IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0636

BLUEBIRD PROPERTY RENTALS, LLC and ALAINA GARCIA,
Plaintiffs/Appellees,

v.

WORLD BUSINESS LENDERS, LLC; WBL SPO I, LLC; and WBL SPO II, LLC,
Defendants/Appellants.

ON APPEAL FROM THE MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY
CAUSE NO. DV-16-2023-201-DS
HON. ANDREW BREUNER, PRESIDING

APPELLEES' ANSWER BRIEF

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STATEMENT OF THE CASE

This appeal arises out of an action brought by Plaintiffs/Appellees, Alaina Garcia and Bluebird Property Rentals, LLC (collectively "Garcia"), under the Montana Declaratory Judgment Act and Montana's usury statute to hold a New York predatory lender liable for a gross violation of Montana usury law. The loan at issue had an APR of more than 85%, was made to Montana residents and secured by Montana real property, and fully repaid with funds from the distress sale of the property.

The Defendants/Appellants, World Business, Lenders, LLC, WBL SPO I, LLC, and WBL SPO II, LLC (collectively "WBL"), are unregulated, non-bank lenders who engaged in a highly sophisticated scheme to chisel nearly a million dollars in interest and fees from Garcia over a two-year period. In an attempt to evade liability under Montana's usury statute, which prohibits unregulated, non-bank lenders from charging more than 15% interest, WBL devised a Gordian knot of unconscionable terms and provisions in its loan documents.

Those unconscionable terms and provisions include a set of verbose, convoluted, and misleading arbitration provisions, largely buried in fine print, stating that either party "may choose" to arbitrate disputes arising from the loan. The arbitration provisions directly conflict with the most clear and conspicuous language found anywhere in the loan documents, stating that any disputes between

the parties "**SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY**."

Those terms and provisions also include a choice-of-law provision which purports to invoke the laws of Nevada, which has no usury law, and which has no connection whatsoever to the parties or the subject loan transaction. They also included the deceptive and last-minute insertion of Axos Bank, a federally regulated bank that is exempt from Montana usury law, as the purported lender in the transaction instead of WBL, the true lender, in what is known as a "rent-a-bank" scheme.[1]

The crux of Garcia's Complaint against WBL alleges that WBL engaged in an unlawful rent-a-bank scheme and should be held liable under Montana's usury statute. Montana courts have yet to consider the legality of rent-a-bank schemes,

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[1] The typical "rent-a-bank" scheme involves a non-bank lender, like WBL, who originates a usurious loan, then partners or contracts with a bank to make the loan according to the non-bank lender's instructions, and then immediately buys the loan from the bank after the loan closing. The bank is effectively renting out its special regulatory privileges to the non-bank lender. See Adam J. Levitin, *Rent-A-Bank: Bank Partnerships and the Evasion of Usury Laws*, 71 Duke L.J.329 (2021). Courts have refused to allow unregulated lenders to make this end-run around usury laws, and held rent-a-bank schemes unlawful, on the grounds that usury exemptions are strictly limited to banks and not transferrable to nonbank lenders, or, alternatively, based upon the "true lender" doctrine" which looks to whether the bank or nonbank was the real lender in the transaction. See *Madden v. Midland Funding, LLC*, 786 F3d 246, 253 (2d Cir. 2015); *Rent-Rite SuperKegs W. Ltd. v. World Bus. Lenders, LLC*, 623 B.R. 335, 342 (D.Colo. 2020).

thus Garcia's case against WBL is a case of first impression. Considering its potential significance in terms of public policy and protecting Montana borrowers against overreaching lenders, Garcia believes that her case should be heard by a Montana court rather than an arbitrator.

Garcia chose to bring her claims in court when she filed her Complaint. When WBL moved to dismiss and compel arbitration, Garcia challenged the arbitration provisions specifically. She first argued that, under Montana's choice-of-law analysis, the Nevada choice-of-law provision should be disregarded and that Montana contract law should govern whether the arbitration provisions are valid and enforceable. Garcia then argued that the provisions were not valid and enforceable because she did not consent to arbitration and did not knowingly waive her Montana Constitutional right to access to the courts. She also argued that the arbitration provisions were adhesive and unconscionable.

The District Court denied WBL's motion to dismiss and compel arbitration, reasoning that the motion was "premature because Montana law must be applied to the question of whether the arbitration and choice-of-law provisions are enforceable." Thus, while the District Court decided as a threshold matter that Montana law would govern the enforceability of the arbitration provisions and denied WBL's motion, it did not expressly rule on enforceability.

When WBL filed this appeal, Garcia moved to dismiss it on the grounds that the District Court had not yet made a final, appealable ruling on WBL's motion to dismiss and compel arbitration. Her motion was denied as the Court held that the District Court's order is properly before the Court on appeal.

STATEMENT OF FACTS [2]

Alaina Garcia is a resident of Gallatin County, Montana and the sole member of Bluebird Property Rentals, LLC ("Bluebird"), a Montana limited liability company. Declaration of Alaina Garcia, ¶¶ 2-3 (10.0)[3]. Garcia established Bluebird to own and operate a couple of rental properties she purchased in the last few years. Id., ¶ 3. One of those properties was 214 South Black Avenue in Bozeman ("the "Property"), previously her family home, which she purchased from her father's estate in 2015 following his death. Id., ¶ 4. The Property had sentimental value to Garcia, and she occupied it as her residence for several years before converting it to a rental. Id.

While Garcia once owned a couple of rental properties and aspired to have a successful rental property business, she was not sophisticated in business,

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[2] WBL characterizes the Statement of Facts in its Brief as being undisputed. In fact, several of WBL's factual allegations are disputed and will be noted herein.

