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 EDUCATION 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' OPENING BRIEF

W. SCOTT O'CONNELL
KRISTEN M. YASENKA
NIXON PEABODY LLP
900 Elm Street
Manchester, NH 03101
Telephone: (603)628-4000

Attorneys for Appellants
KEYBANK, NATIONAL ASSOCIATION and GREAT LAKES EDUCATION LOAN SERVICES, INC.

TODD C. TORAL, SBN 197706
STEPHANIE KARNAVAS, SBN 255596
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, CA 94111
Telephone: (415) 984-8200

Attorneys for Appellants
KEYBANK, NATIONAL ASSOCIATION and GREAT LAKES EDUCATION LOAN SERVICES, INC.

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CORPORATE DISCLOSURE STATEMENT

KeyBank, National Association and Great Lakes Educational Services, Inc. make this corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1:

KeyBank, National Association, as successor-in-interest to KeyBank USA, N.A., is a wholly owned subsidiary of KeyCorp, a publicly traded company. Key Education Resources is an unincorporated division of KeyBank, National Association.

Great Lakes Educational Services, Inc. is not a publicly traded company.

I. JURISDICTIONAL STATEMENT

The case was removed from the California state court to the Northern District of California which had jurisdiction pursuant to 28 U.S.C §§1331, 1332, 1441, 1446 and 1453 (Federal Question, Diversity, and CAFA Jurisdiction). The Ninth Circuit Court of Appeals has jurisdiction pursuant to 9 U.S.C. § 16 because the order denying arbitration is appealable as a matter of right. *See* 9 U.S.C. §16(a)(1)(B). Appellant KeyBank, National Association ("KeyBank") and Great Lakes Educational Loan Association ("Great Lakes") (collectively "Appellant" or "KeyBank") appeal from a July 8, 2009 Order from the Northern District of California denying their motion to compel arbitration. Order, [Excerpts of Record ("E.R.") 1-13]. KeyBank filed a timely Notice of Appeal, pursuant to Federal Rule of Appellate Procedure 4(a), on August 7, 2009. Notice of Appeal [E.R. 14-15].

II. STATEMENT OF THE ISSUES

1. Did the District Court err in failing to compel arbitration as provided in a binding and enforceable agreement between the parties? (Mot. Compel Arbitration [Clerk's Record on Appeal ("C.R.") Docket No. 64]; Reply Opp. Mot. Compel Arbitration [C.R. Docket No. 71]; and Order [E.R. 1-13]. Standard of review is *de novo*.)
2. Did the District Court err in holding that California law barred the arbitration of a private contractual dispute where injunctive relief is sought? (Mot.

Compel Arbitration [C.R. Docket No. 64]; Reply Opp. Mot. Compel Arbitration [C.R. Docket No. 71]; and Order [E.R. 1-13]. Standard of review is *de novo*.)

3. Did the District Court err in not compelling arbitration where the claimed relief is money damages in the form of debt relief and not injunctive relief. (Mot. Compel Arbitration [C.R. Docket No. 64]; Reply Opp. Mot. Compel Arbitration [C.R. Docket No. 71]; and Order [E.R. 1-13]. Standard of review is *de novo*.)

III. STATEMENT OF THE CASE

Putative class representatives Matthew Kilgore ("Kilgore") and William Fuller ("Fuller") (collectively "Plaintiffs") are California residents who enrolled for flight training at Silver State Helicopters ("SSH"). Kilgore and Fuller each borrowed $55,950 from KeyBank to pay for the SSH training. KeyBank contracted with Great Lakes to service these loans. KeyBank disbursed the loans and the Plaintiffs obtained training from SSH.[1]

On February 2, 2008, SSH ceased operations and filed for bankruptcy protection. Dissatisfied with the training received from SSH, Plaintiffs brought this preemptive action seeking to avoid repayment of their student loan debt to

[1] *See infra* § IV.A. for details on the training the Plaintiffs received.

KeyBank. In essence, Plaintiffs seek a judicial reformation of the Promissory Notes to require KeyBank to be liable for the claimed deficiencies of SSH.

Plaintiffs, on behalf of themselves and a putative class of just under 100 student loan borrowers, filed suit against KeyBank to prevent collection of their individual student loan debt. Plaintiffs' complaint alleges three counts against KeyBank: (1) Unfair Competition (Cal. Bus. & Prof. Code §17200 *et seq*.); (2) Aiding and Abetting Fraud; and (3) Civil RICO (18 U.S.C. § 1962). The gravamen of these claims is the legally dubious contention that KeyBank should have included—but did not— the so-called Holder in Due Course notice in its Promissory Notes that would have permitted the students to use alleged SSH training failures as a defense against collection efforts on the student loan debt.[2]

The Plaintiffs' Promissory Notes contain an arbitration provision, a choice of Ohio and Federal law provision and a venue provision selecting Cuyahoga County, Ohio where KeyBank maintains its principal place of business. On April 24, 2009, KeyBank moved to compel arbitration or alternatively to dismiss for improper venue. Mot. Compel Arbitration [C.R. Docket No. 64].[3] On July 6,

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[2] By its terms, the FTC Holder Notice applies only to sellers of services. Here, that would be SSH. *See infra* at § IV.A.

