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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Lasonia Breham,

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No. CV-09-1474-PHX-GMS

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Plaintiff,

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ORDER

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vs.

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Asset Acceptance, LLC,

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Defendant.

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Pending before the Court is the Motion to Strike Jury Demand (Dkt. # 25) filed by

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Defendant Asset Acceptance, LLC (“Defendant”). For the reasons set forth below, the Court

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denies the Motion.

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BACKGROUND

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In October 2008, Plaintiff Lasonia Breham (“Plaintiff”) began working for Defendant

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in its Arizona office. Shortly after Plaintiff was hired, Defendant distributed a new

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“Associate Manual” to employees, including Plaintiff. The Manual contained a Statement

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of Agreement for employees to sign. Within this statement was a “Jury Trial Waiver”

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provision. (Dkt. # 12, Ex. 3.) The provision states:

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I WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND OR DISPUTE RELATING TO OR ARISING OUT OF OR IN THE COURSE OF EMPLOYMENT OR TERMINATION THEREOF. I AGREE AND CONSENT THAT ANY SUCH CLAIM, DEMAND OR DISPUTE SHALL BE DECIDED BY THE COURT WITHOUT A JURY.

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1 (*Id.*) Plaintiff signed the Waiver and dated it November 24, 2008.

2 Because Defendant is a purchaser and collector of consumer debt, Plaintiff also signed
3 paperwork agreeing to “clear up” any outstanding accounts she may have with Defendant
4 when she was hired. Defendant, however, discovered three debts allegedly owed by Plaintiff.
5 Plaintiff contends she attempted to “clear up” these debts, but that Defendant’s ensuing
6 efforts to collect on those debts violated the Fair Debt Collection Practices Act. 15 U.S.C.
7 § 1692 *et seq.* (Dkt. # 1 at 4–10.) These alleged violations eventually led to Plaintiff’s
8 termination, and they provide the basis of her claims. In raising these claims, Plaintiff also
9 demands a jury trial. (*See id.* at 1.)

10 On February 19, 2010, Defendant filed this Motion to Strike Plaintiff’s Jury Demand.
11 Specifically, Defendant contends that Plaintiff’s claims fall within the scope of the Jury Trial
12 Waiver provision discussed above. (Dkt. # 25 at 4.) Plaintiff, in turn, maintains that the Jury
13 Trial Waiver does not apply. She asserts that the Waiver is invalid when evaluated under the
14 Ninth Circuit reasonable expectation and unconscionability standards for analyzing
15 arbitration agreements. (Dkt. # 26 at 5.)

16 LEGAL STANDARD

17 The Ninth Circuit has not addressed the issue of the contractual waiver of a jury trial.
18 In their respective briefs, both parties base their arguments instead upon analysis relating to
19 the validity of arbitration agreements. Those circuits and district courts that have examined
20 the issue, however, consistently apply a different standard for determining the validity of a
21 contractual waiver of the right to jury trial than they apply for determining the validity of an
22 arbitration agreement. Thus, rather than apply the approach asserted by the parties, the Court
23 opts for the legal standard adopted by other circuit courts and the district courts within the
24 Ninth Circuit.

25 The Seventh Amendment right to a jury trial in federal court is governed by federal
26 law. *Simler v. Conner*, 372 U.S. 221, 221–22 (1963); *see also Leasing Serv. Corp. v. Crane*,
27 804 F.2d 828, 832 (4th Cir. 1986). Under federal law, there is a strong presumption against
28 the waiver of this fundamental right. *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107

1 F.3d 1374, 1378 (9th Cir.1997) (holding that courts “must indulge every reasonable
2 presumption against the waiver of the jury trial”). A waiver, however, is enforceable when
3 it is made knowingly, voluntarily, and intelligently. *Phoenix Leasing. v. Sure Broad.*, 843 F.
4 Supp.1379, 1384 (D. Nev. 1994) (citing *Standard Wire & Cable Co. v. AmeriTrust Corp.*,
5 697 F. Supp. 368, 375 (C.D. Cal.1988)); *see also Merrill Lynch & Co. v. Allegheny Energy,*
6 *Inc.*, 500 F.3d 171, 188 (2d Cir. 2007); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 756
7 (6th Cir. 1985); *Leasing Serv.*, 804 F.2d at 832; *Okura & Co. v. Careau Group*, 783 F. Supp.
8 482, 488 (C.D. Cal. 1991). The factors consistently used by courts to determine whether a
9 waiver was knowing, voluntary, and intelligent include:

10 (1) whether there was a gross disparity in bargaining power
11 between the parties; (2) the business or professional experience
12 of the party opposing the waiver; (3) whether the opposing party
had an opportunity to negotiate contract terms; and (4) whether
the clause containing the waiver was inconspicuous.