[3] References are to the District Court docket.

financial, or legal matters. Id., ¶ 5. In 2020 she fell into financial difficulty after incurring some short-term debts. Id., ¶ 6. Around that time, she separated from her longtime partner, which caused her additional financial and emotional stress, as they have a minor child together and Garcia essentially became a single mother. Id. Garcia began searching for a loan to pay off the debts, and to provide funds to expand her business and allow her to increase her income. Id., ¶ 7; Def. Reply Brf., Ex. B-1 (16.0). Because she had bad credit and insufficient wage income she did not qualify for a bank loan. Decl. Garcia, ¶ 7 (10.0). She became quite desperate and her judgment became clouded. Id.

In the fall of 2020, a loan broker introduced Garcia to World Business Lenders ("WBL"), a New York-based non-bank lender, and had her submit a loan application. Id., ¶ 8. WBL indicated that it could loan Garcia the funds she needed, using the Property as collateral. Id. She worked with WBL for several weeks as they went through the underwriting and approval process for the loan. Id., ¶ 9. In mid-December of 2020 WBL finally indicated that they approved Garcia for a loan of $450,000 and that she could close within a few days. Id., ¶ 10.

Garcia saw the loan documents for the first time on December 18, 2020 when they were transmitted to her for electronic signature. Id., ¶¶ 11-13. She signed them that same day. Id., Ex. 1-16. WBL's representatives presented the loan documents to her as the "final" documents that she needed to sign. Decl.

Garcia, ¶ 11 (10.0). The documents included a "Business Promissory Note and Security Agreement" ("Agreement") a "Continuing Guaranty, Personal" ("Guaranty"), and a "Deed of Trust, Assignment of Leases and Rents and Security Agreement ("Deed of Trust"). Id., ¶¶ 12-13. The loan documents were WBL's standard form documents and not subject to negotiation, and Garcia knew that she had to sign them if she wanted the loan. Id., ¶ 14. WBL did not explain the loan documents to her before she signed them. Id. Prior to signing the loan documents, Garcia mainly reviewed the key terms such as the loan amount and repayment terms. Id., ¶ 15. She skimmed the remainder of the loan documents but did not read all of the fine print language closely. Id.

Garcia noticed that the name "Axos Bank" appeared along with WBL on many of the loan documents. Id., ¶ 16. She does not recall if she noticed that Axos Bank was identified as the "lender" in the Agreement and Guaranty. Id. She had not previously had any communications with Axos Bank nor was she aware that it was involved in the loan. Id., ¶ 17. She assumed that Axos Bank was somehow part of or affiliated with WBL. Id. She assumed that WBL was still her lender because she had only communicated with WBL, its name also appeared on most of

the loan documents, she was required to make her loan payments to WBL, and WBL had previously represented that it would be her lender. Id., ¶ 18.[4]

Prior to signing the Guaranty, Garcia did notice the "Jury Waiver" language in all capital, bold print directly above her signature line. Id., ¶ 19. She recalls reading that entire paragraph, including the language that " . . . **ANY SUCH ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY**," which she understood to mean that she was simply waiving her right to a jury trial in the event of a dispute. Id. Garcia does not recall seeing any language in the Agreement or the Guaranty regarding arbitration, or any indication that she was waiving her right to have a dispute decided by the courts. Id., ¶ 20. Garcia has never had any experience with arbitration, and prior to this lawsuit, she did not even know what arbitration is. Id.

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[4] As previously discussed herein, and as alleged in Garcia's Complaint, Axos Bank's purported involvement as Garcia's "lender" was a sham and the linchpin of the unlawful rent-a-bank scheme WBL used to try and evade Montana's usury law. Complaint, pp. 6-7 (1.0). Therefore, WBL's statements that Axos "made" the loan to Garcia, and merely "engaged" WBL to underwrite and service the loan are disputed. See Appellants' Brf., pp. 2-3, ¶ 1, p. 5, ¶ 14. WBL's statement that Garcia has acknowledged that the loan documents themselves are valid and enforceable contracts is likewise disputed. See, Id., p. 8, ¶ 26. However, these factual disputes go to the underlying merits of Garcia's case which are not presently on appeal.

Garcia also does not recall seeing any language in the loan documents that provides for the application of Nevada law to any dispute. Id., ¶ 21. She had no contacts with the state of Nevada, and always believed that she was dealing exclusively with WBL which was in New York. Id.

As a condition of the loan, WBL required Garcia to engage a lawyer to provide WBL with an opinion letter regarding the loan documents. Id., ¶ 22. She hired attorney Jennifer Farve for that purpose. Id. The scope of Farve's engagement was limited to reviewing the loan documents and providing the opinion letter to WBL using WBL's required form. Id., ¶ 23. Garcia's communications with Farve were generally limited to making sure that Farve had the documents she needed to provide the opinion letter. Id. Farve did not advise or consult with Garcia regarding the loan, nor did she explain to Garcia the terms in the loan documents. Id. [5]

After closing the loan funds were direct deposited into Garcia's checking account with Wells Fargo Bank at 211 W. Main in Bozeman. Garcia Decl., ¶ 24

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[5] WBL's statement that Garcia hired Farve to "represent" her in the loan transaction mischaracterizes the facts. See Appellants' Brf., p. 6, ¶ 19. Moreover, Farve's opinion letter to WBL is dated December 22, 2020, four days after Garcia signed the loan documents. Def. Brf. Supp. Mot. Dismiss, Ex. E (6.0). Thus, WBL's statement that Garcia signed the loan documents after Farve reviewed them is also disputed. See Appellants' Brf., p. 7, ¶ 22.

(10.0). She made weekly payments on the loan from that same account, by ACH debits, to WBL's account at Israel Discount Bank in New York. Id. The required weekly payment amount was $8,872.24. Decl. Garcia, Ex. 1-2 (10.0).