[3] Contemporaneously with this motion to compel, Key filed a Motion to Dismiss for failure to state a claim, preemption and failure to plead with particularity, that was incorporated into the Motion to Compel by reference. *See* Mot. to

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2009, the District Court heard oral argument on the motion to compel. Reporter's Transcript ("R.T."), 7/6/09 [E.R. 37-67]. On July 8, 2009, the Court denied the motion to compel arbitration, stating incorrectly that the Plaintiffs only sought injunctive relief and that California law had a fundamental policy against arbitrating claims involving injunctive relief. Order, [E.R. 1-13]. The Court failed to apply the parties' choice of Ohio law based on an inaccurate finding that California and Ohio have a conflict over the arbitrability of the claims at issue. No such conflict exists because California does not bar the arbitration of private claims that that seek injunctive relief. Further, the relief sought is not proper for injunctive relief; there is a complete remedy at law. The Court did not rule on the motion to dismiss for improper venue. On August 7, 2009, KeyBank filed this timely interlocutory appeal. Notice of Appeal, [E.R. 14-15].

IV. STATEMENT OF FACTS RELEVANT TO REVIEW

A. Plaintiffs' SSH Training

Plaintiffs' claims arise completely from their dissatisfaction with the training provided by SSH and their contention that KeyBank should not be able to collect on the student loan debt incurred to fund this training. According to the SSH

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Compel Arbitration, C.R. Docket No. 64, at p. 15, citing Motion to Dismiss, C.R. Docket No. 59.

Service Contract Agreement ("SSH Agreement"), Kilgore and Fuller were entitled to the following in exchange for their tuition:

- 175 "Total Flight Hours" in either an R22 or R44 helicopter;
- "Unlimited Access to the Flight Simulator";
- "Ground School Classes" that "Can Be Repeated At No Additional Cost" including "Individual Instruction At No Additional Cost As Long As Attendance Requirements Are Met";
- Text Books;
- Pilot Supplies; and
- Materials

SSH Agreements, Exhs. A and B to Declaration of Courtney Brooks ("Brooks Decl.") [E.R. 90-97]. Under the SSH Agreements—to which KeyBank was not a party—Kilgore and Fuller were required to complete all of their training within eighteen months of commencing classes at SSH. *Id.* [E.R. 91, 95]("All Training Must Be Completed Within Eighteen Months of the Start of Class."). Additionally, if during the course of his training a SSH student became unhappy with his progress, that student could "cancel the contract for any reason." *Id.* [E.R. 92, 96]. Upon cancellation, the students would be assessed the value of "Any Training Used," including the cost of any flight time, which cost "will be based upon the current by-the-hour rate at the time of cancellation," as well as a $3,000 cancellation fee. *Id.* [E.R. 92, 96].

Neither Kilgore nor Fuller completed their training within the eighteen month time period. Neither Kilgore nor Fuller withdrew from the program as

provided for under the SSH Agreements. Indeed, Kilgore received 185.8 flight hours and Fuller received 310 flight hours, amounts far in excess of the 175 provided in their SSH Agreements. SSH Student Activity Summaries, Brooks Decl. Exhs. C and D [E.R. 99, 101].

B. Plaintiffs' Sue KeyBank Because of SSH's Deficiencies Seeking "Injunctive" Relief

On May 12, 2008, Plaintiffs filed this putative class action in California state court seeking injunctive relief to prohibit KeyBank from enforcing its promissory notes, attorneys' fees and such other relief that the Court may deem just and proper.[4] Plaintiffs filed subsequent amended complaints on May 16, 2008 and June 11, 2008.[5]

Plaintiffs' allege a pattern of racketeering activity in violation of 18 USC §1962. Second Amended Complaint ("SAC"), ¶ 84-89 [E.R. 128-29]. Plaintiffs specifically claim that they "and each member of the KeyBank Proposed Class

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[4] Plaintiffs' characterization of this debt forgiveness under the student loan promissory notes as "injunctive relief" strains credulity. At issue here are the obligations that arise under a contract. Here, Plaintiffs simply want to use SSH's alleged failure to provide the education they sought as a defense against KeyBank's collection of the debt. This is a legal, rather than an equitable, issue for which there is a complete remedy at law. Injunctions lie only where there is no adequate remedy at law. Plaintiffs effort to cast this dispute as one in equity to avoid the agreed-on arbitration is unavailing. *See infra* at § IV.A.5.

