No. 23-___

IN THE

# Supreme Court of the United States

RAC ACCEPTANCE EAST, LLC,
*Petitioner,*
v.
SHANNON MCBURNIE, APRIL SPRUELL,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


WILLIAM F. ALLEN
LITTLER MENDELSON, P.C
2301 McGee Street
8th Floor
Kansas City, MO 64108
(202) 772-2538

KEVIN RANLETT
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

AMY WONG
K&L GATES LLP
1 Park Plaza, Twelfth Floor
Irvine, CA 92614
(949) 253-0900

MATTHEW G. BALL
K&L GATES LLP
4 Embarcadero Center
Suite 1200
San Francisco, CA 94111
(415) 249-1014

ROBERT F. FRIEDMAN
*Counsel of Record*
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500
Dallas, TX 75201-2931
(214) 880-8100
rfriedman@littler.com

JULIE M. MCGOLDRICK
LITTLER MENDELSON, P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067
(415) 276-2631

KAITLYN M. BURKE
BRYAN PECHERSKY
UPBOUND GROUP, INC.
5501 Headquarters Dr.
Plano, TX 75024
(972) 674-6773

*Counsel for Petitioner*


June 12, 2024


WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

## QUESTIONS PRESENTED

In *Viking River Cruises v. Moriana*, this Court held that state law cannot obstruct enforcement of agreements for individualized arbitration by combining arbitrable requests for individualized relief with nonarbitrable requests for relief on behalf of others into an indivisible claim that is exempt from individual arbitration. 596 U.S. 639, 660 (2023).

Here, the plaintiffs pleaded claims for individualized relief and an injunction on behalf of California consumers, challenging a one-time processing fee for contracting with Petitioner. No plaintiff alleged the fee would be incurred again. After the suit was filed, the California Attorney General obtained an injunction against charging California consumers that fee to the extent it exceeds the same statutory limits that plaintiffs here seek to enforce on behalf of the same California consumers.

Contrary to *Viking River*, the Ninth Circuit followed its prior decision in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), refusing to sever and compel arbitration of requests for individualized relief pleaded as part of the same claim as a request for a public injunction because the agreements stated that a "claim for relief" that cannot be arbitrated individually remains in court. In addition, the court held that because the Attorney General injunction "did not determine" whether the disputed fee is unlawful, "[t]he injunction that plaintiffs seek" would provide different relief and thus was not moot.

This petition presents two questions:

1. Whether the Federal Arbitration Act, as interpreted in *Viking River*, *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), permits

courts to refuse to sever and compel arbitration of individualized and divisible components of a claim merely because they have been pleaded as a single cause of action with a nonarbitrable request such as for a public injunction, and the arbitration agreement expressly provides that a "claim for relief" that cannot be arbitrated individually is severable and remains in court.

2. Whether, in conflict with six other courts of appeals, the Ninth Circuit correctly allowed a plaintiff to seek injunctive relief when the plaintiff has alleged no risk of personally incurring the injury in the future and thus lacks Article III standing—here, because the plaintiffs do not allege that they will incur the challenged fee again and because a permanent injunction against the same party in favor of and enforceable by a state attorney general on behalf of the public already prohibits the same conduct to the extent it is unlawful.

## PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to the proceedings below.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner RAC Acceptance East LLC, erroneously sued as Acceptance Now, LLC, is a limited liability company. Its sole member is Rent-A-Center East, Inc., a Delaware corporation and wholly owned subsidiary of Upbound Group, Inc. (formerly known as Rent-A-Center, Inc.), a publicly traded company. Upbound Group, Inc. is a nongovernmental entity that has no parent company.

The following entities hold at least a 10% interest in Upbound Group, Inc.'s common stock: BlackRock Fund Advisors and The Vanguard Group, Inc.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court, Northern District of California and the Ninth Circuit Court of Appeals:

*McBurnie v. RAC Acceptance East, LLC*, No. 3:21-cv-01429-JD (N.D. Cal.), order issued Nov. 30, 2022;

*McBurnie, et al., v. RAC Acceptance East, LLC*, No. 22-16868 (9th Cir.), judgment issued March 14, 2024;

*McBurnie, et al., v. RAC Acceptance East, LLC*, No. 22-16868 (9th Cir.), motion to stay the mandate denied April 25, 2024.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within this Court's Rule 14.1(b)(iii).

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Rent-A-Center Acceptance East, LLC ("RAC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 95 F.4th 1188. The order of the district court denying RAC's motion to compel individual arbitration (App., *infra*, 15a-25a) is reported at 643 F. Supp. 3d 1041.

## JURISDICTION

The judgment of the court of appeals was entered on March 14, 2024, and the mandate issued May 3, 2024. (App., *infra*, 1a-14a; *McBurnie, et al., v. RAC Acceptance East, LLC*, No. 22-16868 (9th Cir), ECF No. 48.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the U.S. Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, [and] . . . to Controversies between . . . Citizens of different States . . . ." U.S. Const. Art. III, § 2, cl. 1.

Section 2 of the FAA states, in relevant part: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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.

## STATEMENT

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to declare "a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House*, 534 U.S. 279, 289 (2002) (quotation marks omitted). As this Court explained, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (quotation marks omitted). And this Court has warned that "we must be alert to new devices and formulas that would achieve much the same result today." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 509 (2018).

California has long been at the forefront of the resistance to the FAA. This Court has repeatedly been required to intervene to invalidate California statutes and judge-made rules that invalidated arbitration agreements outright, *e.g.*, *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984), deferred arbitration until after an administrative body exercises primary jurisdiction over the dispute, *Preston v. Ferrer*, 552 U.S. 346 (2008), discouraged arbitration by conditioning enforcement on the use of procedures that eliminate the "benefits" of "arbitration as envisioned by the FAA," *Concepcion*, 563 U.S. at 351, or that twisted the interpretation of arbitration agreements in order to cause them to self-destruct, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015).

Most recently, in *Viking River*, this Court rejected another device for defeating arbitration agreements—inventing a new "single-package" cause of action that combines individualized claims that parties agreed to

arbitrate with representative claims they did not in order to "coerce[]" parties either to expand the range of arbitrable issues or "forgo arbitration altogether." 596 U.S. at 660, 662.

This case involves another California rule for defeating arbitration. California has declared, and the Ninth Circuit has ratified, that agreements for "individualized" arbitration, which this Court has said that the FAA "protect[s] pretty absolutely," *Epic*, 584 U.S. at 506, cannot be enforced to the extent that they would waive the plaintiff's right to seek broad injunctive relief on behalf of the general public under California consumer-protection laws. *See McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017); *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 827-31 (9th Cir. 2019). Even if *McGill* were compatible with the FAA, the proper course when a party to an agreement for individualized arbitration asserts consumer-protection claims and also requests public injunctive relief would be to sever and compel arbitration of the components of the dispute that can be arbitrated individually, such as the requests for damages or injunctive relief on behalf of the named plaintiff only. Indeed, that is the approach required by the parties' arbitration agreement here, which specifies that if "applicable law precludes enforcement of" the requirement of individualized arbitration "as to a particular claim for relief, then that claim (and only that claim) must be severed from arbitration and may be brought in court." (App., *infra*, 48a-49a, 62a-63a.)

But that is not what the court below did. To defeat arbitration of all claims, the Ninth Circuit affirmed *Blair*'s pre-*Viking River* holding that had construed the phrase "claim for relief" to refer to the entire causes of action pleaded by the plaintiffs. (App., *infra*, 5a, 9a.) And because the plaintiffs had deliberately

pleaded their requests for public injunctive relief as part of the same count as their requests for arbitrable remedies, the court exempted the entire suit from arbitration.

That result contravenes this Court's FAA precedents. The FAA requires the language of arbitration agreements to be construed "in favor of arbitration," not to prevent it. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 189 (2019). And *Viking River* confirms that state law cannot lump together claims on behalf of the plaintiff with ones on behalf of third parties as a device for defeating enforcement of agreements for individualized arbitration.

Even worse, the Ninth Circuit reached this result despite Respondents' lack of Article III standing to seek the injunction that was their ticket out of arbitration. (App., *infra*, 12a-13a.) Respondents were suing over a one-time processing fee incurred when entering into a new rental purchase agreement—yet they never alleged that they would ever enter into such a transaction again or otherwise incur the fee in the future. And, to the extent the fee is unlawful, the fee already is subject to an injunction obtained by the California Attorney General on behalf of the same California consumers for whom Respondents seek an injunction. Because Respondents cannot personally claim any imminent future harm, Article III does not grant them standing to seek an injunction. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Yet the Ninth Circuit concluded that because the Attorney General injunction did not itself determine that the fee was unlawful, the requested injunction was not moot—skipping past the critical step of determining whether Respondents face the requisite threat of future harm necessary to have standing to seek an injunction in the first place.

This Court's intervention is sorely needed to correct this misapplication of this Court's FAA and Article III precedents. The Ninth Circuit's misreading of the severability clause in the parties' contract is inconsistent with a decision of the California Court of Appeal, which recognized that similar language must be interpreted in light of *Viking River*'s mandate that single-package claims be split to allow enforcement of agreements for individualized arbitration. And the Ninth Circuit's standing analysis cannot be squared with decisions of other federal courts of appeal, which recognize that plaintiffs lack Article III standing to seek injunctive relief unless they personally face an impending threat of future harm.

Even if there were no division in authority to resolve, this case would warrant review because the decision below represents yet another effort by a court hostile to arbitration to circumvent this Court's precedents. This Court has granted review—often summarily—to reject similar anti-arbitraion decisions. *See*, *e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246 (2017); *Imburgia*, 577 U.S. 47; *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam). Here, too, review and reversal of the decision is warranted to preserve the integrity of this Court's precedents and ensure uniformity on important questions involving arbitrability and Article III standing.

### A. The Arbitration Agreements Between RAC and Respondents McBurnie and Spruell.

At the time of events at issue in the district court, RAC allowed California consumers to lease merchandise like home furnishings or electronics by entering into

rental purchase agreements ("RPAs"). (*See* ER[1]-231-236.) On January 18, 2017, and March 9, 2020, respectively, Respondents April Spruell and Shannon McBurnie entered into RPAs and identical arbitration agreements. (App., *infra*, 45a-58a, 59a-72a.)

Each arbitration agreement specified that, "in the event of any dispute or claim between us, either you or RAC may elect to have that dispute or claim resolved by binding arbitration." (App., *infra*, 45a-46a.) It is undisputed that the arbitration agreements encompass the claims asserted in this action.

The arbitration agreements require arbitration on an individual basis:

> [A]rbitration shall be conducted on an individual basis, and that neither you nor RAC may seek, nor may the Arbitrator award, relief that would affect RAC account holders other than you. There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class, collective, mass, private attorney general, or representative action.

(*E.g.*, App., *infra*, 48a.)

The arbitration agreements provide for severance in the event the law precludes enforcement of the requirement of individualized arbitration:

> If there is a final judicial determination that applicable law precludes enforcement of this Paragraph's limitations as to a particular claim for relief, then that claim (and only that

[1] "ER _" refers to the Excerpts of Record in the proceedings below in Ninth Circuit Court of Appeals.

> claim) must be severed from the arbitration and may be brought in court.

(*E.g.*, App., *infra*, 48a-49a.)

### B. Proceedings Below.

On December 11, 2020, Respondents filed a putative class action in California state court, alleging (among other things) that each had paid a $45 processing fee when entering into an RPA. (ER-220, 223–224 ¶¶ 3, 17–25.) Respondents alleged that these fees were unreasonable and did not reflect RAC's actual costs, and so violated California's Karnette Act, Cal. Civ. Code §§ 1812.620 *et seq.*, the Consumers Legal Remedies Act ("CLRA"), *id.* §§ 1750 *et seq.*, and the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.* (ER-220–221, 227–229 ¶¶ 3-4, 40-43, 48-49, 52-53.) Among other things, Respondents sought restitution, damages, and what plaintiffs described as "public injunction[s]" under those statutes barring further collection of the processing fee. (ER-225, 228–229 ¶¶ 30, 43, 50, 55.)[2]

RAC did not initially move to compel arbitration because, at the time the lawsuit was filed, RAC's arbitration agreement was unenforceable in this case under then-existing California law. California's *McGill*

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[2] Respondents also initially challenged an expedited-payment fee that RAC had charged in connection with payments made by phone. (ER-220, 224 ¶¶3, 25.) In response to RAC's argument that neither plaintiff paid the expedited-payment fee, the Ninth Circuit remanded the question of standing regarding that fee for further consideration by the district court. (App., *infra*, 14a.) Following issuance of the mandate, Respondents abandoned their challenge to that fee. (Joint Case Management Statement at 2:2-18, *McBurnie v. RAC Acceptance East, LLC*, No. 3:21-cv-01429-JD (N.D. Cal. May 24, 2024), ECF No. 130.)

rule—named for *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017)—forbids enforcement of agreements for individual arbitration to the extent they waive a request for broad injunctive relief on behalf of the general public under California's consumer-protection laws. Before this action was filed, considering the same arbitration agreements at issue here, the United States Court of Appeals for the Ninth Circuit had held in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), that RAC's arbitration agreement was unenforceable under *McGill* and that the FAA does not preempt the *McGill* rule.

Although *McGill* only forbids individualized arbitration of public injunctions, the *Blair* court held that all requested remedies, including requests for damages or individual injunctions, are exempt from arbitration if they are pleaded as part of the same "claim for relief" as the request for "public injunctive relief." *Id.* at 831-32. To justify this result, the Ninth Circuit pointed to the severance clause in RAC's arbitration agreement, which states that if "applicable law precludes enforcement" of the prohibition on non-individualized relief "as to a particular claim for relief, then that claim (and only that claim) must be severed from arbitration and may be brought in court." *Id.* at 831. The Ninth Circuit acknowledged the argument that "'claim for relief'" could "refer only to a particular remedy," but chose instead to construe that phrase as referring to the entire "'cause of action,'" thus requiring that "the entire claim be severed for judicial determination." *Id.*

Shortly after the Supreme Court's decision in *Viking River*, RAC filed a motion to compel arbitration, arguing that *Viking River* confirmed that the FAA preempts California's *McGill* rule, thereby abrogating *Blair*. (ER-091–095.) RAC also argued that even if the

request for public injunctive relief had to proceed in court, the requests for other remedies were required to be severed and compelled to individual arbitration. (ER-097–099.)

Finally, RAC argued that even if, for the sake of argument, *Blair* remained good law, Respondents no longer had Article III standing to seek a public injunction (and thus to invoke the *McGill* rule). On August 2, 2022, the California Attorney General obtained an injunction against RAC on behalf of all California consumers—including the same consumers who would be covered by Respondents' demanded public injunction—that specifically enjoined RAC from charging any processing fee that violates the statutes that Respondents invoke. (App., *infra*, 34a at ¶ 11b.)[3]

On November 30, 2022, the district court denied RAC's motion to compel arbitration, and RAC appealed to the United States Court of Appeals for the Ninth Circuit. (App., *infra*, 15a-25a.)

On March 14, 2024, the Ninth Circuit affirmed the denial of RAC's motion to compel arbitration, reaffirming both *McGill* and *Blair* and holding that *Viking River*'s mandatory joinder rule is specific to California's Private Attorneys General Act ("PAGA"). (App., *infra*, 11a-12a.) The Ninth Circuit followed *Blair* and did not sever the requests for individualized remedies (such as damages) from the request for public injunctive relief. (*See* App., *infra*, 11a-12a.)

