IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS R. MAGILL,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

CASE NO. 4:21-cv-01877 YGR

ORDER GRANTING MOTION TO COMPEL ARBITRATION; DENYING MOTION TO DISMISS; DISMISSING ACTION WITH PREJUDICE

Re: Dkt. Nos. 12, 13

Plaintiff Nicholas R. Magill brings this proposed class action against defendant Wells Fargo Bank, N.A. ("Wells Fargo") for state-law claims arising out of Wells Fargo's alleged undisclosed practice of charging multiple penalty fees to consumers for having inadequate funds based on the same transaction. Now pending are Wells Fargo's motions to compel arbitration or, in the alternative, to dismiss all claims in the complaint.

Having carefully considered the pleadings and the parties' briefs, and for the reasons set forth below, the Court **GRANTS** the motion to compel arbitration, and **DENIES** the motion to dismiss as moot. Additionally, pursuant to Magill's request, which Wells Fargo does not oppose, the Court **DISMISSES THE ACTION WITH PREJUDICE** in lieu of staying the action pending arbitration.

I. BACKGROUND

In the complaint, Docket No. 1-1, Magill alleges as follows.

Magill has a Wells Fargo checking account and his relationship with Wells Fargo is governed by the terms of his Consumer Account Agreement ("Account Agreement"), among other agreements, with Wells Fargo. Magill alleges that Wells Fargo assessed him an insufficient funds fee ("NSF Fee") on a transaction, which Wells Fargo rejected on the basis that Magill had

insufficient funds in his account to cover a purchase. That same transaction for payment was reprocessed by Wells Fargo six days later, which resulted in Magill incurring a second NSF Fee. Magill alleges that Wells Fargo failed to disclose in the Account Agreement that he and other consumers could incur "multiple fees" in connection with the same "item" or transaction. Magill further alleges that Wells Fargo's practice of charging multiple NSF or overdraft fees ("OD Fees") on the same item or transaction violates the terms of the Account Agreement.

Magill asserts two claims against Wells Fargo: (1) breach of contract; and (2) violations of the unfair prong of the Unfair Competition Law ("UCL"), California Business & Professions Code section 17200. Magill asserts these claims on his own behalf and on behalf of a proposed class comprised of:

> All holders of a Wells Fargo checking account in California who, within the applicable statute of limitations preceding the filing of this lawsuit, were charged Multiple Fees on the same item.

Docket No. 1-1 ¶ 56.

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") allows a party to request that a district court compel arbitration and stay judicial proceedings. 9 U.S.C. §§ 3, 4. When deciding whether a dispute is arbitrable under federal law, a court must answer two questions: (1) whether the parties agreed to arbitrate; and, if so, (2) whether the scope of that agreement to arbitrate encompasses the claims at issue. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). In determining whether parties have agreed to arbitrate a dispute, courts apply "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009) (citation omitted). "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). If the party seeking to compel arbitration establishes both factors, the court must compel arbitration. *Id.* "The standard for demonstrating arbitrability is not a high one; in fact, a district

court has little discretion to deny an arbitration motion, since the [FAA] is phrased in mandatory terms." *Republic of Nicar. v. Standard Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991).

The FAA's savings clause "allows courts to refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of a contract.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (quoting 9 U.S.C. § 2). "The clause 'permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "As arbitration is favored, those parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013).

III. MOTION TO COMPEL ARBITRATION

Wells Fargo moves to compel arbitration with respect to both of Magill's claims on the basis that Magill assented to the Account Agreement, which requires Magill's disputes to be resolved through arbitration. Wells Fargo further contends that, to the extent that there are disputes regarding the enforceability of the arbitration agreement, such disputes must be resolved by the arbitrator because the arbitration provisions in the Account Agreement clearly and unmistakably delegate them to the arbitrator.

