IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JPAY LLC, A Delaware Limited Liability Company, Plaintiff, vs. SHALANDA HOUSTON, Defendant.	Civil Action No.: 3:23-cv-00165

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT

Defendant Shalanda Houston ("Ms. Houston") hereby moves this Court to dismiss Plaintiff JPay, LLC's ("JPay") Original Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) and 28 U.S.C. § 2201(a). Ms. Houston requests oral argument on this Motion at a date and time determined by the Court. In support of her Motion, Ms. Houston states:

INTRODUCTION

JPay entered into a contract with Shalanda Houston in 2014 that gave her the right to arbitrate any and all disputes with JPay. In 2015, she filed a demand for class arbitration availing herself of that right, but since that time, JPay has tried to find a court that will allow it to escape from the arbitration proceeding that its own contract required. Over the past seven years, the Eleventh Circuit, the U.S. Supreme Court, and the Southern District of Florida have all declined JPay's invitation. Undeterred, JPay now asks this Court to interject itself into the ongoing class arbitration proceeding and strip the arbitrators of their authority. However, the Eleventh Circuit already decided this issue against JPay and in favor of Ms. Houston: "an arbitrator will decide whether the arbitration can proceed on a class basis," not any court. *JPay, Inc. v. Kobel*, 904 F.3d 923, 927 (11th Cir. 2018), *cert denied*, 139 S. Ct. 1545 (2019).

While JPay now attempts to avoid this mandate from the Eleventh Circuit by arguing that a forum selection clause that it unilaterally added to its terms of service in 2021 requires resolution of the availability of classwide arbitration in this Court, JPay has already tried this argument with the Southern District of Florida and lost.

Specifically, after the Eleventh Circuit's decision, JPay amended its terms of service to (allegedly) prohibit class arbitration and to (supposedly) require the Southern District of Florida to rule on that provision's enforceability. But as the Southern District of Florida explained, "[t]his Court cannot determine whether the . . . Revised Terms apply retroactively to Houston's claims as

the Original Terms already delegated that authority to the Arbitrators." *JPay, Inc. v. Kobel*, 2020 WL 5763930, at *4 (S.D. Fla. Sept. 28, 2020).[1]

Put simply, in this action, JPay is attempting to take yet another bite at the "who decides" apple, but every court that has already considered this issue has reached the same answer—the decision-making power lies with the arbitrators. This Court should not revisit it. Accordingly, and as further detailed below, this declaratory judgment action should be dismissed for both procedural and substantive reasons.

As to the procedural, as a threshold matter, JPay has **failed to establish** that this Court has **subject matter jurisdiction** over this dispute, and there is no **personal jurisdiction** in this Court over a dispute between a resident of **Georgia** and a company headquartered in **Florida**. Moreover, having already litigated these issues in the Eleventh Circuit and the Southern District of Florida, dismissal of JPay's claims is required under the doctrine of *res judicata* because that litigation answered the same fundamental question that JPay now asks this Court to consider—the availability of class arbitration.

As to the substantive, JPay's arguments in the Complaint are based entirely on the meaning of the arbitration clause contained in the 2021 and 2022 Amended Terms of Service, but those terms are **illusory**, and therefore cannot serve as a basis for this action. As the Fifth Circuit has made clear, where, as here, "one party to an arbitration agreement seeks to invoke arbitration to settle a dispute, if the other party can suddenly change the terms of the agreement to avoid arbitration, then the agreement was illusory from the outset." *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012). Moreover, even if the class arbitration clause contained in the

[1] Earlier versions of JPay's terms of service going back to December 2015 also contain similar provisions purporting to bar class arbitration and purporting to require judicial construction of such clauses and were also rejected by the Southern District of Florida on the same reasoning.

Amended Terms of Service was valid (it is not), JPay has **waived enforcement** by not having timely raised the issue in the arbitration. Further, JPay's causes of action for "injunction" fail because **"injunction" is not a standalone cause of action**, and, regardless, JPay has failed to allege each of the elements for such a claim. Finally, even if this Court were to conclude that it is not required to dismiss the action, dismissal is still appropriate because **declaratory judgment jurisdiction is discretionary**, and where, as here, a declaratory judgment action is filed to disrupt a longstanding, first-filed proceeding, abstention is appropriate.

BACKGROUND

A. Ms. Houston Was Charged Hundreds of Dollars in Fees by JPay.

Ms. Houston's partner has been incarcerated in Louisiana prisons since the early 2000s, and for many years Ms. Houston sent money to him via paper money orders through the United States Post Office. *See* Compl. at Ex. 2 ¶¶ 79-80. However, in or about 2012, JPay contracted with the Louisiana Department of Corrections to provide electronic money transfer services to the prison. Ms. Houston began using those services because they were deceptively marketed by JPay as the only viable option available to her. *Id.* at Ex. 2 ¶ 83. Since that time, JPay has charged Ms. Houston hundreds of dollars in fees. *See id*. at Ex. 2 ¶ 86.

B. In 2015, Ms. Houston Filed a Class Arbitration Against JPay Challenging the Fees.

On October 16, 2015, Ms. Houston, along with co-claimant Cynthia Kobel (who is not named as a defendant in this action) filed a demand ("2015 Demand") with the American Arbitration Association ("AAA") for class arbitration (the "Arbitration") pursuant to JPay's November 2014 Terms of Service Agreement. Compl. at Ex. 2. The 2015 Demand was assigned to a Panel of three arbiters, each of whom is a retired judge (the "Arbitration Panel" or "Panel").

In the 2015 Demand, Ms. Houston alleges, among other things, that JPay unlawfully markets its electronic money transfer services by making deceptive representations about the speed

and reliability of its services. *See generally* Compl. at Ex. 2. She further contends that the nature of the fees charged by JPay are not adequately disclosed, including the payment of kickbacks by JPay to correctional institutions to secure exclusive contracts. *See generally id.* Amongst other relief, Ms. Houston seeks damages for herself and the putative Class. *See, e.g.*, *id.* ¶ 108.

C. The Eleventh Circuit Held that the Panel Will Determine Class Arbitration.

In response to the 2015 Demand, JPay filed a declaratory judgment action in Miami-Dade County, Florida, which was subsequently removed to the United States District Court, Southern District of Florida. Declaration of Andrea Gold ("Gold Decl.") at Ex. D. JPay sought a judicial determination that it only agreed to bilateral arbitration, not class arbitration. *Id.* ¶¶ 22, 27, 30.

JPay moved for summary judgment, and the District Court granted JPay's motion concluding that the Terms of Service did not permit class arbitration. *JPay, Inc. v. Kobel*, 2017 WL 3218218 (S.D. Fla. July 28, 2017). Ms. Houston appealed, and, in September 2018, the Eleventh Circuit vacated the order, holding that "an arbitrator will decide whether the arbitration can proceed on a class basis," not a court. *JPay, Inc. v. Kobel*, 904 F.3d 923, 927 (11th Cir. 2018); Gold Decl. at Ex. A.

D. In April 2019, JPay's Petition for Certiorari to the Supreme Court Was Denied.

JPay petitioned for a writ of certiorari seeking review of the Eleventh Circuit's decision, and Ms. Houston opposed. In April 2019, the Supreme Court denied JPay's petition, leaving the Eleventh Circuit's order in effect. *JPay, Inc. v. Kobel*, 139 S. Ct. 1545 (2019); Gold Decl. Ex. B.

E. In September 2019, the Panel Found that Class Arbitration Was Permitted.

With JPay having lost the question of "who decides" in federal court, the parties briefed the issue of clause construction—namely, whether JPay's November 2014 Terms of Service

permitted putative class arbitration—before the Arbitration Panel. After full briefing and oral argument, in September 2019, the Panel held that class arbitration could proceed:

> ORDERED AND AWARDED THAT THE ARBITRATION CLAUSE IN THE PARTIES' AGREEMENT ENTITLED "GOVERNING LAW", AND READ IN THE CONTEXT OF THE AGREEMENT AND THE GOVERNING LAW WHEN THE AGREEMENTS WERE SIGNED, CONTAINS NO AMBIGUITY AS TO PERMITTING CLASS WIDE ARBITRATION OF DISPUTES PRIOR TO THE INCLUSION OF A CLASS ACTION WAIVER IN DECEMBER 2015, THERE IS A CONTRACTUAL BASIS FOR CONCLUDING THAT THE PARTIES AGREED TO CLASS ARBITRATION UNDER THE BROAD LANGUAGE DEFENDANTS DRAFTED.

Gold Decl. at Ex. E at 9. The Panel also rejected JPay's claims that Ms. Houston waived any right to class arbitration via her agreement to subsequent versions of the terms of service that contained a class action waiver clause. *Id.* at Ex. E at 5.

F. JPay Appealed the Panel's Order to the Southern District of Florida, But in September 2020, the Southern District Affirmed the Panel's Determination.

Faced with another significant loss, JPay again sought relief in court, filing an application in the Southern District of Florida to partially vacate the Panel's September 2019 Order. Gold Decl. at Ex. F. Specifically, in its application, JPay argued that it had repeatedly amended its Terms of Service to include a class waiver and expressly designated the Florida courts as the exclusive forum to determine the enforceability, validity, and scope of the class waiver clause. *See id.* at Ex. F at 4-7. As a result, JPay argued, the Panel exceeded its powers by: (i) refusing to enforce these revised terms of service and (ii) making a determination as to the "scope[,] validity, effect, and enforceability" of the class waivers in these agreements. *Id.* at Ex. F at 7.

Ms. Houston opposed this application, and, in September 2020, the Southern District of Florida soundly rejected JPay's arguments, holding that it could not "determine whether the 2015 or 2019 Revised Terms apply retroactively to Houston's claims as the [November 2014] Terms

already delegated that authority to the Arbitrators." *JPay, Inc. v. Kobel*, 2020 WL 5763930, at *4 (S.D. Fla. Sept. 28, 2020); Gold Decl. at Ex. C.

G. Having Lost in the Eleventh Circuit, in the Supreme Court, in Arbitration, and in the Southern District of Florida, JPay Attempted to Amend its Terms of Service in 2021 to Provide for Resolution of Arbitration-Related Disputes Before this Court.

After the Southern District of Florida refused to vacate the Panel's clause construction award, the parties returned to Arbitration. With the Arbitration still pending, however, in August 2021, May 2022, and July 2022, JPay again attempted to amend its terms to adopt Texas law and to provide that Texas state and federal courts had sole authority to decide the "scope, validity, effect, and enforceability" of its class waiver provision contained in the arbitration clause. Compl. ¶¶ 13-14; *id.* at Exs. 1, 5, 6.

H. In January 2023, After Over Seven Years of Litigation, JPay Filed this Declaratory Judgment Action Seeking to Relitigate Questions that Have Been Long Settled.

From August 2021 through January 19, 2023, JPay took no steps to enforce its new forum selection clause against Ms. Houston. JPay first raised its supposed new rights on January 20, 2023, when it filed this action seeking an order "declar[ing that] the Arbitrators are without authority to decide the issue Ms. Houston asks them to adjudicate," in other words, to re-decide the availability of class arbitration. Compl. ¶ 25. JPay further seeks an order enjoining Ms. Houston from contesting the enforceability of the class action waiver clause in the arbitration. Compl. ¶¶ 32-37, 44-49.

The prospective application of the 2021 and 2022 Amended Terms of Service is not presently at issue in the Arbitration, with Claimants not seeking a ruling from the Panel on the availability of discovery, past August 17, 2021, the day before the 2021 Amended Terms of Service allegedly became operative. Gold Decl. at Ex. G. Further, with no class yet certified, the rights of absent class members are not presently being litigated in the Arbitration.

ARGUMENT

A. JPay Has Failed to Establish that this Court Has Subject Matter Jurisdiction.

As a threshold matter, JPay has failed to establish that this Court has subject matter jurisdiction over this action. It is well settled that the Declaratory Judgment Act "does not of itself confer jurisdiction on the federal courts," and, instead, only declaratory judgment actions with an independent jurisdictional basis may proceed in federal court. *Rivero v. Fid. Invs., Inc.*, 1 F. 4th 340, 343 (5th Cir. 2021) (finding no subject matter jurisdiction). In a declaratory judgment action based on diversity of citizenship, "the amount in controversy is measured by the value of the object of the litigation." *La. Indep. Pharmacies Ass'n v. Express Scripts, Inc.,* 41 F.4th 473, 479 (5th Cir. 2022) (finding no subject matter jurisdiction). "The burden of establishing subject matter jurisdiction in federal court rests on the party seeking to invoke it." *Valencia v. Allstate Tex. Lloyd's*, 976 F.3d 593, 595 (5th Cir. 2020) (finding no subject matter jurisdiction). If a court concludes that subject matter jurisdiction is lacking, dismissal is required. *Goodrich v. United States*, 3 F.4th 776, 779 (5th Cir. 2021).

In the Complaint, JPay contends that this Court has subject matter jurisdiction over this declaratory judgment action pursuant to 28 U.S.C. § 1332(a), making a single boilerplate claim that "the amount in controversy exceeds $75,000." Compl. ¶ 4. JPay, however, has not made any ***factual*** allegations showing that the crux of JPay's claim in this action—who should construe the Amended Terms of Service, this Court or the Arbitration Panel—has a value of at least $75,000. *See* 28 U.S.C. § 1332(a). Indeed, on "the face of the Complaint, it is impossible to tell the value, if any, of the right to be protected or the extent of any injury" claimed by JPay because the question of "who decides" does not have a self-obvious economic value. *See Rixoma, Inc. v. Trendtek, LLC*, 2017 WL 6343543, at *3-4 (N.D. Tex. Dec. 12, 2017).

Without any effort by JPay to tie the relief sought in the Complaint to the supposed amount in controversy, pursuant to Federal Rule of Civil Procedure 12(b)(1), JPay's claims must be dismissed in their entirety for lack of subject matter jurisdiction. *See, e.g.*, *Culbertson v. Select Portfolio Servicing, Inc.*, 2013 WL 3870286, at *2-3 (N.D. Tex. July 25, 2013) (remanding declaratory judgment action where no "proof of the 'value of the object of the litigation' or 'the value of the right to be protected or the extent of the injury to be prevented'" was offered); *Essex Ins. Co. v. Accurate Assocs., LLC*, 2013 WL 12141552, at *2-3 (S.D. Tex. Feb. 1, 2013) (granting dismissal in a declaratory judgment action where it was "impossible for the Court to determine whether the underlying complaint appears on its face to exceed the jurisdictional amount").

B. This Court Also Lacks Personal Jurisdiction Over Ms. Houston.

JPay has also failed to demonstrate that this Court has personal jurisdiction over Ms. Houston. As JPay's Complaint makes clear, Ms. Houston is a resident of **Georgia** (Compl. ¶ 2), who transacts business with JPay, a **Delaware** LLC headquartered in **Florida** (Compl. ¶ 1), to send money to a loved one in **Louisiana** (Compl. at Ex. 2 ¶¶ 79-88). Without any alleged contacts with Texas, this Court has neither specific nor general personal jurisdiction over Ms. Houston. *See, e.g.*, *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 428 (5th Cir. 2005) (no specific personal jurisdiction over out of state defendants); *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 618 (5th Cir. 2008) (describing high burden required to establish general personal jurisdiction).

Well aware that Ms. Houston has no contacts with Texas, in the Complaint, JPay instead alleges personal jurisdiction on a single basis—a forum selection clause buried in the 2021 and 2022 Amended Terms of Service. Compl. ¶ 3. However, as detailed in Section D, below, the arbitration agreement containing the forum selection clause is illusory, and, regardless, even if otherwise valid, enforcement of the clause by JPay has been waived. Therefore, the forum selection clause cannot serve as the basis for personal jurisdiction in this Court. *See Jackson v.*

Payday Fin., LLC, 764 F.3d 765, 768 (7th Cir. 2014) (finding illusory arbitration-related forum selection clause unenforceable); *Hampton v. Equity Tr. Co.*, 736 F. App'x 430, 436-37 (5th Cir. 2018) (finding forum selection clause waived when not timely raised).

Accordingly, pursuant to Federal Rule of Civil Procedure 12(b)(2), this action against Ms. Houston should be dismissed due to lack of personal jurisdiction.

C. JPay's Claims Are Barred by *Res Judicata*.

Even if this Court were to conclude that it has subject matter jurisdiction over this action (it should not) and that it has personal jurisdiction over Ms. Houston (it does not), dismissal is still appropriate because the question of "who decides" whether amendments to JPay's terms of service permit classwide relief in the Arbitration has already been resolved by the Eleventh Circuit and the Southern District of Florida in favor of Ms. Houston and against JPay.

1. Legal Standard.

"To determine which [forum's *res judicata*] law applies, [judges] look to the court where the prior judgment was entered." *Dotson v. Atl. Specialty Ins. Co.*, 24 F.4th 999, 1002 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 102 (2022). "[F]ederal courts sitting in diversity apply the preclusion law of the forum state" where the underlying decision was rendered. *Anderson v. Wells Fargo Bank, N.A.*, 953 F.3d 311, 314 (5th Cir. 2020). Here, the underlying orders[2] originated from diversity-jurisdiction-based litigation in the Southern District of Florida, so Florida law applies.

Under Florida law, *res judicata* describes "the preclusive effect of earlier litigation." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1331 (11th Cir. 2010). More specifically, it may mean "claim preclusion" or "issue preclusion." *Id.* at 1331-32. Claim preclusion "bars a

[2] As the Fifth Circuit has confirmed, in a motion to dismiss based on preclusion, "judicial notice of the previous judgments and opinions" is appropriate. *Anderson*, 953 F.3d at 314.

subsequent action between the same parties on the same cause of action." *Id.* at 1332. Issue preclusion, also referred to as collateral estoppel, prevents "re-litigation of issues that have already been decided between the parties in an earlier lawsuit." *Id.*

Claim preclusion applies "under Florida law 'when all four of the following conditions are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in persons for or against whom claim is made.'" *Brown*, 611 F.3d at 1332. Similarly, "[t]he essential elements of issue preclusion under Florida law are that [1] the parties [be identical] and [2] issues be identical, and [3] that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Id.*

"[D]ismissal under Rule 12(b)(6) is proper if the elements of res judicata are apparent based on the facts pleaded and judicially noticed." *Mitchell v. Ocwen Loan Servicing, LLC*, 2019 WL 5647599, at *3 (N.D. Tex. Oct. 31, 2019) (collecting cases and granting dismissal).

2. The Eleventh Circuit and the Southern District of Florida Already Ruled Against JPay, Finding that the Arbitration Panel Must Interpret the Applicability of the Terms of Service to the Claims at Issue in the Arbitration.

As detailed in Background Section B, above, Claimants filed their Demand for Arbitration on a classwide basis in October 2015 with the AAA. *See* Compl. at Ex. 2 (attaching 2015 Demand). In response, JPay sought declaratory relief in court arguing that the 2015 Demand could not proceed as a putative class arbitration. The Eleventh Circuit, however, rejected those arguments, holding that the availability of classwide arbitration under the 2015 Demand was a question for the Arbitration Panel to determine:

> The district court lacked the power to decide whether or not the parties would arbitrate on a class basis. Although JPay says otherwise today, it agreed when drafting its Terms of Service that an arbitrator would decide this question. The district court should have sent the dispute to arbitration and should not have passed on whether or not class proceedings were available. We,

> therefore, VACATE the district court's order granting JPays Cross Motion for Summary Judgment, REVERSE the order denying Kobel and Houston's Motion to Compel Arbitration, and REMAND with instructions that the Demand be referred to arbitration.

JPay, Inc. v. Kobel, 904 F.3d 923, 944 (11th Cir. 2018); Gold Decl. at Ex. A.

Subsequently, in September 2019, the Arbitration Panel issued an order on clause construction, finding that Ms. Houston's claims for class arbitration could proceed. *See* Compl. ¶ 10. JPay appealed that ruling to the Southern District of Florida.

In September 2020, the Southern District of Florida rejected JPay's arguments, finding that the retroactive applicability of the amended terms of service to the 2015 Demand were for the Arbitration Panel, and not a court, to determine:

> JPay argues here, for the first time, that the 2015 Revised Terms and the 2019 Revised Terms retroactively apply to Houston's claims such that the Arbitrators had no authority to determine the availability of class arbitration. However, JPay ignores the posture of this action. ***This Court cannot determine whether the 2015 or 2019 Revised Terms apply retroactively to Houston's claims as the Original Terms already delegated that authority to the Arbitrators. . . .***
>
> The Eleventh Circuit has already held that, under the Original Terms, the Arbitrators had the power to determine the availability of class arbitration. The Arbitrators did what they were tasked to do and interpreted the scope of the Original Terms, finding that class arbitration was available. Moreover, the Arbitrators considered the 2015 Revised Terms but found them inapplicable. . . .
>
> Based on the foregoing, it is ORDERED AND ADJUDGED that JPay's Application to Partially Vacate Arbitration Award [] is DENIED.

JPay, Inc. v. Kobel, 2020 WL 5763930, at *4 (S.D. Fla. Sept. 28, 2020) (emphasis added); Gold Decl. at Ex. C.

JPay did not appeal that order, and the Southern District of Florida case was then closed by that court. Compl. ¶ 11.

3. The Eleventh Circuit and Southern District of Florida Orders Bind JPay.

Having lost in the Eleventh Circuit and the Southern District of Florida, JPay now asks this Court to reconsider and re-decide the central questions that were at issue in each of those proceedings: (1) who should determine the availability of classwide arbitration as sought in the 2015 Demand; and (2) who should determine the retroactive applicability of amendments to the JPay terms of service to the claims at issue in the Arbitration.

As to the first question, the Eleventh Circuit's answer was clear: "an arbitrator will decide whether the arbitration can proceed on a class basis." *JPay, Inc. v. Kobel*, 904 F.3d 923, 944 (11th Cir. 2018); Gold Decl. at Ex. A. And as to the second question, the Southern District of Florida was equally clear: "JPay argues that because the Revised Agreements expressly waive the right to class arbitration and require the courts to resolve any disputes about that waiver, the Arbitrators exceeded their authority in addressing the issue of class arbitration. The Court disagrees." *JPay, Inc. v. Kobel,* 2020 WL 5763930, at *3 (S.D. Fla. Sept. 28, 2020); Gold Decl. at Ex. C.

Accordingly, with identical parties (JPay and Ms. Houston), identical issues (the availability of class arbitration under the 2015 Demand), and identical causes of action (declaratory judgment) that were fully adjudicated in earlier proceedings (the Eleventh Circuit and Southern District of Florida orders), each of the elements for both claim and issue preclusion are satisfied, and JPay's claims in this action should be dismissed.[3] *See, e.g.*, *Robin Singh Educ. Servs. Inc. v. Excel Test Prep Inc.*, 274 F. App'x 399, 406 (5th Cir. 2008) (collateral estoppel applied where "no significant intervening factual change has occurred" since earlier order on same issues); *Test*

[3] These same facts warrant dismissal under the "law of the case" doctrine. *See, e.g.*, *United States v. Suarez*, 769 F. App'x 174, 175 (5th Cir. 2019) ("Under the law of the case doctrine, an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal.").

Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 576 (5th Cir. 2005) (dismissing on collateral estoppel grounds and explaining that "[b]ecause [plaintiff] has not alleged a significant intervening factual change, we find that our previous holding bars [plaintiff's] current claim"); *Mariano v. Ethan Allen Interiors, Inc*., 2010 WL 11626851, at *4 (M.D. Fla. Dec. 30, 2010) (granting dismissal based on claim preclusion); *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 739 F.3d 683, 689 (11th Cir. 2014) (finding claims barred by *res judicata*).

D. The Arbitration Sections of the Amended Terms of Service Are Illusory.

According to its Complaint, in August 2021 JPay amended its Terms of Service to add a Texas choice of law clause and to provide that Texas courts have sole authority to decide the "scope, validity, effect, and enforceability" of the class action waiver provision in the Terms of Service. Compl. at Ex. 5. This requirement was then carried forwarded into all subsequent versions. *Id.* ¶ 13. This declaratory judgment action is predicated on the supposed enforceability of that class waiver provision in the arbitration agreement, but the arbitration agreement is illusory and therefore neither the class action waiver nor the Texas forum selection clauses can be enforced.

1. Legal Standard.

Under Texas law, an arbitration agreement, "like other contracts," must be supported by consideration. *Lizalde v. Vista Quality Mkts.*, 746 F.3d 222, 225 (5th Cir. 2014). "Though a mutual agreement to arbitrate claims is sufficient consideration to support an arbitration agreement, the agreement is illusory '[w]here one party has the unrestrained unilateral authority to terminate its obligation to arbitrate.'" *Nelson v. Watch House Int'l, L.L.C.*, 815 F.3d 190, 193 (5th Cir. 2016) (quoting *Lizalde*, 746 F.3d at 225). "Put differently, where one party to an arbitration agreement seeks to invoke arbitration to settle a dispute, if the other party can suddenly change the terms of the agreement to avoid arbitration, then the agreement was illusory from the outset." *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012). The "crux" of the issue is whether

one party "has the power to make changes to its arbitration policy that have retroactive effect, meaning changes to the policy that would strip the right of arbitration from [a party] who has already attempted to invoke it." *Carey*, 669 F.3d at 205.

Applying these principles, the Fifth Circuit articulated a three-prong test to determine whether a company's unilateral right to modify its agreement to arbitrate avoids being illusory: "1) [it] extends only to prospective claims, 2) [it] applies equally to both [parties'] claims, and 3) . . . advance notice . . . is required before termination is effective."[4] *Lizalde* 746 F.3d at 226. Where it is apparent that each of these three criteria are not met from the face of the complaint, dismissal pursuant to Rule 12(b)(6) is appropriate. *See*, *e.g.*, *Presta v. Omni Hotels Mgmt. Corp.*, 2017 WL 3038219, at *6-7 (S.D. Tex. July 18, 2017).

2. *In re Halliburton* Establishes the Standard for Determining If an Arbitration Agreement Is Illusory.

In re Halliburton Co., 80 S.W.3d 566 (Tex. 2002) is the leading case on whether arbitration agreements are illusory under Texas law. In *In re Halliburton*, the Texas Supreme Court held that an arbitration agreement between an employer and an at-will employee was not illusory, despite the company's right to unilaterally modify or terminate the arbitration program. In reaching that decision, the court focused on two key provisions. First, the agreement provided that "no amendment shall apply to a Dispute of which [Halliburton] had actual notice on the date of the amendment." *Id.* at 569-70. The second provision stated that any termination of the arbitration program "shall not be effective until 10 days after reasonable notice of termination is given to Employees or as to Disputes which arose prior to the date of termination." *Id.* at 570. Because of

[4] Although the Fifth Circuit in *Lizalde* was asked to consider the illusoriness of an arbitration provision that gave one party a unilateral right to terminate the arbitration provision, it has also applied the *Lizalde* criteria to arbitration provisions that grant one party the unilateral right to amend or modify an arbitration provision (a right that presumably would include termination). *See, e.g.*, *Nelson*, 815 F.3d at 194-96.

these two provisions, Halliburton could not "avoid its promise to arbitrate by amending the provision or terminating it altogether." *Id.* Accordingly, the court concluded that the arbitration provision was not illusory. *Id.*

On this basis, Texas courts have generally held that the question of illusoriness turns on the presence or absence of "*Halliburton* type savings clauses which preclude application of such amendments to disputes which arose (or of which [a party] had notice) before the amendment." *Morrison v. Amway Corp.*, 517 F.3d 248, 257 (5th Cir. 2008).[5]

3. The JPay Arbitration Clause in the Amended Terms of Service Is Illusory Under Texas Law, Requiring Dismissal of this Action.

JPay's unilateral August 2021 amendment to the Terms of Service contain no such *Halliburton*-type savings clause. The Terms of Service require no notice to users prior to publishing. Nor does it include any limitation stating it will apply only to prospective claims. In fact, by filing this action, JPay has sought to enforce the Terms of Service retroactively to avoid

[5] *See also Nelson*, 815 F.3d at 195-96 (arbitration policy was illusory because it permitted employer to alter policy without advance notice to employee); *Torres v. S.G.E. Mgmt., LLC*, 397 F. App'x 63, 68 (5th Cir. 2010) (arbitration policy was illusory because it permitted company to modify policy without advance notice to investors and permitted retroactive modifications); *Magdaleno v. PCM Constr. Servs., LLC*, 2014 WL 1760942, at *7 (S.D. Tex. May 1, 2014) (arbitration policy was illusory because it applied only to claims brought by employees and allowed employer in its "sole discretion, to change, revise or eliminate any of its policies as described [t]herein"); *Harrison v. Blockbuster, Inc.*, 622 F. Supp. 2d 396, 399 (N.D. Tex. 2009) (finding arbitration clause illusory because "nothing . . . prevents [defendant] from unilaterally changing any part of the contract," and there was "nothing to suggest that once published [on the company website] the amendment would be inapplicable to disputes arising, or arising out of events occurring, before such publication"); *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 421, 424 (Tex. 2010) (holding that an arbitration clause in a workers' benefit plan was not illusory where, although the employer reserved the right to "amend, modify, or terminate the Plan at any time," it also provided that "no such amendment or termination will alter the arbitration provisions . . . with respect to . . . an Injury occurring prior to the date of such amendment or termination").

arbitration of claims Ms. Houston first asserted in October 2015 under the November 2014 Agreement.[6]

The Fifth Circuit's opinion in *Morrison* is instructive. *Morrison* involved a dispute arising out of a distribution agreement that provided for arbitration of any disputes but gave one party, Amway, the right to unilaterally modify the agreement with its distributors. 517 F.3d at 257. On appeal, the Fifth Circuit found that the agreement to arbitrate was illusory. *Id.* It distinguished Amway's arbitration agreement from the one in *Halliburton* on the basis that Amway retained the unilateral authority to "eliminat[e] [its] entire arbitration program or its applicability to certain claims or disputes" as soon as notice of such amendment was published, such that "mandatory arbitration would no longer be available even as to disputes which had arisen and of which Amway had notice prior to the publication." *Id.* The Fifth Circuit specifically emphasized that "Amway seeks to enforce an arbitration agreement *with respect to* a dispute which arose, and concerns matters which occurred, *before* the arbitration provision was first introduced in September 1997." *Id.* at 256 (emphasis in original).