A few months after closing on the loan, Garcia fell behind on the weekly payments. Id., ¶ 25. WBL declared Garcia in default of the loan and noticed a trustee's sale of the Property. Id. Garcia was forced to sell the Property to pay off the loan and avoid foreclosure and further financial harm. Id., ¶ 26. The Property sold in October of 2022, just two weeks before the scheduled trustee's sale. Id. All net proceeds from the sale went to pay off the loan principal and accumulated interest. Id., ¶ 27. Thus, the WBL loan was paid in full and consumed all of Garcia's equity in the Property.

The stated APR of the loan was approximately 85%. Decl. Garcia, Ex. 1-2 (10.0). However, the true APR of the WBL loan was approximately 125%, after accounting for an exorbitant "prepayment" or default penalty that WBL tacked on after declaring Garcia in default and forcing the distress sale of the Property. Id., Ex. 1-8, par. 4. All told Garcia paid WBL approximately $945,990 in interest and penalties in less than two years on a $450,000 loan. Id., ¶ 27.

STANDARD OF REVIEW

A district court's decision on a motion to dismiss is reviewed *de novo*. *Global Client Solutions, LLC v. Osello,* 2016 Mt 50, ¶ 19, 382 Mont. 345, 367 P.3d

361. A district court's order concerning a motion to compel arbitration is also reviewed de novo. *Id*. A motion to dismiss is considered in a light most favorable to the nonmoving party and the factual allegations of the non-moving party are taken as true. *Id*. This Court will affirm a district court ruling that reaches the right result even if based on a wrong or unspecified reason. *North Star Dev., LLC v. Mont. Pub. Service Comm.*, 2022 MT 103, ¶ 17, 408 Mont. 498, 510 P.3d 1232.

SUMMARY OF ARGUMENT

The District Court correctly denied WBL's Motion to Dismiss and Compel Arbitration. Even if it did not expressly rule upon the validity and enforceability of the arbitration provisions, and did not expressly apply federal law regarding arbitrability, the District Court ruling reached the right result.

Under both federal and Montana law, when a party challenges an arbitration provision, it is for the court, not an arbitrator, do decide whether the provision is valid and enforceable. The only exception to this rule is when the parties clearly and unmistakably agreed to delegate that decision to the arbitrator. Garcia and WBL did not do so here.

Under Montana contract law, which should be applied to the issue of validity and enforceability, the arbitration provisions in WBL's documents are invalid and should not be enforced against Garcia. The arbitration provisions are ambiguous and misleading. Thus, Garcia did not consent to arbitration, and did not knowingly

and voluntarily waive her Montana Constitutional Right of access to the courts. The arbitration provisions are also adhesive and unconscionable.

ARGUMENT

I. WHETHER THE ARBITRATION PROVISIONS ARE VALID AND ENFORCEABLE IS FOR THE COURT, NOT THE ARBITRATOR, TO DECIDE.

The District Court was correct in denying WBL's Motion to Dismiss and Compel Arbitration. Although it did not expressly rule upon the validity and enforceability of the arbitration provisions, and did not expressly apply federal law regarding arbitrability, in denying WBL's Motion the District Court implicitly recognized that that the court, not the arbitrator, decides threshold issues of arbitrability. Even if its order may be based on wrong or unspecified reasons, the District Court reached the right result and should be affirmed. *North Star Dev., LLC*, 2022 MT 103, at ¶ 17.

a. Federal Law on Arbitration and Arbitrability.

WBL and Garcia agree, and this Court has repeatedly recognized, the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"), governs arbitration agreements made in interstate commerce, as well as the issue of issue of arbitrability. This includes the arbitration provisions at issue here.

Arbitration agreements are "valid, irrevocable, and enforceable" except "upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2; *Lenz v. FSC Securities Corp*., 2018 MT 67, ¶ 16, 391 Mont. 84, 414 P.3d 1262. Thus, although strongly favored by federal law, arbitration agreements remain subject to all generally applicable defenses for invalidation of any contract, such as lack of mutual assent or consideration, fraud, duress, unconscionability, and violation of public policy. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 17, 398 Mont. 91, 454 P.3d 655 (citing *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011)).

It is a "fundamental principle under the FAA that it is the responsibility of the court and not the arbitrator to determine the threshold issue of arbitrability—i.e., the validity of a challenged arbitration clause." *Global Client Solutions, LLC v. Osello*, 2016 MT 50, ¶ 27, 382 Mont. 345, 367 P.3d 361 (citing *Buckeye Check Cashing v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 1207, 163 L.Ed.2d 1038 (2006)). Where a party specifically challenges the validity of the arbitration clause, and not just the entire contract that contains it, then it is the court that determines the validity of the arbitration clause. *Id.*, ¶ *22*.

Garcia has challenged the validity of the arbitration provisions specifically, as well as the loan documents themselves. In her Complaint, Garcia alleges that WBL's loan documents as a whole are contracts of adhesion, and that the terms therein which are designed to evade Montana's usury law are unconscionable and against public policy. *Complaint*, p. 9 (1.0). Those claims go to the underlying

merits of the case and are not at issue here. In response to WBL's motion to dismiss/compel arbitration, Garcia challenged the arbitration provisions specifically. [6]

The only exception to the "fundamental principle" that courts must determine the threshold issue of arbitrability is if the parties to an agreement to arbitrate agreed to a "delegation provision" that assigns to the arbitrator the determination of the initial issues of arbitrability. *Global Client Solutions, LLC,* 2016 MT at ¶ 27 (citing *Rent-A-Center West, Inc. v. Jackson,* 561 U.S. 63, 68, 130 S.Ct. 2772, 2777, 177 L.Ed.2d 403). The terms of an enforceable delegation provision must be "clear and unmistakable" on the face of the arbitration agreement. *Id.* "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* (quoting *Rent-A-Center*, 561 U.S. at 68-69, 130 S.Ct. at 2778).

