NO. 09-16703

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW C. KILGORE and WILLIAM BRUCE FULLER

Plaintiffs-Appellees

v.

KEYBANK, NATIONAL ASSOCIATION and
GREAT LAKES EDUCATIONAL LOAN SERVICES, INC.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 3:08-CV-02958-TEH

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The District Court erred by failing to apply controlling federal law to compel the arbitration of claims involving injunctive relief. *Equal Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294-296 (2002). Plaintiffs completely ignore this binding authority which is fatal to the District Court's reasoning for not compelling arbitration. This Court should reverse the District Court's decision and compel arbitration of the Plaintiffs' claims.

II. ARGUMENT

A. Arbitration Under the FAA Extends to Claims That Seek Injunctive Relief.

KeyBank's basis for compelling arbitration was, and remains, the Federal Arbitration Act ("FAA"). *See* Mot. Compel Arbitration, at p. 11 § III(A)(1) ("Under the FAA, this Court Must Compel Arbitration of Plaintiffs' Claims Pursuant to the Express Terms of the Arbitration Agreement"); *id.* at p. 12 "The FAA directs that written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract'" citing 9 U.S.C. §2; *id.* at p. 16 ("Federal law applies to the determination of the scope of this Arbitration Agreement."); *id.* at p. 14 ("The FAA is designed to 'ensure that private agreements to arbitrate are enforced according to their terms.'"). [Clerk's Record on Appeal ("C.R.") Docket No. 64].

See also Promissory Notes, Exhs. A and B to the Declaration of Shawn Baldwin, at ¶ R ("The Provisions of this Notice Will be Governed by Federal Laws and the Laws of the State of Ohio…"). [Excerpts of Record ("E.R.") 73-75; 81-83]. Plaintiffs' suggestion that federal law has been newly-injected into this case on appeal is sophistry. Nonetheless, the District Court's ruling on the validity of the arbitration agreement is *de novo, see Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009), and thus this Court must apply the correct law on appeal.

The FAA directs that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, "generally applicable contract defenses such as fraud, duress or unconscionability" may be applied in order to evaluate the validity of an arbitration agreement. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). The District Court, however, did not find the arbitration provision unenforceable because of fraud, duress or unconscionability. Rather, the District Court held "that the arbitration clause is invalid in this matter, as Plaintiffs plead only injunctive relief claims, which are not arbitrable as a matter of ***California law***." Order [E.R. 12-13] (emphasis supplied). Both the Plaintiffs and the District Court fail to recognize that whether claims for injunctive relief are arbitrable is an issue of federal law as to the scope of the FAA and not an issue of California law.

Tellingly, Plaintiffs fail to even address the holding of *Waffle House*, 534 U.S. at 294-96, in which the United States Supreme Court held that the FAA requires courts to enforce an agreement to arbitrate requests for injunctive relief, even if that relief is designed principally to protect the public. *Waffle House* definitively decides the issue at hand—agreements to arbitrate under the FAA, even as to injunctive relief, cannot be circumscribed by state law and must be enforced. "Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). However, a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1, 16-17 n. 11 (1984)). Thus a state law which purports to make certain types of claims inarbitrable is not enforceable. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995).

The District Court erred in using California law to isolate claims for injunctive relief from arbitration. This Court should overturn the District Court's decision and order that the parties proceed to arbitration as required by the contract between them.

B. Application of Ohio Law Would Not Contravene A Fundamental Policy of California And Thus The District Court Erred by Not Enforcing the Ohio Choice of Law Provision.

Even if this Court were to look past the controlling federal authority to the law of California and Ohio, arbitration should still be compelled. Plaintiffs argue that California law should apply because Ohio law runs contrary to the UCL's policy of allowing consumers to sue financial institutions. In order to apply California law, however, Plaintiffs must establish that the parties' selected Ohio law is contrary to a fundamental policy of California. *See Omstead v. Dell, Inc.*, 533 F. Supp. 2d 1012, 1035 (N.D. Cal. 2008); *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 916 (2001). The fact that Ohio law differs from California law does not necessarily signify that application of Ohio law would contravene California public policy. *See General Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1506 (9th Cir. 1995) (rejecting plaintiff's assertion that the application of New York law would violate California public policy because New York requires a higher burden of proof). Additionally, the District Court did not reach whether the Ohio choice of law offended California policy because it found that there was inadequate authority to find that the UCL is a fundamental policy of California, even if the UCL and Ohio law differ. Order [E.R. 8].

