as here, "the agreement includes a severability clause." *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 330 (2009); Dkt. 1-1, ¶ 17 (severability provision in the Note that plaintiff signed). Accordingly, even if the Court finds the choice-of-law clause unconscionable, it can readily excise that provision and enforce the remainder, especially because "the parties have explicitly expressed their intent for [a court] to do so by agreeing to a severance clause." *Zuver*, 153 Wn.2d at 320 (severing two specific clauses from a contract and "otherwise affirm[ing] the trial court's order to compel arbitration.").

Indeed, courts across the country routinely sever choice-of-law clauses while enforcing an arbitration agreement, even where the choice-of-law clause is *within* the arbitration agreement. *See, e.g., Buchsbaum v. Digital Intelligence Sys., LLC*, No. 20-CV-00706-BAS-AGS, 2020 WL 7059515, at *9 (S.D. Cal. Dec. 2, 2020) (severing Virginia choice-of-law provision within arbitration agreement); *Dumitru v. Princess Cruise Lines, Ltd.,* 732 F.Supp.2d 328, 334 (S.D.N.Y. 2010) (severing choice-of-law clause within arbitration agreement). Here, the Utah choice-of-law clause is not even part of the Arbitration Agreement, it is in a different section of the Promissory Note altogether, and it expressly states that it does ***not*** apply to the Arbitration Agreement. Accordingly, if this Court concludes the Utah choice-of-law clause is unconscionable, it should sever the clause and enforce the Arbitration Agreement.

(2) There Is Nothing Substantively Unconscionable About Enforcing Agreements "as Written."

It is black letter law that contracts, including arbitration agreements, must be enforced as they are written. *See Am. Express Co. v. Italian Colors Rest.,* 570 U.S. 228, 233 (2013) (explaining that "arbitration is a matter of contract" and courts must "rigorously enforce"

arbitration agreements according to their terms); *Stolt-Nielsen,* 559 U.S. 662, 672 ("[T]he task of an arbitrator is to interpret and enforce a contract."). In the context of arbitration agreements, the Supreme Court has stated that "[t]he FAA . . . places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms." *Rent-A-Center, W., Inc*, 561 U.S. at 67–68. The Arbitration Agreement's statement to that effect—"[An] Arbiter must enforce your agreements with us, as they are written"—is an accurate statement of the law, not a predetermination of the outcome of any case Plaintiff may present in arbitration, nor an unconscionable term of the Agreement.

Plaintiff nonetheless takes issue with this language, claiming it requires an arbitrator to apply Utah law, to the exclusion of Washington law, which effectively requires the arbitrator to enter judgment in OppFi's favor. Dkt. 1 ¶ 84. Plaintiff's Complaint does not offer any support for this strained interpretation of a commonly understood statement of the law, and OppFi has not located any. In Washington, courts enforce contracts "as written," which means that the court will not modify the agreement or create ambiguity where none exists. *Skansgaard v. Bank of Am., N.A.*, 896 F.Supp.2d 944, 947 (W.D. Wash. 2011) ("If the language of a contract is clear and unambiguous, the Court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists."); David K. DeWolf et al., § 5:4. Rules of construction, 25 Wash. Prac., Contract Law And Practice § 5:4 (3d ed. 2022) ("[I]f the contract language is clear and unambiguous, the courts will enforce the contract as written"). This statement of law does not mean that courts or arbitrators will inevitably enter judgment in any parties' favor or that they will not consider defenses to enforcement.

As the court in *Johnson* aptly stated, "[i]t is difficult to understand how this innocuous phrase sparked the parade of horribles that [plaintiff] articulates." *Johnson*, 2023 WL 2636712, at *6.

Notwithstanding the foregoing, in *Carpenter*, the court concluded otherwise, holding that enforcing a contract "as written" means the arbitrator is "require[d] . . . to enforce the Utah

choice of law provision [which] effect[s] a waiver of Plaintiffs' substantive rights." 2023 WL 2960327, at *6. The *Carpenter* court missed the mark. As a threshold matter, the *Carpenter* court engaged in the analysis prohibited by *Vimar Seguros*—prematurely guessing how an arbitrator would apply the choice-of-law provision. It then compounded that error by misconstruing the "as written" language. Without case law or statutory support or any effort to address the black letter meaning of the phrase, the *Carpenter* court simply concluded that the "as written" language required the arbitrator to apply Utah law, which the *Carpenter* court concluded was a waiver of plaintiff's substantive rights. This Court should not follow *Carpenter's* lead. It failed to apply binding Supreme Court precedent and engaged in an impermissible guessing game as to how an arbitrator would apply the arbitration provision and then reached an unsupported conclusion that is inconsistent with black letter law.

