

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Cause 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,  
in and for the County of Gallatin,  
Cause No. DV-16-2023-201-DS  
Hon. Andrew Breuner, Presiding

---

**APPELLANTS' REPLY BRIEF**

---

**APPEARANCES:**

Martin S. King  
Emily Bruner  
WORDEN THANE P.C.  
321 W. Broadway St., Ste. 300  
Missoula, MT 59802  
(406) 721-3400  
[mking@wordenthane.com](mailto:mking@wordenthane.com)  
[ebruner@wordenthane.com](mailto:ebruner@wordenthane.com)

*Attorneys for Defendants/Appellants  
World Business Lenders, LLC; WBL  
SPO I, LLC; and WBL SPO II, LLC*

Frederick R. Landers  
Axilon Law  
270 W. Kagey Blvd. Suite F  
Bozeman, MT 59715  
[rlanders@axilonlaw.com](mailto:rlanders@axilonlaw.com)

*Attorneys for Plaintiffs/Appellees  
Bluebird Property Rentals, LLC and  
Alaina Garcia*

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

    1. Bluebird and Garcia are not unsophisticated borrowers or victims ..... 1

    2. The Loan Contracts are not ambiguous..... 3

    3. The District Court erred when it refused to apply federal law..... 6

    4. Under the FAA and the language of the Loan Contracts, arbitrability,  
    including unconscionability, is decided by the Arbitrators..... 6

        a. The delegation provision is enforceable ..... 11

        b. The delegation provision specifically, and the arbitration provisions  
        generally, are not unconscionable under state law..... 13

        c. The delegation provision specifically, and the arbitration provisions  
        generally, are not ambiguous ..... 14

CONCLUSION ..... 18

CERTIFICATE OF COMPLIANCE..... 19

CERTIFICATE OF SERVICE ..... 20

## TABLE OF AUTHORITIES

### Federal Cases

<i>Bielski v. Coinbase, Inc.</i> , 87 F.4th 1003 (9th Cir. 2023).....	6
<i>Brennan v. Opus Bank</i> , 796 F.3d 1125 (9th Cir. 2015).....	7, 8, 9, 10, 11, 15
<i>Briggs v. Service Corp. International</i> , No. C22-1646JLR 2023 WL 2075958 (W. D. Wa. Feb. 17 2023) .....	5
<i>Chiron Corp. v. Ortho Diagnostic Sys., Inc.</i> , 207 F.3d 1126 (9th Cir. 2000) .....	6, 7
<i>Doctors Associates, Inc. v. Casarotto</i> , 517 US 681, 116 S. Ct. 1652, 134 L.Ed.2d 902 (1996).....	4
<i>Ensembles Hyson, S.A. de. C.V. v. Sanchez</i> , No. 23-CV-1887 JLS (KSC),2024 WL 759893 (S.D. Cal. Feb. 23 2024) ...	10, 12
<i>Greer v. Freemantle Productions</i> , 622 F. Supp. 3 <sup>rd</sup> 1010 (D. Nev. 2022).....	15
<i>Hong Kong Continental Trade Co. Limited v. Natural Balance Pet Foods</i> , No. LA CV22-0051JAK, 2023 WL 2664246 (C.D. Ca. March 28, 2023).....	9
<i>Howsam v. Dean Witter Reynolds, Inc.</i> , 537 U.S. 79, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002) .....	6
<i>JPay Inc. v. Kobel</i> , 904 F.3d 923 (11 <sup>th</sup> Cir. 2018).....	11
<i>Mastrobuono v. Shearson Lehman Hutton, Inc.</i> , 514 U.S. 52, 115 S. Ct. 1212,131 L.Ed.2d 76 (1995) .....	5
<i>Molina v. Scandinavian Designs, Inc.</i> , No. 13-CV-04256NC, 2014 WL 1615177 (N.D. Ca. April 21, 2014) .....	16

