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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KATEY HUNTLEY and GARY JACKSON, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ROSEBUD ECONOMIC DEVELOPMENT CORPORATION; ROSEBUD LENDING LZO d/b/a ZPCALOANS; FINTECH FINANCIAL, LLC; TACTICAL MARKETING PARTNERS, LLC; and 777 PARNTERS, LLC,

Defendants.

Case No. 3:22-cv-01172-L-MDD

RESPONSE IN OPPOSITION TO DEFENDANTS TACTICAL MARKETING PARTNERS, LLC AND 777 PARTNERS, LLC'S MOTION TO COMPEL ARBITRATION

Judge: M. James Lorenz

No oral argument unless requested by the Court

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I. INTRODUCTION

Defendants Tactical Marketing Partners, LLC, and 777 Partners, LLC's (the "Defendants" or "777 Defendants'"[1]) Motion to Compel Arbitration as to Plaintiffs Katey Huntley and Gary Jackson ("Plaintiffs") should be denied.

First, the Defendants, as nonparties to the Arbitration Agreements, cannot enforce the Arbitration Agreements because they have failed to produce any evidence substantiating their claim of equitable estoppel, nor have they produced any evidence demonstrating that they are an "agent" or one of the "affiliated entities" supposedly covered by the terms of the Arbitration Agreements. Second, the Arbitration Agreements are unconscionable because they prospectively waive Plaintiffs' protections under federal and California state usury laws. Third, the Defendants have failed to show how the delegation clause in the Arbitration Agreements clearly and unmistakably delegate issues of arbitrability to an arbitrator, and any such delegation clause is unworkable in any event. Thus, both the Arbitration Agreements and the purported delegation clauses are unconscionable and thus unenforceable. Lastly, Defendants have waived any right to arbitration by acting inconsistently in contemporaneously filing a Rule 12(b)(6) motion to dismiss on the merits. As a result, the Court should deny Defendants' Motion to Compel Arbitration in its entirety.

Should the Court find a factual dispute as to any material issue on this Motion to Compel Arbitration, Plaintiffs respectfully request an evidentiary hearing to resolve such dispute pursuant to Federal Arbitration Act ("FAA"). Where the making of an arbitration agreement is in dispute, the FAA instructs courts to "proceed summarily to the trial thereof." 9 U.S.C. § 4. *See also GIB, LLC v. Salon Ware, Inc.*, 634 F. App'x 610, 611 (9th Cir. 2016) (finding district court erred in compelling arbitration without an evidentiary hearing where it was disputed

[1] Defendants collectively refer to themselves as the "777 Defendants" in their motion (Dkt. No. 8-1, 1:4-5).

whether the parties had entered into an agreement and there was no written agreement).

II. RELEVANT FACTS

Both Plaintiffs, who are individual unsophisticated California consumers, took out unsecured consumer loans ostensibly from Defendant Rosebud Lending LZO d/b/a ZocaLoans ("ZocaLoans"), on a take-it-or-leave-it basis. Dkt. No. 1 ("Compl."), ¶¶ 36, 49; Declaration of Gary Jackson ("Jackson Decl."), ¶¶ 2-10; and Declaration of Katey Huntley ("Huntley Decl."), ¶¶ 2-10. Each of the loans violate California state usury laws, as one has an interest rate of 736.38% APR, and the other an interest rate of 492.56% APR. Compl., ¶¶ 37, 50. Plaintiffs made one or more payments on the loans. *Id.*, ¶¶ 44, 57. Plaintiffs were eventually unable to make regular payments (*id.*) and ZocaLoans subsequently made several attempts to collect these usurious and unlawful loans. *Id.*, ¶¶ 44-47, 58-63. ZocaLoans even continued to call Plaintiffs about the loans using automated technology despite Plaintiffs having revoked any consent to receive such calls regarding their respective loans. *Id.*

Even though Plaintiffs' loans were originated, funded and served by ZocaLoans, their loans truly originated, funded and were serviced by non-tribal defendants, including the 777 Defendants. Compl., ¶¶ 39, 52. Despite the 777 Defendants' involvement in originating, funding, and servicing Plaintiffs' loans, neither of the 777 Defendants were parties to the loan agreements or Arbitration Agreements at issue. *See* Dkt. No. 8-3, p. 2; Dkt. No. 8-4, p. 2.

The Arbitration Agreements contained within the loan documents also limit the applicable law to the "laws of the Rosebud Sioux Tribe . . . without regard to the laws of any state or other jurisdiction" (Dkt. No. 8-3, p. 5; Dkt. No. 8-4, p. 5), in an effort by the lender to evade state usury laws. And, while the Arbitration Agreements in one place purports to allow for the application of AAA or JAMS consumer rules in arbitration, the same agreements state that "[t]he arbitrator shall

apply the laws of the Rosebud Sioux Tribe that govern the Agreement" (Dkt. No. 8-3, p. 6; Dkt. No. 8-4, p. 6), which Defendants have not shown provides any substantive body of contract law to pull from, such as a contract defense of unconscionability. Interestingly, the Arbitration Agreements broadly define "Disputes" to include state and federal laws (Dkt. No. 8-3, p. 5; Dkt. No. 8-4, p. 5) while at the same time they seek to prevent applicability of state or federal law to govern the loan agreements that contain the arbitration provisions.

III. LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), "district courts shall direct parties to proceed on issues as to which an arbitration agreement has been signed," but the role of the court is to first determine: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (internal quotation omitted). Before a court may grant a motion to compel arbitration, the FAA requires the court to determine whether a valid agreement to arbitrate exists. *Morse v. Servicemaster Global Holdings, Inc.*, No. C 10-00628 SI, 2012 U.S. Dist. LEXIS 144691, *8-9 (N.D. Cal. Oct. 4, 2012) (citing *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477-478 (9th Cir. 1991) (emphasis added)); *see also* 9 U.S.C. § 4. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). Therefore, the FAA "does not require parties to arbitrate when they have not agreed to do so." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). While the FAA creates a presumption in favor of arbitration, that presumption "does not confer a right to compel arbitration of any dispute at any time." *Morse*, 2012 U.S. Dist. LEXIS 144691 at *9 (citing *Volt Info. Scis. v. Bd. of Trs.,* 489 U.S. 468, 474 (1989)).

Where grounds "exist at law or in equity for the revocation of any contract, courts may decline to enforce such agreements." *See Doctor's Assocs., Inc. v.*

Casarotto, 517 U.S. 681, 683 (1996); *Ferguson v. Countrywide Credit Undus., Inc*., 298 F.3d 778, 782 (9th Cir. 2002). Arbitration agreements "are neither favored nor disfavored, but simply placed on an equal footing with other contracts." *Armendariz v. Foundation Health Psychare Services*, Inc., 24 Cal. 4th 83, 127 (2000). Arbitration agreements are contracts that are subject to the same defenses as any other contract, which includes fraud, duress, unconscionability, or other general contract law defenses. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745-46 (2011). "One such defense is that 'a law established for a public reason cannot be contravened by a private agreement.'" *Brown v. Madison Reed, Inc*., No. 21-cv-01233-WHO, 2021 U.S. Dist. LEXIS 164002, at *17 (N.D. Cal. Aug. 30, 2021) (citing *McGill v. Citibank, N.A.* 2 Cal. 5th 945 (Apr. 6, 2017)).

The United States Supreme Court has stated that "[w]hen deciding whether the parties agreed to arbitrate a certain matter [courts] should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Although there is a liberal federal policy favoring arbitration agreements, the court must still look to state law to address issues concerning the validity and enforceability of contracts. *Ticknor v. Choice Hotels Int'l, Inc*., 265 F.3d 931, 936-37 (9th Cir. 2001) (finding that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2").

IV. DEFENDANTS CANNOT ENFORCE THE ARBITRATION AGREEMENT AS NONPARTIES

1. Defendants are Not Parties to the Arbitration Agreements

"In general, an arbitration clause 'may not be invoked by one who is not a party to the agreement.'" *Meeks v. Experian Info. Sols., Inc*., No. 21-cv-03266-VC, 2021 WL 5149066, at *2 (N.D. Cal. Nov. 5, 2021) (quoting *Britton v. Co-op Banking Grp.*, 4F.3d 742, 744 (9th Cir. 1993)). Whether an arbitration clause is enforceable involves a two-step inquiry: (i) "whether the movant is a party to the contract in

which the arbitration clause is contained[;]" and if not, (ii) "whether the movant can nonetheless enforce the arbitration clause as a non-party." *Id.* at *2 (citing *Revitch v. DirecTV*, 977 F.3d 713, 716, n.2 (9th Cir. 2020).

Here, at step one, the 777 Defendants concede that they are not parties to the arbitration agreements. *See* Dkt. No. 8-1, pp. 1, 6 (indicating that Plaintiffs signed agreements with ZocaLoans and no one else and that the 777 Defendants are "non-signatories.") Therefore, the only way for the 777 Defendants to potentially enforce the arbitration agreements would be as non-parties, under step two.

2. Defendants Cannot Show a Right to Compel Arbitration under State Contract Law Theories

Since the 777 Defendants acknowledge that they are not parties to the arbitration agreements, they could only enforce arbitration agreements, if at all, under limited circumstances as non-parties. "A non-party may . . . enforce an arbitration clause under state contract law theories that permit non-parties to enforce a contract[.]" *Meeks*, 2021 WL 5149066, at *2. Among these theories are "1) incorporation by reference; 2) assumption; 3) agency: 4) veil-piercing/alter ego; and 5) estoppel." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (concluding that defendant could not compel arbitration as a non-party).