Here, as in *Morrison*, JPay is attempting to enforce the class action waiver and the newly added Texas forum selection clauses in the August 2021 Terms of Service with respect to this dispute which arose, and concerns matters that occurred, before the Texas forum selection clauses and the class action waiver were first added to the Terms of Service. The class waiver was introduced a mere two months after Ms. Houston and her co-Claimant filed their class arbitration demand. *See* Compl. at Ex. 4. The Texas forum selection clauses were introduced after the Southern District of Florida refused to vacate the Panel's Order permitting Ms. Houston's claims

[6] As the Fifth Circuit has made clear: "silence about the possible retroactive application of amendments to the arbitration policy [is] interpreted to allow amendments to apply retroactively." *Carey*, 669 F.3d at 206-07.

to proceed in a class arbitration. *See* Compl. at Ex. 5. It is clear that JPay keeps amending its Terms of Service in an attempt to avoid class arbitration of Ms. Houston's case and to avoid the various rulings by the Arbitration Panel, the Southern District of Florida, and the Eleventh Circuit. Had JPay made those changes prospectively, applicable to only claims that arose ***after*** the effective date of amendment, the amended arbitration provisions might have been enforceable. But because JPay purported to make those amendments apply retroactively to Ms. Houston's claims—of which it had notice prior to any of the amendments—it has instead run afoul of *Halliburton* and the amended arbitration provision is illusory and unenforceable.

In *Carey*, the Fifth Circuit specifically admonished against the kind of arbitration agreement that would give a company the ability to change the agreement and make those changes applicable to a pending dispute "if it determined that arbitration was no longer in its interest." 669 F.3d at 206. The Fifth Circuit rejected the idea that a company can hold its employees or customers "to the promise to arbitrate while reserving its own escape hatch." *Id.*

Put simply, like in *Carey,* JPay is attempting to use the August 2021 arbitration clause as an "escape hatch" to avoid the consequences of an arbitration that is no longer in its interest. On this basis, the Court must find the arbitration clause in the August 2021 Terms of Service and all subsequent versions illusory and unenforceable.

E. Even if the Amended Arbitration Clause Were Valid, JPay Has Waived Enforcement.

According to JPay, it amended its terms of service in August 2021 "to choose Texas to both supply the governing law of the agreement and act as the exclusive forum for adjudicating disputes [related to class waiver]," and while JPay further amended its terms of service in May and July, 2022, it "did not substantively alter the class waiver or forum selection clauses" at those times. Compl. ¶ 13. In other words, by JPay's own account, one year and five months passed between when JPay purportedly required class claims to be adjudicated in this Court instead of arbitration

and the filing of this action. JPay also took no steps to enforce (or even raise) its supposed new right in the Arbitration against Ms. Houston during that same period. Gold Decl. ¶ 4.

It is well settled under Texas law that "[s]ilence or inaction, for so long a period as to show an intention to yield the known right, is enough to prove waiver" of a contractual right. *Griffith v. Lone Star FLCA*, 2022 WL 1289559, at *4 (N.D. Tex. Apr. 28, 2022), *aff'd sub nom. Matter of Griffith*, 2023 WL 1095133 (5th Cir. Jan. 30, 2023). This is particularly true, where, as here, the party also undertook significant efforts litigating in an alternative forum and the opposing party is prejudiced by the eleventh-hour dispute over forum. *See Hampton v. Equity Tr. Co.*, 736 F. App'x at 436-437 (finding enforcement of forum selection clause was waived); *In re Mirant Corp.*, 613 F.3d 584, 592 (5th Cir. 2010) (affirming finding of waiver related to contractual arbitration rights); *MC Asset Recovery, LLC v. Castex Energy, Inc.*, 2009 WL 900745, at *3 (N.D. Tex. Apr. 3, 2009) ("it is not enough merely to express a potential intention" to pursue a right in the future).

Accordingly, JPay's claims also fail in their entirety for this separate and additional reason.

F. JPay's Causes of Action for Injunctive Relief Also Fail.

1. Injunction Is a Remedy, Not a Cause of Action.

In this action, JPay brings two causes of action for "injunctive relief." However, "[i]njunctive relief is an equitable remedy, not an independent cause of action." *Okpa v. Bank of New York Mellon*, 2019 WL 1460394, at *1 (N.D. Tex. Mar. 5, 2019). "In other words, although a request for injunctive relief arises out of a cause of action, the remedy sought and the cause of action itself are separate and distinct." *La. Crisis Assistance Ctr. v. Marzano-Lesnevich*, 878 F. Supp. 2d 662, 669 (E.D. La. 2012). As a result, "a request for injunctive relief absent an underlying cause of action is fatally defective." *Thomas v. EMC Mortg. Corp.*, 499 F. App'x 337, 343 n.15 (5th Cir. 2012); *Crook v. Galaviz*, 616 F. App'x 747, 753 (5th Cir. 2015) ("An injunction is a remedy that must be supported by an underlying cause of action . . . .").

In the Complaint, JPay does not tie its two causes of action for "injunctive relief" to any specific substantive cause of action and instead pleads them as standalone counts. Compl. ¶¶ 32-37, 44-49. As a result, these supposed causes of action cannot proceed and Counts 2 and 4 should be dismissed pursuant to Rule 12(b)(6). *See, e.g.*, *Holt v. Deutsche Bank Nat'l Tr. Co.*, 2016 WL 1633254, at *2 (N.D. Tex. Apr. 20, 2016) (dismissing standalone claim for injunctive relief); *Green v. Wells Fargo Bank, N.A.*, 2017 WL 2364334, at *2 (N.D. Tex. May 30, 2017) (same).

2. JPay Has Failed to Plausibly Allege Each of the Required Injunction Elements.

Even if an injunction were a standalone cause of action (it is not), it would not change the result because JPay has failed to allege each of the four elements required for an injunction.

In order to secure an injunction a party must establish: "(1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 533 (5th Cir. 2016). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do," and such conclusory pleadings should be dismissed under Rule 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

JPay has failed to satisfy its pleading obligations with regard to all elements of an injunction. ***First,*** as otherwise demonstrated in this brief, JPay's allegations in the Complaint are insufficient to show that it will prevail on the merits because each cause of action claimed by JPay fails as a matter of law. "Because . . . there is no underlying cause of action for which the Court can provide this equitable remedy. . . Plaintiffs' request for injunctive relief fails as a matter of law." *Wildy v. Wells Fargo Bank, NA*, 2013 WL 246860, at *6 (N.D. Tex. Jan. 21, 2013).

Second, JPay has failed to plead any ***facts*** showing that it will suffer an irreparable injury, the second element required for injunctive relief. While JPay has included a single boilerplate

allegation that "[i]f Ms. Houston is allowed to make an arbitral challenge to the Texas Agreements' class waiver as to the Pre-Waiver Putative Class Members, JPay will be irreparably harmed,"[7] "the Fifth Circuit has held that conclusory allegations are not sufficient to show entitlement to injunctive relief." *Karl v. Jenkins*, 2017 WL 3446542, at *1 (E.D. Tex. July 24, 2017).[8]

Finally, JPay's Complaint does not even address the ***third*** and ***fourth*** elements required for an injunction, that the claimed injury outweighs any damage that the injunction will cause the opposing party and that the injunction will not disserve the public interest. *See* Compl. ¶¶ 32-37, 44-49 (alleging claims for injunctive relief but failing to plead any allegations related to the third and fourth elements). As a result, even if the Court were to find that JPay's barebones, boilerplate allegations of the first two elements were sufficient (they are not), dismissal would still be required because there are simply no allegations in any form to support the existence of the third and fourth elements required for an injunction. *See, e.g.*, *Ybarra v. Wells Fargo Bank, N.A.*, 575 F. App'x 471, 474 (5th Cir. 2014) (affirming dismissal where party failed to plead each element).

Accordingly, Counts 2 and 4 should be dismissed for this additional reason.

G. In the Alternative, this Court Should Exercise Its Discretion and Dismiss this Declaratory Judgment Action.

1. Legal Standard.

Pursuant to the Declaratory Judgment Act, a court "**may** declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added).

[7] Compl. ¶ 45; *id.* ¶ 33 (making same boilerplate allegation as to the post-waiver group). Further, with no class certified, the rights of absent class members are not presently at issue in the Arbitration.

[8] Indeed, if JPay actually believed it would be irreparably harmed, with the Arbitration continuing during the pendency of this action, it undoubtedly would have moved this Court for a preliminary injunction. JPay, however, has not even sought a stay of the Arbitration and has represented to the Panel that it does not intend to seek one. *See* Gold Decl. ¶ 7.

The decision whether to exercise jurisdiction over a declaratory judgment action is within the discretion of the district court. *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590 (5th Cir. 1994); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The Fifth Circuit has identified seven non-exclusive factors, referred to as the "*Trejo* factors," to determine whether abstention is appropriate:

> (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated;
>
> (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
>
> (3) whether the plaintiff engaged in forum shopping in bringing the suit;
>
> (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
>
> (5) whether the federal court is a convenient forum for the parties and witnesses;
>
> (6) whether retaining the lawsuit [in federal court] would serve the purposes of judicial economy; and
>
> (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

Sherwin-Williams Co. v. Holmes Cnty., 343 F.3d 383, 388 (5th Cir. 2003) (citing *Trejo*).

2. The *Trejo* Factors Confirm that this Court Should Decline Jurisdiction Over this Declaratory Judgement Action.

As demonstrated below, the first six *Trejo* factors all favor dismissal and the seventh *Trejo* factor (related to existing state court judgments) is not at issue here. Accordingly, this Court should exercise its discretion and dismiss this declaratory judgment action.

a. The First Factor—the Pendency of Another Action—Favors Dismissal.

The first *Trejo* factor, the pendency of another action, favors dismissal because JPay seeks a declaration related to rights that are already at issue in the Arbitration. *See Layman v. City of Peoria, Illinois*, 352 F. Supp. 3d 874, 880 (C.D. Ill. 2018) (existing arbitration was a parallel action

and dismissing declaratory judgment action). Indeed, JPay is explicit about this point in the Complaint, contending that "JPay now requests the Court declare the Arbitrators are without authority to decide the issue Ms. Houston asks them to adjudicate." Compl. ¶ 25.

It is well settled that "[d]eclaratory relief, of course, may not be used to supplant the role of the arbitrator in interpreting the provisions of [a] contract." *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Loc. No. 2322*, 651 F.3d 176, 190 (1st Cir. 2011). Here, because JPay seeks to use this declaratory judgment action to usurp the first-filed Arbitration—a case that has been pending for over seven years—the first *Trejo* factor weighs in favor of declining jurisdiction. *See, e.g.*, *Torch, Inc. v. LeBlanc*, 947 F.2d 193, 195 (5th Cir. 1991) (affirming dismissal of declaratory judgment where first-filed action "will resolve all the issues present").

b. The Second, Third, and Fourth Factors—Anticipatory Filing, Forum Shopping, and Inequities—Also Favor Dismissal.

"The next three *Trejo* factors consider whether the declaratory judgment plaintiff filed suit in anticipation of a lawsuit filed by the defendant, engaged in forum shopping in bringing the action, and would create potential inequities by gaining precedence in time or changing forums. These factors raise . . . concerns about fairness." *Koch Project Sols., L.L.C. v. All. Process Partners, L.L.C.*, 2022 WL 16859961, at *6 (5th Cir. Nov. 11, 2022). These factors support dismissal where the declaratory judgment action was filed to gain an unfair advantage over the earlier filed action. As the Fifth Circuit recently explained:

> The [district] court correctly recognized that the federal proceeding was "not filed in anticipation of, but in response to" the state proceeding. Nevertheless, the court concluded that this response was unfair. . . . ***[T]he declaratory action was in fact, an effort [] not only to forum shop, but also to gain precedence by having this court instead . . . decide the issues***. . . .
>
> The overlap . . . [in] proceedings suggests that [plaintiff] intends to reassign adjudication of shared legal and factual issues to the federal court. [Plaintiff] says as much in its federal complaint. . . . ***The purpose of its lawsuit is to have the federal court declare [defendants'] state court allegations wrong.***

> . . . . When federal and state court actions are related, the federal action risks changing forums or subverting the real plaintiff's advantage in state court. . . . ***In this case, the relationship between . . . proceedings threatens impermissible meddling . . . . This threat supports the district court's conclusion that, in sum, the fairness factors favor a stay.***

Id. (emphasis added).

Here the Arbitration has been pending since October 2015, fact discovery for the interim discovery period closed in December 2022 before this federal action was even filed, the parties are in the midst of expert discovery, and a hearing on class certification is set to occur later this year. Gold Decl. ¶ 5. JPay filed this declaratory judgment action at the eleventh hour after unilaterally modifying the JPay terms of service to attempt to permit litigation in this Court (*see* Section G, Background, above), and only after the Eleventh Circuit, the Southern District of Florida, and the Arbitration Panel had all ruled against it, and the United States Supreme Court had denied certiorari.[9] Put simply, JPay's efforts to rig the dispute in its favor by shopping for a new forum are facially clear, and, as a result, the second, third, and fourth *Trejo* factors also all favor dismissal.

c. The Fifth Factor—the Inconvenience of the Forum—Favors Dismissal.

As JPay's Complaint makes clear, this Texas federal action involves a resident of **Georgia** (Ms. Houston), who transacts business with a company based in **Florida** that is incorporated under the laws of **Delaware** (JPay), to send money to a loved one in **Louisiana**. Compl. ¶¶ 1-2; *id.* at Ex. 2 ¶¶ 79-88. As detailed in Section G, Background, above, the only connection that this case has to this forum is an invalid forum selection clause that JPay unilaterally inserted into the 2021 and 2022 Amended Terms of Service. In fact, all but one of the witnesses put forward by JPay for deposition in the Arbitration are based in **Florida**, and none of Ms. Houston's witnesses are based

[9] *JPay, Inc. v. Kobel*, 904 F.3d 923, 944 (11th Cir. 2018); *JPay, Inc. v. Kobel*, 2020 WL 5763930, at *4 (S.D. Fla. Sept. 28, 2020); Compl. ¶ 10; *JPay, Inc. v. Kobel,* 139 S. Ct. 1545 (2019).

in Texas. Gold Decl. ¶ 6. This forum has no connection to the dispute, and forcing Ms. Houston to litigate here would create unnecessary complications and burdens on the parties and witnesses. Accordingly, the fifth factor, the inconvenience of the forum, also favors dismissal.

d. Finally, the Sixth Factor—Lack of Judicial Economy—Favors Dismissal.

There are two forums where disputes arising between the parties related to JPay's services can be efficiently litigated—in the Arbitration, where the Panel of three retired judges has presided over the case for years, and in the Southern District of Florida, where JPay's earlier attacks on its own arbitration clause were litigated (and lost). In contrast, this Court has no experience with the dispute between the parties, and would have to review a substantial and complicated record spanning over seven years of litigation from the Arbitration, the Southern District of Florida, the Eleventh Circuit, and the United States Supreme Court.

Further, to promote judicial economy, the Fifth Circuit has made clear that a court should "avoid duplicative or piecemeal litigation where possible" under the Declaratory Judgment Act, *Sherwin-Williams*, 343 F.3d at 391, and that where, as here, the declaratory judgment action can only resolve some (but not all) of the issues in the first-filed case, that the court should instead use its discretion to defer to the first-filed action, *Koch Project*, 2022 WL 16859961, at *7. As JPay concedes in the Complaint, it "is not challenging Ms. Houston's right to proceed with a putative class arbitration in some respect," Compl. ¶ 20, and, as a result, this declaratory judgment action cannot possibly resolve all outstanding issues that could be resolved in the Arbitration. Accordingly, judicial economy also favors dismissal.

As detailed above, the first six *Trejo* factors strongly favor this Court exercising its discretion and declining to exercise jurisdiction over this declaratory judgment action.[10]

CONCLUSION

For the reasons stated above, Ms. Houston respectfully asks that this Court dismiss JPay's claims in their entirety.

Date: February 28, 2023

Respectfully submitted,

/s/ Ellen A. Presby

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[10] The final *Trejo* factor addresses whether the declaratory judgment action requires the construction of earlier state court proceedings. "Because this court is not being called upon to construe a state judicial decree, the seventh factor is not relevant." *Koch Project Sols., LLC v. All. Process Partners, LLC*, 2021 WL 231313, at *10 (S.D. Tex. Jan. 22, 2021).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JPAY LLC, A Delaware Limited Liability Company, Plaintiff, vs. SHALANDA HOUSTON, Defendant.	Civil Action No.: 3:23-cv-00165

DECLARATION OF ANDREA GOLD IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I, Andrea Gold, declare as follows:

1. I am a partner at the law firm of Tycko & Zavareei LLP, and counsel for Defendant in the above-captioned matter. I have been admitted pro hac vice to the United States District Court for the Northern District of Texas for the above-captioned action. *See* ECF No. 15.

2. I am also counsel of record for Ms. Houston in *Kobel v. JPay, Inc.*, No. 01-15-0005-3477 (Am. Arb. Ass'n) (the "Arbitration"), *JPay, Inc. v. Kobel*, No. 1:16-cv-20121 (S.D. Fla.) ("Southern District of Florida Case"), *JPay, Inc. v. Kobel*, No. 17-13611 (11th Cir.), and *JPay, Inc. v. Kobel*, No. 18-811 (U.S.).

3. The facts set forth in this declaration are based on my personal knowledge, and if called upon, I could and would testify competently as to these matters.

4. Between August 18, 2021 and January 19, 2023, JPay did not attempt to enforce its alleged right to adjudicate the class waiver in a Texas court under Texas law against Ms. Houston in the Arbitration.

5. The Arbitration has been pending since October 16, 2015, and fact discovery for

the interim discovery period closed on December 30, 2022 (except as to a single document production, which the Panel authorized JPay to produce in January 2023). Currently, the parties are conducting expert discovery. A hearing on class certification is set to occur later this year.

6. In the Arbitration, only one of the witnesses that JPay put forward for deposition is based in Texas; all others are based in Florida. Further, Ms. Houston did not put forward any witnesses that are based in Texas.

7. To date, JPay has not sought a stay of the Arbitration, even after filing the instant action, and has represented to the Arbitration Panel that it does not intend to seek one.

8. Attached hereto as **Exhibit A** is a true and correct copy of the United States Court of Appeals for the Eleventh Circuit's order entered on or about September 19, 2018 in *JPay, Inc. v. Kobel*, No. 17-13611, ECF No. 37-1.

9. Attached hereto as **Exhibit B** is a true and correct copy of the Supreme Court of the United States' order denying the petition for a writ of certiorari seeking review of the Eleventh Circuit's decision entered on or about April 15, 2019.

10. Attached hereto as **Exhibit C** is a true and correct copy of the United States District Court for the Southern District of Florida's order entered on or about September 28, 2020 in *JPay, Inc. v. Kobel*, No. 16-20121.

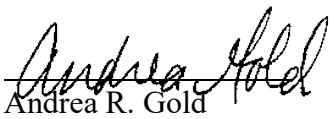
11. Attached hereto as **Exhibit D** is a true and correct copy of JPay, Inc.'s corrected complaint and attachments in *JPay, Inc. v. Kobel*, Southern District of Florida Case No. 1:16-cv-20121.

12. Attached hereto as **Exhibit E** is a true and correct copy of the Arbitration Panel's Opinion, Order and Award on Clause Construction, which is publicly on file and part of the official record in *JPay, Inc. v. Kobel*, Southern District of Florida Case No. 1:16-cv-20121.

13. Attached hereto as **Exhibit F** is a true and correct copy of JPay's Application to Partially Vacate Arbitration Award (without its related exhibits), which is publicly on file and part of the official record in *JPay, Inc. v. Kobel*, Southern District of Florida Case No. 1:16-cv-20121.

14. Attached hereto as **Exhibit G** is a true and correct copy of Claimants' Notice of Amendment to Requested Relief Re Length of Class Discovery Period filed with the American Arbitration Assocation on February 24, 2023 in the Arbitration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 28th day of February 2023 in Kensington, Maryland.



Andrea R. Gold

EXHIBIT A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13611

D.C. Docket No. 1:16-cv-20121-DPG

JPAY, INC.,

Plaintiff - Appellee,

versus

CYNTHIA KOBEL,
SHALANDA HOUSTON,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(September 19, 2018)

Before MARCUS and WILSON, Circuit Judges, and GRAHAM,* District Judge.

MARCUS, Circuit Judge:

At issue today is a question at the intersection of arbitration and class action jurisprudence, a question that has been expressly left open by the Supreme Court and which comes to this Circuit as a matter of first impression. The parties agree that their disputes will be settled in arbitration, but disagree as to whether that arbitration can proceed on a class basis. Further, they disagree about who -- a court or an arbitrator -- should decide whether the arbitration can proceed on a class basis. We must decide as a matter of first impression whether the availability of a class is a "question of arbitrability" that presumptively goes to a court. If we hold that it is -- and we do so today -- we must then decide whether the terms of the parties' agreement evince a clear and unmistakable intent to overcome that presumption.

Cynthia Kobel and Shalanda Houston sought to compel arbitration on a class basis with JPay, Inc., a Miami-based company that provides fee-for-service amenities in prisons in more than thirty states. JPay asked a district court to put a stop to the class proceeding and to force Kobel and Houston to arbitrate only their own claims. The district court granted summary judgment in JPay's favor, holding

* Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

that the availability of class arbitration was a "question of arbitrability," which meant that it was presumptively for the court to decide; that nothing in the terms of this agreement rebutted that presumption; and finally that class arbitration was not available under the terms of the agreement. Thus, a court, not an arbitrator, would resolve, and the district court did resolve, whether the arbitration could proceed on a class basis.

After careful review, we are satisfied that the district court correctly determined that the availability of class arbitration is a "question of arbitrability," presumptively for the court to decide, because it is the kind of gateway question that determines the type of dispute that will be arbitrated. Courts cannot assume that parties would want these kinds of questions to be arbitrated unless an agreement evinces a clear and unmistakable intent to send them to arbitration. However, we also conclude that the language these parties used in their contract expressed their clear intent to overcome the default presumption and to arbitrate gateway questions of arbitrability, including the availability of class arbitration.

Accordingly, we vacate the grant of summary judgment to JPay, reverse the denial of Kobel and Houston's motion to compel arbitration, and remand for proceedings consistent with this opinion. See Parnell v. CashCall, Inc., 804 F.3d 1142, 1149 (11th Cir. 2015). The parties agreed, and we are required to give

meaning to their agreement and to enforce their will. Thus, an arbitrator will decide whether the arbitration can proceed on a class basis.

I.

JPay's services allow friends and family of inmates around the country to purchase various goods and services on inmates' behalf. These include video chats, music downloads, and, most relevant here, money transfers to inmates' accounts. Cynthia Kobel and Shalanda Houston each used JPay services to send electronic money transfers to inmates. Like all JPay users, they agreed to JPay's Terms of Service, including to the following language, which requires that any dispute that might arise between the company and its users be resolved through arbitration:

> In the event of any dispute, claim or controversy among the parties arising out of or relating to this Agreement that involves a claim by the User for less than $10,000, exclusive of interest, arbitration fees and costs, shall be resolved by and through arbitration administered by the American Arbitration Association ("AAA") under its Arbitration Rules for the Resolution of Consumer Related Disputes. Any other dispute, claim or controversy among the parties arising out of or relating to this Agreement shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules. The ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration. The arbitration proceeding shall be conducted in as expedited a manner as is then permitted by the rules of the American Arbitration Association. Both the foregoing Agreement of the parties to arbitrate any and all such disputes, claims and controversies, and the results, determinations, findings, judgments and/or awards rendered through any such arbitration shall be final and binding on the parties and may

> be specifically enforced by legal proceedings in any court of competent jurisdiction.

(emphasis added).

On October 16, 2015, Kobel and Houston filed a Demand for Arbitration against JPay with the AAA. They alleged contractual violations and violation of a Florida consumer protection statute. They said that JPay charged "exorbitant transfer fees" for money-transfers, and used these fees to fund kickbacks to corrections departments. Further, they alleged that JPay dissuaded users from sending money through paper money orders -- a free alternative to JPay transfers -- by intentionally making the money order process slow and complicated and by deceptively marketing money orders as unreliable. Kobel and Houston sought to represent a class consisting of "[a]ll natural persons who paid a fee to JPay for electronic money-transfer services and who agreed to arbitrate their claims with [JPay]."

JPay responded by filing a complaint in Florida state court (the Eleventh Judicial Circuit in Miami-Dade County) seeking declaratory relief specifying the parties' rights and duties under the arbitration provision, seeking to stay class arbitration, and seeking to compel bilateral arbitration of the underlying claims. Kobel and Houston removed the case to federal court in the Southern District of Florida, invoking diversity jurisdiction under the Class Action Fairness Act of

2005, Pub. L. No. 109-2, 119 Stat. 4. 28 U.S.C. § 1332(d).[1] Kobel and Houston then moved to compel arbitration on the question of whether class arbitration was available under JPay's Terms of Service. Their view was that the parties had expressly agreed to arbitrate whether they were entitled to class relief, and therefore that the district court was required to leave that question to the arbitrator. The appellants also sought to stay the federal court proceedings pending the outcome of that arbitration. JPay, in turn, asked the district court for summary judgment, arguing that while it had agreed to arbitrate with its users on a bilateral basis, it had never consented to arbitrate on a class basis. Further, JPay said that a federal court -- not an arbitrator -- should determine whether class arbitration was available.

The district court denied the motion to compel arbitration, finding that the availability of class arbitration was a substantive "question of arbitrability," presumptively for the court to decide, and that the Terms of Service did not clearly and unmistakably evince an intent to overcome this presumption and to send the question to arbitration. Kobel and Houston appealed that determination to this Court, but we dismissed the interlocutory appeal for lack of jurisdiction. JPay, Inc. v. Kobel, No. 16-12917-EE (11th Cir. Jan. 23, 2017). The district court then

[1] In relevant part, and subject to certain exceptions, 28 U.S.C. § 1332 gives federal district courts jurisdiction over class actions in which the amount in controversy (aggregating the class members' claims) exceeds $5 million, the class includes 100 or more individuals, and at least one member of the class is diverse from any defendant. 28 U.S.C. § 1332(d).

granted JPay's motion for summary judgment. It determined that class arbitration was not available under the parties' agreement because the agreement was silent on the availability of class arbitration and the availability of class arbitration could not be implied from the agreement.

Kobel and Houston timely appealed to this Court.

II.

"We review de novo both the district court's denial of a motion to compel arbitration and the district court's interpretation of an arbitration clause." Jones v. Waffle House, Inc., 866 F.3d 1257, 1263 (11th Cir. 2017) (citations omitted).

Arbitration is a matter of contract and of consent. "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648–49 (1986). The Federal Arbitration Act ("FAA"), Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1 et seq.), treats contractual agreements to arbitrate "on an equal footing with other contracts," Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010), and "imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) (quotation omitted). The FAA "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that

arbitration is a matter of contract." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quotations and citation omitted). Where the parties have agreed to arbitrate their dispute, the job of the courts -- indeed, the obligation -- is to enforce that agreement. See, e.g., Stolt-Nielsen, 559 U.S. at 682 ("[T]he central or 'primary' purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." (quotation omitted)). At the same time, courts may not require arbitration beyond the scope of the contractual agreement, because "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

When, despite our best interpretive efforts, a contract is ambiguous or silent on the parties' intent to arbitrate a particular question, we work from a set of default presumptions, laid out by the Supreme Court, which help us determine what the contracting parties intended. See, e.g., Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (describing the inquiry into whether a question should be sent to arbitration as an attempt to identify whether "contracting parties would likely have expected a court to have decided"). "[A]ny doubts concerning the scope of arbitrable issues" -- that is, doubts over whether an issue falls within the ambit of what the parties agreed to arbitrate -- "should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1,

24–25 (1983). This is because parties whose contract "provides for arbitration of some issues . . . likely gave at least some thought to the scope of arbitration." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995). In these circumstances, we apply "the law's permissive policies in respect to arbitration" and send to arbitration the question that is arguably within the agreement's scope. Id. The reasoning behind this rule is that if the parties thought about what they wanted to arbitrate, we can safely assume they thought about and articulated what they didn't want to arbitrate. We assume their intent to arbitrate anything not specifically excluded.

Notably, this presumption is reversed, however, when the contract presents ambiguity on the assignment of a "question of arbitrability" -- when it is unclear "whether a party has agreed that arbitrators should decide arbitrability." Id. at 944 (emphasis added). Questions of arbitrability, often described as "gateway" questions, e.g., Rent-A-Ctr., 561 U.S at 68–69, are higher-order questions. They are presumptively for the courts because, as the Supreme Court put it, they are "rather arcane," and because we cannot presume they crossed the parties' minds. First Options, 514 U.S. at 945. "A party often might not focus . . . upon the significance of having arbitrators decide the scope of their own powers," id., and so, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability," but instead should presume that the question remains with the court. Id. at 944;

AT&T Techs., 475 U.S. at 649 ("[T]he question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). Assuming that the parties agreed to arbitrate arbitrability "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." First Options, 514 U.S. at 945. Thus, we require "clear and unmistakable evidence" of intent before we send questions of arbitrability to arbitration. Id. at 944 (alterations omitted) (quoting AT&T Techs., 475 U.S. at 649); Waffle House, 866 F.3d at 1267.