The following provisions in the Account Agreement are relevant to the present motion:

> Arbitration Agreement between you and Wells Fargo:
> If you have a dispute, we hope to resolve it as quickly and easily as possible. First, discuss your dispute with a banker. If your banker is unable to resolve your dispute, you agree that either Wells Fargo or you can initiate arbitration as described in this section.
>
> Definition: Arbitration means an impartial third party will hear the dispute between Wells Fargo and you and provide a decision. Binding arbitration means the decision of the arbitrator is final and enforceable. *A dispute is any unresolved disagreement between Wells Fargo and you. A dispute may also include a disagreement about this Arbitration Agreement's meaning, application, or enforcement.*
>
> Wells Fargo and you each agrees to waive the right to a jury trial or a trial in front of a judge in a public court. *This Arbitration Agreement has only one exception: Either Wells Fargo or you may still take any dispute to small claims court.*

Docket No. 12-2 at 10 (emphasis added).

A. Whether an Agreement to Arbitrate Exists

The Court first examines whether an agreement to arbitrate exists. *See Mitsubishi Motors*, 473 U.S. at 626 ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.").

Here, Magill does not dispute that the Account Agreement, and its arbitration provisions, constitute a valid agreement to which he assented by signing his application for a deposit account with Wells Fargo. Indeed, Magill alleges that this is the agreement that Wells Fargo has breached. *See, e.g.*, Docket No. 1-1 ¶¶ 9, 14-18. Magill also does not dispute that the latest version of the Account Agreement, which Wells Fargo filed in support of its motion, *see* Docket No. 12-2, is the operative version of the Account Agreement.

Accordingly, the Court concludes that an agreement to arbitrate exists.

B. Whether Magill's Claims Can Be Arbitrated Pursuant to the Agreement

The Court next considers whether Magill's claims in this action are within the scope of the arbitration agreement. *See Brennan*, 796 F.3d at 1130.

Wells Fargo argues that the arbitration provisions in the Account Agreement encompass both of Magill's claims because such provisions state that they cover "any unresolved disagreement between Wells Fargo and [Magill]." *See* Docket No. 12-2 at 10. Wells Fargo further contends that, to the extent that Magill argues that his claims are not within the scope of the arbitration agreement, or that the arbitration agreement is unenforceable, those arguments must be resolved by the arbitrator because (1) the arbitration provisions cover disputes about the arbitration agreement's "meaning, application, or enforcement," *see* Docket No. 12-2 at 10 ("A dispute may also include a disagreement about this Arbitration Agreement's meaning, application, or enforcement."); (2) the arbitration provisions delegate to the arbitrator disputes about whether the agreement to arbitrate is enforceable, *see* Docket No. 12-2 at 10 ("If this Arbitration Agreement is in dispute, the arbitrator will decide whether it is enforceable."); and (3) the arbitration provisions incorporate the AAA Consumer Arbitration Rules, which Wells Fargo

contends have been treated by courts as constituting clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Magill does not dispute that his claims fall within the scope of the arbitration provision requiring the arbitration of "any unresolved disagreement between Wells Fargo and [himself]." Docket No. 12-2 at 10. Rather, Magill opposes the arbitration of his claims on the ground that the entire arbitration agreement is void and unenforceable because (1) its provisions prevent him from seeking public injunctive relief in any forum in violation *of McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017) ("*McGill*"), which holds that any agreement to waive the right to seek public injunctive relief in any forum is invalid and unenforceable under California law; and (2) the arbitration agreement contains a "poison pill," which allows the Court to void the entire arbitration agreement if it finds that the arbitration agreement violates *McGill*. Magill also argues that it is for the Court, not the arbitrator, to decide whether the arbitration agreement is void and unenforceable as a result of *McGill* and its "poison pill" provision.

1. Delegation of Arbitrability

The first issue the Court must resolve, as a threshold matter, is the question of whether there is clear and unmistakable evidence that the parties delegated arbitrability questions to the arbitrator.

