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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CINDY DELISLE and ROBERT  
12 DOUGHERTY, Individually and On  
13 Behalf of All Others Similarly  
14 Situated,  
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16 Plaintiff,  
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18 v.  
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20 SPEEDY CASH,  
21  
22 Defendant.  
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Case No.: 3:18-CV-2042-GPC-RBB

**ORDER DENYING MOTION TO  
COMPEL ARBITRATION AND  
STAY PROCEEDINGS**

**[ECF No. 18.]**

19 On October 16, 2018, Plaintiffs Cindy Delisle and Robert Dougherty (“Plaintiffs”)   
20 filed a First Amended Complaint alleging a putative class action against Defendant   
21 Speedy Cash on behalf of themselves and all others similar situated. (ECF No. 16.)   
22 Plaintiffs assert claims under California’s Unfair Competition Law (“UCL”) Cal. Bus. &   
23 Prof. Code § 17200 *et seq.*, and California’s Consumer Legal Remedies Act (“CLRA”)   
24 Cal. Civ. Code § 1750 *et seq.* Plaintiffs define the proposed class as:

25 All persons in the State of California who obtained loans in excess of \$2,500.00 from   
26 Defendant Speedy cash within the 48 months preceding the filing of this Complaint,   
27 wherein the annual percentage rate (APR) of interest on said loans exceeded 90   
28 percent.

1 (ECF No. 16, at 6.) On October 30, 2018, Speedy Cash moved to compel arbitration and  
2 to dismiss this case. (ECF No. 18.) On January 4, 2019, Plaintiffs filed a response (ECF  
3 No. 20), and on January 11, 2019, Speedy Cash filed a reply (ECF No. 21).

4 Pursuant to Civil Local Rule 7.1(d)(1), the Court finds the matter suitable for  
5 adjudication without oral argument, and having considered the parties' arguments, the  
6 Court finds and concludes as follows.

## 7 **I. Background**

8 Speedy Cash is a Delaware business with its corporate headquarters in Kansas. It  
9 operates thirty-six locations throughout California, and is licensed by the California  
10 Department of Corporations as a California Finance Lender subject to Cal. Fin. Code §  
11 22000. Speedy Cash offers loans through its physical stores, as well as through online loan  
12 portals. According to Plaintiffs, Speedy Cash conducts comprehensive advertising  
13 campaigns in California to generate business for what it characterizes as "Easy, Fast &  
14 Friendly Cash Loans." (ECF No. 16, at 4.)

15 Both Cindy Delisle and Robert Dougherty are citizens of the state of California. On  
16 July 14, 2018, Ms. Delisle entered into an "Installment Loan and Promissory Note" (the  
17 "Loan Agreement," ECF No. 18-3, Ex. A to Decl. of Katrina Anthony) with Speedy Cash,  
18 which provided that Speedy Cash would loan \$4,457.38 to Ms. Delisle at an Annual  
19 Percentage Rate ("APR") of 95.737%. On October 16, 2017, Mr. Dougherty signed an  
20 identical contract with Speedy Cash, under which Speedy Cash agreed to loan him \$2,600  
21 at an APR of 135.441%. The high APRs charged by Speedy Cash meant that Ms. Delisle  
22 would be required to repay Speedy Cash a minimum of \$15,097.63, and Mr. Dougherty, a  
23 minimum of \$12,746.78.

24 The Loan Agreements entered into by Plaintiffs were drafted by Speedy Cash, and  
25 both Plaintiffs aver that they were not given an opportunity to negotiate any terms. The  
26 Loan Agreements contain an arbitration provision, which obligated both Speedy Cash and  
27 its customer to arbitrate "any claim, dispute or controversy between you and us . . . that  
28

1 arises from or relates in any way to this Agreement or any services you request or we  
2 provide under this Agreement . . . .” (ECF No. 18-3, at 6.)

3 Under Section 1 of the “Arbitration Provision,” the contract provides Plaintiffs a  
4 right to reject arbitration, so long as they notify Speedy Cash in writing of their desire to  
5 reject the Arbitration Provision within 30 days of signing. (*Id.* (“RIGHT TO REJECT  
6 ARBITRATION”).) Exercising the opt-out under Section 1 would “not affect [Plaintiffs’]  
7 right to Services or the terms of th[e] Agreement (other than th[e] Arbitration Provision).”  
8 (*Id.*)

9 The Arbitration Provision also outlines the claims to be arbitrated (or not.) Relevant  
10 here, Section 5, titled “NO CLASS ACTIONS OR SIMILAR PROCEEDINGS; SPECIAL  
11 FEATURES OF ARBITRATION,” sets out what claims may proceed to arbitration and  
12 which claims are waived in any forum. Section 5(C) disallows Plaintiffs to “participate in  
13 a class action in court or in arbitration,” and Section 5(E) prohibits Plaintiffs from  
14 “join[ing] or consolidat[ing] claim(s) involving you with claims involving any other  
15 person.” (*Id.* at 8.). Section 5(D) disallows Plaintiffs from “act[ing] as a private attorney  
16 general in court or in arbitration.” (*Id.*)

17 Section 10, titled “SURVIVAL, SEVERABILITY, PRIMACY,” specifies the terms  
18 of the Arbitration Provision’s survivability. Generally, the Arbitration Provision is  
19 severable; if any part thereof “cannot be enforced, the rest of this Arbitration provision will  
20 continue to apply. (*Id.*) However, it also contains a provision which Plaintiffs refer to as  
21 the poison pill: “if Section 5(C), (D) and/or (E) is declared invalid in a proceeding between  
22 you and us, without in any way impairing the right to appeal such decision, this entire  
23 Arbitration Provision . . . shall be null and void in such proceeding.” (*Id.*) Thus, if any  
24 one of Sections 5(C), 5(D), and 5(E) are determined invalid, then neither party would be  
25 bound to arbitration. It is undisputed that neither Plaintiff opted out of the Arbitration  
26 Provision within 30 days of signing the Loan Agreements.

27 The instant litigation arises out of Plaintiffs’ putative class action suit, articulated in  
28 their First Amended Complaint (“FAC”), filed October 16, 2018. (ECF No. 16.) Plaintiffs

1 allege that Speedy Cash’s business model is premised on selling loans with usurious  
2 interest rates to people who cannot afford to pay them back. They claim that the APR  
3 charged by Speedy Cash is excessive and prohibited by California law, namely, the  
4 prohibitions against unfair, unlawful, and deceptive business practices espoused by the  
5 UCL and the CLRA. For these wrongs, Plaintiffs seek disgorgement, restitution, punitive  
6 damages, reasonable attorney’s fees, and a declaration that Speedy Cash is in violation of  
7 the UCL and CLRA.