To summarize, then, when faced with "silence or ambiguity about the question whether a particular merits-related dispute is arbitrable," we presume that an arbitrator will decide the merits-related dispute. First Options, 514 U.S. at 944 (quotations omitted). But, when faced with "silence or ambiguity about the question 'who (primarily) should decide arbitrability,'" we presume that a court will decide arbitrability. Id. Questions of arbitrability, then, stay with the court "unless there is 'clear and unmistakable evidence' that the parties intended to submit such questions to an arbitrator." Dean Witter Reynolds, Inc. v. Fleury, 138 F.3d 1339, 1342–43 (11th Cir. 1998) (emphasis added); see also Howsam, 537 U.S. at 83.

We start, then with our first question: whether the availability of class arbitration is a question of arbitrability, presumptively for the courts to decide. Because we answer the question affirmatively and hold that this question is presumptively for the courts and not the arbitrator, we must answer the second question in this case: whether the words the parties used in their agreement "clearly and unmistakably provide" that the parties intended to overcome the default presumption and delegate the question to arbitration. Howsam, 537 U.S. at 83. After close review of the words these parties used in their agreement, we hold that they clearly intended to send the matter to arbitration for decision.

A.

A question of arbitrability is one of a narrow range of "potentially dispositive gateway question[s]," specifically one that "contracting parties would likely have expected a court to . . . decide[]." Howsam 537 U.S. at 83. These are fundamental questions that will determine whether a claim will be brought before an arbitrator, and include questions about whether particular parties are bound by an arbitration clause and questions about whether a clause "applies to a particular type of controversy." Id. at 84. Because we will not compel anyone to arbitrate if we aren't confident they have agreed to do so, we presume that parties would have expected a court to answer questions of arbitrability. First Options, 514 U.S. at 945; see John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546–47 (1963)

("Under our decisions, whether or not the [party] was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.").

As we see it, questions of arbitrability are better understood as substantive questions, rather than as "procedural" issues "which grow out of the dispute and bear on its final disposition." Howsam, 537 U.S. at 84; see also id. at 85 (quoting approvingly a uniform law describing that "in the absence of an agreement to the contrary, issues of substantive arbitrability are for a court to decide and issues of procedural arbitrability . . . are for the arbitrators to decide" (alteration omitted) (quoting Revised Unif. Arbitration Act § 6 cmt. 2 (Nat'l Conference of Comm'rs on Unif. State Laws 2000))). "Procedural" questions are presumptively for the arbitrator to decide. They include whether the parties have fulfilled "prerequisites to arbitration," like time limits or notice requirements, as well as defenses like waiver and delay. Id. at 84–85.

We have no binding precedent on whether the availability of class arbitration is a fundamental question of arbitrability for the courts. Fifteen years ago, a Supreme Court plurality held that it was not a question of arbitrability for the courts to decide, in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003). There, four justices reasoned that the availability of class arbitration "concern[ed] neither the validity of the arbitration clause nor its applicability to the underlying

dispute," but rather "concern[ed] contract interpretation and arbitration procedures" which arbitrators were "well situated" to analyze. Id. at 452–53 (plurality opinion). Kobel and Houston urge that we follow Bazzle and hold that class availability is a "procedural" question. Unfortunately for them, the Court has since emphasized on two occasions that the Bazzle plurality's holding is nonbinding and that the question remains an open one. First, in Stolt-Nielsen S. A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), the Court noted that in Bazzle, "no single rationale commanded a majority," id. at 678, and thus, that "Bazzle did not yield a majority decision" on the question of who, by default, decides whether class arbitration is available, id. at 679. Again, and unanimously, in Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013), the Justices told us that "this Court has not yet decided whether the availability of class arbitration is a question of arbitrability." Id. at 569–70 n.2. Although neither case states explicitly that the Bazzle plurality was incorrect, the Court has repeated that we are not bound by it. This necessarily would lead us to proceed cautiously even if we found Bazzle's reasoning persuasive. Without an answer from the Supreme Court or from our own precedents, we are required to conduct our own analysis. See S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352, 1359 n.6 (11th Cir. 2013) ("Like the Supreme Court, we also have not decided whether the availability of class arbitration is a question of arbitrability."); see also Spirit Airlines v. Maizes,

No. 17-14415, 2018 WL 3866335 at *4 n.5 (Aug. 15, 2018). Lacking any controlling precedent, we conclude for the first time in this Circuit that the availability of class arbitration is a question of arbitrability, presumptively for the courts to decide.

The availability of class arbitration is a "potentially dispositive gateway question." Howsam, 537 U.S. at 83. The availability of class arbitration is a gateway or threshold question, both formally and functionally. Formally, the question whether class arbitration is available will determine the scope of the arbitration proceedings. In class arbitration, like in a class action, representative plaintiffs make their case before the adjudicator on behalf of a host of similarly situated plaintiffs who will have the opportunity to collect damages if the class wins. Procedures like notice requirements and opt-out opportunities protect the interests of these absent class members, but, nonetheless, allowing a class proceeding means determining the rights of many parties who are not actively involved, not represented by their own counsel, and, in all likelihood, not paying attention. Class availability opens a "gateway" to the arbitration proceedings, through which thousands of these absent class members might pass if a class is available. If, on the other hand, a class is not available, the representative plaintiffs, here, Kobel and Houston, will argue only for themselves. From a defendant's perspective the size of the "gateway" is important because class

arbitration is much more time consuming and complex -- it requires different allocations of resources and attention, and possibly different counsel, as compared with the alternative of hundreds of individual arbitrations, each of which would be a fairly simple proceeding.

Functionally, too, this is a gateway question. Many, if not most, putative class proceedings, are for relatively small-dollar claims. If claimants must act on an individual basis, the cost of arbitrating any single claim would certainly outweigh their expected recovery. No single bilateral arbitration would be rational. Only by joining together as a class do they make arbitration efficient. Essentially, the plaintiffs pool their resources, paying one filing fee, and paying one team of attorneys to argue on behalf of the whole class. Each plaintiff still stands to recover only a small dollar amount, but they won't have to spend as much to prosecute their claim. In many cases, they won't end up paying anything because the parties will reach a settlement whereby the defendant pays attorney's fees. This increases liability for defendants like JPay because many consumer plaintiffs who would never have dreamed of taking the time to pursue claims on their own will be perfectly happy to collect their share of the recovery earned in class proceedings conducted on their behalf but without their knowledge. Class proceedings will thus remove the economic barrier blocking the "gateway" to arbitration for many plaintiffs.

Identifying class availability as a potentially dispositive gateway question does not conclude our analysis, though, because "the phrase 'question of arbitrability' has a far more limited scope." Howsam, 537 U.S. at 83. Plenty of gateway matters could dispose of a case, but questions of arbitrability only arise in the "narrow circumstance where contracting parties would likely have expected a court to decide the gateway matter." Id. The Court has been perfectly comfortable assuming that parties to an agreement implicitly agreed to arbitrate "procedural" matters like whether prerequisites to arbitration were fulfilled, whether waiver or delay defenses are available, or whether plaintiffs have run into trouble with "time limits, notice, laches, estoppel," and the like. Id. at 84–85. If the parties agreed to arbitrate something, but were silent on these sorts of "procedural" questions, the Court hasn't thought it unfair to throw these to arbitration as well, even if the case's disposition might depend on the answer. See id. at 83–84. The Court has identified, in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), only two categories presenting the "narrow circumstance" in which we presume that the question remains with the courts. See id. at 83–84. These two categories of questions of arbitrability -- presumptively for the courts to decide -- are questions "about whether the parties are bound by a given arbitration clause"[2] and questions

[2] Because we are confident that the availability of class arbitration falls in the second category identified in Howsam, we need not decide the more difficult question whether it falls in this first

"about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." Id. at 84.

The availability of class arbitration fits squarely in the second category because it relates to "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." Howsam, 537 U.S. at 84. A class-based proceeding yields "fundamental changes" in the arbitration process, as the Supreme Court has emphasized in related contexts. Stolt-Nielsen, 559 U.S. at 686 ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." Id. at 685.). Class arbitration is very different from bilateral arbitration in several important ways identified by the Court: Bilateral arbitration is designed to be more efficient than litigation in court, but class arbitration is complex, forfeiting some of the efficiency that parties likely hoped to achieve by agreeing to arbitrate. See id. at 685–86. Similarly, class arbitration, involving more parties, is less confidential than bilateral arbitration, undermining another key advantage of arbitration. See id. at 686. Class arbitration, like a class

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one. The Third Circuit has said that class availability does relate to "whether the parties are bound by a given arbitration clause" because the inclusion or exclusion of absent class members concerns "whose claims an arbitrator may decide." Opalinski v. Robert Half Int'l, Inc., 761 F.3d 326, 332 (3d Cir. 2014). On the other hand, class availability does not relate to whether any particular party is bound to arbitrate its claims, but only to whether they may be arbitrated together. So the availability of a class could be seen as lacking any effect on whose claims the arbitrator may decide and as only influencing whose claims the arbitrator will decide in a given proceeding.

action, can bind absent parties in a way that bilateral proceedings would not. See id. Class arbitration also entails a significant increase in a defendant's potential liability, while retaining the relatively limited scope of judicial review available following an arbitration decision. See id. at 686–87; see also Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 588 (2008) (holding that the FAA permits "just the limited review [of arbitration decisions] needed to maintain arbitration's essential virtue of resolving disputes straightaway" and not "full-bore legal and evidentiary appeals"). Class arbitration is, therefore, a different "type" of proceeding, and we should assume that parties contracting to arbitrate their disputes would still typically have wanted a court to decide whether it was available.

The Supreme Court's analysis in Stolt-Nielsen, and Sutter supports our conclusion. Thus, for example, in Sutter, the Supreme Court observed that "Stolt-Nielsen flagged that [class availability] might be a question of arbitrability." Sutter, 569 U.S. at 570 n.2. In Stolt-Nielsen, the parties agreed that they had "expressly assigned . . . to the arbitration panel" the question whether a class was available. Stolt-Nielsen, 559 U.S. at 680. Unlike in our case, the Court did not have occasion to consider whether class availability was a question of arbitrability presumptively for the court to decide, or a question for the arbitrators, because the express assignment overcame any presumption otherwise. See id. With the "who

decides" question settled, the Court only faced and only decided the underlying merits question of whether class arbitration was available, and held that class arbitration could not be compelled absent a "contractual basis" on which the parties could be said to have agreed to class proceedings. Id. at 684. Class proceedings were simply too different, for the reasons we have stated -- less efficiency, less confidentiality, impact on absent parties, and increased liability, yet with only the weak judicial review given to arbitral decisions. See id. at 686–87. The following term, in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), the Court reiterated and expanded on these differences. Id. at 346–51. Again, unlike in our case, the question of "who decides" was not at issue; these differences were discussed in the context of evaluating whether a California Supreme Court doctrine that would have forced parties into class arbitration without their explicit consent was preempted by the FAA (it was). See id. at 348.

Neither Stolt-Nielsen nor Concepcion considered whether class arbitration is the same "type" of controversy as bilateral arbitration, but, because the Court has been so clear that these distinctions are highly significant, we find these cases relevant to our consideration of that question. If class proceedings are available, the arbitration is fundamentally changed. Thus, we cannot read consent to arbitration and silence on the class availability question as necessarily implying

consent to an arbitrator's deciding whether a very different "type" of proceeding is available. As a result, class availability is a question of arbitrability.

Our view is confirmed because the availability of class arbitration does not present a "procedural" question of the sort that is presumptively for the arbitrator to decide. See Howsam, 537 U.S. at 84–85 (identifying such questions as "presumptively not for the judge, but for an arbitrator," id. at 84). Stolt-Nielsen is again instructive. There, the Supreme Court rejected the idea that class arbitration was "merely [a] 'procedural mode.'" Stolt-Nielsen, 559 U.S. at 687. If the question were merely one of procedure, "there would be no need to consider the parties' intent with respect to class arbitration." Id. (citing Howsam, 537 U.S. at 84). Consistent with "the consensual basis of arbitration," we must ask "whether the parties agreed to authorize class arbitration." Id. Framing the question as merely a "procedural" matter elides the real differences between bilateral and class arbitration, and undermines the parties' freedom to shape their own agreement.

The availability of class arbitration is dissimilar from those questions that courts have identified as "procedural" in this context. In an older case, the Supreme Court was faced with the questions whether an arbitration clause between an employer and a union survived the employer's merger with another corporation, and whether a court or arbitrator should make determinations about prerequisites to arbitration. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 544 (1964).

These determinations included "whether grievance procedures . . . ha[d] been followed or excused, [and] whether the unexcused failure to follow them avoid[ed] the duty to arbitrate." Id. at 557. These were "procedural" questions, not questions of arbitrability, because they presented "intertwined issues of 'substance' and 'procedure' growing out of a single dispute." Id. And, the Court added, it would be strange to "carve[] up [the intertwined issues] between two different forums," because the answers "depend[ed] to a large extent on how one answers questions bearing on the basic issue" to be arbitrated, which related to the effect of the merger on the parties' contract. Id. Since the underlying dispute would be arbitrated, questions about whether the prerequisites had been met were "procedural" and did not call into question the arbitrability of the dispute.

The availability of class arbitration is not the same kind of question. Whether class proceedings are available does not depend on how one views the "basic issue" -- the merits of the case -- but is a separate matter of contract interpretation. Here, a court could review JPay's Terms of Service for intent to arbitrate on a class basis without considering JPay's business practices in the least. Nor is class availability the kind of obviously "procedural" prerequisite that derives from the terms of the contract. See, e.g., Howsam, 537 U.S. at 85 (identifying as "procedural" questions "whether prerequisites such as time limits,

notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met" (emphasis removed)).

Our conclusion that the availability of class arbitration is a fundamental question of arbitrability that should presumptively be decided by a court is consistent with the views of four circuits that have considered the same question since Stolt-Nielsen. The first such case was Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013), in which the Sixth Circuit considered the concerns raised in Stolt-Nielsen and Concepcion as it analyzed the differences between bilateral and class arbitration. Id. at 598. The Sixth Circuit reviewed the now-familiar concerns that these cases raise: class arbitration is less efficient and less confidential than bilateral arbitration. Id. Class proceedings also raise the stakes of arbitration for defendants and adjudicate the rights of absent parties, who must then be afforded notice, opportunities to be heard, and opt-out rights. Id. The Sixth Circuit discerned the same message we did from these cases, and found that they amounted to "the Court [having] given every indication, short of an outright holding, that classwide arbitrability is a gateway question." Id. It concluded that "whether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail" but rather presents a "gateway question" for the courts. Id. at 598–99. For the Sixth Circuit, the availability of class arbitration was even more consequential

than the availability of arbitration in and of itself, and thus there was even more reason to be careful not to force it on an unwilling party. Id. at 599.

Other circuits followed, beginning with the Third Circuit in Opalinski v. Robert Half International, Inc., 761 F.3d 326, 333–35 (3d Cir. 2014). The Fourth and Eighth Circuits reached the same conclusion, also relying heavily on Stolt-Nielsen and Concepcion. Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 971–72 (8th Cir. 2017); Dell Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 874–77 (4th Cir. 2016). Against these circuits, the California Supreme Court has expressed a contrary view, Sandquist v. Lebo Auto. Inc., 376 P.3d 506, 522–23 (Cal. 2016), and the Fifth Circuit has stood by an earlier circuit precedent that had followed the Bazzle plurality. Robinson v. J & K Admin. Mgmt. Servs., Inc., 817 F.3d 193, 197 (5th Cir. 2016) (following Pedcor Mgmt. Co. v. Nations Pers. of Tex., Inc., 343 F.3d 355 (5th Cir. 2003)). Still, every federal court of appeals to have considered the question anew since Stolt-Nielsen has determined that class availability is a fundamental question of arbitrability.

We do the same today. We hold that the availability of class arbitration is a question of arbitrability, presumptively for a court to decide, because it is a gateway question that determines what type of proceeding will determine the parties' rights and obligations. The differences between class and bilateral arbitration are substantial, and have been repeatedly emphasized by the Supreme

Court. In light of these differences, we think it likely that contracting parties would expect a court to decide whether they will arbitrate bilaterally or on a class basis. We leave the question of class availability presumptively with the court because we do not want to force parties to arbitrate so serious a question in the absence of a clear and unmistakable indication that they wanted to do so.

We note in passing that although we hold the question of class arbitration availability is properly categorized as a question of arbitrability, the question in this case would be headed for arbitration either way. This is so because we find that JPay and its users expressly delegated questions of arbitrability, and we therefore instruct the district court to compel arbitration on class availability. If, instead, we had held that class arbitration availability was a "procedural" question presumptively for the arbitrator, we would still instruct the district court to compel arbitration on class availability.

B.

Having concluded that the availability of class arbitration is a question of arbitrability, we presume that it is a question for courts to decide, and we turn to the language in the parties' agreement to determine whether anything in it clearly and unmistakably evinces a shared intent to overcome that presumption. The Supreme Court has made clear that "parties can agree to arbitrate 'gateway' questions of 'arbitrability'" because "arbitration is a matter of contract." Rent-A-

Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." Id. at 70. Since the parties plainly have it in their power to agree that an arbitrator should decide whether class arbitration is available, we turn to the language of JPay's Terms of Service and the question becomes a textual one.

1.

We find a clear and unmistakable intent to delegate questions of arbitrability to the arbitrator throughout the arbitration provision in JPay's Terms of Service. First, it references AAA rules three times. It states that any and all disputes, claims, or controversies will be resolved "by and through arbitration administered by the [AAA]" either "under its Arbitration Rules for the Resolution of Consumer Related Disputes" or "under its Commercial Arbitration Rules," and later that "[t]he arbitration proceeding shall be conducted in as expedited a manner as is then permitted by the rules of the [AAA]." Under controlling Circuit precedent, this alone serves as a clear and unmistakable delegation of questions of arbitrability to an arbitrator, a conclusion confirmed by the agreement's subsequent reference to "the rules of the [AAA]" in general terms. Second, and quite independently, the parties expressly agreed that "[t]he ability to arbitrate the dispute, claim or

controversy shall likewise be determined in the arbitration." Finally, the agreement is written in unmistakably broad terms, as the parties agreed "to arbitrate any and all such disputes, claims and controversies." (emphasis added). Either of the first two of these statements would amount to a clear and unmistakable delegation of questions of arbitrability to the arbitrator. Together, and with the addition of the third, their expression of intent is unequivocal. We address each in turn.

We begin with our case precedent -- Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005); U.S. Nutraceuticals, LLC v. Cyanotech Corp., 769 F.3d 1308 (11th Cir. 2014); and, most recently, Spirit Airlines, Inc. v. Maizes, No. 17-14415, 2018 WL 3866335 (Aug. 15, 2018). Collectively, these cases dictate that by incorporating AAA rules into an agreement parties clearly and unmistakably evince an intent to delegate questions of arbitrability. In Terminix, this Court considered an arbitration agreement that the claimant said was unenforceable because it improperly limited remedies and rights. Terminix, 432 F.3d at 1329. This question "ultimately [went] to the validity of the parties' agreement to arbitrate" -- that is, it was a question of arbitrability. Id. at 1331; see id. at 1331–32. We explained that questions like these "ordinarily" would be reviewed by a court. Id. at 1331. That default rule was overcome in Terminix, though, because the arbitration agreement at issue there provided that

"arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the [AAA]." Id. at 1332. Those rules, in turn, gave the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Id. In agreeing to arbitrate according to rules that granted this power to the arbitrator, we reasoned, the parties in Terminix clearly and unmistakably agreed that the arbitrator would have this power. Id. Citing comparable rulings drawn from other circuit courts, we held that incorporating such rules into their agreement meant that "the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." Id.; see, e.g., Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005) ("[T]he incorporation [of rules that empower an arbitrator to decide issues of arbitrability] serves as clear and unmistakable evidence of the parties' intent to delegate such issues to the arbitrator.").

More recently, in U.S. Nutraceuticals, we clarified the scope of Terminix's holding, and put it in the more familiar terms of questions of arbitrability. In U.S. Nutraceuticals, the parties' agreement did not reference any particular AAA rules, but contained an agreement to arbitrate "under the auspices and rules of the [AAA]." Id. at 1309–10. Unlike in Terminix, this language referenced and

incorporated AAA rules in general, not any specific set of AAA rules.[3] In U.S. Nutraceuticals, class arbitrability was not at issue, but the parties disagreed as to whether they were bound by their arbitration agreement. See U.S. Nutraceuticals, 769 F.3d at 1310. Citing Terminix, we held that "[w]hen the parties incorporated . . . the [AAA Rules], they clearly and unmistakably contracted to submit questions of arbitrability to an arbitrator." Id. at 1311 (citing Terminix, 432 F.3d at 1332). Incorporating relevant AAA rules, we said, is a clear and unmistakable indication of the parties' intent for the arbitrator to decide not just whether the arbitration clause is valid, but whether it applies. Id. We did not interrogate which specific AAA rules were incorporated through the contract's general incorporation language, but simply followed the rule of Terminix.

By expressly incorporating two sets of AAA rules, JPay's Terms of Service clearly and unmistakably give the arbitrator power to rule on his own jurisdiction, thus delegating questions of arbitrability to the arbitrator. JPay's Terms of Service mention two sets of AAA rules, the Arbitration Rules for the Resolution of Consumer Related Disputes and the Commercial Arbitration Rules. Each uses the same language as the AAA rules that were incorporated in Terminix, providing that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction,

[3] The AAA maintains over fifty different sets of rules that it designates as "active," and which might be employed in a given arbitration proceeding. See Active Rules, Am. Arbitration Ass'n (2018), https://www.adr.org/active-rules.

including any objections with respect to the existence, scope, or validity of the arbitration agreement." Am. Arbitration Ass'n, Consumer Arbitration Rules R-14(a) (2016), https://www.adr.org/sites/default/files/Consumer%20Rules.pdf; Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures R-7(a) (2013), https://www.adr.org/sites/default/files/CommercialRules_Web.pdf; see also Terminix, 432 F.3d at 1332 (quoting identical language). Terminix is squarely on point because the AAA rules incorporated by the Terminix agreement -- a prior version of the AAA commercial rules -- used precisely the same language as the rules incorporated by the JPay Terms of Service. Each set of rules gives the arbitrator "the power to rule on his or her own jurisdiction."

Terminix does not require that a particular question of arbitrability be addressed in the incorporated AAA rules. JPay notes, accurately, that neither set of rules incorporated into their Terms of Service either mentions class arbitration or expressly incorporates the AAA Supplementary Rules on Class Arbitration, which do, of course, discuss class arbitration.[4] But Terminix dictates, without any

[4] The supplementary rules, for their part, purport to reverse-incorporate themselves into all other AAA rules by stating that they "shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the [AAA]." Am. Arbitration Ass'n, Supplementary Rules for Class Arbitrations at 1(a) (2010), https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf. JPay suggests we follow those courts that have refused to credit the "daisy-chain of cross-references" required for the supplemental rules to apply when a contract mentions only a set of AAA rules that neither refer

caveat, that we read an arbitration agreement incorporating AAA rules containing this language as clear and unmistakable evidence that the parties contracted around the default rule and intended to delegate questions of arbitrability to the arbitrator. Terminix, 532 F.3d at 1332. After Terminix, and certainly after U.S. Nutraceuticals, in this Circuit, JPay need not have consented to rules specifically contemplating class proceedings in order to have delegated the question of class availability via incorporation of AAA rules. The incorporation of the AAA consumer and commercial rules are enough because they grant the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Id.

Spirit Airlines reinforces our decision. It addressed delegation of the precise question of arbitrability that concerns us today. In Spirit Airlines, as here, the parties disagreed as to whether class arbitration was available. See Spirit Airlines, 2018 WL 3866335 at *1. In their agreement, the parties in Spirit Airlines had agreed that "[a]ny dispute . . . will be resolved by submission to arbitration . . . in accordance with the rules of the [AAA] then in effect." Id. The agreement made no specific mention of class arbitration. We held again that we were bound by the

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to class proceedings nor incorporate the supplementary rules. E.g., Chesapeake Appalachia, LLC v. Scout Petrol., LLC, 809 F.3d 746, 761 (3d Cir. 2016). Because we are bound to follow the more straightforward result dictated by Terminix, U.S. Nutraceuticals, and Spirit Airlines, we need not and do not evaluate what the supplementary rules accomplish through this attempt at reverse-incorporation.

reasoning of Terminix. Id. at *3. We explained that by incorporating AAA rules in general terms, the parties had incorporated the Supplementary Rules for Class Arbitrations. Id. Rule 3 of the Supplementary Rules explains that class availability will be decided by the arbitrator. Id. Just like in Terminix, the agreement was read as evincing a clear and unmistakable intent to arbitrate according to the incorporated AAA rules. Id. We thus concluded that incorporating the Supplementary Rules constituted "clear and unmistakable evidence that the parties chose to have an arbitrator decide whether their agreement provided for class arbitration." Id.

The long and short of it is that our case precedent compels that we read the JPay agreement as clearly and unmistakably evincing an intent to delegate questions of arbitrability.

Moreover, and altogether independent of incorporating the AAA rules, the language these parties employed in this agreement evinces the clearest possible intent to delegate questions of arbitrability to the arbitrator. The Terms of Service provide that "[t]he ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration" and later refer to "the foregoing Agreement of the parties to arbitrate any and all such disputes" (emphasis added). Even if we were to assume that the incorporation of AAA Rules failed, in some way, to delegate questions of arbitrability -- and our case law has plainly rejected

that view -- we would still find that this language sufficed to do so. Unlike incorporating AAA Rules, which are separate documents that parties to the agreement might not have read, this delegation clause has an express meaning that would be obvious and comprehensible to any careful reader of the agreement. At the absolute least, its significance would have been obvious to the JPay attorneys who drafted the Terms of Service.

In fact, in the past, we have found that comparable language expressed a clear and unmistakable intent to delegate questions of arbitrability in general. E.g., Jones v. Waffle House, Inc., 866 F.3d 1257, 1267 (11th Cir. 2017) (interpreting a contract stating that "the Arbitrator . . . shall have authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement"); Martinez v. Carnival Corp., 744 F.3d 1240, 1245–46 (11th Cir. 2014) (interpreting a delegation of "any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination," id. at 1245). Other circuits have also specifically found that comparable language delegated the precise question of class arbitrability. Wells Fargo Advisors, Inc. v. Sappington, 884 F.3d 392, 395 (2d Cir. 2018) (interpreting a contract stating that "[a]ny controversy relating to your duty to arbitrate hereunder, or to the validity or enforceability of this arbitration clause, or to any defense to arbitration, shall also be arbitrated"); Robinson v. J & K Admin.

Mgmt. Servs., Inc., 817 F.3d 193, 198 (5th Cir. 2016) ("The agreement required arbitration of . . . 'claims challenging the validity or enforceability of this Agreement . . . or challenging the applicability of the Agreement to a particular dispute or claim.'" Id. at 194.). Put succinctly, an express delegation clause like this one delegates questions of arbitrability, one of which is the question of class availability.

The Second Circuit reached the same conclusion in Wells Fargo v. Sappington, 884 F.3d 392 (2d Cir. 2018), when it rejected the same argument JPay makes today -- that an arbitration agreement delegating questions of arbitrability nonetheless does not delegate the question of class availability if written using "bilateral terminology." Id. at 397; see id. at 397–98. There, the Second Circuit was reading a contract in light of a Terminix-equivalent precedent dictating that incorporating "[AAA] rules that empower an arbitrator to decide issues of arbitrability . . . serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." Id. at 396 (quoting Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 208 (2d Cir. 2005)). The defendant, Wells Fargo, argued that "the 'bilateral terminology' of the contracts -- 'you and Wells Fargo,'" meant that "the parties did not intend to let an arbitrator decide the class arbitration availability question in particular." Id. at 397. The Second Circuit thought that bilateral terminology was "to be expected in an employment contract" and pointed

out that "even an express contractual statement concerning class arbitration could easily be phrased in bilateral terms." Id. at 397–98 (considering the hypothetical language "[y]ou and Wells Fargo agree that the availability of class arbitration . . . shall be determined by an arbitrator," id. at 398). Similarly here, the fact that JPay's Terms of Service are written in bilateral terms should not be read for more than it is worth and does not change the fact that questions of arbitrability have unmistakably been delegated.

We add that the breadth of the delegation achieved by the language found in this agreement is as extensive as possible. Even if, after reviewing the express delegation clause, we were somehow still not sure whether the agreement to delegate "[t]he ability to arbitrate the dispute, claim or controversy" truly expressed an intent to delegate any and all such disputes, claims, or controversies, our uncertainty would be settled by the concluding sentence of the agreement's arbitration provision, which references "the foregoing Agreement of the parties to arbitrate any and all such disputes, claims and controversies." This phrase cannot refer to anything but the disputes previously mentioned in the arbitration clause, including disputes about arbitrability. The language cries out with express intent and emphasizes that a broad reading of the foregoing express delegation clause is warranted and is, in fact, what the parties intended when they contracted. In the past we have held that the delegation of "any" gateway questions entails the

delegation of "all" such questions, Waffle House, 866 F.3d at 1267, but this agreement helpfully includes both words already. The use of such sweeping language serves to reaffirm our reading of the foregoing delegation, and confirms that the parties intended to delegate questions of arbitrability and that our inquiry is thus at an end. See id. at 1271.

2.

