UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY ACTION

Defendant Opportunity Financial, LLC ("OppFi") moves, 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 and to stay this case pending completion of arbitration. Dkt. 12. Plaintiff opposes the motion. Dkt. 13. Having considered the parties' filings and balance of the record, the Court finds the motion may be determined without oral argument and **GRANTS** OppFi's motion.

BACKGROUND

A. Factual and Procedural Background

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. Attached to the Complaint is a Promissory Note dated May

11, 2021. Dkt. 1-1, Ex. A (the "Note"). The Note identifies FinWise as the "Lender," *id*. at 1, provides that FinWise will formally "extend credit" to Plaintiff, *id.* at 1 and states Plaintiff "promise[d] to pay [FinWise] . . . until the loan is fully paid." *Id*. ¶ 3. The Note identifies OppFi as the servicer on the loan. *Id*. ¶ 4.

Although FinWise is listed as the "Lender" on the Note, Plaintiff alleges OppFi is the "true lender" because it "holds the predominant economic interest" in the loan transaction. Dkt. 1, ¶ 7. Plaintiff asserts because OppFi is the true lender, it is subject to interest rate caps under Washington law, which the interest rate on her loan exceeds. *Id*. ¶¶ 30-32, 119-124. As a result, Plaintiff contends her loan agreement is "void and unenforceable," *id*. ¶ 12, and 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.

Plaintiff lives and works in the State of Washington. Dkt. 14, Declaration of Katherine Fama, ¶ 2. Plaintiff learned of OppFI through the internet and applied for loans via the internet on her mobile phone. *Id*. at ¶¶ 4, 5. Plaintiff read the loan agreement but only up to the payment schedule. *Id.* at ¶ 6. Plaintiff was unaware of FinWise Bank and or its involvement with her loans or loan applications. *Id.*, ¶¶ 10, 11. According to Plaintiff, she did not see or read the arbitration agreement, the opt-out provision, or the Utah choice-of-law requirement and even if she had, she would not have understood their importance or applicability as she is not a lawyer and did not graduate high school. *Id*. at ¶ 3.

Chris McKay, Chief Risk and Analytics Officer of OppFi, is personally familiar with OppFi's services to banks and OppLoan's online technology platform and consumer loan application process. Dkt. 17, Declaration of Chris McKay, ¶ 2. Mr. McKay is also familiar with

the systems and processes related to personal loans made by banks, which are obtained through the OppLoans online platform. According to OppFi's records, Plaintiff entered into seven Promissory Notes with FinWise Bank between August 15, 2019 and May 11, 2021, which contain identical provisions relating to arbitration. *Id.*, ¶¶ 3-9; Ex. A-G.

B. Arbitration Clause[1]

The Note contains an "ARBITRATION DISCLOSURE" notice on the second page, in bold lettering, as follows:

> **This Promissory Note includes an Arbitration Clause (the "Arbitration Clause"). In the event of a dispute related to this loan, your ability to have the dispute resolved in court is limited. You can "opt out" of the Arbitration Clause as set forth below. Please review the Arbitration Clause carefully before signing this Note.**

See, e.g., Dkt. 1-1, Ex. A at 5-7; Dkt. 17, McKay Decl., ¶ 9, Ex. G.

The Arbitration Clause is prominently displayed within the Note, spanning three pages of an eight-page agreement. Dkt. 1-1 at 5-7. The Arbitration Clause is set out in a user-friendly chart with questions and answers covering the background, scope, applicable law, process, contact information, and an opt-out provision described below. The Arbitration Clause is referenced throughout the Promissory Note, including the first page, referred to above, which advises Plaintiff to "review the Arbitration Clause carefully before signing this Note." *Id*. at 2.

The Arbitration Clause also contains an opt-out provision, permitting Plaintiff to opt out of arbitration within 60 days. Dkt. 1-1 at 7, ¶ 21. The opt-out provision is prominently displayed in the Note, including the top of the Note in bold text, and within the Arbitration Clause. *Id*. at 2 **("You can 'opt out' of the Arbitration Clause as set forth below."**); *id*. at 7, ¶ 21:

[1] Whether referred to in the Note or herein as the Arbitration Clause or the Arbitration Agreement, at issue here is whether the parties' agreement to arbitrate is enforceable.

