UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CRYSTAL CARPENTER, et al.,

Plaintiffs,

v.

OPPORTUNITY FINANCIAL, LLC, et al.,

Defendants.

Case No. 2:21-cv-09875-FLA (Ex)

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS [DKT. 18]

RULING

Before the court is Defendant Opportunity Financial, LLC's ("Defendant" or "Opportunity Financial") Motion to Compel Arbitration and Stay Proceedings Pending Completion of Arbitration ("Motion"). Dkt. 18 ("Mot."). Plaintiffs Crystal Carpenter and Jordan Cason (collectively, "Plaintiffs") filed an Opposition on behalf of a prospective class. Dkt. 23 ("Opp'n"). Opportunity Financial filed a Reply. Dkt. 24 ("Reply"). On February 14, 2022, the court found the Motion appropriate for resolution without oral argument and took the matter under submission. Dkt. 25; *see* Fed. R. Civ. P. 78(b); Local Rule 7-15.

For the reasons set forth below, the court DENIES Defendant's Motion.

BACKGROUND

Plaintiffs filed this putative class action on December 22, 2021, asserting claims against Defendant. *See generally* Dkt. 1 ("Compl."). Plaintiffs obtained loans from FinWise Bank and each signed a promissory note establishing the interest rate at 159.56% (the "Agreements"). *Id.* ¶¶ 6, 109; *see* Dkt. 1-1 (Ex. A), Dkt. 1-2 (Ex. B). Plaintiffs allege the loans are illegal under several state and federal laws because the interest rate is usurious. *Id.* ¶¶ 109, 135-204. Specifically, Plaintiffs assert seven claims against Defendant for: (1) violation of Cal. Bus. & Prof. Code § 17200 et seq. (the Unfair Competition Law, "UCL") based on violations of the California Financial Code; (2) violation of the UCL based on the doctrine of unconscionability; (3) money had and received; (4) declaratory relief; (5) violation of the Racketeer Influence and Corrupt Organizations ("RICO") Act Association-in-Fact Enterprise, 18 U.S.C. § 1962(c); (6) violation of RICO Conspiracy, 18 U.S.C. § 1962(d); and (7) fraudulent concealment. Compl. at 1. Plaintiffs further allege that FinWise Bank is a "sham" and Defendant Opportunity Financial is the "true lender" on the loans. *Id.* ¶¶ 6-7.

In the present Motion, Defendant seeks to enforce the arbitration clause in the Agreements. *See generally* Mot.

DISCUSSION

I. Legal Standard

Section 2 of the Federal Arbitration Act ("FAA") makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision reflects both a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Accordingly, "courts must place arbitration agreements on equal footing with other contracts, and enforce them according to their terms." *Id.* (citations omitted). Arbitration agreements may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that

apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (quotation marks omitted).

The FAA allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court … for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. "Because the FAA mandates that 'district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed[,]' the FAA limits courts' involvement to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

When deciding whether a valid arbitration agreement exists, courts generally apply "ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Any doubts about the scope of arbitrable issues must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Additionally, "the party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense, such as unconscionability." *Serafin v. Balco Props. Ltd.*, 235 Cal. App. 4th 165, 172-73 (2015); *see Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1289 (9th Cir. 2006) (en banc).

II. Analysis

As a preliminary matter, the role of the federal courts in evaluating a motion to compel arbitration is limited: the sole question is whether the arbitration clause at issue is valid and enforceable under Section 2 of the FAA. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). In making this determination, federal courts may not address the validity or enforceability of the contract as a whole. *Id.*; *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).

Here, the Agreements state the FAA governs the arbitration clause and that a court will determine challenges going to the validity and enforceability of the clause itself. Dkt. 1-1 (Ex. A) at 5; Dkt. 1-2 (Ex. B) at 5.[1] Plaintiffs argue the arbitration clause is invalid because it is unconscionable under California law, and, thus, unenforceable. Compl. ¶¶ 85-96; Opp'n at 14-26.[2]

A. Unconscionability

"[T]he core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013) (quotation marks omitted). "The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided." *Id.* (citations and quotation marks omitted).