So, while WBL makes much of the applicability of the FAA and federal law to the arbitration provisions and arbitrability, the parties agree on that point and it

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[6] While WBL has noted multiple times in this case that Garcia challenged the arbitration provisions for the first time in response to WBL's Motion to Dismiss and Compel, thus implying that her challenge was somehow untimely, this was sufficient to meet her obligation to challenge the clause. *Global Client Solutions, LLC,* 2016 MT at ¶ 26 (citing *Bridge Fund Capital v. Fastbucks,* 622 F.3d 996, 999 (9th Cir.2010)).

is not really at issue in this appeal. What the parties do disagree on is whether a valid and enforceable agreement to arbitrate exits, and whether the arbitration provision delegates the determination of that issue to the arbitrator.

b. There is No Delegation Provision, Nor Any Clear and Unmistakable Evidence That the Parties Agreed to Arbitrate Threshold Issues of Arbitrability.

There simply is no "delegation provision" in the arbitration provisions, much less any "clear and unmistakable" evidence that the parties agreed to arbitrate arbitrability. While the arbitration provisions are remarkably long-winded and confusing, the lack of a delegation provision is plain to see.

WBL's argument that the issue of arbitrability must be decided by an arbitrator conflates a variety of court holdings and concepts, and is difficult to follow. WBL does not argue that the arbitration provisions contain an actual delegation provision. Rather, WBL argues that a delegation provision should be *read into* the arbitration provisions by focusing on the broad scope language, typical in almost every arbitration agreement, that the arbitration provisions apply to "any or all disputes and claims arising out of or relating to" the agreements.[7]

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[7] WBL's argument in favor of a phantom delegation provision was raised for the first time in its Reply Brief in Support of its Motion to Dismiss and Compel Arbitration. Def's Reply Brf., pp. 9-10 (16.0). Thus, Garcia is just now addressing it. While WBL now argues that Garcia has only challenged the validity

Appellants' Brf., p. 14. WBL cites no authority for the proposition that such language, standing alone, amounts to a delegation provision or clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability.[8]

WBL relies heavily upon *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir.2015), but *Brennan* involved an arbitration provision that expressly stated that "any controversy or claim arising out of this Agreement . . . shall be settled by binding arbitration in accordance with the Rules of the American Arbitration Association."[9] *Brennan*, 796 F.3d at 1130 The court in *Brennan* held in that case that incorporation of the AAA arbitration rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability. *Id*.

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of the arbitration provisions as a whole, rather than the delegation provision specifically, she cannot challenge a delegation provision that does not exist.

[8] WBL cites *Peeler v. Rocky Mountain Log Homes Canada, Inc*. 2018 MT 297, 393 Mont. 396, 431 P.3d 911, for the proposition that language in an arbitration agreement requiring arbitration of all disputes "arising hereunder" or "out of" encompasses arbitrability. However, *Peeler* stands for no such thing, and instead addressed the distinction between questions of substantive arbitrability, which are generally determined by the courts, versus questions of procedural arbitrability, which are generally determined by arbitrators. *Peeler*, ¶ 20.

[9] The AAA Rules referenced by the agreement in *Brennan* state that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the . . . validity of the arbitration agreement." *Brennan*, 796 F.3d at 1130.

While WBL argues that the arbitration provision in *Brennan* is very similar to the provisions at issue here, they are not remotely similar. The arbitration provisions in WBL loan documents merely state that if a party seeks to have a dispute resolved by arbitration and the parties do not reach an agreement to resolve the claim, ". . . any party may commence an arbitration proceeding with the [AAA]." Appellants' Appendix, Ex. 2, ¶ 16(o). This language is found midway down in the arbitration provisions, after a lengthy and confusing discussion about the parties' ability to "choose" litigation or arbitration. It says nothing about the AAA Rules.[10] Further down in the provisions, there is a sentence that purports to require WBL, under certain circumstances, to pay the administration or arbitrator's fees " . . . only if required by the AAA rules." Id. This is the only reference to the AAA Rules found anywhere in the loan documents. There is certainly no express or wholesale incorporation of the AAA Rules, nor any clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Brennan is also distinguishable on the ground that the court's holding was expressly limited to the facts of that case, which the court noted involved an

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[10] To the extent this language in the arbitration provision is ambiguous (and Garcia contends that it is), it should be interpreted most strongly against WBL as the party responsible for it. *Global Client Solutions, LLC*, 2016 MT 50, ¶ 29.

arbitration agreement between sophisticated parties.[11] *Brennan*, 796 F.3d at 1131. As will be argued further herein, Garcia is not sophisticated in matters of business and the law. WBL cites three additional cases for its argument that the arbitration provisions here delegate to the arbitrator the threshold issue of arbitrability; however, those cases are all similarly distinguishable, in that they each involved arbitration provisions that expressly incorporated AAA Rules wholesale, and they each involved sophisticated parties.[12]

The present case is more like *Global Client Solutions, LLC*, supra, 2016 MT 50. There, this Court considered a purported delegation provision that was ambiguous and provided that the arbitration be "administered by the AAA pursuant to its rules and procedures . . ." *Global Client Solutions, LLC*, at ¶ 28-31. The court noted that the reference to administration by the AAA pursuant to its rules

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[11] Brennan, the party seeking to void the arbitration provision in his employment contract with Opus Bank, was an experienced lawyer and businessman: a partner at Jones Day law firm for 16 years, as well as a bank executive. *Id*., at 1131.