8 Plaintiffs have also invoked “public injunctive relief” under UCL § 17204, (ECF  
9 No. 16, at 14), which allows UCL injunctions under § 17203 to be brought by the attorney  
10 general, district attorneys, or by “any person who has suffered injury in fact and has lost  
11 money as a result of [] unfair competition.” UCL § 17204. The contours of the injunction  
12 Plaintiffs seek are as follows: they hope to enjoin Speedy Cash from “entering into loan  
13 agreements with an APR in excess of 90%,” (ECF No. 16, at 12), “charging an unlawful  
14 interest rate on its loans exceeding \$2,500,” (*id.* at 15), and requiring it to “institute  
15 corrective advertising and providing written notice to the public of the unlawfully charged  
16 interest rate on prior loans.” (*Id.*)

17 Speedy Cash’s motion to compel arbitration insists that Plaintiffs’ claims must be  
18 resolved in arbitration, and urges the present suit be stayed pending arbitration. (ECF No.  
19 18.) Plaintiffs’ opposition counters that the Arbitration Provision is unconscionable and  
20 against California public policy. Plaintiffs do not challenge the propriety of the class-  
21 action waiver. Indeed, they cannot, since class waiver unconscionability arguments are  
22 “now expressly foreclosed by [the Supreme Court’s decision in] *Concepcion*.” *Kilgore v.*  
23 *KeyBank, N.A.*, 718 F.3d 1052,1058 (9th Cir. 2013) (en banc) (citing *AT&T Mobility LLC*  
24 *v. Concepcion*, 563 U.S. 333, 336 (2011)). Instead, Plaintiffs contend that waivers of  
25 public injunctive relief is invalid under *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017),  
26 and therefore the entire Arbitration Provision must fall pursuant to the poison pill clause.  
27 Speedy Cash disputes that *McGill* applies, arguing that Plaintiffs have not made a true  
28

1 claim for public injunctive relief, and that, in any event, that the Federal Arbitration Act  
2 (“FAA”) preempts the rule in *McGill*.

## 3 **II. Discussion**

4 The FAA applies when arbitration agreements meet two conditions: (1) the  
5 agreement is in writing; and (2) the agreement is part of “a contract evidencing a  
6 transaction involving commerce.” 9 U.S.C. § 2. Arbitration provisions satisfying these  
7 two requirements are “valid, irrevocable, and enforceable” under federal law. *Id.*; *see*  
8 *also Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)  
9 (“The FAA provides that any arbitration agreement within its scope ‘shall be valid,  
10 irrevocable, and enforceable,’ . . . and permits a party ‘aggrieved by the alleged . . .  
11 refusal of another to arbitrate’ to petition any federal district court for an order  
12 compelling arbitration in the manner provided for in the agreement.”).

13 The FAA “leaves no place for the exercise of discretion by a district court, but  
14 instead mandates that district courts shall direct the parties to proceed to arbitration on  
15 issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds Inc.*  
16 *v. Byrd*, 470 U.S. 213, 218 (1985). The role of a district court under the FAA “is  
17 therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it  
18 does, (2) whether the agreement encompasses the dispute at issue.” *Chiron*, 207 F.3d at  
19 1130 (citations omitted). “If the response is affirmative on both counts, then the [FAA]  
20 requires the court to enforce the arbitration agreement in accordance with its terms.” *Id.*  
21 Where a dispute is subject to arbitration under the terms of a written agreement, the  
22 district court shall “stay the trial of the action until such arbitration has been had in  
23 accordance with the terms of the agreement.” 9 U.S.C. § 3.

24 Here, it is undisputed that the Arbitration Provision is in writing, is part of a  
25 “contract evidencing a transaction involving commerce” within the meaning of the FAA,  
26 and encompasses the claims alleged by the Plaintiffs in this action. Plaintiffs resist  
27 arbitration only on the first consideration enumerated in *Chiron*—contending that no  
28 “valid agreement to arbitrate exists.” *Id.* To wit, Plaintiffs allege that the Arbitration

1 Provision is unenforceable and invalid under California law for being procedurally and  
2 substantively unconscionable. The Court notes that the party asserting a state-law  
3 defense against arbitration—here, Plaintiffs—bears the burden of proving the defense  
4 applies. *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 911 (2015).

#### 5 **A. Choice of Law Dispute**

6 At the threshold, the Court notes that the parties dispute whether Kansas’s or  
7 California’s law should govern issues related to contract formation and validity. The  
8 choice-of-law issue matters because California law provides heightened protections  
9 against unconscionable contracts, whereas Kansas law is less protective. *See Mendoza v.*  
10 *Ad Astra Recovery Servs. Inc.*, No. 2:13-cv-06911-CAS(JCGx) (C.D. Cal. Jan. 6, 2014)  
11 (comparing the two jurisdictions’ respective laws respecting unconscionability and  
12 concluding that California’s was “more expansive”). The parties also appear to be in  
13 accord that Kansas, unlike California, does not have a *McGill* equivalent rule against  
14 waivers of public injunctive relief.

15 Speedy Cash posits that Kansas law applies because the Arbitration Provision  
16 expressly stipulates that Kansas law is to be applied with respect to the enforceability of  
17 the Arbitration Provision. (*See* ECF No. 18-3, at 8 (“GOVERNING LAW. . . . the law of  
18 Kansas . . . shall be applicable to the extent that any state law is relevant in determining  
19 the enforceability of this Arbitration provision under Section 2 of the FAA.”)) Plaintiffs  
20 argue that California law should be applied under *Nedlloyd Lines B.V. v. Superior Court*,  
21 3 Cal. 4th 459, 466 (1992), because California has materially greater interest than Kansas  
22 in the enforcement of its more protective laws.

23 A federal court sitting in diversity applies the choice-of-law rules of the state in  
24 which it sits. *Mortensen v. Bresnan Comm’cns, LLC*, 722 F.3d 1151, 1161 (9th Cir.  
25 2013). California’s choice of law framework is set forth in *Nedlloyd*. Under this  
26 approach, “[a]s a threshold matter, a court must determine ‘whether the chosen state has a  
27 substantial relationship to the parties or their transaction, or . . . whether there is any other  
28 reasonable basis for the parties’ choice of law.’” *Ruiz v. Affinity Logistics Corp.*, 667

1 F.3d 1318, 1323 (9th Cir. 2012) (quoting *Nedlloyd*, 3 Cal. 4th at 330). Assuming that one  
2 of these conditions is met, *Nedlloyd* then inquires whether applying the chosen state’s law  
3 would be “contrary to a fundamental policy of California,” and if so, “whether California  
4 has a materially greater interest than the chosen state in resolution of the issue.”

