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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

TERESITA JOYA YENKO, Plaintiff and Appellant, v. CROWN ASSET MANAGEMENT, LLC, Defendant and Respondent.	A148536 (Alameda County Super. Ct. No. HG15781181)

Plaintiff Teresita Joya Yenko filed a putative class action lawsuit against defendant Crown Asset Management, LLC (Crown), a debt buyer that purchased plaintiff's alleged charged-off credit card debt. Crown moved to compel arbitration based on an arbitration provision in an agreement between plaintiff and the issuing bank, Synchrony Bank (Synchrony). The trial court granted the motion to compel arbitration, dismissed plaintiff's class claims, and ordered plaintiff to arbitrate her individual claims against defendant. Plaintiff contends the trial court erred because (1) Crown failed to meet its burden to show the existence of an arbitration agreement, (2) Crown was not assigned the right to arbitrate, and (3) plaintiff's claim against Crown falls outside the scope of the arbitration agreement. We conclude plaintiff's arguments lack merit and affirm the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 2012, plaintiff opened a consumer credit account at a J.C. Penney store. Plaintiff completed an in-store application and was approved immediately. After receiving her credit card in the mail, plaintiff made purchases on the card. Plaintiff states

she made monthly payments on the balance of the card and generally denies she owes any debt.

In July 2015, plaintiff filed a consumer class action complaint against Crown, alleging Crown violated the California Fair Debt Buying Practices Act (CFDBPA), Civil Code sections 1788.50–1788.64. Plaintiff's complaint alleges Synchrony, the issuer of her J.C. Penney credit card, sold her alleged credit card debt to Crown for collection purposes, and a third party debt collector acting as Crown's agent sent plaintiff a written communication that failed to contain the notice required by Civil Code section 1788.52, subdivision (d)(1).

Crown filed an answer raising arbitration as an affirmative defense and shortly thereafter moved to compel arbitration. In support of its motion, Crown submitted an affidavit from Martha Koehler, a manager of litigation support for Synchrony. Koehler stated Synchrony sent plaintiff a copy of the "Credit Card Account Agreement" (CCAA) governing her account in October 2012, and attached a copy of the CCAA to her affidavit. Koehler also stated Synchrony transferred all of its title, rights, and interest in plaintiff's account to Crown in June 2015 and attached a copy of the "Bill of Sale" (Bill of Sale) between Synchrony and Crown to her affidavit. In addition, Crown filed a declaration from Jessica Foster, vice president of operations for Crown, verifying that Crown purchased all of Synchrony's title, rights, and interest in certain credit card accounts, including plaintiff's, and attached a copy of the parties' "Forward Flow Receivables Purchase Agreement" (Forward Flow Agreement) and the Bill of Sale.

Plaintiff opposed the motion to compel arbitration, arguing, among other things, that Crown could not show she had agreed to arbitrate. Plaintiff filed a declaration attesting she had never seen the CCAA and she did not receive a copy in the mail with her charge card. Plaintiff stated she had never agreed to settle disputes regarding her credit card in arbitration.

Plaintiff deposed Koehler about the contents of her affidavit. When asked about the mailing of the CCAA, Koehler testified it is Synchrony's practice to mail the cardholder agreement with the plastic credit card within 7 to 10 days of the opening of

the account. Koehler also testified she knew the CCAA attached to her affidavit was the agreement sent to plaintiff because it was the effective agreement for new accounts at the time plaintiff opened her account.

After several continuances, the trial court determined the class action waiver in the parties' arbitration agreement was enforceable, dismissed the class claims, and ordered plaintiff to arbitrate her individual claims, staying the litigation as to her individual claims pending the completion of arbitration. This appeal followed.

II. DISCUSSION

A. *Appealability*

As an initial matter, we consider whether the order compelling arbitration is appealable. Orders granting motions to compel arbitration are generally not immediately appealable and review of the order must typically await appeal from the final judgment. (*Garcia v. Superior Court* (2015) 236 Cal.App.4th 1138, 1149.) Plaintiff acknowledges this rule, but contends her claims are nonetheless reviewable under the "death knell" doctrine.

The death knell doctrine applies in class actions to allow immediate appellate review when an order effectively terminates class claims, while permitting individual claims to persist. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757–758, 761 ["the death knell doctrine applies to render an order foreclosing class claims appealable when, and only when, individual claims survive"]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 [order sustaining demurrer as to class claims was appealable because order was "tantamount to a dismissal of the action as to all members of the class other than plaintiff"].) Courts have concluded an order dismissing class claims on the basis of a class action waiver and compelling a plaintiff to arbitrate individual claims is appealable under the death knell doctrine. (See *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288; *Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 200–203 [order dismissing class and representative claims under Labor Code Private Attorneys General Act of 2004 based on waiver in arbitration agreement was appealable under death knell doctrine].) Here, because the trial court

found the class action waiver enforceable and dismissed the class claims, effectively terminating the class litigation, the order is appealable.[1]

B. *Standard of Review*

"The determination of arbitrability is a legal question subject to de novo review." (*Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1277.) To the extent the trial court's ruling depends on the resolution of disputed facts, we uphold the resolution of such facts if supported by substantial evidence, drawing all inferences necessary to support the judgment. (*Ibid*.; *Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1508.)