[12] See *Hong Kong Continental Trade Co. Ltd. v. Natural Balance Pet Foods, Inc*., 2023 WL 2664246 (C.D.Ca. 2023)(arbitration agreement between multinational corporations expressly incorporating the AAA's International Arbitration Rules); *Washington v. Goettsche*, 2020 WL 9767878 (D.Mont. June 3, 2020)(arbitration agreement between owners of Bitcoin mining company expressly incorporating AAA rules); and *Navajo Transitional Energy Co., LLC v. BNSF Ry. Co*., 2023 WL 4826485 (D.Mont. July 24, 2023)(arbitration agreement between energy company and BNSF railroad expressly incorporating AAA Commercial Arbitration Rules).

declares nothing concerning delegation, and there was no clear and unmistakable evidence that the parties agreed to forego the general rule that arbitrability is to be decided by the court. Id., ¶¶ 31-32. The Court also distinguished the federal cases holding that incorporation of AAA rules amounts to a delegation of arbitrability, noting that those cases almost exclusively involve arbitration disputes between sophisticated parties in commercial settings. Id., ¶ 32.

At various points in its argument on this issue, WBL completely upends the federal substantive law on arbitrability, arguing that it is incumbent upon Garcia to prove that the parties agreed to have the issue of arbitrability decided "by a court or by anybody other than the arbitrators." Appellants' Brf., pp. 14-15. Again, there must be "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability," not vice versa. *Caremark, LLC v. Chickasaw Nation,* 43 F.4th 1021, 1029 (9th Cir. 2022)(citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985(1995)). Silence or ambiguity on the question of who should decide the threshold issue of arbitrability necessarily means that the issue is for the court to decide. Accordingly, it is for the Court to decide arbitrability here.

II. THE ARBITRATION PROVISIONS ARE NOT VALID OR ENFORCEABLE.

Garcia did not assent to the arbitration provisions, nor did she knowingly and voluntarily waive her right of access to the courts. The arbitration provisions

are also adhesive and unconscionable. Therefore, they are invalid and cannot be enforced against her.

a. Montana Contract Law Should Be Applied to the Issue of Validity and Enforceability.

In reviewing the validity and enforceability of an arbitration agreement, a state court must apply state law that arose to govern the validity, revocability, and enforceability of contracts generally. *Kelker v. Geneva-Roth Ventures, Inc*., 2013 MT 62, 369 Mont. 254, 303 P.3d 777. The District Court, considering the arguments of the parties, correctly concluded that Montana law applies to the issue of validity and enforceability, notwithstanding a Nevada choice-of-law provision in WBL's loan documents.[13]

Montana courts apply Montana law, relying the *Restatement (Second) of Conflict of Laws*, when deciding whether a choice-of-law provision in an agreement should be given effect. *Modroo v. Nationwide Mut. Fire Ins. Co*., 2008

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[13] The Nevada choice-of-law provision is one of several unconscionable terms and provisions in WBL's loan documents. It's obvious and sole purpose is to protect WBL from usury liability in Montana and other states with usury laws where WBL originates loans (the provision states that "the legality, enforceability and interpretation of this Agreement *and the amounts contracted for, charged and reserved under this Loan Agreement* will be governed by such laws'). In her Complaint Garcia challenges the validity and enforceability of the Nevada choice-of-law provision on various grounds. Complaint, pp. 8-10 (1.0). For purposes of this appeal, the issue is whether it is valid enforceable with regard to the arbitration provision.

MT 275, ¶ 53, 345 Mont. 262, 191 P.3d 389. The law of the state chosen by the parties will not be applied if three factors are met: (1) if, but for the choice-of-law provision, Montana law would apply under § 188 of the *Restatement*; (2) if Montana has a materially greater interest in the particular issue than the state chosen by the parties; and (3) if applying the state law chosen by the parties would contravene a fundamental policy of Montana. Id., ¶ 54.

In a case strikingly similar to this case, involving a usury claim by a Montana borrower against a Massachusetts-based predatory lender, a Montana U.S. District Court used this three-factor analysis to void a Massachusetts choice-of-law provision in a loan agreement. See *Kampfe v. Aquent, LLC*, 2009 WL 10678365 (D.Mont. May 5, 2009).

Addressing the first factor, Montana law would apply here but for the choice of-law provision. § 188 of the Restatement provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

Modroo, supra, ¶ 55. Restatement § 6(1) states that "[a]court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." *Id*. Montana law provides that a contract is to be interpreted

according to the law and usage of the place where it is to be performed. MCA § 28-3-102.

The loan agreement was performed by Garcia in Montana. She applied for the loan from Montana. The loan funds were deposited into her bank account in Montana. She made weekly payments on the loan from that same bank account, to WBL's account at Israel Discount Bank in New York. The loan was secured by Montana Deed of Trust on Montana real property, and fully repaid from the distress sale of that property after WBL noticed a Trustee's sale under Montana law. The final payoff funds were wired from Security Title Company in Bozeman to WBL's account in New York.

Garcia did not make a single payment to Axos Bank or to any address or account in Nevada. WBL argues that Garcia ignores WBL's place of performance and points to language in the Loan Agreement that "this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada." Appellants' Brf., p. 19. First, this language only purports to describe Axos Bank's actions, not WBL's actions. WBL does even argue that it has done anything in Nevada about the loan to Garcia, or that it has its own ties to the state.[14] This language also is

[14] In its arguments on the choice-of-law issue, WBL repeatedly seeks to claim the purported actions of Axos Bank in Nevada as its own. While WBL took assignment of the loan documents after the loan closing, Axos Bank's purported

self-serving, meaningless, and false.[15] Garcia never had any contact with Axos Bank, and did not engage in any contact or transactions with anyone in Nevada. Indeed, this issue goes to the crux of Garcia's Complaint, and her claim that Axos Bank's involvement in the transaction and the purported ties with Nevada are a sham designed to evade usury liability.

In *Kampfe*, *supra*, the court held that the place of performance of the loan agreement was in Montana based upon the fact that the loan funds were placed into the borrower's accounts in Montana, the lender perfected a security interest in the borrower's property by filing a UCC with the Montana Secretary of State, and the loan payments were made from the borrower's Montana accounts with proceeds earned in Montana. *Kampfe*, 2009 WL 10678365, *3; see also *Modroo*, ¶ 57 (holding that place of performance of auto insurance policy was Montana, based on accident and other claim-related activities that occurred in Montana). Based on the

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involvement in the transaction ended. Axos Bank is not a party to this case, and WBL itself did nothing in Nevada and has no purported ties of its own to Nevada. Therefore, the Court should disregard any WBL arguments based on Axos Bank's purported ties to and actions in Nevada.