[5] On November 16, 2009, Plaintiffs filed for leave to file a third amended complaint months after the deadline for such amendments and while KeyBank's motion to dismiss for failure to state a claim is pending before the court. KeyBank plans to oppose this motion for leave.

suffered pecuniary injury as a result of these violations." SAC ¶ 89 [E.R. 129]. Plaintiffs seek injunctive relief to address the pecuniary injury that they claim to have suffered. Injunctive relief, however, is not available to a private plaintiff in a civil RICO action. *Religious Tech. Ctr v. Wollersheim*, 796 F.2d 1076, 1077 (9th Cir. 1986). Successful RICO plaintiffs may only recover treble damages, attorneys' fees and costs. Plaintiffs do seek attorneys' fees under the RICO statute and also pray for "such other and further relief as the Court may deem proper." Plainly, Plaintiffs seek more than injunctive relief under this claim.

Plaintiffs allege Aiding and Abetting Fraud. SAC ¶¶ 80-83 [E.R. 127-28]. As part of this claim, Plaintiffs claim that "as a proximate result of the conduct of [KeyBank] in aiding and abetting SSH's fraudulent scheme as alleged herein, Plaintiffs have suffered injury in fact and have lost money and property and are entitled to injunctive relief as set forth below." SAC ¶ 83 [E.R. 128]. This is a common law claim, however, triable to a jury, which cannot issue an injunction. Plainly, Plaintiffs seek something other than injunctive relief which is unavailable for this claim.

Plaintiffs also seek recovery under California Business & Professions Code § 17200 ("UCL"). SAC ¶ 76-79 [E.R. 125-27]. Plaintiffs claim that they "have suffered injury in fact and have lost money or property as a result of the Defendants' violations of the UCL." *Id.* at ¶ 78 [E.R. 127]. Plaintiffs' proposed

remedy is to prevent KeyBank from collecting the student debt. There is no allegation that the Plaintiffs have an inadequate remedy at law.

C. The Parties' Agreement to Arbitrate Claims

The Plaintiffs executed Promissory Notes that expressly require arbitration of their claims. The Promissory Notes contain the following Arbitration Provisions:

> Q. ARBITRATION
>
> … This Arbitration Provision will apply to my Note…unless I notify you in writing that I reject the Arbitration Provision within 60 days of signing my Note.
>
> ... Any Claim shall be resolved, upon the election of [KeyBank] or [the Plaintiffs], by binding arbitration pursuant to this Arbitration Provision and the applicable rules of either the J.A.M.S/Endispute or the National Arbitration Forum in effect at the time the Claim is filed.
>
> … IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER [KEYBANK] NOR [PLAINTIFFS] WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED FOR IN THE APPLICABLE ARBITRATION RULES. FURTHER, I WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. EXCEPT AS SET FORTH BELOW, THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. I UNDERSTAND THAT OTHER RIGHTS THAT I WOULD HAVE IF I

WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION. (Emphasis in original)

... This Arbitration Provision is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1 et seq.

* * *

R. ADDITIONAL AGREEMENTS

…THE PROVISIONS OF THIS NOTICE WILL BE GOVERNED BY FEDERAL LAWS AND THE LAWS OF THE STATE OF OHIO, WITHOUT REGARD TO CONFLICT OF LAWS RULES.

* * *

S. MY CERTIFICATION

… [Plaintiffs] certify that [they] understand the provisions of this Note and [their] responsibilities and their rights under the Loan Program.

* * *

CAUTION—IT IS IMPORTANT THAT [PLAINTIFFS] THOROUGHLY READ THE CONTRACT BEFORE [THEY] SIGN IT.

NOTICE TO CONSUMER/CUSTOMER:

(a) [PLAINTIFFS] WILL NOT SIGN THIS AGREEMENT/NOTE BEFORE [THEY] READ IT (EVEN IF OTHERWISE ADVISED)…

(e) [PLAINTIFFS] UNDERSTAND THAT THE MASTER STUDENT LOAN PROMISSORY NOTE

> GOVERNING [THEIR] LOAN[S] CONTAIN AN ARBITRATION PROVISION UNDER WHICH CERTAIN DISPUTES (AS DESCRIBED IN THE ARBITRATION PROVISION) BETWEEN [PLAINTIFFS] AND [KEYBANK] AND/OR CERTAIN OTHER PARTIES WILL BE RESOLVED BY BINDING ARBITRATION, IF ELECTED BY [PLAINTIFFS] OR [KEYBANK] OR CERTAIN OTHER PARTIES. IF A DISPUTE IS ARBITRATED, THE PARTIES WILL NOT HAVE THE OPPORTUNITY TO HAVE A JUDGE OR JURY RESOLVE IT AND OTHER RIGHTS MAY BE SUBSTANTIALLY LIMITED.

Promissory Notes, Exhs. A and B to the Declaration of Shawn Baldwin ("Baldwin Decl."), at ¶¶ Q, R, S and signature box (emphasis in original) [E.R. 73-75; 81-83]. Neither Kilgore nor Fuller rejected these Arbitration Provisions as permitted under the Promissory Notes. Baldwin Decl. ¶ 5, [E.R. 69].