> If you don't want to arbitrate, can you opt-out of the Clause?
>
> Yes. Within 60 days.
>
> Write us within 60 calendar days of signing this Note to opt-out of this Clause via email at compliance@oppLoans.com or by mail to OppLoans, ATTN: Compliance Department, One Prudential Plaza, 130 E. Randolph St, Suite 3400, Chicago, IL 60601. List your name, address, loan number and date. This is the only way you can opt out.

Dkt. 1-1, Ex. A at 7. Plaintiff did not opt out of the agreement to arbitration with respect to the May 11, 2021 Note nor did she opt out of the agreements to arbitrate with respect to her prior six Notes with FinWise.

Plaintiff contends the "opt-out provision does not cure the substantive unconscionability of the Arbitration Clause because the font used is in 4.5 font." *See* Dkt. 15, Ex. A, Terzian Decl. at ¶ 13. However, Plaintiff does not allege technical issues like those encountered by the plaintiffs in *Carpenter v. Opportunity Financial, LLC*., 2023 WL 2960327 (C.D. Cal. March 29, 2023). She accessed the loan application on her telephone, applied for the loan on her telephone, and read the payment schedule, but chose not to read beyond the payment schedule before she signed the Note. In fact, Plaintiff accessed, applied for, and signed seven Notes with FinWise in the same manner. OppFi also points out that in an electronic document, the size of the text scales to the size of the viewing window and can be enlarged or shrunken. *See* Dkt. 17, McKay Decl., p. 2 fn.1 (OppFi does not set a static size for the words that appear on any screen and implemented code that scales the text to the size of the viewing window).

The Arbitration Clause governs "all 'Claims' of one party against another," defined as:

> [T]he word "Claims" has the broadest reasonable meaning consistent with this Clause. It includes all claims even indirectly related to your application, the loan, this Note and your agreements with us. It includes claims related to information you previously gave us. It includes all past agreements. It includes extensions, renewals, refinancings or payment plans. It includes claims related to collections,

> privacy and customer information. However, it DOES NOT include claims related to the validity, enforceability, coverage or scope of this Clause. Those claims shall be determined by a court.

Dkt. 1-1, at 5, ¶ 21 (emphasis in original).

C. Governing Law

The FAA governs this Court's review of the Arbitration Clause. The Note explicitly selects the FAA as the governing law. Dkt. 1-1 at 4, ¶ 17 (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"), 9 U.S.C. §§ 1-9." Dkt. 1-1 at 4. Thus, "[t]he Arbiter must apply substantive law consistent with the FAA." *See*, *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 662-63 (9th Cir. 2012). Additionally, the FAA governs contracts involving interstate commerce and this case involves a Washington resident who obtained a loan from a Utah-chartered bank to be serviced by an Illinois limited liability company. *See* Dkt. 1, ¶¶ 13-19; 9 U.S.C. §§ 1-2; *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).

LEGAL STANDARDS

The Court's role on a motion to compel arbitration is limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The FAA requires a court to stay an action whenever the parties to an action have agreed in writing to submit their claims to arbitration. *See* 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).

Agreements to be arbitrated may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746 (2011). The Court looks to Washington contract law to determine the validity of the parties' arbitration clause. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002). The burden of demonstrating a contract is unconscionable lies with the party attacking it. *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).

DISCUSSION

Plaintiff contends the Arbitration Clause is procedurally (Dkt. 1, ¶ 82) and substantively (*id*. ¶¶ 83-87) unconscionable, prospectively waives her federal rights (*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). "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). Substantive unconscionability relates to contractual clauses or terms alleged to be one-sided or overly harsh; procedural unconscionability relates to impropriety during the process of forming a contract.

A. Procedural Unconscionability

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). 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.