5 *Nedlloyd*, 3 Cal. 4th at 466.

6 Here, the Court finds that Kansas, as the chosen state, has a substantial relationship  
7 to Speedy Cash and that a reasonable basis exists for the parties’ choice of law. Speedy  
8 Cash maintains its headquarters in Kansas, and Plaintiffs acknowledge that Speedy Cash  
9 maintains ten branch offices there. (ECF No. 20, at 9.) That fact is sufficient to sustain  
10 the parties’ stipulated chosen state for the first part of the *Nedlloyd* analysis. *See e.g.*  
11 *Peleg v. Neiman Marcus Grp., Inc.*, 204 Cal. App. 4th 1425, 1446 (2012) (holding that a  
12 Texas choice of law provision could be sustained where defendant corporation had its  
13 principal place of business, corporate headquarters, and operating center in Dallas) (citing  
14 *In re Comm. Money Ctr., Equip. Lease Litig.*, 627 F.Supp.2d 786, 801–02 (applying  
15 Nevada law where one of the contracting parties had headquarters in Nevada)).

16 Next, the Court addresses the second prong of the *Nedlloyd* analysis, i.e., whether  
17 Kansas’s law is contrary to a fundamental policy of California. Plaintiffs assert  
18 California has a material and fundamental interest in maintaining a pathway to public  
19 injunctive relief in unfair competition cases, as evinced by UCL section 17204 and as  
20 reaffirmed by the California Supreme Court in *McGill*. Speedy Cash does not dispute  
21 that California considers the availability of public injunctive relief an issue of  
22 fundamental importance; it argues only that *McGill* is inapplicable to this case or  
23 preempted on the merits. (ECF No. 18-1, at 13.) Because the parties do not dispute that  
24 California has a weighty interest in maintaining the availability public injunctive relief  
25 for UCL claims, and because both the Plaintiffs in this case obtained their loans in  
26 California and press claims under California consumer protection statutes, the Court  
27 determines that California has a materially greater interest than Kansas in employing its  
28 laws to resolve the instant dispute.

1 As such, the Court will apply California law.

2 **B. The Arbitration Provision is Unconscionable**

3 In California, “[i]n order to render a contract unenforceable under the doctrine of  
4 unconscionability, there must be both a procedural and substantive element of  
5 unconscionability.” *See Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 783  
6 (9th Cir. 2002) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th  
7 83, 114 (2000)). These two elements, however, need not both be present in the same  
8 degree. *See Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 981 (9th Cir. 2007).  
9 “[T]he more substantively oppressive the contract term, the less evidence of procedural  
10 unconscionability is required to come to the conclusion that the term is unenforceable.”  
11 *Armendariz*, 6 P.3d at 690.

12 Plaintiffs provide two main arguments for why the Arbitration Provision cannot  
13 stand. First, they argue that the Arbitration Provision is procedurally unconscionable.  
14 Second, they argue that the waiver of public injunctive relief in Section 5 is substantively  
15 unconscionable under *McGill*, which, if true, would nullify the entirety of the Arbitration  
16 Provision. The Court addresses these arguments in turn.

17 **1. Procedural Unconscionability**

18 Procedural unconscionability “concerns the manner in which the contract was  
19 negotiated and the respective circumstances of the parties at the time.” *Kinney v. United*  
20 *Healthcare Servs., Inc.*, 70 Cal. App. 4th 1322, 1329 (1999). At heart is the level of  
21 unfair surprise and oppression involved in the agreement. *See A & M Produce Co. v.*  
22 *FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982). Surprise “involves the extent to which  
23 the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form  
24 drafted by the party seeking to enforce the disputed terms.” *Id.* Oppression arises from  
25 an inequality which results in no real negotiation and an absence of meaningful choice.  
26 *Id.*

27 Plaintiffs argue that the Loan Agreements were procedurally unconscionable  
28 because they were provided to them on a take it or leave it basis, and that they were not



1 afforded an opportunity to review their terms before signing. Similarly, they contend that  
2 because Speedy Cash was the party with the only negotiating power, the Loan  
3 Agreements are classic, and unconscionable contracts of adhesion. Speedy Cash argues  
4 that there was no procedural unconscionability or unfair surprise because the Arbitration  
5 Provision permitted Plaintiffs to opt-out of binding arbitration within 30 days of signing  
6 the contract.

7 1. RIGHT TO REJECT ARBITRATION. If you do not want this  
8 Arbitration Provision to apply, you may reject it within 30 days after the  
9 date of this Agreement by delivering to us . . . a written rejection notice .  
10 . . . Your rejection of arbitration will not affect your right to Services or  
the terms of this Agreement (other than this Arbitration provision).

11 (ECF No. 18-3, at 7).

12 It is undisputed that neither Ms. Delisle nor Mr. Dougherty exercised their rights to  
13 reject arbitration within the 30 allotted. But that fact alone is not dispositive. Speedy  
14 Cash cites *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1075–76 (9th Cir.  
15 2013), for the proposition that the 30-day opt-out provision immunizes the Arbitration  
16 Provision from a procedural unconscionability challenge. However, as discussed in  
17 *Mohammed v. Uber Techs., Inc.*, 848 F.3d 1201, 1211–11 (9th Cir. 2016), opt-out  
18 provisions which would require plaintiffs to waive statutory causes of action “before they  
19 knew any such claims existed” are unenforceable. *Id.* (holding, in a case involving a  
20 waiver of a labor law claim under the Private Attorneys General Act, that although  
21 plaintiffs were given an option to opt out within 30 days, that “it is ‘contrary to public  
22 policy for an employment agreement to eliminate this choice altogether by requiring  
23 employees to waive the right to bring a PAGA action before any dispute arises.’”  
24 (quoting *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 358, 383 (2014)).

25 Here, Plaintiffs were required to opt out of arbitration before any dispute existed.  
26 The Court finds that there were elements of procedural unconscionability,  
27 notwithstanding the 30-day opt out provision.

### 28 **C. Substantive Unconscionability**

1 Substantive unconscionability “focuses on the terms of the agreement and whether  
2 those terms are so one-sided as to shock the conscience.” *Kinney*, 70 Cal. App. 4th at  
3 1330 (internal quotations and citations omitted). In California, “mandatory waivers of  
4 non-waivable statutory rights” are viewed as inherently suspect, since they present “the  
5 sort of one-sided and overly-harsh terms that render an arbitration provision substantively  
6 unconscionable.” *Bridge Fund Capital Corp. v. Fasbucks Franchise Corp.*, 622 F. 3d  
7 996, 1104 (9th Cir. 2010). Because the parties’ contentions turn on whether the rule in  
8 *McGill*—i.e., that predispute waivers of public injunctive relief is unenforceable as matter  
9 of California public policy—is preempted by the FAA, the Court now turns to examine  
10 the decision in detail.