Plaintiffs' argument that the UCL embodies a fundamental policy which trumps Ohio law is unsupported by the authority cited. In *Cardonet, Inc. v. IBM Corp.*, 2007 U.S. Dist. LEXIS 14519 (N.D. Cal. Feb. 14, 2007), the court stated that "[w]hether a § 17200 claim implicates fundamental California policy depends on the predicate violation" and then determined that a choice of law provision applying New York law would not offend a fundamental policy of California law. "The fact that New York law differs from California law does not necessarily signify that application of New York law would contravene California public policy. Similarly, the mere fact that the chosen law provides greater or lesser protection than California law, or that in a particular application the chosen law would not provide protection while California law would, are not reasons for not applying California law." *Id.* at * 16-17 (internal quotations and citations omitted). The court did not find that the UCL is a fundamental policy of California law and, indeed, expressly rejected such an idea.

Plaintiffs' additional citations are similarly inapposite. *See Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881, 907-08 (1998) (no discussion of § 17200 as representing a fundamental policy of California law noting only "Section 17200 expresses California public policy against unfair competition"); *Nibeel v. McDonald's Corp*., 1998 U.S. Dist. LEXIS 13425 at *28 (N.D. Ill. Aug. 26, 1998) (expressly refused to find whether the UCL represented a

"fundamental" policy of California law and in fact expressed doubt that it did); *It's Just Lunch Int'l LLC v. Island Park Enter. Group, Inc.*, 2008 U.S. Dist. LEXIS 89194 at * 11 (C.D. Cal. Oct. 21, 2008) (". . . the Court declines to find that section 17200 embodies a fundamental policy in California as used here").

C. The District Court Erred In Finding That California Law Precludes Arbitration of Injunctive Relief Under The UCL

The District Court erred when it concluded that the arbitration agreement is unenforceable because Plaintiffs' claims would not be arbitrable under California law based on *Ramirez v. Cintas Corp.*, No. C-04-281, 2005 U.S. Dist. LEXIS 43531, at *13-14 (N.D. Cal. Nov. 2, 2005). Indeed, another sister court post-*Ramirez* granted a motion to compel arbitration in a dispute involving a § 17200 claim finding that the parties had a valid and enforceable agreement to arbitrate. *See Digiacomo v. Ex'pression Ctr. for New Media, Inc.*, 2008 U.S. Dist. LEXIS 70099, at *26 (N.D. Cal. Sept. 15, 2008). In *Digiacomo*, the plaintiff was a student at a vocational school who signed an enrollment agreement that contained an arbitration clause. *Id.* at *3. The plaintiff's enrollment at the school was terminated prior to completing his course of study. *Id.* Plaintiff then brought six causes of action, including violations of the UCL under § 17200, against the school. *Id.* at *4. The school moved to compel arbitration of the dispute. *Id.*

The *Digiacomo* court (Patel, J.) recognized that it is "well settled that statutory claims may be the subject of an arbitration agreement, enforceable

pursuant to the FAA." *Id.* at * 23 citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). "Although not all statutory claims are necessarily appropriate for arbitration, by agreeing to arbitrate, the party should be held to it 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 23-24 citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). Because it could point to nothing in the text or the legislative history of any of the statutes asserted that explicitly precluded arbitration, the court found the plaintiff's arguments insufficient to preclude the arbitration of statutory rights. *Id.* at *24.

The *Digiacomo* court also recognized that the United States Supreme Court has ruled that statutory claims are appropriate for arbitration "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, [because] the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp.*, 473 U.S. at 637. Specifically, *Digiacomo* stated that "[s]o too has the California Supreme Court held claims alleging violations of the California Unfair Competition Law under California Business of Professions Code section 17200 subject to arbitration, notwithstanding the fact that such claims vindicate important statutory rights." *Id.* at *26 citing *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303, 317 (2003). The court held that there was no evidence to suggest that the arbitration agreement would be

contrary to public policy and provided for an adequate forum for the plaintiff to secure his statutory rights. *Id.*

Accordingly, California law does not preclude arbitration of claims for injunctive relief under the UCL. Thus, the District Court not only erred by failing to apply controlling federal law but further erred by finding that claims for injunctive relief under the UCL are not arbitrable.