In general, "whether the court or the arbitrator decides arbitrability is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'" *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013) (citation and internal quotation marks omitted). Courts, therefore, "apply a more rigorous standard" when determining whether arbitrability is a matter for the arbitrator pursuant to a delegation clause. *See Momot v. Mastro*, 652 F.3d 982, 987-88 (9th Cir. 2011). Clear and unmistakable evidence of an agreement to arbitrate arbitrability might include "a course of conduct demonstrating assent" or "an express agreement to do so." *Id.* at 988 (citation and internal quotation marks omitted). The application of the "*McGill* rule," as well as the enforceability of an arbitration agreement in general, are "gateway issue[s] that may be delegated to the arbitrator." *See Marselian v. Wells Fargo & Co.*, No. 20-CV-03166-HSG, __ F. Supp. 3d __, 2021 WL 198833, at *6 (N.D. Cal. Jan. 20, 2021)

(collecting cases); *see also First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995) (holding that the question of "who has the power to decide arbitrability . . . turns upon what the parties agreed about *that* matter") (emphasis in the original). Where clear and unmistakable evidence exists showing that the parties delegated to the arbitrator issues as to the "meaning, validity, and enforcement" of an arbitration provision, courts lack the authority to decide them. *Marselian*, 2021 WL 198833, at *6 (citations omitted).

As noted, Wells Fargo argues that the arbitration provisions in the Account Agreement expressly delegate to the arbitrator any questions as to the enforceability of the arbitration provisions and, as a result, the Court must enforce such provisions and abstain from resolving Magill's challenges to the enforceability of the arbitration agreement.

Magill argues that the delegation provisions to which Wells Fargo points do not constitute "clear and unmistakable evidence" of an agreement to delegate arbitrability because the Account Agreement contains two other provisions that suggest (1) that courts, and not the arbitrator, have exclusive jurisdiction to resolve enforceability disputes; and (2) that courts have the power to modify the arbitration agreement to the extent they find any of its provisions to be invalid. Magill contends that these two provisions render the delegation provisions upon which Wells Fargo relies ambiguous and, therefore, unenforceable:

> What courts may be used to resolve a dispute?
>
> Wells Fargo and you each agree that *any lawsuits, claims, or other proceedings* arising from or relating to your account or the Agreement, *including the enforcement of the Arbitration Agreement* and the entry of judgment on any arbitration award, *will be venued exclusively in the state or federal courts* in the state whose laws govern your account, without regard to conflict of laws principles.

Docket No. 12-2 at 15 (emphasis added).

> Any term of the Agreement that is inconsistent with the laws governing your account will be considered to be modified by us and applied in a manner consistent with such laws. *Any term of the Agreement that a court of competent jurisdiction determines to be invalid will be modified accordingly.* In either case, the modification will not affect the enforceability or validity of the remaining terms of the Agreement.

Docket No. 12-2 at 9 (emphasis added).

Wells Fargo responds that Magill's arguments that the delegation provisions are ambiguous fail in light of *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1212 (9th Cir. 2016). There, two arbitration agreements delegated to the arbitrator all disputes between the parties, including those relating to arbitrability and enforceability of the arbitration agreement, except that one of the agreements carved out challenges to the validity of a waiver of claims under the Private Attorneys General Act ("PAGA") and required that such carved-out challenges be resolved by a "court of competent jurisdiction." *Id.* at 1208. The district court declined to enforce the delegation provision on the ground that other provisions in the agreements rendered it ambiguous and, therefore, unenforceable. The Ninth Circuit reversed, holding that language in the arbitration agreements stating that the parties "delegated to the arbitrators the authority to decide issues relating to the 'enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision' . . . clearly and unmistakably indicates [the parties'] intent for the arbitrators to decide the threshold question of arbitrability." *Id.* at 1208-09. The court of appeals rejected the district court's conclusion that the delegation provision was rendered ambiguous by other clauses in the contracts that the plaintiffs had identified as conflicting with it, namely provisions "granting state or federal courts in San Francisco 'exclusive jurisdiction' over 'any disputes, actions, claims or causes of action arising out of or in connection with this Agreement,'" *Id.* at 1209. The Ninth Circuit reasoned that any perceived conflicts between these provisions and the delegation provision were "artificial" because it was clear that the provisions were intended "to identify the venue for any other claims that were not covered by the arbitration agreement" (i.e., the challenges to PAGA waivers that were carved out). *Id.* (citation omitted). Stated differently, the Ninth Circuit reasoned that the provisions that the plaintiffs had identified as being inconsistent with the delegation provision did not, in fact, conflict with it; instead, the purportedly inconsistent provisions filled in the gap, so to speak, by describing how the claims that had been carved out of the arbitration agreement would be litigated outside of arbitration.