Here, the 777 Defendants base their motion to compel arbitration on the theory of equitable estoppel. "Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013) (internal quotation marks omitted). Where a nonsignatory seeks to enforce an arbitration clause, the doctrine of equitable estoppel applies in two circumstances:

> (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract, and (2) when the signatory

> alleges substantially independent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement.

Kramer, 705 F. 3d at 1128-29 (internal citations, quotation marks, and alterations omitted).

Defendants rely on the first theory—i.e., that Plaintiffs must rely on the terms of the written agreement in asserting their claims against Defendants or that Plaintiffs' claims are intimately founded in and intertwined with the underlying contract. *See* Dkt. No. 8-1, p. 11. Not so. Defendants have not explained how Plaintiffs rely on any of the terms of the ZocaLoans agreements in asserting their claims against the 777 Defendants, nor have they demonstrated how Plaintiffs' claims are intimately founded in and intertwined with the underlying loan agreements. Plaintiffs here are not alleging breach of contract, for example. *See Rajagopalan v. Noteworld, LLC*, 718 F.3d 844, 847-8 (9th Cir. 2013) (holding that plaintiff did not allege breach of contract but instead had independent statutory claims, making equitable estoppel inappropriate).

Also, Defendants have failed to show how Plaintiffs claim any benefit of the loan agreements in bringing suit. *See Kramer,* 705 F.3d at 1128. Plaintiffs' claims arise independently of the terms of the ZocaLoans agreements that contain the arbitration provisions, as Plaintiffs complain against the 777 Defendants for their hand in operating the illegal payday lending scheme (Compl., ¶¶ 23-24, 27, and 52). *See Kramer*, 705 F.3d at 1132 (plaintiffs' consumer claims did "not seek to enforce or challenge the terms, duties, or obligations of the Purchase Agreements" containing the arbitration provisions); *Safley v. BMW of N. Am., LLC*, No. 20-cv-00366-BAS-MDD, 2021 U.S. Dist. LEXIS 22577, at *20 (S.D. Cal. Feb. 5, 2021) (finding defendant "is not entitled to enforce the Sale Contract's arbitration provision under the equitable estoppel doctrine"); *Amadeus Stanislausky v.*

Mercedes-Benz USA, LLC, No. CV 21-5484-JFW(JPRx), 2021 U.S. Dist. LEXIS 258424, at *8 (C.D. Cal. Sep. 10, 2021) (plaintiff's terms arose "independently of the terms of the Lease containing the arbitration provision"). In other words, Plaintiffs do not seek to enforce any provisions of the loan agreements here or derive any benefits therefrom.[2]

The 777 Defendants further contend that Plaintiffs' claims are covered by the "Arbitration Agreements' expansive definition of 'Disputes.'" Dkt. No. 8-1, p. 11. "Disputes," as that term is used in the Arbitration Agreements, is said to cover "related third parties," which include ZocaLoans's "employees, agents, directors, officers, governors, managers, members, parent company or affiliated entities." *Id.*, p. 6. However, courts in the Ninth Circuit have declined to compel arbitration when presented with similar language.

For instance, in *Jurosky v. BMW of N. Am.*, the plaintiff brought action against the dealership, with whom he signed a contract containing an arbitration provision, and the manufacturer. 441 F. Supp. 3d 963, 966 (S.D. Cal. 2020). The manufacturer, who brought a motion to compel arbitration, contended that "Plaintiff's arbitration provision contemplates inclusion of any dispute that 'arises out of . . . [the] purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract).'" *Id.* at 973. Analyzing the above arbitration provision, the court concluded that the language did not give the manufacturer the right to compel arbitration. *Id.* "Rather, the language refers to types of disputes between *Plaintiff and the dealership* that may be arbitrated by *Plaintiff or the dealership*." *Id.* (emphasis in original). *See also Chen v. BMW of N. Am., LLC*, No. 21-cv-03531-DMR, 2021 U.S. Dist. LEXIS 152985, at *10 (N.D. Cal. Aug. 13, 2021) (finding that the definition of "Claims" only identified which claims may be arbitrated and what the subject matter of those

[2] Defendants correctly recognize that "Plaintiffs did not attach their loan agreements to the Complaint" (Dkt. No. 8-1, n. 2).

claims may be; it did not identify who may compel arbitration). Such cases strongly counsel against interpreting the Arbitration Agreements here as including the 777 Defendants within their coverage.

The Defendants' only basis for arguing that they are an "agent" or "affiliated entity" covered by the Arbitration agreements is in looking to Paragraphs 20-23 of the Complaint (Dkt. No. 8-1, p. 11). Paragraph 23, for example, alleges that ZocaLoans "is run by Defendants 777 and TACTICAL, who operate their illegal payday lending scheme out of Miami, FL." Compl., ¶ 23. Aside from allegations in the Complaint concerning the conduct of Defendants, the Defendants offer no actual evidence to substantiate their position that they are agents or affiliated entities of ZocaLoans. *See Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (the party seeking to compel arbitration has the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence). Regardless, even if they did provide evidence, it would be improper to afford the Defendants protections under the Arbitration Agreements simply by virtue of a broadly-worded definition of "Disputes" as oppose to clear language making the Defendants at least intended beneficiaries of the Arbitration Agreements – which is not the case here.