<i>Momot v. Mastro</i> , 652 F.3d 982 (9 <sup>th</sup> Cir. 2011) .....	10
<i>Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.</i> , 460 US 1, 103 S. Ct. 927, 74 L.Ed.2d 765 .....	18
<i>Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.</i> , No. CV-22-146-BLG-SPW, 2023 WL 4826485 (D. Mont. July 24, 2023).....	9
<i>Rent-A-Center West Inc. v. Jackson</i> , 561 U.S. 63, 130 S. Ct. 2772, 177 L.Ed.2d 403 (2010) .....	12
<i>Saperstein v. Thomas P. Gohagan &amp; Co.</i> , 476 F. Supp. 3d 965 (N.D. Cal. 2020) .....	11
<i>Shearson Lehman Hutton, Inc.</i> , 514 U.S. 52, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995).....	5
<i>Washington v. Goettsche</i> , 2020 WL 9767878, at *3 (D. Mont. June 3, 2020) .....	9
<i>Weimen Chen v. Sierra Trading Post, Inc.</i> , No. 2:18-CV-1581-RAJ, 2019 WL 3564659 (W. D. Wash. Aug. 6, 2019) ....	10
<i>Zeevi v. Citibank, N.A.</i> , No. 219CV02206GMNBNW, 2021 WL 621423, at *3 (D. Nev. Feb. 16, 2021) .....	12

### **Montana State Cases**

<i>Global Client Solutions, LLC v. Othello</i> , 2016 MT 50, 382 Mont. 345, 367 P.3d 361 .....	8
<i>Lenz v. FSC Securities Corp.</i> , 2018 MT 67, 391 Mont. 84, 414 P.3d 1262 .....	14, 16, 17, 18
<i>Peeler v. Rocky Mountain Log Homes Canada, Inc.</i> , 2018 MT 297, 383 Mont. 386, 431 P.3d 911 .....	4, 11, 15

<i>Sayler v. Sun</i> , 2023 MT 175, 413 Mont. 303, 536 P.3d 399 .....	16
--	----

<i>Stowe v. Big Sky Vacation Rentals, Inc.</i> , 2019 MT 288, 398 Mont. 91, 454 P.3d 655 .....	13
---	----

**Nevada State Cases**

<i>Burch v. Second Judicial Dist. Court</i> , 118 Nev. 438, 443, 49 P.3d 647, 650 (2002).....	13
--	----

<i>Kindred v. Second Judicial District</i> , 116 Nev. 405, 966 P.2d 903 (2000).....	14
--	----

<i>State, Dept. Bus. &amp; Indus. v. Check City</i> , 130 Nev. 909, 337 P.3d 755, 756 (2014).....	2
--	---

**Federal Statutes**

9 U.S.C. § 1 .....	6
--------------------	---

9 U.S.C. § 2 .....	18
--------------------	----

**Montana Statutes**

Mont. Code Ann § 31-1-108(2) .....	1
------------------------------------	---

Mont. Code Ann. § 31-1-112(1) .....	3, 14
-------------------------------------	-------

Mont. Code Ann. § 71-1-317 .....	1
----------------------------------	---

**Other Authority**

<i>Restatement (Second) of Contracts</i> , § 157.....	5
---	---

American Arbitration Association, Commercial Arbitration Rules, Rule R-1(a) .....	8
---	---

American Arbitration Association, Commercial Arbitration Rules, Rule R-7 .....	8
--	---

## ARGUMENT

### **1. Bluebird and Garcia are not unsophisticated borrowers or victims.**

Throughout their response Plaintiffs Bluebird and Garcia try to characterize themselves as unsophisticated borrowers and victims of a predatory “rent-a-bank” scheme that they claim justifies disregarding the plain language of the Loan Contracts. While the relevance and credibility of said argument is largely an issue for the arbitrators, it is unsupported by evidence, is illogical, and untrue.