D. KeyBank's Motion to Compel Arbitration or Alternatively to Dismiss for Improper Venue

On April 24, 2009, KeyBank filed a Motion to Compel Arbitration. Mot. Compel Arbitration, C.R. Docket No. 64. On July 8, 2009, the District Court denied KeyBank's Motion to Compel claiming that "[t]he arbitration clause is invalid in this matter, as Plaintiffs plead only injunctive relief claims, which are not arbitrable as a matter of California law. As such, the Court shall not compel Plaintiffs to arbitrate their claims."[6] Order, [E.R. 12-13]. The Court's conclusion,

[6] The Court did not address KeyBank's request that the case be dismissed as brought in the wrong venue.

however, is neither an accurate statement of the Plaintiffs' complaint nor California law.[7] This timely interlocutory appeal as of right followed. *See* 9 U.S.C. §16(a)(1)(B).

V. SUMMARY OF ARGUMENT

The District Court incorrectly denied KeyBank's Motion to Compel Arbitration. The Federal Arbitration Act preempts all state laws or policies that purport to invalidate an arbitration clause that is otherwise enforceable under state law. The District Court erred in limiting the scope of the FAA under the contention that California law precludes the arbitration of claims for injunctive relief as any such law is preempted. Also, the District Court failed to determine the enforceability of the agreement under the parties' choice of Ohio law. Rather, the District Court incorrectly applied California law, not on the issue of enforceability of the agreement, but under the mistaken contention that California can limit the scope of claims that are arbitrable under the FAA. The District Court also failed to recognize that the Plaintiffs' request for injunctive relief was actually a claim for debt forgiveness for which there is an adequate remedy at law and which is fully arbitrable under Ohio and California law. As a direct result of these errors, the District Court failed to compel arbitration.

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[7] *See infra* § VII.A.4-5.

Here, the FAA provides for the arbitration of injunctive relief. The parties entered into a valid and enforceable agreement to arbitrate (under either Ohio or California law). The District Court erred in not compelling arbitration and its decision should be reversed.

VI. STANDARD OF REVIEW

This Circuit reviews the district court's ruling on the validity and scope of an arbitration clause *de novo*. *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007). *See also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) citing *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1154 (9th Cir. 1998) ("Whether a party has waived the right to sue by agreeing to arbitrate is reviewed *de novo*."). Additionally, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hoffman v. Citibank, N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008). Because the Plaintiffs did not meet their burden of proving that their claims are unsuitable for arbitration, the District Court erred in denying the Motion to Compel Arbitration.

VII. ARGUMENT

A. The District Court Erred in Not Compelling Arbitration of The Parties' Dispute

1. The Court Must Order Arbitration Where the Parties Have A Binding and Enforceable Agreement to Arbitrate

The principles controlling this Court's analysis are familiar. The Federal Arbitration Act ("FAA") embodies the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). By its terms, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Thus, the court must grant a motion to compel arbitration if (1) a valid agreement to arbitrate exists, and (2) the dispute at issue falls within the scope of the arbitration agreement. *See Circuit City Stores, Inc. v. Ahmed, Inc.* 283 F.3d 1198, 1199-1201 (9th Cir. 2002) (affirming district court's order compelling arbitration where contract gave the employee an opportunity to opt-out of the arbitration agreement); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (affirming district court's order to compel arbitration where the arbitration clause required the parties to arbitrate "any dispute, controversy or claim arising out of or relating to" the agreement).

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).

If the Court determines that the parties have agreed to arbitrate and that agreement has not been honored, and the dispute falls within the scope of the agreement, the Court ***must order*** arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967). **This is true even if the result might be the maintenance of separate proceedings in different fora.** *See Byrd*, 470 U.S. at 217.

2. The FAA Preempts Any California Law or Policy Which Purports to Invalidate An Arbitration Clause That Is Otherwise Enforceable Under State Law

The Supreme Court of the United States has made clear that "the FAA ensures" that an agreement to arbitrate specified claims "will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration." Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (emphasis added). "[A]ny …state policy" that purports to invalidate an arbitration clause in a contract otherwise enforceable under state law is "unlawful,

for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress' intent." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). Thus, the Supreme Court's binding instruction on this issue of federal law, holds that "the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 478 (1989); *see also Mastrobuono*, 514 U.S. at 58 (FAA preempts New York prohibition against arbitrating punitive damages); *Allied-Bruce Terminix Cos.*, 513 U.S. at 268-277 (FAA preempts Alabama statute making predispute arbitration agreements unenforceable); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (FAA preempts California statute prohibiting arbitration of wage collection actions); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (FAA preempts California statute prohibiting arbitration of claims under the California Franchise Investment Law).

The District Court erred in relying on California law which purports to limit the arbitrability of claims involving injunctive relief. Indeed, this is an issue of federal law. The United States Supreme Court has 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. *Equal Opportunity Commission v. Waffle House, Inc*, 534 U.S. 279, 294-296 (2002). Thus, unless the arbitration

provision was unconscionable under Ohio law, the District Court should have compelled arbitration.

3. The District Court Erred in Not Applying Ohio Law Which Compels Arbitration of Plaintiffs Claims

The District Court improperly failed to apply the parties' choice of Ohio law. Promissory Notes, Exhs. A and B to Baldwin Decl., at ¶ R, [E.R. 74, 82]. A federal court sitting in diversity jurisdiction "look[s] to the law of the forum state when making choice of law determinations," *Hoffman*, 546 F.3d at 1082, and both parties agree that California choice of law rules apply in this matter. Order [E.R. 6]. The court erred, however, in finding that the California choice-of-law analysis under *Hoffman* dictates application of California substantive law.

Where "an agreement contains a choice of law provision, California courts apply the parties' choice of law unless the analytical approach articulated in §187(2) of the Restatement (Second) of Conflicts of Laws ("§187(2)") dictates a different result." *Hoffman*, 546 F.3d at 1082. Section 187(2) "'reflects a strong policy favoring enforcement of such provisions.'" *Omstead v. Dell, Inc.*, 533 F. Supp. 2d 1012, 1014 (N.D. Cal. 2008) (citing *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1150-52 (Cal. 1992)(emphasis added). Enforcement of choice of law provisions applies "equally to all contracts, including consumer

contracts of adhesion." *Omstead*, 533 F. Supp. 2d at 1014 (emphasis added).[8]

Under the §187(2) analysis, this District Court first determined whether the chosen state of Ohio has a "substantial relationship to the parties or their transaction, or . . . whether there is any other reasonable basis for the parties' choice of law." *Nedlloyd*, 834 P.2d at 1152. The Plaintiffs concede that Ohio has a substantial relationship. The parties' choice of Ohio law, therefore, must be enforced unless Plaintiffs can establish that Ohio law is contrary to a fundamental policy of California *and* that California has a materially greater interest in the determination of the particular issue. *Omstead*, 533 F. Supp. 2d at 1035; *Washington Mut. Bank v. Superior Court*, 15 P.3d 1071, 1078 (Cal. 2001). Plaintiffs cannot meet their burden because the Arbitration Agreement – as opposed to other provisions in the Note which the Plaintiffs attack – is not contrary to a fundamental policy of California law. *See infra* § VII.A.4(California does not bar the arbitration of private claims that seek injunctive relief). Accordingly, since no conflict exists, the Court need not reach the question whether California has a "materially greater interest than [Ohio] in the determination of the particular issue." *Nedlloyd*, 834 P.2d at 1152 (quoting Rest., § 187, subd. (2)).

[8] While the Arbitration Agreement is not adhesive because Plaintiffs had a meaningful opportunity to opt-out of that provision, the agreement is enforceable even if it were adhesive.

As the District Court recognized, under Ohio law, the claims are arbitrable. *Hawkins v. O'Brien*, No. 22490, 2009 Ohio App. LEXIS 73, at *17 (Ohio Ct. App. Jan. 9, 2009); *see also Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1170 (Ohio Ct. App. 2004). The FAA is designed to "ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono*, 514 U.S. at 53-54. The Arbitration Provision here—out of which Plaintiffs could have opted but did not—makes clear that Plaintiffs cannot proceed on a representative basis. Indeed, the Promissory Notes state that "there shall be no authority for any Claims to be arbitrated on a class action basis. Furthermore, an arbitration can only decide [KeyBank] or [Plaintiff's] Claim(s) and may not consolidate or join the claims of other persons that may have similar claims." Promissory Notes, Exhs. A and B to Baldwin Decl. at ¶ Q [E.R. 74, 82]. Thus, under the terms of the Promissory Notes, Kilgore, Fuller and all putative class members must be compelled to proceed with individual arbitrations to resolve only their individual claims.

Moreover, under the chosen law of Ohio, the Arbitration Provisions, including the terms that Plaintiffs proceed on an individual non-representative basis, are enforceable. *See, e.g.*, *Fazio v. Lehman Bros., Inc.*, 340 F. 3d 386, 392 (6th Cir. 2003) ("The FAA establishes a liberal policy favoring arbitration agreements, and any doubts regarding arbitrability should be resolved in favor of arbitration over litigation."); *Price v. Taylor*, 575 F. Supp. 2d 845, 854-55 (N.D.

Ohio 2008) (finding arbitration agreement contained in a mortgage was enforceable even though it limited plaintiff borrower's right to proceed in a class action); *Howard v. Wells Fargo Minn., N.A.*, No. 1:06cv2821, 2007 U.S. Dist. LEXIS 70099, at *12-14 (N.D. Ohio Sept. 21, 2007) (finding a binding, valid and enforceable arbitration agreement existed despite the inclusion of a class action waiver in such agreement).