Therefore, the Defendants have not and cannot satisfy their burden in compelling arbitration based on an equitable estoppel theory or in looking to how the Arbitration Agreements define "Disputes."

V. THE COURT SHOULD DETERMINE THRESHOLD ISSUES

"[C]hallenges to the validity of the arbitration clause itself are generally resolved by the court in the first instance." *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.*, 22 Cal. App. 5th 1096, 1108, 232 Cal. Rptr. 3d 282, 289 (2018). One narrow exception to this general rule is where the parties have "clearly and unmistakably agreed to delegate questions regarding the validity of the arbitration clause to the arbitrator." *Id.* (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (emphasis added)). "California courts have recognized that a court is

the appropriate entity to resolve challenges to a delegation clause nested in an arbitration clause when a specific contract challenge is made to the delegation clause." *Id*. at 1109.

The 777 Defendants argue that questions of arbitrability have been delegated to an arbitrator. *See* Dkt. No. 8-1, p. 14. That is incorrect. Defendants point only to a single vague sentence in the Arbitration Agreements that does not amount to a "clear and unmistakable" intent for threshold issues of arbitrability to be delegated to an arbitrator. *Id.*; *see also*, Dkt. No. 8-3, p. 6; Dkt. No. 8-4, p. 6. Indeed, the plain language of the Arbitration Agreements demonstrate no express intent to have the issue of whether the Arbitration Agreements are unenforceable delegated to an arbitrator.

First, the section of the Arbitration Agreements relied on by Defendants for a purported delegation clause states:

> The word 'Dispute' is given the broadest possible meaning and includes, without limitation . . . the validity and scope of this Provision and any claim or attempt to set aside this Provision …

Dkt. No. 8-3, p. 5; Dkt. No. 8-4, p. 5. However, such generalized language in defining covered disputes does not satisfy the required intent to have the issue of arbitrability decided by an arbitrator under a clear and convincing standard. *See Aguilera v. Matco Tools Corp.*, No. 3:19-cv-01576-AJB-AHG, 2020 U.S. Dist. LEXIS 16457, at *19 (S.D. Cal. Jan. 31, 2020) ("Given the generalized language of the alleged delegation clause, the Court finds no such 'clear and unmistakable' agreement to delegate.") Much like the delegation clause at issue in *Aguilera*, the delegation clause here lacks any language expressly delegating questions of "'interpretation, applicability, enforceability, or formation' to an arbitrator." *Id.* (quoting *Armenta v. Go-Staff, Inc.*, No. 16-CV-2548 JLS (AGS), 2017 U.S. Dist.

LEXIS 67784, at *4 (S.D. Cal. May 3, 2017)).[3]

Although the "Ninth Circuit has held that 'incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability,' it expressly left open the question of whether the holding applies to unsophisticated parties." *Magill v. Wells Fargo Bank, N.A.*, No. 4:21-cv-01877 YGR, 2021 U.S. Dist. LEXIS 248891, at *15 (N.D. Cal. June 25, 2021) (quoting *Brennan v. Opus Bank*, 796 F.3d 1125, 1128 (9th Cir. 2015)). Indeed, "[w]here at least one party is unsophisticated, judges in this circuit routinely find that the incorporation of the AAA rules is insufficient to establish a clear and unmistakable agreement to arbitrate arbitrability." *Id.* (citing *Ingalls v. Spotify USA, Inc.*, No. 16-cv-03533-WHA, 2016 U.S. Dist. LEXIS 157384, at *9 (N.D. Cal. Nov. 14, 2016) (collection of cases)) (citing *Eliess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1253 (N.D. Cal. 2019) (noting that, "[f]or an unsophisticated plaintiff to discover she had agreed to delegate gateway questions of arbitrability, she would need to locate the arbitration rules at issue, find and read the relevant rules governing delegation, and then understand the importance of a specific rule granting the arbitrator jurisdiction over questions of validity …")).

Defendants cite to two cases to argue that "[e]ven if one construes the claim in the Complaint that Plaintiffs' loans were 'unlawful debts,' courts have found such arguments do not act as a challenge to a delegation provision itself, but rather the agreement as a whole." Dkt. No. 8-1, p. 16. However, neither of those cases looked at whether the plaintiff particularly challenged the arbitration agreements at issue in the complaint, contrary to the Defendants' suggestion here. Plaintiffs in the present action do directly challenge the delegation clause (*see* Section V, *infra*). *See*

[3] *See also AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 651 (1986) ("It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a 'lack of work' determination by the Company.").