D. Plaintiffs' Additional § 17200 Claims In Their Third Amended Complaint Are Neither Relevant To This Appeal Nor Do They Save Their Claims From Arbitration.

Plaintiffs argue that the operative complaint is the Third Amended Complaint which was filed long after this appeal was docketed. In their newest iteration of claims, the Plaintiffs assert six counts under the UCL and jettison claims under RICO and aiding and abetting.[1]

Plaintiffs' claims are still not for public injunctive relief. Despite their contentions that "the request for injunctive relief seeks to protect members of the class by enjoining the defendants' wide-spread unfair business practices against California consumers generally," Appellees' Response at p. 19, the reality is that Plaintiffs seek debt forgiveness for themselves. The fact is that Plaintiffs' only claim against KeyBank stems from their promissory notes, which contain an

[1] Currently pending before the District Court is a motion to dismiss these claims for failure to bring suit in the proper forum, failure to apply Ohio law, and failure to state a claim under § 17200.

express arbitration provision. Their attempt to plead a public injunction when all of the affected parties will have similar contractual relationships is unavailing. Indeed, the requested relief is to prevent KeyBank from collecting from the Plaintiffs under the promissory notes. This is debt forgiveness pure and simple. It is tantamount to a declaratory judgment action to void the contract *ab initio*. Creative word play and artful pleading cannot solve this fundamental architectural flaw with the Plaintiffs' claims. Even if California law could exclude claims for injunctive relief from arbitration—which it cannot—this is truly an action for debt forgiveness dressed-up as something else.

E. Plaintiffs Continue to Misapply California Law In An Attempt to Create a Conflict Between It and Ohio Law That Does Not Exist In This Case.

Plaintiffs allege that California has a "well-established 'fundamental' policy against class action bans in consumer adhesion contracts." Appellees' Response at p. 24. The Plaintiffs, however, even misstate what the District Court expressed when it noted without resolving that California does not have a fundamental policy against all class action waivers, but instead has a fundamental policy against exculpatory class action waivers in consumer contracts of adhesion, because they are unconscionable. Order [E.R. 11]. As explained in the Opening Brief at pp. 26-29, the class action waiver in Plaintiffs' contract is not a "contract of adhesion" because the Plaintiffs had a meaningful and informed opportunity to opt-out of the

arbitration agreement but chose not to. *See Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1067 (N.D. Cal. 2007) (A contract of adhesion is one which is "presented on a 'take it or leave it' basis with no opportunity to negotiate."). Accordingly, the class action waiver would not be unconscionable and the Arbitration Agreement is enforceable.

F. Plaintiffs' Other Gratuitous Allegations and Factual Recitations Should be Disregarded as Having No Bearing or Relationship to This Appeal.

Plaintiffs' lengthy and spurious factual allegations are not relevant to the legal issue this Court is addressing on appeal—whether the District Court erred by failing to compel arbitration based on an enforceable agreement between the parties governed by the FAA. Furthermore, the "development" alleged by Plaintiffs related to the Minnesota Attorney General suing the National Arbitration Forum is not related to the legal issues at hand and should be stricken.

III. CONCLUSION

For the reasons stated herein and in KeyBank's opening brief, the District Court erred by not applying controlling federal authority that claims for injunctive relief are arbitrable under the FAA. Accordingly, KeyBank requests that this Court reverse the decision of the District Court denying the Motion to Compel Arbitration, find that a valid, enforceable Arbitration Agreement exists between the parties, and compel arbitration.

Dated: February 4, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Case No. 09-16703

Kilgore, et al., v. KeyBank, National Association, et al.

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number No. 09-16703:

I certify that the attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a reply brief of no more than 15 pages.

Dated: February 4, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

Kilgore, et al., v. KeyBank, National Association, et al.

Ninth Circuit Case No. 09-16703
U.S.D.C. Case No. 3:08-CV-02958-TEH

I hereby certify that on February 4, 2010, I electronically filed the following entitled document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

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