The loan was not made to Garcia. It was made to Bluebird, a limited liability company. Garcia is not a borrower or maker under the *Business Promissory Note and Security Agreement*. She is a guarantor under the *Guaranty*, as is typical on commercial loans, but according to her declaration, the loan was paid from proceeds from the sale of the mortgaged real property, which was a rental property owned by Bluebird.<sup>1</sup> Garcia was not charged or paid interest under the *Guaranty*, and thus even under Plaintiffs’ usury theory, Garcia personally cannot state a claim for a usury violation. See, Mont. Code Ann § 31-1-108(2).<sup>2</sup>

Regardless, Garcia acknowledges that the loan was used to expand the Bluebird business and there is no question that the loan documents provide

---

<sup>1</sup> Garcia claims she lost her equity in the real property. The property was owned by Bluebird and not Garcia.

<sup>2</sup> Additionally, non-judicial foreclosure of the deed of trust encumbering the Bluebird real property would have eliminated any liability that Garcia might have had for interest or otherwise. Mont. Code Ann. § 71-1-317.

repeatedly that the loan is a “business loan” for a “business purpose”. A registered Montana limited liability company, that obtains a business loan from an out of state lender, secured by company property, and using loan documents that are reviewed by borrower’s counsel in advance<sup>3</sup>, should not thereafter be allowed to claim that it is a weaker and less sophisticated party based on the background of its members or shareholders (and inadequate advice of their counsel), and that consequently select terms of the contract, including the arbitration and choice of law provisions, should be interpreted as unconscionable and unenforceable.

Regarding Bluebird and Garcia’s characterization of WBL as part of a “rent-a bank” scheme to charge usurious interest, that claim simply doesn’t make sense. The Loan Contracts provide in numerous places, and in upper case type, that the loan and Loan Contracts will be interpreted according to federal law and, if not federal law, Nevada law. Agreement ¶ 16(c); Guaranty p. 2. Montana law is not mentioned.

Plaintiffs acknowledge that Nevada does not have usury or a limitation on the amount of interest that may be charged on a loan of money. *State, Dept. Bus. & Indus. v. Check City*, 130 Nev. 909, 910, 337 P.3d 755, 756 (2014). There is no

---

<sup>3</sup> Montana legal counsel “retained” by Garcia and Bluebird issued an opinion letter representing that they had reviewed the Agreement and Guaranty, among other loan documents, and opined they were enforceable against both Garcia and Bluebird in accordance with their terms. (Doc. 6.00; Ex. E)

logical reason for the “rent a bank” scheme to charge higher interest, as alleged by Bluebird and Garcia, since under the applicable law of the Loan Contracts, which the parties explicitly and repeatedly contracted for, the rate of interest charged was, and is, perfectly legal.<sup>4</sup> Engaging in a “rent a bank” scheme to charge a higher rate of interest was unnecessary as alleged by Plaintiffs, because the applicable law stated throughout the Loan Contracts, i.e. Nevada law, allowed the rate of interest charged.

## **2. The Loan Contracts are not ambiguous.**

Bluebird and Garcia claim the Loan Contracts are ambiguous. First, they claim that the arbitration language is ambiguous because any party “may choose” arbitration. It isn’t ambiguous. The language accurately describes the parties’ rights, i.e. that each party has the option to submit any claim to arbitration before the AAA, or not. If either party makes the election, as WBL properly did here, the entire claim is arbitrated. Bluebird and Garcia claim it is ambiguous because it is not, according to them, a “typical arbitration clause” because it does not use the word “shall”. (Appellee Br. p. 29) Because the language does not follow what Plaintiffs baldly assert to be “typical”, does not render the language ambiguous, especially since it correctly describes the parties’ respective, and equal, rights to

---

<sup>4</sup> It is also perfectly legal under Montana law. Mont. Code Ann. § 31-1-112(1).

“choose” arbitration as set forth in the Loan Contracts. See, *Peeler v. Rocky Mountain Log Homes Canada, Inc.*, 2018 MT 297, ¶ 4, 383 Mont. 386, 431 P.3d 911. [Either party “may” make a demand for arbitration, held to be enforceable.]