4. The District Court Erred In Finding the Arbitration Agreement Invalid Under California Law

The Court incorrectly concluded that the arbitration agreement is unenforceable because private claims involving injunctive relief are not arbitrable under California law. While this is an issue of federal law concerning the preemptive effect of the FAA, neither California law nor Ohio law bar the arbitration of private contractual claims seeking injunctive relief.[9] Indeed, arbitrators have the power to grant all legal and equitable remedies, including declaratory and injunctive relief. *Digiacomo v. Ex'pression Ctr. for New Media, Inc.*, 2008 U.S. Dist. LEXIS 70099, at *26 (N.D. Cal. Sept. 15 2008) (citing *Green Tree Financial Corp.v. Bazzle*, 539 U.S. 444 (2003)). Additionally, arbitrators in California commonly provide such equitable relief as specific performance, reformation and rescission. *Cruz v. Pacificare Health Sys., Inc.*, 66 P.3d 1157,

[9] *See supra* § VI.A.2-3.

1166 (Cal. Ct. App. 2003) ("Nothing in *Broughton*'s functional analysis suggests that the mere designation of restitution as an equitable remedy makes the request for remedy inarbitrable."); *Mercurio v. Superior Court*, 96 Cal. App. 4th 167, 178 (Cal. Ct. App. 2002) (citing *Stirlen v. Supercuts, Inc*., 51 Cal. App. 4th 1519, 1537 (Cal. Ct. App. 1997); *Advanced Micro Devices, Inc. v. Intel Corp*., 885 P.2d 994, 1012 (Cal. 1994).

California has carved out a limited and discrete exception—not at issue here—that certain "*public* injunctions" are incompatible with arbitration. *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1080 (9th Cir. 2007); *see also Cruz*, 66 P.3d at 1157 (plaintiff's "action to enjoin PacifiCare's alleged deceptive business practices is undertaken for the public benefit…*it is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff*") (emphasis added); *see also Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999) (plaintiff was acting as a private attorney general seeking to enjoin future deceptive advertising practices on behalf of the general public). In certain circumstances, the public benefit sought through the injunction is paramount and issues of supervision, enforcement and compliance by a court predominated making arbitration unsuitable.[10]

[10] The District Court adopted a sister court's analysis of the discussion of arbitrability of claims for injunctive relief. *See Ramirez v. Cintas Corp*., No.

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Here, Plaintiff's requested relief is not for the benefit of the general public but rather for their own benefit. *See Broughton*, 988 P.2d at 78 (distinguishing between relief for the benefit of the general public rather than the party bringing the action); *Cruz*, 66 P.3d at 1162 (distinguishing between public injunctions from other sorts of actions, such as antitrust suits, in which the public benefit is incidental to the plaintiff's award of damages). Plaintiffs are not seeking to enjoin anything other than KeyBank's collection efforts on promissory notes and related credit bureau reporting. The relief applies only to themselves and a discrete class of less than 100 individuals who have similar promissory notes with KeyBank. *See* SAC ¶ 5 [E.R. 104] ("The sole remedy Plaintiffs seek on behalf of themselves and the proposed classes is an injunction prohibiting defendants from contacting credit agencies regarding the Notes and prohibiting them from taking any action to enforce the Notes."); *Id.* ¶ 25 [E.R. 111] (the KeyBank proposed class is only California residents who remain obligated to KeyBank on their Promissory Note); *Id.* ¶ 28 [E.R. 112] ("each Proposed Class...being comprised of less than 100

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C-04-281, 2005 U.S. Dist LEXIS 43531, at *13-14 (N.D. Cal. Nov. 2, 2005) (White, J.) (citing *Davis*, 485 F.3d at 1080). Neither the Court below nor the *Ramirez* court recognize and acknowledge the distinction between injunctions for public benefits and injunctions to address private wrongs. On their face, neither of these decisions can be reconciled with the fact that arbitrators are empowered to grant injunctive relief. *Digiacomo*, 2008 U.S. Dist. LEXIS 70099 at *26.

individuals). *Cf. Cruz*, 66 P.3d at 1159 (the *Cruz* plaintiff alleged that he was filing the action "in his individual capacity and on behalf of the general public" and he sought to represent a class of "approximately 1.6 million PacifiCare Health Plan enrollees in California."). Any public benefit is incidental to the debt relief that these Plaintiffs seek. *See Cruz*, 66 P.3d at 1162.

None of the special issues concerning the enforcement of a public injunction are present. California courts have identified two factors taken in combination that make for an 'inherent conflict' between arbitration and the underlying purpose of an injunctive relief remedy: (1) benefit to the general public rather than the party and (2) significant institutional advantages to the judicial forum. *See id.* As previously stated, the relief sought only benefits the specific plaintiffs. Additionally, there is no institutional advantage to a judicial forum because there is no reason for any resulting award to be supervised by a Court. *See Cruz*, 66 P.3d at 1166 (citing *Arriaga v.Cross Country Bank*, 163 F. Supp. 2d 1189, 1197 (S.D. Cal. 2001)) (overruled on other grounds) (finding that disgorgement of funds does not need to be continuously monitored because it is essentially the same as awarding money damages, and within the power of arbitrators to award). Thus, Plaintiffs' requested injunctions arising in a private contractual context is compatible with arbitration and it should be compelled.