C. *Existence of Arbitration Agreement*

"[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." (*Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626.) Plaintiff contends the trial court erred in granting the motion to compel arbitration because Crown failed to prove Synchrony sent the arbitration agreement to plaintiff, plaintiff received it, or the agreement Crown claims was sent is the one that governs plaintiff's account. Plaintiff further argues even if the CCAA was sent, Crown has not shown she accepted its terms.

Under both federal and state law, a party cannot be made to arbitrate a controversy in the absence of an agreement to do so. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943; *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 640.) In determining whether the parties entered a valid and enforceable arbitration agreement, we look to general principles of state law regarding formation, revocation, and enforcement of contracts. (*First Options*, at p. 944; *Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 685 [courts apply general California contract law to

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[1] In *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1123, this court briefly discussed the death knell doctrine and suggested the plaintiff in that action had not demonstrated how the trial court's order compelling arbitration made it impracticable for her to proceed with her individual action. This court did not decide whether the death knell doctrine applied, but exercised its discretion to treat the appeal as a petition for writ of mandate. (*Ibid*.)

determine whether parties formed valid agreement to arbitrate].) Though Crown argues the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) and Utah state law control our analysis, the FAA does not apply until the existence of an enforceable arbitration agreement is established. (*Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 634.) In any event, neither party has suggested the application of federal or Utah state law might lead to a different outcome on arbitrability. Accordingly, we apply California law to determine whether the parties entered an agreement to arbitrate.

Under California law, the formation of a contract requires mutual consent. (Civ. Code, §§ 1550, 1565.) Plaintiff contends she never agreed to arbitrate because she never received the CCAA, but the record contains substantial evidence to the contrary. Koehler's affidavit was made based on her personal knowledge of Synchrony's operations and records kept within the ordinary course of business with which she was familiar. Based on her review of those records, Koehler confirmed the CCAA was sent to plaintiff in October 2012. When asked at her deposition what document or screenshot would show the CCAA was sent to plaintiff, Koehler testified she was not aware of any document, but she knew it was Synchrony's practice to send the cardholder agreement along with the plastic credit card, within 7 to 10 days of opening the account. Koehler further testified she knew the version of the CCAA attached to her affidavit was the agreement sent to plaintiff because it was the effective agreement sent to new accounts on the date plaintiff opened her account. Plaintiff admits she received the plastic credit card in the mail and made purchases on her J.C. Penney credit card account. From all of this evidence, the trial court could draw a reasonable inference the CCAA was sent to plaintiff within 7 to 10 days after opening her account, along with the plastic credit card she acknowledges receiving.

Plaintiff, of course, presented conflicting evidence. Plaintiff's declaration attests she has never seen the CCAA, it was not mailed to her, and while she received the credit card in the mail, it was not accompanied by the CCAA. Faced with these contested facts, the trial court was required to decide whom to believe, "and its credibility call is binding

on this appeal." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421.) Drawing all inferences in support of the trial court's order, substantial evidence supports trial court's determination plaintiff received the CCAA.

We are not persuaded by plaintiff's citation to the unpublished federal decision, *Kennedy v. Conseco Fin. Corp.* (N.D.Ill. Nov. 29, 2000, No. 00 C 4399) 2000 U.S.Dist. Lexis 17704. In *Kennedy*, the trial court found a credit card issuer failed to establish that notice of an alleged *amendment* to an original credit card agreement had been mailed to the accountholder. (*Id.* at pp. *8–*11.) Because the retail credit compliance manager's declaration failed to demonstrate personal knowledge of the bank's mailing procedures and practices, the court was unable to apply the presumption of delivery. (*Id.* at pp. *8, *10–*11.) Here, unlike in *Kennedy*, Synchrony's affiant testified at deposition as to her knowledge of the bank's mailing practices—specifically, that it is the bank's practice to mail the credit card agreement with the plastic credit card within 7 to 10 days of the opening of the account. Koehler's testimony, combined with plaintiff's own admission she received the credit card in the mail, supports a reasonable presumption the CCAA was sent to plaintiff and she received it.