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("respondents did not challenge the arbitration provision itself, but instead claimed that the entire contract was void" in opposing a motion to compel); *Sleeper Farms v. Agway, Inc.*, 506 F.3d 98, 101-03 (1st Cir. 2007) (the court considered plaintiff's arguments made on appeal as to the district court's "2002 order referring the dispute to the arbitrator, and the 2006 order confirming the arbitrator's award").

Here, both Plaintiffs are individual consumers (they are not attorneys), who entered into the consumer loan agreements on a take-it-or-leave-it basis, with virtually no bargaining power, and are thus reasonably considered unsophisticated parties for the purposes of reviewing the Arbitration Agreements. Jackson Decl., ¶¶ 3-10; Huntley Decl., ¶¶ 3-10. Thus, the Court may and should decide the threshold issue of arbitrability because the purported delegation clause does not clearly and unmistakably delegate issues of arbitrability to an arbitrator. In other words, there is no separate agreement of the parties to have an arbitrator decide issues of arbitrability. *See generally Rent-A-Center, W., Inc.*, 561 U.S. at 68 (noting delegation clauses are severable from the rest of the agreement). And, perhaps equally important is the fact that the 777 Defendants, nonsignatories, fail to make any credible argument that they may enforce such a *separate* delegation agreement.

Lastly, even if, *arguendo*, there were a valid delegation agreement, the Court should not enforce it because it is unworkable and therefore unconscionable. Specifically, the Arbitration Agreement requires that the arbitrator apply the laws of Rosebud Sioux Tribe, yet there has been no showing by the 777 Defendants that there exists a body of general contract law under the laws of the Rosebud Sioux Tribe that may be applied by the arbitrator, such as general contract defenses like unconscionability. As explained in *Dunn v. Glob. Tr. Mgmt., LLC*, 506 F. Supp. 3d 1214, 1230 (M.D. Fla. 2020),[4] this makes any delegation provision unworkable and

[4] On appeal, Case Nos. 21-10120 and 21-10121 (consolidated).

unenforceable.

In sum, it is for this Court to decide threshold issues of arbitrability here.

VI. CALIFORNIA LAW APPLIES AND THE ROSEBUD SIOUX TRIBE CHOICE OF LAW PROVISION IS UNENFORCEABLE

The Motion seeks to enforce Arbitration Agreements containing language purporting that "the laws of the Rosebud Sioux Tribe" apply. Dkt. No. 8-3, pp. 4, 6; Dkt. No. 8-4, pp. 4, 6. However, doing so here would be unreasonable, unconscionable, and contrary to public policy.

Under California's choice of law framework, California courts enforce choice-of-law clauses only where the chosen state "has a substantial relationship to the parties or the transaction." *See ABF Capital Corp v. Osley*, 414 F.3d 1061, 1065 (9th Cir. 2014). Specifically, under the Restatement approach, the court must first determine "whether the chosen state has a substantial relationship to the parties or their transaction, or . . . whether there is any other reasonable basis for the parties' choice of law." *Hoffman v. Citibank, N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008) (quoting *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992). Also, courts consider whether the "chosen state's law is contrary to a fundamental policy of California." *Id.* "If such a conflict with California law is found, 'the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue." *Id.* "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 12 (2001).

Here, the laws of the Rosebud Sioux Tribe have no substantial relationship to either Plaintiff, both of whom are Californians who resided in California at the time they entered the contracts at issue. Jackson Decl., ¶¶ 4-7; Huntley Decl., ¶¶ 4-7. The laws of the Rosebud Sioux Tribe have no substantial relationship with the transaction at issue in this matter, and there is no reasonable basis to select the laws

of the tribe to govern this matter. Two out of Plaintiffs' four causes of action are brought under *California* law. Particularly, Plaintiffs assert claims on behalf of themselves and others similarly situated under *California*'s Unfair Competition Law ("UCL") and California's Rosenthal Fair Debt Collection Practices Act ("RFDCPA"). *See* Dkt. No. 1.

California has a strong public policy in protecting California's consumers from unfair and deceptive business practices (including those alleged here). This public policy encompasses California's desire to protect against any "unlawful, unfair or fraudulent business act or practice …", Cal. Bus. & Prof. Code §§ 17200, and to "prohibit debt collectors from engaging in unfair or deceptive acts or practices in collection of consumer debts …", Cal. Civ. Code § 1788.1. Forcing Plaintiffs to redress their claims under the laws of the tribe would prevent them from enjoying the benefits of California's strong public policy against unfair competition and debt collection provided by the UCL and RFDCPA. Choice of law and forum selection clauses that operate as a waiver of a plaintiff's statutory rights are unenforceable and against public policy. *See Mitsubishi Motors Corp. v. Soler Chrystler-Plymouth*, 473 U.S. 614, 638 n.20 (1985).