5. Plaintiffs' Requested Injunctive Relief Is Actually Debt Forgiveness For Which There is An Adequate Remedy at Law

Through artful pleading, Plaintiffs attempt to disguise the true nature of this action in an attempted end-run around fundamental precepts of contract law which should govern this dispute. When properly analyzed, it is evident that the claims and relief sought are fully arbitrable damage claims. The relationship between the parties arises and is governed by promissory notes. Thus, the essence of the relationship sounds in contract. There is a complete and adequate remedy at law for the Plaintiffs. Plaintiffs have not, however, brought an action on the contract but rather asserted common law tort and statutory claims which seek relief from obligations under the contract. "An action under the UCL is not an all-purpose substitute for a tort or contract action." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 948 (Cal. 2003). Unfortunately for the Plaintiffs, the law does not permit the use of tort and statutory claims to undue the obligations of a contract. The California Supreme Court has instructed that the UCL is not a substitute for contract or tort claims. Specifically, that Court instructs:

> Given the UCL's liberal standing requirements and relaxed liability standards, were we to allow nonrestitutionary disgorgement in an individual action under the UCL, plaintiffs would have an incentive to recast claims under traditional tort theories as UCL violations. They could recover from a competitor without having to meet the more rigorous pleading requirements of a negligence action ***or a breach of contract suit***. ***The result could be that the UCL would***

> ***be used as an all-purpose substitute for a tort of contract action, something the Legislature never intended***.

Id. at 948-49 (emphasis added).

KeyBank never conceded that California law prevents the arbitration of the Plaintiffs' claims. *See* Order [E.R. 12]. In fact, KeyBank's counsel, while conceding as it must that public injunctive relief does not lend itself to arbitrability, under either Ohio or California law, (*see* Reporter's Transcript of Proceeding, July 6, 2009 p. 4, ln. 13-15 [E.R. 40]) specifically noted that the procedural posture of this case is not the typical injunction case but is "artful and creative pleading from the plaintiffs to call it injunctive relief, but when the battle is fully joined, either in this court or in arbitration, it will absolutely turn on the obligation of a debt." R.T. 7/6/09, 5:2-6 [E.R. 41].

Here, Plaintiffs claim that KeyBank should have, but did not, include the Holder Notice in the promissory notes. In such a circumstance, the borrower is constrained to vindicate his/her obligations under the contract through a declaratory judgment action seeking to void the contract *ab initio* or through a defense to any collection action. In either situation, the relief Plaintiffs could obtain is a judgment releasing them from any obligation under the promissory notes. Plaintiffs did neither and have hopelessly confounded an otherwise straight forward situtation by trying to shoehorn this claim into the UCL.

The court's discretion in determining the propriety of affording equitable relief by injunction is not arbitrary, but must be exercised in accordance with fixed principles and precedents of equity jurisprudence. *People v. Paramount Citrus Assoc*., 305 P.2d 135, 144 (Cal. Ct. App. 1957). These pleading gymnastics confound what should be straight forward analysis. Plaintiffs are only entitled to injunctive relief if there is no adequate remedy at law. *See Dept. of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554, 1564 (Cal. Ct. App. 1992) (citing 6 Witkin, Cal. Procedure (3d ed. 1985) Provisional Remedies, § 253, p. 220 ("A party seeking injunctive relief must show the absence of an adequate remedy at law.")). Additionally, the power to issue an injunction is an extraordinary one to be exercised with great caution and only in those cases where plaintiff will suffer irreparable injury if injunction is not issued. *Id.*

The Plaintiffs seek debt forgiveness under the promissory notes which is a complete remedy under the law if properly pled and proved. *See Prudential Home Mortgage Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1250 (Cal. Ct. App. 1998) (court denied plaintiffs' injunction request under the UCL holding that plaintiffs' statutory remedies precluded their request for additional equitable relief under § 17200). Moreover, there is no difficulty determining the amount of compensation that would afford adequate relief. *Compare Wind v. Herbert*, 186 Cal. App. 2d 276, 285 (Cal. Ct. App. 1960) ("injunction properly issues in any case in which it

would be extremely difficult to ascertain amount of compensation that would afford adequate relief").

B. The Arbitration Agreement is Not Unconscionable Under California Law and Should be Enforced

The District Court expressly declined to reach the issue of unconsionability of the arbitration agreement under California law. Order [E.R. 11].[11] As a matter of judicial economy, this Court should resolve this discrete legal issue passed over by the court below.