Here, by contrast, the only claims carved out of the scope of the arbitration agreement are claims that can be brought in small claims court. *See* Docket No. 12-2 at 10 ("This Arbitration

Agreement has only one exception: Either Wells Fargo or you may still take any dispute to small claims court."). Unlike in *Mohamed*, it is not the case here that the provisions that Magill has identified as being inconsistent with the provisions delegating all disputes to the arbitrator (except those that can be brought in small claims court) help fill in the gap by describing how carved out claims (i.e., claims that can be litigated in small claims court) will be handled outside of arbitration. Instead, the provisions to which Magill points describe other scenarios that do not involve either an arbitrator or a small claims court; they refer to the resolution of disputes by "state or federal courts" and to the invalidation and modification of contractual terms by a "court of competent jurisdiction." These provisions, therefore, appear to contemplate that a state or federal court with jurisdiction that exceeds that of a small claims court would resolve at least *some* disputes arising out of the Account Agreement, including those pertaining to the enforcement and validity of the arbitration agreement. Accordingly, rather than complementing and filling in gaps, the provisions to which Magill points directly *contradict* Wells Fargo's interpretation of the arbitration agreement as delegating all questions regarding enforceability and validity to the arbitrator. *Mohamed*, therefore, does not compel a finding that the delegation provisions here are clear and unmistakable.

Wells Fargo also argues that the arbitration agreement's incorporation of the AAA Consumer Arbitration Rules constitutes "clear and unmistakable evidence" that the parties agreed to arbitrate disputes as to arbitrability. Wells Fargo contends, and Magill does not dispute, that the AAA Consumer Arbitration Rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *See* Docket No. 12 at 9-10.

The Ninth Circuit has held that "incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability," but the Ninth Circuit expressly left open the question of whether this holding applies in the context of unsophisticated parties. *See Brennan*, 796 F.3d at 1128. Where at least one party is unsophisticated, judges in this district routinely find that the incorporation of the AAA rules is

insufficient to establish a clear and unmistakable agreement to arbitrate arbitrability. *See, e.g.*, *Ingalls v. Spotify USA, Inc.*, No. 16-cv-03533-WHA, 2016 WL 6679561, at *3-4 (N.D. Cal. Nov. 14, 2016) (noting that "every district court decision in our circuit to address the question since *Brennan* has held that incorporation of the AAA rules was insufficient to establish delegability in consumer contracts involving at least one unsophisticated party" and reasoning that unsophisticated parties to an arbitration agreement "could not be expected to appreciate the significance of incorporation of the AAA rules") (collecting cases); *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1253 (N.D. Cal. 2019) (same and noting that, "[f]or an unsophisticated plaintiff to discover she had agreed to delegate gateway questions of arbitrability, she would need to locate the arbitration rules at issue, find and read the relevant rules governing delegation, and then understand the importance of a specific rule granting the arbitrator jurisdiction over questions of validity – a question the Supreme Court itself has deemed "'rather arcane'") (citation omitted).

Here, it is undisputed that the arbitration agreement incorporates the AAA rules. The Court finds, however, that the incorporation of these rules does not clearly and unmistakably establish an agreement to delegate questions of arbitrability, because customers of Wells Fargo, including Magill, could not be expected to understand that the incorporation of the AAA rules would mean that the overwhelming majority of disputes arising out of the Account Agreement would be resolved by an arbitrator.