Instead, the Court should follow *Johnson*, *Michael*, and the other courts in this district that have established that this phrase is merely a recitation of black letter law.

(3) Plaintiff's Preclusion-Based Substantive Unconscionability Argument Fails.

Plaintiff's next challenge is to the provision in the Arbitration Agreement providing that "[n]o arbitration award under this Agreement will affect any dispute involving any other party," and that "[n]o arbitration award under another party's agreement will affect any arbitration under this Agreement." Dkt. 1, ¶ 85. According to Plaintiff, this provision renders the Arbitration Agreement "unlawful and void because it violates fundamental principles of res judicata, collateral estoppel, and issue preclusion." *Id.* That is, she claims this clause effectively prevents an arbitrator in a future case from applying preclusion principles based on other arbitration awards. *Id.* ¶ 87. For several reasons, Plaintiff cannot establish unconscionability even if this clause operates precisely how Plaintiff claims it would.

First, there is nothing "unlawful" about the Arbitration Agreement simply because it stipulates that an arbitration award will not have preclusive effect in another dispute. To the

contrary, "it is settled that the parties to an arbitration may choose to limit the arbitration award's preclusive effect." *Fox v. GEICO Gen. Ins. Co.,* No. 13-CV-6436 (MKB) (VVP), 2015 WL 5350243, at *3 (E.D.N.Y. Aug. 21, 2015), *report and recommendation adopted,* No. 13-CV-6436 (MKB) (VVP), 2015 WL 5334413 (E.D.N.Y. Sept. 14, 2015); Restatement (Second) of Judgments § 84 cmt. 4 (1982) ("If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.").[2] That is because "[t]he preclusive effect of the award is as much a creature of the arbitration contract as any other aspect of the legal-dispute machinery established by such a contract." *IDS Life Ins. Co. v. Royal All. Assocs., Inc.,* 266 F.3d 645, 651 (7th Cir. 2001); *Miller v. Runyon,* 77 F.3d 189, 194 (7th Cir. 1996) (explaining that "[g]iven the contractual nature of arbitration, it can be argued that the preclusive effect of either a judicial judgment or an arbitration award on a subsequent arbitration should depend on what the parties agreed to").

Moreover, this agreement is consistent with the public policy embodied in the FAA. As the Supreme Court explained in *Epic Systems Corp. v. Lewis,* the FAA "protect[s] . . . absolutely" agreements calling for "one-on-one arbitration" using "individualized proceedings" given the "traditionally individualized and informal nature of arbitration." *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612, 1619-23 (2018) (citing *Concepcion,* 563 U.S. at 347, 348). An agreement ensuring that all disputes in arbitration are bilateral and heard on their own merits is consistent with the "traditionally individualized and informal nature of arbitration." *Id* at 1623.

Second, Plaintiff does not explain how the agreement on preclusive effect is unconscionable where the clause has mutual effect, Plaintiff had the ability to opt out, and it does not prevent Plaintiff from pursuing her claims. Straining to identify a harm, Plaintiff asks

[2] While the Ninth Circuit has not specifically addressed this issue, it has quoted this section of the Restatement with approval. *In re Khaligh*, 338 B.R. 817, 829 & n.11 (B.A.P. 9th Cir. 2006), *aff'd*, 506 F.3d 956 (9th Cir. 2007).

this Court to "imagine" a hypothetical scenario in which some other party prevails against OppFi, but she cannot take advantage of it. Dkt. 1, ¶ 86. This hypothetical concern does not render the provision substantively unconscionable. *See, e.g., Hodges v. Comcast Cable Commc'ns,* LLC, 21 F.4th 535, 541 (9th Cir. 2021) (courts should not "stretch to invalidate contracts based on hypothetical issues that are not actually presented in the parties' dispute.").

Third, Plaintiff's claim that this phrase violates RCW 19.86.130 is nonsensical. The Arbitration Agreement deals with the effect of one arbitration proceeding on others. RCW 19.86.130 addresses the effect that judgements in certain suits brought by the State of Washington have on other civil litigation. The statute is irrelevant to preclusive effect of a private arbitration award.

Fourth, even if the Court finds the clause unenforceable, the Court should sever it. As established above, an invalid provision should be severed, and arbitration compelled, where, as here, severing the clause would not impact the remainder of the arbitration agreement.

2. The Arbitration Agreement Does Not Waive Federal Rights.

Plaintiff's second challenge to the Arbitration Agreement is a reformulation of her attack on the Utah choice-of-law provision. Plaintiff argues that the Arbitration Agreement is void "by prospectively waiving [Plaintiff's] right to bring a RICO claim." Dkt. 1, ¶ 86. Plaintiff's theory appears to be that by selecting Utah law in the choice-of-law clause, the parties excluded the operation of federal law. Plaintiff is wrong on several levels.