### 11 **1. Legal Backdrop**

12 In *McGill*, the California Supreme Court addressed a provision in an arbitration  
13 agreement that waived the right to seek “public injunctive relief” for violations of the  
14 CLRA, UCL, and California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500.  
15 The Court determined that California public policy mandated that public injunctions  
16 under all three statutes, specifically section 17204 (the public injunctive relief provision  
17 of the UCL), and section 17535 (the public injunctive relief provision of the CLRA),  
18 were sacrosanct, and not subject to waiver where such waiver would result in a  
19 prohibition against seeking public injunctive relief in any forum.

20 The *McGill* court began by outlining what it meant by public injunctive relief.  
21 Public injunctive relief is injunctive relief enabled by statute which “has the primary  
22 purpose and effect of prohibiting unlawful acts that threaten future injury to the general  
23 public.” *Id.* at 951. Public injunctive relief by and large benefits the general public and  
24 benefits the plaintiff, if at all, only incidentally or as a constituent member of the general  
25 public. *Id.* at 955. In contrast, private injunctive relief primarily resolves a private  
26 dispute between parties, rectifies individual wrongs, and benefits the public, if at all, only  
27 incidentally. *Id.* The court acknowledged that sections 17204 and 17355 expressly  
28 enabled qualifying private plaintiffs to file a lawsuit on his or her own behalf seeking “as

1 one of the requested remedies, injunctive relief ‘the primary purpose and effect of’ which  
2 is ‘to prohibit and enjoin conduct that is injurious to the general public.’ *Id.* at 961  
3 (quoting *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1077 (1999)). Accordingly,  
4 the court determined that McGill’s request for an injunction to prohibit Citibank “from  
5 continuing to engage in its allegedly illegal and deceptive practices,”—i.e., the marketing  
6 of its ‘credit protect’ plan and its handling of her claim thereunder—qualified as a claim  
7 for public injunctive relief.

8 The court then considered whether the arbitration clause at issue ran afoul of  
9 California public policy because it purported to bar McGill from seeking public  
10 injunctive relief in any forum—arbitration or otherwise. The court decided that question  
11 in the affirmative in light of California Civil Code section 3513. Section 3513 provides  
12 that “[a]ny one may waive the advantage of law intended solely for his benefit[, b]ut a  
13 law established for a public reason cannot be contravened by private agreement.” CAL.  
14 CIV. CODE § 3513. Reasoning that because “the waiver in a predispute arbitration  
15 agreement of the right to seek public injunctive relief under [the UCL] would seriously  
16 compromise the public purposes [the UCL was] intended to serve,” the court held that “a  
17 waiver of the right to request public injunctive relief in any forum is invalid and  
18 unenforceable under California law.” *Id.* at 961. Finally, the court held that the rule it  
19 announced was not preempted by the FAA.

## 20 **2. The Parties’ Arguments**

21 Plaintiffs argue that their claims, which encompass a request for public injunctive  
22 relief under UCL section 17204, cannot be subject to waiver under *McGill*. Since Section  
23 5 would purport to waive their public injunctive claims, the offending clauses in Section  
24 5 must be invalidated, and such would trigger the poison pill in Section 10 to render the  
25 entirety of the Arbitration Provision null and void. Defendants counter that Plaintiffs  
26 only have a claim for private, not public injunctive relief, and that in any event the rule in  
27 *McGill* must be invalidated because it is preempted under the FAA as interpreted by the  
28 Supreme Court in *Concepcion*.

1 Resolution of the parties’ contentions turns on three issues: first, whether the  
2 Arbitration Provision in fact contains a waiver of public injunctive relief; second,  
3 whether Plaintiffs’ FAC articulates a true prayer for public injunctive relief; and third,  
4 whether *McGill* is preempted by the FAA.

5 **3. The Arbitration Provision prohibits public injunctive relief in any**  
6 **forum**

7 Plaintiffs locate the waiver of public injunctive relief in Section 5(D). Section  
8 5(D) disallows Plaintiffs from “act[ing] as a private attorney general in court or in  
9 arbitration.” (ECF No. 18-3, at 8.) Defendants, on the other hand, locate the waiver in  
10 Section 5(E), which prohibits Plaintiffs from “join[ing] or consolidat[ing] claim(s)  
11 involving you with claims involving any other person.” (*Id.*) Regardless of which  
12 specific subsection of Section 5 applies, there is no disagreement among the parties that  
13 the Arbitration Provision encompasses this dispute and that it prohibits Plaintiffs from  
14 seeking public injunctive relief in any forum, arbitral or judicial.<sup>1</sup>

15 **4. Plaintiffs’ FAC seeks public injunctive relief**

16 Speedy Cash argues *McGill* does not apply because Plaintiffs seek to obtain  
17 “public injunctive relief” in name only. Specifically, Defendant contends that Plaintiffs  
18 seek *private* injunctive relief, not public injunctive relief. This argument is unwinning,  
19 because the relief Plaintiffs seek falls squarely within the ambit of public injunctive  
20 relief.

21 Recall that Plaintiffs’ FAC seeks injunctive relief pursuant to the UCL and the  
22 CLRA. Specifically, Plaintiffs allege that Speedy Cash continues to engage in a business  
23 practice that is ongoing and harmful to the California consumer public, and seek to enjoin  
24 Speedy Cash to “immediately cease entering into loan agreements with an APR in excess  
25

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26  
27 <sup>1</sup> Indeed, section 9 confirms that any arbitrator selected under the Arbitration Provision “shall be  
28 authorized to award all remedies available in an *individual lawsuit . . .*” (ECF No. 18-3, at 18  
(emphasis added).)

1 of 90%,” (ECF No. 16, at 12), and to “institute corrective advertising and providing  
2 written notice to the public of the unlawfully charged rate on prior loans.” (*Id.* at 15.)  
3 The injunctive relief sought by Plaintiffs is precisely the kind which the California  
4 Supreme Court has designated as “public,” and therefore not subject to waiver.