The District Court 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]. The court erred by not deciding definitively that there is no conflict because, applying California law, the class action waiver contained in the arbitration clause of the contracts between the Plaintiffs and KeyBank is not unconscionable and is therefore enforceable. The class action waiver 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. A contract of adhesion is one which is "presented on a 'take it or

[11] The District Court should have applied Ohio law. The arbitration agreement is not unconsciouable or otherwise unenforceable under Ohio law. *See supra* at § VII.A.3.

leave it' basis with no opportunity to negotiate." *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1067 (N.D. Cal. 2007). However, an arbitration clause which provides a meaningful opportunity to opt-out "can preclude a finding of procedural unconscionability and render an arbitration provision enforceable." *Hoffman*, 546 F.3d at 1085. Whether a consumer has a meaningful opportunity to opt out includes an analysis of "issues such as how much additional time the expiration date cutoff typically provides, how many customers exercise their ability to opt out and whether other banks use similar provisions." *Id*.

The Plaintiffs were provided with a meaningful and informed opportunity to opt out of the class-action waiver in this case. The Plaintiffs' Promissory Notes contained a provision allowing the Plaintiffs to opt-out of the arbitration provision and class action waiver if they informed KeyBank of their intent to opt-out within 60 days. Order [E.R. 3]. *Cf. Oestreicher*, 502 F.Supp.2d at 1070 (21 day period to rescind agreement does not insulate waiver from unconscionability); *Brazil v. Dell Inc.*, No. C-07-01700, 2007 U.S. Dist. LEXIS 59095, at *8 (N.D. Cal. Aug. 3, 2007) (30 day period to rescind agreement does not insulate waiver from unconscionability). Further, the arbitration provision at issue explained to the Plaintiffs the costs and loss of certain rights associated with arbitration. *Cf. Gentry v. Superior Court*, 165 P.3d 556, 573 (Cal. 2007) (finding opt-out provision insufficient to avoid finding of unconscionability where it failed to set forth

disadvantages of arbitration); *Duran v. Discover Bank*, 2009 Cal. App. Unpub. LEXIS 4947, *16 (Cal. Ct. App. June 19, 2009) (finding no meaningful opt-out provision where there was "nothing . . . [explaining] the disadvantages of consenting to the arbitration and class waiver provisions; nothing clearly explaining the cost of arbitration; and nothing explaining the practical consequences of a class action waiver").

The class action waiver agreements did not occur in the context of disputes over small amounts of damages. Most cases "involving an unenforceable class action waiver [have involved] essentially negligible sums of money on an individual basis." *Oestreicher*, 502 F. Supp. 2d at 1067 (citing cases where individual damages ranged from $22 to $50). In this case, the amount of damages on an individual basis is both significant and substantial. Each plaintiff received a student loan in the amount of $55,950. An amount in the tens of thousands of dollars, a sum amounting to an entire year's salary for many, should be sufficient to warrant individual litigation and sufficient to justify obtaining legal assistance. Moreover, if the Plaintiffs are successful in reforming the promissory notes to make KeyBank liable for the failures of SSH, then the individual training of each student will need to be litigated to determine whether any offset against the student debt is appropriate. Thus, the claims need to be decided on an individual rather

than a class basis. Accordingly, the class action waiver would not be unconscionable and the Arbitration Agreement is enforceable.

Additionally, the District Court erred in finding that KeyBank conceded that there is a conflict between Ohio and California law on the issue of how attorneys fees are allocated. Order, [E.R. 12] Counsel for KeyBank agreed at the hearing that KeyBank would pay the arbitration fees for Mr. Fuller or Mr. Kilgore. R.T. 7/6/09, 12:3-11 [E.R. 48]. There is no record of KeyBank conceding a conflict between Ohio and California law.

VIII. CONCLUSION

For the reasons stated herein, the District Court erred in finding that California law barred arbitration of the Plaintiffs' claims for relief and thus conflicted with Ohio law. California law does not bar the arbitration of Plaintiffs' claims for debt reduction and thus does not create a conflict. Thus, the District Court erred by applying California law to determine whether the Arbitration Agreement was valid and erred in finding that it was unenforceable. Accordingly, KeyBank requests that this Court reverse the decision of the District Court denying the Motion to Compel Arbitration and find that a valid, enforceable Arbitration Agreement exists between the parties.

IX. REQUEST FOR ORAL ARGUMENT

KeyBank requests oral argument.

Dated: November 23, 2009

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Scott O'Connell
W. Scott O'Connell
Attorneys for Appellants
KeyBank, National Association
and Great Lakes Educational
Loan Association

STATEMENT OF RELATED CASES

Case No. 09-16703

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

Appellants KeyBank, National Association and Great Lakes Educational Services, Inc. state that there are no known related cases pending in this Court.

Dated: November 23, 2009

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Scott O'Connell
W. Scott O'Connell
Attorneys for Appellants
KeyBank, National Association
and Great Lakes Educational
Loan Association

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 principal brief of no more than 30 pages.

Dated: November 23, 2009

Respectfully submitted,

NIXON PEABODY LLP

/s/ W. Scott O'Connell
W. Scott O'Connell
Attorneys for Appellants
KeyBank, National Association
and Great Lakes Educational
Loan Association

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 November 23, 2009, 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:

APPELLANT'S OPENING BRIEF

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed on November 23, 2009 at San Francisco, California.

Lillian Cardona