The Ninth Circuit also held that Respondents have Article III standing when the Attorney General had

[3] RAC also explained below why Respondents' other arguments for opposing arbitration, including waiver, were wrong as a matter of law. The Ninth Circuit did not reach Respondents' other arguments.

already enjoined RAC from charging a processing fee that was greater than its actual costs incurred. (App., *infra*, 12a-13a.) Because the Attorney General injunction "did not determine whether the $45 processing fee in this case violates the Karnette Act's requirement that fees be 'reasonable' and the fees represent an 'actual cost incurred by RAC," the Ninth Circuit concluded that the public injunctive Respondents seek "would provide relief that is not addressed by" the Attorney General injunction. (*Id.* at 13a.) The Ninth Circuit affirmed the district court's holding that Respondents' challenge to the $45 processing fee was not "moot." (*Id.*)[4]

## REASONS FOR GRANTING THE PETITION

### I. The Ninth Circuit's Refusal to Sever and Compel Arbitration of Plaintiffs' Individual Claims Warrants Review.

#### A. The Decision Below Contravenes the FAA and Defies This Court's Precedents Regarding Divisibility of Claims and Construction of Arbitration Terms in Favor of Arbitrability.

The Ninth Circuit's refusal to sever and compel individual arbitration of Respondents' claims for damages and individual injunctive relief merely because Respondents also seek public injunctive relief

[4] As noted above, Respondents also had challenged an expedited-payment fee, but they have since abandoned their claims related to that fee. (*McBurnie v. RAC Acceptance East, LLC*, No. 3:21-cv-01429-JD (N.D. Cal. May 24, 2024), ECF No. 130.)

cannot be squared with this Court's FAA precedents. Nor can *Viking River* be simply confined to PAGA claims.[5]

As this Court has explained, "Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013). Section 2 of the FAA provides that arbitration agreements "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. "[C]onsistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms[.]'" *Am. Express*, 570 U.S. at 233.

"Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018). For example, parties' "intention to use individualized rather than class or collective action procedures" is a choice that the FAA "seems to protect pretty absolutely." *Id.* at 506.

Most recently, in *Viking River*, this Court confronted another California rule obstructing the enforcement of agreements for individualized arbitration—the so-called *Iskanian* rule (named for *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014)). *Iskanian*

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[5] A Supreme Court decision may effectively overrule lower court decisions even where it "does not do so expressly" or "when the issue in the Supreme Court case is not 'identical' to the one decided" by the lower court. *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115, 1121 (9th Cir. 2020). And lower courts are "bound not only by the holdings of [the Supreme Court's] decisions but also by their mode of analysis." *United States v. Van Alstyne*, 584 F.3d 803, 813 (9th Cir. 2009) (citation and internal quotation marks omitted) (alteration in *Van Alstyne*). Here, *Viking River*'s "mode of analysis" extends beyond PAGA claims.

involved claims under California's Private Attorney General Act (PAGA), which allow a single named plaintiff to seek civil penalties for Labor Code violations not only experienced by the plaintiff, but also by "current or former employees." Cal. Labor Code § 2699(a). Under *Iskanian*, agreements for individualized arbitration could not be enforced as to PAGA claims, as California law deems the right to seek civil penalties for violations as to other employees to be non-waivable. *Viking River*, 596 U.S. at 646.

The *Viking River* Court held that PAGA's "built-in mechanism of claim joinder" to inhibit enforcement of agreements for individualized arbitration violates the FAA. *Id.* at 659. The Court explained that California's "prohibition on contractual division of PAGA actions into constituent claims" for requests for relief for the named plaintiff and "representative" requests for relief on behalf of other employees "unduly circumscribes the freedom of parties to determine" the scope of arbitrable issues. *Id.* In other words, "[t]he only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding." *Id.* at 661. "A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration." *Id.* at 660. It improperly "compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether." *Id.* at 660-61. The Court therefore held that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Id.* at 662.

The upshot of *Viking River* is that, under the FAA, states may not prevent enforcement of agreements for individualized arbitration by creating a "unitary" cause of action that fuses together both individual and non-individualized components. *Viking River*, 596 U.S. at 653.

In this case, however, the court below did just that. It permitted plaintiffs to avoid arbitration by combining into a single cause of action (1) individual-specific relief (*e.g.*, restitution, damages, and private injunctive relief), and (2) "public injunctive relief." App, *infra*, 4a-12a; *see also McGill*, 393 P.3d at 88-89 (distinguishing "between private injunctive relief—i.e., relief that primarily resolves a private dispute between the parties and rectifies individual wrongs, and that benefits the public, if at all, only incidentally—and public injunctive relief—i.e., relief that by and large benefits the general public and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public.") (cleaned up).

These are two distinct components of a "cause of action" under the consumer protection statutes, just as PAGA's "representative" claim for remedies affecting other employees is distinct from an "individual" claim "premised on Labor Code violations actually sustained by the plaintiff." *Viking River*, 596 U.S. at 648; *see McGill*, 393 P.3d at 90 ("Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief," which is relief primarily aimed at "prohibiting unlawful acts that threaten future injury to the general public").

The Ninth Circuit reached this result by incorrectly assuming that *Viking River* was limited to PAGA

claims,[6] and by adhering to its past decision in *Blair*, which held that requests for individual remedies cannot be severed from requests for public injunctions because RAC's arbitration agreements specify that if the requirement of individual arbitration cannot be enforced as to a "claim for relief," the entire pleaded cause of action must remain in court. *Blair*, 928 F.3d at 831-32.

The *Blair* court had acknowledged that the term "claim for relief" in RAC's severance clause could refer to the "particular remedy" that a plaintiff seeks. 928 F.3d at 831.[7] But applying California contract-interpretation principles, the *Blair* court instead construed "claim for relief" expansively as referring to the entire "'cause of action'" pleaded by the plaintiff. *Id.* at 831-32.

This application of state contract law to defeat arbitration contravenes Supreme Court precedent. For

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[6] *See* App., *infra*, 11a-12a ("*Viking River* dealt with PAGA claims, which are different from public injunction claims brought under the consumer protection statutes at issue in *Blair* and this case."). A public injunction, even more so than a representative PAGA claim, is a "massive-scale dispute[]" that is inconsistent with traditional arbitration of the plaintiff's own dispute. *Viking River*, 596 U.S. at 661-62. Indeed, the *Blair* panel presciently acknowledged that "arbitration of a public injunction will in some cases be more complex than arbitration of . . . a representative PAGA claim." 928 F.3d at 829.

[7] Indeed, courts commonly refer to a public injunction as a type of "claim." *See*, *e.g.*, *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1087 (9th Cir. 2020) ("claim for public injunctive relief"); *Ferguson v. Corinthian Colls.*, 733 F.3d 928, 924 (9th Cir. 2013) (same); *McGill*, 393 P.3d at 88, 90 (same); *People v. Maplebear Inc.*, 81 Cal. App. 5th 923, 938 n.8 (2022) (same); *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745, 748 (2019) ("claims for 'public' injunctive relief are not arbitrable," but "claims for private injunctive relief or restitution [are arbitrable]").

example, this Court has reiterated that, as a matter of federal law, "ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration." *Lamps Plus, Inc.*, 587 U.S. at 189 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 626, and *Moses H. Cone Mem' Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Because the phrase "claim for relief" *could* be read to refer to each individual request for relief so as to permit arbitration of the individualized aspects of the case, the FAA requires that result.

Moreover, because *Viking River* holds that state law cannot prevent the division of "single-package" claims into individual and non-individual "components" (596 U.S. at 661), the same is true when interpreting arbitration agreements under state law. And plaintiffs cannot avoid that result through artful pleading. Here, Respondents deliberately chose to cram all of the requests for relief under each California consumer protection law—individual or otherwise—into a single count per statute. But *in substance*, their complaint actually asserts multiple claims for relief under each statute—some individual (*e.g.*, for damages and restitution), and some not (*e.g.*, for public injunctive relief). Lumping those claims for relief under a particular statute into a single count (or "Claim for Relief" or "cause of action") cannot mask their true nature as a legally divisible claim. Thus, by refusing to sever and compel arbitration of the individual claims, the court below applied an "indivisibility rule" akin to the one that this Court deemed preempted in *Viking River*, 596 U.S. at 661, 662.[8]

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[8] The Ninth Circuit's rationale is cloaked in the language of a "mandatory joinder rule" that it asserts "is specific to California's PAGA statute" and "does not exist under the consumer statutes at issue in this action," *see* App., *infra*, 11a-12a, but what this

Just as *Viking River* requires courts to divide a PAGA action into "individual" and "non-individual claims" and sever the non-arbitrable claims for purposes of enforcing arbitration agreements under the FAA, *id*. at 662, so too must courts divide causes of action under the Karnette Act, CLRA, and UCL into their private and public components to the fullest extent possible.[9] Otherwise, invalidating agreements requiring arbitration of only the individualized components of a cause of action "unduly circumscribes the freedom of the parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate.'" *Id*. at 659 (quoting *Lamps Plus*, 587 U.S. at 184).

### B. The Decision Below Conflicts With a California Court of Appeals Decision Considering Similar Severability Language.

In addition to contravening Supreme Court precedent, including *Viking River* and *Lamps Plus*, the Ninth Circuit's refusal to sever and compel arbitration of Respondents' requests for individual relief conflicts with a 2023 decision by the California Fourth District Court of Appeal. *Piplack v. In-N-Out Burgers*, 88 Cal. App. 5th 1281 (2023), *review granted*, (Cal. June 14, 2023), *review dismissed*, (Cal. Sept. 13, 2023). That case held that similar severability language in an arbitration agreement cannot prevent subdividing a PAGA claim into individual and non-individual components and compelling arbitration of the individual ones. *Id.* at 1285 (2023). This clear split of authority

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Court called a "compulsory joinder rule" it also called an "indivisibility rule." *Viking River*, 596 U.S. at 661, 662.

[9] Respondents' UCL claim is entirely derivative of the Karnette Act and CLRA claims.

between the Ninth Circuit and the California Court of Appeal further underscores the need for Supreme Court review.

In *Piplack*, the California Court of Appeal agreed that *Viking River* requires revisiting the interpretation of severability language in arbitration agreements. In that case, the court addressed a severability clause specifying that a Private Attorney General Waiver was severable "in any case in which (1) the dispute was filed as a private attorney general action and (2) a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable," in which event "any private attorney general claim must be litigated in" court. 88 Cal. App. 5th at 1285. The court explained that although "a private attorney general action" would have been interpreted to refer to the entire PAGA claim, "*Viking* [*River*] changes the analysis." *Id.* at 1288. Now, "every PAGA action is properly understood as a combination of two claims: an 'individual' claim … and a 'representative' claim,'" and so the only "claim" exempted from arbitration is the "representative claim." *Id.* at 1288-89.

*Piplack*'s application of *Viking River* is even more compelling here. Whereas *Piplack* refused to find that a "claim" was indivisible, the RAC arbitration agreements' term "particular claim for relief" connotes even more strongly a focus on an individual type of relief requested.[10]

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[10] In a different case, the California First District Court of Appeal followed *Blair*'s severability holding and refused to sever and compel arbitration of requests for individualized remedies from requests for public injunctive relief that were pleaded as part of the same claim in *Jack v. Ring LLC*, 91 Cal. App. 5th 1186, 1209-10 (2023). But that court did not consider the impact of the

### C. Plaintiffs' Ability to Evade Individual Arbitration by Tacking on a Request for a Public Injunction Is an Issue of Critical Importance for the Enforceability of Arbitration Agreements.

This case is an ideal vehicle for the Court to address the broader meaning of *Viking River* as it applies to other California laws beyond PAGA. It arises out of federal court, so it does not implicate the views expressed by one member of this Court that the FAA does not apply in state court proceedings. The case also cleanly presents a judicial construction of the parties' arbitration agreement to defeat arbitration.

If *Viking River* were confined to PAGA claims, plaintiffs would be encouraged to abuse the *McGill* rule by pairing requests for public injunctive relief with individual relief in a single claim, thus frustrating arbitration. While it is true the *McGill* rule is a California-specific rule (as was the *Iskanian* rule), that does not mean this case does not present an issue of nationwide importance. Consumer class actions against nationwide companies are often brought in California, which is one of the largest economies in the world and in which corporations from around the world participate. These class actions often include requests for public injunctive relief in connection with state consumer-protection claims. Thus, the impact of the lower court's ruling will ripple throughout the country. Perhaps for this reason, the Supreme Court has repeatedly granted certiorari to reverse California-specific anti-arbitration rules.[11]

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FAA and *Viking River* on the interpretation of the severability clause in that case. *See id.*

[11] *See, e.g.*, *Viking River*, 596 U.S. at 662 (holding that FAA preempts California's *Iskanian* rule barring individual arbitration of

Moreover, other states may follow California's example in *McGill* by crafting their own state-law causes of action allowing an individual plaintiff to seek broad injunctive or other relief on behalf of non-parties—claims that cannot be waived by an agreement for individualized arbitration. Indeed, plaintiffs have already begun pressing this argument in other states. *See Bodie v. Cricket Wireless, LLC*, 350 So. 3d 480, 481, 484 (Fla. Dist. Ct. App. 2022) (LaRose, J., concurring) (discussing the "consequential issue" of whether Florida should follow "*McGill*"); *see also*, *e.g.*, *Moreno v. T-Mobile USA, Inc.*, No. 2:22-cv-00843-JHC, 2023 WL 401913, at *4 (W.D. Wash. Jan. 25, 2023) (noting plaintiff's argument that "Washington law does not permit a party to contractually waive" a "request for 'public' injunctive relief'" by agreeing to individualized arbitration); *Cunningham v. Lyft, Inc.*, No. 1:19-cv-11974-IT, 2020 WL 1323103, at *2-3 (D. Mass. Marc. 20, 2020) ("Plaintiffs urge the court to 'follow' . . . *McGill*[.]").

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state Private Attorney General Act claims); *Lamps Plus, Inc.*, 587 U.S. at 186-89 (same for California law deeming silence to be consent to class arbitration); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58 (2015) (same for California court's interpretation of particular arbitration clause); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (same for California's rule in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005); *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (same for California's Talent Agencies Act); *Perry v. Thomas*, 482 U.S. 483, 492 (19870 (same for California Labor Code provision).

## II. The Ninth Circuit's Decision Warrants Review Regarding the Scope of Federal Court Jurisdiction.

### A. The Decision Below Contravenes This Court's Precedents Regarding Article III Standing and Mootness.

Article III of the Constitution limits federal courts' jurisdiction to certain "Cases" and "Controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To establish Article III standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez,* 594 U.S. 413, 423 (2021) (citation omitted). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for *each form of relief* that they seek (for example, *injunctive relief* and damages)." *Id.* at 2208 (citation omitted); *see also id.* at 2210.

For injunctive relief in particular, a plaintiff must demonstrate that the threatened future harm is "*certainly impending*"; "allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (2013) (internal quotation marks omitted). Federal courts "have never been empowered to issue advisory opinions." *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 735 (1978).

Notably, there must be an "actual controversy" both "at the time the complaint is filed," and also through "all stages" of the litigation. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted)); *see also Burke v. Barnes*, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the

case."). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already*, 568 U.S. at 91. A finding of mootness is appropriate when "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 170, 189 (2000).

In this case, Respondents challenge a one-time $45 processing fee that each paid when entering into a new rental-purchase agreement. But Respondents have never alleged they would ever again enter into a rental-purchase agreement or otherwise incur a processing fee. Moreover, after the case was filed, on August 2, 2022, RAC's parent company and its subsidiaries (including RAC) were permanently enjoined by an injunction obtained by the California Attorney General on behalf of California consumers from "charging or listing a processing fee or any other fee that Defendant cannot establish as reasonable and an actual cost incurred by Defendant." (App., *infra*, 33a-34a at ¶ 11(b).) The stipulated injunction applies to a "processing fee or any other fee" that RAC might charge in violation of the Karnette Act. (*Id.*)

The Ninth Circuit skirted this Court's foundational law regarding Article III standing. It disregarded Respondents' failure to allege that they personally would ever incur the processing fee again, and it erroneously concluded that, because the Attorney General injunction "did not determine whether the $45 processing fee in this case violates the Karnette Act's requirement that fees be 'reasonable' and the fees represent an 'actual cost incurred by RAC," then the public injunction Respondents seek "would provide relief that is not addressed by" the Attorney General

injunction. (App., *infra*, 13a.) Therefore, Respondents' challenge to the $45 processing fee was not "moot." (*Id.*)

By suggesting that a fee that already has been enjoined to the extent that it is unlawful can be the subject of another request for an injunction by a plaintiff who does not even allege that she will enter into another transaction in the future and incur the fee, the Ninth Circuit contravened this Court's Article III precedents. Under Article III, even declaratory relief "is available only when there exists an actual case or controversy." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Where the declaratory relief sought has been mooted by developments subsequent to the filing of the complaint, no justiciable case or controversy exists. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Notably, courts "cannot simply presume a material risk of concrete harm." *TransUnion*, 594 U.S. at 438. This is especially true in the context of injunctive relief. The risk of future harm must be "substantial," and the threatened harm must be "*certainly impending*" in order to be sufficiently concrete; "allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (internal citation omitted).