5 As recognized by *McGill*, “public injunctive relief under the UCL [and] the CLRA  
6 is relief that has the primary purpose and effect of “prohibiting lawful acts that threaten  
7 future injury to the general public.” 2 Cal. 5th at 955. Here, it is hard to see how  
8 Plaintiffs’ requested injunction would benefit them directly, since they have “already  
9 been injured, allegedly, by [the Defendant’s] practices and is aware of them.”  
10 *Broughton*, 21 Cal. 4th at 1081 n.5 (considering an injunction sought pursuant to the  
11 CLRA). In this case, as was true in *Broughton*, “even if a CLRA plaintiff stands to  
12 benefit from an injunction against a deceptive business practice, it appears likely that the  
13 benefit would be incidental to the general public benefit of enjoining such a practice.” *Id.*  
14 If Plaintiffs’ injunction is granted, then the public would not be exposed to the high (and  
15 allegedly, buried) APR rates offered by Speedy Loan, and would receive the benefit of  
16 corrective advertising. Contrary to Speedy Loan’s arguments, there would be “real  
17 prospective benefit to the public at large from the relief sought.” *Kilgore*, 718 F.3d at  
18 1061.

19 The fact that Plaintiffs would receive incidental benefit from the requested  
20 injunction is of no moment. To have standing to raise a claim of public injunctive relief  
21 under the UCL in the first place, Plaintiffs are required by statute to have “suffered injury  
22 in fact” and “lost money or property as a result of the unfair competition.” Section  
23 17204. Thus, it is natural, if not almost inevitable, that a prayer for public injunctive  
24 relief under section the UCL would have the ancillary effect of benefiting a UCL  
25 plaintiff.

26 Plaintiffs’ FAC seeks public injunctive relief within the definition of *McGill*.

## 27 **5. *McGill* is not preempted by the FAA**

28

1 Defendants argue that Plaintiffs cannot avail themselves of the rule in *McGill*  
2 because *McGill* is preempted by the FAA under *AT&T Mobility LLC v. Concepcion*, 563  
3 U.S. 333 (2011), because public injunctive relief is hostile to the fundamental attributes  
4 of arbitration. Plaintiffs contend that *McGill* is not preempted, largely for the same  
5 reasons as stated by the Ninth Circuit in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d  
6 425 (9th Cir. 2015), with respect to waivers of California Private Attorneys General Act  
7 (“PAGA”) actions, Cal. Lab. Code § 2698 *et seq.*

8 For the following reasons, the Court holds that *McGill* is not subject to preemption.

9 **a. FAA Preemption Principles**

10 While “[t]he FAA contains no express preemptive provision,” and does not “reflect  
11 a congressional intent to occupy the entire field of arbitration,” *Volt Info Scis., Inc. v. Bd.*  
12 *of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989), it does preempt state  
13 law “to the extent that it ‘stands as an obstacle to the accomplishment and execution of  
14 the full purposes and objectives of Congress.’” *Id.* (quoting *Hines v. Davidowitz*, 312  
15 U.S. 52, 67 (1941)). The Supreme Court has held that the FAA was enacted in response  
16 to counteract “widespread judicial hostility to arbitration agreements,” and embodies “a  
17 liberal federal policy favoring arbitration agreements, notwithstanding any state  
18 substantive or procedural policies to the contrary.” *Concepcion*, 563 U.S. at 346 (quoting  
19 *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 (1983)). The FAA  
20 espouses this principle through Section 2, which provides that “[a] written provision . . .  
21 in a contract . . . to settle by arbitration a controversy thereafter arising out of such  
22 contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist  
23 at law or equity for the revocation of any contract.”

24 At the same time, the final clause of § 2, the FAA’s savings clause, “permits  
25 agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such  
26 as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration  
27 or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at  
28 349 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). To fall

1 within the saving clause, the state-law invalidity doctrine must be a “ground[] . . . for the  
2 revocation of *any contract*,” and “generally applicable,” in the sense that the state law  
3 must not single out arbitration agreements for unfavorable treatment. *Casarotto*, 517  
4 U.S. at 687. Even if a state-law rule is “generally applicable,” it is preempted if it stands  
5 as “an obstacle to the accomplishment of the FAA’s objectives.” *Concepcion*, 563 U.S.  
6 at 343.

7 **b. *McGill***

8 In *McGill*, the California Supreme Court considered the enforceability of a  
9 contractual provision waiving the right to seek public injunctive relief in any forum.

10 The first part of the opinion held that waivers of public injunctive relief were  
11 contrary to California law. *McGill* determined that “[b]y definition, the public injunctive  
12 relief available under the UCL, the CLRA, and the false advertising law . . . is primarily  
13 ‘for the benefit of the general public,’” rather than to resolve private disputes. 2 Cal. 5th  
14 at 961. Because allowing waivers of public injunctive relief would indisputably and  
15 “seriously compromise the public purposes” that the UCL, CLRA, and false advertising  
16 law were enacted to accomplish, *McGill* concluded that any contract purporting to totally  
17 foreclose a party’s right to such relief—i.e., through a waiver of such claims in both  
18 arbitration and in court—would be invalid under California Civil Code § 3513 (“Any one  
19 may waive the advantage of a law intended solely for his benefit. But a law established  
20 for a public reason cannot be contravened by a private agreement.”). Thus, *McGill*  
21 concluded that predispute contracts purporting to waive the right to seek the statutory  
22 remedy of public injunctive relief in any forum are contrary to public policy and thus  
23 unenforceable under California law.

24 In the second part, *McGill* held that the rule it pronounced was not preempted  
25 under *Concepcion*. As an initial matter, *McGill* observed that the rule precluding waivers  
26 of statutes intended for public benefit—i.e., California Civil Code § 3513—was one of  
27 general application and did not derive its meaning from the fact that an agreement to  
28 arbitrate is at issue. *Id.* at 962. Thus, because it operated equally in arbitral and judicial

1 fora, its application to waivers of public injunctive relief fell within the FAA’s savings  
2 clause for generally-applicable contract invalidation doctrines. *Id.* at 640. Next, *McGill*  
3 turned to address whether, notwithstanding the “generally applicable” nature of the rule it  
4 announced, it might be preempted under *Concepcion*. It concluded that its rule withstood  
5 *Concepcion* because the FAA preempts only generally-applicable *procedural*  
6 mechanisms, like class actions, at odds with arbitration, but had no effect on  
7 “provision[s] in an arbitration agreement forbidding the assertion of certain statutory  
8 rights.” 2 Cal. 5th at 965 (quoting *Am. Express Co. v. Italian Colors Restaurant*, 570  
9 *U.S.* 228, 236 (2013)).