California has a materially greater interest than the tribe in protecting the rights of California citizens for conduct that occurred in California, which resulted in violations of California law. And, three (3) out of the five (5) classes Plaintiffs seek to represent are California sub-classes. Compl., ¶¶ 72-74. Indeed, none of the classes Plaintiffs seek to represent consist of individuals living within or even associated with the tribe. *Id.*, ¶¶ 70-74.

Therefore, California clearly has a materially greater interest than the tribe in the outcome of this dispute as it directly impacts California residents, implicates California law, and the violation occurred in California. *See Delisle v. Speedy Cash*, 818 F. App'x 608, 611 (9th Cir. 2020) (holding that "Kansas law is contrary to California policy and that California holds a materially greater interest in th[e]

litigation"); *see also Saravia v. Dynamex, Inc*., 310 F.R.D. 412, 419 (N.D. Cal. 2015) ("California has a materially greater interest than Texas in adjudicating this dispute inasmuch as plaintiff is located in California, and the agreements at issue were executed and performed in California, while Texas's only interest in the dispute arises out of the fact that one of the defendants is headquartered there. Accordingly, California law governs Saravia's defenses to the enforcement of the arbitration provisions…").

Consequently, California law applies to the loan agreements (including the Arbitration Agreements) under California's choice of law framework.

VII. THE ARBITRATION AGREEMENTS ARE UNCONSCIONABLE

To be unconscionable under California law, an agreement must be both procedurally and substantively unconscionable. *See Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 981 (9th Cir. 2007). However, *procedural and substantive unconscionability need not be present in the same degree*; the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to reach the conclusion that the term is unenforceable, and vice versa. *See Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000). In other words, California courts apply a "sliding scale" when determining unconscionability. *Id.* at 981-82.

California and federal courts alike have found that consumer contracts of adhesion are procedurally unconscionable. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853 (9th Cir. 2009) ("Procedural unconscionability generally takes the form of a contract of adhesion, that is, a contract drafted by the party of superior bargaining strength and imposed on the other, without the opportunity to negotiate the terms.").

1. The Arbitration Agreements are Procedurally Unconscionable

"Procedural unconscionability addresses the manner in which agreement to the disputed terms was sought or obtained, such as unequal bargaining power

between the parties and hidden terms included in contracts of adhesion." *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1099-100 (2002) (holding amendment to cardholder agreement was unconscionable because the only option if plaintiff did not want to agree to terms was to cancel their account). Further, "[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability." *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001). Furthermore, "California courts have found that a degree of procedural unconscionability may be found when an arbitration provision refers to arbitration rules, but a copy of those rules [is] [sic] not provided to the individual." *Solo v. Am. Ass'n of Univ. Women*, 187 F. Supp. 3d 1151, 1161 (S.D. Cal. 2016). The same is true when the costs of arbitration are also omitted from the arbitration agreement. *Id.*

Here, ZocaLoans, as the lender, is the party with far superior bargaining power to the Plaintiffs, both of whom are individual consumers. When Plaintiffs engaged ZocaLoans to receive a loan, they were provided with Arbitration Agreements (as well as the choice of law clauses) on a take-it-or-leave-it basis – a classic adhesion contract. Jackson Decl., ¶¶ 3-10; Huntley Decl., ¶¶ 3-10. And there was no option to opt out of arbitration. *Edwards v. Chartwell Staffing Servs.*, No. CV 16-9187 PSG (KSx), 2017 U.S. Dist. LEXIS 223582, at *7 (C.D. Cal. May 30, 2017) (finding procedural unconscionability due to lack of opt-out procedure).

Moreover, such online payday loans are designed for, and cater to, unsophisticated individuals like the Plaintiffs. Although ZocaLoans indicated that either AAA or JAMS rules would govern the arbitration's rules, they failed to provide Plaintiffs with a copy of those rules (Jackson Decl., ¶ 11; Huntley Decl., ¶ 11). *See e.g., Zullo v. Superior Court*, 197 Cal.App.4th 477, 485, 127 Cal.Rptr.3d 461 (Cal. Ct. App. 2011) ("The absence of the AAA (American Arbitration Association) arbitration rules adds a bit to the procedural unconscionability.").

The Arbitration Agreements, by their terms, are also confusing as to whether

the procedural rules of the tribe also apply to Plaintiffs' claims, were they brought in or compelled to arbitration. *See, e.g.*, Dkt. No. 8-4, p. 5 (under "ARBITRATION PROCEDURES," it states that "[w]e adhere to and follow the Consumer Due Process Protocol of the AAA . . . and the JAMS Minimum Standards of Procedural Fairness …", but then say "The arbitrator shall apply the laws of the Rosebud Sioux Tribe that govern this agreement.") Again, there is no indication that the laws of the Rosebud Sioux Tribe would allow Plaintiffs to bring claims of unconscionability to challenge the Arbitration Agreements.[5] Indeed, the 777 Defendants make no effort in their motion to point to, or provide evidence of, the actual laws of the tribe that would be applied to the agreements.