Standing is assessed based on the specific facts in the complaint, and the focus is on the injury ***to the plaintiff***. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (holding plaintiff "must clearly allege facts" supporting its standing (internal quotation, alteration and citation omitted); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (holding complaint must include "particularized allegations of fact deemed supportive of plaintiff's standing"); *see TransUnion*, 594 U.S. at 431 ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.") (citation omitted).

With no allegation or showing that either Respondent might ever enter into another rental-purchase agreement, and particularly in light of the California Attorney General injunction, there is no "certainly impending" risk of future harm sufficient to confer Article III standing to seek an injunction. *Clapper*, 568 U.S. at 409.

### B. The Decision Below Conflicts With the Decisions of Several Other Circuits.

The Ninth Circuit's opinion permitting a claim for injunctive relief to continue without Article III standing conflicts with the law of other circuits, which all require a plaintiff seeking an injunction to establish that they face a risk of future harm. *See, e.g.*, *Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist., Wis.*, 95 F.4th 501, 505-07 (7th Cir. 2024) ("Applying *Clapper*'s reasoning here reveals that Parents Protecting's expressions of worry and concern do not suffice to show that any parent has experienced actual injury or faces any imminent harm attributable to the Administrative Guidance or a Gender Support Plan."), *cert. pet. pending*, No. 23-1280 (U.S. June 7, 2024); *Mikel v. Quin*, 58 F.4th 252, 258 (6th Cir.), *cert. denied sub nom. Mikel v. Nichols*, 143 S. Ct. 2660 (2023) ("Mikel suffered a present, ongoing injury when she lost custody of her girls. That loss, however, is the only injury supporting Mikel's standing theory. Among other things, Mikel has not pled that she plans to foster more children going forward. As a result, she cannot argue that she faces 'imminent' risks of losing future foster children."); *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 630-31 (4th Cir. 2023) ("Simply put, the parents may think the Parental Preclusion Policy is a horrible idea. They may think it represents an overreach into areas that parents should handle. They may think that the Board's views on gender

identity conflict with the values they wish to instill in their children. And in all those areas, they may be right. But even so, they have alleged neither a current injury, nor an impending injury or a substantial risk of a future injury. As such, these parents have failed to establish an injury that permits this Court to act."); *City of S. Miami v. Governor*, 65 F.4th 631, 640 (11th Cir. 2023) (plaintiffs "failed to produce concrete evidence that S.B. 168 is an imminent threat"); *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020) ("Buchholz lacks standing under *Clapper* because the threat of litigation was not 'certainly impending' when Buchholz filed his complaint."); *Glass v. Paxton*, 900 F.3d 233, 238-42 (5th Cir. 2018) ("By adjudicating claims for which the alleged harm is not certainly impending, federal courts risk disregarding their constitutional mandate to limit their jurisdiction to actual cases and controversies and thereby avoid the issuance of advisory opinions.").

Notably, other circuits do not permit plaintiffs to avoid their burden to prove their own individual standing by pointing to the potential of harm to third parties. *See, e.g.*, *Doe 1 v. Apple Inc.*, 96 F.4th 403, 413 & n. 2 (D.C. Cir. 2024) ("At the pleading stage, 'that a suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have Article III standing.'") (quoting *Spokeo*, 578 U.S. at 338 n.6); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019) (similar). Thus, the Ninth Circuit's opinion below creates a circuit conflict with the Circuits that have addressed those issues.

### C. Review Is Warranted to Resolve an Important Threshold Question Governing the Scope of Federal Jurisdiction.

The requirement of Article III standing to seek injunctive relief is a critical issue, especially where, as here, the strategic pleading of a request for an injunction that would not benefit the plaintiffs is being used to avoid arbitration under the FAA, another important federal policy.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." *Clapper*, 568 U.S. at 408. California's *McGill* rule already exempts requests for public injunctive relief from arbitration under agreements that require individualized arbitration. *See McGill*, 393 P.3d at 93-94. If Article III standards for requesting injunctive relief are allowed to be watered down, then any plaintiff may evade arbitration by simply tacking a request for public injunctive relief onto each cause of action pleaded in the complaint. The *McGill* rule, then, would become as "toothless and malleable" as the limitations on applicability of California's old *Discover Bank* rule, which this Court held obstructed the FAA's purpose because "it allows any party to a consumer contract to demand" class arbitration "*ex post*." *Concepcion*, 563 U.S. at 346-47. The question presented by this petition thus is critical to preventing the widespread invalidation of arbitration agreements in California.

Moreover, the question presented by this petition involves the same type of Article III jurisdictional limitation that the Court considered in *Clapper*. The Court in this case has the opportunity to make an incremental development in its case law construing

federal court jurisdiction in the context of injunctive relief.

## CONCLUSION

This Court should grant this petition.

Respectfully submitted,

WILLIAM F. ALLEN
LITTLER MENDELSON, P.C
2301 McGee Street
8th Floor
Kansas City, MO 64108
(202) 772-2538

KEVIN RANLETT
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

AMY WONG
K&L GATES LLP
1 Park Plaza, Twelfth Floor
Irvine, CA 92614
(949) 253-0900

MATTHEW G. BALL
K&L GATES LLP
4 Embarcadero Center
Suite 1200
San Francisco, CA 94111
(415) 249-1014

ROBERT F. FRIEDMAN
*Counsel of Record*
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500
Dallas, TX 75201-2931
(214) 880-8100
rfriedman@littler.com

JULIE M. MCGOLDRICK
LITTLER MENDELSON, P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067
(415) 276-2631

KAITLYN M. BURKE
BRYAN PECHERSKY
UPBOUND GROUP, INC.
5501 Headquarters Dr.
Plano, TX 75024
(972) 674-6773

*Counsel for Petitioner*

June 12, 2024

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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No. 22-16868

D.C. No. 3:21-cv-01429-JD

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SHANNON MCBURNIE; APRIL SPRUELL,

*Plaintiffs-Appellees*,

v.

RAC ACCEPTANCE EAST, LLC,

*Defendant-Appellant*.

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Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding

Argued and Submitted October 4, 2023
San Francisco, California

Filed March 14, 2024

Before: William A. Fletcher, Richard C. Tallman, and
Kenneth K. Lee, Circuit Judges.

Opinion by Judge W. Fletcher

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OPINION

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## SUMMARY*

### Public Injunctive Relief

The panel affirmed the district court's denial of RAC Acceptance East, LLC's motion to compel arbitration, and remanded for the district court to address named plaintiff April Spruell's standing to challenge a $1.99 expedited payment fee.

The appeal arises from a putative class action alleging that two fees imposed by RAC, the owner and operator of retail stores that lease household and electronic items through rent-to-own contracts, violated California consumer protection laws. California's *McGill* rule invalidates contractual agreements that waive the right to seek injunctive relief on behalf of the general public. *See McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961-62 (2017). This court held in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), that RAC's arbitration agreement was unenforceable under California's *McGill* rule, that the invalid provision was not severable from the rest of the arbitration provision, and that California law was not preempted by the Federal Arbitration Act.

The panel held that *Blair* was not abrogated by the Supreme Court's subsequent decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022). *Viking River* dealt with California Private Attorneys General Act claims, which are different from public injunction claims brought under the consumer protection statutes at issue in *Blair* and in this case. The panel therefore affirmed the district court's denial of RAC's motion to compel arbitration.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

RAC argued that plaintiffs' claim for public injunctive relief was mooted by a Consent Decree that RAC entered into with the California Attorney General. The Consent Decree prohibited RAC from charging or listing a fee that it could not establish as a reasonable actual cost incurred by RAC. RAC argued that plaintiffs' requested injunction against the $45 processing fee that RAC assessed as part of every new rent-to-own agreement would merely duplicate this relief. The panel held that the public injunction that plaintiffs sought would provide relief that was not addressed by the Consent Decree, and therefore affirmed the district court's finding that the challenge to the $45 fee was not moot.

RAC further argued that plaintiffs lacked standing to challenge the $1.99 expedited payment fee for every payment made via telephone because plaintiff Spruell conceded that she did not actually pay the $1.99 fee. Because the district court did not address the issue in its order denying RAC's motion to compel arbitration, the panel remanded for the district court to do so.

## COUNSEL

Robert F. Friedman, I (argued), Littler Mendelson PC, Dallas, Texas; Julie M. McGoldrick and Shannon R. Boyce, Littler Mendelson PC, Los Angeles, California; Kaitlyn M. Burke, Upbound Group Inc., Plano, Texas; Kevin Ranlett, Mayer Brown LLP, Washington, D.C.; Matthew G. Ball, K&L Gates LLP, San Francisco, California; Wai H. Wong and Caitlin C. Blanche, K&L Gates LLP, Irvine, California; for Defendant-Appellant.

Michael Rubin (argued), Connie K. Chan, and Christine M. Salazar, Altshuler Berzon LLP, San Francisco, California; James T. Hannink and Zachariah P.

Dostart, Dostart Hannink LLP, La Jolla, California; for Plaintiffs-Appellees.

Peter B. Rutledge, University of Georgia School of Law, Athens, Georgia; Jennifer B. Dickey and Jordan L. Von Borken, United States Chamber Litigation Center, Washington, D.C.; Deborah R. White, Retail Litigation Center Inc., Washington, D.C.; Stephanie A. Martz, National Retail Federation, Washington, D.C.; for Amici Curiae Chamber of Commerce of the United States of America, Retail Litigation Center Inc., and National Retail Federation.

**OPINION**

W. FLETCHER, Circuit Judge:

Plaintiffs brought a putative class action alleging that defendant RAC Acceptance East, LLC ("RAC") charged two fees that violated California consumer protection laws. After more than a year of discovery and multiple rounds of settlement negotiations, RAC moved to compel arbitration of the named plaintiffs' claims.

We held in *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), that RAC's arbitration agreement is unenforceable under California law, and that California law is not preempted by the Federal Arbitration Act ("FAA"). RAC argues that *Blair* was abrogated by the Supreme Court's subsequent decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022). We disagree. We affirm the district court's denial of RAC's motion to compel arbitration.

I. Factual and Procedural Background

RAC owns and operates retail stores that lease household and electronic items through rent-to-own contracts, under which the consumer rents an item,

agrees to pay a set number of installments, and then takes ownership of the item once all payments are made.

In 2017 and 2020, respectively, April Spruell and Shannon McBurnie each entered into rent-to-own agreements with RAC for furniture. They each paid a $45 processing fee that RAC assessed as part of every new rentto-own agreement. Further, they each agreed to pay an additional $1.99 as an expedited payment fee for every payment made via telephone.

Spruell and McBurnie each signed RAC's arbitration agreement, which provided that "in the event of any dispute or claim between us, either you or RAC may elect to have that dispute or claim resolved by binding arbitration." In relevant part, the arbitration agreement also provided:

> [N]either you nor RAC may seek, nor may the Arbitrator award, relief that would affect RAC account holders other than you. There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class, collective, mass, private attorney general, or representative action.

California's *McGill* rule invalidates contractual provisions that waive the right to seek injunctive relief on behalf of the general public. *See McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961–62 (2017). In *Blair*, we considered the same RAC arbitration agreement as the agreement at issue here. We held that the agreement contained a provision that is unenforceable under *McGill*, and that the invalid provision is not severable from the rest of the arbitration agreement. *Blair*, 928 F.3d at 822. We also held that California's *McGill* rule is not preempted by the FAA. *Id*.

Spruell and McBurnie filed a class action complaint on December 11, 2020, alleging that the $45 processing fee and $1.99 expedited payment fee are unlawful under several California consumer protection statutes—the Karnette Rental-Purchase Act, Cal. Civ. Code § 1812.620 et seq. ("Karnette Act"), the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 et seq., and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. They sought restitution and damages, statutory fines, attorneys' fees and costs, and public injunctions prohibiting RAC from continuing to charge the contested fees.

From August 2021 to August 2022, the parties conducted discovery proceedings and participated in multiple settlement negotiations. In August 2022, RAC moved for the first time to compel arbitration of plaintiffs' claims. RAC acknowledged in its motion that *Blair* prevented enforcement of the arbitration agreement. However, RAC argued that the Supreme Court's June 2022 decision in *Viking River* implicitly abrogated *Blair*, allowing enforcement of RAC's arbitration agreement. RAC also argued that the plaintiffs' challenge to the $45 processing fee is moot because the California Attorney General had recently obtained an injunction that banned RAC from "[c]harging or listing a processing fee or any other fee that [RAC] cannot establish as reasonable and an actual cost incurred by [RAC]" under the Karnette Act, thereby curing any injury arising out of the $45 processing fee. RAC further argued that plaintiff Spruell, the only plaintiff who claimed to have paid the $1.99 expedited payment fee, could not challenge the fee because she could not show that she in fact paid it.

The district court denied RAC's motion. The court found that RAC waived its right to demand arbitration

by actively litigating the case for over a year and a half before moving to compel. The court further held that even if RAC had preserved its right to arbitration, *Viking River* did not abrogate *Blair*, and that the injunction obtained by the California Attorney General did not moot plaintiffs' request for public injunctive relief. The court did not address whether plaintiff Spruell had standing to challenge the $1.99 fee charged for expedited telephone payments. We review these issues in turn.

## II. Enforcement of the Arbitration Agreement

RAC argues the district court erred in denying its motion to compel arbitration of plaintiffs' claims, renewing its argument that the Supreme Court's decision in *Viking River* implicitly abrogated our holding in *Blair*. We have jurisdiction under 9 U.S.C. § 16(a)(1)(C). We review de novo. *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (en banc).

### A. *Blair*

Several California statutes, including those upon which plaintiffs rely, authorize public injunctions. A public injunction is a form of "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill*, 2 Cal. 5th at 951. The California Supreme Court held in *McGill* that state law prohibits contractual waivers of a party's right to seek public injunctive relief. *Id*. at 952.

The FAA provides that arbitration agreements are "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. To determine whether the FAA preempts a state-law rule that would otherwise invalidate an arbitration agreement, we first ask

whether the state-law rule is a "generally applicable contract defense[]." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (citation omitted).

If the relevant state-law rule is not a generally applicable contract defense, the FAA preempts the state-law rule and the arbitration agreement may be enforced. If, however, the state-law rule is a generally applicable contract defense, we ask whether the state-law rule nevertheless "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343. At this step, we consider the "fundamental attributes of arbitration" and ask whether the state-law rule "creates a scheme inconsistent" with those attributes. *Id*. at 344.

In *Blair*, we applied *Concepcion*'s preemption analysis to California's *McGill* rule and held that the rule was not preempted by the FAA. We first determined that the *McGill* rule was a generally applicable contract defense, noting the rule "expresses no preference as to whether public injunction claims are litigated or arbitrated," but instead "merely prohibits the waiver of the right to pursue those claims in any forum." *Blair*, 928 F.3d at 827. We noted that the *McGill* rule "derives from a general and long-standing prohibition on the private contractual waiver of public rights." *Id*.