10 Speedy Cash argues that *McGill*’s preemption analysis is flawed.<sup>2</sup> According to  
11 Speedy Cash, instead of ascertaining whether the arbitration of claims for public  
12 injunctive relief would turn arbitration into the “litigation it was meant to displace,” *Epic*  
13 *Sys. Corp. v. Lewis*, --- U.S. ----, 138 S. Ct. 1612, 1623–24 (2018), *McGill* myopically  
14 focused on an artificial distinction between class actions on the one hand, and claims for  
15 public injunctive relief on the other. (ECF No. 18-1, at 28.) It points out that *McGill*  
16 elided the key inquiries urged by *Concepcion*, i.e., whether a generally-applicable  
17 defense might be preempted because it (1) is “applied in a fashion that disfavors  
18 arbitration” or (2) “interferes with fundamental attributes of arbitration,” such as “lower  
19 costs, greater efficiency and speed, and the ability to choose expert adjudicators to  
20 resolve specialized disputes.” 563 U.S. at 348. Speedy Cash also contends that the  
21 distinction drawn by *McGill* between impermissible “procedural restrictions” (i.e. no  
22 waiver of class actions) and rules vindicating “substantive statutory remedies” (i.e., no  
23 waivers of public injunctive relief) has no basis in law.

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26 <sup>2</sup> Speedy Cash has not challenged the first part of *McGill* which determined that that predispute  
27 waivers of public injunctive relief are contrary to California public policy. This is for good reason, as  
28 the Court is bound to follow *McGill* on matters of state law. *See McArdle v. AT&T Mobility LLC*, Case  
No. 09-cv-01117-CW, 2017 WL 4354998, at \*1 (N.D. Cal. Oct. 2, 2017) (finding *McGill* dispositive on  
this question, noting that “[i]n interpreting state law, federal courts are bound by the pronouncements of  
the state’s highest court” (quoting *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002)).



1 Speedy Cash’s arguments are well taken. *McGill* does not engage in the kind of  
2 in-depth preemption analysis demanded by *Concepcion*. Cf. *Sakkab*, 803 F.3d at 436–37  
3 (“*Concepcion* requires us to examine whether the waived claims mandate procedures that  
4 interfere with arbitration, as the class claims in *Concepcion* did.”). There is scant  
5 discussion in *McGill* whether an anti-waiver rule in the context of public injunctive relief  
6 (1) “sacrifices” arbitration’s “informality,” *Concepcion*, 563 U.S. at 348, (2) “makes the  
7 process lower, more costly, and more likely to generate procedural morass than final  
8 judgment,” *id.*, (3) “requires procedural formality” *id.* at 349, or (4) “greatly increases  
9 risks to defendants.” *Id.* at 350. Nor is *McGill* particularly persuasive at defending its  
10 decision to distinguish defenses waiving procedural avenues from defenses arising from  
11 substantive law.

### 12 c. *McGill*’s Reception in Federal Court

13 *McGill*’s s preemption analysis is not binding on federal courts. See *Fardig v.*  
14 *Hobby Lobby Stores Inc.*, No. SACV 14-00561 JVS, 2014 WL 4782618, at \*4 (C.D. Cal.  
15 Aug. 11, 2014) (“[W]hether or not a California rule is preempted by the FAA is a  
16 question of federal law.”). However, with one recent exception, all district courts to date  
17 have agreed that *McGill*’s anti-waiver rule is not preempted by the FAA. See, e.g., *Blair*  
18 *v. Rent-A-Ctr., Inc.*, No. C 17-02335 WHA, 2017 WL 4805577, at \*5 (N.D. Cal. Oct. 25,  
19 2017) (not preempted); *Roberts v. AT&T Mobility LLC*, 2018 WL 131746 (N.D. Cal.  
20 2018); *Dornaus v. Best Buy Co.*, No. 18-CV-04085-PJH, 2019 WL 632957, at \*4 (N.D.  
21 Cal. Feb. 14, 2019) (not preempted); *McArdle v. AT&T Mobility LLC*, No. 09-cv-01117-  
22 CW, 2017 WL 4354998, at \*1 (N.D. Cal. Oct. 2, 2017) (not preempted); cf., *McGovern v.*  
23 *U.S. Bank N.A.*, 362 F.Supp.3d 850, 859–864 (S.D. Cal. 2019) (preempted).

24 Courts siding with *McGill* have taken pains to furnish the *Concepcion* analysis  
25 missing in *McGill*. They have generally relied on *Sakkab*, 803 F.3d 425, as a reference  
26 point for their preemption analysis. In *Sakkab*, the Ninth Circuit was asked to decide  
27 whether the rule in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014),  
28 which invalidated as against public policy waivers of PAGA actions, was subject to

1 preemption. *Sakkab* examined whether the *Iskanian* rule conflicted with the FAA’s  
2 purposes, and “whether the waived claims mandate procedures that interfere with  
3 arbitration.” *Id.* at 436–37. *Sakkab* determined that *Iskanian* was not preempted because  
4 arbitrations under PAGA do not by necessity mandate onerous procedures that would  
5 interfere with the fundamental attributes of arbitration. *Id.* at 436. Unlike class actions,  
6 PAGA does not provide a right for others to join in the action, so there was “no need to  
7 protect absent employees’ due process rights in PAGA arbitrations,” *id.*, and accordingly  
8 no cumbersome class action procedures, like notice and certification requirements, which  
9 would impede the arbitration of PAGA claims.

10 Courts that have considered claims for public injunctive relief under section 17204  
11 have found them highly similar to PAGA claims for preemption purposes and extended  
12 the reasoning in *Sakkab* to *McGill*. See *Dornaus*, 2019 WL 632957, at \*5 (“The  
13 adjudication of claims seeking public injunctive relief mirrors the *Sakkab* court’s analysis  
14 of PAGA claims.”); *Roberts*, 2018 WL 1317346, at \*6 (“If the California state law rule  
15 (*Iskanian*) prohibiting waiver of representative PAGA claims (in any forum) does not  
16 interfere with the fundamental attributes of arbitration, then it is difficult to see how the  
17 California state law rule (*McGill*) prohibiting waiver of public injunctive relief (in any  
18 forum) could.”); see *McArdle*, 2017 WL 4353998, at \*4 (surveying the rationales stated  
19 in *Sakkab* and concluding that “[t]he same analysis applies here, with equal force”).

20 There is great similitude between these two types of actions. PAGA “authorizes an  
21 employee to bring an action for civil penalties on behalf of the state against his or her  
22 employer for Labor Code violations committed against the employee and fellow  
23 employees, with most of the proceeds of that litigation going to the state.” *Iskanian*, 59  
24 Cal. 4th at 360. An action under PAGA is a type of qui tam action, crafted to remedy the  
25 California legislature’s perception that “there was a shortage of government resources to  
26 pursue enforcement.” *Sakkab*, 803 F.3d at 429–30 (quoting *Iskanian*, 59 Cal. 4th at 379,  
27 and 2003 Cal. Stat. ch. 906 § 1). Thus, “[t]o compensate for the lack of ‘adequate  
28 financing of essential labor law enforcement functions,’ the legislature enacted the PAGA

1 to permit aggrieved employees to act as private attorneys general to collect civil  
2 penalties.” *Id.* at 430.