Plaintiff does not contend she could not read the Note due to the font size or due to any technical glitches. Plaintiff testified she read portions of the Note on her telephone but chose not to read beyond the payment schedule. Although Plaintiff states she would not have understood the importance or applicability of the Arbitration Clause even if she had read it, this does not make the Note procedurally unconscionable. The key inquiry is if Plaintiff lacked a meaningful choice and there is no evidence that she did. There was no demand that Plaintiff sign the Note immediately or that she could not have contacted counsel or OppFi if she had any questions or concerns about the terms of the Note. Plaintiff completed the loan application remotely using her telephone and in fact, signed seven materially identical notes in a similar manner over a three-year period – all of which indicates Plaintiff had reasonable opportunities to consider the terms of the Note and the Arbitration Clause.

Other Washington borrowers who obtained loans from FinWise have opted out of arbitration. *Sanh v. Opportunity Fin., LLC*, No. C20-0310RSL, 2021 WL 100718, at *2 (W.D. Wash. Jan. 12, 2021) (recognizing plaintiff successfully opted out of FinWise's arbitration agreement). In addition, the terms of the Arbitration Clause are clearly disclosed. The first page of the Note includes, in all-caps and bold font, an "ARBITRATION DISCLOSURE," notifying Plaintiff of both the Arbitration Clause and her ability opt out. Dkt. 1-1 at 2. The Arbitration Clause is not hidden or buried in the text but is laid out in a consumer-friendly table across three of the eight pages of the Note. *Tjart*, 107 Wn. App. at 899 (arbitration provision was not unconscionable because it was "obvious in the fairly short contract"). Plaintiff would not have

missed these terms if she had read the entire Note. *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."); *Zuver*, 153 Wn.2d at 304 (rejecting procedural unconscionability argument based on unequal bargaining power and the existence of an adhesion contract).

Courts in this State routinely find opt out provisions 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).

The opt-out provision is a substantive right to reject the issues Plaintiff now complains about while accepting the benefits of the Promissory Note. As one court explained, "[n]o one could reasonably argue that if one is given a reasonable opportunity to opt out of an otherwise (assumed) unconscionable arbitration provision, he can fail to opt out and still argue that the provision is substantively unconscionable." *Alvarez v. T-Mobile USA, Inc.*, 822 F.Supp.2d 1081, 1088 (E.D. Cal. 2011) (emphasis in original). Not only did Plaintiff fail to opt-out once, she failed to opt-out of seven materially identical notes with the same Arbitration Clauses and opt-out provisions. Dkt. 17, McKay Decl., ¶¶ 3–9.

Additionally, Plaintiff appears to abandon her procedural unconscionability claim in her opposition brief stating, the opt-out provision is irrelevant and while "[i]t might cure procedural unconscionability . . . this case is about substantive unconscionability." Dkt. 13 at 5.

The Court finds no procedural unconscionability.

B. Substantive Unconscionability

1. Utah Choice-of-Law Provision

Plaintiff argues the Note's Utah choice-of-law provision forces an arbitrator to apply Utah law. Dkt. 1, ¶ 83. However, the choice-of-law provision is not contained in the Arbitration Clause and in fact, the language of the Note specifically excepts the Arbitration Clause:

> 17. GOVERNING LAW; SEVERABILITY; INTERSTATE COMMERCE. This 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"), 9 U.S.C. §§ 1-9*.

Dkt. 1-1 at 4, Ex. A, § 17 (emphasis added). Under the rule of severability established by the Supreme Court, this Court is prohibited from considering the Utah choice-of-law provision because only the arbitrator, not the Court, can consider this provision. In deciding a motion under the FAA, a court may only consider a challenge that is directed "specifically to the arbitration clause." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Choice-of-law questions are for the arbitrator in the first instance. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer* ("*Vimar Seguros*"), 515 U.S. 528, 541 (1995).