Next Bluebird and Garcia complain that the jury waiver language is ambiguous because Garcia believed that when she read the jury waiver language, she would still have a right to have her case tried in court, claiming also that the arbitration language is “hidden”. First, the arbitration language is not hidden.<sup>5</sup> It is contained in both the Agreement and the Guaranty. The Guaranty contains a paragraph heading which reads in bold print and upper case: **ARBITRATION**. In that same paragraph it is explained, yet again and in upper case print, that the parties are waiving their right to a jury trial and explains that the parties may choose arbitration. The language is not ambiguous. All parties have waived their right to a jury trial and agree that each party may choose to arbitrate any claims or, if not arbitrated, the claims will be litigated in court without a jury.

The U.S. Supreme Court has determined that when a court interprets provisions in an agreement covered by the FAA, “due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the

---

<sup>5</sup> A Montana law requiring that arbitration provisions be “conspicuous” was declared by the United States Supreme Court to be illegal as inconsistent with, and preempted by, the FAA. *Doctors Associates, Inc. v. Casarotto*, 517 US 681, 116 S. Ct. 1652, 134 L.Ed.2d 902 (1996).

arbitration clause itself are resolved in favor of arbitration.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 115 S. Ct. 1212, 1218, 131 L. Ed. 2d 76 (1995)

In her declaration Garcia claims she never saw the language concerning arbitration, despite it being stated in both Loan Contracts and in bold and upper-case print in the Guaranty, and claims that even if she had, she did not know what arbitration is. (Garcia Dec. ¶ 20, Doc. 10.00) She then proceeds to claim the arbitration language is ambiguous because it conflicted with her understanding of the jury waiver, which she did read. The language does not conflict, but Garcia cannot claim that she did not knowingly consent to arbitration when she admits that she simply did not read the Loan Contracts or even consult with her attorney about their ramifications, despite having the opportunity to do so. *Restatement (Second) of Contracts*, § 157, cmt b. (1981); *Briggs v. Service Corp. International*, No. C22-1646JLR, 2023 WL 2075958 (W. D. Wa. Feb. 17, 2023) [Where a party signs a contract consenting to arbitration without reading it, that party cannot successfully argue that mutual assent was lacking as long as the party was not deprived of the opportunity to read the contract, the contract was plain and unambiguous, the party was capable of understanding the contract, and no fraud, deceit, or coercion occurred.]

**3. The District Court erred when it refused to apply federal law.**

Bluebird and Garcia acknowledge that the District Court erred when it refused to consider and apply federal law, specifically the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.* (FAA), when it denied the Defendants’ motion to dismiss and compel arbitration.

**4. Under the FAA and the language of the Loan Contracts, arbitrability, including unconscionability, is decided by the Arbitrators.**

Plaintiffs do not dispute that valid Loan Contracts were executed. There is no question that Bluebird received the loan. Rather, Plaintiffs argue that the specific “arbitration provisions” within the Loan Contracts are ambiguous and unconscionable and therefore unenforceable.

The FAA limits court review of arbitration agreements to two gateway arbitrability issues: “(1) whether a valid agreement to arbitrate exists, and if it does, (2) whether the agreement encompasses the dispute at issue.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1009 (9th Cir. 2023), citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Under the FAA, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Chiron*, 207 F.3d at 1131.

As held by the Ninth Circuit in *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015), when an agreement is covered by the FAA, “federal law governs the arbitrability question by default” if the “parties have not clearly and unmistakably designated that nonfederal arbitrability law applies”. Following this principal and relying on federal law, federal courts have held that if the contract incorporates the Rules of the American Arbitration Association (AAA) *or* if the language of the contract delegates arbitrability, including unconscionability, the question of arbitrability, including unconscionability, is left to the arbitrators. *Brennan*, 796 F.3d at 1130.

Here, the Agreement that was signed by Bluebird, and the Guaranty signed by Garcia, provide in each document, in *three* separate locations, that the arbitration will commence before the AAA, and that WBL will, in certain circumstances, pay the arbitration and administration fees as required by AAA rules. Agreement, ¶ 16(o); Guaranty, p. 2.