3 Public injunctive claims under section 17204, on the other hand, are similarly  
4 crafted to vindicate California’s interest in enforcing its public policy, i.e., the Unfair  
5 Competition Laws. Section 17204 permits requests of injunctive relief under section  
6 17203 to be brought by state authorities (i.e., “the Attorney General or a district attorney  
7 or by a county counsel . . .”) and provides standing for private individuals who have  
8 “suffered injury in fact and lost money or property as a result of the unfair competition.”  
9 UCL § 17204. “By definition, the public injunctive relief available under the UCL, the  
10 CLRA, and the false advertising law . . . is primarily ‘for the benefit of the general  
11 public.’” *McGill*, 2 Cal. 5th at 961 (citations omitted). Thus, there is a strong argument  
12 to be made that public injunctive relief under section 17204, like PAGA claims,  
13 “primarily carry a potential remedy that reflects vindication of claims on behalf of the  
14 state.” *Dornaus*, 2019 WL 632957, at \*5. In fact, before a 2004 amendment to the bill  
15 added the requirement that private individuals must demonstrate injury-in-fact, section  
16 17204 was commonly described as espousing “private attorney general” claims. *See*,  
17 *e.g.*, *Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1001 (9th Cir. 2001); *Stop Youth Addiction,*  
18 *Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 598 (1998).

19 As is true of PAGA claims, “[c]laims seeking public injunctive relief do not  
20 necessarily require the procedural complexities of class claims,” like the ones  
21 disapproved of by *Concepcion*. *Id.* “There is no notice to the public, no opportunity for  
22 others to join, and no concern for others’ due process rights.” *Id.*, *cf. Concepcion*, 563  
23 U.S. at 350 (observing in the class action context that “it is . . . odd to think that an  
24 arbitrator would be entrusted with ensuring that third parties’ due process rights are  
25 satisfied”). Because “[t]he issues of class notice and multi-faceted elements which  
26 inform class certification particularly under Rule 23(b)(3) do not obtain where a public  
27 injunction is sought under 17200,” there are no concerns here about forcing the  
28 procedures of class actions onto arbitration. *Roberts*, 2018 WL 1317346, at \*7.

1           Because any logic which immunizes a contract defense precluding PAGA waivers  
2 from preemption applies with equal force to a rule prohibiting public injunctive relief  
3 waivers, most district courts have applied *Sakkab* to the *McGill* rule.

4           **d. Speedy Cash’s preemption arguments are addressed by *Sakkab***

5           With *Sakkab* on the books, *McGill*’s survival is almost ineluctable; all of the  
6 preemption arguments raised by Speedy Cash find some retort in *Sakkab*.

7           For example, Speedy Cash claims that arbitrating public injunctive claims would  
8 sacrifice arbitration’s informality and render it akin to a class action which is “slower,  
9 more costly, and more likely to generate procedural morass.” *Concepcion*, 563 U.S. at  
10 349. It argues that public injunction proceedings may necessitate a sprawling evidentiary  
11 inquiry relating to injury for non-parties, and the likelihood of future injury to the public.  
12 (ECF No. 18-1, at 24 (citing *Cisneros v. U.D. Registry, Inc.*, 39 Cal. App. 4th 548, 564  
13 (1995); *Fetelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1012  
14 (2005).)

15           But as *Sakkab* pointed out in the PAGA context, “the potential complexity of  
16 PAGA actions is a direct result of how an employer’s liability is measured under the  
17 statute . . . . ‘potential complexity should not suffice to ward off arbitration’ where, as  
18 here, the complexity flows from the substance of the claim itself, rather than any  
19 procedures required to adjudicate it (as with class actions).” *Sakkab*, 803 F.3d at 438.  
20 Moreover, there is no reason to think that public injunctive relief claims categorically  
21 implicate massive evidentiary inquiries. Here, the requested injunction is for a cessation  
22 of loans extended at a higher than 90% APR, and corrective advertising. Thus, “in the  
23 instant case,” the public evidentiary inquiry “will likely be particularly straightforward,  
24 consisting, *e.g.*, of advertising common to all relevant markets and [] customer  
25 agreements common to all relevant markets.” *Roberts*, 2018 WL 1317346, at \*7. In any  
26 event, neither the “*Iskanian* rule prohibiting waiver of representative PAGA claims,” nor  
27 the *McGill* rule prohibiting waiver of public injunctive relief “diminish parties’ freedom  
28 to select informal arbitration procedures.” *McArdle*, 2017 WL 4354998, at \*3 (quoting

1 *Iskanian*, 59 Cal. 4th at 435). In fact, “nothing ‘prevents parties from agreeing to use  
2 informal procedures to arbitrate representative PAGA claims,’” *id.*, or public injunctive  
3 relief claims.

4 Speedy Cash also asserts that claims for public injunctive relief interfere with  
5 fundamental attributes of arbitration because they “greatly increase[s] risks to  
6 defendants.” (ECF No. 18-1, at 27.) The idea is that claims for public injunctive relief  
7 could fundamentally alter Speedy Cash’s core business practices in a way that individual  
8 claims would not. The greater risk inheres because “the risk of an error,”—which the  
9 defendant might be able to stomach in an individualized arbitral proceeding—“will often  
10 become unacceptable” when magnified in a public injunctive relief setting where no  
11 judicial review is possible. *Concepcion*, 563 U.S. at 350. However, this argument was  
12 also amply rejected in *Sakkab*:

13 We acknowledge that the Court in *Concepcion* . . . expressed concern that “class  
14 arbitration greatly increases risks to defendants” by aggregating claims and  
15 increasing the amount of potential damages. As the Court observed, arbitration is  
16 “poorly suited to the higher stakes of class litigation,” because it does not provide  
17 for judicial review. Although PAGA actions do not aggregate individual claims,  
18 they may nonetheless involve high stakes. Defendants may face hefty civil  
19 penalties in PAGA actions, and may be unwilling to forego judicial review by  
20 arbitrating them. It does not follow, however, that the FAA preempts the *Iskanian*  
21 rule just because the amount of civil penalties the PAGA authorizes could make  
22 arbitration a less attractive method than litigation for resolving representative  
23 PAGA claims. By their nature, some types of claims are better suited to arbitration  
24 than others. But the FAA would not preempt a state statutory cause of action that  
25 imposed substantial liability merely because the action’s high stakes would  
26 arguably make it poorly suited to arbitration. Nor, we think, would the FAA  
27 require courts to enforce a provision limiting a party’s liability in such an action,  
28 even if that provision appeared in an arbitration agreement. The FAA  
contemplates that parties may simply agree ex ante to litigate high-stakes claims if  
they find arbitration’s informal procedures unsuitable. By the same token, the  
FAA does not require courts to enforce agreements to waive the right to bring  
representative PAGA actions just because the amount of penalties an aggrieved  
employee is authorized to recover for the state makes the formal procedures of  
litigation more attractive than arbitration’s informal procedures. Just as the high  
stakes involved in antitrust actions may cause parties to agree ex ante to exclude

1 antitrust claims from arbitration, parties may prefer to litigate representative PAGA  
2 claims.