Throughout its argument, JPay points to and relies on three cases drawn from outside our Circuit: Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013), Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746 (3d Cir. 2016), and Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017). We are unpersuaded by JPay's invocation of these cases for three reasons. In the first place, we are bound to follow our own Circuit precedent. Just recently, Spirit Airlines declined to follow any of these cases, finding no basis for their holdings in Supreme Court precedent. Spirit Airlines, 2018 WL 3866335 at *4. What's more, Terminix and U.S. Nutraceuticals foreclose their reasoning. The Third, Sixth, and Eighth Circuits held that incorporation of AAA Rules by reference served to delegate questions of arbitrability generally, but that this did not delegate the specific question of class action availability. Catamaran, 864 F.3d at 973; Chesapeake Appalachia, 809 F.3d at 761–62; Reed Elsevier, 734 F.3d at 599. Unlike the Eleventh Circuit, the Third and Sixth Circuits did not have

precedents dictating that the incorporation of AAA rules giving an arbitrator the power to rule on his or her own jurisdiction constitutes a clear and unmistakable delegation of questions of arbitrability.[5] Terminix, 432 F.3d at 1332; see also U.S. Nutraceuticals, 769 F.3d at 1311 (applying the holding of Terminix). Much of the reasoning and analysis JPay would have us follow is foreclosed to us because of our obligation to follow our own binding precedents.

In the second place, those cases are factually different in at least one critical way. The parties to those agreements used different language from the words JPay used. Notably, none of those cases included an express delegation of questions of arbitrability. The Third, Sixth, and Eighth Circuits were reviewing contracts that accomplished delegation only by incorporation of the AAA rules. Catamaran, 864 F.3d at 969 (quoting the relevant contractual language); Chesapeake Appalachia, 809 F.3d at 749 (same); Reed Elsevier, 734 F.3d at 599 (same). None faced the language we have here: the incorporation of AAA rules and an express delegation clause. As we have held, either JPay's incorporation of AAA rules or its express delegation clause would have been enough, on its own, to delegate the question of class availability. The combination of the two confirms our reading of each half in isolation. As compared with the contracts reviewed by these other circuits, the

[5] The Eighth Circuit did have a Terminix-equivalent precedent but read it as applying only to bilateral arbitration. See Catamaran, 864 F.3d at 973 (citing Fallo v. High-Tech Inst., 559 F.3d 874 (8th Cir. 2009)). As we have explained, we do not agree that the question of class availability ought to be treated separately from other questions of arbitrability in this way.

express delegation clause not only provides a second, independent ground on which to hold as we do, but also confirms our holding on the first ground. No other circuit analyzed a contract with two such mutually reinforcing methods of delegation. And, indeed, the Third Circuit recognized that an express delegation clause in addition to an incorporation of AAA rules would probably have been enough for it to find clear and unmistakable delegation of the class availability question. See Chesapeake Appalachia, 809 F.3d at 758. So even if we could follow the guidance of at least that circuit, we would still be obliged to find that the contractual language in this case accomplishes the delegation of the class availability question.

Finally, as we see it, each of these cases conflates the "who decides" question with the "clause construction" question of class availability by analyzing the former question with reasoning developed in the context of the latter. The questions are conceptually related, but require a distinct analysis. By default, a court presumptively decides whether the parties consented to class arbitration. As we have explained, at this stage, in considering whether JPay, specifically rebutted the application of the default rule, we are asking who decides in this instance. We are not investigating whether JPay consented to class arbitration. That is for the arbitrator to decide. In Stolt-Nielsen and Concepcion the Court made only merits determinations of whether class arbitration was available. These cases raised

important concerns about why we should not force parties to class arbitration without a contractual basis to do so, but considering these concerns at the higher-order "who decides" stage conflates that stage with the merits.

The concerns raised in Stolt-Nielsen do not apply, as a doctrinal matter, to the "who decides" question of contractual intent to delegate. We alluded to this confusion in Spirit Airlines. Spirit Airlines, 2018 WL 3866335 at *4. Our earlier analysis of the default rule -- who decides when a contract is silent -- depended on policy judgments. But the "who decides" question at this stage is a matter of contract interpretation, and we answered it by conducting a close reading of JPay's Terms of Service. Stolt-Nielsen's concerns about the differences between bilateral and class arbitration have precious little bearing on the textual analysis required to determine "who decides" under this specific contract. Here we ask only whether the parties intended to delegate the question of class availability. Having found that the parties intended to delegate, we have no reason -- and, indeed, no power -- to evaluate whether a class proceeding is available or what consequences might result if it is.

The content of the concerns raised in Stolt-Nielsen reaffirms our view. Textual analysis of the agreement to determine the parties' intent does not implicate the fact that class arbitration is less efficient, less confidential, and higher-stakes. See Stolt-Nielsen, 559 U.S. at 686–87 (raising these concerns). We

have done nothing more than decide (because the parties have agreed) that an arbitrator, not a court, will determine whether a class is available. The arbitrator's decision whether a class is available will be more efficient and more confidential than a court's would be. The determination of class availability has the same stakes and involves the same parties whether it is decided in a court or in arbitration. The arbitrator's decision is somewhat less reviewable than a court's will be, but in isolation this doesn't count for much -- it will be no less reviewable than any other decision made in arbitration, and the law generally favors arbitration of many high-stakes questions. See First Options, 514 U.S. at 945. In Stolt-Nielsen, reduced judicial review was a matter of concern only because of the increased liability of class proceedings. See Stolt-Nielsen, 559 U.S. at 687. Quite simply, the concerns raised in Stolt-Nielsen and Concepcion are not implicated by our decision today.

Against our conclusion that the class availability question must go to an arbitrator, JPay argues that the particular question of class availability ought to be treated differently from questions of arbitrability in general -- that "consent to arbitrate class arbitrability cannot be presumed 'by simply agreeing to submit' disputes over 'arbitrability' to an arbitrator." (quoting Stolt-Nielsen, 559 U.S. at 685). "[T]he particular question of class arbitration," JPay says, quoting the Eighth Circuit, "demand[s] a more particular delegation of the issue [to the arbitrator] than

we may otherwise deem sufficient." (quoting Catamaran, 864 F.3d at 973). JPay suggests that we ought to look for some more specific indicia that class arbitration was contemplated, something like "express reference to class arbitration, the availability of class arbitration, the Supplementary Rules, or who decides whether the arbitration agreement permits class arbitration." (quoting Chesapeake Appalachia, 809 F.3d at 759).

For starters, JPay's preferred rule is foreclosed by Spirit Airlines, which rejected just this argument, and by Terminix, which gave no indication that questions of arbitrability are treated as anything but a unitary category. In Spirit Airlines, the defendant argued "that we should demand a higher showing for questions of class arbitrability than for other questions of arbitrability," but we rejected this, "find[ing] no basis for that higher burden in Supreme Court precedent." Spirit Airlines, 2018 WL 3866335 at *3–4. Altogether consistent with Spirit Airlines, Terminix never required that the AAA rules that the parties say anything about any particular question of arbitrability in order for that question to be delegated. In Terminix, the defendant challenged the validity of the arbitration agreement, arguing that the parties' contracts were unenforceable because they limited remedies illegally. Terminix, 432 F.3d at 1329. The court did not look for an express contractual reference to the evaluation of the validity of an agreement. Rather, it treated this question of arbitrability as part of a unitary category of

questions of arbitrability. This category is not broken down into individual questions, and we need not look for a specific reference to the class availability question any more than we needed to look for a specific reference to "validity" or evaluation of remedial limitations in Terminix.

Moreover, a consistent body of case law has spoken of questions of arbitrability as a unitary category. There is no reason to consider whether any particular question of arbitrability is specifically delegated because the questions are typically delegated or preserved as a group. The Supreme Court has looked for delegation of arbitrability in general, rather than for an intent to delegate precise questions of arbitrability. E.g., Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010) ("The delegation provision is an agreement to arbitrate threshold issues . . . . [P]arties can agree to arbitrate 'gateway' questions of 'arbitrability.'" (emphases added)); First Options of Chi. Inc. v. Kaplan, 514 U.S. 938, 944 (1994) ("Courts should not assume the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." (alterations omitted) (emphasis added)). This Court has spoken of questions of arbitrability as a group as well. E.g., Spirit Airlines, 2018 WL 3866335 at *5 ("Florida's Arbitration Code reserves questions of arbitrability for courts."); Waffle House, 866 F.3d at 1267 ("The language clearly and unmistakably evinces the parties' intent to arbitrate all gateway issues." (emphasis added)).

Indeed, if we were to follow the logic of JPay's argument -- and our case precedent forbids us from travelling down that road -- and require something more than a general delegation of questions of arbitrability in order to delegate the question of class availability, contract-drafting would be made needlessly, if not impossibly, complex. If questions of arbitrability are not delegated as a group by default, we would need to distinguish which questions of arbitrability require special additional indicia of delegation, and which, if any, would be delegated through language delegating questions of arbitrability only in general. JPay might respond that class availability raises unique concerns, but we anticipate that other important considerations could be raised about any number of fundamental gateway questions of arbitrability. We agree that these are important questions, but their importance is accounted for by the default rule that they presumptively stay in the courts in the absence of a clear and unmistakable delegation. If, after finding a general delegation of questions of arbitrability, we were to require additional specific indicia of the delegation of particular questions of arbitrability, contracting parties hoping to delegate as much as possible would be burdened with explicitly listing and delegating as many questions of arbitrability as they could think of. Even then, if an unforeseen question of arbitrability later arose, parties who had hoped to arbitrate all questions of arbitrability might be forced into court against their will if a court, perhaps applying the canon of *expressio unius est*

exclusio alterius, reasoned that the explicit delegation of other questions implied that this new question was reserved for the court. We avoid any complications and unpleasant results by treating questions of arbitrability as a group unless an agreement gives us a reason to do otherwise. Finally, we reiterate that our aim in this analysis is only to give meaning to the parties' expressed will by applying the words they used, and remind future parties that they are free to draft using language as specifically or generally as they want.

III.

To return to basics as we conclude, arbitration is a matter of contract and of consent. See Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013); Stolt-Nielsen, 559 U.S. at 681 (2010). JPay and its users contracted and consented to arbitrate "any and all . . . disputes, claims and controversies" arising out of or relating to JPay's Terms of Service, and they agreed to arbitrate the arbitrability of those claims. When parties ask whether an arbitration may be conducted on a class basis, they are asking whether a class-based claim -- a unique type of claim -- is arbitrable. Thus, the instant dispute poses a question of arbitrability, and JPay has agreed that this is a question to be answered in arbitration.

The district court lacked the power to decide whether or not the parties would arbitrate on a class basis. Although JPay says otherwise today, it agreed when drafting its Terms of Service that an arbitrator would decide this question.

The district court should have sent the dispute to arbitration and should not have passed on whether or not class proceedings were available. We, therefore, VACATE the district court's order granting JPay's Cross Motion for Summary Judgment, REVERSE the order denying Kobel and Houston's Motion to Compel Arbitration, and REMAND with instructions that the Demand be referred to arbitration.

VACATED in part, REVERSED in part, and REMANDED

GRAHAM, District Judge, concurring in part and dissenting in part:

I agree wholeheartedly with the majority holding that the availability of class arbitration is a question of arbitrability, presumptively for a court to decide, and that courts cannot assume that parties would want these kinds of questions to be arbitrated unless an agreement evinces a clear and unmistakable intent to send them to arbitration. I also agree with the majority's finding that the arbitration agreement in this case expressly and by incorporation of specific rules of the American Arbitration Association (the "AAA") delegated issues of arbitrability to the arbitrator. But I disagree with the majority's conclusion that the language these parties used in their contract expressed a clear intent to permit the arbitrator to decide the question of the availability of class arbitration.

I believe that a general delegation to arbitrate issues of arbitrability is not enough and that without a specific reference to class arbitration the court should presume that the parties did not intend to delegate to an arbitrator an issue of such great consequence.

The arbitration agreement in this case makes no express reference to class arbitration or any other procedure for combining or consolidating multiple claims. It does contain a general delegation of the power to decide matters of arbitrability: "The ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration." And it refers to two specific rules of the AAA—the

Arbitration Rules for the Resolution of Consumer Related Disputes and the Commercial Arbitration Rules—each of which includes a general delegation of the power to decide issues of arbitrability: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."

Neither the express delegation clause nor the AAA rules make any reference to class arbitration. In the absence of a reference to class claims it should be presumed that the delegation of the power to determine arbitrability is limited to the arbitrability of bilateral claims and controversies arising out of the contractual relationship between the parties.

In *Terminix*, this Court construed an arbitration agreement that said, "the arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the [AAA]." *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). Those rules included this provision: "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* This Court held that this language was enough to give the arbitrator the authority to determine the validity of the arbitration clause. *Id.* The case involved a single plaintiff, Palmer Ranch, which claimed that Terminix

failed to properly perform termite protection services for its apartment complex. *Id.* at 1330. *Terminix*, unlike the present case, involved the authority of the arbitrator to determine his or her jurisdiction to decide the merits of a bilateral dispute arising out of the parties' commercial relationship.

A similar case from this Court likewise involved a dispute between two parties to an arbitration agreement, which provided that almost any dispute that arose between them under their commercial agreement would be arbitrated "under the rules of the [AAA]." *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1309 (11th Cir. 2014). Adhering to its holding in *Terminix*, the Court held that the arbitrator had the authority to determine arbitrability of that bilateral dispute. 769 F.3d at 1312.

In *Spirit Airlines*, this Court addressed for the first time the issue of the authority of an arbitrator to decide whether an arbitration agreement permitted class arbitration, finding that the arbitration agreement in that case did confer such authority upon the arbitrator. *Spirit Airlines, Inc. v. Maizes*, No. 17-14415, 2018 WL 3866335 (11th Cir. Aug. 15, 2018). The arbitration agreement in *Spirit Airlines* referred in general to "the Rules of the American Arbitration Association." *Id.* at *4. The Court in *Spirit Airlines* relied on one of those sets of rules, to wit, the Supplementary Rules for Class Arbitrations, which include Supplementary Rule 3

which "provides that an arbitrator shall decide whether an arbitration clause permits class arbitration." *Id.* at *3.

In contrast, the arbitration agreement in this case refers to two very specific rules of the AAA that will govern the parties' disputes: the "Arbitration Rules for the Resolution of Consumer Related Disputes" and "Commercial Arbitration Rules." Significantly, absent in either of these two sets of rules is any reference to the Supplementary Rules for Class Arbitrations. There is one general reference to the rules of the AAA in JPay's arbitration agreement, but its context is quite unlike the all-inclusive language in *Spirit Airlines*. JPay's arbitration agreement says, "The arbitration proceedings shall be conducted in as expedited a manner as is then permitted by the rules of the [AAA]." Any suggestion that this general reference was intended to adopt by reference the Supplemental Rules for Class Arbitration would be absurd—class arbitration could hardly be considered expeditious. The lack of a general reference to the rules of the AAA that could be reasonably construed to reference class arbitration makes JPay's arbitration agreement factually distinguishable from the agreement in *Spirit Airlines*.

I conclude that none of the Eleventh Circuit cases cited by the majority are controlling here. In *Spirit Airlines* the Court relied on a specific reference to class arbitration in the AAA Supplemental Rules for Class Arbitrations. Without such specificity, a court should presume that a general delegation of the power to decide

questions of arbitrability does not include the power to construe an arbitration agreement to permit class arbitration.

My conclusions are driven by the immense differences between adjudication of bilateral disputes and the conduct of class action proceedings. Other courts, including the Supreme Court of the United States, have enumerated some of these significant differences, including the duration, complexity, inefficiency, and expense of class proceedings, vastly increased potential liability, lack of confidentiality, and limited scope of judicial review.[1]

The majority relies heavily on these considerations in deciding that the availability of class arbitration is a question of arbitrability for a court to decide. But it refuses to consider them when deciding whether the parties in this case intended to let the arbitrator decide if their agreement permits him or her make that call. That is puzzling because that inquiry is an inquiry into the parties' intent and ordinarily a court considers consequences in determining what the parties intended. I believe the court should consider the consequences in deciding whether the

[1] Another factor a court might want to consider in deciding whether the parties intended to let the arbitrator make the call is the stake the arbitrator has in the outcome. Arbitration is no longer a cottage industry; it is big business. Deborah Rothman, *Trends in Arbitrator Compensation*, Dispute Resolution Magazine, Spring 2017, at 8 (noting rates for arbitrators may exceed $1,000 an hour), available at https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2017/3_rothman_trends_in_arbitrator.authcheckdam.pdf. Arbitrators charge substantial fees and vigorously compete for business. Transforming a simple bilateral dispute into a class action, which may require months or years of full-time work, might tax an arbitrator's impartiality.

parties' general delegation of the authority to decide arbitrability was intended to include the important issue of the arbitrability of class claims. The consequences of transforming a bilateral arbitration into a fundamentally different type of proceeding supports the proposition that the arbitrator's power to do so should not be inferred from a general delegation to decide issues of arbitrability. The principles of *Howsam* should likewise apply here. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("[A] disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court.").[2]

I find some support for my views in several other circuit court decisions. *See, e.g.*, *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 973 (8th Cir. 2017) ("The risks incurred by defendants in class arbitration . . . and the difficulties presented by class arbitration . . . all demand a more particular delegation of the

[2] The majority also holds that the significance of the delegation clause, "[a]t the absolute least . . . would have been obvious to the JPay attorneys who drafted the Terms of Service." *Ante* at 32. I disagree. The implication here is that the majority would hold ambiguity against the drafters. It's true that many states have adopted the rule of construing ambiguous terms in a contract against the drafter. But our context demands "clear and unmistakable" language, *Howsam*, 537 U.S. at 83, a standard stood on its head if a court applies the construe-ambiguity-against-the-drafter canon, *see Chesapeake Appalachia*, 809 F.3d at 763 (refusing to construe ambiguity against the drafter because of the clear-and-unmistakable standard). The Supreme Court is set to resolve this question: "Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements." *Lamps Plus, Inc. v. Varela*, 2018 WL 389119 (U.S.) (cert. petition); *see Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 673 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697, 200 L. Ed. 2d 948 (2018).

issue than we may otherwise deem sufficient in bilateral disputes."); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 764–65 (3d Cir. 2016) ("Given these considerations, it is conceivable that [the parties] may have agreed to the Leases because they intended to delegate questions of bilateral arbitrability to the arbitrators—as opposed to the distinctive question of whether they thereby agreed to a fundamentally different type of arbitration not originally envisioned by the FAA itself."); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) ("But given the total absence of any reference to classwide arbitration in this clause, the agreement here can just as easily be read to speak only to issues related to bilateral arbitration. Thus, at best, the agreement is silent or ambiguous as to whether an arbitrator should determine the question of classwide arbitrability; and that is not enough to wrest that decision from the courts.").

I would also note that in *Oxford Health* the arbitration agreement incorporated the rules of the AAA, and nevertheless at least two of the Justices felt that was not sufficient to authorize the arbitrator to decide whether to conduct class arbitration. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (Alito, J., concurring) (joined by Justice Thomas) ("But unlike petitioner, absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't.").

I would affirm the district court's decision that the arbitration agreement in this case does not permit the arbitrator to decide whether the agreement permits class arbitration.

EXHIBIT B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 15, 2019

16-CV-20121-DPG

Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: JPay, Inc.
v. Cynthia Kobel, et al.
No. 18-811
(Your No. 17-13611)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 16-20121-CIV-GAYLES

JPAY, INC.,

Plaintiff,

v.

CYNTHIA KOBEL
and SHALANDA HOUSTON,

Defendants.
_____/

ORDER

This cause came before the Court on JPay's Application to Partially Vacate Arbitration Award (the "Motion") [ECF No. 54]. The Court has reviewed the Motion and the record and is otherwise fully advised. For the reasons that follow, the Motion is denied.

I. BACKGROUND

A. The Original Arbitration Agreement

JPay, Inc. ("JPay") provides several services to friends and families of inmates in correctional institutions, including money transfers to inmates' accounts. Claimants Cynthia Kobel ("Kobel") and Shalanda Houston ("Houston") (collectively "Claimants") used JPay's services to send money to inmates. To do so, Claimants consented to JPay's Original Terms of Service (the "Original Terms") which provided in relevant part:

> **1. NOTICE AND CONSENT.** By using JPay's services, you agree to the terms and conditions of this Agreement . . . . We may amend this Agreement at any time by posting a revised version on our website. The revised version will be effective at the time we post it. By continuing to use JPay's service after any such change, you agree to be bound by the changed terms and conditions of this Agreement as of the effective date of such changes. . . .

13. GOVERNING LAW.

> (a) . . . Any [] dispute, claim or controversy among the parties arising out of or relating to this Agreement shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules. The ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration. The arbitration proceeding shall be conducted in as expedited a manner as is then permitted by the rules of the American Arbitration Association. Both the foregoing Agreement of the parties to arbitrate any and all such disputes, claims and controversies, and the results, determinations, findings, judgments and/or awards rendered though any such arbitration shall be final and binding on the parties and may by specifically enforced by legal proceedings in any court of competent jurisdiction.

[ECF No. 19-2].

On October 16, 2015, Claimants, in accordance with the Original Terms, filed a demand for arbitration with the American Arbitration Association ("AAA") alleging that JPay engaged in unlawful conduct relating to its money transfer services. Claimants' demand was on behalf of themselves and a class consisting of "[a]ll natural persons who paid a fee to JPay for electronic money transfer services and who agreed to arbitrate their claims with JPay. . . ." [ECF No. 1-1].

JPay then filed this action in the Eleventh Judicial Circuit in and for Miami Dade County, Florida, seeking (i) a declaration that it had not consented to class arbitration; (ii) to stay class arbitration; and (iii) to compel bilateral arbitration. [ECF No. 1-2]. Claimants removed the action to federal court. [ECF No. 1].

B. JPay Revises Its Terms

On December 16, 2015, two months after Claimants filed their demand for class arbitration, JPay revised the Original Terms (the "2015 Revised Terms"). [ECF No. 42-2]. The 2015 Revised Terms provided, in pertinent part, that (1) arbitration shall be administered by JAMS; (2) the parties shall arbitrate all disputes on an individual basis and waive the right to participate in a class action lawsuit; (3) the arbitrators have no authority to conduct class arbitration; and (4) "[t]he validity,

effect, and enforceability of the [] waiver class action lawsuit and class-wide arbitration" are to be determined by the courts and not by JAMS or any arbitrator. *Id.* JPay notified its customers via email of the 2015 Revised Terms. Houston again used JPay's services on May 3, 2016, August 15, 2017, and August 22, 2017, after the 2015 Revised Terms took effect, and therefore implicitly consented to the 2015 Revised Terms. [ECF No. 54-2 ¶ 6].

C. The Court and the Eleventh Circuit Review the Original Terms

On February 16, 2016, Claimants moved to compel class arbitration and stay the proceedings based on the Original Terms. [ECF No. 11]. JPay filed a Cross Motion for Summary Judgment, arguing that class arbitration was not available to Plaintiffs under the Original Terms. [ECF No. 19]. In response to JPay's Motion for Summary Judgment, Claimants referenced the 2015 Revised Terms as evidence that JPay could have explicitly excluded class arbitration from the Original Terms but chose not to. [ECF No. 42]. In its briefing on the Motion to Compel and Motion for Summary Judgment, JPay did not argue to this Court that the 2015 Revised Terms applied to Houston's claims.

On May 16, 2016, the Court denied, in part, Claimants' Motion to Compel arbitration, finding that the availability of class arbitration was a substantive question of arbitrability for the Court to decide and that Claimants had not overcome their burden to establish that the parties agreed to have an arbitrator make that determination.[1] [ECF No. 28]. The Court then granted JPay's Motion for Summary Judgment, finding that the Original Terms did not permit class arbitration. [ECF No. 44].

Claimants appealed to the Eleventh Circuit. [ECF No. 46]. JPay did not reference the 2015 Revised Terms in its briefing to the Eleventh Circuit but instead maintained its argument that the Original Terms did not delegate questions of arbitrability to the arbitrators or permit class arbitration.

On September 19, 2018, the Eleventh Circuit held that while the availability of class arbitration is a gateway question of arbitrability for courts to decide, in this case, "the language these parties employed in [the Original Terms] evinces the clearest possible intent to delegate questions of arbitrability to the arbitrator. . . . [and that the Court] lacked the power to decide whether or not the parties would arbitrate on a class basis." *JPay v. Kobel*, 904 F.3d 923, 939, 944 (11th Cir. 2018). On remand, the Court granted Claimant's Motion to Compel Arbitration and referred their demand for arbitration to the AAA. [ECF No. 51].

D. JPay Again Revises Its Terms

In February 2019, JPay made changes to the 2015 Revised Terms (the "2019 Revised Terms"). [ECF No. 54-4]. The 2019 Revised Terms continued to prohibit class arbitration and mandated that only a court could determine the "scope, validity, effect, and enforceability" of the class action waiver. *Id.* On April 26, 2019, Houston initiated a new transaction with JPay, explicitly consenting to the 2019 Revised Terms.[2]

E. The Arbitrators Construe the Original Terms

The arbitration proceedings continued. In its briefing before the Arbitrators on the availability of class-wide arbitration, JPay argued, for the first time, that the 2015 Revised Terms applied to Houston's claims and that, under those terms, the Arbitrators could not find that class arbitration was available.[3] The Arbitrators disagreed. In their Opinion, Order and Award on Clause Construction, issued on September 26, 2019, the Arbitrators found that (1) the operative agreement between the

1 Claimants filed an interlocutory appeal of the Court's Order on their Motion to Compel. The Eleventh Circuit dismissed the appeal for lack of jurisdiction. [ECF No. 37].
2 In December 2017, JPay revised its user interface, making it impossible for any customer to initiate a transaction without explicitly consenting to JPay's terms. Houston has since consented to the 2019 Revised Terms at least six more times. [ECF No. 54-2 ¶ 6].
3 JPay only provided the Arbitrators with the 2015 Revised Terms and not the 2019 Revised Terms. [ECF No. 57-1].

parties was the Original Terms and not the 2015 Revised Terms; (2) the Original Terms were not ambiguous; and (3) the Original Terms permitted class arbitration. [ECF No. 54-1].

F. JPay Seeks Judicial Review

JPay now moves to partially vacate the arbitration award to the extent it applies to Houston and any other JPay customer who consented to either the 2015 Revised Terms or the 2019 Revised Terms. JPay argues that because the Revised Agreements expressly waive the right to class arbitration and require the courts to resolve any disputes about that waiver, the Arbitrators exceeded their authority in addressing the issue of class arbitration. The Court disagrees.

II. DISCUSSION

A. Standard of Review

"Judicial review of arbitration decisions is among the narrowest known to the law." *Gherardi v. Citigroup Global Markets Inc.*, ---F.3d---, 2020 WL 5553255, at *3 (11th Cir. Sep. 17, 2020) (internal quotations omitted). Indeed, "[t]here is a presumption under the FAA that arbitration awards will be confirmed, and federal courts should defer to an arbitrator's decision whenever possible." *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1321 (11th Cir. 2010) (internal quotations omitted).

"Sections 10 and 11 of the FAA, 9 U.S.C. §§ 10, 11, provide the exclusive means by which a federal court may upset an arbitration panel's award." *White Springs Agricultural Chemicals, Inc. v. Glawson Investments Corp.*, 660 F.3d 1277, 1280 (11th Cir. 2011). Relevant here, § 10(a)(4) permits a court to vacate an arbitration award if "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). "[F]ew awards are vacated [under section 10(a)(4)] because the scope of

the arbitrator's authority is so broad." *Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d 1083, 1087 (11th Cir. 2016).

In reviewing whether the arbitration panel exceeded its authority, the Court is guided by two principles. *Wiregrass Metal*, 837 F.3d at 1087. "The first is that [the Court] must defer entirely to the arbitrator's interpretation of the underlying contract no matter how wrong we think that interpretation is." *Id.*; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671–72 (2010) ("It is not enough for petitioners to show that the panel committed an error—or even a serious error."). Therefore, the only question for the Court "is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 569 (2013). "In fact, under our current scheme, an arbitrator's actual reasoning is of such little importance to our review that it need not be explained—the decision itself is enough." *Gherardi*, 2020 WL 5553255, at *3.

The second principle guiding the Court's analysis is that "[v]acatur is permitted only when an arbitrator 'strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice.'" *Id.* (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001). Some examples of when vacatur is appropriate include: "awarding relief on a statutory claim when the arbitration agreement allows only for arbitration of contractual claims; failing to give preclusive effect to an issue already (and properly) decided by a court; and forcing a party to submit to class arbitration without a contractual basis for concluding that the party agreed to it." *Id.* (internal citations omitted). As set forth by these principles, a motion under § 10(a)(4) is not an appeal in the "traditional sense." *Id.*; *see also Sutter*, 569 U.S. at 568-69 ("If parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process.") (internal quotations omitted). Rather,

the arbitrators' decision "can be challenged, not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate." *Gherardi*, 2020 WL 5553255, at *3 (internal quotations omitted).

B. The Arbitrators Did Not Exceed Their Power

JPay argues here, for the first time, that the 2015 Revised Terms and the 2019 Revised Terms retroactively apply to Houston's claims such that the Arbitrators had no authority to determine the availability of class arbitration.[4] However, JPay ignores the posture of this action. This Court cannot determine whether the 2015 or 2019 Revised Terms apply retroactively to Houston's claims as the Original Terms already delegated that authority to the Arbitrators. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 529 (2019) ("[A] court may not rule on the potential merits of the underlying claim that is assigned by contract to an arbitrator, even if it appears to the court to be frivolous.").