To start, the challenged choice-of-law clause provides that "[t]his note is governed by federal law and the laws of the State of Utah." Dkt. 1-1 at 3, ¶ 17. The fact that "federal law" "govern[s]" the Promissory Note alone defeats Plaintiff's suggestion that federal statutory claims are somehow waived.

Moreover, the law is clear that selecting the law of another state does not waive federal law. *Murphy v. DirecTV, Inc.,* 724 F.3d 1218, 1227 (9th Cir. 2013) ("By settled principles of federal supremacy, the law of any place in the United States includes federal law."); *World Fuel*

Servs. Trading, DMCC v. Hebei Prince Shipping Co., Ltd., 783 F.3d 507, 521 (4th Cir. 2015) (a choice-of-law clause selecting Florida law necessarily includes federal law); *Atkinson v. General Elec. Credit Corp.,* 866 F.2d 396, 398–99 (11th Cir. 1989) (concluding that "Georgia law includes federal law" where there was a Georgia choice-of-law provision). That is because the laws of any state necessarily include federal law. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 157 (1982) ("[A] fundamental principle in our system . . . mandates that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.") (internal citations omitted).

3. The Arbitration Agreement Does Not Violate Washington Consumer Loan Act Prohibitions on Releases of Future Damages for Usury.

Plaintiff's third challenge is that "the arbitration clause violates RCW 31.04.027(k)," a section of the Washington Consumer Loan Act. Dkt. 1, ¶ 91. It does not, and this is an argument about the Note as a whole, not the Arbitration Agreement, so it must go to the arbiter. RCW 31.04.027(k) states that it is a violation of the Washington Consumer Loan Act for "a licensee . . . or any other person subject to this chapter to: . . . (k) Obtain at the time of closing a release of future damages for usury or other damages or penalties provided by law or a waiver of the provisions of this chapter." The Arbitration Agreement does none of those things. The Complaint may, in other places, take the position that portions of the Promissory Note violate RCW 31.04.027(k) or other statutes, but those issues are not directed at the Arbitration Agreement. Plaintiff's position is really that the Promissory Note as a whole is unenforceable due to the interest rate, but as discussed above (*supra* Section IV.B.1.b(1)), that type of argument cannot render the Arbitration Agreement unconscionable or unenforceable.

4. Plaintiff's Public Injunctive Relief Argument Fails.

Plaintiff's last argument is that the arbitration clause is invalid because it "bars seeking public injunctions" and Washington law permits plaintiffs to seek injunctions for the public benefit. Dkt. 1, ¶ 92. This argument fails on multiple levels.

As a threshold matter, the argument that Plaintiff invokes arises under California law pursuant to *McGill v. Citibank, N.A.*, 2 Cal.5th 945, 962 (2017), not Washington law. In *McGill*, the California Supreme Court held that a waiver of a claimant's right to pursue "public injunctive relief," in any forum, under ***California's*** consumer protection statutes is contrary to ***California public policy***. *Id*. This is, in part, because California law expressly states that a waiver of rights under its Consumer Legal Remedies Act "is contrary to public policy and shall be unenforceable and void." Cal. Civ. Code § 1751. Accordingly, under *McGill*, a consumer must be able to pursue public injunctive relief in ***either*** court ***or*** arbitration. 2 Cal.5th at 962.

There is no Washington law equivalent to the *McGill* rule. *Moreno v. T-Mobile USA, Inc.*, No. 2:22-CV-00843-JHC, 2023 WL 401913, at *6 n.3 (W.D. Wash. Jan. 25, 2023) (explaining it is "unclear" "whether Washington law considers a contractual waiver of the right to seek [public] injunctive relief unconscionable"). Courts in California and elsewhere have rejected invitations to apply *McGill* where the claim does not arise under California law. *Miracle-Pond v. Shutterfly, Inc.*, No. 19 CV 04722, 2020 WL 2513099, at *8 (N.D. Ill. May 15, 2020) (rejecting attempt to apply *McGill* rule to claims arising under Illinois law); *Roberts v. AT&T Mobility LLC*, No. 15-CV-03418-EMC, 2018 WL 1317346, at *9 (N.D. Cal. Mar. 14, 2018) (plaintiff "has no *McGill* argument because his claims for relief are governed by Alabama law, not California law"); *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 254 n.6 (1st Cir. 2021) (declining invitation to apply *McGill* to Massachusetts law).

Indeed, the concept of "public injunctive relief" is moored to California law. Although the Washington Consumer Protection Act permits a claimant to seek an injunction in the public interest, "public injunctive relief" is a concept unique to California law. The phrase is not referenced in a single Washington state court decision, and the only Washington district court cases referencing the term involve California law. Under California law there is a well-established body of law defining the parameters of the concept. *See, e.g., Hodges*, 21 F.4th at 542 (clarifying what is and what is not "public injunctive relief" under California law).

Washington courts have not adopted the concept of "public injunctive relief" let alone defined its parameters.[3] Accordingly, there is no basis to assume that the injunctive relief Plaintiff seeks is even covered by the Arbitration Agreements' discussion of "public injunctive relief." The Court should reject Plaintiff's invitation to export California law to Washington.[4]

Even if the *McGill* rule applied under Washington law, the Arbitration Agreement does not implicate the concern articulated in *McGill*, because it does not prohibit Plaintiff from seeking "public injunctive relief" ***in any forum***. Instead, it provides that Plaintiff is "waiv[ing] [her] right to seek public injunctive relief ***if such a waiver is permitted by the FAA***." Dkt. 1-1, at 5. If the waiver is not permitted under the FAA, her request for an injunction will be addressed by a court after her individual claims proceed in arbitration. *Id*. This is not a waiver. Not even *McGill* prohibits such clauses. Just the opposite, Plaintiff's Arbitration Agreement is valid under *McGill* as Plaintiff may pursue "public injunctive relief" in court. *J.A. through Allen v. Microsoft Corp*., No. C20-0640-RSM-MAT, 2021 WL 1723454, at *9 (W.D. Wash. Apr. 2, 2021), report and recommendation adopted, No. C20-0640-RSM, 2021 WL 1720961 (W.D. Wash. Apr. 30, 2021) (analyzing an arbitration clause under California law and explaining that the case could return to court on the public injunctive relief issue after arbitration).

Finally, even if Washington recognized the *McGill* rule and this court held that the arbitration clause is a waiver—despite express language to the contrary—the provision could be

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[3] Assuming *arguendo* that California law applies, the relief Plaintiff seeks is not "public injunctive relief" because it seeks to vindicate rights on behalf of those similarly situated, rather than the public as a whole. *Hodges*, 21 F.4th at 542 (explaining that "private injunctive relief, which provides benefits to an individual plaintiff—*or to a group of individuals similarly situated* to the plaintiff," is different than "public injunctive relief [which] involves diffuse benefits to the general public as a whole").

[4] Although the Ninth Circuit held that the FAA does not preempt *McGill*, *Blair v. Rent-A-Ctr., Inc.,* 928 F.3d 819 (9th Cir. 2019), the Supreme Court's precedent, including *Concepcion*, casts substantial doubt over the Ninth Circuit's decision in *Blair*. *Swanson v. H&R Block, Inc*., 475 F.Supp.3d 967, 978 (W.D. Mo. 2020) (applying California law and holding that *McGill* is preempted by the FAA). Accordingly, OppFi maintains that *McGill* is preempted.

severed, which negates any unconscionability, even under California law. *Carpenter*, 2023 WL 2960327, at *8.

C. This Action Should be Stayed.

As established above, all of Plaintiff's underlying claims are arbitrable. Under the FAA, the court is required to stay this action. 9 U.S.C. § 3; *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1048 (9th Cir. 1996); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d 1126, 1130 (9th Cir. 2000).

V. CONCLUSION

For all of the foregoing reasons, the Court should compel arbitration and stay the matter pending completion of arbitration.

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Dated this 5th day of July, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this memorandum contains 8,360 words, in compliance with the Local Civil Rule 7(e)(6).

DATED: July 5, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED: July 5, 2023

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THE HONORABLE BRIAN A. TSUCHIDA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KATHERINE FAMA, an individual on behalf of herself, the public, and all persons similarly situated,

Plaintiff,

v.

OPPORTUNITY FINANCIAL, LLC, a limited liability company,

Defendant.

Case No. 3:23-cv-05477-BAT

[PROPOSED] ORDER GRANTING DEFENDANT OPPORTUNITY FINANCIAL LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

The above-entitled matter has come on regularly for hearing before the Honorable Brian A. Tsuchida, United States District Court Magistrate Judge, on Defendant Opportunity Financial, LLC's ("OppFi" or "Defendant") Motion to Compel Arbitration and to Stay Plaintiff's Action (the "Motion"). The Court has considered the Motion and the submissions in support and opposition thereto, and is fully apprised in the premises. NOW, THEREFORE, it is hereby ORDERED that OppFi's Motion to Compel Arbitration and to Stay Plaintiff's Action is GRANTED.

Dated this ____ day of August, 2023.

UNITED STATES MAGISTRATE JUDGE

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