[15] Clearly the language was included in the loan documents with the intention of pre-empting any challenge to the Nevada choice-of-law provision.

same reasoning, the place of performance of the Agreement between WBL and Garcia was in Montana.

For the second factor, to determine whether Montana has a materially greater interest in an issue than the parties' chosen state, Montana courts weigh five factors: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Modroo*, ¶ 59 (citing Restatement (Second), ¶ 188(2)). These contacts are evaluated according to the relative importance they bear to the issue at hand. *Id*.

Garcia was in Colorado visiting her aunt when she signed electronically signed the Agreement and Guaranty. While there were no negotiations *per se* over the documents (they were foisted upon Garcia shortly before closing), Garcia was in Montana and Colorado in the days and weeks leading up to the loan closing, when she was providing WBL with documents and information it needed to approve the loan. Garcia dealt exclusively with WBL, who was in New York, not Nevada. Thus, factors (a) and (b) weigh in favor of Montana over Nevada.

As previously argued, Montana was the place of performance. The subject matter of the Agreement and the loan is either the Property that was pledged as security and used to repay the loan, or the loan funds that were deposited into

Garcia's account, both of which were located in Montana. Garcia is and was a Montana resident when she entered into the Agreement. The WBL entities are limited liability companies organized in New York and Delaware with their place of business in New York. World Business Lenders, LLC is also registered in Montana. Thus, factors (c), (d) and (e) also weigh in favor of Montana over Nevada. They also carry the most weight in the analysis given their importance to the matters at hand (i.e., whether this dispute should be decided by a Montana court or an arbitrator, and whether WBL is liable under Montana's usury law).

In sum, the factors establish Montana as having a materially greater interest in this action. See *Kampfe*, *3-4; see also *Keystone, Inc. v. Triad Sys. Corp*., 1998 MT 326, ¶ 12, 292 Mont. 229, 971 P.2d 1240 (place of performance and location of the subject matter of contract for sale and installation of computer system in Montana meant that Montana has a materially greater interest in the case than California). In contrast, Nevada has little, if any, interest in this case.

Regarding the third factor under the Restatement analysis, it is clear that applying Nevada law would contravene a fundamental policy of Montana, namely Montana's usury statute, Mont. Code Ann. § 31-1-107. Montana's usury statute reflects a fundamental public policy of protecting borrowers who lack real bargaining power against overreaching by creditors. *Scarr v. Boyer*, 250 Mont. 248, 252, 818 P.2d 381 (1991). In contrast, as WBL admits in its Brief, Nevada

has no usury law. WBL's loan to Garcia, which according to the loan documents had an APR of 85%, would be perfectly legal in Nevada.

In *Kampfe*, the court held that if the plaintiff's allegations of usury were correct, he would be a victim of an overreaching creditor, and that the application of Massachusetts usury law, which allowed excessive interest, would violate a fundamental policy of Montana. *Kampfe*, supra, * 4. Courts in other jurisdictions that have considered choice-of-law provisions in usury cases have also held that states with usury laws have a substantially greater interest in a transaction and a case than a chosen state without a usury law. See *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 622-23 (3d Cir. 2009)[16]; and *Hengle v. Asner*, 433 F.Supp.3d 825, 866-67 (E.D.Va. 2020)(enforcement of tribal choice-of-law provision in loan agreement would violate Virginia's compelling public policy against unregulated usurious loans).

WBL wades into the merits of Garcia's usury claim by arguing that Axos Bank, as a regulated lender, is exempt from Montana's usury statute. Appellant's Brf., p. 21. WBL argues, therefore, that there is no public policy reason to apply

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[16] In considering a choice-of-law provision in loan documents that provided for the application of Delaware law, which has no usury statute, the court in *Kaneff* noted that "the methods used by usurious lenders often involve subterfuge, to attempt to circumvent fundamental public policy." *Kaneff*, 587 F.3d at 623.

Montana law over Nevada law. Id. This argument ignores the crux of Garcia's entire case, namely that Axos Bank's involvement in the loan was a sham and part of an unlawful rent-a-bank scheme by WBL to avoid usury liability, and that WBL was the true lender in the transaction.[17]

Based on Montana's choice-of-law rules the Nevada choice-of-law provision is invalid and Montana law should apply to the issue of whether the arbitration provision is valid and enforceable. Moreover, the Nevada choice-of-law provision is itself simply another unconscionable term in WBL's loan documents that was intended for the purpose of evading liability under Montana's usury law, which was designed to protect Montana borrowers like Garcia against predatory lenders like WBL. For this additional reason it should be disregarded.

b. The Arbitration Provisions are Ambiguous, and Garcia Did not Consent to Them.

The primary reason the arbitration provisions are invalid and cannot be enforced against Garcia is because *she did not consent* to arbitration. The Court can resolve this issue in Garcia's favor without even considering the issues of arbitrability, enforceability of the Nevada choice of law provision, or whether the arbitration provision is adhesive and unconscionable.

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[17] These allegations in Garcia's Complaint must be taken as true for purposes of this appeal, and WBL has thus far not disputed them.

First, as WBL acknowledged in the District Court, only the court can determine whether an arbitration agreement (i.e., a contract) has been formed between the parties. *Granite Rock Co. v. Int'l Broth. Of Teamsters*, 561 U.S. 287, 300, 130 S.Ct. 2847, 2858, 177 L.Ed2d 567; Def's Reply Brf., p. 8 (16.0). "Even the most sweeping delegation [provision] cannot send the contract-formation issue to the arbitrator because, until the court rules that a contract exists, there is simply no agreement to arbitrate." *K.F.C. v. Snap, Inc*. 29 F.4th 835, 837 (7th Cir. 2022)(citing ("the breadth of a delegation [provision] is irrelevant if the parties did not enter into a contract"). Therefore, Garcia's argument that she did not consent to arbitration must be determined by a court, regardless of how the arbitrability issue is decided.