The Eleventh Circuit has already held that, under the Original Terms, the Arbitrators had the power to determine the availability of class arbitration. *JPay*, 904 F.3d at 944. The Arbitrators did what they were tasked to do and interpreted the scope of the Original Terms, finding that class arbitration was available. Moreover, the Arbitrators considered the 2015 Revised Terms but found them inapplicable.[5] That JPay believes the Arbitrators made a legal or factual error is of no moment

4 In making this argument, JPay relies heavily on the Eleventh Circuit's decision in *Jones v. Waffle House*, 866 F.3d 1257 (11th Cir. 2017). JPay's reliance on *Jones* is misplaced. There, after initiating class litigation in court, the plaintiff signed an arbitration agreement with the defendant covering all past, present, or future claims and waiving class litigation. *Id.* at 1262. The defendant then moved to compel arbitration arguing that the newly signed arbitration agreement mandated that the arbitrators decide gateway questions of arbitrability. The district court denied the motion to compel, but the Eleventh Circuit reversed, holding that the arbitration agreement delegated questions of arbitrability, including the interpretation, applicability, enforceability, and formation of the agreement, to the arbitrators. *Id.* In a footnote, the Eleventh Circuit noted that because the agreement included past claims, it could be broad enough for the *arbitrators* to conclude that the arbitration provision included previously filed litigation. *Id.* at 1271 n1. Notably, the Eleventh Circuit left the issue of whether the arbitration agreement retroactively applied to the plaintiffs claims to the arbitrators. *Id.*

5 The arbitrators did not consider the 2019 Revised Terms because JPay never presented them to the arbitrators.

to the Court.[6] *See Gherardi*, 2020 WL 5553255, at *3 ("Arbitrators do not exceed their powers when they make errors, even a serious error.") (internal quotation omitted); *White Springs*, 660 F.3d at 1280 ("[A] panel's incorrect legal conclusion is not grounds for vacating or modifying the award.").

"[T]he law[] insist[s] that arbitration losers who resort to the courts continue to lose in all but the most unusual circumstances, of which this is not one." *Wiregrass Metal*, 837 F.3d at 1086. Accordingly, the Motion to Vacate shall be denied.

CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that JPay's Application to Partially Vacate Arbitration Award (the "Motion") [ECF No. 54] is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of September 2020.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

6 Even if the Court could vacate the arbitration award based on an error, it is unclear whether the 2015 Revised Terms and 2019 Revised Terms apply retroactively. Moreover, even if the revisions could be applied retroactively, JPay may have waived those arguments by failing to raise them until now.

EXHIBIT D

EXHIBIT 2

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

COMPLEX BUSINESS LITIGATION SECTION

JPAY, INC.,
A Delaware Corporation,

Plaintiff.

v.

CYNTHIA KOBEL, an individual, and
SHALANDA HOUSTON, an individual,

Defendants.
_____/

CASE NO.: 2015-028740-CA-01

NOTICE OF SCRIVENER'S ERROR

Plaintiff, JPAY, INC., a Delaware Corporation ("JPay"), hereby gives notice of a scrivener's error in the Complaint filed in this action. Due to a clerical error, the incorrect version of the Complaint was uploaded to the E-Filing Portal. The correct version of the Complaint with attachments, is attached to this notice as Exhibit "A".

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

COMPLEX BUSINESS LITIGATION SECTION

JPAY, INC.,
A Delaware Corporation,

Plaintiff.

v.

CYNTHIA KOBEL, an individual, and
SHALANDA HOUSTON, an individual,

Defendants.

_____/

CASE NO.: 2015-028740-CA-01

COMPLAINT

Plaintiff, JPAY, INC., a Delaware Corporation ("JPay"), sues CYNTHIA KOBEL, an individual, and SHALANDA HOUSTON, an individual ("Defendants") and alleges:

PARTIES

1. Plaintiff JPay is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Miami-Dade County, and is otherwise *sui juris*.

2. Defendant, CYNTHIA KOBEL was, at all times material hereto, a citizen and resident of Michigan. Defendant, SHALANDA HOUSTON was, at all times material hereto, a citizen and resident of Georgia.

Exhibit "A"

JURISDICTION AND VENUE

3. This is an action for (i) declaratory relief pursuant to Fla. Stat § 86.011, (ii) an action to stay arbitration inconsistent with the agreement and to compel arbitration pursuant to the parties' agreement under Fla. Stat § 682.03, and (iii) a petition for an order to compel arbitration pursuant to the parties' agreement under the Federal Arbitration Act, 9 U.S.C. § 4.

4. Defendants are subject to personal jurisdiction in this Court pursuant to §48.193(1)(a)(7), Fla. Stat. (2014) because they breached a contract in Florida by failing to perform acts the contract required to be performed in Florida. Specifically, Defendants filed an arbitration in this state, but failed to abide by the arbitration agreement's express terms. Additionally, this Court has jurisdiction over Defendants because the contract Defendants agreed to provides that all disputes will be exclusively resolved through arbitration in Miami, Florida, and Defendants in fact filed an arbitration in Miami, Florida. Pursuant to Florida law, including the Revised Florida Arbitration Code, §682.01, *et seq.*, Fla. Stat. (2014), this constitutes consent to jurisdiction in this Court and confers personal jurisdiction on this Court. JPay's Terms of Service attached as Exhibit "A." Plaintiffs' claims are otherwise within the jurisdictional limits of the Circuit Court.

5. Pursuant to Fla. Stat. §682.19 (2014), venue is proper in Miami-Dade County as the arbitration agreement provides that any arbitration hearings shall take place in Miami, Florida.

COMPLEX BUSINESS CASE

6. This is a complex business case as it seeks a declaration and injunctive relief that a purported Class Action arbitration filed by Defendants under Florida's Deceptive and Unfair

Trade Practices Act is not lawful. The purported class action alleges intentional acts of unfair competition and unconscionability, and the amount in controversy well exceeds $150,000.00 exclusive of interest, costs, and attorneys' fees. Defendants' class definition could include millions of people. Further, due to the stakes involved, this case will likely result in numerous pre-trial motions filed by the four law firms already involved in this dispute. Finally, this case may raise novel state and federal legal issues involving class action arbitration which will have a significant impact on Plaintiff's business.

7. Consequently, JPay requests this action be assigned to the Complex Business Litigation Section (Div 40), pursuant to Administrative Order No. 11-04.

GENERAL ALLEGATIONS

8. On October 16, 2015, Defendants filed a Demand for Class Arbitration of a business dispute before the American Arbitration Association ("AAA") under the AAA's Commercial Arbitration Rules. A copy of Defendants' Demand for Arbitration is attached as Exhibit "B".

9. Defendants purport to have filed on behalf of a class of "all natural persons who paid a fee to JPay for electronic money transfer services and who agreed to arbitrate their claims with JPay." This class would include millions of people.

10. The Defendants' Class Action Arbitration Demand seeks actual damages, punitive damages, statutory damages, and injunctive relief. The demand includes claims for relief based on:

a. Florida's Unfair and Deceptive Trade Practices Act;

b. Breach of Contract, Including Covenant Of Good Faith And Fair Dealing;

c. Unjust Enrichment; and

d. Unconscionability.

11. But the JPay's Terms of Service never consented to class arbitration, never mentioned class arbitration, never infers class arbitration, and expressly reserves any rights not *expressly* granted.

12. Thus, Defendants' demand for arbitration impermissibly seeks to force JPay into a class arbitration against possibly *millions* of consumers that it never consented to.

13. All conditions precedent to the filing of this action have been extinguished, performed or were otherwise waived.

COUNT I – Declaratory Judgment

Plaintiff adopts and reincorporates the allegations in paragraphs 1 through 13 as if set forth herein.

14. This is an action for declaratory judgment under Fla. Stat § 86.011.

15. Consent is a fundamental principle of arbitration. Similarly, it is axiomatic that arbitration agreements are a creature of contract, and that arbitration may only be conducted in accordance with the parties' agreement.

16. JPay's Terms of Service consent to bilateral arbitration. It never consents to any form of class arbitration. Specifically, the agreement provides in pertinent part:

> In the event of any dispute, claim or controversy among the parties arising out of or relating to this Agreement that involves a claim by the User for less than $10,000, exclusive of interest, arbitration fees and costs, shall be resolved by and through arbitration administered by the American Arbitration Association ("AAA") under its Arbitration Rules for the Resolution of Consumer Related Disputes. Any other dispute, claim or controversy among the parties arising out of or relating to this Agreement shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules.

See Ex. "A", at Paragraph 13(a).

17. Further, the Terms of Service only mention two potentially applicable arbitration rules: the "Arbitration Rules for Consumer Related Disputes" and the "Commercial Arbitration Rules" of the AAA. Neither of these rules provide for, or even mention, class arbitrations. JPay does not incorporate any other rules into its arbitration clause.

18. But despite JPay never consenting to class arbitration, Defendants filed a class arbitration.

19. Further, despite JPay never having consented to or even referenced (directly or indirectly) the AAA's Supplemental Rules for Class Arbitrations, the AAA appears to be proceeding under them and has apparently designated this dispute a class arbitration. *See* November 18, 2015 Letter Notice from AAA, attached as Exhibit "C".

20. Because Defendants (and non-party AAA), are acting as if class arbitration is permitted without JPay's consent, JPay is in doubt as to its rights under its Terms of Service.

21. Further, there is a bona-fide, actual, present and practical need for a declaration as to JPay's rights under the arbitration clause because Defendants have filed a demand for class arbitration that the AAA has registered.

22. Therefore, JPAY asks that this Court declare that JPay never consented to class arbitration and to compel bilateral arbitration consistent with the parties' arbitration agreement.

WHEREFORE, Plaintiff, JPAY, INC., demands judgment against DEFENDANTS declaring the parties' rights under the contract, together with an award of costs.

COUNT II – Action To Stay Class Arbitration Because There Is No Agreement To Class Arbitration And To Compel Bilateral Arbitration Pursuant To The Agreement

(682.03 Fla. Stat.)

Plaintiff adopts the allegations in paragraphs 1 through 13 and 15 through 19 as if fully set forth herein.

23. This is an action to stay the impermissible class arbitration and compel bilateral arbitration in accordance with the express terms of the parties' arbitration clause in accordance with Fla. Stat. §682.03 (2014).

24. JPay hereby alleges that Defendants have initiated a class arbitration, but there is no agreement to arbitrate as a class.

25. JPay therefore asks this Court to "summarily decide the issue" and order Defendants to stay their impermissible and non-consensual class arbitration proceedings.

26. Further, Defendants refuse to arbitrate pursuant to the parties' agreement (that only consents to bilateral arbitration) and instead seek to arbitrate as a class.

27. JPay therefore also seeks an order compelling Defendants to arbitrate bilaterally pursuant to the parties' agreement.

WHEREFORE, Plaintiff, JPAY, INC., demands (1) an order staying the impermissible, non-consensual, and un-agreed to class arbitration currently pending before the AAA; and (2) an order compelling Defendants to arbitrate any and all alleged disputes with JPay in bilateral arbitrations pursuant to the parties' agreement together with an award of costs.

COUNT III – Petition to Compel Arbitration Pursuant To The Agreement

(9 U.S.C. § 4)

Plaintiff adopts the allegations in paragraphs 1 through 13 and 15 through 19 as if set forth herein.

28. This is a petition under the Federal Arbitration Act (9 U.S.C. § 4) for an order directing "arbitration proceed in the manner provided for in [the] agreement." Id.

29. JPay has been aggrieved by Defendants' failure and refusal to arbitrate in "the manner provided in [their] agreement," i.e., bilateral arbitration, and their attempts to arbitrate as a class.

30. Therefore, JPay seeks an "order directing the parties to proceed to arbitration in accordance with the terms of the agreement," i.e., bilaterally and not as a class arbitration.

WHEREFORE, Plaintiff, JPay demands an order compelling Defendants to arbitrate any and all alleged disputes with JPay in bilateral arbitrations pursuant to the parties' agreement together with an award of costs.

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JPay Terms of Service

As a condition of using JPay's services as described herein, you agree to this JPay Terms of Service ("Agreement") and any future amendments.

1. **NOTICE AND CONSENT.** . By using JPay's services, you agree to the terms and conditions of this Agreement, the JPay Privacy Policy and any other documents incorporated by reference. You further agree that this Agreement forms a legally binding contract between you and JPay, and that this Agreement constitutes a writing signed by you under any applicable law or regulation. Any rights not expressly granted herein are reserved by JPay. We may amend this Agreement at any time by posting a revised version on our website. The revised version will be effective at the time we post it. By continuing to use JPay's service after any such change, you agree to be bound by the changed terms and conditions of this Agreement as of the effective date of such changes. We last modified this Agreement on October 6, 2014. In this Agreement, "You," "User" or "Customer" means any person or entity using the JPay Service (as defined below).

2. **THE JPAY SERVICE.** . A User may send money (the "Payment") to an inmate's account at a JPay-affiliated correctional institution (a "Client"), to a JPay prepaid media account ("JPay Credits") or to a prepaid debit/phone account. A Client has the authority to review, withhold or reject a Payment. Payments may be made (1) over the Internet or telephone using a Visa or MasterCard branded credit card or debit card (collectively "Bank Card"), (2) at a partner location using cash (i.e., MoneyGram), (3) at a JPay kiosk located at a Client using cash or a Bank Card, or (4) by sending a money order to JPay's lockbox (collectively, the "JPay Service").

   Depending on the Client, Payments may be made to a variety of inmate accounts including, but not limited to, inmate trust, restitution, temporary leave and funeral expenses. In addition, each Client may accept Payments through select JPay Service channels. If you are unsure of which inmate's account to send a Payment or which JPay Service channels are available to you, please contact JPay or the Client. JPay will not be liable for a Payment sent to the incorrect inmate account.

3. **PAYMENT INFORMATION.** To facilitate Payments, you will be required to provide JPay with certain information to allow us, among other things: to verify your identity; to receive appropriate Bank Card authorization if applicable; and to gather any other information a Client shall require of you to send the Payment. Please refer to JPay's Privacy Policy regarding JPay's use of this information. When required by applicable law, Payments will be reported to federal, state or local authorities.

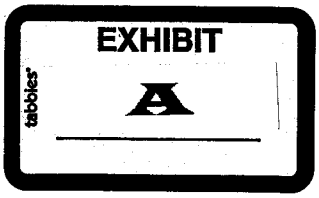
4. **IDENTITY AUTHENTICATION.** You authorize JPay, directly or through third parties, to make any inquiries we consider necessary to validate your identity. This may include asking you for further information, requiring you to provide your date of birth, and/or other information that will allow us to reasonably identify you, requiring you to take steps to confirm ownership of your email address, or verifying your Information against third party databases or through other sources. We may also ask to see your driver's license or other identifying documents at any time. JPay reserves the right to close, suspend, or limit access to your account and/or the JPay Service in the event we are unable to obtain or verify this Information.

5. **FEES.** In consideration for the use of the JPay Service, you agree to pay JPay a fee for each Payment sent by you at the applicable rate then in effect (the "Service Fee"). All Service Fees are non-refundable.

6. **MONEY ORDERS.** Where the lockbox Payment method is available to you, JPay will only accept money orders valued at $1,000.00 or less, depending on the Client. Any money orders over $1,000.00 will be returned to you. All approved money orders will be processed within up to ten (10) business days following receipt by JPay.

   All money orders must be made payable to "JPay Inc.". A deposit slip and any accompanying information required by the Client must be filled out and submitted with every money order. Deposit slips can be found on JPay's website. All deposit slips must be legible and completely filled out. Any materials sent with the money order other than the deposit slip will be discarded.

7. **JPAY CREDITS.** Depending on the Client, JPay Credits can be used by the inmate to purchase media related products. JPay Credits are non-transferrable and unused JPay Credits will not be refunded.



8. **PAYMENT.** Service Fees and the principal Payment amount are due and payable before JPay processes the Payment. By making a Payment with a Bank Card, you authorize JPay to process the Payment. When using a Bank Card, if JPay does not receive authorization from the card issuer, the Payment will not be processed and a hold may be placed on your Bank Card which can only be removed by the issuing bank. Each time you use the JPay Service, you agree that JPay is authorized to charge your designated Bank Card account for the principal Payment amount, the Service Fee, and any other applicable fees.

9. **OTHER CHARGES.** JPay is not responsible for any fees or charges that may be imposed by the financial institutions associated with your Payment. For example (without limitation), some credit card issuers may treat the use of your credit card to use the Service as a "cash advance" rather than a purchase transaction, and may impose additional fees and interest rates for the transaction. JPay is not responsible for any non-sufficient funds charges, chargeback fees, or other similar charges that might be imposed on you by your bank, credit card issuer, or other provider.

10. **RECURRING PAYMENT.** A recurring payment is a Payment in which you authorize JPay to charge your Bank Card on a regular or periodic basis ("Recurring Payment"). This authorization is to remain in full force and effect until you cancel a Recurring Payment. You may cancel a Recurring Payment at any time up to one (1) business day prior to the date the Payment is scheduled to be processed. To cancel a Recurring Payment, log into your account, access the "Money" tab, then access the "Recurring Payments" tab and click "Delete."

11. **REFUNDS.** You may not cancel a Payment. Under some circumstances, a Payment may not be completed or a Client may refuse to accept a Payment. In such cases, JPay will cancel the Payment transaction and refund the principal Payment amount less the Service Fee to the Customer.

12. **ESCHEAT LAWS.** JPay must comply with each state's unclaimed property (escheat) laws. If, for whatever reason, JPay is unable to transfer your Payment to a Client, JPay will attempt to contact you to issue you a refund. If JPay cannot get in contact with you and you do not claim your Payment within the statutory time period, JPay may be required to escheat the Payment to your resident state. JPay will determine your state of residency based on the information provided by you at the time of Payment. If you do not claim an unpaid Payment within one (1) month after the date you made the Payment, JPay shall hold the Payment in an account and impose a $3.00 service fee per month until such time the unpaid Payment must be escheated to the state.

13. **GOVERNING LAW.**

(a) In the event of any dispute, claim or controversy among the parties arising out of or relating to this Agreement that involves a claim by the User for less than $10,000, exclusive of interest, arbitration fees and costs, shall be resolved by and through arbitration administered by the American Arbitration Association ("AAA") under its Arbitration Rules for the Resolution of Consumer Related Disputes. Any other dispute, claim or controversy among the parties arising out of or relating to this Agreement shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules. The ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration. The arbitration proceeding shall be conducted in as expedited a manner as is then permitted by the rules of the American Arbitration Association. Both the foregoing Agreement of the parties to arbitrate any and all such disputes, claims and controversies, and the results, determinations, findings, judgments and/or awards rendered through any such arbitration shall be final and binding on the parties and may be specifically enforced by legal proceedings in any court of competent jurisdiction.

(b) The arbitrator(s) shall follow any applicable federal law and Florida State law in rendering an award.

(c) If you reside in the State of Illinois, any arbitration hearing will occur in the county where you reside. Otherwise, any arbitration hearing will occur in Miami, Florida, or another mutually agreeable location, or a location ordered by the arbitrator.

(d) The cost of the arbitration proceeding and any proceeding in court to confirm or to vacate any arbitration award, as applicable, including, without limitation, each party's attorneys' fees and costs, shall be borne by the unsuccessful party or, at the discretion of the arbitrator(s), may be prorated between the parties in such proportion as the arbitrator(s) determines to be equitable and shall be awarded as part of the arbitrator's award.

14. **INDEMNIFICATION.** Except to the extent that JPay is otherwise liable under this Agreement or by law, you agree to indemnify and hold JPay, its shareholders, subsidiaries, affiliates, directors, officers, employees, agents, representatives, suppliers, service providers, and subcontractors harmless from any and all losses, liabilities, claims, demands, judgments and expenses, including but not limited to reasonable attorney's fees, arising out of or in any way connected with your use of or the performance of the JPay Service.

15. **DISCLAIMER OF WARRANTIES AND LIMITATION OF LIABILITY.** THE JPAY SERVICE IS PROVIDED BY JPAY INC. ON AN "AS IS" AND "AS AVAILABLE" BASIS. JPAY MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AS TO THE OPERATION OF THE JPAY SERVICE OR THE INFORMATION, CONTENT, MATERIALS, PRODUCTS OR SERVICES INCLUDED ON THIS SITE. YOU EXPRESSLY AGREE THAT YOUR USE OF THE JPAY SERVICE IS AT YOUR SOLE RISK AND THAT YOU ARE SOLELY RESPONSIBLE FOR THE ACCURACY OF THE PERSONAL AND PAYMENT INFORMATION THAT YOU PROVIDE.

    TO THE FULL EXTENT PERMISSIBLE BY APPLICABLE LAW, JPAY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. JPAY DOES NOT WARRANT THAT THIS SITE, ITS SERVICES OR E-MAIL SENT FROM JPAY ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. JPAY (AS WELL AS ITS OFFICERS, DIRECTORS, EMPLOYEES, AFFILIATES AND STOCKHOLDERS) WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF THIS SITE, ANY CREDIT CARD COMPANY'S NON-AUTHORIZATION OF A USER'S BANK CARD PAYMENT, ANY GOVERNMENT ENTITY'S NON-ACCEPTANCE OF A PAYMENT FROM A USER USING THE JPAY SERVICE, FOR DISRUPTIONS IN THE JPAY SERVICE, OR FOR ERROR, DELAY OR MIS-DELIVERY OF A PAYMENT, REGARDLESS OF THE CAUSE, INCLUDING (WITHOUT LIMITATION) DIRECT, INDIRECT, INCIDENTAL, PUNITIVE AND CONSEQUENTIAL DAMAGES.

    CERTAIN STATE LAWS DO NOT ALLOW LIMITATIONS ON IMPLIED WARRANTIES OR THE EXCLUSION OR LIMITATION OF CERTAIN DAMAGES. IF THESE LAWS APPLY TO YOU, SOME OR ALL OF THE ABOVE DISCLAIMERS, EXCLUSIONS OR LIMITATIONS MAY NOT APPLY TO YOU, AND YOU MIGHT HAVE ADDITIONAL RIGHTS.

MORGAN & MORGAN
COMPLEX LITIGATION GROUP
Mass Torts | Whistleblower | Class Action

October 16, 2015

Attn: Errol L. Feldman
JPay, Inc.
12864 Biscayne Blvd.
Suite 243
Miami, FL 33181

Dear Mr. Feldman:

Please find enclosed a Demand for Arbitration along with the JPay Terms of Service.

Very truly yours,

Lauren A. Cueva
Litigation Paralegal
Morgan & Morgan Complex
Litigation Group

Enclosure

/lac

EXHIBIT
tabbies
B

DEMAND FOR ARBITRATION

Claimants Cynthia Kobel ("Kobel") and Shalanda Houston ("Houston"), collectively "Claimants", file this Demand for Arbitration ("Demand") against JPay, Inc. ("Respondent" or "JPay"), individually and on behalf of all others similarly situated, and complain and allege upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

I. INTRODUCTION

1. Family members or friends of prison inmates often need to send money to prisoners to pay for basic needs such as toothpaste, toilet paper, visits to the doctor, and winter clothes. In some states, families of inmates pay for electricity and even room and board, as governments increasingly shift the costs of imprisonment from taxpayers to the families of inmates.

2. Historically, family members and friends of inmates would send a paper money order to the prison or jail—for nothing more than the cost of a stamp and the value of the money order.

3. But in the last decade, JPay has taken control of money transfers in 70% of prison systems in the United States. Today, some 1.7 million inmates and their friends and families are captive to JPay, which is their sole or primary means of money transfer—for an outrageous ransom. These exorbitant electronic money transfer fees fall, in large part, on the shoulders of families already struggling to survive in the absence of a jailed family member.

4. Now, rather than paying for the cost of a stamp to send an inmate $20, JPay charges family members and friends a fee as high as *45 percent of the amount transferred.*

5. As part of its aggressive push to control all money transfer for a given prison

system, JPay also eliminates or controls the one remaining free or inexpensive method for money transfers—paper money orders. Once JPay takes control over the means of transferring money orders at a prison or jail, JPay intentionally makes it unnecessarily difficult and burdensome for people to use paper money orders to send money to a prisoner. Worse, JPay intentionally slows down paper money order processing in order to force family members and friends to use JPay's expensive electronic money transfer services if they want to deliver money to the inmate in anything approaching a timely fashion.

6. Complaints from around the country indicate that when JPay takes over money transfer services at a given prison, paper money order processing times increase exponentially—and now regularly exceed thirty days. Such delays are intolerable for family members who need to get funds to prisoners for often-urgent needs.

7. JPay never informs users of its money transfer services that significant portions of its exorbitant money transfer fees are not for services rendered, but are rather used to pay kickbacks or "commissions" to the prison officials and departments that run the prisons. In Illinois, for example, JPay pays the Department of Corrections 50 cents out of every money transfer fee paid by a friend or family member of an inmate—but it never discloses this fact to users of its services. Similarly, in Louisiana, JPay pays the Department of Corrections 15% of every money transfer fee paid by an inmate's family or friend—but does not inform its users of this kickback.

8. In 2013, JPay handled seven million transfers amounting to approximately one billion dollars of prisoner funds, generating well over $50 million in fee revenue from prisoners' families and friends.

9. JPay uses four tactics to make sure that Claimants and members of the Class did

not and could not choose to use money transfer services other than it expensive, electronic service. ***First***, JPay makes the free money order option difficult to use. ***Second***, JPay makes deceptive marketing representations that exploit the difficulty and slowness of free money order transfers—*even though such difficulty and slowness are both of its own making*—without ever adequately informing consumers that a free money order option exists. ***Third***, JPay intentionally slows down access to money transferred with free money orders in order to force consumers to use its expensive electronic transfer services. ***Finally***, JPay never informs consumers that the "service fee" it charges for electronic transfers is used, in part, to pay commissions to prison officials.

II. PARTIES

10. Cynthia Kobel is a citizen of Michigan and resides in Harbert, Michigan. Ms. Kobel made electronic money transfers through JPay to inmates at Illinois prisons.

11. Shalanda Houston is a citizen of Georgia and resides in Atlanta, Georgia. Ms. Houston made electronic money transfers through JPay to an inmate at Louisiana Correctional Facilities.

12. JPay, Inc. is a provider of corrections-related services in more than thirty states across the country, as well as a provider of a payment options for individuals in community corrections. JPay maintains its headquarters in Miami, Florida.

III. FACTUAL ALLEGATIONS

A. JPay Assesses Exorbitant Transfer Fees And Uses a Substantial Portion of Those Fees to Pay Undisclosed Kickbacks to Corrections Departments.

13. Out of every electronic money transfer fee a consumer pays, JPay sends at least 50 cents to the prison operator or corrections department in the form of an "incentive payment" or kickback. The "incentive" is for the prison officials to provide JPay unfettered access to its

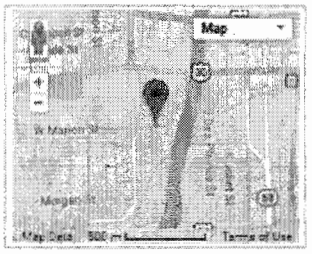
captive prison population, and to allow JPay to exploit this powerless group of people—without competition or scrutiny.

14. JPay assesses electronic money transfer fees of up to 45% per transfer.

15. In Illinois, those fees are as follows:

Stateville Correctional Center

Illinois Department of Corrections



Get Driving Directions

Available JPay Services

Send Money Rates

Rates

Online		
$ 0.00	- 20.00	$4.95
$ 20.01	- 100.00	$7.95
$ 100.01	- 200.00	$9.95
$ 200.01	- 300.00	$11.95
By Phone		
$ 0.00	- 20.00	$5.95
$ 20.01	- 100.00	$8.95
$ 100.01	- 200.00	$10.95
$ 200.01	- 300.00	$12.95

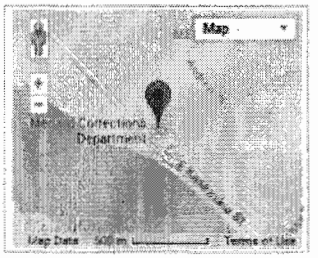
Delivery Timing**

If you send money on	Inmate can spend on
Before 10:00 PM CST Thursday	Friday
Before 10:00 PM CST Friday	Saturday
Before 10:00 PM CST Monday	Tuesday
Before 10:00 PM CST Tuesday	Wedn...
Before 10:00 PM CST Wedn...	Thursday
Before 10:00 PM CST Saturday	Sunday
Before 10:00 PM CST Sunday	Monday

**Please note, payment availability is subject to depositor validation in accordance with federal and state regulations.

Menard Correctional Center

Illinois Department of Corrections



Get Driving Directions

Available JPay Services

Send Money Rates

Rates

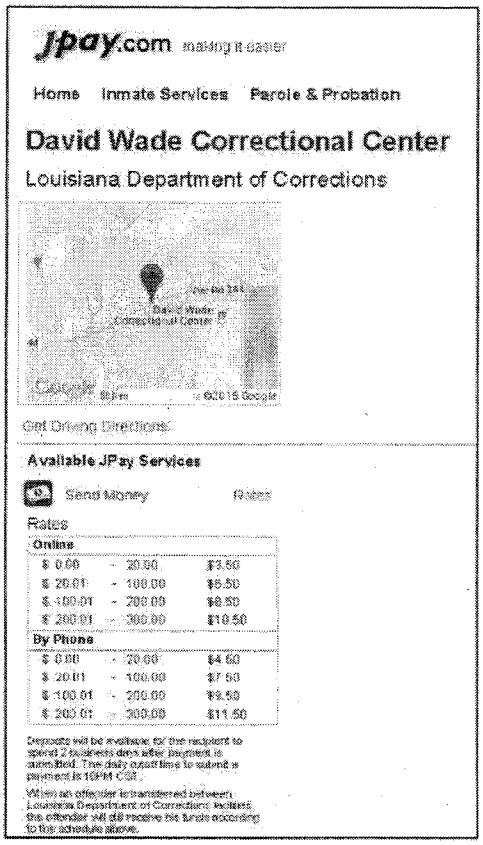
Online		
$ 0.00	- 20.00	$4.95
$ 20.01	- 100.00	$7.95
$ 100.01	- 200.00	$9.95
$ 200.01	- 300.00	$11.95
By Phone		
$ 0.00	- 20.00	$5.95
$ 20.01	- 100.00	$8.95
$ 100.01	- 200.00	$10.95
$ 200.01	- 300.00	$12.95

Delivery Timing**

If you send money on	Inmate can spend on
Before 10:00 PM CST Thursday	Friday
Before 10:00 PM CST Friday	Saturday
Before 10:00 PM CST Monday	Tuesday
Before 10:00 PM CST Tuesday	Wedn...
Before 10:00 PM CST Wedn...	Thursday
Before 10:00 PM CST Saturday	Sunday
Before 10:00 PM CST Sunday	Monday

**Please note, payment availability is subject to depositor validation in accordance with federal and state regulations.

16. In Louisiana, those fees are as follows:



17. JPay sets its electronic money transfer fees, depending on the amount of the transfer, to include the kickbacks. Ms. Kobel and Ms. Houston, therefore, paid the amount of the commissions and were not reimbursed for them.

