Greenwood v. Cottonwood Fin., Ltd.

United States District Court for the Northern District of Texas, Dallas Division

July 29, 2022, Decided; July 29, 2022, Filed

No. 3:21-cv-2459-L

Reporter
2022 U.S. Dist. LEXIS 171189 *

JAMIE GREENWOOD, Plaintiff, v. COTTONWOOD FINANCIAL, LTD. et al., Defendants.

Core Terms

arbitration, borrower, consumer report, consumer, safe harbor, parties, consumer reporting agency, database, argues, consumer credit, arbitration clause, nationwide, asserts, arbitration provision, class claim, birth date, recommendation, nonarbitrable, agreement to arbitrate, arbitration agreement, safe harbor provision, compel arbitration, loan agreement, status report, purportedly, regulations, disputes, genuine, qualify, verify

Counsel: **[*1]** For Jamie Greenwood, Individually and on Behalf of All Others Similarly Situated, Plaintiff: John D Blythin, LEAD ATTORNEY, Jesse Fruchter, Ademi LLP, Cudahy, WI.

For Cottonwood Financial LTD, Cottonwood Financial Wisconsin LLC, Cottonwood Financial Arizona LLC, Cottonwood Financial Colorado LLC, Cottonwood Financial Idaho LLC, Cottonwood Financial Illinois LLC, Cottonwood Financial Kansas LLC, Cottonwood Financial Michigan LLC, Cottonwood Financial Missouri LLC, Cottonwood Financial Ohio LLC, Cottonwood Financial Oklahoma LLC, Cottonwood Financial Texas LLC, Cottonwood Financial Utah LLC, Cottonwood Financial Virginia LLC, Cottonwood Financial Washington LLC, Cottonwood Financial Austin CSO, CF New Mexico LLC, Defendants: Andrew K York, LEAD ATTORNEY, London Ryynanen England, William Nelson Drabble, Gray Reed & McGraw LLP, Dallas, TX.

Judges: DAVID L. HORAN, UNITED STATES MAGISTRATE JUDGE.

Opinion by: DAVID L. HORAN

Opinion

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Defendants Cottonwood Financial, LTD. et al ("Defendants") have filed a Motion to Compel Arbitration, Dismiss Plaintiff's Class Claims, and Stay Proceeding ("the Motion"). *See* Dkt. No. 7. Plaintiff Jamie Greenwood has **[*2]** filed a response [Dkt. No. 22], to which Defendants have filed a reply [Dkt. 26]. For the reasons explained below, the Court should grant in part and deny in part Defendants' Motion.

Background

The underlying action giving rise to this motion involves a consumer loan that Defendant Cottonwood Financial, LTD. ("Cottonwood") an Irving, Texas headquartered consumer finance company, issued to Plaintiff Jamie Greenwood, purportedly in violation of the Military Lending Act ("MLA"). *See* Dkt. No. 1.

Cottonwood and its subsidiaries purport to operate, across Wisconsin and several other states, more than 250 "Cash Stores" that offer short term credit products to consumers. *See* Dkt. No. 8 at 2. According to Cottonwood, because these products carry interest rates that typically exceed the cap set by the MLA, Cash Stores do not extend credit to "covered borrowers" as they are defined under the MLA. *See id.* Before originating any loan, the Cash Store requires a prospective borrower to complete a loan application, the information from which is then entered into an electronic application in the Cash Store computer system. *See id.* The computer system then automatically sends an electronic inquiry to Experian, **[*3]** the consumer credit reporting company, to determine whether the prospective borrower is a "covered borrower" under the MLA. *See id.* Based on the loan application information,

Experian then returns the Cash Store one of two coded responses: "1203 — MLA COVERED BORROWER" or "1204 — NON-MLA COVERED BORROWER." *See id.* The Cash Stores purportedly proceed with the loan underwriting process only if the Experian report returns a response code showing that the prospective borrower is not covered by the MLA. *See id.* at 3.

