NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID FERGUSON, Individually and on behalf of all others similarly situated, Plaintiff-Appellant, and ELIZABETH BELYEA; et al., Plaintiffs, v. GREENSKY, INC., a corporation; et al., Defendants-Appellees.	No. 22-15780 D.C. No. 3:20-cv-01693-JSC MEMORANDUM*

DAVID FERGUSON, Individually and on behalf of all others similarly situated, Plaintiff-Appellee, and ELIZABETH BELYEA; et al., Plaintiffs, v.	No. 22-15817 D.C. No. 3:20-cv-01693-JSC

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

GREENSKY, INC., a corporation; et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted June 9, 2023
San Francisco, California

Before: MILLER and KOH, Circuit Judges, and LYNN,[**] District Judge.

GreenSky, Inc. services point-of-sale loans that enable consumers to pay for home repair and home improvement costs. David Ferguson sued GreenSky in a putative class action for allegedly violating California lending and consumer protection laws. He appeals from the district court's order granting GreenSky's motion to compel arbitration, and GreenSky cross-appeals. We have jurisdiction under 28 U.S.C. § 1291. Reviewing the district court's order de novo, *Ahlstrom v. DHI Mortg. Co.*, 21 F.4th 631, 634 (9th Cir. 2021), we reverse and remand for further proceedings.

1. Invoking section 1789.16 of the Credit Services Act of 1984, Cal. Civ. Code § 1789.16, Ferguson argues that the parties did not form a contract and thus

[**] The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

did not agree to arbitration. We "apply state-law principles of contract formation," *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 855 (9th Cir. 2022), and in interpreting California law, we will "follow a published intermediate state court decision . . . unless we are convinced that the California Supreme Court would reject it," *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013). In *Mitchell v. American Fair Credit Ass'n*, a California appellate court held that the signature and disclosure requirements in section 1789.16 are "contract formation requirements . . . ." 122 Cal. Rptr. 2d 193, 199 (Cal. Ct. App. 2002); *see Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) (recognizing that "whether the alleged obligor ever signed the contract" is a question that pertains to contract formation).

There is no genuine factual dispute that GreenSky is a "credit services organization" under the Credit Services Act, which defines that term to include a corporation that, "with respect to the extension of credit by others, . . . provides . . . advice or assistance to a consumer with regard to" obtaining a loan "in return for the payment of money . . . ." Cal. Civ. Code § 1789.12(d)(3); *see Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021) (applying a summary judgment standard to formation disputes). In its answer, GreenSky admitted that contractors submit consumers' loan applications to GreenSky "for underwriting and approval," that loans are "funded through the

bank partner to which GreenSky has allocated the loan," that GreenSky "arranges for the consumer to make payments on the loan, which GreenSky also services," and that GreenSky "is paid a predetermined percentage of every loan . . . ." Those factual admissions establish that GreenSky is a credit services organization as a matter of law. *See In re Barker*, 839 F.3d 1189, 1195 (9th Cir. 2016). Neither in its briefing nor at oral argument did GreenSky identify any contrary facts in the record—or outside of the record. Its bare assertion that it is not a credit services organization is a statement of a legal conclusion that does not give rise to a genuine dispute of fact.

There is also no genuine factual dispute that the parties' agreement violates the formation requirements in section 1789.16. For example, the agreement lacks the required statement: "You, the consumer, may cancel this contract at any time before midnight on the fifth working day after you sign it." Cal. Civ. Code § 1789.16(a)(1).

Because the parties did not form an agreement under the applicable statutory requirements, "there is no basis upon which to compel arbitration." *Ahlstrom*, 21 F.4th at 635.

2. GreenSky argues that an arbitrator must resolve any formation challenge that Ferguson has raised, citing *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989). To the extent *Teledyne* compelled arbitration of certain formation

challenges, *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), has since abrogated it. "[I]n *Granite Rock* . . . , the Supreme Court clarified that contract-*formation* issues are always matters for judicial resolution." *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1030 (9th Cir. 2022).

3. The district court had the authority to address the Credit Services Act argument even though Ferguson did not raise it until the district court sought to reconsider a previous interlocutory order denying GreenSky's motion to compel. When ruling on a Federal Rule of Civil Procedure 59(e) motion to reconsider a judgment, a court will not address new arguments that a party could have raised earlier, *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020), but the power to reconsider an interlocutory order "is not subject to the limitations of Rule 59," *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1315 (11th Cir. 2000)). The district court had "the inherent procedural power to reconsider . . . an interlocutory order for cause seen by it to be sufficient." *Id.* at 889 (quoting *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981)).

4. In its cross-appeal, GreenSky argues that the parties formed an arbitration agreement under general state law standards. GreenSky's cross-appeal was unnecessary because "all it wishes to do is present alternative grounds for affirming the judgment" dismissing the complaint and compelling arbitration. *Ellis*

v. Salt River Project Agric. Improvement & Power Dist., 24 F.4th 1262, 1268 (9th Cir. 2022); *see United States v. Accra Pac, Inc.*, 173 F.3d 630, 632 (7th Cir. 1999). In any event, it makes no difference whether the agreement complied with general state law standards, because the agreement failed to satisfy the formation requirements in the Credit Services Act.

Costs shall be taxed against GreenSky.

REVERSED and REMANDED.