18. JPay promises such commissions to the prison operators in order to win exclusive contracts to provide money transfer services to inmates and ensure a captive population for its electronic money transfer services.

19. According to the contract between JPay and the Illinois Department of Corrections ("IL DOC"), for example, "The vendor [JPay] will charge the sender for the services rendered, with an incentive payment to the Agencies for the transactions…JPay will pay $0.50 per deposit to the Agency as an incentive payment."

20. As the plain terms of JPay's contract with the State of Illinois indicates, JPay is

only authorized to charge friends and family members of inmates (the "senders") for "services rendered." However, JPay also charges senders for monies it pays to the Department of Corrections in the form of a kickback or commission.

21. According to the contract between JPay and the Louisiana Department of Public Safety & Corrections ("LA DOC"), the LA DOC receives "Commissions on Electronic Funds Transfers." Specifically, 15% of the fee charged to senders of Electronic Funds (i.e. family and friends of inmates) per each transaction is "to be remitted to the Department [LA DOC] as Commissions revenue."

22. While a consumer may initiate a money transfer through JPay via the internet or via the phone, in neither case does JPay ever disclose that it is using the service fee to pay a commission.

23. Additionally, JPay's website includes a page that purports to represent "JPay Terms of Service."

24. Claimants were not affirmatively presented with, and did not review, the "JPay Terms of Service" prior to making electronic money transfers through JPay.

25. Even assuming, *arguendo*, that JPay's Terms of Service ever became part of a contract between Claimants and JPay, JPay breached the terms of that contract.

26. The Terms of Service state that "**In consideration for the use of the JPay Service, you agree to pay JPay a fee** for each Payment sent by you at the applicable rate then in effect (the "Service Fee"). All Service Fees are non-refundable" (emphasis added). However, the JPay "Service Fee" was, in part, not "consideration for use of the JPay Service," but was rather the extraction of monies that JPay used to pay kickbacks to state prison officials.

27. JPay failed to disclose to its users that it was forcing them to pay the IL DOC and

LA DOC kickbacks that allowed JPay to charge them unconscionable fees in the first place.

28. JPay pays these kickbacks to secure the business of a captive population so that it can charge exorbitant fees for electronic money transfer services. JPay was not contractually authorized to charge consumers for this purpose.

B. JPay Forces Friends and Family Members to Use Its Expensive Electronic Money Transfer Services By Intentionally Slowing Down the Free Money Order Option

29. Prior to JPay taking control of money transfers in a given prison system, family members could simply send a paper money order to the prison, where it would be credited to the prisoner's account, free of charge.

30. When JPay takes control of money transfers at a prison, it also takes control of the paper money order deposit system as well. Consumers must send funds to JPay, at a "lockbox" located in Florida, and request that JPay add the funds to the prisoner's account. But JPay intentionally slows down the low-cost paper money order system to force people to use its expensive electronic transfers.

31. Historically, there is a clear slowdown in the paper money order system as soon as JPay takes over. For example, in Virginia, complaints indicate that prior to JPay taking over the money transfer system, Virginia state prisons credited paper money orders to inmates' accounts in roughly *three days*. Today, paper money orders can take *more than a month* to reach an inmate's account—often giving friends and family members no choice but to use the JPay electronic transfer option.

32. In an investigation, the Center for Public Integrity has found that, across the country, delays and other obstacles make the "free" money order transfer option inaccessible to many families. According to the investigation, more than a dozen families in five different states said that money orders have been credited much more slowly since JPay took over money

transfers at certain prisons.

33. The manufactured delays leave consumers little choice but to use JPay's electronic money transfer services, which JPay touts as faster.

34. JPay does not hide the fact that it intends to force consumers to use its expensive electronic money transfer option. The founder of JPay admitted to the Center for Public Integrity that said JPay does "want people to convert from a money order customer to a digital customer, absolutely"—supposedly because electronic payments are more efficient. In actuality, JPay has a clear profit motive for "converting" consumers.

35. According to the contract between JPay and the Louisiana Department of Corrections, "JPay's lockbox team maintains staggered shifts during a 12-hour business day. The team processes and submits the [paper money order] payments daily; decreasing the time it takes to reach the offender's account while eliminating mistaken payments." The contract continues, "After the payment is scanned, verified and processed, the funds post to the offender's trust account the next morning in accordance with the Offender Banking System (OBS) interface."

36. JPay violates this promise and does not process and post paper money orders to inmate accounts "the next morning".

37. The Terms of Service (which Ms. Houston did not ever receive or review) are directly contrary to the agreement with the LA DOC and provide "All approved money orders will be processed within up to ten (10) business days following receipt by JPay." As discussed above, JPay routinely does not process paper money orders within this time.

38. According to the contract between JPay and the Illinois Department of Corrections, "JPay can collect, process and support US Postal money orders and cashier's checks

sent to Agency inmates. Money orders are retrieved each business day from a JPay post office box, processed and added to the deposit file within 48 hours of receipt."

39. JPay violates this promise and does not deposit money orders to inmate accounts "within 48 hours."

40. Indeed, the Terms of Service (which Ms. Kobel did not ever receive or review) are directly contrary to the agreement with the DOC and provide "All approved money orders will be processed within up to ten (10) business days following receipt by JPay." As discussed above, JPay routinely does not process money orders within this time.

C. JPay Forces Consumers to Use Its Expensive Money Transfer Services By Making the Free Money Order Option Hard To Use

41. Before JPay took over the Illinois prisons' money transfer services, friends and family members of inmates simply purchased money orders—usually for approximately $1—and mailed them to the prison.

42. When JPay takes over a prison's money transfer system—as JPay did in Illinois prisons in approximately 2009 and Louisiana prisons in approximately 2011—it either eliminates the money order option altogether, or takes control of it and intentionally makes it difficult to use and slower than its electronic transfer services.

43. Despite its obligation to provide a free money order option in certain states, JPay makes it difficult for consumers to discover that such an option even exists. JPay also makes it difficult for consumers to discover that the option is free. And JPay makes it procedurally difficult for consumers to avail themselves of the free money order transfer option.

44. In short, JPay creates several new burdens and obstacles to use paper money orders after it takes control of a prison's money transfer system.

45. Those seeking to avoid the exorbitant electronic money transfer fees by sending a

money order must print and fill out a JPay provided form, then mail that form to Florida—as opposed to simply sending a money order to the prison as was formerly possible.

46. The instructions on the form are dwarfed by large print urging consumers to "Put down your pen! Put away your car keys!" because "There's a faster way to send money, go to JPay.com and sign up now!"

47. In contrast, the money order deposit form says in almost illegible tiny print that the money order option is free—and this is the only place JPay informs consumers of this fact:

JPay Stay connected.

Money Order Deposit Form

HOW TO

SEND A MONEY ORDER

1. Detach and complete the bottom portion of this form in blue or black ink
2. Make the money order payable to JPay
   We recommend using US Postal Money Orders
3. Place the money order and the Money Order Deposit Form in an envelope
4. Mail to: JPay, PO Box 260250, Hollywood, FL 33026

Make sure to...

- Write clearly on the form to avoid delays processing the money order
- Not include any letters or notes with your payment because these will be discarded
- Verify that your loved one's name and ID are entered correctly on the Money Order Deposit Form

There is no fee for sending money via money order

Visit JPay.com/LegalAgreements/OutLaw for Terms & Conditions. A JPay account is not needed to send money orders. Call 800-574-5729 if you need more information or assistance completing this form

—DID YOU KNOW?—

Money orders can take days to mail and process?

There's a Better Way

Send money without a money order – and get the funds there the next day!*

www.JPay.com
Sign up for your free account today

JPay Mobile
Free mobile app for Android and iPhone

800-574-5729
Toll-free phone number, 24/7

In-Person/Cash
MoneyGram® locations, including CVS & Walmart
(Receive code 7364)

*Some facilities do not process on holidays and weekends. Delivery timing subject to depositor verification

---

JPay

Money Order Deposit Form

ALL FIELDS REQUIRED

Mail to: JPay, PO Box 260250, Hollywood, FL 33026

Money Order Amount – maximum $999.99

$ ____.__

Inmate's ID

Inmate's State I L

Inmate's Full Name

Your First Name

Your Last Name

Sender's Address

City

State Zip

Email

Your Phone Number ___-___-____

D. JPay Forces People to Use Its Expensive Money Transfer Services with Deceptive Marketing Representations, Including Hiding Fact that Money Transfers are Free

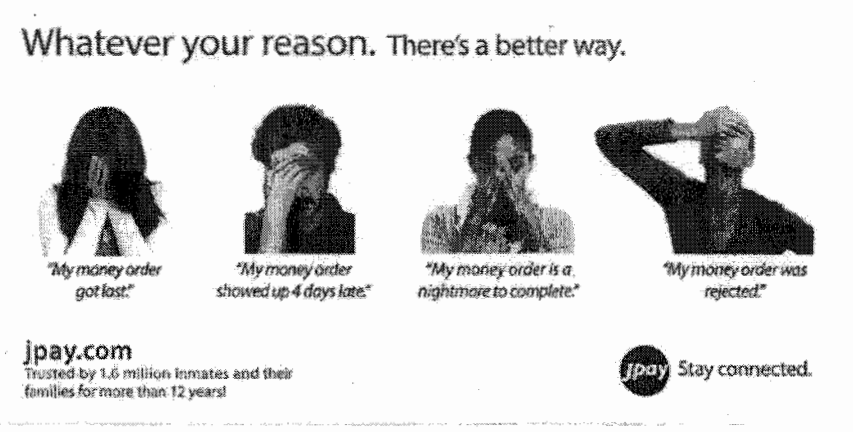
48. JPay is required to offer free money orders, pursuant to its contract with the Illinois Department of Corrections, the Louisiana Department of Corrections, and other states' corrections systems. But JPay uses marketing misrepresentations to denigrate the very free money order option its contracts with Illinois and other states require it to provide.

49. JPay fails to present transfer options other than the JPay electronic transfer services equally.

50. JPay does not adequately disclose that consumers may elect to send money to inmates for free via money orders.

51. For the few consumers that are able to determine a free money order option exists, JPay ensures those consumers are faced with severe disincentives against using that option—in the form of manufactured money transfer delays.

52. For example, JPay has promised the state of Illinois and the state of Louisiana to provide a fast, free money order option, but JPay conceals this fact from consumers. In fact, it spends the entirety of its marketing efforts convincing consumers that money orders should be avoided at all costs:



53. The above marketing representation is deceptive for because, for one, it

misrepresents JPay's contractual promise to Illinois, Louisiana, and other states. By reading the ad, a consumer could not know that a money order was a free and feasible option to transfer funds to an inmate.

54. Moreover, each of the bad outcomes reflected in the advertisement are completely *within the control of JPay*, including lateness of funds delivery and the "nightmare" process of completing a money order. JPay thus strikes fear into the heart of consumers by exploiting its own poor performance and misconduct.

55. Consumers are deceived into believing that they had no choice but to use JPay's expensive electronic money transfer services.

56. In the form of website representations and marketing representations—including posters—disseminated at prisons, JPay represents to consumers that their money transfers will reach inmates significantly faster if they choose the JPay electronic transfer option and that their transfers would be delayed if they did *not* use that option.

57. However, as discussed above, a transfer would be "delayed" only because JPay has designed its system to make money order processing more time-consuming and because JPay intentionally delays processing of money orders.

58. Because inmates need money quickly—often for survival—JPay coerces family members to use JPay electronic transfer services in order to give inmates immediate access to their funds.

59. JPay exploits the slowness of the free money order option (a slowness it manufactures) in its marketing and other communications.

60. Indeed, when a consumer clicks the money order transfer link on JPay's website, the following page appears, urging consumers <u>not</u> to use money orders, nowhere stating that

money orders are a fast and free money transfer option (but for JPay's intentional interference), and nowhere providing a fair comparison of the costs and benefits of the money transfer options:

61. JPay's tactics are extraordinarily successful. According to the Center for Public Integrity, one former marketing director for the company lists as a key accomplishment on his LinkedIn profile that he "Converted 78 percent" of money order users to online users, boosting the company's annual revenue by $985,000.

62. In Pennsylvania, another state that used to process money orders quickly for free, but where JPay now forces consumers to process money orders via a "lockbox" in Florida, the number of money orders plunged by *two-thirds* in the first two months after JPay took over payments.

63. In Missouri, the state prison system processed, for free, 30,000 money orders a month before JPay took over money transfer services. Now, JPay processes only 1,000 free

money orders per month.

64. JPay then charges family members and friends unconscionable and excessive electronic money transfer fees.

E. JPay's Electronic Money Transfer Fees are Exorbitant, as Other Companies Provide Similar Prison Services for a Fraction of the Cost

65. Other companies provide similar prison money transfer services for far less.

66. NIC Inc., a JPay competitor, charges a flat fee of $2.40 in Maine to send money to inmates.

67. Until recently, Arkansas charged merely 5 percent to send money through the state's own Web portal.

F. Claimant Cynthia Kobel's Experience

68. While Ms. Kobel does not have a relative in prison, for years she has sent funds to Illinois prisoners as an act of charity.

69. For approximately 14 years, and continuing until 2013, Ms. Kobel sent funds to prisoners in Illinois state prisons using money orders. She spent approximately $1 per transaction, regardless of transaction amount.

70. On or about January 2013, Ms. Kobel began to send funds to prisoners at Menard and Stateville Prisons. Ms. Kobel used JPay's electronic transfer services to send these funds, and understood herself to have no other reasonable option to send funds.

71. The inmates to whom Ms. Kobel sends funds told her that they had received notice of JPay taking over money transfer services in Illinois prisons via a newsletter and other marketing materials.

72. Ms. Kobel believe she had no choice but to use JPay electronic money transfer services because these services were marketed as the cheapest and most time-efficient option.

73. By speaking to family members of inmates, Ms. Kobel came to understand that the money order transfer times had become exponentially lengthier, since friends and family members were deprived of the option of sending a money order through the post office, bank, or institution not affiliated with JPay. This extreme slow-down was a well-known fact among inmates' friends and family members. As such, Ms. Kobel, along with thousands of other inmates' friends and family members, was forced to begin using JPay electronic money transfer services if she wanted funds to arrive in anything approaching a timely fashion.

74. Because Ms. Kobel was forced to begin using JPay electronic money transfer services, her cost for sending her charitable contributions soared. Rather than approximately $1 per transfer, Ms. Kobel now faced higher charges for money transfers to Menard and Stateville.

75. At least 10 times a year, Ms. Kobel sends inmates $50 to $100 dollars online, resulting in $7.95-per-transaction fees from JPay.

76. A portion of each of these transaction fees was used by JPay to pay a commission to the Illinois Department of Corrections. Ms. Kobel was never informed by JPay that it was using her money to pay a kickback to the Illinois Department of Corrections.

77. Ms. Kobel would not have used JPay electronic money transfer services if JPay had not made free money order transfers burdensome and untimely.

78. Ms. Kobel would not have used JPay electronic money transfer services if she had known a portion of the high transfer fees was used by JPay to pay a commission to the Illinois Department of Corrections, a kickback which JPay paid to win the business of the captive Illinois prison population for electronic money transfers. Moreover, if given the option, Ms. Kobel would not have paid the 50-cent portion of the transfer fee that was ultimately paid to the DOC in the form of an "incentive payment."

G. Claimant Shalanda Houston's Experience

79. Ms. Houston has been sending funds to her husband for years, who is currently incarcerated at David Wade Correctional Center in Louisiana, in order to cover his legal fees and other expenses.

80. For approximately 12 years, and continuing to 2012, Ms. Houston sent funds to her husband in Louisiana state prison using paper money orders. She spent approximately $1 per transaction, regardless of the transaction amount.

81. On or about August of 2012, Ms. Houston began to send funds to her husband at David Wade Correctional Facility. Ms. Houston used JPay's electronic transfer services to send these funds, and understood herself to have no other reasonable option to send funds.

82. Ms. Houston's husband told her that he had received notice of JPay taking over money transfer services in Louisiana prisons via a newsletter and other marketing materials.

83. Ms. Houston believe she had no choice but to use JPay money transfer services because these services were marketed as the only time-efficient option.

84. By speaking to family members of inmates, Ms. Houston came to understand that the money order transfer times had become exponentially lengthier, since friends and family members were deprived of the option of sending a money order through the post office, bank, or institution not affiliated with JPay. This extreme slow-down was a well-known fact among inmates' friends and family members. As such, Ms. Houston, along with thousands of other inmates' friends and family members, was forced to begin using JPay electronic money transfer services if she wanted funds to arrive in anything approaching a timely fashion.

85. Because Ms. Houston was forced to begin using JPay electronic money transfer services, the cost to financially support her husband soared. Rather than approximately $1 per transfer, Ms. Houston now faced higher charges for money transfers to David Wade.

86. Ms. Houston sends her husband almost $1000 dollars per month online, resulting in more than $20 in monthly transaction fees (including the hidden kickbacks) from JPay. JPay policy prohibits sending more than $300 in one transaction, so Ms. Houston is forced to make several transactions in order to complete her monthly contribution, thereby resulting in more transfer fees and kickbacks.

87. Ms. Houston would not have used JPay electronic money transfer services if JPay had not made free money order transfers burdensome and untimely.

88. Ms. Houston would not have used JPay electronic money transfer services if she had known a portion of the high transfer fees was used by JPay to pay a commission to the Louisiana Department of Corrections, a kickback which JPay paid to win the business of the captive Louisiana prison population for electronic money transfers.

IV. CLASS ACTION ALLEGATIONS

89. Description of the Class: Claimants bring this class action on behalf of themselves and a Class defined as follows:

> All natural persons who paid a fee to JPay for electronic money transfer services and who agreed to arbitrate their claims with Jpay (the "Class").

90. Excluded from the Class are JPay's officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded from the Class is any judge, justice, judicial officer or arbiter presiding over this matter and the members of their immediate families and judicial staffs.

91. Numerosity: The proposed Class is so numerous that individual joinder of all members is impracticable.

92. Common Questions of Law and Fact Predominate: There are many questions of

law and fact common to Claimants and the Class, and those questions substantially predominate over any questions that may affect individual Class members. Common questions of law and fact include:

a. Whether JPay's money transfer services are unfairly and exorbitantly priced;

b. Whether JPay intentionally slows down its free money order option;

c. Whether JPay hides the fact that free money transfers are available;

d. Whether JPay used proceeds from money transfer fees to pay undisclosed kickbacks to the Illinois Department of Corrections, the Louisiana Department of Corrections, and/or other prison agencies;

e. Whether JPay engaged in unlawful unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce;

f. Whether JPay breached its contracts with Claimants and the Class;

g. Whether JPay breached the implied covenant of good faith and fair dealing with Claimants and the Class;

h. Whether JPay was unjustly enriched through its dealings with Claimants and the Class;

i. Whether JPay acted unconscionably through its dealings with Claimants and the Class;

j. Whether JPay should be ordered to pay actual damages to Claimants and the other members of the Class;

k. Whether JPay should be ordered to pay punitive damages, as allowable by law, to Claimants and the other members of the Class;

l. Whether JPay should be ordered to pay statutory damages, as provided by the Florida Deceptive and Unfair Trade Practices Act, to Claimants and the other members of the Class; and

m. Whether JPay should be ordered to pay attorneys' fees and costs.

93. Typicality: Claimants' claims are typical of the claims of the members of the Class. Claimants and all members of the Class have been similarly affected by the actions of JPay.

94. Adequacy of Representation: Claimants will fairly and adequately represent and protect the interests of the Class. Claimants has retained counsel with substantial experience in prosecuting complex and class action litigation. Claimants and their counsel are committed to vigorously prosecuting this action on behalf of the Class, and have the financial resources to do so.

95. Superiority of Class Action: Claimants and the members of the Class suffered, and will continue to suffer, harm as a result of JPay's unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy.

FIRST CLAIM FOR RELIEF
Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.201, *et seq.*)
(On behalf of the Class)

96. Claimants re-allege and incorporate by reference the allegations contained in paragraphs 1 through 95 above as if fully set forth herein.

97. The Florida Deceptive and Unfair Practices Act ("FDUTPA") renders unlawful unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Fla. Stat. § 501.204. Unconscionable acts or practices include, but are not limited to, the use of market power to extract contract concessions from parties to a transaction; withholding information that could affect a consumer's decision to enter into a transaction; intentionally stalling or slowly performing contract obligations; and violations of any statute, rule, regulation, or ordinance that prohibits unconscionable acts or practices.

98. Among other purposes, FDUTPA is intended "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or

unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.202.

99. JPay engaged in "trade or commerce" within the definition of FDUTPA, by engaging in "advertising, soliciting, providing, offering, or distributing, whether by sale . . . or otherwise, of any good or service . . . or any other article, commodity, or thing of value." Fla. Stat. § 501.203(8). More specifically, as alleged above, JPay, from its Florida headquarters, sold and provided electronic money transfer services to Claimants and members of the Class.

100. Claimants are "consumers" as defined by Fla. Stat. § 501.203(7) because Claimants each qualify as "an individual; child, by and through its parent or legal guardian; business; firm; association; joint venture; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; any commercial entity, however denominated; or any other group or combination." Thus, Claimants are entitled to seek the underlying relief.

101. The JPay Terms of Service contain a Florida choice of law provision.

102. JPay engaged in deceptive acts or unfair and/or unconscionable practices by using deceptive marketing representations and omissions to force consumers away from free money order transfer services and toward exorbitantly-priced JPay electronic money transfer services.

103. JPay also engaged in deceptive acts or unfair and/or unconscionable practices by making free money order transfers burdensome and difficult to use—even though it was required to provide such free services pursuant to contracts with Illinois, Louisiana, and other states—to force consumers away from free money order transfer services and toward exorbitantly-priced JPay electronic money transfer services.

104. JPay also engaged in deceptive acts or unfair and/or unconscionable practices by intentionally slowing down free money order transfers, which it is required to provide pursuant

to contracts with Illinois, Louisiana, and other states, to force consumers away from free money order transfer services and toward exorbitantly-priced JPay electronic money transfer services.

105. JPay has paid a substantial portion of electronic money transfer fees to prison officials in the form or commissions or kickbacks—a scheme both unfair and unconscionable to consumers and one that deceived them into believing that they were paying for JPay services when, in fact, they paying for kickbacks.

106. Through its unfair, unconscionable and deceptive practices, JPay caused Claimants and the Class to pay exorbitant fees that they otherwise would not have, but for JPay's wrongful acts.

107. FDUTPA specifically provides for injunctive relief related to alleged unfair, deceptive, and unconscionable practices. Without an injunction requiring JPay to disclose its kickbacks to consumers and preventing JPay from making its deceptive marketing representations and omissions detailed herein, consumers, including Claimants and the Class, will continue to be deceived. Therefore, pursuant to Fla. Stat. § 501.211(1), Claimants seek a declaration stating that JPay's deceptive, unfair, and unconscionable conduct has violated and continues to violate FDUTPA and seek injunctive relief regarding JPay's past and continuing deceptive, unfair, and unconscionable conduct.

108. Claimants and the Class suffered actual damages in the form of exorbitant fees paid to JPay that they would not have paid had JPay not forced them away from free money order transfer services.

109. Pursuant to Fla. Stat. § 501.211(2), Claimants are authorized to bring a civil action to recover Claimants' actual damages, plus attorneys' fees and costs, as provided by Fla. Stat. § 501.2105.

SECOND CLAIM FOR RELIEF
Breach of Contract, Including Covenant of Good Faith and Fair Dealing
(On behalf of the Class)

110. Claimants re-allege and incorporate by reference the allegations contained in paragraphs 1 through 95 above as if fully set forth herein.

111. Claimants and JPay have contracted for electronic money transfer services, and an express or implied contract exists between the parties for this service.

112. JPay violated, and continues to violate, the contract it has with consumers when it uses electronic money transfer fees to pay commissions to state prison officials.

113. Under the laws of the states where JPay does business, good faith is an element of every contract. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

114. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

115. JPay violated the covenant of good faith and fair dealing when it assessed service fees for electronic money transfers that were used, in part, to pay kickbacks and commissions to

prisons and prison officials.

116. JPay willfully engaged in the foregoing conduct in bad faith, for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing revenue from Claimants and other members of the Class. These practices were not authorized by the contract, were not within JPay's discretion under the contract, and were outside the reasonable expectations of Claimants and the Class members.

117. Claimants and members of the Class have performed all, or substantially all, of the obligations imposed on them.

118. Claimants and members of the Class have sustained damages as a result of JPay's breach of the covenant of good faith and fair dealing.

119. Claimants and members of the Class have no adequate remedy at law.

THIRD CLAIM FOR RELIEF
Unjust Enrichment
(On behalf of the Class)

120. Claimants re-allege and incorporate by reference the allegations contained in paragraphs 1 through 95 above as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

121. Claimants, on behalf of themselves and the Class, assert a common law claim for unjust enrichment.

122. By means of JPay's wrongful conduct alleged herein, JPay engaged in a scheme whereby it paid a substantial portion of electronic money transfer fees to prison officials in the form or commissions or kickbacks—a scheme that was unfair, unconscionable, and oppressive.

123. JPay uses deceptive marketing representations and omissions to force consumers away from free money order transfer services and toward exorbitant JPay electronic money

transfer services.

124. JPay intentionally slows down free money order transfers, which it is required to provide pursuant to contracts with Illinois, Louisiana, and other states, to force consumers away from free money order transfer services and toward exorbitant JPay electronic money transfer services.

125. JPay knowingly received and retained wrongful benefits and funds from Claimants and members of the Class. In so doing, JPay acted with conscious disregard for the rights of Claimants and members of the Class.

126. As a result of JPay's wrongful conduct as alleged herein, JPay has been unjustly enriched at the expense of, and to the detriment of, Claimants and members of the Class.

127. JPay's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

128. Under the common law doctrine of unjust enrichment, it is inequitable for JPay to be permitted to retain the benefits it received, and is still receiving, without justification, from the imposition of exorbitant transfer fees on Claimants and members of the Class in an unfair, unconscionable, and oppressive manner. JPay's retention of such funds under circumstances making it inequitable to do so constitutes unjust enrichment.

129. The financial benefits derived by JPay rightfully belong to Claimants and members of the Class. JPay should be compelled to disgorge in a common fund for the benefit of Claimants and members of the Class all wrongful or inequitable proceeds received by it. A constructive trust should be imposed upon all wrongful or inequitable sums received by JPay traceable to Claimants and the members of the Class.

130. Claimants and members of the Class have no adequate remedy at law.

FOURTH CLAIM FOR RELIEF
Unconscionability
(On behalf of the Class)

131. Claimants re-allege and incorporate by reference the allegations contained in paragraphs 1 through 95 above as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

132. JPay's policies and practices are or were substantively and procedurally unconscionable in the following respects, among others:

a. JPay employs deceptive marketing representations and omissions to force consumers away from free money order transfer services and toward exorbitantly-priced JPay electronic money transfer services.

b. JPay intentionally slows down free money order transfers, which it is required to provide pursuant to contracts with Illinois, Louisiana, and other states, to force consumers away from free money order transfer services and toward exorbitantly-priced JPay electronic money transfer services.

c. JPay assesses service fees for electronic money transfers that were used, in part, to pay kickbacks and commissions to prisons and prison officials.

133. Considering the great business acumen and experience of JPay in relation to Claimants and the Class, the great disparity in the parties' relative bargaining power, the inconspicuousness and incomprehensibility of the contract terms at issue, the oppressiveness of the contract terms, the commercial unreasonableness of the contract terms, the purpose and effect of the contract terms, the allocation of the risks between the parties, and similar public policy concerns, these provisions are unconscionable and, therefore, unenforceable as a matter of law.

134. Claimants and the Class members have suffered damages as a result of JPay's unconscionable policies and practices as alleged herein.

V. REQUEST FOR RELIEF

WHEREFORE, Claimants, individually and on behalf of the other members of the Class proposed in this Complaint, respectfully request that the Arbitrator enter judgment in their favor

and against JPay, as follows:

1. Declaring that this action is a proper class action, certifying the Class as requested herein, designating Claimants as Class Representatives and appointing the undersigned counsel as Class Counsel for the Class;

2. Ordering JPay to pay actual damages to Claimants and the other members of the Class;

3. Ordering JPay to pay punitive damages, as allowable by law, to Claimants and the other members of the Class;

4. Ordering JPay to pay statutory damages, as provided by the Florida Deceptive and Unfair Trade Practices Act, to Claimants and the other members of the Class;

5. Awarding declaratory and injunctive relief as permitted by law;

6. Ordering JPay to pay attorneys' fees costs and expenses; and

7. All other relief the Arbitrator deems necessary.

Dated: October 16, 2015

Respectfully submitted,

/s/ John A. Yanchunis
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November 23, 2015

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Case Number: 01-15-0005-3477

Shalanda Houston and Cynthia Kobel, individually
and on behalf of all others similarly situated
-vs-
JPay, Inc.