On February 21, 2020, Greenwood visited the Cash Store location in Racine, Wisconsin, operated by Defendant Cottonwood Wisconsin, to apply for a cash-advance loan. *See id.* A Cash Store employee entered Greenwood's loan application information into the computer system, which, according to Cottonwood, returned an Experian report containing the response code "1204" indicating Greenwood was not an MLA-covered borrower. *See id.* The Cash Store proceeded to issue Greenwood a loan for $2,700 and provided her with a Consumer Installment Loan Agreement (the "Loan Agreement"), which she signed. *See id.* at 3-4.

Greenwood did not make any payments on the loan, and, in January 2021, Cottonwood **[*4]** filed a small claims collection complaint against Greenwood in Wisconsin Circuit Court. *See* Dkt. 1 at 6. On October 6, 2021, Greenwood filed the underlying action in federal court bringing claims on behalf of herself and a putative nationwide class against Defendants for violations of the Military Lending Act ("MLA") 10 U.S.C. § 987 and the Wisconsin Consumer Act ("WCA") Wis. Stat. Ann §§ 421.101-427.105. *See id.*

In response, Defendants filed this motion to dismiss Greenwood's class claims, compel arbitration of her individual claims, and stay the proceedings, arguing that the Loan Agreement's arbitration clause applies to Greenwood's claims and requires that they be submitted to arbitration. *See* Dkt. No. 8.

Legal Standard

In enacting the Federal Arbitration Act ("FAA"), Congress "expressed a strong policy favoring arbitration." J. S. & H. Const. Co. v. Richmond Cty. Hosp. Auth., 473 F.2d 212, 214-15 (5th Cir. 1973). The FAA provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see* Bank One, N.A. v. Coates, 125 F. Supp. 2d 819, 827 (S.D. Miss. 2001), *aff'd*, *34 F. App'x 964 (5th Cir. 2002)*. A party may bring a motion to compel arbitration under the FAA, and a court must direct parties to arbitration if it is "satisfied that the making of the agreement for arbitration ... is not in issue." 9 U.S.C. § 4; *see Matos v. AT&T Corp.*, No. 18-cv-2591-M-BK, 2019 WL 5191922, at *2 (N.D. Tex. Sept. 9, 2019) **[*5]** ("[O]nce a court finds an agreement to arbitrate between the parties, the court is restricted to enforcing the agreement."), *rep. & rec. adopted*, 2019 WL 5191487 (N.D. Tex. Oct. 15, 2019).

Courts in the Fifth Circuit employ a two-step inquiry when determining a motion to compel arbitration under the FAA. *See* Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). The first step is to determine whether the parties agreed to arbitrate the dispute at issue. *See* Webb v. Investacorp., Inc., 89 F.3d 252, 258 (5th Cir. 1996) (per curiam). The second step is to determine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." Safer v. Nelson Fin. Grp., Inc., 422 F.3d 289, 294 (5th Cir. 2005) (quoting Webb, 89 F.3d at 258); *accord* OPE Int'l LP v. Chet Morrison Contractors, Inc., 258 F.3d 443, 445-46 (5th Cir. 2001) (per curiam) (citing Mitsubishi, 473 U.S. at 628). "Only if the court finds there is an agreement to arbitrate does it consider the second step of whether any legal constraints render the claims nonarbitrable." *Edwards v. Conn Appliances, Inc.*, No. 3:14-cv-3529-K, 2015 WL 1893107, at *2 (N.D. Tex. Apr. 24, 2015) (citing Webb, 89 F.3d at 258).

In determining whether the parties agreed to arbitrate the dispute at issue, courts must consider "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." Safer, 422 F.3d at 294 (citations omitted); *accord* Webb, 89 F.3d at 258. In light of the strong federal policy favoring arbitration, "the Supreme Court has held that 'any doubts **[*6]** concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" Safer, 422 F.3d at 294 (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). But this presumption "does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." Will-Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 214 (5th Cir. 2003) (quoting Fleetwood Enters. Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002)). "Determining whether there is a valid arbitration agreement is a question of state contract law and is for

the court." *Huckaba v. Ref-Chem, L.P., 892 F.3d 686, 687 (5th Cir. 2018)* (citing *Kubala v. Supreme Production Services, Inc., 830 F.3d 199, 202 (5th Cir. 2016)*).