Bluebird and Garcia argue with this language saying the loan contracts do not “incorporate” the AAA rules specifically. This is nonsensical. <sup>6</sup>The loan

---

<sup>6</sup> Bluebird and Garcia rely on *Global Client Solutions, LLC v. Othello*, 2016 MT 50, 382 Mont. 345, 367 P.3d 361. *Othello* was a consumer case and does not discuss the federal substantive standard established by the Ninth Circuit in *Brennan* and subsequent federal cases.

contracts are explicit that the arbitration will take place before the AAA and indicate that it relies on AAA rules.<sup>7</sup> Reference to, and the requirement for, an arbitration before the AAA incorporates the AAA rules. Indeed, the American Arbitration Association Commercial Arbitration Rules at Rule R-1(a) explicitly provide that:

**The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules.**

The AAA Rules likewise require at Rule R-7 that:

**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.**

Plaintiffs argue that there is no delegation provision in the Loan Contracts, despite each Loan Contract providing specifically that:

---

<sup>7</sup> The Agreement and Guaranty each read in relevant part:

*“If Borrower, Lender or a Guarantor do not reach an agreement to resolve the claim within 10 days after the Notice is received, any party may commence an arbitration proceeding with the American Arbitration Association (“AAA”).”*

...

*“If the arbitrator finds that either the substance of any claim raised by Borrower or a Guarantor or the relief sought by Borrower or a Guarantor is improper or not warranted, as measured by the standards set forth in Federal Rule of Procedure 11(b), then Lender will pay the administration and arbitrator fees only if required by the AAA Rules.”*

Agreement, ¶ 16(o); Guaranty, p. 2.

*Any 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, the Guaranty or any other related document. A claim includes matters arising as an initial claim, counter-claims, cross-claim, third-party claim, or otherwise.*

The Loan Contracts then provide that the arbitration proceeding will be “with the American Arbitration Association (AAA)”. Agreement ¶ 16(o); Guaranty p. 2.

Bluebird and Garcia try to distinguish the holding of *Brennan*, and other cases cited by WBL in which arbitrability was delegated to the arbitrators, namely *Washington v. Goettsche*, No. CV-20-2-BV-BMM-KLD, 2020 WL 9767878, at \*3 (D. Mont. June 3, 2020); *Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.*, No. CV-22-146-BLG-SPW, 2023 WL 4826485, at \*5 (D. Mont. July 24, 2023) and *Hong Kong Continental Trade Co. Limited v. Natural Balance Pet Foods*, No. LA CV-22-0051JAK, 2023 WL 2664246 (C.D. Ca. March 28, 2023), by claiming that the contracting parties in those cases were sophisticated parties and Bluebird and Garcia are not. While the plaintiff in *Brennan* was a lawyer, the contract at issue there was in connection with an employment dispute between the plaintiff and his employer. Here, the borrower Bluebird is a corporate entity seeking a commercial loan to expand its business who had a lawyer review the Loan Contracts in advance. The borrower here is no less sophisticated nor in any weaker position than the plaintiff in *Brennan*.

Moreover, *Brennan* left open that its holding could apply to non-sophisticated parties. *Brennan*, 796 F.3d 1130-113. And the weight of authority throughout the country since *Brennan*, even by courts within the Ninth Circuit, is that the holding of *Brennan* also applies to non-sophisticated parties and even to consumer contracts. *Ensembles Hyson, S.A. de. C.V. v. Sanchez*, No. 23-CV-1887JLS(KSC) 2024 WL 759893 (S.D. Cal. Feb. 23, 2024); *Weimen Chen v. Sierra Trading Post, Inc.*, No. 2:18-CV-1581-RAJ, 2019 WL 3564659 (W. D. Wash. Aug. 6, 2019).