We then asked whether the *McGill* rule impedes the FAA's goal of enforcing arbitration agreements "according to their terms 'so as to facilitate streamlined proceedings.'" *Id.* at 828 (citation omitted). We observed that

claims for public injunctive relief require no special procedures and are brought by an individual plaintiff who "retains sole control over the suit." *Id*. at 829. The *McGill* rule invalidates contractual provisions that completely waive the right to bring public injunctive claims, but it "leaves undisturbed an agreement that both requires bilateral arbitration and permits public injunctive claims." *Id*. After deciding that the FAA does not preempt the *McGill* rule, we held in *Blair* that RAC's arbitration agreement was unenforceable because it violated the *McGill* rule by including a provision that completely waived the right to seek public injunctive relief and that provision was not severable from the rest of the arbitration agreement. *Id.* at 831–32.

In deciding that the FAA did not preempt the *McGill* rule, we relied on our prior decision in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015), writing that "our decision in *Sakkab* all but decides this case." *Blair*, 928 F.3d at 825. *Sakkab* involved an arbitration agreement that waived the right to bring representative claims on behalf of other employees under California's Private Attorneys General Act ("PAGA"), Cal. Lab. Code §§ 2698 et seq. *Sakkab*, 803 F.3d at 427-28. PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state." *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 360 (2014). In *Iskanian*, the California Supreme Court held unenforceable contracts that categorically waived the right to bring PAGA claims. *Id.*

The issue in *Sakkab* was whether the FAA preempted the *Iskanian* rule. We first determined that the *Iskanian* rule was a generally applicable contract defense

because the rule "bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Sakkab*, 803 F.3d at 432. We then determined that the *Iskanian* rule left "parties free to adopt the kinds of informal procedures normally available in arbitration." *Id*. at 439. We therefore held in *Sakkab* that the FAA did not preempt the *Iskanian* rule. *Id*.

B. *Viking River*

The Supreme Court's decision in *Viking River* partially overruled *Iskanian*. There were two *Iskanian*-based state-law rules before the Court in *Viking River*. The first was a rule prohibiting contractual waiver of the right to bring a "representative" PAGA claim in any forum. *Viking River*, 596 U.S. at 662. The Court upheld that rule, writing, "[T]hat aspect of *Iskanian* is not preempted by the FAA." *Id.*

The second *Iskanian* rule was a mandatory joinder rule that forbade dividing PAGA claims into individual and representative claims. Under PAGA, an employee with a single alleged Labor Code violation may "seek any civil penalties the state can, including penalties for violations involving employees other than the PAGA litigant herself." *Id*. at 646–47 (quoting *ZB, N.A. v. Superior Ct.*, 8 Cal. 5th 175, 185 (2019)). Thus, "[t]he only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding. The effect of *Iskanian*'s rule mandating this mechanism is to coerce parties into withholding PAGA claims from arbitration." *Id.* at 661. Because individual and representative claims could not be divided, *Iskanian* effectively forbade waiver of the right to bring either such claim in court. The Court struck down *Iskanian*'s second rule, holding that the FAA prevented PAGA

from insulating individual claims from arbitration in this manner. *Id.* at 662.

C. Discussion

RAC argues that *Viking River* implicitly overrules not only *Iskanian*'s second rule, but also its first, and that, as a consequence, *Blair* no longer binds us. In general, "a panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit" or "where 'intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority.'" *United States v. Easterday*, 564 F.3d 1004, 1010–11 (9th Cir. 2009) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)). The "clearly irreconcilable" requirement "is a high standard." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (quoting *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012)). "[I]f we can apply our precedent consistently with that of the higher authority, we must do so." *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019).

RAC argues that *Viking River* is clearly irreconcilable with *Blair*. We disagree. *Viking River* is entirely consistent with *Blair*.

*Viking River* dealt with PAGA claims, which are different from public injunction claims brought under the consumer protection statutes at issue in *Blair* and this case. In *Viking River*, the Supreme Court was concerned that PAGA's mandatory joinder rule forced parties to resolve their individual PAGA disputes in court, thereby violating "the fundamental principle that 'arbitration is a matter of consent.'" 596 U.S. at 659 (quoting *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)). But the mandatory joinder rule is specific to California's PAGA statute. It

does not exist under the consumer statutes at issue in *Blair* and in the case before us.

To state it another way, the only rule at issue in the case before us is the *McGill* rule. The *McGill* rule forbids a party to waive the right to seek a public injunction. The *McGill* rule is essentially the first *Iskanian* rule, which the Supreme Court explicitly upheld in *Viking River*. That rule forbids a party to waive the right to bring a representative claim in any forum. We held in *Blair* that the *McGill* rule is not preempted by the FAA. Far from overruling our holding in *Blair*, *Viking River* reaffirms it.

We therefore affirm the district court's denial of RAC's motion to compel arbitration. We need not reach the other grounds urged by plaintiffs for affirming the district court's decision.

III. Mootness and Standing

RAC argues that plaintiffs' claim for public injunctive relief is mooted by the Consent Decree that RAC entered into with the California Attorney General. The Consent Decree prohibits RAC from "[c]harging or listing a processing fee or any other fee that [RAC] cannot establish as reasonable and an actual cost incurred by [RAC], as described [under the Karnette Act] in Civil Code section 1812.624, subdivision (a)(7)." RAC argues that plaintiffs' requested injunction against the $45 processing fee would "merely duplicate[]" this relief.

The district court rejected this argument, finding that "the $45 processing fee at issue here was not the focus of the California Attorney General's investigation" and that plaintiffs are entitled to "seek public injunctive relief that is more concrete than merely reaffirming that RAC is required to abide by California

law on rental-purchase agreements." We agree. The Consent Decree did not determine whether the $45 processing fee in this case violates the Karnette Act's requirement that fees be "reasonable" and that the fees represent an "actual cost" incurred by RAC. Thus, the public injunction that plaintiffs seek would provide relief that is not addressed by the Consent Decree. We affirm the district court's finding that plaintiffs' challenge to the $45 processing fee is not moot.

RAC further argues plaintiffs lack standing to challenge the $1.99 expedited payment fee because, according to RAC, plaintiff Spruell has conceded that she did not actually pay the $1.99 fee. Plaintiffs may only invoke California's *McGill* rule if they have standing and seek public injunctive relief in federal court. *Stover v. Experien Holdings, Inc.*, 978 F.3d 1082, 1087 (9th Cir. 2020).

In her original complaint, Spruell alleged that she had "made several payments to [RAC] by telephone and was charged, and paid, a $1.99 fee each time." In her deposition, she described making telephone payments that incurred the $1.99 fee. She provided no other evidence of having made those payments. When RAC asked, "What evidence do you have that you made a payment by phone in this case?" Spruell responded, "I don't have no documents." A few minutes later, RAC asked again, "You don't have any receipts showing that you ever paid an expedited payment fee of $1.99, right?" Spruell responded, "No, like how would I have a receipt?" In her written responses to RAC's interrogatories, Spruell admitted that she does not have documents showing that she paid the $1.99 fee, and that she "cannot identify any witnesses who could show" that she paid the fee.

The district court did not address the issue of Spruell's standing to challenge the $1.99 expedited payment fee in its order denying RAC's motion to compel arbitration. We remand to allow the district court to do so.

## Conclusion

We **AFFIRM** in part and **REMAND** in part.

**APPENDIX B**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Case No. 3:21-cv-01429-JD

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SHANNON MCBURNIE, *et al.*,

*Plaintiffs*,

v.

ACCEPTANCE NOW, LLC,

*Defendant*.

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**ORDER RE ARBITRATION**

Plaintiffs Shannon McBurnie and April Spruell, suing on behalf of themselves and a putative class, allege that defendant RAC Acceptance East, LLC ("RAC")[1] charged excessive fees in connection with its rent-to-own business, in violation of California's Karnette Rental-Purchase Act, Cal. Civ. Code § 1812.620 *et seq.* ("Karnette Act"), Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* ("CLRA"), and unfair competition law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"). Dkt. No. 1-1.

RAC asks for an order compelling McBurnie and Spruell to individual arbitration pursuant to the parties'

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[1] RAC says that it was erroneously sued as Acceptance Now, LLC: "'Acceptance Now' is a name under which RAC Acceptance East, LLC does business," but "Acceptance Now, LLC does not exist." Dkt. No. 1-3 at ECF 3 & n.1.

arbitration agreements and the Federal Arbitration Act ("FAA"). Dkt. No. 67. Arbitration is denied.

## BACKGROUND

The salient facts are undisputed. Plaintiffs bought furniture from a retail store, which they "financed" by agreeing to pay RAC over time. Dkt. No. 1-1 ¶¶ 17-25. They could take the furniture home that day, but would own it only after making an agreed-upon number of payments to RAC. *Id.* ¶ 11. As part of this arrangement, named plaintiffs paid RAC a "processing fee" of $45.00 and agreed to pay RAC an "expedited payment fee" of $1.99 for each payment made by telephone. *Id.* ¶¶ 20, 23-25.

Plaintiffs' contracts with RAC contained an arbitration agreement, which is the same for each plaintiff and states that "in the event of any dispute or claim between us, either you or RAC may elect to have that dispute or claim resolved by binding arbitration." *Id.* at ECF 24, 30. The agreement provides that plaintiffs and RAC will conduct arbitration only on an individual basis, and they cannot "seek, nor may the Arbitrator award, relief that would affect [other] RAC account holders." *Id.* at ECF 25, 31.

Plaintiffs originally sued in the Alameda County Superior Court in December 2020. Dkt. No. 1-1. They alleged that RAC's processing and expedited payment fees were unreasonable and violated the Karnette Act and other California laws. *Id.* ¶¶ 1-4. RAC answered the complaint in state court, and identified the arbitration agreement as an affirmative defense. Dkt. No. 1-3 ¶ 1. Even so, RAC did not seek to compel arbitration. In February 2021, RAC filed a notice of removal of the case to this Court under the Class

Action Fairness Act, 28 U.S.C. § 1332(d). Dkt. No. 1. Plaintiffs did not contest removal.

After removal, the parties participated in a case management conference in June 2021. Dkt. No. 18. They entered a stipulated protective order, which the Court approved, Dkt. No. 23. On several occasions the parties stipulated to extend case deadlines, Dkt. Nos. 24, 34, 41, 47, each time representing that they were actively working to move the litigation forward. *See, e.g.*, Dkt. No. 34 at 2 ("The parties agree that in order to complete the necessary discovery for this case, including the required meet-and-confer process for outstanding discovery, . . . scheduling and taking necessary depositions, and conducting further discovery and document production, a 90-day continuance of all scheduling deadlines is appropriate."). None of these requests raised the prospect of arbitration.

The parties stayed busy with litigation. They actively engaged in discovery and participated in settlement discussions. *See, e.g.*, Dkt. No. 34 at 1-2; Dkt. No. 71 ¶¶ 4-5; Dkt. No. 78-1 ¶ 5. On the discovery front, plaintiffs represent, without objection by RAC, that RAC deposed both named plaintiffs, made six sets of requests for the production of documents and three sets of requests for admissions, and propounded five sets of interrogatories. Dkt. No. 78 at 3. The parties brought several discovery disputes to the Court, Dkt. Nos. 51, 54, 56, 62, 63, 64, and were twice directed to meet and confer for four hours to resolve their issues, Dkt. Nos. 59, 66. On the settlement side, the parties participated in a number of pre-settlement conferences with a magistrate judge in this District. Dkt. Nos. 25, 30, 32, 37, 40, 46. They have also engaged in private mediation. Dkt. No. 34 at 1-2.

In July 2022, over eighteen months after plaintiffs filed suit in state court, RAC filed a motion to stay discovery in anticipation of seeking to compel arbitration, Dkt. No. 58, which the Court denied without prejudice to renewal if a motion to compel was filed, Dkt. No. 66. RAC did not file a motion to compel arbitration until August 2022. Dkt. No. 67. Its renewed motion to stay discovery, Dkt. No. 70, was denied after the arbitration briefing was completed, Dkt. No. 85.

## DISCUSSION

### A. Legal Standards

The arbitration demand is governed by the FAA. The Court has discussed the governing standards in prior orders, which are incorporated here. *See Louis v. Healthsource Glob. Staffing, Inc.*, No. 22-cv-02436-JD, 2022 WL 4960666 (N.D. Cal. Oct. 3, 2022); *Williams v. Eaze Sols., Inc.*, 417 F. Supp. 3d 1233 (N.D. Cal. 2019). In pertinent part, the FAA's "overarching purpose . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Under Section 4 of the FAA, the Court's role "is limited to determining whether a valid arbitration agreement exists and, if so, whether the agreement encompasses the dispute at issue." *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). If the party seeking to compel arbitration establishes both factors, the district court "must order the parties to proceed to arbitration only in accordance with the terms of their agreement." *Id.* "Any doubts about the scope of arbitrable issues should be decided in favor of arbitration." *Williams*, 417 F. Supp. 3d at 1239; *see also Louis*, 2022 WL 4960666, at *2.

Like other contractual rights, the right to arbitration can be waived. *See Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016). Waiver of an arbitration agreement governed by the FAA is evaluated under federal rather than state law. *See Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1269-70 (9th Cir. 2002); *see also Abary v. BMW of N. Am., LLC*, No. 19-cv-00087-JD, 2020 WL 5798377, at *1 (N.D. Cal. Sept. 29, 2020). A "party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration [and] (2) acts inconsistent with that existing right." *Martin*, 829 F.3d at 1124 (cleaned up). While the Ninth Circuit's waiver rule in the arbitration context previously included a prejudice requirement, that has been abrogated by *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). "[T]he usual federal rule of waiver does not include a prejudice requirement." *Morgan*, 142 S. Ct. at 1714. Because the FAA "does not authorize federal courts to invent special, arbitration-preferring procedural rules," *id.* at 1713, the Supreme Court held that "prejudice is not a condition of finding that a party, by litigating too long, waived its right to . . . compel arbitration under the FAA," *id.* at 1714.

**B. Waiver**

Plaintiffs' main objection is that RAC has waived a right to demand arbitration by actively litigating this case in court for over eighteen months before filing a motion to compel. Dkt. No. 78 at 5-10. Although RAC's arbitration agreement has language indicating delegation of some arbitrability disputes to the arbitrator, Dkt. No. 1-1 at ECF 25, it did not expressly delegate the question of waiver, and the Court will decide the issue based on federal law. *See Martin*, 829 F.3d at 1124 ("We have made clear that courts generally

decide whether a party has waived [its] right to arbitration by litigation conduct."); *see also Anderson v. Starbucks Corp.*, No. 20-cv-01178-JD, 2022 WL 797014, at *3 (N.D. Cal. Mar. 16, 2022).

RAC is in no position to say that it was unaware of its own arbitration agreements with the named plaintiffs, which pre-dated the filing of the original complaint in state court. Consequently, the only question for waiver is whether RAC acted inconsistently with a right to arbitrate.

"There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate." *Martin*, 829 F.3d at 1125. The question of waiver turns on the "totality" of the actions by the party seeking to compel arbitration, including its "extended silence and delay in moving for arbitration," and its conduct in actively litigating a case in court. *Id.* at 1125-26.

The record amply demonstrates that RAC has waived arbitration by actively litigating this case in court for more than eighteen months. During this time, RAC engaged in substantive discovery. Plaintiffs represent that "the scope of discovery in which RAC has engaged far exceeds what its own arbitration agreement entitled it to obtain," Dkt. No. 78 at 8, and RAC does not argue otherwise. RAC also made considerable use of federal judicial resources in pre-settlement conferences before a magistrate judge. This is not a situation in which a defendant did the bare minimum in court while pressing a prompt demand for arbitration.

RAC's main defense is that it believed it could not compel arbitration until one of two things happened: (i) the publication of the Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906

(2022); and (ii) the execution of a stipulated judgment between RAC's parent company and the California Attorney General in August 2022, which prohibits RAC from charging a processing fee that violates the Karnette Act. Dkt. No. 67 at 1-2; Dkt. No. 84 at 6-8. RAC believes the decision in *Viking River* was an essential predicate because it surmounted an opinion by the California Supreme Court in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), which in RAC's view precluded enforcement of the arbitration agreement here. Alternatively, RAC considers the settlement with the Attorney General to have cleared the way for its motion to compel because it mooted the named plaintiffs' claim for public injunctive relief, preventing the application of *McGill* and consequently permitting an arbitration demand. *See generally* Dkt. No. 67 at 6-15.

Neither point is well taken. To start, the Supreme Court docket indicates that the petition for certiorari in *Viking River* was filed on May 10, 2021, and certiorari was granted on December 15, 2021.[2] Even so, RAC never brought *Viking River* to the Court's attention as a possible basis for compelling arbitration until it filed the motion to stay discovery in July 2022. Dkt. No. 58 at 2-3. Nor did it request a stay of the case while *Viking River* was pending in the Supreme Court, as similarly situated parties did in other cases. *See, e.g.*, *Harper v. Charter Commc'ns, LLC*, No. 2:19-cv-00902-WBS, 2022 WL 229861, at *1 (E.D. Cal. Jan. 26, 2022) (granting defendant's motion for a stay pending the resolution of *Viking River*).

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[2] The Supreme Court docket for *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, is available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1573.html.

The same is true for the Attorney General settlement. Documents submitted by RAC say that the settlement was the end result of a "multi-year investigation" into its business practices. Dkt. No. 69-1 at ECF 2-3.[3] But RAC again never mentioned these proceedings until the arbitration demand in August 2022, or asked for stay or other accommodation for them here.

Instead, RAC blazed ahead with discovery and settlement proceedings as though arbitration would never be a possibility in this case. This is not consonant with preserving a right to arbitration. It waited for eighteen months before moving to compel, despite knowing of the arbitration clauses in its own contracts with the named plaintiffs, and never mentioned *Viking River* or the settlement. It may be, as RAC suggests, that it sprinkled a few references to arbitration in some docket filings, but such placeholder "statement[s] by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver." *Martin*, 829 F.3d at 1125 (citing *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) ("A reservation of rights is not an assertion of rights.")). While prejudice is no longer a required element of waiver, it bears noting that "[s]pending a lengthy amount of time litigating in the more complex federal court system with its rigorous procedural and substantive rules will almost inevitably cause the parties to expend more time, money, and effort than had they proceeded directly to arbitration." *Id.* at 1127. This is true "even if the parties exchanged the same information in court as they would have in

[3] RAC's request for judicial notice, Dkt. No. 69, which plaintiffs did not oppose, is granted. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (courts "may take judicial notice of court filings and other matters of public record").

arbitration" because "the process of doing so in federal court likely cost far more" than in arbitration. *Id.* at 1128.

There are additional reasons why RAC's argument against waiver is not tenable. The suggestion that *Viking River* effected a sea change in the enforceability of the arbitration agreement is questionable at best. RAC contends that its hands were tied up to *Viking River* because the arbitration agreement with the named plaintiffs precluded a request for "public injunctive relief" in any forum, which *McGill* held to be unenforceable as contrary to public policy. *McGill*, 2 Cal. 5th at 961. The Ninth Circuit concluded that the *McGill* rule was not preempted by the FAA. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 830-31 (9th Cir. 2019). The arbitration provisions here are materially the same as those in *Blair*, which involved RAC's parent company. *See* Dkt. No. 1-1 at ECF 24-34; *Blair*, 928 F.3d at 831; *see also* Dkt. No. 78 at 11.

RAC correctly says that *Blair* would sink a bid for arbitration here, but its notion that *Viking River* somehow saved the day is misplaced. *Viking River* did not reverse or otherwise abrogate *Blair* or *McGill*. *Viking River* addressed the California Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.* Under PAGA, an employee that suffers a Labor Code violation can bring a claim in her individual capacity against an employer, and is "delegated authority to assert the State's claims [for code violations suffered by other employees] on a representative basis." *Viking River*, 142 S. Ct. at 1919. *Viking River* abrogated a different California rule that "invalidate[d] agreements to arbitrate only 'individual PAGA claims for Labor Code violations that an employee suffered,'" *id.* at 1923 (quoting *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 383 (2014)), because "[t]he only way for

parties to agree to arbitrate *one* of an employee's PAGA claims [was] to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding," *id.* at 1924. This rule "unduly circumscribe[d] the freedom of parties to determine the issues subject to arbitration." *Id.* at 1923 (internal quotation and citation omitted).

*McGill* did not involve PAGA or present the same ostensible dilemma. *McGill* says that a plaintiff is entitled to seek public injunctive relief in some forum, which means that the total waiver of a public injunction in the RAC arbitration agreement would be unenforceable. *Viking River* does not abrogate *McGill*, and is not "clearly irreconcilable" with *Blair*, which controls here. *See Masood v. Barr*, No. 19-cv-07623-JD, 2020 WL 95633, at *3 (N.D. Cal. Jan. 8, 2020).

RAC's suggestion that plaintiffs' request for a public injunction is moot is also misdirected.[4] The defendant typically "bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). RAC says that the injunction its parent agreed to with the Attorney General, which binds RAC as a subsidiary, prohibits RAC from "[c]harging or listing a processing fee or any other fee that [RAC] cannot establish as reasonable and an actual cost incurred by [RAC], as described in Civil Code section 1812.624, subdivision (a)(7)." Dkt. No. 69-1 ¶ 11(b). That may be, but that hardly bars all possible public injunctive relief available to plaintiffs. Based on the restitution made available to consumers

[4] RAC initially suggested that plaintiffs lacked standing to pursue injunctive relief because "RAC no longer charges the Processing Fee in California" and "has not done any business in California in over a year." Dkt. No. 67 at 11. Its reply brief concedes that this would not have mooted plaintiffs' claims for public injunctive relief. *See* Dkt. No. 84 at 5-6.

under the settlement, it appears that the $45 processing fee at issue here was not the focus of the California Attorney General's investigation. Dkt. No. 69-1 ¶ 24. Plaintiffs, who claim injury from the processing fee, may seek public injunctive relief that is more concrete than merely reaffirming that RAC is required to abide by California law on rental-purchase agreements. Moreover, even if RAC has agreed not to commit further Karnette Act violations, plaintiffs have also sought public injunctive relief under the CLRA, alleging that RAC "insert[s] unconscionable provisions in their [rental-purchase agreements] with Plaintiffs, Class members, and other California consumers." Dkt. No. 1-1 ¶ 49. RAC does not say why this CLRA claim is moot. Because RAC has not shown that plaintiffs cannot obtain "any effectual [public injunctive] relief" in this case, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (internal quotation and citation omitted), plaintiffs' claims remain live, and the *McGill* rule applies to their arbitration agreements. Consequently, under *Blair*, the arbitration agreement's severance clause requires that each claim, in its entirety, "be severed for judicial determination." *Blair*, 928 F.3d at 832.

**CONCLUSION**

The motion to compel arbitration is denied.

**IT IS SO ORDERED.**

Dated: November 30, 2022

/s/ James Donato
JAMES DONATO
United States District Judge

**APPENDIX C**

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF ALAMEDA

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Case No. 22-CV-015422

---

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Plaintiff*,

v.

RENT-A-CENTER, INC., a Delaware corporation,

*Defendant*.

---

**STIPULATION FOR ENTRY OF FINAL JUDGMENT AND PERMANENT INJUNCTION**

---

ROB BONTA
Attorney General of California
NICKLAS A. AKERS
Senior Assistant Attorney General
MICHAEL E. ELISOFON (SBN 240707)
Supervising Deputy Attorney General
RACHEL A. FOODMAN (SBN 308364)
TIMOTHY D. LUNDGREN (SBN 254596)
DANIEL A. OSBORN (SBN 311037)
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-1499
Telephone: (510) 879-1300
Fax: (415) 703-5480
Email: rachel.foodman@doj.ca.gov

*Attorneys for the People of the State of California*

Plaintiff, the People of the State of California ("People or Plaintiff"), through its attorney, Rob Bonta, Attorney General of the State of California, by Supervising Deputy Attorney General Michael E. Elisofon and Deputy Attorneys General Rachel A. Foodman, Timothy D. Lundgren and Daniel A. Osborn, acting on behalf of the People of the State of California, and Defendant Rent-A-Center, Inc. ("Defendant"), appearing through its attorney Anthony Jannotta, hereby stipulate as follows:

1. The State of California has engaged in a multi-year investigation of the following business practices: the Defendant's charging or listing a Cash Price in a Covered Rental-Purchase Agreement that is higher than the lowest advertised price offered by the associated third-party retailer at that location or on the retailer's website, calculation and charging of a $45 processing fee based on applicable costs; marketing and offering of the Club Membership Program; and the provisions of the November 16, 2006 Stipulation for Entry of Final Judgment and Final Judgment entered into between Plaintiff and Defendant.

2. In exchange for the releases provided herein, Defendant is willing to enter into this Stipulation and Final Judgment in order to resolve, and thereby avoid significant expense, inconvenience, and uncertainty, arising from the People's concerns and claims as to the matters addressed in this Judgment, which are outlined above and in the attached Final Judgment and Permanent Injunction, and which have been investigated by the Plaintiff.

3. The Final Judgment and Permanent Injunction ("Judgment"), a true and correct copy of which is attached hereto as Exhibit 1, may be entered by any judge of the Alameda County Superior Court.

4. The Plaintiff may submit the Judgment to any judge of the superior court for approval and signature, based on this stipulation, during the court's ex parte calendar or on any other ex parte basis, without notice to or any appearance by the Defendant which notice and right to appear the Defendant hereby waives.

5. Plaintiff and Defendant (collectively, "the Parties") hereby waive their right to move for a new trial or otherwise seek to set aside the Judgment through any collateral attack, and further waive their right to appeal from the Judgment, except that Plaintiff and Defendant each agree that this Court shall retain jurisdiction for the purposes specified in paragraph 28 of the Judgment.

6. The Parties have stipulated and consented to the entry of the Judgment without the taking of proof and without trial or adjudication of any fact or law herein.

7. Defendant will accept service of any Notice of Entry of Judgment entered in this action by delivery of such notice to its counsel of record, and agrees that service of the Notice of Entry of Judgment will be deemed personal service upon it for all purposes.

8. The individuals signing below represent that they have been authorized by the parties they represent to sign this Stipulation.

9. This stipulation may be executed in counterparts, and the Parties agree that a facsimile signature shall be deemed to be, and shall have the full force and effect as, an original signature.

ROB BONTA
Attorney General
State of California

DATED: July 28, 2022

By: /s/ Rachel A. Foodman
Rachel A. Foodman
Deputy Attorney General
Attorney for Plaintiff

COUNSEL FOR DEFENDANT RENT-A-CENTER, INC.

DATED: August 1, 2022

By: /s/ Anthony Jannotta
Anthony Jannotta
Nicole Lueddeke
Paul Hastings LLP
*Attorneys for Rent-A-Center, Inc.*

VICE PRESIDENT, ASSISTANT GENERAL COUNSEL FOR DEFENDANT RENT-A-CENTER, INC.

DATED: 8/1/2022

/s/ Mathew W. Grynwald
Mathew W. Grynwald
Assistant General Counsel
*Rent-A-Center, Inc.*

**EXHIBIT 1**

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF ALAMEDA

---

Case No. 22-CV-015422

---

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Plaintiff*,

v.

RENT-A-CENTER, INC., a Delaware corporation,

*Defendant*.

---

**[PROPOSED] FINAL JUDGMENT AND PERMANENT INJUNCTION**

---

ROB BONTA
Attorney General of California
NICKLAS A. AKERS
Senior Assistant Attorney General
MICHAEL E. ELISOFON (SBN 240707)
Supervising Deputy Attorney General
RACHEL A. FOODMAN (SBN 308364)
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Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-1499
Telephone: (510) 879-1300
Fax: (415) 703-5480
Email: rachel.foodman@doj.ca.gov

*Attorneys for the People of the State of California*

Plaintiff, the People of the State of California ("People" or "Plaintiff"), through its attorney, Rob Bonta, Attorney General of the State of California, by Supervising Deputy Attorney General Michael E. Elisofon and Deputy Attorneys General Rachel A. Foodman, Timothy D. Lundgren and Daniel A. Osborn, acting on behalf of the People of the State of California, and Defendant Rent-A-Center, Inc. ("Defendant"), appearing through its attorney Anthony Jannotta, having stipulated and consented to the entry of this Final Judgment and Permanent Injunction ("Judgment") without the taking of proof and without trial or adjudication of any fact or law, without this Judgment constituting evidence of or an admission by Defendant regarding any issue of law or fact alleged in the Complaint on file, and without Defendant admitting any liability, and with all parties having waived their right to appeal, and the Court having considered the matter and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over the allegations and subject matter of the Complaint filed in this action, and the parties to this action; venue is proper in this County; and this Court has jurisdiction to enter this Judgment.

2. Defendant does not admit to any violations of law and does not admit any wrongdoing that was or could have been alleged by Plaintiff before the date of the Judgment under any law. No part of this Judgment, including its statements and commitments, shall constitute evidence of any liability, fault, or wrongdoing by Defendant.

3. This Judgment shall not be construed or used as a waiver or limitation of any defense otherwise available to Defendant, and its past and present employees, representatives, subsidiaries, operating companies, predecessors, assigns and successors, in any other action or in any lawsuit of any kind, or of their rights to defend themselves from, or make any arguments in, any other private individual, regulatory, governmental, or putative or certified class claims, proposed or actual representative claims or suits relating to the subject matter or terms of this Judgment. This Judgment is made without trial or adjudication of any issue of fact or law or finding of liability of any kind. Nothing in this Judgment should be construed to create, waive, or limit any individual consumer's substantive claim or cause of action.

**DEFINITIONS**

For purposes of this Judgment:

4. "Rental-Purchase Agreement" has the same meaning as the term as defined in Civil Code section 1812.622, subdivision (d).

5. "Covered Conduct" means the following conduct by Defendant, including by its past and present employees, representatives, subsidiaries, operating companies, predecessors, assigns and successors, within the Defined Time Period: marketing and offering the Club Membership Program, including its terms and the timing of disclosure; the calculation and charging of a $45 processing fee based on applicable costs; charging or listing a Cash Price in a Covered Rental-Purchase Agreement that is higher than the lowest advertised price offered by the associated third-party retailer at that location or on the retailer's website; and any conduct covered by the November 16, 2006 Stipulation

for Entry of Final Judgment and Final Judgment entered into between the Parties.

6. "Covered Rental-Purchase Agreement" means any Rental-Purchase Agreement prepared by the Defendant, including its past and present employees, representatives, subsidiaries, operating companies, predecessors, assigns and successors, and executed with a consumer at a third-party retailer's physical location or in connection with a third-party retailer's website. For clarity, the term Covered Rental-Purchase Agreement includes, but is not limited to, Rental-Purchase Agreements executed through Defendant's Preferred Lease business segment, formerly known as RAC Acceptance or Acceptance Now.

7. "Cash Price" has the same meaning as the term as defined in Civil Code section 1812.622, subdivision (e).

8. "Club Membership Program" means any membership program, benefit program, or other arrangement offered to consumers for a fee (including but not limited to Defendant's Benefits Plus program) that purportedly entitles the purchaser to discounts, benefits, or services on a preferential basis not made generally available to the public.

9. "Defined Time Period" is January 18, 2014 through the date on which a copy of the Judgment, duly executed by Defendant and by Plaintiff, is approved by, and becomes a Judgment of the Court.

**INJUNCTION**

10. Nothing in this Judgment alters the requirements of federal or state law to the extent they offer greater protection to consumers.

11. Defendant and its present employees, subsidiaries, operating companies, predecessors, assigns and

successors are hereby permanently enjoined and restrained from directly or indirectly engaging in any of the following acts or practices related to Covered Rental-Purchase Agreements in California:

a. Charging or listing a Cash Price in a Covered Rental-Purchase Agreement that is higher than the lowest advertised price offered to the consumer by the associated third-party retailer at the time the consumer executes the Covered Rental-Purchase Agreement, as described in Civil Code section 1812.622[1];

b. Charging or listing a processing fee or any other fee that Defendant cannot establish as reasonable and an actual cost incurred by Defendant, as described in Civil Code section 1812.624, subdivision (a)(7);

c. Charging or listing a down payment as described in Civil Code section 1812.624, subdivision (a)(8);

d. Failing to provide upon request an exemplar Rental-Purchase Agreement when a consumer identifies to Defendant or its employees specific proposed merchandise item(s) for lease as required by Civil Code section 1812.629, subdivision (a);

e. Failing to provide the notices described in Civil Code section 1812.632, subdivisions (a)(2) and (c);

f. Failing to process rent reductions when required by Civil Code section 1812.632, subdivision (d);

---

[1] Any reference to the Karnette Rental-Purchase Act herein pertains only to the version of the code section as written on the date of this agreement.

g. Offering any service contract that is prohibited by Civil Code section 1812.635, subdivision (a);

h. Preventing or limiting in any way the consumer's right to terminate the Rental-Purchase Agreement without penalty at any time and for any reason. Defendant nevertheless retains all applicable rights regarding consumer liability under Civil Code section 1812.627 if any such consumer liability exists;

i. Failing to disclose clearly and conspicuously in all marketing materials relating to Covered Rental-Purchase Agreements (including in-store displays) that the service being advertised is a rental-purchase transaction;

j. In any written or oral communications, describing Covered Rental-Purchase Agreements as "financing," or using the term "interest" to refer to rental fees, or using other language suggesting that the transaction is not a Rental-Purchase Agreement;

k. In any written or oral communications, representing to consumers that there is a limitation on, or penalty associated with, the return of merchandise, or otherwise making any oral or written representation that contradicts the disclosures required in paragraph 12, below;

l. In any written or oral communications, representing to consumers that any portion of a consumer's payment(s) will be treated as a "down payment," or using the term "money down";

m. In any written or oral communications, representing that the right to acquire ownership of the merchandise during the first three months

for the Cash Price as described in Civil Code section 1812.632 is an "amendment" or a "limited time promotion"; and

n. In any written or oral communications, making representations which violate the obligations under Civil Code section 1812.632, subdivision (d).

12. Defendant shall provide each consumer with a document entitled "Know Your Rights" at the time that the consumer enters into a Covered Rental-Purchase Agreement. The "Know Your Rights" document shall use plain language, in the same language as principally used in any oral sales presentation or negotiations leading to the execution of the agreement (e.g., English or Spanish), and shall clearly and conspicuously describe the following rights afforded to the consumer under the Karnette Rental-Purchase Act:

a. The right to terminate a rental-purchase agreement at any time without limitation or penalty but that Defendant nevertheless retains all applicable rights regarding consumer liability under Civil Code Section 1812.627 if any such consumer liability exists;

b. The right to cancel the Covered Rental-Purchase Agreement, without penalty or obligation, if the consumer has not taken possession of the property, as provided for in Civil Code section 1812.628, subdivision (b);

c. The right to reinstate the Covered Rental-Purchase Agreement after default if the provisions of Civil Code section 1812.631, subdivision (c) are satisfied;

d. The right to acquire ownership of the subject property during the course of the contract period, as provided for in Civil Code section 1812.632, subdivisions (a) and (b);

e. The right to a reduction in the periodic lease payment amount if the consumer experiences an interruption or reduction in income that satisfies the requirements of Civil Code section 1812.632, subdivision (d);

f. The amount and nature of any processing fee charged on Covered Rental-Purchase Agreements. In particular, such disclosures shall explain in plain language that the processing fee is not credited toward the price of the merchandise, including for purposes of the early purchase option. Defendant shall not charge any processing fee unless the consumer acknowledges in writing that he or she has read and understands these disclosures.

13. In selling, offering to sell, or providing any Club Membership Program, including but not limited to the program currently known as "Benefits Plus", Defendant shall not:

a. Fail to comply with the requirements of California's Subscriptions Law, Business and Professions Code section 17600 et seq. for any agreement, program, or offering that constitutes a "continuous service" or "automatic renewal" as defined therein;

b. Solicit a consumer to purchase a Club Membership Program before the consumer has signed a Covered Rental-Purchase Agreement or include in a Covered Rental-Purchase Agreement any

terms or obligation to enroll in a Club Membership Program;

c. Fail to disclose clearly and conspicuously in writing in plain language to each consumer all of the following before or at the time of the offer of a Club Membership Program and before the consumer signs any agreement to purchase a Club Membership Program: (a) all existing benefits, services, features, and discounts included as part of the Club Membership Program, (b) the existing cost to the consumer of the Club Membership Program, including all weekly or monthly fees, (c) that the purchase of the Club Membership Program is optional and may be canceled at any time without charge, penalty, or obligation, and (d) that purchasing or not purchasing the Club Membership Program does not affect the consumer's rights, obligations, or cost for the rental or purchase of goods under the Covered Rental-Purchase Agreement;

d. Fail to apply payments received from a consumer first to the amount owed under outstanding Covered Rental-Purchase Agreements and then to the Club Membership Program; or

e. Fail to provide a written receipt for each payment made on a Club Membership Program. The written receipt required under this provision may be included with the written receipt provided pursuant to Civil Code section 1812.629, subdivision (d) if the receipt clearly identifies the amount paid for the Club Membership Program separately from the amount paid on the Covered Rental-Purchase Agreement.

14. Defendant shall train its California employees, and any employees that have responsibility over Covered Rental-Purchase Agreements in California, regarding the specific injunctive provisions of this Judgment. This training shall include, but is not limited to, providing such employees with the following:

a. A description of the Karnette Rental-Purchase Act's requirements; and

b. A description of the acts and practices that are prohibited and/or required by the injunctive terms of this Judgment.

15. Defendant shall notify all third-party retailers associated with Covered Rental-Purchase Agreements in California regarding Defendant's legal obligations arising under the Karnette Rental-Purchase Act and provide them with a copy of this Judgment.

16. Defendant shall notify all third-party retailers associated with Covered Rental-Purchase Agreements in California that they may not market Defendant's services as "financing" or display Defendant's services on a "financing" webpage unless that webpage clearly and conspicuously describes Defendant's services as lease-to-own services.

**COMPLIANCE**

17. Defendant shall prepare and provide reports to the Attorney General's office documenting its compliance with the injunctive provisions of this Judgment. The first compliance report shall be provided one calendar year after entry of this Judgment. Two additional reports shall be provided thereafter at one-year intervals following production of the initial report, unless the parties agree in writing to a different schedule.

18. The Attorney General's office may make reasonable requests to Defendant for additional information showing its compliance with any provision(s) of this Judgment. Defendant shall furnish such information within 30 days after the request is made, unless another date is agreed upon in writing.

19. Defendant shall provide a copy of this Judgment to each of its representatives, employees and agents with management-level responsibility for overseeing or communicating with consumers related to Covered Rental-Purchase Agreements in California as well as to all persons who subsequently fall into this category after entry of this Judgment. Defendant shall obtain from each such person a signed acknowledgment that they have read, understand, and agree to abide by the terms of the Judgment. A copy of each acknowledgment signed pursuant to this paragraph shall be retained by Defendant and made available for inspection by the Attorney General's office upon request.

20. Nothing in this Judgment limits the right of the Attorney General's office to request or obtain information from, or otherwise contact, Defendant as provided by law.

**RELEASE**

21. Effective upon payment of the full amount due under Paragraph 22 of this Judgment, Plaintiff releases and discharges Defendant and its past and present employees, representatives, officers, directors, subsidiaries, operating companies, predecessors, assigns and successors, from any and all claims, causes of action, costs and attorney's fees, Plaintiff has asserted or could have asserted based on, arising from, or relating to the Covered Conduct prior to the date of

entry of this Judgment, including all matters set forth in the Complaint filed in the above-captioned action.

**MONETARY PROVISIONS**

22. Defendants shall pay, in the aggregate, Fifteen Million, Five Hundred Thousand Dollars ($15,500,000) as further described in Paragraphs 23-24 of this Judgment. Payment shall be made within thirty (30) calendar days of the date of entry of this Judgment, pursuant to instructions provided by the Attorney General's Office.

23. Of the aggregate Fifteen Million, Five Hundred Thousand Dollars ($15,500,000), Defendant shall pay a total of Two Million Dollars ($2,000,000) in and for civil penalties under Business and Professions Code sections 17206 and 17536.

24. Of the aggregate Fifteen Million, Five Hundred Thousand Dollars ($15,500,000), Defendant shall pay a total of Thirteen Million, Five Hundred Thousand Dollars ($13,500,000) in and for restitution under Business and Professions Code sections 17203 and 17535. Such restitution shall be offered to each customer who entered into and made payments on one or more Covered Rental-Purchase Agreements during the Defined Time Period and such agreement charged or listed a Cash Price in excess of the Cash Price advertised by the third party retailer. Each consumer eligible to receive restitution under this paragraph shall receive a pro rata share of the total restitution amount based on the total number of eligible consumers and the total amount paid by the consumer in connection with any Covered Rental-Purchase Agreement(s). Each consumer shall be informed that by cashing the restitution award, the consumer acknowledges that Defendant may be entitled to offset that restitution award against any future claim by that consumer

against Defendant relating to the same Covered Rental-Purchase Agreement(s).

25. At its sole discretion, the Attorney General's office may use unclaimed restitution funds offered under Paragraph 24 to provide additional restitution to eligible consumers and to pay for the administration costs associated with such additional offers or awards, or for the enforcement of consumer protection laws.

26. Within 60 days of the date of entry of this Judgment, Defendant shall provide the Attorney General's office with a list that identifies each consumer entitled to restitution under the terms of this Judgment, the consumer's last known address, and the total amount paid by that consumer in connection with any Covered Rental Purchase Agreement(s) during the Definted Time Period. Defendant shall also provide the Attorney General's office access to information sufficient to confirm the accuracy of the data provided.

27. Restitution shall be administered by a third party administrator selected by the Attorney General's office who shall administer restitution according to this Judgment. Payment for services rendered by the restitution administrator shall be paid from the Thirteen Million, Five Hundred Thousand Dollar ($13,500,000) restitution payment.

**OTHER TERMS**

28. Jurisdiction is retained by the Court for the purpose of enabling any party to the Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or the carrying out of this Judgment, for the modification of any of the injunctive provisions

hereof, for enforcement of compliance herewith, and for the punishment of violations hereof, if any.

29. Any notices required to be sent to Plaintiff or to Defendant under this Judgment shall be sent by email and certified mail to the following:

a. For the People of the State of California:

Deputy Attorney General Rachel Foodman
Consumer Protection Section
Office of the Attorney General
1515 Clay St., Suite 2000
Oakland, CA 94612
Rachel.Foodman@doj.ca.gov
Timothy.Lundgren@doj.ca.gov
Daniel.Osborn@doj.ca.gov
Michael.Elisofon@doj.ca.gov

b. For Defendant:

Mathew W. Grynwald
VP, Assistant General Counsel
Rent-A-Center, Inc.
5501 Headquarters Drive
Plano, TX 75024

*With a copy to:*

Anthony Jannotta
Paul Hastings LLP
200 Park Avenue
New York, NY 10166

30. The clerk is ordered to enter this Judgment forthwith.

DATED: _____

_____
JUDGE OF THE SUPERIOR COURT

**DECLARATION OF SERVICE BY E-MAIL**

Case Name: People v. Rent-A-Center, Inc.

Case No: 22-CV-015422

I, Rachel Foodman, declare:

I am employed in the Office of the Attorney General and am a member of the California State Bar. I am 18 years of age or older and not a party to this matter.

On August 2, 2022, I served the attached **Stipulation for Entry of Final Judgment and Permanent Injunction** by transmitting a true copy via electronic mail, addressed as follows:

Anthony Jannotta
Paul Hastings - New York
200 Park Avenue
New York, NY 10166
**E-mail:** anthonyjannotta@paulhastings.com

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 2, 2022, at Oakland, California.

Rachel Foodman
Declarant

/s/ Rachel Foodman
Signature

## APPENDIX D

## RENT-A-CENTER/ACCEPTANCE NOW CONSUMER ARBITRATION AGREEMENT

Date: Mar 09, 2020

Consumer Lease, Rental-Purchase Agreement, or Retail Installment Sale Contract

Agreement Number jhp01725

**PLEASE READ THIS ARBITRATION AGREEMENT. IT IS BINDING AND ENFORCEABLE UNLESS YOU SEND IN A REJECTION NOTICE, AS SET OUT IN PARAGRAPH (A) BELOW.**

This Arbitration Agreement ("Agreement") is between RAC and the Consumer. As used in this Agreement, the term "Consumer" or "Consumers" mean the customers who sign this Agreement. The term "Consumer Contract" means the consumer lease, rental-purchase agreement, or retail installment contract between the Consumers and RAC. The terms "you" and "your" mean the Consumer, customer, lessee, renter, user, buyer, and other third-party beneficiaries of the items or services RAC is providing, will provide, or has provided to you. And the term "RAC" means Rent-A-Center, its parents, subsidiaries, affiliate entities (including but not limited to Acceptance Now), predecessors or successors in interest, officers, directors, employees, assigns, or agents acting in such capacity. The Federal Arbitration Act (9 U.S.C. § 1-16) ("FAA") governs this Agreement, which evidences a transaction involving interstate commerce.

Except as otherwise provided in this Agreement, you and RAC hereby agree that, in the event of any dispute or claim between us, either you or RAC may elect to have that dispute or claim resolved by binding

arbitration on an individual basis in accordance with the terms and procedures set forth in this Agreement.

**(A) Your Right to Reject: If you want to reject this Arbitration Agreement, you must send a written Rejection Notice, by certified mail, return receipt requested, to: Rent-A-Center Legal Department, 5501 Headquarters Drive, Plano, TX 75024-5837. The Rejection Notice must: (i) state that you are rejecting this Agreement; (ii) provide your name, address, and phone number; and (iii) provide the agreement number from the Consumer Contract you entered into with RAC, which is incorporated in this Agreement as though fully set forth. A Rejection Notice is effective only if it is signed by all Consumers who signed the Consumer Contract with RAC and postmarked within 15 days after the date of the execution of this Agreement. RAC will acknowledge your rejection in writing. You should retain the acknowledgement to establish rejection of this Agreement. If you do not receive the acknowledgement from RAC within 15 days from the date you sent your Rejection Notice to RAC, then you should contact the RAC Legal Department by mail or by email at arbitration. reject@rentacenter.com. A Rejection Notice applies only to this Agreement and does not affect the validity or enforceability of any past or future Arbitration Agreements between you and RAC.**

**(B) What Claims Are Covered:** You and RAC agree that, in the event of **any dispute or claim between us,** either you or RAC may elect to have that dispute or claim resolved by binding arbitration. This agreement to arbitrate is intended to be interpreted as

broadly as the FAA allows. Claims subject to arbitration include, but are not limited to:

- claims arising under, arising out of, or relating in any way to any Consumer Contract entered into between you and RAC at any time, and/or any services rendered under or that relate to any such Consumer Contract;
- claims that arose before the execution of this Agreement or any current or prior Consumer Contract between you and RAC, such as claims related to advertising or disclosures;
- claims that arise after the termination of any Consumer Contract between you and RAC;
- claims that are based on any legal theory whatsoever, including negligence, breach of contract, tort, fraud, misrepresentation, trespass, the common law, or any statute, regulation or ordinance;
- except as specified in Paragraph (C) below, claims that are asserted in a lawsuit in court, including class actions in which you are not a member of a certified class, which the defendant (or counterclaim defendant) elects to have resolved by binding arbitration; and
- except as specified in Paragraph (D) below, any and all disputes relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to, any contention that all or any part of this agreement to arbitrate is void or voidable.

**(C) Small Claims Court Option:** Notwithstanding the foregoing, you and RAC each have the right to file an action in small claims court that would be permissi-

ble under Paragraph (D) if brought in arbitration and that is within the jurisdiction of the small claims court. The defendant or counterclaim defendant in such a small claims court action may not elect to have the claim resolved by binding arbitration.

**(D) Requirement of Individual Arbitration:** You and RAC agree that arbitration shall be conducted on an individual basis, and that neither you nor RAC may seek, nor may the Arbitrator award, relief that would affect RAC account holders other than you. There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class, collective, mass, private attorney general, or representative action. Nor shall the Arbitrator have any authority to hear or preside over any such dispute or to join or consolidate arbitrations involving more than one consumer unless RAC and the affected consumers all agree in writing. In addition, although the Arbitrator shall be bound by rulings in prior arbitrations involving the same customer to the extent permitted by applicable law, the Arbitrator shall not be bound by rulings in prior arbitrations involving different customers. Regardless of anything else in your Consumer Contract, this Agreement, or the arbitration provider's rules or procedures, the interpretation, applicability, and enforceability of this Paragraph, including, but not limited to, any claim that all or part of this Paragraph is void or voidable, may be determined only by a court. Any such court challenge shall be governed by the law of the customer's mailing address at the time the dispute arises, but only to the extent permitted and not preempted by the FAA or other federal law. If there is a final judicial determination that applicable law precludes enforcement of this Paragraph's limitations as to a particular claim for relief, then that claim (and

only that claim) must be severed from the arbitration and may be brought in court.

**(E) Starting or Initiating Arbitration:** A party who intends to seek arbitration must first send to the other, by certified mail, return receipt requested, a written Notice of Dispute. A Notice of Dispute to RAC should be addressed to: Rent-A-Center Legal Department, 5501 Headquarters Drive, Plano, TX 75024-5837. Notices of Dispute to you will be sent to you at the last known address you provided to RAC. A Notice of Dispute must (i) provide your name, address, phone number, and Consumer Contract number; (ii) describe the nature and basis of the claim or dispute; and (iii) set forth the specific relief sought. You and RAC agree that any statute of limitations applicable to any claims described in a Notice of Dispute shall be deemed to be tolled for 30 days after receipt of that Notice of Dispute.

If RAC and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or RAC may commence an arbitration with the American Arbitration Association ("AAA") by sending written notice to the other party **and** to the AAA by certified mail, return receipt requested. A written request for arbitration should be made as soon as possible after the event or events in dispute so that the arbitration of any differences may take place promptly. Requests for arbitration by you should be sent to: Rent-A-Center's Legal Department, 5501 Headquarters Drive, Plano, Texas 75024-5837. Requests for arbitration by RAC will be sent to you at the last known address you provided to RAC. Requests for arbitration also should be sent to: American Arbitration Association, Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043. The AAA's current address also may be found on its web site at www.adr.org. Requests

for arbitration must be clearly marked "Request for Arbitration," include your name, address, phone number, and Consumer Contract number, and provide a short statement of the claim and the relief that is being sought.

**(F) The Arbitration Process:** Arbitration is more informal than a lawsuit in court. **In arbitration you and RAC each give up the right to a trial by jury.** The arbitration will be administered by the American Arbitration Association ("AAA"), and except as provided in this Agreement, shall proceed in accordance with the AAA's Commercial Arbitration Rules, Optional Rules for Emergency Measures, and Supplementary Procedures for Consumer Related Disputes ("AAA Rules") in effect at the time the arbitration commences. The AAA rules are available at **www.adr.org**, or **by calling the AAA at 1-800-778-7879 or its then current telephone number** as provided on its web site, or by sending a written request to: **The American Arbitration Association, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043.** If the AAA is unavailable or unwilling to administer the matter, the Parties may agree to or a court of competent jurisdiction shall select another arbitration provider to administer the arbitration or otherwise fulfill the duties of the AAA under this Agreement. Any such substitute arbitration provider shall apply the AAA rules, as modified by this Agreement. Unless the parties agree otherwise, the Arbitrator shall be either an attorney who is experienced in commercial law and licensed to practice law in at least one state or a retired judge from any jurisdiction (the "Arbitrator"). Unless the parties agree otherwise, the arbitration shall take place in the U.S. city or county in which you reside at the time arbitration is commenced.

For claims seeking relief valued at $75,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, the AAA shall appoint the Arbitrator in accordance with its rules and procedures. For all claims seeking relief above $75,000.00 in value (in either your or RAC's assessment), excluding attorney's fees and costs, unless prohibited by the AAA (in which case the AAA's rules and procedures for arbitrator selection shall apply), the Arbitrator shall be selected as follows: The AAA shall give each party a list of five (5) arbitrators drawn from its roster of arbitrators. Each party shall have ten (10) calendar days from the receipt of the list to strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the Arbitrator. If more than one common name remains on the lists of both parties, the parties shall strike names alternately from the list of common names until only one remains. The party who did not initiate arbitration shall strike first. If no common name remains on the lists of all parties, the AAA shall furnish an additional list of five (5) arbitrators from which the parties shall strike alternately, with the party who initiated arbitration striking first, until only one name remains. That person shall be designated as the Arbitrator. Regardless of the value of the claims, if either you or RAC requests emergency relief before the Arbitrator may be appointed, the AAA shall appoint an emergency arbitrator in accordance with the AAA Optional Rules for Emergency Measures of Protection.

Subject to the limitations in Paragraph (D) above, the Arbitrator may award any party any remedy to which that party is entitled under applicable law (including without limitation, legal, equitable and injunctive relief), but such remedies shall be limited to

those that would be available to a party in a court of law for the claims presented to and decided by the Arbitrator. Except to the extent preempted by the FAA, the Arbitrator shall apply the substantive law including, but not limited to, the applicable statutes of limitations (and the law of remedies, if applicable) of the state of the customer's mailing address with RAC at the time arbitration commences, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator is without jurisdiction to apply any different substantive law or law of remedies.

The Arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold pre-hearing conferences by telephone or in person, as the Arbitrator deems necessary. The Arbitrator shall have the authority to entertain a motion to dismiss and/or a motion for summary judgment by any party.

Any party may arrange for a court reporter to provide a stenographic record of the proceedings in accordance with the AAA rules. Should any party refuse or neglect to appear for, or participate in, the arbitration hearing, the Arbitrator shall have the authority to decide the dispute based upon the evidence that is presented. Upon request at the close of the hearing, either party shall be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the Arbitrator.

The Arbitrator shall render an award by reasoned written opinion no later than thirty (30) days from the date the arbitration hearing concludes or the post-hearing briefs (if requested) are received, whichever is later, unless the parties agree otherwise. The opinion shall be in writing and include the factual and legal basis for the award. Before the Arbitrator issues this

award, neither RAC nor you should disclose the substance of any settlement offers to the Arbitrator.

Each party shall have the right to take the deposition of one individual and any expert witnesses designated by the other party. Each party shall have the right to send requests for production of documents to any party, consistent with applicable legal privileges, the informal and expedited nature of arbitration, and each party's right to a fundamentally fair hearing. At either party's request, the Arbitrator may allow additional discovery. Additional discovery is also permitted by the parties' mutual agreement in writing.

**(G) Arbitration of Claims of $10,000.00 Or Less:** If your claim seeks relief valued at $10,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, and the Arbitrator issues you an award that is greater than the value of RAC's last written settlement offer made before the Arbitrator was selected, then RAC will (i) pay you $10,000.00 ("the alternative payment"); and (ii) pay your attorney, if any, one and one half (1 1/2) the amount of attorney's fees, and reimburse any expenses (including expert witness fees and costs), that your attorney reasonably accrued for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium"). If your claim seeks relief valued at $10,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, and RAC did not make a written offer to settle the dispute before the Arbitrator was selected, you and your attorney will be entitled to receive the alternative payment and the attorney premium, respectively, if the Arbitrator awards you any relief on the merits. The Arbitrator shall make any rulings and resolve disputes as to the payment and reimbursement of fees, expenses and the alternative payment

and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the Arbitrator's ruling on the merits. The alternative payment and attorney premium are available only for arbitrations in which: (1) you seek relief valued at $10,000.00 or less (in both your and RAC's assessment); (2) you have provided RAC with 30 days' notice of the dispute as required by Paragraph (E); and (3) you have not disclosed the substance of any settlement offer by RAC to the Arbitrator before an award on the merits is issued. In assessing whether an award that includes attorneys' fees or expenses is greater than the value of RAC's last written settlement offer, the Arbitrator shall include in his or her calculations the value of any attorney's fees or expenses you reasonably incurred before RAC's settlement offer. If you are entitled to statutory attorney's fees, then the Arbitrator shall decide any award of attorney's fees, but in no event will you be entitled to a recovery of both the attorney premium and an award of attorney's fees pursuant to a statutory award of attorney's fees. If, after commencing arbitration, you amend your claim to include new or different claims or to request different or greater relief than you initially requested, the AAA or the Arbitrator shall stay further arbitration proceedings for 30 days. During that time, RAC may make a written settlement offer. If not accepted, that offer will be used by the Arbitrator to determine whether you are entitled to the alternative payment and whether your attorney, if any, is entitled to the attorney premium. If the AAA appointed an emergency arbitrator to decide a request for emergency relief before the regular Arbitrator who decides the merits of the claims may be selected, RAC's last written settlement offer made before the appointment of the later-selected regular Arbitrator shall be the offer used to

determine eligibility for the alternative payment and attorney premium.

**(H) Judicial Review:** Judicial review shall be governed by the Federal Arbitration Act. 9 U.S.C. §§ 9-11. The decision of the Arbitrator may be entered and enforced as a final judgment in any court of competent jurisdiction.

**(I) Arbitration Fees And Costs:** RAC will pay all filing, administration, and arbitrator fees assessed by the AAA for any arbitration that RAC commences. RAC also will pay all such fees for any arbitration that you commence seeking relief valued at $75,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs. If, however, the Arbitrator concludes that your claim is frivolous or has been brought for an improper purpose (as measured by the standards of Federal Rule of Civil Procedure 11(b)), then the payment of all such fees shall be governed by the AAA rules, and you agree to reimburse RAC for any monies it paid on your behalf that would be your responsibility under the AAA rules. In addition, if you commence an arbitration seeking relief valued above $75,000.00 (in either your or RAC's assessment), excluding attorney's fees and costs, the payment of all such fees shall be governed by the AAA rules. The Arbitrator shall determine all factual and legal issues regarding the payment and/or apportionment of said fees and costs.

After RAC receives notice that you have commenced arbitration in accordance with this Agreement of a claim seeking relief valued at $75,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, RAC will promptly reimburse you for your payment of the filing fee. The filing fee currently is $200, but is subject to change by the AAA. If you are

unable to pay this fee, RAC will pay it directly upon receiving a written request at the address listed in Paragraph (E). In the event applicable law requires a different allocation of arbitral fees and costs in order for this Agreement to be enforceable, then such law shall be followed.

Each party shall pay for its own costs and attorney's fees, if any. However, if applicable law would entitle a party to an award of reasonable attorney's fees, or if there is a written agreement providing for attorneys' fees, the Arbitrator may award such fees as provided by law, except to the extent such an award would be barred by Paragraph (G) above.

**(J) Interstate Commerce:** You understand and agree that RAC is engaged in transactions involving interstate commerce, and that the Federal Arbitration Act therefore governs this Agreement.

**(K) Sole and Entire Agreement:** This is the complete Agreement of the parties on the subject of arbitration of claims or disputes. This Agreement to arbitrate shall survive the termination of any Consumer Contract you entered into with RAC. Unless this Agreement in its entirety is deemed void, unenforceable or invalid, this Agreement supersedes any prior or contemporaneous oral or written understandings on the subject. No party is relying on any representations, oral or written, on the subject of the effect, enforceability, or meaning of this Agreement, except as specifically set forth in this Agreement.

**(L) Construction:** Except as provided above in Paragraph (D) above, if any provision of this Agreement is adjudged to be void or voidable or otherwise unenforceable, in whole or in part, such provision shall be severed from this Agreement, and the adjudication

shall not affect the validity of the remainder of the Agreement. All remaining provisions shall remain in full force and effect. A waiver of one or more provisions of this Agreement by any party shall not be a waiver of the entire Agreement. You and RAC agree that an executed electronic copy or photocopy of this Agreement shall have the same force and effect as the original.

**(M) Consideration:** The mutual obligations by you and RAC to arbitrate differences provide consideration for each other.

**ACKNOWLEDGEMENT**

BY SIGNING BELOW, YOU ACKNOWLEDGE THAT: (1) YOU HAVE READ THIS ENTIRE ARBITRATION AGREEMENT CAREFULLY; (2) YOU ARE ENTERING INTO THIS ARBITRATION AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS OTHER THAN THOSE CONTAINED IN THIS ARBITRATION AGREEMENT; (3) YOU HAVE THE RIGHT TO REJECT THIS ARBITRATION AGREEMENT IN ACCORDANCE WITH PARAGRAPH (A) ABOVE; AND (4) YOU HAVE BEEN PROVIDED WITH A DUPLICATE COPY OF THIS ARBITRAITION AGREEMENT.

END OF AGREEMENT

AGREED TO: (Only Signatures Follow)

**SIGNATURES**

Date: 3/9/2020

/s/ Shannon McBurnie
Signature - Consumer

SHANNON MCBURNIE
Printed Name

Date: _____

_____
Signature - Consumer

_____
Printed Name

Date: 3/9/2020

/s/ Jim Villalon
Signature --- RAC Representative

Jim Villalon
Printed Name

## APPENDIX E

## RENT-A-CENTER/ACCEPTANCE NOW CONSUMER ARBITRATION AGREEMENT

Date: Jan 18, 2017

Consumer Lease, Rental-Purchase Agreement, or Retail Installment Sale Contract

Agreement Number jhp00117

**PLEASE READ THIS ARBITRATION AGREEMENT. IT IS BINDING AND ENFORCEABLE UNLESS YOU SEND IN A REJECTION NOTICE, AS SET OUT IN PARAGRAPH (A) BELOW.**

This Arbitration Agreement ("Agreement") is between RAC and the Consumer. As used in this Agreement, the term "Consumer" or "Consumers" mean the customers who sign this Agreement. The term "Consumer Contract" means the consumer lease, rental-purchase agreement, or retail installment contract between the Consumers and RAC. The terms "you" and "your" mean the Consumer, customer, lessee, renter, user, buyer, and other third-party beneficiaries of the items or services RAC is providing, will provide, or has provided to you. And the term "RAC" means Rent-A-Center, its parents, subsidiaries, affiliate entities (including but not limited to Acceptance Now), predecessors or successors in interest, officers, directors, employees, assigns, or agents acting in such capacity. The Federal Arbitration Act (9 U.S.C. § 1-16) ("FAA") governs this Agreement, which evidences a transaction involving interstate commerce.

Except as otherwise provided in this Agreement, you and RAC hereby agree that, in the event of any dispute or claim between us, either you or RAC may elect to have that dispute or claim resolved by binding

arbitration on an individual basis in accordance with the terms and procedures set forth in this Agreement.

**(A) Your Right to Reject: If you want to reject this Arbitration Agreement, you must send a written Rejection Notice, by certified mail, return receipt requested, to: Rent-A-Center Legal Department, 5501 Headquarters Drive, Plano, TX 75024-5837. The Rejection Notice must: (i) state that you are rejecting this Agreement; (ii) provide your name, address, and phone number; and (iii) provide the agreement number from the Consumer Contract you entered into with RAC, which is incorporated in this Agreement as though fully set forth. A Rejection Notice is effective only if it is signed by all Consumers who signed the Consumer Contract with RAC and postmarked within 15 days after the date of the execution of this Agreement. RAC will acknowledge your rejection in writing. You should retain the acknowledgement to establish rejection of this Agreement. If you do not receive the acknowledgement from RAC within 15 days from the date you sent your Rejection Notice to RAC, then you should contact the RAC Legal Department by mail or by email at arbitration. reject@rentacenter. com. A Rejection Notice applies only to this Agreement and does not affect the validity or enforceability of any past or future Arbitration Agreements between you and RAC.**

**(B) What Claims Are Covered:** You and RAC agree that, in the event of any dispute or claim between us, either you or RAC may elect to have that dispute or claim resolved by binding arbitration. This agreement to arbitrate is intended to be interpreted as

broadly as the FAA allows. Claims subject to arbitration include, but are not limited to:

- claims arising under, arising out of, or relating in any way to any Consumer Contract entered into between you and RAC at any time, and/or any services rendered under or that relate to any such Consumer Contract;
- claims that arose before the execution of this Agreement or any current or prior Consumer Contract between you and RAC, such as claims related to advertising or disclosures;
- claims that arise after the termination of any Consumer Contract between you and RAC;
- claims that are based on any legal theory whatsoever, including negligence, breach of contract, tort, fraud, misrepresentation, trespass, the common law, or any statute, regulation or ordinance;
- except as specified in Paragraph (C) below, claims that are asserted in a lawsuit in court, including class actions in which you are not a member of a certified class, which the defendant (or counterclaim defendant) elects to have resolved by binding arbitration; and
- except as specified in Paragraph (D) below, any and all disputes relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to, any contention that all or any part of this agreement to arbitrate is void or voidable.

**(C) Small Claims Court Option:** Notwithstanding the foregoing, you and RAC each have the right to file an action in small claims court that would be permissi-

ble under Paragraph (D) if brought in arbitration and that is within the jurisdiction of the small claims court. The defendant or counterclaim defendant in such a small claims court action may not elect to have the claim resolved by binding arbitration.

**(D) Requirement of Individual Arbitration:** You and RAC agree that arbitration shall be conducted on an individual basis, and that neither you nor RAC may seek, nor may the Arbitrator award, relief that would affect RAC account holders other than you. There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class, collective, mass, private attorney general, or representative action. Nor shall the Arbitrator have any authority to hear or preside over any such dispute or to join or consolidate arbitrations involving more than one consumer unless RAC and the affected consumers all agree in writing. In addition, although the Arbitrator shall be bound by rulings in prior arbitrations involving the same customer to the extent permitted by applicable law, the Arbitrator shall not be bound by rulings in prior arbitrations involving different customers. Regardless of anything else in your Consumer Contract, this Agreement, or the arbitration provider's rules or procedures, the interpretation, applicability, and enforceability of this Paragraph, including, but not limited to, any claim that all or part of this Paragraph is void or voidable, may be determined only by a court. Any such court challenge shall be governed by the law of the customer's mailing address at the time the dispute arises, but only to the extent permitted and not preempted by the FAA or other federal law. If there is a final judicial determination that applicable law precludes enforcement of this Paragraph's limitations as to a particular claim for relief, then that claim (and

only that claim) must be severed from the arbitration and may be brought in court.

**(E) Starting or Initiating Arbitration:** A party who intends to seek arbitration must first send to the other, by certified mail, return receipt requested, a written Notice of Dispute. A Notice of Dispute to RAC should be addressed to: Rent-A-Center Legal Department, 5501 Headquarters Drive, Plano, TX 75024-5837. Notices of Dispute to you will be sent to you at the last known address you provided to RAC. A Notice of Dispute must (i) provide your name, address, phone number, and Consumer Contract number; (ii) describe the nature and basis of the claim or dispute; and (iii) set forth the specific relief sought. You and RAC agree that any statute of limitations applicable to any claims described in a Notice of Dispute shall be deemed to be tolled for 30 days after receipt of that Notice of Dispute.

If RAC and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or RAC may commence an arbitration with the American Arbitration Association ("AAA") by sending written notice to the other party **and** to the AAA by certified mail, return receipt requested. A written request for arbitration should be made as soon as possible after the event or events in dispute so that the arbitration of any differences may take place promptly. Requests for arbitration by you should be sent to: Rent-A-Center's Legal Department, 5501 Headquarters Drive, Plano, Texas 75024-5837. Requests for arbitration by RAC will be sent to you at the last known address you provided to RAC. Requests for arbitration also should be sent to: American Arbitration Association, Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043. The AAA's current address also may be found on its web site at www.adr.org. Requests

for arbitration must be clearly marked "Request for Arbitration," include your name, address, phone number, and Consumer Contract number, and provide a short statement of the claim and the relief that is being sought.

**(F) The Arbitration Process:** Arbitration is more informal than a lawsuit in court. **In arbitration you and RAC each give up the right to a trial by jury.** The arbitration will be administered by the American Arbitration Association ("AAA"), and except as provided in this Agreement, shall proceed in accordance with the AAA's Commercial Arbitration Rules, Optional Rules for Emergency Measures, and Supplementary Procedures for Consumer Related Disputes ("AAA Rules") in effect at the time the arbitration commences. The AAA rules are available at **www.adr.org**, or **by calling the AAA at 1-800-778-7879 or its then current telephone number** as provided on its web site, or by sending a written request to: **The American Arbitration Association, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043.** If the AAA is unavailable or unwilling to administer the matter, the Parties may agree to or a court of competent jurisdiction shall select another arbitration provider to administer the arbitration or otherwise fulfill the duties of the AAA under this Agreement. Any such substitute arbitration provider shall apply the AAA rules, as modified by this Agreement. Unless the parties agree otherwise, the Arbitrator shall be either an attorney who is experienced in commercial law and licensed to practice law in at least one state or a retired judge from any jurisdiction (the "Arbitrator"). Unless the parties agree otherwise, the arbitration shall take place in the U.S. city or county in which you reside at the time arbitration is commenced.

For claims seeking relief valued at $75,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, the AAA shall appoint the Arbitrator in accordance with its rules and procedures. For all claims seeking relief above $75,000.00 in value (in either your or RAC's assessment), excluding attorney's fees and costs, unless prohibited by the AAA (in which case the AAA's rules and procedures for arbitrator selection shall apply), the Arbitrator shall be selected as follows: The AAA shall give each party a list of five (5) arbitrators drawn from its roster of arbitrators. Each party shall have ten (10) calendar days from the receipt of the list to strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the Arbitrator. If more than one common name remains on the lists of both parties, the parties shall strike names alternately from the list of common names until only one remains. The party who did not initiate arbitration shall strike first. If no common name remains on the lists of all parties, the AAA shall furnish an additional list of five (5) arbitrators from which the parties shall strike alternately, with the party who initiated arbitration striking first, until only one name remains. That person shall be designated as the Arbitrator. Regardless of the value of the claims, if either you or RAC requests emergency relief before the Arbitrator may be appointed, the AAA shall appoint an emergency arbitrator in accordance with the AAA Optional Rules for Emergency Measures of Protection.

Subject to the limitations in Paragraph (D) above, the Arbitrator may award any party any remedy to which that party is entitled under applicable law (including without limitation, legal, equitable and injunctive relief), but such remedies shall be limited to

those that would be available to a party in a court of law for the claims presented to and decided by the Arbitrator. Except to the extent preempted by the FAA, the Arbitrator shall apply the substantive law including, but not limited to, the applicable statutes of limitations (and the law of remedies, if applicable) of the state of the customer's mailing address with RAC at the time arbitration commences, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator is without jurisdiction to apply any different substantive law or law of remedies.

The Arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold pre-hearing conferences by telephone or in person, as the Arbitrator deems necessary. The Arbitrator shall have the authority to entertain a motion to dismiss and/or a motion for summary judgment by any party.

Any party may arrange for a court reporter to provide a stenographic record of the proceedings in accordance with the AAA rules. Should any party refuse or neglect to appear for, or participate in, the arbitration hearing, the Arbitrator shall have the authority to decide the dispute based upon the evidence that is presented. Upon request at the close of the hearing, either party shall be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the Arbitrator.

The Arbitrator shall render an award by reasoned written opinion no later than thirty (30) days from the date the arbitration hearing concludes or the post-hearing briefs (if requested) are received, whichever is later, unless the parties agree otherwise. The opinion shall be in writing and include the factual and legal basis for the award. Before the Arbitrator issues

this award, neither RAC nor you should disclose the substance of any settlement offers to the Arbitrator.

Each party shall have the right to take the deposition of one individual and any expert witnesses designated by the other party. Each party shall have the right to send requests for production of documents to any party, consistent with applicable legal privileges, the informal and expedited nature of arbitration, and each party's right to a fundamentally fair hearing. At either party's request, the Arbitrator may allow additional discovery. Additional discovery is also permitted by the parties' mutual agreement in writing.

**(G) Arbitration of Claims of $10,000.00 Or Less:** If your claim seeks relief valued at $10,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, and the Arbitrator issues you an award that is greater than the value of RAC's last written settlement offer made before the Arbitrator was selected, then RAC will (i) pay you $10,000.00 ("the alternative payment"); and (ii) pay your attorney, if any, one and one half (1½) the amount of attorney's fees, and reimburse any expenses (including expert witness fees and costs), that your attorney reasonably accrued for investigating, preparing, and pursuing your claim in arbitration ("the attorney premium"). If your claim seeks relief valued at $10,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, and RAC did not make a written offer to settle the dispute before the Arbitrator was selected, you and your attorney will be entitled to receive the alternative payment and the attorney premium, respectively, if the Arbitrator awards you any relief on the merits. The Arbitrator shall make any rulings and resolve disputes as to the payment and reimburse-

ment of fees, expenses and the alternative payment and the attorney premium at any time during the proceeding and upon request from either party made within 14 days of the Arbitrator's ruling on the merits. The alternative payment and attorney premium are available only for arbitrations in which: (1) you seek relief valued at $10,000.00 or less (in both your and RAC's assessment); (2) you have provided RAC with 30 days' notice of the dispute as required by Paragraph (E); and (3) you have not disclosed the substance of any settlement offer by RAC to the Arbitrator before an award on the merits is issued. In assessing whether an award that includes attorneys' fees or expenses is greater than the value of RAC's last written settlement offer, the Arbitrator shall include in his or her calculations the value of any attorney's fees or expenses you reasonably incurred before RAC's settlement offer. If you are entitled to statutory attorney's fees, then the Arbitrator shall decide any award of attorney's fees, but in no event will you be entitled to a recovery of both the attorney premium and an award of attorney's fees pursuant to a statutory award of attorney's fees. If, after commencing arbitration, you amend your claim to include new or different claims or to request different or greater relief than you initially requested, the AAA or the Arbitrator shall stay further arbitration proceedings for 30 days. During that time, RAC may make a written settlement offer. If not accepted, that offer will be used by the Arbitrator to determine whether you are entitled to the alternative payment and whether your attorney, if any, is entitled to the attorney premium. If the AAA appointed an emergency arbitrator to decide a request for emergency relief before the regular Arbitrator who decides the merits of the claims may be selected, RAC's last written settlement offer made before the appointment

of the later-selected regular Arbitrator shall be the offer used to determine eligibility for the alternative payment and attorney premium.

**(H) Judicial Review:** Judicial review shall be governed by the Federal Arbitration Act. 9 U.S.C. §§ 9-11. The decision of the Arbitrator may be entered and enforced as a final judgment in any court of competent jurisdiction.

**(I) Arbitration Fees And Costs:** RAC will pay all filing, administration, and arbitrator fees assessed by the AAA for any arbitration that RAC commences. RAC also will pay all such fees for any arbitration that you commence seeking relief valued at $75,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs. If, however, the Arbitrator concludes that your claim is frivolous or has been brought for an improper purpose (as measured by the standards of Federal Rule of Civil Procedure 11(b)), then the payment of all such fees shall be governed by the AAA rules, and you agree to reimburse RAC for any monies it paid on your behalf that would be your responsibility under the AAA rules. In addition, if you commence an arbitration seeking relief valued above $75,000.00 (in either your or RAC's assessment), excluding attorney's fees and costs, the payment of all such fees shall be governed by the AAA rules. The Arbitrator shall determine all factual and legal issues regarding the payment and/or apportionment of said fees and costs.

After RAC receives notice that you have commenced arbitration in accordance with this Agreement of a claim seeking relief valued at $75,000.00 or less (in both your and RAC's assessment), excluding attorney's fees and costs, RAC will promptly reimburse you for your payment of the filing fee. The filing fee currently

is $200, but is subject to change by the AAA. If you are unable to pay this fee, RAC will pay it directly upon receiving a written request at the address listed in Paragraph (E). In the event applicable law requires a different allocation of arbitral fees and costs in order for this Agreement to be enforceable, then such law shall be followed.

Each party shall pay for its own costs and attorney's fees, if any. However, if applicable law would entitle a party to an award of reasonable attorney's fees, or if there is a written agreement providing for attorneys' fees, the Arbitrator may award such fees as provided by law, except to the extent such an award would be barred by Paragraph (G) above.

**(J) Interstate Commerce:** You understand and agree that RAC is engaged in transactions involving interstate commerce, and that the Federal Arbitration Act therefore governs this Agreement.

**(K) Sole and Entire Agreement:** This is the complete Agreement of the parties on the subject of arbitration of claims or disputes. This Agreement to arbitrate shall survive the termination of any Consumer Contract you entered into with RAC. Unless this Agreement in its entirety is deemed void, unenforceable or invalid, this Agreement supersedes any prior or contemporaneous oral or written understandings on the subject. No party is relying on any representations, oral or written, on the subject of the effect, enforceability, or meaning of this Agreement, except as specifically set forth in this Agreement.

**(L) Construction:** Except as provided above in Paragraph (D) above, if any provision of this Agreement is adjudged to be void or voidable or otherwise unenforceable, in whole or in part, such provision shall be

severed from this Agreement, and the adjudication shall not affect the validity of the remainder of the Agreement. All remaining provisions shall remain in full force and effect. A waiver of one or more provisions of this Agreement by any party shall not be a waiver of the entire Agreement. You and RAC agree that an executed electronic copy or photocopy of this Agreement shall have the same force and effect as the original.

**(M) Consideration:** The mutual obligations by you and RAC to arbitrate differences provide consideration for each other.

**ACKNOWLEDGEMENT**

BY SIGNING BELOW, YOU ACKNOWLEDGE THAT: (1) YOU HAVE READ THIS ENTIRE ARBITRATION AGREEMENT CAREFULLY; (2) YOU ARE ENTERING INTO THIS ARBITRATION AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS OTHER THAN THOSE CONTAINED IN THIS ARBITRATION AGREEMENT; (3) YOU HAVE THE RIGHT TO REJECT THIS ARBITRATION AGREEMENT IN ACCORDANCE WITH PARAGRAPH (A) ABOVE; AND (4) YOU HAVE BEEN PROVIDED WITH A DUPLICATE COPY OF THIS ARBITRAITION AGREEMENT.

END OF AGREEMENT

AGREED TO: (Only Signatures Follow)

**SIGNATURES**

Date: 1/18/17

Signed via click-through
AcceptanceNOW web portal.
APRIL SPURELL
2017-01-18 15:01:72
Signature - Consumer

APRIL SPURELL
Printed Name

Date: _____

_____
Signature - Consumer

_____
Printed Name

Date: 1/18/17

/s/ Jim Villalon
Signature --- RAC Representative

Jim Villalon
Printed Name

## APPENDIX F

Constitution of the United States
Article III. The Judiciary
U.S.C. Const. Art. III § 2, cl. 1

Currentness

**Section 2, Clause 1. Jurisdiction of Courts**

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Title 9. Arbitration
Chapter 1. General Provisions
9 U.S.C.A. § 2

Effective: March 3, 2022

Currentness

**§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.