When presented with similar evidence of delegation, and similarly-worded contractual provisions that appear to delegate questions of enforceability or validity to courts instead of an arbitrator, judges in this district routinely conclude that there is no "clear and unmistakable evidence" of an agreement to delegate questions of arbitrability to the arbitrator. *See, e.g., Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-03408-JST, 2016 WL 946112, at *6-7 (N.D. Cal. Mar. 14, 2016) ("[D]espite clear language delegating arbitrability to the arbitrator [including the incorporation of AAA rules], the issue of delegation is made ambiguous by the language of the arbitration provision that *permits modification* of the [Agreement] should 'a *court of law or equity'* hold any provision of the Agreement unenforceable.") (emphasis added); *Levi Strauss & Co. v. Aqua Dynamics Sys., Inc.*, No. 15-CV-04718-WHO, 2016 WL 1365946, at *7 (N.D. Cal.

Apr. 6, 2016) (finding no clear and unmistakable evidence of delegation where JAMS rules were incorporated because the arbitration agreement also contained a provision stating, "[i]f any part of this Agreement shall be *declared invalid or unenforceable by a court of competent jurisdiction*, it shall not affect the validity of the balance of this Agreement") (emphasis added). This Court reaches the same conclusion here.[1]

In light of the foregoing, the Court finds that there is no clear and unmistakable evidence that the parties agreed to arbitrate issues of arbitrability. Accordingly, such issues are for the Court, and not the arbitrator.

2. *McGill* Rule

The Court next turns to Magill's argument that the arbitration agreement is void and unenforceable because it precludes him from seeking public injunctive relief in any forum in violation *of McGill*, 2 Cal. 5th at 945.

"In *McGill*, the California Supreme Court held that no one can contractually waive all rights to seek public injunctive relief." *DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1152 (9th Cir. 2021) (citing *McGill*, 2 Cal. 5th at 948). "Thus, any contract that bars public injunctive relief in both court and arbitration is invalid" under *McGill*. *Id.* (citations omitted). "California's legal requirement that contracts allow public injunctive relief is known as the *McGill* rule." *Id.* The *McGill* rule "is a generally applicable contract defense" and "the FAA does not preempt" it. *See Blair v. Renta-Center, Inc*., 928 F.3d 819, 827-831 (9th Cir. 2019).

Magill argues that the arbitration agreement prevents him from seeking public injunctive relief under the UCL[2] in any forum in violation of *McGill* for the following reasons: (1) "all" of

[1] Wells Fargo relies on *Marselian v. Wells Fargo and Co.*, No. 20-cv-03166-HSG, 2021 WL 198833, at *5 (N.D. Cal. Jan. 20, 2021) and *Revitch v. Uber Techs, Inc.*, No. 18-CV-2974-PSG-GJS, 2018 WL 6340755, at *5 (C.D. Cal. Sept. 5, 2018) to support the proposition that the incorporation of AAA rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate enforceability issues, including the application of the *McGill* rule. These cases are inapposite, however, because the plaintiff in those cases failed to challenge specifically the delegation provisions in the arbitration agreement. Here, as discussed above, Magill has specifically challenged the delegation provisions at issue as ambiguous.

[2] "The UCL, FAL, and CLRA all authorize public injunctive relief." *DiCarlo*, 988 F.3d at 1152 (citations omitted).

his claims fall within the scope of the arbitration agreement and, as such, he is prohibited from litigating any claims outside of arbitration except for claims that can be brought in small claims court; (2) requests for public injunctive relief cannot be brought in small claims court because a small claims court lacks jurisdiction over such claims; (3) while "*individual* injunctive relief may be available as a remedy in arbitration" pursuant to the arbitration agreement, *see* Opp'n at 9, Docket No. 13 (emphasis added), the arbitration agreement nevertheless violates the *McGill* rule because it prohibits Magill from requesting *public* injunctive relief in arbitration, as it bars claims brought in the "interests of the general public" or as a "private attorney general."