In *Buckeye*, the borrowers brought a putative class action against their lender alleging the lender charged usurious interest rates. *Id.*, 546 U.S. at 442-43 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). 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. The Supreme Court noted there are two types of challenges to an arbitration agreement – one challenges specifically the validity of the agreement to arbitrate; the other challenges the contract either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on a ground that the illegality of one of the contract's provisions renders the whole contract invalid. *Id*. at 444 (citations omitted). In *Buckeye*, the Supreme Court concluded the borrowers' claim was of the second type and this type 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*. at 440 (quoting *Prima Paint*); *see also*, *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."); *see also*, *Johnson v. Opportunity Fin., LLC*, No. 3:22-cv-190, 2023 WL 2636712 (E.D. Va. Mar. 24, 2023) (the Court must not consider the choice-of-law clause (which is separate from, presented in a different format, and located on a different page than the arbitration agreement) in deciding the validity of the arbitration agreement; rather, "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)); *Michael v. Opportunity Financial, LLC*, No. 1:22-CV-00529-LY, 2022 WL 14049645, at *5 (W.D. Tex. Oct. 2, 2022) ("[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.").

Courts 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 is 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." (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.").

Plaintiff is concerned 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. As in *Buckeye*, the crux of Plaintiff's Complaint is that the contract, as a whole (including its arbitration provision), is rendered invalid by the usurious finance charge. 546 U.S. at 448. And as in *Buckeye*, this Court must reject that challenge, refer the case to arbitration, and allow the arbitrator to determine the validity of the loan rates.

2. Enforcement of Arbitration Clause "As Written"

Plaintiff next contends the Arbitration Clause is unconscionable and against public policy because it requires the arbitrator to "enforce [her] agreements with [FinWise] as they are written." Plaintiff argues the Utah choice-of-law provision is one of those "agreements" and therefore, the arbitrator would be required to apply Utah law, which will result in a waiver of Plaintiff's federal and Washington state claims. Dkt. 13 at 9-10, 19, 22-24.

Arbitration agreements are contracts and like all contracts, they must be "rigorously enforce[d]" according to their terms. *See Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228, 233 (2013); *Stolt-Nielsen*, 559 U.S. 662, 672 ("[T]he task of an arbitrator is to interpret and enforce a contract."); *see also*, *Rent-A-Center, West, Inc v. Jackson*, 561 U.S. 63, 67–68 (2010) ("[t]he FAA . . . places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms."). In Washington, courts enforce contracts "as written," which means 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); *David K. DeWolf et al.*, § 5:4. Rules of Construction, 25 Wash. Prac., Contract Law And Practice § 5:4 (3d ed. 2022) (same).

The Arbitration Clause does not preclude Plaintiff from pursuing her federal statutory claims during arbitration – her concern is that the application of Utah law, instead of Washington law, will result in losing her RICO claims on the merits. However, the Supreme Court has upheld agreements to arbitrate before a specific forum even if the choice of forum would change the outcome of the case, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 n.19 (1985), and it warned the lower courts against determining "the legal requirements

for success on the merits claim-by-claim," *Am. Exp. Co*., 570 U.S. at 238. Thus, it is enough that a plaintiff is not barred from bringing her claim, even if it is likely bound for defeat.

The Court is aware the California district court in *Carpenter* held 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. However, the Court finds more persuasive, decisions in this District and elsewhere, which have determined the phrase "as written" is merely a recitation of black letter law. The Court declines to conflate its analysis of the enforceability of the arbitration clause with an analysis of the application of the choice-of-law provision – the latter of which is the purview of the arbitrator.

Plaintiff argues the requirement to apply "substantive law" consistent with the FAA means "Utah law," and because the arbitrator must enforce agreements "as written" that means an arbitrator necessarily must "enforce the loan contract as valid under Utah law." Dkt. 13 at 17. As previously discussed, this argument relies on Plaintiff's erroneous construction of the "as written" language of the parties' contract. In addition, the requirement to apply substantive law consistent with the FAA merely precludes application of state arbitration law (*e.g.*, Washington's or Utah's Arbitration Act). *See* Dkt. 1-1 at 5, ¶ 21 ("the FAA governs" any arbitration and "[t]he Arbiter must apply substantive law consistent with the FAA"). Ultimately, whether Utah or Washington substantive law applies is a decision for the arbitrator. *Vimar*, 515 U.S. at 541.