13 *Phoenix Leasing*, 843 F. Supp. at 1384 (quoting *Hydramar, Inc. v. Gen. Dynamics Corp.*,
14 1989 WL 159267, at *3 (E.D. Pa. Dec. 29, 1989)); *see also Leasing Serv.*, 804 F.2d at 833
15 (applying these same factors).

16 There is a split among the circuits regarding which party has the burden of proving
17 these factors. *See Irving Trust*, 757 F.2d at 758 (placing the burden on the party opposing the
18 waiver). *But see Leasing Serv.*, 804 F.2d at 832–33 (placing the burden on the party seeking
19 to enforce the waiver). Since placing the burden of proof on the party seeking to enforce the
20 waiver is most in keeping with the strong presumption against the waiver of this Seventh
21 Amendment right, the Court will follow the approach set forth in *Leasing Serv. See id.*;
22 *Phoenix Leasing*, 843 F. Supp. at 1384 (applying this approach in the District of Nevada).

23 DISCUSSION

24 This suit is predicated upon the jury trial waiver contained in an “Associate Manual”
25 signed by the Plaintiff during the course of her employment. Examining this document in
26 light of the factors articulated above, the Court finds that the waiver fails to meet the
27 knowing, voluntary, and intelligent standard. The waiver, therefore, appears to be
28 unenforceable.

1 Defendant offers no evidence to suggest that Plaintiff had any equal ability to bargain
2 with her employer. This weighs in favor of denying Defendant’s Motion. *See MZ Ventures*
3 *LLC v. Mitsubishi Motor Sales of Am., Inc.*, 1999 WL 33597219, at *16 (C.D. Cal. Aug. 31,
4 1999) (observing that defendant’s failure to present evidence that plaintiff had equal
5 bargaining power weighed in favor of denying the motion to strike jury demand). Defendant
6 also fails to offer evidence of Plaintiff’s business acumen. *See Sullivan v. Ajax Navigation*
7 *Corp.*, 881 F. Supp. 906, 911 (S.D. N.Y. 1995) (noting that a lack of business acumen weighs
8 against waiver). Defendant further does not present evidence that waiver was negotiable. *See*
9 *Ginsberg v. Silversea Cruises Ltd*, 2004 WL 3656827, at *2 (S.D. Fla. Mar. 18, 2004)
10 (holding that waiver was invalid where the form included standardized language, was drafted
11 by the defendant, and was nonnegotiable).

12 Defendant does present evidence that the clause containing the waiver provision was
13 conspicuous. The waiver is in all capital letters, bolded, and clearly labeled “Jury Trial
14 Waiver.” This factor alone, however, is not enough to render the waiver knowing, voluntary,
15 and intelligent. *See Sullivan*, 881 F. Supp. at 911 (holding that a “defendant cannot overcome
16 the presumption against a waiver” simply “by referring to the placement and font size of the
17 waiver clause”); *see also MZ Ventures*, 1999 WL 33597219, at *17 (denying motion to strike
18 jury demand even though there was evidence that the waiver was conspicuous).

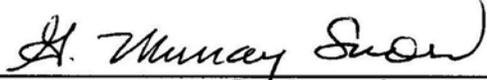
19 In light of the lack of evidence of parity in bargaining power, of professional
20 experience on the part of Plaintiff, and of her ability to negotiate the terms of the waiver
21 agreement, the Court finds that the factors set forth in *Phoenix Leasing* weigh against
22 granting the Motion to Strike. *See* 843 F. Supp. at 1384. Nonetheless, to the extent that
23 discovery reveals additional facts suggesting that Plaintiff’s waiver was both knowing and
24 voluntary, the Court denies the Motion without prejudice. *See MZ Ventures*, 1999 WL
25 33597219, at *17 (denying a motion to strike jury demand, but permitting the parties to raise
26 the issue again on summary judgment). Here, additional facts related to and leading up to
27 Plaintiff’s signing of the waiver form may prove to be relevant to this issue.

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IT IS THEREFORE ORDERED that Defendant's Motion to Strike Jury Demand (Dkt. # 25) is **DENIED** without prejudice.

DATED this 27th day of April, 2010.



G. Murray Snow
United States District Judge