District courts within the Fifth Circuit apply a summary-judgment-like standard when considering this question. *See Johnson v. CMI Group*, No. 3:19-cv-2361-N-*BH, 2020 WL 8461518, at *4 (N.D. Tex. Dec. 29, 2020)*, *rep. & rec. adopted*, *2021 WL 424279 (N.D. Tex. Feb. 8, 2021)*. "[T]he moving party must first 'present evidence sufficient to demonstrate an enforceable agreement to arbitrate.'" *Id.* (quoting *Clutts v. Dillard's, Inc., 484 F. Supp. 2d 1222, 1224 (D. Kan. 2007)*). "'This burden does not require the moving party to show initially that the agreement would be enforceable, merely that one existed.'" *Id.* (quoting *Hines v. Overstock.com, Inc., 380 F. App'x 22, 24 (2d Cir. 2010)* (emphasis in original)). "Once this burden has been met by the movant, the burden shifts to the non-movant to raise a genuine dispute of material fact regarding the existence of an agreement to arbitrate." *Id.* (citing *Hancock v. American Telephone and Telegraph Co., Inc., 701 F.3d 1248, 1261 (10th Cir. 2012)*). "'Just as in summary judgment proceedings, a party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration **[*7]** rests; the party must identify specific evidence in the record demonstrating a material factual dispute for trial.'" *Id.* (quoting *Tinder v. Pinkerton Security, 305 F.3d 728, 735 (7th Cir. 2002)*).

Analysis

I. The Court should grant Defendants' motion to compel Greenwood's individual claims

A. The dispute is covered by an enforceable arbitration agreement

Greenwood does not dispute that a valid arbitration agreement exists. Nor does she dispute that the arbitration clause, which provides that "all disputes including any Representative Claims against [Cottonwood Wisconsin] and/or Related Third Parties shall be resolved by binding arbitration only on an individual basis with [Greenwood]," covers her claims against Defendants. There is no genuine issue of material fact as to the parties' agreement to arbitrate the dispute at issue.

B. The MLA does not render Greenwood's claims nonarbitrable

Because there is a valid, applicable arbitration clause, the analysis proceeds to whether any federal statute or policy renders the claims nonarbitrable. *See Wash. Mut. Fin. Group, L.L.C., v. Bailey, 364 F.3d 260, 263 (5th Cir. 2004)*. Greenwood argues that the arbitration provision is unenforceable because, at the time that she was issued the loan, she was on Active Guard duty and thus was a "covered member" under the MLA. *See 10 U.S.C. § 987(f)(4)* ("[N]o agreement **[*8]** to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member.").

1. The Military Lending Act

The MLA governs extensions of consumer credit to covered members of the armed forces and their dependents and seeks to provide protections against predatory lending practices by imposing limitations on the cost and terms of credit products. *See 10 U.S.C. § 987*; *32 C.F.R. § 232.1(b) (2021)*. In addition to capping interest rates and requiring certain disclosures, the MLA makes it "unlawful for any creditor to extend consumer credit to a covered member ... with respect to which the creditor requires the borrower to submit to arbitration" and provides that "no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against ... any person who was a covered member ... when the agreement was made." *10 U.S.C. §§ 987(f)(4)*, *(e)(3)*.

As defined in the "regulations prescribed under [the MLA]," "consumer credit" means "credit offered or extended to a covered borrower primarily for personal, family, or household purposes." *10 U.S.C. §§ 987(i)(6)*; *32 C.F.R. § 232.3(f)(1) (2021)*.