As such, the Arbitration Agreements, as well as the choice of law clauses, are procedurally unconscionable as part of a contract of adhesion with unsophisticated consumers with little to no bargaining power. Similarly, the purported delegation agreements (discussed in Section V, above) are contracts of adhesion (to the extent the constitute an actual separate agreement to delegate threshold issues to arbitration) and therefore procedural unconscionable.

2. <u>The Arbitration Agreements are Substantively Unconscionable</u>

Substantive unconscionability analyzes whether the agreement is so one-sided as to be objectively unreasonable. Such substantive unconscionability is typically found where there is procedural unconscionability, and thus no ability of one party to bargain. *See Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532 (1997) (". . . a contract is largely an allocation of risks between the parties, and

[5] At best, it appears that the tribal code available online (which is subject to judicial notice under Fed. R. Evid. 201 as part of the National Indian Law Library) contains a provision for "Damages for Breach of Contract" in Title 8 – Remedies. *See* https://narf.org/nill/codes/rosebudcode/index.html (last accessed on December 27, 2022). And, while the tribe seems to have a courthouse, the website for that courthouse does not appear to provide access to any relevant tribal codes or laws. *See* https://rstcourt.wixsite.com/rstcourts (last accessed on December 27, 2022).

therefore that a contract term is substantively suspect if it reallocates the risk of the bargain in an objectively unreasonable or unexpected manner."). *See also Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1244 (2016) ("The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as 'overly harsh,' 'overly oppressive,' . . . or 'unfairly one-sided.'") (internal citations omitted). "Substantive unconscionability may be shown if the disputed contract provision falls outside the nondrafting party's reasonable expectations." *Parada v. Sup. Ct.*, 176 Cal. App. 4th 1554, 1573 (2009). Mandatory waivers of non-waivable statutory rights are "the sort of one-sided and overly-harsh terms that render an arbitration provision substantively unconscionable." *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 966, 1004 (9th Cir. 2010).

As previously explained, the tribal choice-of-law provision is substantively unconscionable because it acts as an unreasonable prospective waiver of federal[6] law protections as well as California[7] state statutory protections against usurious loans. *See Turng v. Guaranteed Rate, Inc.*, 371 F. Supp. 3d610, 631 (N.D. Cal. 2019) (holding that a "choice of law provision has a high degree of substantive unconscionability" when it prevents a party from bringing "certain California state law claims" that do not have an equivalent under the state noted in the choice of law provision). Similarly, the Arbitration Agreements deprive Plaintiffs of the opportunity to vindicate their state-law rights by applying tribal and federal law to the exclusion of state consumer protection laws. According to the court in *Dunn,* 506 F. Supp. 3d at 1236, such a "scheme seeks to abuse the arbitral forum by using it to evade state consumer finance protections and usury laws that [the lender] (now

[6] *See e.g.*, 12 U.S.C. § 86; 18 U.S.C. § 1961 & 1962.

[7] *See e.g.*, Cal. Const. art. XV, § 1; Cal. Civ. Code § 1670.5; Cal. Fin. Code § 22303 (interest rate cap for loans under $2,500); Cal. Fin. Code § 22304.5 (interest rate cap for loans between $2,500 and $9,999).

Defendants) could not otherwise avoid."

As reasoned by the court in *Dunn,* 506 F. Supp. 3d at 1230, the prospective waiver of "state-law claims" is unjust and makes the choice-of-law provision unconscionable. Indeed, Plaintiffs' unconscionability arguments here are even stronger than those in *Dunn* because the choice-of-law provision not only excludes state law protections but also any "other jurisdiction" under the "LAW THAT APPLIES" section (Dkt. No. 8-2, p. 4 of 9; Dkt. 8-4, p. 5 of 9[8]), which would include federal law protections as well. *See e.g.*, *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 675 (4th Cir. 2016) (holding that a choice of law provision that "waives a potential claimant's federal rights through the guise of a choice of law clause" was unenforceable); *see also Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 240-41 (3d Cir. 2020) (arbitration agreement and delegation clause in online payday loan providing tribal law applied and requiring arbitration unenforceable under prospective waiver doctrine); *Jackson v. Payday Fin. LLC*, 764 F.3d 765, 778, 783 (7th Cir. 2014) (choice of law provision applying tribal law and requiring arbitration to online payday loan procedurally and substantively unconscionable and unenforceable); *Titus v. ZestFinance, Inc.*, 2018 U.S. Dist. LEXIS 179380, 2018 WL 5084844, at *5 (W.D. Wash. Oct. 18, 2018) (forum selection clause and choice of law clauses requiring tribal law application unenforceable prospective waivers in online payday loan agreements), *appeal dismissed as district court decision vacated as moot by Titus v. Blue Chip Fin.*, 786 F. App'x 694 (9th Cir. 2019).