The arbitration agreement at issue in this action can be invalidated under the *McGill* rule *only if* it "bars public injunctive relief *in both* court and arbitration[.]" *DiCarlo*, 988 F.3d at 1152 (citing *McGill*, 2 Cal. 5th at 948). Accordingly, if Magill can seek public injunctive relief in *either* court or arbitration, then the arbitration agreement cannot be invalidated under the *McGill* rule. *See id.*

Here, Magill concedes that the arbitration agreement allows him to assert claims for *individual* injunctive relief in arbitration.[3] *See* Opp'n at 9, Docket No. 13 (arguing that "individual injunctive relief may be sought in arbitration" pursuant to the arbitration agreement). If it is the case that the arbitration agreement allows Magill to also request *public* injunctive relief in arbitration, then the arbitration agreement would not be subject to invalidation under the *McGill* rule. Magill argues that the arbitration agreement does not permit him to request public injunctive relief in arbitration because some of its provisions prohibit him from asserting claims in the

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[3] The provision in the arbitration agreement that Magill contends allows him to pursue individual injunctive relief in arbitration is the following:

> What other rights do Wells Fargo or you have when resolving disputes? Wells Fargo or you each can exercise any lawful rights or use other available remedies to
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> - Preserve or obtain possession of property,
> - Exercise self-help remedies, including setoff rights, or
> - *Obtain provisional or ancillary remedies such as injunctive relief*, attachment, garnishment, or appointment of a receiver by a court of competent jurisdiction.

Docket No. 12-2 at 11-12 (emphasis added).

"interests of the general public" or as a "private attorney general" in arbitration.[4] In other words, Magill's interpretation of the arbitration agreement as barring him from requesting public injunctive relief in arbitration presupposes that public injunctive relief can *only* be sought by someone who is asserting claims in the "interests of the general public" or as a "private attorney general," as opposed to on his own behalf.

The Ninth Circuit recently rejected the premise underlying Magill's arguments. In *DiCarlo*, the plaintiff contended that an arbitration agreement was invalid under the *McGill* rule on the basis that it disallowed her from seeking public injunctive relief in arbitration, because it (1) prohibited her from "acting as a private attorney general"; and (2) limited the remedies available in arbitration to those that could be obtained in an individual action. 988 F.3d at 1153. The Ninth Circuit rejected these arguments and held that the arbitration agreement was not invalid on the basis of the *McGill* rule, because it was not the case that the agreement barred the plaintiff from pursuing public injunctive relief in arbitration. The court of appeals reasoned that "litigants proceeding in individual lawsuits may request public injunctive relief without becoming private attorneys general" and, because the plaintiff did not need to act as a private attorney general or to assert claims on a representative basis to seek public injunctive relief, the arbitration agreement's prohibitions on acting as a private attorney general or on behalf of others in arbitration did not preclude the plaintiff from seeking public injunctive relief in arbitration. *Id.* at 1155-56.

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[4] The provision in the arbitration agreement that Magill contends bars him from seeking public injunctive relief in arbitration is the following:

> Can either Wells Fargo or you participate in class or representative actions?
>
> No, neither Wells Fargo nor you will be entitled to join or consolidate disputes by or against others as a representative or member of a class, *to act in any arbitration in the interests of the general public, or to act as a private attorney general. If any provision related to a class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, the entire Arbitration Agreement will be unenforceable.*

Docket No. 12-2 at 10 (emphasis added).

Here, as the plaintiff in *DiCarlo*, Magill interprets the arbitration agreement as precluding him from requesting public injunctive relief in arbitration in violation of the *McGill* rule based on the agreement's prohibitions on acting in arbitration as a private attorney general or on behalf of the general public. Under *DiCarlo*, Magill's interpretation of the arbitration agreement falls flat.