Regardless of whether the AAA rules have been properly incorporated, the language in the Loan Contracts that any party “may choose to arbitrate any or all disputes and claims arising out of or relating to this Loan Agreement, the Guaranty or any other related document” is by itself sufficient to refer arbitrability to the arbitrators. See, *Momot v. Mastro*, 652 F.3d 982, 984 (9<sup>th</sup> Cir. 2011) [language “*If a dispute arises out of or relates to this Agreement, the relationships that result from this Agreement, the breach of this Agreement or the validity or application of any of the provisions of this Section 4, and, if the dispute cannot be settled through negotiation, the dispute shall be resolved exclusively by binding arbitration.*” required that arbitrability be submitted to the arbitrators.]; *Peeler v. Rocky Mountain Log Homes Canada, Inc.*, 2018 MT 297, ¶ 19-20 [language that

“[A]ll disputes, claims and questions regarding the rights and obligations of the parties under the terms of this Agreement are subject to arbitration. Either party may make a demand for arbitration by filing such demand in writing with the other party within 30 (thirty) days after the dispute first arises”, sufficiently conferred arbitrability to the arbitrators.]; *JPay Inc. v. Kobel*, 904 F.3d 923, 936 (11<sup>th</sup> Cir. 2018) ([p]arties agreement to “*arbitrate any and all such disputes, claims and controversies*” was, by itself, sufficient to delegate the issue of arbitrability to the arbitrators.)

a. The delegation provision is enforceable.

Where a contract delegates the arbitrability question to an arbitrator, including by referencing AAA rules, the courts must respect the parties’ decision. Still, in situations in which the respondent explicitly raises the issue, the Court must decide whether the particular provision delegating arbitrability—the *delegation provision*—is itself unenforceable. *Brennan*, 796 F.3d at 1132; see also, *Saperstein v. Thomas P. Gohagan & Co.*, 476 F. Supp. 3d 965, 975 (N.D. Cal. 2020) [“[I]f a party challenges specifically the enforceability of the delegation clause, the district court must consider the challenge, but if a party challenges the enforceability of the arbitration agreement as a whole, the challenge is for the arbitrator.”]. *Ensamble Hyson, S.A. de C.V. v. Sanchez*, No. 23-CV-1887 JLS (KSC), 2024 WL 759893, at \*5 (S.D. Cal. Feb. 23, 2024). To challenge the

delegation's validity, a respondent must both mention the delegation provision *and* make arguments specific to it. *Rent-A-Center West Inc. v. Jackson*, 561 U.S. 63, 72–74, 130 S. Ct. 2772, 177 L.Ed.2d 403 (2010). A bare assertion that a delegation clause is unenforceable does not suffice. *Zeevi v. Citibank, N.A.*, No. 219CV02206GMNBNW, 2021 WL 621423, at \*3 (D. Nev. Feb. 16, 2021) [finding challenge was only to entire agreement where plaintiff “d[id] not specifically challenge the delegation clause beyond the unsubstantiated claim that it [was] unconscionable”]. *Ensamble Hyson, S.A. de C.V. v. Sanchez*, No. 23-CV-1887 JLS (KSC), 2024 WL 759893, at \*5 (S.D. Cal. Feb. 23, 2024)

Before the District Court Bluebird and Garcia alleged in response to WBL’s motion to compel arbitration only that the “arbitration provision” in the Loan Contracts, without specifying the *delegation* provision, was unenforceable because it was a contract of adhesion, equitably unconscionable and ambiguous. (Doc. 9.00 p. 14)

These challenges are not specific enough under the *Rent-a-Center* standard, therefore mandating that any issue concerning the conscionability of the delegation provision be decided by the arbitrators. However, even if they are sufficiently specific, they are not supportable.

When properly challenged, Court's will review the enforceability of a delegation provision, even within an otherwise valid contract, to determine whether it is illegal, contrary to public policy or unconscionable. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 19, 398 Mont. 91, 454 P.3d 655. Notably, "ambiguity" does not necessarily render a contract, or a delegation provision, unenforceable.

b. The delegation provision specifically, and the arbitration provisions generally, are not unconscionable under state law.

Bluebird and Garcia allege that the "arbitration provisions" are equitably unconscionable because they are adhesive. Plaintiffs' argument confuses unconscionability.