Nor does the Code of the Rosebud Sioux Tribe appear to allow for judicial review of arbitration awards, given the "arbitrator shall apply the laws of the Rosebud Sioux Tribe that govern this agreement." Dkt. No. 8-3, p. 5; *see also* Dkt. No. 8-4, p. 5 (defining "Dispute" to include" "*any claim or attempt to set aside*

[8] If there were any doubt, that same section says "… in the event of a bona fide dispute between you and us, Tribal Law shall exclusively apply to such dispute." Dkt. No. 8-2, p. 4 of 9; Dkt. 8-4, p. 5 of 9 (emphasis added).

this Provision …") (emphasis added). This means that even in arbitration, Plaintiffs would not be afforded protections of California state or federal law. In other words, "all roads lead to tribal law with no way out," *Dunn,* 506 F. Supp. 3d at 1239, without the option for even limited judicial review, which is substantively unfair.

Thus, the Arbitration Agreements (including the choice-of-law provision) are substantively unconscionable because they are one-sided and prevent Plaintiffs from seeking relief under California law for the usurious loans' interest rates.

3. The illegal choice-of-law provision cannot be saved by the severance doctrine

Should the 777 Defendants argue for severance of the illegal choice-of-law provision, that relief should be denied because said provision is integral to the tribe's arbitration scheme of preventing vindication of state consumer protection laws that prohibit such usurious (and oppressive) payday loan interest rates. *See Dunn,* 506 F. Supp. 3d at 1239 (refusing to sever similar offending tribal choice-of-law provision); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) ("Good authority counsels that severance should not be used when an agreement represents an 'integrated scheme to contravene public policy.'"), citing *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. Or. 1994) ("It is a well-known principle in contract law that a clause cannot be severed from a contract when it is an integrated part of the contract.") (quoting E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990)); *Newton v. Am. Debt Servs*., 854 24 F. Supp. 2d 712, 730 (N.D. Cal. 2012) (finding "arbitration clause as a whole is unconscionable").

VIII. DEFENDANTS HAVE WAIVED ANY RIGHT TO COMPEL ARBITRATION BY BRINGING A MOTION TO DISMISS ON THE MERITS THAT HAS NOT BEEN WITHDRAWN

Arbitration agreements are subject to general contract principles like waiver. *Newirth ex rel. Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 940 (9th Cir. 2019). To show waiver of the right compel arbitration, the party opposing

arbitration must show (1) the party knew of its existing right to compel arbitration; and (2) the party took intentional acts inconsistent with that existing right. *Id.* While there was a third element (prejudice), the Supreme Court recently disavowed the need for a showing of prejudice because that element put arbitration agreements on better footing than other contracts, in violation of the Federal Arbitration Act's ("FAA") command to treat arbitration agreements like all other contracts. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). In *Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016), the Ninth Circuit held the defendants acted inconsistently with pursuing arbitration when they spent months actively litigating their case, including filing a motion to dismiss "on a key merits issue." *Id.* at 1126.

Here, Defendants have acted inconsistent with any right to compel arbitration because they have also filed a Rule 12(b)(6) motion to dismiss (Dkt. No. 9) which has not been withdrawn and is being briefed concurrently. Indeed, Defendants acknowledge their motion to dismiss that was filed contemporaneously with the motion to compel arbitration. Dkt. No. 9-1, 18:3-5. By engaging in litigation through the Rule 12(b)(6) motion to dismiss, Defendants has thus waived that right by engaging in litigation and its calculated hedging about the arbitration issue. A party acts inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case to take advantage of being in court. *Newirth*, 931 F.3d at 941. "Seeking a decision on the merits of a key issue in a case indicates an intentional and strategic decision to take advantage of the judicial forum." *Id.* Defendants should be held to account for their choice to engage in litigation through substantive motion practice on key legal issues under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IX. CONCLUSION

In conclusion, the 777 Defendants' Motion to Compel Arbitration should be denied in its entirety. Defendants have failed to show that they are permitted to

enforce the Arbitration Agreements as nonparties. Further, Defendants have failed to demonstrate that the question of arbitrability should be decided by an arbitrator rather than the Court, as the purported delegation clause is unworkable. The Arbitration Agreements (including the choice-of-law provisions) are procedurally and substantively unconscionable as a contract of adhesion and an improper prospective wavier of federal and California state law protections against usurious payday loans. Should the Court determine a valid and enforceable arbitration agreement exists, the Court should nevertheless hold that any right to compel arbitration has been waived due to Defendants having filed and not withdrawn a motion to dismiss under Rule 12(b)(6). Lastly, Plaintiffs respectfully request an evidentiary hearing on any disputed issues of fact pertinent to the Motion to Compel Arbitration.

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