Moreover, the choice of law analysis is irrelevant to this issue because Montana law and Nevada law on contract formation is substantially similar. All contracts must contain four essential elements: (1) identifiable parties capable of contracting; (2) mutual consent of the parties; (3) a lawful object; and (4) mutual consideration. *Lenz*, 2018 MT 67, ¶ 18; MCA § 28-2-102. There must be mutual assent or a meeting of the minds on all essential terms to form a binding agreement. *Lenz*, ¶ 18. Contract terms to which the parties did not mutually assent are not valid and enforceable against a party who did not assent. *Id*. Similarly, under Nevada law, basic contract principles require, for an enforceable contract, an offer and

acceptance, meeting of the minds, and consideration. *Certified Fire Prot., Inc. v. Precision Constr*., 128 Nev. 371, 378, 283 P.3d 250, 255. A meeting of the minds exists when the parties have agreed upon the contract's essential terms. Id. A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257.

Here, Garcia dis not consent to the arbitration provision, and there was no meeting of the minds, because the arbitration provision is ambiguous and misleading. The provision itself merely states that "[a]ny of the Borrower, Lender or a Guarantor *may choose* to arbitrate any or all disputes and claims arising out of or relating to this Loan Agreement, Guaranty or any other document." This discretionary language is ambiguous compared to a typical arbitration clause stating that all disputes "*shall* be resolved by arbitration." The provision then states that "If the Borrower, Lender or a Guarantor chooses to litigate any dispute or claim . . . the decision to litigate shall not be deemed a waiver of arbitration . . ."

Most significantly, the arbitration provision is in direct conflict with the most prominent language found anywhere in the loan documents, which specifically mandates that any dispute "SHALL BE DECIDED BY <u>TRIAL TO THE COURT</u> WITHOUT A JURY." The language appears in bold, block letters right above Garcia's signature line in the Guarantee, and reads:

JURY WAIVER

GUARANTOR KNOWINGLY AND VOLUNTARILY WAIVES TRIAL BY JURY IN ANY ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM BASED UPON, ARISING OUT OF OR IN ANY WAY RELATING TO THIS GUARANTY, THE OBLIGATIONS GUARANTEED BY THIS GUARANTY OR ANY CONDUCT, ACT OR OMISSION OF LENDER, AND AGREES AND CONSENTS THAT ANY SUCH ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY. GUARANTOR ACKNOWLEDGES AND UNDERSTANDS THAT THIS WAIVER AND CONSENT CONSTITUTES A MATERIAL INDUCEMENT TO LENDER TO ENTER INTO THE TRANSACTION WITH THE BORROWER.

Guaranty, Appellants' Appendix, 2, p. 4. Garcia read this provision prior to signing the documents, and understood that while she was waiving her right to a jury trial, any disputes would be still be decided by the courts.

This Court has refused to enforce arbitration provisions that are ambiguous and in conflict with other language in the same contract, reasoning that there was no "mutual intent" or "meeting of the minds" between the parties regarding the arbitration provisions. See *Riehl v. Cambridge Court GF, LLC*, 2010 MT 28, ¶¶ 26-30, 355 Mont. 161, 226 P.3d 581; and *Kelker, supra*, 2013 MT 62, at ¶ 37. An ambiguity in a contract is generally construed against the party who drafted it. *Kelker*, ¶ 37; see also *Kingston v. Ameritrade*, 2000 MT 269, 302 Mont. 90, 12 P.3d 929 (uncertain terms in an arbitration provision are to be construed strictly against the party causing the uncertainty). The conflicting language in the arbitration provisions here is extremely unclear and misleading, and cannot be

reconciled. It shows that the there was no mutual consent between the parties to agree to arbitration, and thus renders the arbitration provision altogether void.

c. The Arbitration Provisions are Unconscionable.

The arbitration provisions are also void under Montana law because they are unconscionable. A contract term is equitably unconscionable if it is adhesive and either unreasonably favors the stronger party or is unduly oppressive to the weaker party. *Stowe*, 2019 MT 288, ¶ 19. A contract term is adhesive if dictated by a party in a superior bargaining position to a weaker party on a take it or leave it basis without any reasonably opportunity for negotiation. *Id*. An adhesion contract is typically a pre-printed, standard-form contract prepared by one party, to be signed by the party in a weaker position who adheres to the contract with little choice about the terms. *Woodruff v. Bretz, Inc*., 2009 MT 329, ¶ 8, 353 Mont. 6, 218 P.3d 486.

There is ample evidence to establish that the arbitration provisions here are adhesive. The loan documents are WBL's standard-form contracts, they were presented to Garcia as the "final" documents that she had to sign if she wanted the loan, and she had no opportunity to negotiate them. There is no question that WBL had the superior bargaining power in the transaction. Garcia was in a desperate financial situation and had been strung along for several weeks waiting for WBL to approve the loan.

There is also ample evidence that the arbitration provisions are unduly oppressive to Garcia as the weaker party. Whether a contract term of adhesion unreasonably favors the stronger party or is unduly oppressive to the weaker party is a mixed question of fact and law under the totality of circumstances surrounding the execution of the contract. Lenz, ¶ 31.