But the statute exempts from the definition of consumer credit "[a]ny credit transaction or account for credit for which a creditor determines **[*9]** that a consumer is not a covered borrower by using a method and by complying with the recordkeeping requirement set forth in *§ 232.5(b)*." *32 C.F.R. § 232.3(f)(1)(v) (2021)*. *Section 232.5(b)*, in turn, provides that "[a] creditor may conclusively determine whether credit is offered or extended to a covered borrower ... by assessing the status of a consumer" using one of two methods. First, "a creditor may verify the status of a consumer by using information relating to that consumer, if any, obtained directly or indirectly from the database maintained by the Department." *32 C.F.R. § 232.5(b)(2)*. Alternatively, "a creditor may verify the status of a consumer by using a statement, code, or similar indicator describing that status, if any, contained in a consumer report obtained

from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis." *Id.*

Cottonwood does not contest that the loan that it issued Greenwood would ordinarily qualify as consumer credit under the MLA, or that, because the loan agreement includes an interest rate of 520.00% and a mandatory arbitration provision, the MLA would normally prohibit extension to a covered member.

Cottonwood's contention, and the sole issue on which the applicability of the arbitration **[*10]** clause turns, is whether Cottonwood successfully availed itself of the safe harbor provision under *32 C.F.R. § 232.5(b)*, such that the MLA does not apply to Greenwood's loan agreement.

2. No genuine dispute of material fact exists regarding Cottonwood's use of the safe harbor provision

Cottonwood asserts that it used the second method, verifying Greenwood's status through Experian prior to issuing her the loan, and keeping and maintaining a record of the information that Experian provided as required. *See* *32 C.F.R. § 232.5(b)(2)(ii)*. Cottonwood argues that, whatever Greenwood's true status, Cottonwood was entitled to rely on the 1204 code that it received from Experian as a conclusive determination that Greenwood was not a covered member and that this conclusive determination rendered the loan not consumer credit and thus not subject to the MLA, including its ban on forced arbitration.

Greenwood asserts that Cottonwood is not entitled to rely on the safe harbor provision because the search that the Cash Store performed to verify Greenwood's status fails to satisfy the requirements of either subsection.

a. Subsection (b)(2)(ii)

Greenwood argues that, although Cottonwood purportedly obtained a descriptive code from Experian indicating **[*11]** that Greenwood was not a covered member under the MLA, Defendants cannot rely on that report for safe harbor for several reasons.

First, Greenwood asserts that Cottonwood mischaracterizes the method that it used to determine Greenwood's MLA status. According to the Declaration of James Vineyard (the "Vineyard Declaration"), when a Cash Store employee inputs a prospective borrower's completed loan application into the computer system triggering an electronic inquiry to Experian regarding the prospective borrower's MLA status, "Experian runs a search through the Department of Defense database and provides the Cash Store with the prospective borrower's military status." Dkt. No. 10 at 2. In other words, Greenwood argues, "Experian is simply acting as an intermediary, obtaining information directly from the MLA database and then passing that information on to Cottonwood." Dkt. No. 22 at 12. And such a search is thus actually obtaining Greenwood's MLA status "indirectly from the database maintained by the Department" as contemplated by subsection (b)(2)(i), not verifying MLA status using a descriptive code "contained in a consumer report obtained by a consumer reporting agency that compiles and maintains files **[*12]** on consumers on a nationwide basis" as Cottonwood argues it was doing under subsection (b)(2)(ii).

But, as Defendants point out, nothing in the statute prohibits a creditor from invoking safe harbor under subsection (b)(2)(ii) using a consumer report containing data derived from the Department's database. And the Department's own guidance provides that "a nationwide consumer reporting agency that provides to its client-creditors consumer reports containing covered-borrower data derived solely from the MLA Database may enable those creditors to use either of the two methods for the safe harbor in *§ 232.5(b)*." *Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 F.R. 43560, 43577 n.159 (July 22, 2015)*. In other words, that the code that Cottonwood relied on allegedly resulted from a consumer report that Experian created by obtaining information solely from the MLA database does not preclude Defendants from arguing safe harbor under subsection (b)(2)(ii), even if the inquiry could also qualify as an indirect MLA database search under subsection (b)(2)(i).