Plaintiff also contends even if she received the CCAA, she did not accept its terms. Plaintiff's argument fails in light of the CCAA's express language and the application of ordinary contract principles. The CCAA provides: "By opening or using your account, you agree to the terms of the entire Agreement." Plaintiff admits she both opened and used the account. The CCAA also sets forth procedures for a cardholder to object to the arbitration agreement by sending written notice within 60 days after opening the account. Plaintiff presented no evidence she objected to arbitration. Under California law, a party's acceptance of an agreement to arbitrate may be express, or implied-in-fact by conduct. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 850 ["Mutual assent may be manifested by written or spoken words, or by conduct."].) By using her account and failing to object to arbitration, plaintiff demonstrated an intent to be bound by the terms of the CCAA and thus agreed to its arbitration provision. (See,

e.g., *Stinger v. Chase Bank, USA, NA* (5th Cir. 2008) 265 Fed. Appx. 224, 227 [plaintiff's use of credit cards showed intent to be bound by terms of credit card agreements including arbitration provisions].)

Plaintiff also attempts to analogize to *Badie v. Bank of America* (1998) 67 Cal.App.4th 779 (*Badie*) by arguing the CCAA was a change of terms to which she did not agree, but that case is inapposite. In *Badie,* the plaintiffs challenged the validity of an arbitration provision Bank of America attempted to add to its existing credit card account agreements through a notice included with customers' monthly billing statements (a "bill stuffer"). (*Id.* at pp. 785–786.) The Court of Appeal rejected Bank of America's argument that a provision in the *original* credit card agreement allowing the bank to make unilateral changes permitted the bank to add an entirely new term regarding arbitration by means of a bill stuffer, when the original agreement made no reference to the method or forum for dispute resolution. (*Id.* at pp. 795, 803.) In this case, the arbitration agreement was not a half-page notice included with plaintiff's monthly billing statement purporting to add a term to an existing agreement, but part of the original agreement accompanying the mailing of her card.[2] Also unlike in *Badie,* the arbitration provision here included an opt-out provision which plaintiff failed to exercise. (See, e.g., *Cayanan v. Citi Holdings, Inc.* (S.D.Cal. 2013) 928 F.Supp.2d 1182, 1200 [distinguishing *Badie* based on provision in bill stuffer allowing plaintiff to opt out of arbitration]; *Ackerberg v. Citicorp USA, Inc.* (N.D.Cal. 2012) 898 F.Supp.2d 1172, 1176 [same].) By using the card, plaintiff manifested her assent to terms of the CCAA that accompanied it. Accordingly, we conclude there is substantial evidence of the existence of an agreement to arbitrate.

[2] Plaintiff argues the CCAA was a change of terms, but she presented no evidence of the terms of an earlier agreement. Indeed, plaintiff objected to Crown's attempt to introduce evidence of "key terms" of credit agreed to by the parties at the time plaintiff submitted her in-store application and the trial court sustained her objections.

D. ***Assignment of Right to Arbitrate***

Plaintiff also argues Crown may not enforce the arbitration agreement because it was assigned only a "receivable" and not the "account" under the terms of the Bill of Sale.

We, like the trial court, find plaintiff's attempt to distinguish between "account" and "receivable" in this context unavailing. "As with contracts generally, the nature of an assignment is determined by ascertaining the intent of the parties." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 988–989.) Here, Crown submitted declarations from representatives of *both* contracting parties attesting Synchrony transferred all of its "title, rights and interest" in plaintiff's *account* to Crown. Koehler testified at her deposition she was unaware of any distinction between an "account" and the "receivable" in her work. The trial court properly considered such evidence as an aid in interpreting the parties' agreement, and plaintiff did not present any contrary extrinsic evidence of the parties' intent. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 38 [court must "ascertain and give effect to this intention by determining what the parties meant by the words they used"].)

Moreover, regardless of whether Synchrony assigned Crown the "account" or only the "receivables," there is no evidence it intended *not* to transfer the right to arbitrate as an incident of its ownership interest in the receivables. (See Civ. Code, § 1084 [transfer of a thing transfers all of its incidents, unless expressly excepted].) The CCAA allows the creditor to "sell, assign or transfer any or all of our rights or duties under this Agreement or your account, including our rights to payments." Under the express terms of the Forward Flow Agreement, Synchrony sold "all right, title and interest in and to the Receivables" to Crown.

"An assignment carries with it all the rights of the assignor. [Citations.] '. . . The assignee "stands in the shoes" of the assignor, taking his rights and remedies, subject to *any defenses* which the *obligor* has against the assignor prior to the notice of the assignment.' " (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096; *Heritage Pacific Financial, LLC v. Monroy*, *supra*, 215 Cal.App.4th at p. 990.) Because

Synchrony transferred all of its ownership rights in the receivables under the terms of the Bill of Sale and Forward Flow Agreement, Crown steps into Synchrony's shoes and has the same rights it had under the CCAA, including the right to arbitrate.