Plaintiff's reliance on *Pinela v. Neiman Marcus Grp., Inc*., 238 Cal.App.4th 227, 234, 243-44 (2015) is misplaced. In *Pinela*, the choice-of-law clause, which was part of the arbitration agreement itself, expressly precluded the arbitrator from applying any law other than Texas law. That conclusion has been criticized by other courts. *See*, *e.g.*, *Gountoumas v. Giaran, Inc*., 2018 WL 6930761, at *9 (C.D. Cal. Nov. 21, 2018) ("[T]he *Pinela* decision rests on a faulty premise –

the choice-of-law provision did not necessarily preclude the arbitrator from applying California law."). Moreover, this case is unlike *Pinela* because the challenged Utah choice-of-law provision is not located within the Arbitration Clause and is specifically inapplicable to the Arbitration Clause. Courts have found these distinctions controlling. *Wainwright v. Melaleuca*, 2020 WL 417546, at *6 (E.D. Cal. Jan. 24, 2020), aff'd, 844 F.App'x 958 (9th Cir. 2021) (*Pinela's* choice-of-law provision "materially differs from the one at issue here," because Pinela "not only set forth a choice-of-law, but also prohibited the arbitrator from finding that choice unenforceable"); *Quiroz v. Cavalry SPV I, LLC*, 217 F.Supp.3d 1130, 1132 (C.D. Cal. 2016) (distinguishing *Pinela* on the same basis and holding "nothing in the Arbitration Agreement prevents the arbitrator from conducting a choice-of-law analysis to determine whether California statutory law might apply to [plaintiff's] substantive claims.").

Plaintiff also argues the arbitrator is not allowed to look to rules contained in the AAA or JAMS that would otherwise authorize an arbitrator to deviate from the Arbitration Clause requirement that the arbiter enforce the agreements and apply substantive law. Plaintiff does not explain how these other unidentified rules apply. Moreover, as with any contract, the parties "can specify the rules under which the arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

3. Preclusion Provision

Plaintiff challenges the provision in the Arbitration Clause 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. Plaintiff argues this provision renders the Arbitration Agreement "unlawful and void because it violates fundamental principles of res judicata, collateral estoppel,

and issue preclusion" and effectively prevents an arbitrator in a future case from applying preclusion principles based on other arbitration awards. *Id.* ¶ 87.

"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-CV6436 (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."); *See also*, *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) (quoting § 84 with approval.) "The 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) ("[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, the preclusive effect agreement is consistent with the public policy embodied in the FAA. *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1619-23 (2018) (citing *Concepcion*, 563 U.S. at 347, 348)) (the FAA "protect[s] . . . absolutely" agreements calling for "one-on-one arbitration" using "individualized proceedings" given the "traditionally individualized and informal nature of arbitration."). 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. *See also*, *Vandenberg v. Super. Ct*., 21 Cal.4th 815,

835 (1999) ("Fairness and public policy thus counsel against application of nonmutual collateral estoppel in this setting, unless the parties specifically agree thereto.").

Plaintiff fails to explain how the preclusive effect agreement 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. Plaintiff asks the 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.").

Plaintiff also claims the preclusive effect agreement violates RCW 19.86.130. However, RCW 19.86.130 addresses the effect judgments in certain suits brought by the State of Washington have on other civil litigation, which is not applicable here.

4. Public Injunctive Relief

Plaintiff next argues that the Arbitration Clause is unconscionable because it bars public injunctive relief. Plaintiff provides no basis from which it may be assumed that the injunctive relief Plaintiff seeks is even covered by the Arbitration Agreements' discussion of "public injunctive relief."[2] It is also unclear whether "Washington law considers a contractual waiver of the right to seek [public] injunctive relief unconscionable." *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).

[2] *See Hodges v. Comcast Cable Communications, LLC*, 21 F.4th 535, 542 (9th Cir. 2021) ("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").

Moreover, there is nothing substantively unconscionable about the Arbitration Clause's treatment of requests for public injunctive relief. It permits such claims to proceed in court, if required by the FAA. This approach has been repeatedly approved by courts. *See*, *e.g.*, *Nguyen v. Tesla, Inc.*, 2020 WL 2114937, at *5 (C.D. Cal. Apr. 6, 2020) (compelling arbitration of individual claims and staying action pursuant to arbitration clause containing a public injunctive relief severance clause); *J.A. through Allen v. Microsoft Corp.*, 2021 WL 1723454, at *9 (W.D. Wash. Apr. 2, 2021), *report and recommendation adopted*, 2021 WL 1720961 (W.D. Wash. Apr. 30, 2021) ("[I]f the arbitrator finds the issue of public injunctive relief cannot be arbitrated and finds Microsoft liable under California law, the case would return to this Court for a determination as to public injunctive relief").