Courts should consider as relevant the factors articulated in *Kortum-Managhan v. Herbergers NBGL,* 2009 MT 79, 349 Mont. 475, 204 P.3d 693, such as: whether the arbitration provision was the product of negotiation or dictated by the party with more bargaining power, whether the provision was conspicuous and clearly explained the consequences of waiving rights to legal redress and jury trial, whether a disparity in business experience and sophistication existed between the parties, whether the waiving party had assistance of counsel at the time of execution, whether the waiving party was under economic, social or practical duress compelling acceptance of the arbitration provision, whether the waiving party separately signed or initialed the provision, and whether the provision was ambiguous or misleading. *Lenz*, ¶ 19 (citing *Kortum*, ¶ 27).

Again, the arbitration provision was basically dictated by WBL to Garcia without any opportunity for negotiation, and there was a vast disparity in experience and sophistication between WBL, a New York based predatory lender, and Garcia, a Montana single mother who was trying to establish a small rental

property business and in financial distress. Garcia lacked sophistication in business and legal matters and, at the time, did not even know what arbitration was.

WBL makes much of the fact that Garcia held her two rental properties through an LLC, but that is not necessarily indicative of sophistication. Use of LLCs for real estate ownership is of course extremely common and anyone can establish one by submitting a simple form to the Montana Secretary of State and paying a small fee. Moreover, Garcia acquired one rental property (the property that she pledged as security for WBL loan), from her father's estate, and then lost it because of the WBL loan, losing all of her equity in the process. It goes without saying that, had Garcia been experienced and sophisticated in business and legal matters, and not under economic duress, she would not have taken out a loan with an 85% annual interest rate.[18]

While Garcia did involve a lawyer in the transaction, the lawyer's involvement was *required by WBL* as a condition of the loan, and was solely for

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[18] WBL also argues that Garcia was not under economic duress because she was generating approximately $6,000 per month in rental income before the loan, and estimated that she would be generating approximately $22,000 per month after securing the loan. Yet, the required payments on the WBL loan were $8,872.24 per week (approximately $36,000 per month). So how, exactly, was WBL expecting Garcia to make these payments based on her estimated income? There is also no indication of whether this income was gross or net of expenses.

the purpose of providing an opinion letter *for the use and benefit of WBL*. Garcia did not receive any legal advice herself, and was merely satisfying one of WBL's required conditions for the loan. While WBL now conveniently argues that the lawyer's involvement should insulate WBL from Garcia's claims, this argument does not stand up to scrutiny.

WBL argues that the loan transaction was inherently commercial rather than consumer, based on the involvement of Garcia's LLC and the language in the loan documents stating that the loan was for business purposes. Therefore, WBL argues, the present case is more like the facts of *Lenz* and *Bucy*, 2019 MT 173, 396 Mont. 408, 445 P.3d 812, where this Court upheld arbitration provisions between sophisticated parties, than *Global Client Solutions, LLC, supra*, where the Court held invalid an arbitration between a debt-ridden consumer and a debt-relief company. An examination of those cases show that WBL's argument rings hollow. Again, the proof is plainly in the undisputed facts and results of the transaction. WBL took Garcia for nearly $1 million in interest and fees in less than two years, and took all of her equity in her former family home. To argue that this was in any way appropriate, or that she had it coming, is incredible in itself.

Lastly, the arbitration provisions are buried within the loan documents and relatively inconspicuous. It is not in bold print or all caps; rather, it is in fine print. As previously discussed, the arbitration provisions are ambiguous and misleading,

and is in direct conflict with bold, block language above Garcia's signature line stating that any dispute "SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY."

For these and other reasons addressed elsewhere herein, the arbitration provisions are adhesive, unduly oppressive, and, therefore, unconscionable. They should not be enforced against Garcia.

d. Garcia did Not Knowingly and Voluntarily Waive Her Constitutional Rights of Access to the Courts.

In addition to compliance with generally applicable contract principles, arbitration agreements must also comply with Montana's constitutional standards generally applicable to contracts. *Lenz*, 2018 MT 67, ¶ 19. Arbitration provisions necessarily effect a waiver of a party's state and federal constitutional rights to full legal redress/access to the courts. *Id*. The Montana constitutional rights to full legal redress and jury trial are fundamental rights entitled to the highest level of constitutional scrutiny and protection. *Id*. A waiver of a fundamental Montana constitutional right is valid only if made knowingly, voluntarily, and intelligently under the totality of the circumstances. *Id*.

WBL makes a straw man argument, that Garcia is arguing that she did not understand that she was waiving her right to a jury trial, and calls this "incredible." Garcia has argued no such thing. Rather, she only argues that she did not waive her constitutional right of access to the courts, in the form of a trial without a jury.

Indeed, the right to trial without a jury is guaranteed in WBL's own loan documents.

For the same reasons that the arbitration provision is equitably unconscionable, it cannot be said that Garcia knowingly, voluntarily, and intelligently waived her Montana Constitutional right to have her dispute decided in court. The fact that the most conspicuous language in the loan documents states that any disputes "SHALL BE DECIDED BY TRIAL TO THE COURT WITHOUT A JURY" is enough to resolve this issue in Garcia's favor.[19]

CONCLUSION

The Court should affirm the ruling of the District Court denying WBL's Motion to Dismiss and Compel Arbitration and that Montana contract law should be applied to the issues of the validity and enforceability of the arbitration provision. The Court should further hold, based on the material ambiguities in the arbitration provisions, that Garcia did not agree to arbitration or, alternatively, that the she did not knowingly and voluntarily waive her right of access to the courts,

[19] The result would arguably be the same under Nevada law, which requires that arbitration provisions give adequate notice that a party is waiving important rights. *KJH & RDA Investor Group, LLC v. Eight Judicial District Court*, 125 Nev. 1053, 281 P.3d 1192 (2009).

or that the arbitration provisions are adhesive and unconscionable and, therefore, unenforceable.

Respectfully submitted this 20th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double spaced; and that the word count as calculated my Microsoft Word is 9,897 words, excluding the table of contents, table of authorities, and certificate of compliance.

Dated this 20th day of March, 2024.

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