Unconscionability has both a procedural and substantive element. "The prevailing view is that procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. … But they need not be present in the same degree." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) (alterations and citations omitted), *abrogated in part on other grounds by Concepcion*, 563 U.S. at 340. Rather, California courts employ a sliding scale model, such that "the more substantively oppressive the contract term, the less evidence of

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[1] The court cites documents by the page numbers added by the CM/ECF system, rather than any page numbers listed within the documents.

[2] As both parties analyze the arbitration clause under California law, the court will likewise apply California law to evaluate the parties' arguments regarding unconscionability. *See, e.g.*, Mot. at 15-16 ("California courts apply a 'sliding scale' analysis to unconscionability challenges…."); Opp'n at 15-16 (citing California law).

procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id*.

1. Procedural Unconscionability

"The procedural element of unconscionability focuses on 'oppression or surprise due to unequal bargaining power.'" *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260 (9th Cir. 2017) (quoting *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012)). "The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1000 (9th Cir. 2021) (quotation marks omitted).

"Oppression can be established by showing the contract was one of adhesion or by showing from the totality of the circumstances surrounding the negotiation and formation of the contract that it was oppressive." *Id.* (quotation marks omitted). Surprise occurs "where the allegedly unconscionable provision is hidden within a prolix printed form." *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 126 (2019) (quotation marks omitted). "A showing of either oppression or surprise may render a contract procedurally unconscionable." *Fisher v. MoneyGram Int'l, Inc.*, 66 Cal. App. 5th 1084, 1095 (2021).

a. Font Size and Technological Issues

Plaintiffs first argue the Agreements' arbitration clause is procedurally unconscionable because it is three pages long, typed in 4.5-point font, and begins on the fifth page of an eight-page document. Opp'n at 17. Further, Plaintiffs state they accessed the Agreements through their smartphones, and when they tried to "zoom in" to read the small font, the website glitched, refreshed, and reset the application to the beginning. *See* Dkt. 23-1, ("Carpenter Decl.") ¶ 12; Dkt. 23-2, ("Cason Decl.") ¶ 12.

Defendant argues the font size did not render the Agreements procedurally unconscionable because Plaintiffs admit they reviewed the documents electronically and were able to "zoom in" to read the documents. Reply at 11. According to

Defendant, "Plaintiffs do not dispute they could read the agreement despite the purported technical glitches, and that 'they appear to be saying they simply decided it was not worth their effort to zoom in and they decided to just sign it without reviewing it in full or asking for technical assistance.'" *Id*.

California courts analyzing procedural unconscionability have found "font size is a significant factor in the [procedural] unconscionability determination," and a "6-point typeface is extremely difficult to read and contributes significantly to the surprise element." *Fisher*, 66 Cal. App. 5th at 1100. In *Fisher*, the California Court of Appeal identified multiple statutes requiring minimum font sizes larger than 6-point in a wide variety of business and consumer contexts. *Id.* at 1100-02 (listing statutes and font sizes). In *Kho*, 8 Cal. 5th at 128, the California Supreme Court affirmed a finding of procedural unconscionability where the agreement was "written in an extremely small font" that was "visually impenetrable" and "challenge[d] the limits of legibility."

Here, like in *Fischer* and *Kho*, the 4.5-point font size made the Agreements extremely difficult to read. That Plaintiffs may have been able to read the terms after making multiple attempts to overcome technological glitches and/or seeking technical assistance does not overcome the fact that they were presented with the arbitration clause in a form that challenged the limits of legibility and could not be easily and readily viewed. Accordingly, the court finds this factor establishes a strong degree of procedural unconscionability.

b. Adhesive Nature of the Agreements

Next, Plaintiffs argue the Agreements' arbitration clause is procedurally unconscionable because it exists within an adhesive contract. Opp'n at 15-16. According to Plaintiffs, Defendant presented the Agreements in "a pre-printed form" on a take it or leave it basis, that could not be changed, altered, or negotiated in any way. Carpenter Decl. ¶¶ 7-9; Cason Decl. ¶¶ 7-9. Defendant argues the Agreements were not adhesive or procedurally unconscionable because Plaintiffs had a meaningful

right to opt out of arbitration. Reply at 9-10 (citing *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1211 (9th Cir. 2016)).

"A contract of adhesion is one imposed and drafted by the party of superior bargaining strength that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Lim*, 8 F.4th at 1000 (quotation marks omitted); *see Kho*, 8 Cal. 5th at 126 ("An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power on a take-it-or-leave-it basis."). "While these circumstances can establish some degree of procedural unconscionability, a contract of adhesion is not per se unconscionable." *Lim*, 8 F.4th at 1000-01 (quotation marks omitted). An arbitration agreement is not adhesive and may not be procedurally unconscionable if there is a meaningful opportunity to opt out of the agreement. *Mohamed*, 848 F.3d at 1211. "A meaningful opportunity to negotiate or reject the terms of a contract must mean something more than an empty choice." *Cir. City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1106 (9th Cir. 2003). "At a minimum, a party must have reasonable notice of his opportunity to negotiate or reject the terms of a contract, *and* he must have an actual, meaningful, and reasonable choice to exercise that discretion."

Given the legibility and technological issues discussed above, the court finds Plaintiffs did not have reasonable notice of opportunity to opt out of the arbitration clause of the Agreements or an "actual, meaningful, and reasonable choice to exercise that discretion." *See id.* The court, therefore, finds the opt out provision does not reduce the procedural unconscionability of the arbitration clause.

c. Failure to Attach Arbitration Rules

Third, Plaintiffs assert Defendant's failure to attach the governing arbitration rules increases the procedural unconscionability of the arbitration clause. Opp'n at 18. Defendant argues an otherwise valid arbitration agreement is not rendered procedurally unconscionable when the American Arbitration Association or JAMS rules are incorporated by reference. Reply at 10-11.

In *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1246 (2016), the California Supreme Court held that the failure to attach arbitration rules could increase the procedural unconscionability of an agreement if "the plaintiff's unconscionability claim depended in some manner on the arbitration rules in question." As Plaintiffs do not identify or challenge any provision of the arbitration rules in question, Defendant's failure to attach copies of these rules to the Agreements does not add to the procedural unconscionability of the arbitration clause. *See id.* at 1246.

d. Conclusion Regarding Procedural Unconscionability

Given the totality of the circumstances, the court finds the arbitration clause of the Agreements presents a high degree of procedural unconscionability. The arbitration clause was written in 4.5-point font size and displayed on a website that crashed when Plaintiffs attempted to enlarge the text, rendering the provision visually impenetrable and challenging the limits of legibility. Based on these legibility and technological issues, Plaintiffs did not have a meaningful opportunity to opt out of the arbitration clause, which existed within an otherwise adhesive contract.

2. Substantive Unconscionability

"Substantive unconscionability examines the fairness of a contract's terms." *Kho*, 8 Cal. 5th at 129. "The substantive unconscionability doctrine is concerned with terms that are unreasonably favorable to the more powerful party, not just a simple old-fashioned bad bargain." *Lim*, 8 F.4th at 1001-02 (quotation marks omitted). "California law seeks to ensure that contracts, particularly contracts of adhesion, do not impose terms that are overly harsh, unduly oppressive, or unfairly one-sided." *Id.* at 1002.

The court addresses two grounds raised by Plaintiffs regarding substantive unconscionability: (1) the Utah choice of law provision, and (2) the prohibition on public injunctive relief. As the court has determined that the arbitration clause presents a high degree of procedural unconscionability, a lower showing of substantive unconscionability is required on the sliding scale for the court to find the

clause unenforceable. *See Armendariz*, 24 Cal. 4th at 114.

a. Choice of Law

Plaintiffs assert the arbitration clause is substantively unconscionable because it bars Plaintiffs from presenting statutory claims under California and federal law and would effect the waiver of unwaivable claims. Opp'n at 21-22. According to Plaintiffs, the arbitration clause requires the arbitrator to apply Utah substantive law, which would eliminate Plaintiffs' claims, as they arise under California law. *Id.* (citing Dkt. 1-1 (Ex. A) at 6; Dkt. 1-2 (Ex. B) at 6 ("Such Arbitrator must enforce your agreements with us, as they are written.")).

The Complaint alleges Defendant has engaged in unfair and illegal business practices because it issues loans that exceed the maximum interest rate allowed under California law. Compl. ¶¶ 30-43, 135-54. California caps the maximum allowable interest rate at thirty percent for loans under $2,500, and thirty-six percent for loans between $2,500 and $10,000. Cal. Fin. Code §§ 22303, 22304.5. In contrast, Utah does not cap the interest rates on loans. Utah Code Ann. § 15-1-1 (1) ("The parties to a lawful written, verbal, or implied contract may agree upon any rate of interest for the contract."). As the arbitration clause provides the arbitrator "must enforce [the Agreements] … as they are written," Dkt. 1-1 (Ex. A) at 6; Dkt. 1-2 (Ex. B) at 6, Plaintiffs argue the agreements' choice of law provision would "operate to impermissibly waive all claims the borrowers have under the California Financing Law" because Utah does not have usury laws. Opp'n at 21.

California Courts of Appeal have found the requirements of the Financial Lenders Law (Cal. Fin. Code § 22000 et seq.) are matters of significant importance to the state that are not subject to waiver. *Brack v. Omni Loan Co.*, 164 Cal. App. 4th 1312, 1327 (2008) ("[T]he Finance Lenders Law is a matter of significant importance to the state and, like the provisions of Corporate Securities Law of 1968 and the CLRA [Consumers Legal Remedies Act], is fundamental and may not be waived."); *see also McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961 (2017) (recognizing claims for

public injunctive relief under the UCL cannot be waived because "a law established for a public reason cannot be contravened by a private agreement."). Under California law, statutory rights may be waived only if (1) the statute does not prohibit waiver, (2) the statute's public purpose is incidental to its primary purpose, and (3) the waiver does not seriously undermine any public purpose the statute was designed to serve. *Sharon S. v. Super. Ct.*, 31 Cal. 4th 417, 426 (2003). "Even when a limited waiver is permissible, the waiver of an important right must be 'a voluntary and *knowing* act done with *sufficient awareness* of the relevant circumstances and *likely consequences*.'" *Pinela v. Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227, 252 (2015) (quotation marks omitted, italics in original).

In *Pinela*, 238 Cal. App. 4th at 251-52, the California Court of Appeal found an arbitration clause substantively unconscionable because it contained a choice of law provision that required the arbitrator to apply Texas law to the plaintiffs' claims. As Texas law did not recognize a private cause of action for the enforcement of the plaintiff's wage-and-hour claims, the court found the mandatory choice of law provision eliminated the substantive basis for the plaintiff's statutory claims, "blocking him from pursuing his claims at all, not merely burdening their pursuit in arbitration." *Id.* at 251. As nothing in the record supported finding the plaintiff had engaged in a valid and knowing waiver of his substantive rights, the court held the mandatory choice of law provision rendered the arbitration agreement substantively unconscionable. *Id.* at 252. The court, therefore, refused to enforce the arbitration provision, finding this portion of the agreement "plainly obnoxious to public policy in California." *Id*.

Similarly, here, the arbitration clause requires the arbitrator to "enforce [the Agreements] … as they are written," including a choice of law provision that mandates the application of Utah law and which would eliminate the substantive basis for Plaintiffs' claims. Dkt. 1-1 (Ex. A) at 6; Dkt. 1-2 (Ex. B) at 6. Also, like in *Pinela*, 238 Cal. App. 4th at 251-53, there is nothing in the record to indicate Plaintiffs

knowingly and voluntarily intended to waive substantive rights under the California Financial Code by agreeing to arbitrate their claims pursuant to the arbitration clause. Thus, the enforcement of the mandatory Utah choice of law provision would act as an impermissible waiver of Plaintiffs' substantive rights, rendering the arbitration clause substantively unconscionable.

Defendant contends Plaintiffs' argument is not a proper challenge to the arbitration clause itself, and is an improper challenge to the validity of the Agreements in their entirety, which must be directed to the arbitrator under *Buckeye*, 546 U.S. at 45-46, and its progeny. Mot. at 19-23 (citing *e.g.*, *Terminix Int'l Co. v. Quiles*, No. 2:19-cv-08234-AB (JPRx), 2019 WL 8198214, at *3 (C.D. Cal. Nov. 18, 2019)).[3] The court disagrees.

The effect of the choice of law provision on the arbitration clause is a separate issue from its effect on the remainder of the Agreements. While Plaintiffs' arguments regarding unconscionability may also have implications regarding the validity of the Agreements as a whole, that is a separate issue from whether enforcement of the arbitration clause, itself, would effect a substantively unconscionable waiver of Plaintiffs' unwaivable substantive rights. On that issue, the court finds that the arbitration clause itself is substantively unconscionable—the text of the clause would

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[3] Defendants' cited cases are distinguishable. *Cf. Terminix*, 2019 WL 819214 (finding respondent's argument that an arbitration agreement was unconscionable because it was contained in a contract of adhesion that allowed for unilateral modification by an employer did not go to the parties' specific agreement to arbitrate but challenged the validity of the employment contract as a whole); *Wainwright v. Melaleuca, Inc.*, No. 2:19-cv-02330-JAM-DB, 2020 WL 417546, at *6 (E.D. Cal. Jan. 27, 2020) (finding an arbitration agreement enforceable because the parties delegated all "issues relating to the scope and enforceability of the arbitration" to the arbitrator and "nothing in the parties' agreement restrict[ed] the arbitrator from considering the enforceability of [the] choice-of-law provision…"); *Tura v. Medicine Shoppe Int'l, Inc.*, No. 2:09-cv-07018-SVW (VBKx), 2010 WL 11506428, at *8, 12-18 (C.D. Cal. Mar. 3, 2010) (finding Missouri law would adequately protect Plaintiffs' unwaivable statutory rights under California law to the extent they conflict with Missouri law).

require the arbitrator to enforce the Utah choice of law provision and effect a waiver of Plaintiffs' substantive rights that was not knowingly and voluntarily given. *See Pinela*, 238 Cal. App. 4th at 245 (recognizing substantive unconscionability arises when provisions "impose unfair or one-sided burdens that are *different* from the clauses' inherent features and consequences"); *see id.* at 244 ("We are not the first court to recognize that obscure, difficult to comprehend choice of law clauses may serve as traps for the unwary in mandatory arbitration agreements"); *Kho*, 8 Cal. 5th at 125-26 ("[T]he more deceptive or coercive the bargaining tactics employed, the less substantive unfairness is required.").

Defendant also contends the court should compel arbitration even if it determines the choice of law provision is unconscionable, arguing that the provision can be severed without impacting the rest of the arbitration clause. Mot. at 17. The California Supreme Court set out the principles governing severance of illegal provisions in *Armendariz*, 24 Cal. 4th at 124.

> Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.

Here, the choice of law provision affects the substance of Plaintiffs' claims and cannot be extirpated from the arbitration clause without a significant impact on any potential arbitrator's determinations regarding the merits these claims. Accordingly, the court finds that this provision is not severable.

In sum, the court finds that the provision requiring the arbitrator to apply Utah law renders the arbitration clause substantively unconscionable and is not severable.

b. Public Injunctive Relief

Plaintiffs argue the arbitration clause is also substantively unconscionable because it attempts to waive Plaintiffs' right to public injunctive relief. Opp'n at 24.

Under California law, a contractual arbitration agreement that purports to waive a plaintiff's right to request in any forum public injunctive relief is contrary to California public policy and unenforceable. *McGill*, 2 Cal. 5th at 961 ("[T]he arbitration provision here at issue is invalid and unenforceable under state law insofar as it purports to waive [plaintiff's] statutory right to seek [public injunctive relief under the UCL]."); *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 822, 830-31 (9th Cir. 2019) (holding the FAA does not preempt the *McGill* rule).[4]

The arbitration clause states, in relevant part:

> You also waive your right to seek a public injunction if such a waiver is permitted by the FAA. If a court decides that such a waiver is not permitted, and that decision is not reversed on appeal, your Claim for a public injunction will be decided in court and all other Claims will be decided in arbitration under this Clause. In such a case the parties will request that the court stay the Claim for a public injunction until the arbitration award regarding individual relief has been entered in court. **In no event will a claim for public injunctive relief be arbitrated.**

Dkt. 1-1 (Ex. A) at 5; Dkt. 1-2 (Ex. B) at 5.

The Complaint requests a public injunction that, inter alia, bars Defendant "from directly or indirectly offering, providing, advertising, or acting as a service provider for any loans over the maximum interest rate…." Compl. at 37. Defendant contends Plaintiffs' request does not constitute a "true" claim for public injunctive relief, as their request would primarily benefit themselves and similarly situated individuals. Mot. at 27-28. The court disagrees.

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[4] Defendant acknowledges the Ninth Circuit found the FAA does not preempt the *McGill* rule, but argues the Ninth Circuit erred and that *Blair* was likely to be called into question in the Supreme Court's anticipated decision in *Viking River Cruises v. Moriana*, No. 20-1573. Reply at 19. The Supreme Court did not address *Blair* or the *McGill* rule in *Viking River*, 142 S. Ct. 1906 (2022). *See Vaughn v. Tesla, Inc.*, 87 Cal. App. 5th 208, 236-38 (2023) (recognizing *Viking River* did not address the *McGill* rule). Defendant's argument, thus, fails.

Here, like in *Blair*, 928 F.3d at 822-23, Plaintiffs seek to prohibit Defendant from engaging in conduct they contend violates the California Financial Code and the UCL. *See* Compl. ¶¶ 30-48, 135-43, 145. The requested injunction prohibiting Defendant "from directly or indirectly offering, providing, advertising, or acting as a service provider for any loans over the maximum interest rate…" seeks forward-looking relief against future unlawful acts aimed at the general public, and constitutes a valid claim for public injunctive relief. *See Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 543 (9th Cir. 2021).

The arbitration clause, thus, is substantively unconscionable to the extent it purports to waive Plaintiffs' right to seek public injunctive relief under the UCL. *See McGill*, 2 Cal. 5th at 961; *Blair*, 928 F.3d at 830-31. Nevertheless, as the arbitration clause also states that any request for public injunctive relief will not be arbitrated if a court decides that such a waiver is not permitted, and will be decided in court, Dkt. 1-1 (Ex. A) at 5; Dkt. 1-2 (Ex. B) at 5, the court finds that this provision is severable. *See Armendariz*, 24 Cal. 4th at 124 ("If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.").

Thus, while the court finds that the provision of the arbitration clause that purports to waive Plaintiffs' claims for public injunctive relief is substantively unconscionable, the provision is severable and does not add to the substantive unconscionability of the arbitration clause.

3. Conclusion Regarding Unconscionability

The court finds the arbitration clause is highly procedurally unconscionable due to legibility and technological issues, and substantively unconscionable because it impermissibly waives Plaintiffs' substantive rights under the California Financial Code. Applying the sliding-scale test, the court finds the arbitration clause is unenforceable. *See Armendariz*, 24 Cal. 4th at 114; *Pinela*, 238 Cal. App. 4th at 250.

/ / /

CONCLUSION

For the foregoing reasons, the court DENIES Defendant's Motion to Compel Arbitration and Stay Proceedings Pending Completion of Arbitration.

IT IS SO ORDERED.

Dated: March 29, 2023

FERNANDO L. AENLLE-ROCHA
United States District Judge