We observe courts in many other jurisdictions have determined the assignment of accounts receivable transfers underlying contractual rights, including the right to arbitrate. (See, e.g., *Systran Financial Services v. Giant Cement Holding* (N.D.Ohio 2003) 252 F.Supp.2d 500, 503–505 [assignee of accounts receivable was subject to arbitration clause contained in agreement between contract signatories because assignee "stands in the shoes" of an assignor]; *GMAC Commercial Credit LLC v. Springs Industries* (S.D.N.Y. 2001) 171 F.Supp.2d 209, 214 [finance assignee suing on an assigned contract is bound by arbitration clause unless it obtained waiver from signatory seeking to arbitrate]; *Banque de Paris et des Pays-Bas v. Amoco Oil Co.* (S.D.N.Y 1983) 573 F.Supp. 1464, 1470 ["an assignee is entitled to enforce an arbitration clause as one of the rights acquired by assignment"]; *Cone Constructors v. Drummond Comm. Bank* (Fla.Dist.Ct.App. 2000) 754 So.2d 779, 780–781 [assignee of accounts receivable was subject to all terms of contract between account debtor and assignor, including arbitration provision].)[3] Because California law similarly provides that assignees are subject to the same rights and remedies as the assignor, we find the analysis in these authorities persuasive.

E. *Scope of the Arbitration Provision*

Plaintiff also argues Crown may not enforce the arbitration agreement because the arbitration provision in the CCAA does not cover disputes between accountholders and third party debt buyers like Crown. The CCAA's arbitration provision states: "If either

[3] Plaintiff cites *Munoz v. Pipestone Financial, LLC* (D.Minn. 2005) 397 F.Supp.2d 1129, in which a federal trial court determined the assignment of "receivables" under a bill of sale did not transfer the right to collect interest and attorney fees in support of her argument Crown cannot compel plaintiff to arbitrate. *Munoz* involved a motion for summary judgment, however, not a motion to compel arbitration, and it did not discuss or apply legal principles regarding assignments. For these reasons, we find *Munoz* unpersuasive.

you or we make a demand for arbitration, you and we must arbitrate any dispute or claim between you or any other user of your account, and us, our affiliates, agents and/or J.C. Penney Corporation, Inc. if it relates to your account . . . ." Plaintiff contends "us" refers only to Synchrony, its "affiliates," "agents," and J.C. Penney, not assignees like Crown. Plaintiff further argues because the agreement references "any dispute or claim" that "relates to your account" and Crown was only assigned the receivables, plaintiff's CFDBPA claims are not within the scope of the arbitration provision.

Plaintiff relies for her argument on another unpublished federal decision we find distinguishable and unpersuasive. In *Jenkins-Brown v. Liberty Acquisitions Servicing, LLC* (D.Or. Mar. 5, 2015, No. 3:14-cv-01610-ST) 2015 U.S.Dist. Lexis 50815, the federal court held because the arbitration provision did not expressly include future assignees and the debt buyer acquired less than all of the creditor's rights, it could not compel the plaintiff to arbitrate. (*Id.* at pp. *13–*15.) *Jenkins-Brown* reached its conclusion with little analysis, and did not consider or apply the law of assignments or discuss the liberal policy favoring arbitration in construing the scope of the arbitration clause.

The CCAA expressly provides it is governed by the FAA and Utah law to the extent it is relevant under the FAA. The FAA reflects a strong public policy favoring arbitration. (9 U.S.C. § 2; *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24.) "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (*Moses H.*, at pp. 24–25.)

As discussed above, California and federal cases have held an assignee "stands in the shoes" of the assignor, and takes all the rights and remedies of the assignor subject to any defenses the obligor has against the assignor. Utah law is in accord. (*Sunridge Development v. RB&G Engineering* (Utah 2010) 230 P.3d 1000, 1003, 1004 [" 'assignee [stands] in the shoes of the assignor' "; "assignee has rights and liabilities identical to those of its assignor"].) Because Synchrony assigned all rights, title, and interest in the receivables to Crown, Crown steps into its shoes and has the right to arbitrate under the CCAA.

Crown's conduct in attempting to collect its assigned receivables, i.e., amounts due on plaintiff's account, undeniably falls within the arbitration provision's broad language covering any dispute "related" to plaintiff's account. (See *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 650 [where contract contains an arbitration clause, there is presumption of arbitrability, and any doubts must be resolved in favor of coverage].) In light of the strong policy favoring arbitration, we conclude plaintiff's CFDBPA claims against Crown are subject to arbitration under the terms of the CCAA.

III. DISPOSITION

The judgment is affirmed. Crown is entitled to costs on appeal.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.