Second, Greenwood asserts that Defendants are not entitled to rely on the MLA status report as a "consumer report" because a creditor may only take advantage of subsection (b)(2)(ii) by using a consumer report that already contains information about the consumer's MLA status. *See* Dkt. No. 22 at 13. Greenwood points to the Notice of Rulemaking's **[*13]** justification for allowing MLA status to be determined through searches run by nationwide consumer reporting agencies, in which the Department states that it "believes that a covered borrower would not face a material risk of being mis-identified as not having that status by a creditor's use of a consumer report because, under the FCRA, a consumer reporting agency must 'follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual about whom

the report relates.'" 80 F.R. at 43577. Those procedures producing the type of "sufficiently robust systems [] that would provide for the degree of accuracy for covered-borrower checks that would warrant granting a safe harbor to the client-creditors," "inherently require nationwide consumer reporting agencies to both self-validate the information in the report and to afford consumers a reasonable opportunity to obtain their information and dispute any inaccurate information." 80 F.R. at 43577; Dkt. No. 22 at 14 (citing 15 U.S.C §§ 1681g(a), 1681i). Greenwood argues that the MLA status report was not produced under these standards of accuracy for a consumer reporting agency because (1) the evidence suggests that Experian did not self-validate the database **[*14]** inquiry against its own files, which indicated that Greenwood was a Department of Defense Active Duty service member, and (2) Greenwood had no opportunity to dispute the inaccurate MLA status information because it did not exist until the loan inquiry was initiated. And so "Cottonwood is trying to avail itself of the 'consumer report' safe harbor even though Experian's inquiry included none of the 'robust systems' that warrant safe harbor protection." Dkt. No. 22 at 15. Greenwood contends that the MLA status report does not qualify as a consumer report under subsection (b)(2)(ii).

But these arguments, while raising concerns regarding the reliability of consumer reporting agencies and how effectively the regulations accomplish their stated goal of ensuring prospective borrowers are not misidentified, are separate from the definition of what constitutes a consumer report under the MLA and implementing regulations. Section (b(2)(ii) states that the term "consumer report" has the same definition given that term in the FCRA, 15 U.S.C §§ 1681a, which broadly defines a consumer report as

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit **[*15]** standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes.

15 U.S.C §§ 1681a(d)(1). Greenwood does not dispute that Experian, a consumer reporting agency, communicated information bearing on her credit capacity, personal characteristics, and/or mode of living to the Cash Store via a descriptive numerical code, which the Cash Store then used as a factor in establishing her eligibility for credit to be used primarily for personal, family, or household purposes.

There is no genuine issue of material fact as to whether the MLA status report qualifies as a consumer report.

Third, Greenwood asserts that, even if the MLA status report qualifies as a consumer report under subsection (b)(2)(ii), Cottonwood is still not entitled to safe harbor because Experian instructs creditors who want to avail themselves of the provision's protections that they must provide the consumer's date of birth, which Greenwood alleges Cottonwood failed to do.

Greenwood and Defendants **[*16]** offer conflicting evidence regarding whether Experian requires creditors to provide a prospective borrower's date of birth when requesting an MLA status consumer report. *Compare* Dkt. No. 23 at Appx. 10-11 (citing instructions from Experian to creditors stating that for a credit report with MLA status only "Year of Birth ... will be required for an MLA response"), *with* Dkt. No. 21-1 at Appx. 98 (citing information on Experian's website stating that an "MLA search requires ... date of birth. This applies to both the credit report add-on and standalone solutions. If any of this data is missing from the inquiry, we are unable to perform the MLA search").