Under Nevada law, the stated choice of law in the Loan Contracts, a contract can be deemed equitably unconscionable only if it is *both* procedurally and substantively unconscionable. *Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 443, 49 P.3d 647, 650 (2002). Pursuant to Nevada law, an adhesion contract is a pre-printed contract that can be considered procedurally unconscionable when used in a *consumer* transaction. *Kindred v. Second Judicial District*, 116 Nev. 405, 966 P.2d 903, 907 (2000). This is not a consumer transaction and Bluebird and Garcia do not even try and apply Nevada law.

Under Montana law<sup>8</sup>, a contract of adhesion, i.e., a pre-printed form contract, which today is used in virtually every commercial loan, or a term within an adhesive contract, is only unconscionable if in addition to being adhesive, it also unreasonably favors the stronger party or unduly oppresses the weaker party. *Lenz v. FSC Securities Corp.*, 2018 MT 67, ¶ 26, 391 Mont. 84, 414 P.3d 1262. Despite several opportunities to do so, Bluebird and Garcia still fail to explain even in the slightest how either the delegation provision specifically, or the arbitration provisions more generally, unreasonably favor WBL or unduly oppress Bluebird and Garcia. They simply cannot prove the second element.

c. The delegation provision specifically and arbitration provisions generally are not ambiguous.

Bluebird and Garcia claim that the “arbitration provisions” are ambiguous claiming they conflict with the waiver of jury trial. First, this is not an attack on the delegation provision specifically, but rather an attack on the arbitration provisions as a whole and therefore an issue that is properly decided by the arbitrators. See,

---

<sup>8</sup> Bluebird and Garcia spend a large portion of their reply brief arguing that Montana is the correct choice of law, because Nevada, the stated choice of law after federal law in the Loan Contracts, does not have a limitation on interest charged on commercial loans and, in the case of unregulated lenders, Montana does. Bluebird and Garcia’s only response to the fact that this loan is exempt from Montana usury under M.C.A. Section 31-1-112(1), thus defeating their choice of law analysis, is to repeat their unsubstantiated and illogical claim that this is part of a “rent a bank” scheme.

*Greer v. Freemantle Productions*, 622 F. Supp. 3<sup>rd</sup> 1010, 1018 (D. Nev. 2022) citing *Brennan*, 796 F. 3d at 1133. Moreover, it is not accurate. The two provisions do not conflict. As explained previously, interpreting and giving effect to the entire contract, as the Court must do, e.g., *Peeler*, ¶ 18, there is no right by any party to a jury trial. All parties have an equal right to have claims asserted through arbitration, and if no party requests arbitration, all claims are litigated in court sitting without a jury.

Bluebird and Garcia argue that they did not “have a meeting of the minds” because the arbitration provision is ambiguous. Again, “mutuality” is not directed to the delegation provision specifically, but the arbitration provisions generally, and is an issue properly decided by the arbitrators. *Greer*, 622 F. Supp. at 1018, citing *Brennan*, 796 F.3d at 1133.

In any case, by her own admission, Garcia did not read the arbitration provisions and thus she is precluded from claiming that she did not assent to their provisions when she had full opportunity to read the Loan Contracts and have them explained to her by counsel. “A party who executes a written contract is presumed to have read and understood the clear and unambiguous language of its express terms.” Lenz, ¶ 23. See, *Molina v. Scandinavian Designs, Inc.*, No. 13-CV-04256NC, 2014 WL 1615177 (N.D. Ca. April 21, 2014) [Signature on a contract

consenting to arbitration is considered an assent by the signing party to its terms whether the party read or understood the contract or not.] *Sayler v. Sun*, 2023 MT 175, ¶ 23, 413 Mont. 303, 536 P.3d 399. [“One who executes a written contract is presumed to know the contents of the contract and to assent to those specified terms, in the absence of fraud, misrepresentation, or other wrongful act by the other contracting party. Absent incapacity to contract, ignorance of the contents of a written contract is not a ground for relief from liability.”] Bluebird and Garcia apparently didn’t care enough to read or to take the time to understand the Loan Contracts. They can’t now claim there was no mutual assent or that they did not knowingly waive their constitutional rights.