3 *Sakkab*, 803 F.3d at 437–38.

4 Speedy Cash’s attempt to distinguish PAGA actions from public injunctive relief  
5 under section 17204 is also unavailing. Speedy Cash insists that *Sakkab* was uniquely  
6 predicated on the fact that “there is no need to protect absent employee’s due process  
7 rights in PAGA arbitrations.” 803 F.3d at 435–36. But, as other courts have held, there is  
8 little difference between PAGA and public injunctive relief in this regard; neither is  
9 subject to the “procedural morass” which clings to Rule 23. *Concepcion*, 563 U.S. at  
10 349. If anything, PAGA actions bear a stronger similarity to class actions than public  
11 injunctive relief; they are representative actions wherein “third parties are affected as they  
12 may be bound by a PAGA judgment.” *Roberts*, 2018 WL 1317346, at \*6. In contrast,  
13 despite the intended public impact of public injunctive relief, litigants under section  
14 17204 “fil[e] the lawsuit or action on his or her own behalf, not ‘on behalf of the general  
15 public.’” *McGill*, 2 Cal. 5th at 959.

16 As the foregoing demonstrates, *Sakkab* effectively controls the instant dispute over  
17 waivers of public injunctive relief. Accordingly, the Court will follow the path charted  
18 by its sister courts and conclude that *McGill* is not preempted under *Concepcion*.<sup>3</sup>

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21 <sup>3</sup> The Court pauses briefly to address *McGovern*, 362 F.Supp.3d 850, which was decided after  
22 briefing was complete in this case. In *McGovern*, the court held that *McGill* was incompatible with the  
23 FAA’s objectives. The Court opined that the *McGill* rule is merely the latest “device or formula”  
24 intended to frustrate the parties’ agreement to the individualized nature of arbitration proceedings, one  
25 of its key “fundamental attributes.” *Epic Sys.*, 138 S. Ct. at 1623. According to *McGovern*, there is little  
26 daylight between class action waivers and waivers of public injunctive relief, since public injunctive  
27 relief would apply to a wide swath of individuals, and is “by definition, unnecessary to make a plaintiff  
28 whole in an individual arbitration.” *McGovern*, 362 F.Supp.3d at 863. “*McGill*,” the court opines,  
“merely attempts to circumvent *Concepcion*’s holding that class action waivers in arbitration agreements  
can be enforced by giving individuals the unwaivable right to seek wide-ranging injunctive relief not  
specific to their individual injuries without following the procedural requirements for a class action.” *Id.*  
*McGovern*, however, does not adequately address binding Ninth Circuit authority, namely,  
*Sakkab*. Instead, it admits in a footnote that its application of *Epic Systems* to *McGill* is “difficult to  
reconcile” with *Sakkab*. *Id.* at 850 n.5. The sole rationale *McGovern* cited for discounting *Sakkab* was

1           **4. The Public Injunctive Relief waivers are not severable**

2           As discussed *supra*, the parties agree that the Arbitration Provision—either under  
3 Section 5(E) or Section 5(D)—waives public injunctive relief under UCL section 17204.  
4 Given that the Arbitration Provision contains invalid terms under *McGill*, the Court turns  
5 to their effect on the enforceability thereof. “The procedure to be followed here is  
6 dictated . . . by the specific procedures contracted to by the parties in the arbitration  
7 agreement at issue here.” *McArdle*, 2017 WL 4354998, at \*4.

8           Pursuant to the Arbitration Provision, “if Section 5(C), (D) and/or (E) is declared  
9 invalid in a proceeding between you and us, without in any way impairing the right to  
10 appeal such decision, this entire Arbitration Provision . . . shall be null and void in such  
11 proceeding.” Thus, given the invalidity of Section 5(E) and 5(D), the Arbitration  
12 Provision is rendered wholly nugatory, and Speedy Cash has no grounds upon which to  
13 compel arbitration or stay the case. *See McArdle*, 2017 WL 4354998, at \*4 (holding that  
14 similar “poison pill” language left “no room for doubt” that the entirety of the arbitration  
15 provision would be invalidated).

16           **III. Conclusion**

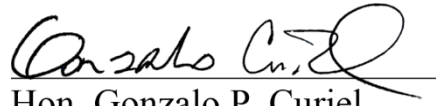
17           For the foregoing reasons, Speedy Cash’s motion to compel arbitration and to stay  
18 proceedings is **DENIED**. (ECF No. 18.)

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21           the fact that *Epic Systems* reversed a Ninth Circuit opinion which had “us[ed] reason similar to . . . (and  
22 even cit[ed]) *Sakkab*.” *Id.* In the underlying decision, *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th  
23 Cir. 2016), the Ninth Circuit held that concerted action waivers violate the National Labor Relations  
24 Act, and any rule invalidating the same would not be subject to preemption. The Supreme Court  
25 disagreed in *Epic Systems*, holding that by “attacking (only) the individualized nature of the arbitration  
26 proceedings, the employees’ argument seeks to interfere with one of arbitration’s fundamental  
27 attributes.” *Epic Sys.*, 138 S. Ct. at 1622.

28           Whatever its deficiencies, *Sakkab* is still good law and involves a waiver that is much more  
analogous than that considered in *Epic Systems*. Even if Speedy Cash were to assert that the Ninth  
Circuit made the wrong decision in *Sakkab*, there is no authority for this Court to simply ignore it.  
Indeed, the Supreme Court has been asked to weigh in on whether the FAA preempts *Iskanian* on many  
occasions; each time it denied certiorari. *See, e.g., Prudential Overall Supply v. Betancourt*, 138 S. Ct.  
566 (2017); *Bloomindale’s Inc. v. Tanguilig*, 138 S. Ct. 356 (2017); *Bloomindale’s, Inc. v. Vitolo*, 137  
S. Ct. 2267 (2017); *CarMax AutoSuperstores Cal., LLC v. Areso*, 136 S.Ct. 689 (2015).

**IT IS SO ORDERED.**

Dated: June 10, 2019

  
Hon. Gonzalo P. Curiel  
United States District Judge

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