But, while subsection (b)(2)(i) specifies that "[a] search of the Department's database requires the entry of the consumer's last name, date of birth, and Social Security number," subsection (b)(2)(ii) has no similar requirement. 32 C.F.R. § 232.5(b). As discussed above, the second method allows a creditor to determine whether a consumer is a covered borrower by relying on information obtained from a consumer report prepared by a nationwide consumer reporting agency, even if that information is derived solely from an MLA database search. *See* 32 C.F.R. § 232.5(b)(2)(ii); 80 F.R. at 43577 n.159. While, as this case makes clear, declining to require **[*17]** that creditors provide consumer reporting agencies with a prospective borrower's full birth date may lead to misidentification of their MLA status, subsection (b)(2)(ii) does not expressly require creditors to provide that information, nor does it expressly prohibit a creditor from availing itself of safe harbor under that subsection where it was excluded from the inquiry.

Finally, Greenwood argues that Cottonwood cannot claim safe harbor because it failed to comply with the statute's recordkeeping requirements. Section

232.5(b)(3) instructs that a creditor who uses one or both of the inquiry methods to determine a prospective borrower's MLA status may claim safe harbor "so long as that creditor timely creates and thereafter maintains a record of the information so obtained."

Here, Cottonwood asserts that it timely created and properly maintained the information that it received from Experian. *See* Dkt. No. 27 at 26-27. And Cottonwood provides in its Appendix a "true and correct copy" of the report containing the code "1204 MLA NO RECORD FOUND" response. *See* Dkt. No. 10, Appx. 5-6, 26-27. Greenwood asserts that this document "appears to be source code rather than a 'true and correct copy' of a consumer report and complains **[*18]** that Cottonwood has not "produce[d] any record of the MLA database inquiry it purportedly made through Experian before the loan was issued." Dkt. No. 21-1 at 15-16. But the source code copy provided by Cottonwood both comports with the descriptions provided by Cottonwood and in Experian's materials of an MLA status inquiry and report; and, as discussed above, a descriptive MLA status code is a consumer report under the FCRA's broad definition. *See* 15 U.S.C §§ 1681a; *see also* Holmes v. Telecheck Int'l, Inc., 556 F. Supp. 2d 819, 832 (M.D. Tenn. 2008) (finding that numeric codes transmitted by check guarantee company to merchant purportedly identifying check-writer's risk profile were consumer reports). Greenwood does not allege any facts disputing that the report is "a record of the information so obtained" from Experian or suggesting that Cottonwood obtained other information from Experian that it did not properly maintain. And, so, Greenwood has not raised any genuine dispute as to Cottonwood's required recordkeeping.

b. Subsection (b)(2)(i)

Second, Greenwood argues that, because Cottonwood's MLA status inquiry failed to include Greenwood's date of birth, it did not meet the requirements for conclusive determination under subsection (b)(2)(i) and similarly cannot not claim safe harbor protection **[*19]** under this subsection. Cottonwood does not dispute this, nor does it argue that it otherwise meets the requirements for safe harbor under subsection (b)(2)(i). But, because Cottonwood met its burden in alleging safe harbor under subsection (b)(2)(ii), this failure has no bearing on the applicability of the arbitration provision.

3. The Court may not consider Greenwood's argument under the Admirative Procedure Act

Greenwood alternatively argues that 32 C.F.R. § 232.5(b)(2)'s safe harbor provisions should not apply to exempt Cottonwood from the requirements of the MLA because "the regulations themselves contravene the plain language of the [MLA] and are void" under the Administrative Procedure Act ("APA") because they are arbitrary and capricious. Dkt. No. 22 at 18.

But this suit is not an appropriate vehicle by which to challenge 32 C.F.R. § 232.5(b)(2)'s validity under the APA, which "'by its terms ... applies only to federal agencies.'" Friends of Lydia Ann Channel v. United States Army Corps of Engineers, 701 F. App'x 352, 358 (5th Cir. 2017) (quoting S. Carolina Wildlife Fed'n v. Limehouse, 549 F.3d 324, 331 n.5 (4th Cir. 2008)); 5 U.S.C. § 701. "[I]t is well settled that suits under the APA may not be pursued against nonfederal entities, nor may federal courts enjoin nonfederal entities based on the conduct of federal agencies held to run afoul of the APA. *Id.*; *see also* Coliseum Square Ass'n v. Jackson, 465 F.3d 215, 249 (5th Cir. 2006) ("[T]he APA 'does not provide private plaintiffs a route for reviewing the actions of nonfederal **[*20]** defendants.'"). As neither party to this suit is a federal entity against which a proper APA suit may be brought, this Court does not have a basis for considering Greenwood's argument that the safe harbor regulations are inconsistent with the MLA.