Bluebird and Garcia cite and rely on *Lenz* at length. *Lenz* involved an action by investors against their investment advisor and investment representative for negligence, fraud, and self-dealing. Defendants moved to compel arbitration pursuant to language set forth in pre-printed customer agreements that all of the investors executed, except in one instance, without the benefit of having them reviewed by counsel.

The Plaintiff investors opposed arbitration claiming that the agreements were adhesive and unconscionable and arguing that they did not see the arbitration provisions in the agreements. The district court and this Court rejected the

Plaintiffs claims determining that Plaintiffs cannot escape the arbitration provisions by claiming that they did not read or did not understand the terms of the Agreement. “Absent incapacity, mutual mistake, fraud, misrepresentation, or other tortious conduct affecting assent, ignorance, or disregard of clear and unambiguous contract language is not a ground for relief from liability.” *Lenz*, ¶ 22.

*Lenz* went on to find that the arbitration provision at issue was not unconscionable especially since it did not unreasonably favor the brokerage firm or unduly oppress the plaintiff investors and because there was no special relationship between the investment firm and the investors. *Lenz*, ¶ 32.

Referral of this case to arbitration is even more compelling than in *Lenz*. This case involves a commercial loan between a Montana company and an out-of-state bank. *Lenz* involved an investment arrangement between investors and their investment *advisors*. Here the borrower and guarantor were represented by counsel who reviewed the Loan Contracts while, except for one, the investors in *Lenz* were not represented by counsel before executing the customer agreement. And, like *Lenz*, the arbitration provisions at issue here do not unreasonably favor WBL (or favor WBL at all), and do not oppress Bluebird or Garcia.

Section 2 of the FAA reflects a liberal federal policy favoring arbitration agreements. 9 U.S.C. § 2. Under the FAA, any doubts regarding arbitration should

be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 US 1, 25-26, 103 S.Ct. 927, 74 L.Ed.2d 765. Referral to arbitration of Plaintiffs' claims is mandated in this case.

### CONCLUSION

For the foregoing reasons, the Appellants respectfully request that the Order of the District Court be reversed and that this action and Plaintiffs' claims be dismissed and referred to arbitration before the American Arbitration Association.

Dated this 3<sup>rd</sup> day of May, 2024.

WORDEN THANE P.C.  
*Attorneys for Defendants/Appellants*  
*World Business Lenders, LLC; WBL SPO*  
*I, LLC; and WBL SPO II, LLC*

/s/ Martin S. King  
Martin S. King

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4,486 words, not averaging more than 280 words per page, excluding the certificate of service and certificate of compliance.

Dated this 3<sup>rd</sup> day of May, 2024.

WORDEN THANE P.C.  
*Attorneys for Defendants/Appellants  
World Business Lenders, LLC; WBL SPO  
I, LLC; and WBL SPO II, LLC*

/s/ Martin S. King  
Martin S. King

## CERTIFICATE OF SERVICE

I certify that on May 3, 2024, I served a copy of the preceding document by prepaid mail on the following:

Frederick P. Landers  
Axilon Law  
270 W. Kagy Blvd., Suite F  
Bozeman, MT 59715  
[rlanders@axilonlaw.com](mailto:rlanders@axilonlaw.com)  
*Attorneys for Appellees*

/s/ Christina DiMuro

## CERTIFICATE OF SERVICE

I, Martin S. King, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-03-2024:

Frederick P. Landers (Attorney)  
270 W. Kagy Blvd.  
Suite F  
Bozeman MT 59715  
Representing: Bluebird Property Rentals, LLC, Alaina Garcia  
Service Method: eService

Emily Jung Bruner (Attorney)  
Worden Thane PC  
321 West Broadway, Ste. 300  
Missoula MT 59802  
Representing: WBL SPO I, LLC, WBL SPO II, LLC, World Business Lenders, LLC  
Service Method: eService

Electronically signed by Christina DiMuro on behalf of Martin S. King  
Dated: 05-03-2024