Magill has not addressed, much less distinguished, *DiCarlo*. Instead, Magill relies on authorities that are not controlling to argue that other courts have held that the very arbitration agreement at issue here prevents Wells Fargo consumers from seeking public injunctive relief in any forum based on the agreement's prohibitions on acting as a private attorney general or on behalf of the general public. *See* Docket No. 13 at 7-8 (citing *Wallace v. Wells Fargo & Co.*, Case No. 2017-CV-217775 (Super Ct. Cal., Santa Clara Cty. Aug 7, 2018) (holding that arbitration agreement prevents plaintiff from seeking public injunctive relief in light of prohibitions on acting as private attorney general or on behalf of the public) and *Lotsoff v. Wells Fargo Bank, N.A.*, No.: 18-cv-02033-AJB-JLB, 2019 WL 4747667 (S.D. Cal. Sept. 30, 2019) (same)). The Court declines to follow these non-binding opinions because they pre-date and contradict *DiCarlo*, which is controlling.

Accordingly, in light of *DiCarlo*, the Court cannot conclude that the arbitration agreement violates the *McGill* rule based on its prohibitions on acting as a private attorney general or on behalf of the general public.[5]

3. Poison Pill

Magill argues that the arbitration agreement as a whole is unenforceable because it contains a "poison pill" provision that states:

> If any provision related to a class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, the entire Arbitration Agreement will be unenforceable.

[5] Even if any ambiguity existed as to whether the arbitration agreement permits Magill to request public injunctive relief in arbitration, *DiCarlo* requires that the Court "construe the Agreement to abide by *McGill* and allow arbitration." *See* 988 F.3d at 1158. The Court finds that the arbitration agreement permits an arbitrator to consider requests for public injunctive relief because all disputes and claims are subject to arbitration, except for those that can be brought in small claims court, and here, it is undisputed that a small claims court cannot consider requests for public injunctive relief.

See Docket. 12-2 at 4. Magill argues that this poison pill provision can be used to invalidate the entire arbitration agreement on the basis that the arbitration agreement is invalid under the *McGill* rule. *See* Docket No. 13 at 9-10.

Because the Court concludes, as discussed in above, that the arbitration agreement is not unenforceable based on the *McGill* rule, Magill's poison pill argument fails.

In sum, because all of Magill's challenges to the enforceability of the arbitration agreement are unavailing, and because it is undisputed that all of Magill's claims fall within the scope of the arbitration agreement and thus must be resolved in arbitration, the Court **GRANTS** Wells Fargo's motion to compel arbitration.

C. Request for a Stay Pending Arbitration or to Dismiss the Action

Wells Fargo initially requested that the Court stay the action pending arbitration to the extent that it grants its motion to compel arbitration. In his opposition, however, Magill requests that the Court dismiss the action in the event that the Court grants Wells Fargo's motion to compel arbitration so that he can appeal the order immediately. *See* Docket No. 13 at 14 ("In the unlikely event the Court compels arbitration, Mr. Magill respectfully requests that the Court exercise its discretion to dismiss the case, rather than to stay it, to allow for an immediate appeal of this important issue."). "Wells Fargo does not oppose Plaintiff's request for dismissal." Docket No. 19 at 10.

In the absence of any dispute that the Court may dismiss this action in the event that it grants Wells Fargo's motion to compel arbitration, and given that the Court will grant Wells Fargo's motion to compel arbitration, the Court **DISMISSES THE ACTION WITH PREJUDICE**. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000) (holding that "order direct[ing] that the dispute be resolved by arbitration and dismiss[ing] respondent's claims with prejudice" was immediately appealable).

IV. MOTION TO DISMISS

Because the Court will dismiss the action for the reasons discussed above, the Court **DENIES** Wells Fargo's motion to dismiss as moot.

V. CONCLUSION

For the foregoing reasons, the Court (1) **GRANTS** Wells Fargo's motion to compel arbitration; (2) **DENIES** Wells Fargo's motion to dismiss as moot; and (3) **DISMISSES** this action with prejudice. The Clerk shall terminate the case.

This order terminates Docket Numbers 12 and 13.

IT IS SO ORDERED.

Dated: June 25, 2021

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California