d. The Court may not decide whether the loan agreement was void ab initio

Finally, Greenwood argues that the Court should deny Defendants' motion to compel because, even if the safe harbor provision applies, the entire loan agreement, including the arbitration clause, was void from inception because its terms violated the MLA. *See* Dkt. No. 22 at 23. This argument is similarly unavailing.

The United States Supreme Court has consistently held that, while the validity of an arbitration provision is subject to initial court determination, "the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide." Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012) ("[I]t is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court." (internal quotations omitted)). **[*21]** Accordingly, and as explained above, the Court may only consider whether the parties agreed to arbitrate and, if so, whether any federal policy or statute nonetheless

renders the claims nonarbitrable. Greenwood's claim that the loan was void from inception is an attack on the validity of the contract, not evidence that the MLA renders Greenwood's claims nonarbitrable. Such a claim is properly reserved for the arbitrator to decide and does not serve as a basis for this Court to deny Defendants' motion to compel.

The parties have a valid and enforceable arbitration and no federal policy or statute renders Greenwood's claims nonarbitrable. The Court should grant Defendants' motion and order arbitration of Greenwood's individual claims.

II. The arbitrability of Greenwood's class claims should be determined by an arbitrator

Defendants also argue that the loan agreement's arbitration clause bars Greenwood from bringing or participating in a class action lawsuit and request this Court dismiss her class claims. Specifically, Defendants point to the section of the arbitration provision which states:

> YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY **[*22]** OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.
> ...
> [A]ll disputes including any Representative Claims against us and/or Related Third Parties shall be resolved by binding arbitration only on an individual basis with you. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBI1RATION.

Dkt. No. 10 at Appx. 31.

Greenwood does not specifically address the validity of the class waiver and relies only on her previously discussed arguments that the arbitration provision is inapplicable or otherwise void.

Having concluded that the parties have an enforceable agreement to arbitrate and that Greenwood must submit her claims for arbitration, the Court should leave for the arbitrator to determine whether the waiver prohibits Greenwood's class claims. *See* Henricks v. UBS Financial Services, Inc., 546 F. App'x 514, 519 (5th Cir. 2013); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003) (plurality) (concluding that under the parties' agreement, the question — whether the agreement forbids class arbitration — is for the arbitrator to decide because the parties **[*23]** agreed to submit to the arbitrator all disputes, claims, or controversies arising from or relating to the contract) (cleaned up); Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc., 343 F.3d 355, 359 (5th Cir. 2003) ("[A]rbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration.").

III. The Court should stay the proceedings pending arbitration

Finally, Defendants urge the Court to stay further proceedings until the parties complete arbitration. The undersigned agrees that a stay, rather than dismissal, is appropriate. *See* Ruiz v. Donahoe, 784 F.3d 247, 249 (5th Cir. 2015) (citing Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 658-59, 662 (5th Cir. 1995) and 9 U.S.C. § 3) ("If a dispute is subject to mandatory grievance and arbitration procedures, then the proper course of action is usually to stay the proceedings pending arbitration.").

Recommendation

For the reasons and to the extent explained above, the Court should grant Defendants' motion to compel arbitration; deny without prejudice the motion to dismiss class claims; and grant the motion to stay proceedings pending arbitration.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with **[*24]** a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate

judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 1417 (5th Cir. 1996)*.

DATED: July 29, 2022

/s/ David L. Horan

DAVID L. HORAN

UNITED STATES MAGISTRATE JUDGE