Dear Parties:

Thank you for choosing the American Arbitration Association (AAA) to assist you in resolving your dispute. The AAA is committed to providing you with the highest level of service in order to facilitate the resolution of your dispute. As Manager of ADR Services for the American Arbitration Association, I will be your primary contact for this matter and am here to serve as your resource during the administration of your case. Please do not hesitate to contact me directly with any questions, issues, or concerns. Please note, my staff will be assisting me throughout the administration of the case to ensure that it is handled efficiently and expeditiously. Accordingly, there may be times when you are contacted, on my behalf, by a member of my staff. My staff is comprised of Vilma Peguero, Case Administrator.

This will acknowledge receipt of the balance of the filing fee. Therefore, we will proceed with administration. We note that the claim involves a potential class action. Copies of our Commercial Arbitration Rules and Mediation Procedures, as amended and in effect November 1, 2014, Fee Schedule Amended and Effective July 1, 2015, as well as the Supplementary Rules for Class Arbitrations as amended and effective October 8, 2003, may be obtained from our website at www.adr.org.

I have included the Class Arbitration Information Sheet, which provides you with some basic information about the AAA's arbitration process and sets forth some initial dates by which certain steps should be completed by the parties. We call your attention to Section 9 of the Supplementary Rules for Class Arbitrations, which states in part:

All class arbitration hearings and filings may be made public.

Therefore, the parties are encouraged to review their filings for confidential or sensitive information, including all pleadings, and take whatever steps are necessary, including redacting their pleadings to avoid the disclosure of any privileged or

otherwise confidential information. The administration of the case shall be conducted by the AAA with the appropriate party representatives. We shall direct all other inquiries to the AAA Class Action Docket on our website (www.adr.org).

Claimants have requested that the hearing be held in Miami, FL. Please review the Rules regarding the locale of hearings. Also, in accordance with the Rules, if Respondent does not answer on or before December 7, 2015, we will assume that the claim is denied. If Respondent wishes to counterclaim, file two copies, together with the administrative fee, to my attention. A copy should also be directly sent to Claimants.

This will confirm an Administrative Conference is scheduled on December 4, 2015, at 2:00 PM EST via conference call. Please dial in to the conference call by using the following telephone number and security code:

Telephone: 888-537-7715
Security Code: 43775158#

For your convenience, the enclosed Class Arbitration Information Sheet covers items to be discussed on the call.

In order to assist the arbitrator(s) with providing full disclosures, I have enclosed a Checklist for Conflicts to list those witnesses you expect to present, as well as any persons or entities with an interest in these proceedings. The checklist should only be sent to the AAA and should not be exchanged between the parties. The Conflicts Checklist is due on or before December 7, 2015. An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case administrator.

The parties' attention is directed to 1-3.11 and 4-5.5 of the Rules Regulating the Florida Bar ("Rules"). As of January 1, 2006, the Rules permit a lawyer admitted to practice in a jurisdiction other than Florida to represent a party in a Florida arbitration, provided that certain administrative requirements are met. In particular, the Rules require the non-Florida attorney to file a verified statement with the Florida Bar and opposing counsel which provides information regarding that attorney's practice, prior participation in Florida arbitrations, disciplinary record in other states, information regarding the representation at issue in the arbitration and the payment of a $250 filing fee to the Florida Bar.

The Rules provide additional information and impose additional requirements on non-Florida attorneys representing parties in Florida arbitrations. The Rules may be obtained from the Florida Bar's website, www.floridabar.org

The AAA brings this matter to your attention so that the parties and their counsel will take the appropriate steps to comply with the Rules.

Please feel free to contact me, should you have any questions or concerns. We look forward to assisting you in this matter.

Sincerely,

Jonathan J Weed
Manager of ADR Services
Direct Dial: (401) 431-4745
Email: jonathanweed@adr.org
Fax: (866) 644-0234

Encl.

Class Arbitration Information Sheet

This document provides information about your upcoming arbitration and the expectations concerning each party's conduct throughout the process. Please save this information sheet so that you may refer to it throughout the arbitration.

Both the Commercial Arbitration Rules and Mediation Procedures, as amended and in effect November 1, 2014, Fee Schedule Amended and Effective July 1, 2015, and the Supplementary Rules for Class Arbitrations (SRCA), as amended and in effect October 8, 2003, govern this matter; where inconsistencies exist between the Supplementary Rules and the other AAA rules that apply to the dispute, the Supplementary Rules will govern.

Please also note that the SRCA consist of the following phases:

1. Clause Construction Phase: During this phase the arbitrator will decide whether the parties' arbitration agreement allows for class action. If the arbitrator determines the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class, the arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. If the arbitrator determines that the agreement does not allow for class action, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. See SRCA Section 3.

2. The Class Certification Phase: During this phase the arbitrator will determine whether to certify the class or not. If the arbitrator finds certification of the class is not warranted and Claimant wishes to pursue individual claims, he/she must file an amended demand setting forth the individual claims. However, if the arbitrator certifies the class, the case will move to the Class Determination Phase. See SRCA Section 4.

3. The Class Determination Phase: During this phase the arbitrator will define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion. The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. See SRCA Section 5.

Once the above phases have been completed, hearings will be scheduled and held for the purpose of determining the merits of the issues.

Administrative Conference

The AAA may conduct an administrative conference with the parties to identify and establish expectations of this process. The conference may be used for parties to agree on ways to tailor the process to meet the needs of the specific case and ask questions. Please be prepared to discuss the following:

- Review of the SRCA provisions
- Applicability of any other Procedures set forth in the rules
- Arbitrator Selection Process
- Due date for Answer/ Counterclaim
- Costs

- Verification of party and representative information
- Guidelines for communication
- Class Arbitration Docket

Exchange of Correspondence and Documents

It is also important to note that, unless specifically directed otherwise, the parties must exchange copies of all correspondence during the course of the arbitration. The two exceptions are the Checklist for Conflicts mentioned above and the party's arbitrator ranking list, which you will receive further information on during the course of the arbitrator appointment process. The parties only need to send copies of documents, such as discovery, to the AAA if the document is to be transmitted to the arbitrator for a determination.

Documents such as the Demand and amended claims may be posted to the AAA Class Action Docket for this matter. Therefore, the parties are encouraged to review their filings for confidential or sensitive information, including all pleadings, and take whatever steps are necessary, including redacting their pleadings to avoid the disclosure of any privileged or otherwise confidential information.

Timeliness of Filings

Please pay particular attention to response dates included on any correspondence. If you need an extension to any deadline, please contact the other party to reach an agreement. In the event you are unable to agree, the AAA or the arbitrator will determine if an extension will be granted. Requests for extensions must be received prior to the expiration of any existing deadline.

AAA WebFile

We invite the parties to visit our website to learn more about how to file and manage your cases online. As part of our administrative service, AAA's WebFile allows parties to perform a variety of case related activities, including:

- Review, modify, or add new claims
- Complete the Checklist for Conflicts form
- View invoices and submit payment
- Share and manage documents
- Strike and rank list of neutrals
- Review case status or hearing dates and times

AAA WebFile provides flexibility because it allows you to work online as your schedule permits - day or night. Cases originally filed in the traditional offline manner may also be viewed and managed online. If the case does not show up when you log in, you may request access to the case through WebFile. Your request will be processed within one business day after review by your case administrator.

AMERICAN ARBITRATION ASSOCIATION
CHECKLIST FOR CONFLICTS

In the Matter of the Arbitration between:

Case Number: 01-15-0005-3477

Shalanda Houston and Cynthia Kobel, individually
and on behalf of all others similarly situated
-vs-
JPay, Inc.

CASE ADMINISTRATOR: Jonathan J. Weed
DATE: November 23, 2015

To avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator pursuant to the Rules, we must advise the arbitrator of the names of all persons, firms, companies or other entities involved in this matter. Please list below all interested parties in this case, including, but not limited to, witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This form will only be used as a list for conflicts, not a preliminary or final witness list. Please note that the AAA will not divulge this information to the opposing party, and the parties are not required to exchange this list. This form will, however, be submitted to the arbitrator, together with the filing papers. You should be aware that arbitrators will need to divulge any relevant information in order to make appropriate and necessary disclosures in accordance with the applicable arbitration rules.

An online Conflicts Checklist function is available for clients using WebFile, our web-based case management tool. If you do not have a WebFile account, please contact your case administrator.

NAME	AFFILIATION	ADDRESS

DATED: _____ PARTY: _____
Please Print

EXHIBIT E

EXHIBIT 1

Corodemus & Corodemus
Attorneys at Law

Honorable Marina Corodemus (Ret.)
Director ADR Practice Area
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September 26, 2019

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PUBLIC JUSTICE
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Washington, DC 20036

Re: Cynthia Kobel, Shalanda Houston. JPay, Inc.
AAA Case No.: 01-15-0005-3477

OPINION, ORDER AND AWARD ON CLAUSE CONSTRUCTION

Commercial and Class Action Arbitration Tribunal

Pursuant to the Commercial Arbitration Rules of the American Arbitration Association (AAA), and Supplementary Rules for Class Arbitrations, a hearing on the Clause Construction issue was held on June

33 Wood Avenue South, Suite 600, Iselin, NJ 08830
Tel 732-603-0005 www.ccadr.com

13, 2019, before Arbitrators Hon. Marina Corodemus, Barry Stone, Esq., and Norman Gerstein, Esq. (Law Offices of Norman Gerstein). Appearances were taken and reflected in the Transcript of Proceedings as such:

Karla Gilbride, Esq., Public Justice

John A Yanchunis, Esq., Morgan & Morgan, P.A.

Andrea R. Gold, Esq., Tycko & Zavareei, LLP

Velvel Freeman, Esq. and Robert Keefe, Esq, Boies, Schiller, & Flexner, LLP

Jessica Y. Camuffo, Esq., JPay, Inc.

Before the Panel is a request from the parties to resolve the issue of clause construction contained in the Original Terms of Service Agreement attached to each party's submissions as Exhibit "A." The following is the clause at issue:

13. GOVERNING LAW

(a) In the event of any dispute, claim or controversy among the parties arising out of or relating to this Agreement that involves a claim by the User for less than $10,000, exclusive of interest, arbitration fees and costs, shall be resolved by and through arbitration administered by the American Arbitration Association ("AAA") under its Arbitration Rules for the Resolution of Consumer Related Disputes. Any other dispute, claim or controversy among the parties arising out of or relating to this Agreement shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules. The ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration. The arbitration proceeding shall be conducted in as expedited a manner as is then permitted by the rules of the American Arbitration Association. Both the foregoing Agreement of the parties to arbitrate any and all such disputes, claims and controversies, and the results, determinations, findings, judgments and/or awards rendered through any such arbitration shall be final and binding on the parties and may be specifically enforced by legal proceedings in any court of competent jurisdiction.

Based on the submissions of the parties, the governing law, and the procedural posture of this case, the panel must decide whether an ambiguity exists in the above arbitration clause.

PROCEDURAL HISTORY

33 Wood Avenue South, Suite 600, Iselin, NJ 08830
Tel 732-603-0005 www.ccadr.com

On October 16, 2015, Claimants Houston and Kobel ("Claimants") filed a demand with AAA for class arbitration pursuant to the Terms of Service Agreement. On December 11, 2015 JPay filed a lawsuit against Claimants in the United States District Court, Southern District of Florida, moving for summary judgment and seeking declaratory judgment that it never consented to class arbitration. Claimants then moved, on February 16, 2016, to compel arbitration and to stay the proceedings before the District Court. On May 16, 2016, the District Court denied, in relevant part, Claimants' motion to compel and found the question of class arbitration was a substantive question presumptively reserved for the courts and that the parties had not otherwise clearly and unmistakably delegated it to the arbitrators. *JPay Inc. v. Kobel*, 2016 WL 2853537 (S.D. Fla. 2016). Claimants appealed to the Eleventh Circuit, and the appeal was dismissed for lack of jurisdiction.

On July 28, 2017, the District Court granted JPay's motion for summary judgment, concluding that JPay's Original Terms of Service do not permit class arbitration. *JPay Inc. v. Kobel*, 2017 WL 3218218 (S.D. Fla 2017). Claimants filed a timely notice of appeal to the Eleventh Circuit. After full briefing and oral argument, on September 19, 2018 the Eleventh Circuit concluded that JPay's Original Terms of Service clearly and unmistakably delegated the question of whether a class arbitration can proceed to the arbitrators; the District Court was without jurisdiction to decide whether JPay's arbitration clause permitted class arbitration. *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018) (stating "an arbitrator will decide whether the arbitration can proceed on a class basis.") (emphasis added).

SUMMARY OF ARGUMENTS

***Claimants' Position*:**

Claimants executed service agreements ("Agreement") with JPay in August 2012 and January 2013, respectively[1]. Services included fee-for-service amenities for incarcerated individuals for which they had paid on behalf of certain inmates. Both agreements included arbitration clauses requiring that upon execution, all disputes arising from the agreement shall be resolved by and through arbitration.

Claimants argue that the Agreement's plain language does not specifically exclude class arbitration or other limitations on individual actions. (Claimant's Mot. at 1). Claimants assert that JPay was capable of specifically excluding class arbitration in the form of a class action waiver as they did in a Revised Terms of Service Agreement in December 2015 ("Revised Agreement"), which JPay drafted and issued *after* Claimants filed a demand with AAA. JPay's Revised Agreement contained specific language indicating that execution of the agreement constituted waiver of a claimants right to class arbitration. (Exhibit "B" to Claimant's Motion).

[1] During oral argument on June 13, 2019 the Panel requested screenshots of the actual terms to which the Claimants electronically assented, however, the Parties were unable to produce agreements signed by both Claimants. There exists no record of the actual language/images available for review by the Claimants.

Claimants argue:

- That U.S. Supreme Court precedent via *Stolt-Nielsen* does not require inclusion of explicit language addressing class arbitration in order to authorize it,
- That the Agreement is broadly worded to include class arbitration,
- That Claimants never intended implicitly to waive their legal rights to pursue class claims. (Claimant's Mot. at 1-2), and
- That the agreement is not ambiguous; it is specific in that it includes language of "any and all."

Claimants recognize U.S. Supreme Court precedent, but argue that *Stolt-Nielsen S.A., v. AnimalFeeds International Corp*., 559 U.S. 662 (2010) is not applicable because the underlying facts are not consistent with the facts at issue here. The Court in *Stolt-Nielsen* held that parties could not be compelled to arbitrate on a class basis where they stipulated that there was no agreement to arbitrate on a class-wide basis. Contrary to the facts of *Stolt-Nielsen,* the Claimants here argue there is no such stipulation.

Claimants cite support from other federal district courts interpreting *Stolt-Nielsen* in the same manner. *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1011 (N.D. Cal. 2011)(citing *Stolt-Nielsen* where an arbitration agreement is "silent in the sense that [the parties] had not reached any agreement on the issue of class arbitration," and not "not simply ... that the clause made no express reference to class arbitration," *Stolt–Nielsen*, 130 U.S. at 685-686).

***Defendant's Position*:**

JPay maintains, first, that the operative agreement between the parties is the Revised Agreement where a waiver of class arbitration was specifically described and allegedly assented to by both Claimants, and that the Claimants have waived their right to class arbitration by consenting to JPay's Revised Agreement which contains a class action waiver. (Defendant's Mot. at 7).

JPay also argues that exclusive jurisdiction for determining the issue of waiver lies with the courts, alternatively, this Panel should not allow class arbitration to proceed due to U.S. Supreme Court precedent holding that parties must affirmatively agree to class arbitration separate and apart from any agreement to arbitration bilaterally. (Def. Mot. At 1).

Also, at oral argument JPay stated its belief that the issue before the panel is whether JPay, via its agreements, consented to class arbitration. Tr. At 90.

Notice of Supplemental Authority: *Lamps Plus, Inc., v. Varela*

After the deadline to submit briefing in this matter, the U.S. Supreme Court issued an opinion in *Lamps Plus, Inc., et al. v. Varela* on point with the issue before the panel. 139 S.Ct. 1407 (2019). JPay submitted

a Notice of Supplemental Authority further arguing its point that ambiguity in an arbitration agreement does not allow class-wide arbitration, and the Federal Arbitration Act ("FAA") "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." *Lamps Plus*, 139 S. Ct. at 1415. Claimants submitted a reply.

The Panel reviewed all submissions as a basis for its interpretation and ruling regarding the clause construction at issue in this matter.

ARBITRATIBILITY

The Eleventh Circuit's opinion as to the delegation provision in this matter states that, based on the contractual agreement between the parties, the question of whether these claims may be arbitrated on a class wide basis is one for arbitration. *JPay, Inc.* at 936 (11th Cir. 2018), *cert. denied*, 18-811, 2019 WL 1590250 (U.S. Apr. 15, 2019). Whereas the question of arbitrability is one usually reserved for the courts, JPay and its users, including Claimants Houston and Kobel, contracted and consented to arbitrate any and all disputes which includes the arbitrability of such disputes. *JPay, Inc.*, 904 F.3d at 936 (stating that it was a "clear and unmistakable intent to delegate questions of arbitrability to the arbitrator throughout the arbitration provision in JPay's Terms of Service."). Although JPay currently argues otherwise, the Eleventh Circuit instructed the district court to compel arbitration on class availability, stating that JPay "agreed when drafting its Terms of Service that an arbitrator would decide this question." *JPay, Inc.*, 904 F.3dat 944.

RULING

It is a fundamental principle that the Federal Arbitration Act ("FAA") reflects "both a liberal and federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract*." AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (citing *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). Consequently, any doubts regarding "the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983). The "overarching purpose of the FAA…is to ensure the enforcement of arbitration agreements according to their terms." *AT&T Mobility*, 563 U.S. at 344. Thus, arbitration must move forward even where the result would possibly be inefficient. *Telecom Italia, SpA v. Wholesale Telecom Corp*., 248 F.3d 1109, 1117 (11th Cir. 2001) (quoting *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 217 (1985)).

First, we disagree with JPay's argument that the Revised Agreement is the operative agreement and that "the question really is…can the parties enter into an arbitration agreement over past claims." Tr. at 69:2-8. The Revised Agreement (attached as Exhibit "B" to both parties' submissions) does not contain language stating that it supersedes all other agreements. Moreover, Counsel's reliance on *Jones v. Waffle House,* 866 F.3d 1257 (2017) is also unpersuasive. Tr. at 72:9-16. In *Jones v. Waffle House*, the claimant sought employment at a Waffle House location and was denied. He then brought a class action lawsuit for

violations of the Fair Credit Reporting Act as a reason for not being hired. After initiating the lawsuit, he applied and was hired at another Waffle House location and as a condition of being hired he signed an arbitration agreement. Upon learning of the agreement, Waffle House moved to compel arbitration arguing that the arbitration clause included all claims and controversies, including past claims.

Unlike the facts here, there was no previous arbitration agreement in the *Waffle House* dispute that could have been superseded by a later agreement. The issue in *Waffle House* was the arbitrability of the claim, not evaluation of the claim itself. Moreover, in a footnote to the opinion, the Eleventh Circuit alluded to the potential tenuousness of the substantive issue:

> Waffle House also says that Jones's FCRA claims are arbitrable because the agreement is broad enough to encompass the claims of a rejected applicant even when those claims predate the agreement. While this claim might not ultimately succeed…[t]he scope of the agreement includes "all claims," "past, present, or future, arising out of any aspect of or pertaining in any way to" Jones's employment (emphasis added). This language is broad and could be read to include Jones's previous attempt at employment. And while there was no arbitration agreement in place at the time Jones's FCRA claims arose, the agreement includes "past" claims and we have previously allowed the arbitration of claims that arose prior to the execution of an arbitration agreement.

Jones, 866 F.3d at 1273, n.1.

Moreover, regardless of which agreement is controlling, Counsel for JPay admits that none of the AAA rules are available, i.e., viewable to anyone during the execution of JPay's online agreement and therefore would not be privy to the basis for Counsel's argument that there is no ability to administrate class arbitrations under the rules. Tr. at, 102-105.

Second, based on the Supreme Court's opinion in *Stolt-Nielsen*, *Lamps Plus*, and the Eleventh Circuit precedent in this matter, we find the issue before this panel comes down to our interpretation of whether there is an ambiguity in the contract JPay drafted and Claimants Houston and Kobel executed electronically in 2012 and 2013, respectively.

Initially, just prior to the hearing in this matter when JPay provided notice of supplemental authority including its argument of how the *Lamps Plus* opinion should be interpreted, the status of U.S. Supreme Court precedent seemed almost impossible for Claimants to overcome. The U.S. Supreme Court continues to narrow class action alternatives, however, when one reads and analyzes the paragraph in question against the specific U.S. Supreme Court rulings, there is still allowance for class wide arbitrations in certain situations, this being one, because of the specific language utilized in the Governing Law section. Essentially, neither *Stolt-Neilsen* nor *Lamps Plus* prescribe a manner to be used in order to determine if an ambiguity exists. Nor does either opinion hold that certain language must be included in

an arbitration clause in order to include or exclude the availability of class wide arbitration. The U.S. Supreme Court's holdings are limited to the facts it reviewed and determined there can be no class wide arbitration where contracts are silent or ambiguous.

Stolt-Nielsen: The parties in *Stolt-Nielsen* stipulated that their agreement was silent as to class arbitration thereby relieving the Court of the need to engage in an analysis of whether the agreement at issue was in fact silent. 130 U.S. at 676. The U.S. Supreme Court later described it as "an unusual stipulation." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 571 (2013). Unusual or not, there is no similar stipulation in this matter, and therefore *Stolt-Nielsen* is not on point in assisting our interpretation of the contract at issue.

Lamps Plus: Similar to *Stolt-Nielsen*, the majority of the Court in *Lamps Plus* did not conduct an analysis of whether an ambiguity existed in the agreement between Lamps Plus and the employee/claimant because the Ninth Circuit had already determined an ambiguity did exist in the contractual language and the U.S. Supreme Court deferred to the lower court's interpretation, which is customary. *Lamps Plus*, 139 S. Ct. at 1415. Such deference is warranted to avoid unnecessary review of decisions where lower federal courts are in a better position and more able to interpret the laws of their respective states. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149-1150 (2017) (citing *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 500 (1985)); *see also*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 214 (1983) (stating the Court's "general practice is to place considerable confidence in the interpretations of state law reached by the federal courts of appeals.").

This panel is not an appellate body. There is no decision below this panel along the judicial path this case has taken resulting in the current procedural posture to which similar customary deference is to be paid to a lower decision. This matter, on the contrary, has been sent to arbitration via order of the Eleventh Circuit's review of arbitrability. *JPay, Inc.,* 904 F. 3d at 936.

As part of the Eleventh Circuit's review to determine arbitrability of the matter, it evaluated the same language upon which the current issue turns: Whether the language of the contract is ambiguous. *Id*., at 927. Specifically, The Eleventh Circuit quotes and underlines the terms "any", and "any and all". *Id*. Whereas the specific issue before the Eleventh Circuit was JPay's ability to surmount a default assumption that arbitrability is one for the courts, the Eleventh determined that the language was "clear and unmistakable" as to the breadth of the scope of that language. The language was "clear" (the opposite of ambiguous) enough to overcome the high hurdle of a long-held default presumption because it found the intent to arbitrate any claim not specifically excluded. On its face, the language was specific enough for the Eleventh Circuit to hold that the parties must have articulated what they didn't want to arbitrate, and therefore they safely surmised that it was the parties' intent "to arbitrate anything not specifically excluded." *JPay Inc.*, 904 F.3d at 929 (emphasis added).

Under Florida law, the plain language of a contract must be given effect when that language is clear and unambiguous. *Hahamovitch v. Hahamovitch,* 174 So. 3d 983, 985 (Fla. 2015). Using the same logic and analysis as the Eleventh Circuit used in clearing a hurdle set as high as the default presumption of arbitrability, we find the same language is as unambiguous when evaluating what can be arbitrated as the Eleventh Circuit did in determining who can arbitrate. We find this to be especially true where the facts include the re-drafting of the contractual language to include a class action waiver effectively excluding class wide resolution within 60 days of Claimants' demand for class arbitration; the parties cannot exclude something from the contract that was not there to begin with. Def. Mot. at 4. This is clear in that we find no such waiver in the original Agreement supporting the notion that the intent of the parties was to include any dispute - including class proceedings - that may arise under the agreement to arbitrate.

With this guidance from the Eleventh Circuit, we find the facts in this matter distinguishable from the facts of *Lamps Plus* where the lower court, the Ninth Circuit, specifically found contractual language that created an obvious ambiguity; an interpretation the U.S. Supreme Court adopted:

> "The Ninth Circuit then determined that the agreement was ambiguous on the issue of class arbitration. On the one hand, as Lamps Plus argued, certain phrases in the agreement seemed to contemplate 'purely binary claims.' At the same time, as Varela asserted, other phrases were capacious enough to include class arbitration, such as one stating that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

Lamps Plus, 139 S. Ct. at 1413 (citations omitted).

Thus, determining whether the language of the *Lamps Plus* contract was ambiguous was never conducted and therefore cannot be used as the tool to determine here whether the clause in the JPay contract was ambiguous; the facts simply do not match. In this sense, the U.S. Supreme Court has not completely closed the door on class wide arbitration, it has only done so where a contract is ambiguous.

Lamps Plus further describes "shifting" from individual to class arbitration as a kind of "fundamental change" like that which was described in *Stolt-Nielsen*. *Id*. "Fundamental changes" include, but are not limited to, resolution of many disputes versus a single dispute between the parties, the frustrations of assumptions made by the parties (e.g., privacy and confidentiality), etc. *Stolt-Nielsen*, 130 U.S. at 686.

But we find no relevance to these fundamental changes because we find no "shift" based on the broad language contained in the contract JPay drafted which is unequivocally all-inclusive of all anticipated claims. This is especially clear when one considers the Eleventh Circuit's deferential reading of this all-inclusive language which JPay drafted without identifying anything it sought not to arbitrate. *JPay Inc.*, 904 F.3d at 929. Like the language JPay drafted regarding the arbitrability of this issue, the Eleventh

Circuit's confirmation that "any and all" means simply that makes it clear that JPay was cognizant enough of class wide arbitration since they later provide specific waiver language once faced with a complaint to arbitrate on a class wide basis.

Claimants discussed the dissenting opinion in *Lamps Plus*. Whether the panel follows the dissenting opinion from *Lamps Plus* or not, the majority neither evaluated, nor provided a scheme to evaluate whether the contract is ambiguous – it accepted the determination of the lower court. Nor is there a stipulation here that the contract is silent or ambiguous. We read only an agreement allowing any and all disputes, which can include class procedures, to be arbitrated.

In that regard, we find: 1) no ambiguity in the language of the contract, and 2) there is a contractual basis for concluding that the parties agreed class arbitration was included under the broad language JPay drafted.

FOR THE FOREGOING REASONS, the Arbitrators determine, and it is on this 26th day of September 2019,

ORDERED AND AWARDED THAT THE ARBITRATION CLAUSE IN THE PARTIES' AGREEMENT ENTITLED "GOVERNING LAW", AND READ IN THE CONTEXT OF THE AGREEMENT AND THE GOVERNING LAW WHEN THE AGREEMENTS WERE SIGNED, CONTAINS NO AMBIGUITY AS TO PERMITTING CLASS WIDE ARBITRATION OF DISPUTES PRIOR TO THE INCLUSION OF A CLASS ACTION WAIVER IN DECEMBER 2015, THERE IS A CONTRACTUAL BASIS FOR CONCLUDING THAT THE PARTIES AGREED TO CLASS ARBITRATION UNDER THE BROAD LANGUAGE DEFENDANTS DRAFTED.

Furthermore, Rule 3 of the AAA Rules for Class Arbitrations provides for an automatic stay of all proceedings for at least thirty (30) days following this Clause Construction Award:

> "Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having

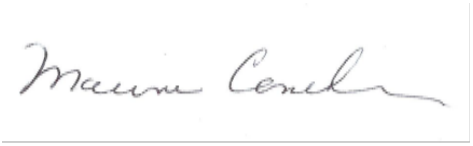
informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court."

Pursuant to this provision, the proceedings are ordered STAYED for the initial period of thirty (30) days from the date hereof.

All issues and/or arguments raised by the parties on the issue of Clause Construction have been considered, but not all have been expressly addressed in this Clause Construction Award. Any such arguments not so addressed are hereby rejected and denied.

Following any stay pursuant to this Order or as ordered by a Court of competent jurisdiction, counsel are directed to confer with the assigned Case Manager to set up a conference call with the Arbitrators to discuss the terms of a further comprehensive Case Management and Scheduling Order for the Class Determination Phase of this putative class arbitration, to be implemented of Judicial Review or the waiver thereof.

IT IS SO ORDERED AND AWARDED.



Judge Marina Corodemus (Ret.)
Director of ADR Practice Area
Corodemus & Corodemus, LLC

ON BEHALF OF THE PANEL

cc: Jonathan Weed (JonathanWeed@adr.org)
Hon. Barry Stone (barrystone224@gmail.com)
Hon. Norman Gerstein (nsgmia@aol.com)

AMERICAN ARBITRATION ASSOCIATION

Commercial and Class Action Arbitration Tribunal

CYNTHIA KOBEL, an individual, and
SHALANDA HOUSTON, an individual, on behalf
of themselves and all others similarly situated,

Claimants,

v.