Plaintiff next argues this same language waives her right to all injunctions. However, the cited language does not mention injunctions. *See* Dkt. 1-1 at 6 ("No arbitration award under this Agreement will affect any dispute involving any other party. No arbitration award under another party's agreement will affect any arbitration under this Agreement.") Plaintiff offers no explanation of how language relating to the preclusive effect of an arbitration award will impact Plaintiff's injunctive relief request. Nevertheless, under Washington law, a party to a contract can waive, not only the right to injunctive relief under the Washington Consumer Protection Act ("CPA"), but all CPA claims if there is a "feasible alternative avenue to seek relief for the conduct." *Culinary Ventures, Ltd v. Microsoft Corp.*, 527 P.3d 122, 133 (Wash. Ct. App. 2023). Here, Plaintiff can pursue her CPA claim in arbitration, she has asserted alternative causes of actions based on the same underlying alleged conduct that can also be pursued in arbitration, and she could have opted out of arbitration altogether. These are more than feasible alternatives to seeking relief.

5. Prospective Waiver of Federal Rights

Plaintiff argues the Note's Utah choice-of-law provision acts as a waiver of her federal rights. However, the Note specifically states it "is governed by federal law," and the laws of any state, including Utah, are deemed to include federal law. In addition, this is an issue for the arbitrator to determine in the first instance.

Consistent with contract principles, the Supreme Court has recognized that arbitration agreements that operate "as a prospective waiver of a party's right to pursue statutory remedies" are not enforceable because they are in violation of public policy. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 n.19, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Therefore, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," courts should enforce the parties' contract under the FAA. *Id*. at 637, 105 S.Ct. 3346. But where an arbitration agreement prevents a litigant from vindicating federal statutory rights, courts will not enforce the agreement. *Id*.

A foreign choice of law provision, of itself, will not trigger application of the prospective waiver doctrine. *See Mitsubishi*, 473 U.S. at 637 n.19, 105 S.Ct. 3346. Instead, a court first must examine whether, as a matter of law, the "choice-of-forum and choice-of-law clauses operate[ ] in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Id*. When there is uncertainty whether the foreign choice of law would preclude otherwise applicable federal substantive statutory remedies, the arbitrator should determine in the first instance whether the choice of law provision would deprive a party of those remedies. *See Vimar Seguros*, 515 U.S. at 540-41. In such a case, the prospective waiver issue would not become ripe for final determination until the federal court is asked to enforce the arbitrator's decision. *Vimar*, 515 U.S. at 540-41.

6. Arbitrability of Declaratory Relief Claim

Plaintiff argues her declaratory relief claim cannot be arbitrated because it challenges (in part) the enforceability of the Arbitration Agreement. Dkt. 13 at 25. However, the Court's resolution of this motion addresses Plaintiff's arguments for declaring the Arbitration Clause unenforceable. Thus, by resolving this motion, there is nothing left to adjudicate in court. *See Cherdak v. ACT, Inc*., 437 F.Supp.3d 442, 463 (D. Md. 2020) (declaratory judgment claim on validity and effect of arbitration clauses was mooted by the court's determination the clauses were unenforceable); *Noel v. Paul*, 2022 WL 4125216, at *13 (N.D. Tex. Sept. 9, 2022) (declaratory judgment claim resolved by court's determination as a gateway issue is moot).

CONCLUSION

For the foregoing reasons, the Court **ORDERS**: the motion to compel arbitration (Dkt. 12) is **GRANTED** and this matter is **STAYED** until arbitration of this matter has been completed. The parties shall notify the Court of the outcome of arbitration and submit a status report as to what further action the Court should take.

DATED this 10th day of October, 2023.

BRIAN A. TSUCHIDA
United States Magistrate Judge