JPAY, INC.,

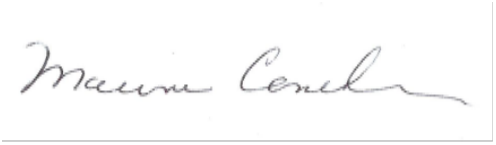
Defendant.
_____/

Case No. 01-15-0005-3477

FOR THE FOREGOING REASONS, the Arbitrators determine, and it is on this 26th day of September, 2019,

ORDERED AND AWARDED THAT THE ARBITRATION CLAUSE IN THE PARTIES' AGREEMENT ENTITLED "GOVERNING LAW", AND READ IN THE CONTEXT OF THE AGREEMENT AND THE GOVERNING LAW WHEN THE AGREEMENTS WERE SIGNED, CONTAINS NO AMBIGUITY AS TO PERMITTING CLASS WIDE ARBITRATION OF DISPUTES PRIOR TO THE INCLUSION OF A CLASS ACTION WAIVER IN DECEMBER 2015, THERE IS A CONTRACTUAL BASIS FOR CONCLUDING THAT THE PARTIES AGREED TO CLASS ARBITRATION UNDER THE BROAD LANGUAGE DEFENDANTS DRAFTED.

Dated: September 26, 2019



Hon. Marina Corodemus
Arbitrator, Panel Chairperson

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 16-20121-CIV-GAYLES/TURNOFF

JPAY, INC.,

Plaintiff,

vs.

CYNTHIA KOBEL and SHALANDA HOUSTON,

Defendants.

JPAY'S APPLICATION TO PARTIALLY VACATE ARBITRATION AWARD

Pursuant to 9 U.S.C. 10(a)(4), JPay applies to this Court to vacate the September 26, 2019 arbitration award regarding "clause construction" (the "Award", Exhibit 1) insofar as it applies to Defendant Shalanda Houston and any other JPay customer who consented to JPay's Revised Terms of Service (as defined below), which expressly waive the right to class arbitration and also expressly designate the Courts, and not an arbitrator, as the exclusive forum to resolve disputes about that waiver.

Introduction

On September 19, 2018, the Eleventh Circuit ordered the arbitrators to determine whether class arbitration was available under the then-operative arbitration agreement between the parties. Subsequent to that order, however, Houston repeatedly consented to revised versions of the arbitration agreement with JPay. These revised agreements all expressly waived class arbitration and, **most importantly**, designated the Florida courts as the "sole[]" and "exclusive[]" forum to determine the "scope, validity, effect, and enforceability" of the waiver. Stated simply, Houston

rendered the Eleventh Circuit's decision moot when she replaced the original arbitration agreement with a revised agreement.

JPay raised this with the arbitration panel, but it ignored JPay's request to let this Court resolve the class arbitration waiver issue that had now been expressly carved out of their jurisdiction. Instead, the Panel impermissibly and without authority held that the revised agreement didn't apply; then, contrary to numerous district court decisions, including the decision of this Court, the panel held that class arbitration was available under JPay's original arbitration agreement with Houston (the "Original Terms of Service").

While JPay disagrees with the panel's reading of its original agreement with Houston, it doesn't challenge that aspect of the Award before this Court. Instead, JPay only seeks to vacate the Award *as it applies* to Houston (and those like her) who indisputably consented to a revised arbitration agreement with JPay (the "Revised Terms of Service") subsequent to the initial arbitration demand.[1] These Revised Terms of Service were not previously addressed in this Court or in the appeal to the Eleventh Circuit because Houston had not yet affirmatively agreed to them.

Importantly, the Revised Terms of Service (1) apply to all claims Houston may seek to arbitrate including claims that accrued before she agreed to them; (2) prohibit class arbitration; and (3) explicitly provide that only Florida courts, and not any arbitrator, may determine the "scope, validity, effect, and enforceability of the foregoing waiver of . . . class-wide arbitration." The arbitrators ignored this limitation and exceeded their contractually-granted power when they purported to construe the effect of the Revised Terms of Service. For this reason, the Award as to Houston and anyone else who signed the Revised Terms of Service is therefore subject to vacatur

[1] As discussed in greater detail below, Houston affirmatively consented to multiple revisions of this agreement since April 2019. While there are slight differences between the revisions, they all expressly waived class arbitration and chose the Florida courts as the exclusive forum to resolve disputes related to that waiver.

under the Federal Arbitration Act because it is necessarily premised on a determination that was forbidden to the arbitrators, *i.e.,* the inapplicability of the Revised Terms of Service.

Background

Parties

JPay provides services for correctional institutions that include, among other services, money transfer, video visitation, and media services, which include tablets and content for inmates. D.E. 19, at 4.

Cynthia Kobel and Shalanda Houston are JPay customers who accepted JPay's Terms of Service (the "Original Terms of Service") before using JPay's electronic money transfer service to send funds to incarcerated friends or family. Id. The Original Terms of Service included an arbitration clause that was silent as to class arbitration. JPay, Inc. v. Kobel, 904 F.3d 923, 927 (11th Cir. 2018), cert. denied, 139 S. Ct. 1545 (2019).

Procedural History

On October 16, 2015, Houston and Kobel filed a demand for class arbitration before the American Arbitration Association ("AAA"). D.E. 1-1. Houston and Kobel alleged breach of contract, unjust enrichment, unconscionability, and violations of Florida's Deceptive and Unfair Trade Practices Act. Id. They sought compensatory and punitive damages, as well as injunctive relief. The gravamen of their demand for arbitration was that JPay purposely delayed processing traditional money orders so that JPay's customers would pay for JPay's electronic money transfer service. Id.

JPay initially brought this action seeking a declaration that its Original Terms of Service did not permit class arbitration. In July 2017, this Court agreed and entered summary judgment for JPay. D.E. 44. Kobel and Houston appealed. D.E. 46.

A divided Eleventh Circuit panel reversed on jurisdictional grounds. JPay, Inc. v. Kobel, 904 F.3d at 927. Over dissent, the panel found that the Original Terms of Service delegated disputes about the availability of class arbitration to the arbitrators; it therefore held this Court should have let the arbitrators determine that issue. Id.[2]

JPay petitioned for certiorari because the panel majority's decision established precedent in this Circuit that split from the Third, Sixth, and Eighth Circuits, but joined the Tenth and Second Circuits. The Supreme Court ordered Kobel and Houston to respond to JPay's petition, but ultimately denied certiorari. Kobel, 139 S. Ct. 1545 (2019).

Houston consents to JPay's Revised Terms of Service

On remand, the issue of whether class arbitration was permitted under the agreement came before the arbitrators (the "Panel"). But due to a new arbitration agreement Houston consented to in April 2019, JPay objected to the Panel ruling on Houston's ability to bring a class arbitration.

Section 1 of the Original Terms of Service Houston agreed to in 2014 specifically allowed JPay to amend the agreement:

> We may amend this Agreement at any time by posting a revised version on our website. The revised version will be effective at the time we post it. By continuing to use JPay's service after any such change, you agree to be bound by the changed terms and conditions of this Agreement as of the effective date of such changes.

D.E. 19-2.

On December 16, 2015, "in an attempt to foreclose[e] any additional litigation over its Terms of Service," D.E. 44 at n.1, JPay amended its Original Terms of Service.[3] D.E. 21-1 at 14; Decl. of Javier Lopez ¶ 4 (attached as Exhibit 2). The amended Terms of Service included a new

[2] This Court had previously issued a decision finding it should resolve the issue (D.E. 28), but the majority reversed that decision. JPay, Inc. v. Kobel, 904 F.3d at 927.

[3] Since that date, JPay made several updates to its Terms of Service as described in more detail below.

section, in all capital letters, that included a waiver of any right to participate in a class arbitration regardless of when the dispute arose, **and designated the Florida courts as the sole forum to adjudicate that waiver's validity and applicability.**[4] That same day, JPay notified existing customers via email about the Revised Terms of Service. Lopez Decl. ¶ 5.

Houston and her counsel were well aware of JPay's revision to its Terms of Service as Houston's counsel heavily cited JPay's revision in its briefing before this Court in 2016 (D.E. 42, at 4-6, 10-11), its briefing before the Eleventh Circuit in 2017, and its briefing before the Supreme Court in 2019.[5]

In December 2017, JPay updated its online interface so that customers must consent to its then operative Terms of Service "**each time they attempt to use JPay's electronic money transfer service**." Lopez Decl. ¶ 7. Since December 2017, if a customer attempted to transfer money without consenting to JPay's then operative Terms of Service, JPay's web interface would not allow the customer to proceed. Lopez Decl. ¶ 7. Instead, it would reiterate that the customer needed to accept JPay's Terms of Service before using JPay's money transfer service. Lopez Decl. ¶ 8.

On February 28, 2019, JPay revised its Terms of Service again. Lopez Decl. ¶ 10. This version, like the last, contained multiple express waivers of class arbitration including the following language:

> (f) RESTRICTIONS ON ARBITRATION: **ALL DISPUTES, REGARDLESS OF THE DATE OF ACCRUAL OF SUCH DISPUTE, SHALL BE ARBITRATED ON AN INDIVIDUAL BASIS**. YOU ARE WAIVING YOUR RIGHT TO

[4] The Terms of Service have stayed in substantially the same form since the amendment in December 2015, which is attached hereto as Exhibit 3. The form of the Terms of Service that Houston accepted in April 2019 is attached hereto as Exhibit 4. The form Houston accepted seven more times between July and October 2019 did not change any of the relevant language and is attached hereto as Exhibit 5. These forms, collectively, are referred to herein as "Revised Terms of Service."

[5] In fact, as written by Houston's counsel, both she and her counsel would have been "fully aware of the significance of [JPay's] Terms of Service and the ease of amending them at a moment's notice." D.E. 42, at 22, n8.

> PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. **YOU ARE WAIVING, AND WILL NOT HAVE, THE RIGHT TO** CONSOLIDATION OR JOINDER OF INDIVIDUAL DISPUTES OR ARBITRATIONS, **TO HAVE ANY DISPUTE ARBITRATED ON A CLASS ACTION BASIS**, OR TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. FURTHER, **YOU AND JPAY AGREE THAT THE ARBITRATORS HAVE NO AUTHORITY TO ORDER** CONSOLIDATION OR **CLASS ARBITRATION OR TO CONDUCT ANY FORM OF** REPRESENTATIVE OR **CLASS-WIDE ARBITRATION PROCEEDINGS**, **AND ARE ONLY AUTHORIZED TO RESOLVE THE INDIVIDUAL DISPUTES BETWEEN YOU AND JPAY ALONE.**
>
> (g) **THE SCOPE, VALIDITY, EFFECT, AND ENFORCEABILITY OF THE FOREGOING WAIVER OF CLASS ACTION LAWSUIT AND REPRESENTATIVE OR CLASS-WIDE ARBITRATION ARE TO BE DETERMINED SOLELY AND EXCLUSIVELY BY THE FEDERAL DISTRICT COURT LOCATED IN THE SOUTHERN DISTRICT OF FLORIDA** OR FLORIDA STATE COURT IN MIAMI-DADE COUNTY **AND NOT BY** JAMS OR **ANY ARBITRATOR**. IF A LAWSUIT IS FILED THE PARTIES AGREE THAT THE ARBITRATION SHALL BE IMMEDIATELY STAYED, BY AGREEMENT OR COURT ORDER, UNTIL THE COURT CASE IS RESOLVED AND ALL APPELLATE REVIEW IS EXHAUSTED. THE COST OF PROCEEDINGS UNDER THIS SECTION, INCLUDING, WITHOUT LIMITATION, EACH PARTY'S ATTORNEYS' FEES AND COSTS, SHALL BE BORNE BY THE UNSUCCESSFUL PARTY.

Exhibit 4, § 15(f)–(g) (emphasis added).

On April 26, 2019, (*i.e.,* eleven days after the Supreme Court denied certiorari) —and for the first time after JPay had implemented the structural change to its user interface that required affirmative consent to its then-operative Terms of Service each time its service was used—Houston used JPay's service to transfer funds. Lopez Decl. ¶ 11. That means Houston necessarily consented to JPay's Revised Terms of Service. Id. ¶¶8-9. Terms of Service that include a clear (i) class arbitration waiver that (ii) applies to "all disputes regardless of the date of accrual of such dispute" and that (iii) selects Florida courts "and not . . . any arbitrator" as the exclusive forum to resolve any dispute related to the "scope, validity, effect, and enforceability" of the class arbitration waiver. Id. ¶¶10-11.

On July 1, 2019, JPay revised its Terms of Service again. Lopez Decl. ¶ 12. This revision did not alter the arbitration-related sections. Id. Houston then affirmatively consented to JPay's Revised Terms of Service, **seven more times** on July 18, 25, and 30; August 13 and 15; September 9; and October 15, 2019. Lopez Decl. ¶¶ 6, 13.

Consequently, JPay objected to the Panel issuing any decision that related to the scope, validity, effect, and enforceability of the class arbitration waiver Houston signed in April 2019.

On September 26, 2019, the Panel issued the Award finding JPay consented to class arbitration under the Original Terms of Service and holding that the Revised Terms of Service were inapplicable. Exhibit 1. The Panel's decision completely ignored the unequivocal forum selection clause in the Revised Terms of Service. See id. Instead, the Panel summarily decided that Revised Terms of Service were inapplicable because it did "not contain language stating that it supersedes all other agreements." Exhibit 1 at 5–6.

Of course, in refusing to apply the Revised Terms of Service, the Panel necessarily made a determination as to the "scope validity, effect, and enforceability" of the explicit class-arbitration waiver, in direct violation of the express language giving Florida courts "sole[]" and "exclusive[]" power to make all such determinations. At least as to Houston, whose consent to the Revised Terms of Service is undisputed, "the arbitrators exceeded their powers" by deciding an issue expressly carved out of the operative arbitration agreement between the parties.

Consequently, JPay now moves for the Award to be vacated on the grounds that the arbitrators exceeded their powers. See 9 U.S.C. § 10.

Argument

A. The arbitration award must be vacated because the arbitrators clearly exceeded their powers

One of the limited grounds for vacating an arbitration award under the Federal Arbitration Act is "where the arbitrators exceeded their powers . . . ." 9 U.S.C. § 10(a)(4). Arbitrators "exceed their power within the meaning of § 10(a)(4) if they fail to comply with mutually agreed-upon contractual provisions in an agreement to arbitrate." Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 843 (11th Cir. 2011). This commonly occurs when arbitrators ignore "contractual provisions regarding the scope . . . of the arbitration." See id. at n.13. Stated simply:

> an arbitrator may not ignore the plain language of the contract. That means an arbitrator may not issue an award that contradicts the express language of the agreement. It also means that an arbitrator may not modify clear and unambiguous contract terms.

Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc., 837 F.3d 1083, 1088 (11th Cir. 2016) (internal citations omitted).

JPay's Revised Terms of Service clearly limit the "scope of the arbitration" by expressly prohibiting class arbitration and then expressly forbidding an arbitrator from making any decision regarding the "scope validity, effect, and enforceability" of that class arbitration prohibition. Exhibit 3 at §14(f)–(g); Exhibits 4 and 5 at § 15(f)–(g).

Despite this unequivocal limitation on the scope of the arbitrator's powers, the Panel purported to find that JPay's Revised Terms of Service and its class arbitration waiver don't apply to the dispute between JPay and Houston. Exhibit 1 at 5 ("we disagree with JPay's argument that the Revised Agreement is the operative agreement"). Thus, the arbitrators necessarily and impermissibly made a determination as to the "scope," "effect," and "enforceability," of the class-arbitration waiver in the Revised Terms of Service.

That decision, therefore, must be set aside, and this Court must instead determine for itself the "scope," "effect," and "enforceability," of the class arbitration waiver in JPay's Revised Terms of Service.

B. The Revised Terms of Service encompass Houston's claims and bar her participation in any class arbitration

As described above, Houston (i) consented to JPay's Original Terms of Service, which expressly allowed JPay to revise its terms, D.E. 19, at 4; (ii) JPay then revised those terms to include a class arbitration waiver and forum selection clause, Lopez Decl. ¶¶ 4–12; (iii) JPay then instituted a web interface requiring users to affirmatively consent to JPay's Revised Terms of Service each time the user uses its money transfer services, id.; and (iv) over a year later, Houston affirmatively consented to JPay's Revised Terms of Service on at least eight separate occasions (including as recently as this month). Id.

The scope of the class arbitration waiver in the Revised Terms of Service includes "ALL DISPUTES, REGARDLESS OF THE DATE OF ACCRUAL OF SUCH DISPUTE . . ." Exhibit 3 at §14(f)–(g); Exhibits 4 and 5 at § 15(f)–(g). This language encompasses claims that arose prior to this revision. Rodriguez v. JPay Inc., No. 2:19-14137 (S.D. Fla. Oct. 17, 2019) (finding JPay arbitration clause with near identical language applied retroactively); See Jones v. Waffle House, Inc., 866 F.3d 1257, 1271 n.1 (11th Cir. 2017) (enforcing arbitration agreement signed after a class action had been filed in court); see also Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1028 (11th Cir. 1982), abrogated on other grounds by Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985) ("[A]ppellee argues that because certain acts complained of occurred prior to execution of the arbitration agreement those claims are not properly disposed of by submission to an arbitrator. Again, we disagree."); Kidd v. Equitable Life Assur. Soc. of U.S., 32 F.3d 516, 518 (11th Cir. 1994).

The Eleventh Circuit's interpretation of a similarly broad arbitration agreement in Jones is instructive. In Jones, the plaintiff sued Waffle House claiming it had violated the Fair Credit Reporting Act by, *inter alia*, failing to provide a copy of his background check. Jones, 866 F.3d at 1261. The plaintiff also sought to represent a class of former Waffle House employees. Id. While his lawsuit was pending, the plaintiff applied for and gained employment at a different Waffle House location. Id. In connection with his employment, the plaintiff signed an arbitration agreement that covered "all claims and controversies [ ], past, present, or future, arising out of any aspect of or pertaining in any way to [his] employment." Id. The arbitration agreement also included a waiver of class-action arbitration. Id. at 1263. When Waffle House's legal team learned that the plaintiff had signed an arbitration agreement, it moved to compel arbitration pursuant to the agreement. Id.

The district court denied the motion and Waffle House appealed. Id. On appeal, the Eleventh Circuit reversed and sent Jones to arbitration. The court noted that "while there was no arbitration agreement in place at the time [the plaintiff's] claims arose, the agreement includes 'past' claims and we have previously allowed the arbitration of claims that arose prior to the execution of an arbitration agreement." Id.

Additionally, a court in this District just held that a near-identical JPay arbitration clause applied retroactively. In Rodriguez v. JPay Inc., No. 2:19-14137 (S.D. Fla. Oct. 17, 2019), the court found that while sometimes courts decline to enforce retroactive arbitration agreements, "where the arbitration clause is sufficiently broad or contains language authorizing retroactive application, the Eleventh Circuit has found that it may include claims that occurred before the contract containing the arbitration agreement was entered." Id. at *11. As to JPay's arbitration agreement, Judge Maynard found that "[t]he language here goes even further, however, by

applying to claims 'no matter the date of accrual.' This suggests that the arbitration provision applies to claims that accrue before as well as after inmates enter the Terms of Service." Id. at *12.

Here, JPay's Revised Terms of Service include a waiver of class arbitration for "ALL DISPUTES, **REGARDLESS OF THE DATE OF ACCRUAL** OF SUCH DISPUTE." Exhibit 3 at §14(f)–(g); Exhibits 4 and 5 at § 15(f)–(g) (emphasis added). This language is just as broad, if not broader than, the agreement at issue in Jones and it closely tracks the language construed in Rodriguez to apply retroactively. Id.; Jones, 866 F.3d at 1271 n.1. Also, like the plaintiff in Jones who voluntarily signed the arbitration agreement while his lawsuit against Waffle House was pending, Houston voluntarily accepted the Revised Terms of Service with full knowledge of her pending claim against JPay. See Jones, at 1266. Accordingly, Houston contractually waived any right she might have had to class arbitration and this Court should not permit her to proceed on a class-wide basis.

The Eleventh Circuit held that Waffle House was entitled to compel Jones to arbitrate the claims in the class-action lawsuit even though that lawsuit had been filed before he signed the arbitration agreement. Jones chose to pursue a continuing business relationship with Waffle House rather than simply suing over the past, and, as a consequence of that choice, he agreed to a contract that he later found inconvenient to his preferred litigation strategy. Had he prioritized his litigation preferences, he could have declined to engage in a new transaction with Waffle House and not consented to the arbitration agreement. But he did not do so, and the Eleventh Circuit refused to let him have it both ways, nor did it insist that the controlling agreement be read to "grandfather" or otherwise carve out claims already being litigated.

Houston has no greater entitlement to have it both ways here. Houston chose to pursue additional business relationships with JPay rather than preserving any potential right to class

arbitration. Nor did Houston lack alternatives. JPay's electronic money transfer service was not the only way she could send funds to an inmate. Instead of accepting JPay's Revised Terms of Service eight times between April and October 2019, Houston could have used MoneyGram to send the funds electronically or could have sent a traditional money order to JPay (where JPay would have processed and posted the funds to the inmate's account for free). Lopez Decl. ¶ 14. Instead, she chose to use JPay's electronic money transfer service, which means she chose to consent to JPay's Revised Terms of Service, and those terms included a clear and unequivocal class arbitration waiver that commits any challenge to that waiver to Florida Courts. The money Houston sent reached its destination. JPay upheld its end of the bargain. This Court should make sure Houston is held to hers.

Both the Plaintiffs and the arbitrators have sought to distinguish Waffle House by pointing out that, in that case, enforcement of the arbitration agreement overtook a pending litigation rather than a pending arbitration commenced under an earlier version of the agreement. But that is a distinction without a difference. If parties to pending litigation remain free to agree to arbitrate the dispute, even after the lawsuit has been filed, parties to a pending arbitration remain free to agree to arbitrate under different rules than previously agreed to even after the initial arbitration proceeding has been commenced. There is no rationale and no authority for a distinction. This is especially true because the Revised Terms of Service are a revision of the original agreement and not a separate agreement itself.

Finally, the Award purported to find the Revised Terms of Service inapplicable because they failed to contain sufficiently-explicit language superseding the Original Terms of Service. Exhibit 1 at 5. But there is no rule that a later contract does not supersede an earlier contract on the same subject matter unless it contains that specific language. Indeed, here the Original Terms

of Service expressly contemplated that they could be superseded and explained how that would work:

> We may amend this Agreement at any time by posting a revised version on our website. The revised version will be effective at the time we post it. By continuing to use JPay's service after any such change, you agree to be bound by the changed terms and conditions of this Agreement as of the effective date of such changes.

Houston, when presented with the Revised Terms of Service eight times, decided (eight times) that she preferred to use JPay's service for new transactions rather than to withhold her consent to the Revised Terms of Service. There is no basis to allow her to avoid the consequence of her choices. She remains free to arbitrate whatever claims against JPay she believes she possesses on an individual basis.

C. No party to the Revised Terms of Service can participate in a class arbitration against JPay

As discussed above, JPay's Revised Terms of Service apply to "all disputes, regardless of the date of accrual of such dispute," expressly forbid class arbitrations, and provide that "the arbitrators have no authority to order . . . class arbitration or to conduct class wide arbitration proceedings . . . ." Exhibit 3 at §14(f)–(g); Exhibits 4 and 5 at § 15(f)–(g). Such waivers are indisputably enforceable. AT&T Mobility LLC v Concepcion, 563 U.S. 333 (2011). And "an arbitrator may not modify clear and unambiguous contract terms." Wiregrass Metal, 837 F.3d at 1088.

Thus, it's not only Houston who is barred from participating in a class arbitration, but anyone who consented to JPay's Revised Terms of Service.

D. Pursuant to the terms of the Revised Terms of Service, the arbitration should be stayed pending this Court's determination

The Revised Terms of Service contemplate the possibility that an arbitrator will wrongly attempt to pass on the "scope," "effect," or "enforceability" of the class arbitration waiver or otherwise wrongly refuse to order bilateral arbitration. For this reason, it provides that

> IF A LAWSUIT IS FILED, THE PARTIES AGREE THAT THE ARBITRATION SHALL BE IMMEDIATELY STAYED, BY AGREEMENT OR COURT ORDER, UNTIL THE COURT CASE IS RESOLVED AND ALL APPELLATE REVIEW IS EXHAUSTED . . .

Exhibit 3 at §14(g); Exhibits 4 and 5 at § 15(g). **As discussed above, Houston has affirmatively consented to these conditions no less than eight times.** Accordingly, the Court should stay the putative class arbitration until it has resolved the issues raised by this application to vacate.

E. Kobel's status is unresolved, and JPay should be provided with a short discovery window to determine whether she's consented to JPay's Revised Terms of Service

At this time, JPay's records show that Kobel has not consented to JPay's Revised Terms of Service with the account she previously used to access JPay's services. Nevertheless, JPay believes it should be provided with a limited jurisdictional discovery period to determine whether she has, in fact, accepted the Revised Terms of Service through a different account. At a minimum, JPay believes it should be entitled to five requests for production, five interrogatories, and one four-hour deposition of Kobel.

Conclusion

WHEREFORE, JPay requests this Court enter an order (1) vacating the arbitrators' award as to Houston; (2) enforcing the class-arbitration waiver of the Revised Terms of Service as to Houston and anyone else who has consented to JPay's Revised Terms of Service, without prejudice to their right to pursue an individual arbitration against JPay; as well as (3) staying the putative

class arbitration until the disposition of this case; and (4) ordering limited discovery regarding whether Kobel has consented to the Revised Terms of Service.

CERTIFICATE OF PRE-FILING CONFERENCE

Pursuant to S.D. Fla. L.R. 7.1(a)(3), Plaintiff's counsel conferred with Defendants' counsel who did not agree to the relief sought herein.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2019, I electronically filed the foregoing document with the Clerk of the District Court using CM/ECF which served all counsel of record.

Respectfully submitted,

By: */s/Velvel Devin Freedman*
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EXHIBIT G

AMERICAN ARBITRATION ASSOCIATION

Commercial and Class Action Arbitration Tribunal

CYNTHIA KOBEL, an individual, and SHALANDA HOUSTON, an individual, on behalf of themselves and all others similarly situated,

Claimants,

v.

JPAY, INC.,

Respondent.
_____/

Case No. 01-15-0005-3477

CLAIMANTS' NOTICE OF AMENDMENT TO REQUESTED RELIEF RE LENGTH OF CLASS DISCOVERY PERIOD

Claimants Cynthia Kobel and Shalanda Houston ("Claimants") write to notify the Panel that in response to the February 16, 2023 correspondence from Panel Chairperson Corodemus adjourning the oral argument scheduled for February 17 in light of Respondent JPay, Inc.'s ("Respondent") decision to file an action in Texas federal court, Claimants wish to voluntarily amend the relief they are seeking regarding the length of the class discovery period in this case so that this arbitration can continue expeditiously without any unwarranted delay. Specifically, Claimants will no longer seek discovery from Respondent from any time on or after August 18, 2021, when JPay amended its Terms of Service to be governed by Texas law and invoke the jurisdiction of Texas courts.[1]

It is Claimants' position that the only potential impact the Texas action could have on this pending arbitration would involve the time period after JPay amended its Terms of Service on August 18, 2021 to first invoke Texas law. Although for all of the reasons stated in Claimants'

[1] As previously stated by Claimants in footnote 1 of their opening brief on the class waivers, any issues regarding the composition of the class are not yet ripe for decision.

opening and reply briefs regarding JPay's purported class waiver, Claimants do not believe the purported class waivers in the August 2021, May 2022, or July 2022 Terms of Service are any more enforceable than any of JPay's earlier class waivers, Claimants do not wish this arbitration to be delayed for months or years while JPay's latest delay tactic plays out in federal district court in Texas and through a potential appeal to the Fifth Circuit.

Therefore, in an attempt at compromise and without waiving any of the legal arguments made in their prior briefing, Claimants voluntarily amend their proposed class discovery period to end on August 17, 2021. Claimants request that the Panel enter an order extending discovery to that date given JPay's failure to substantively respond to any of Claimants' arguments regarding JPay's pre-2021 class waivers. Alternatively, if the Panel believes oral argument is still necessary based on the parties' submissions and in light of Claimants' amended requested class discovery period, Claimants respectfully request that the Panel set a new date for oral argument on the issue of the proper length of the class discovery period.

Dated: February 24, 2023

Respectfully Submitted,

/s/ Andrea R. Gold

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Counsel for Claimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 24, 2023, a true and correct copy of the foregoing was filed with the AAA and served on all counsel of record via electronic mail.

/s/ Andrea R. Gold
Andrea R. Gold

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JPAY LLC, A Delaware Limited Liability Company, Plaintiff, vs. SHALANDA HOUSTON, Defendant.	Civil Action No.: 3:23-cv-00165

[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND GRANTING DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

Having considered Defendant's Motion to Dismiss Plaintiff's Original Complaint for Declaratory and Injunctive Relief and associated Request for Judicial Notice filed concurrently therewith, as well as the arguments and authorities therein, any responses, and all other pleadings in this action, and finding good cause exists, the Motion to Dismiss is hereby **GRANTED** in its entirety for the reasons set forth in Defendant's Motion. The Request for Judicial Notice is also **GRANTED** in its entirety for the reasons set forth in the Request.

Further, finding that Plaintiff's claims cannot be cured through amendment, this action is hereby **DISMISSED** with prejudice. The Court respectfully directs the Clerk to close this matter.

DATED: _____

_____
HONORABLE KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE