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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JEFFREY REICHERT and GARY
9 MOYER, both individually and on
behalf of all others similarly situated,

10 Plaintiffs,

v.

11 KEEFE COMMISSARY NETWORK
12 LLC, d/b/a ACCESS CORRECTIONS;
13 RAPID INVESTMENTS, INC., d/b/a
14 RAPID FINANCIAL SOULTIONS,
d/b/a ACCESS FREEDOM; and
CACHE VALLEY BANK

15 Defendants.

CASE NO. C17-5848 BHS

ORDER DENYING
DEFENDANTS' MOTIONS TO
COMPEL ARBITRATION

16 This matter comes before the Court on Defendant Keefe Commissary Network,
17 LLC's motion to compel arbitration of Plaintiff Gary Moyer's claims, Dkt. 134, and
18 Defendants Rapid Investments, Inc. and Cache Valley Bank's related motion to compel
19 arbitration of Moyer's claims, Dkt. 136. The Court has considered the motions and the
20 briefing filed in support of and in opposition to the motions and the remainder of the file
21 and hereby denies the motions for the reasons stated herein.
22

1 **I. BACKGROUND**

2 **A. Overview**

3 When people are arrested and detained, detention facilities confiscate their cash
4 and hold it in trust. Facilities traditionally returned the money upon release in cash or
5 with a check. Increasingly, private companies contract with facilities to convert the
6 money into prepaid debit cards (“release cards”) and shift administrative costs to the
7 releasee through fees. Releasees often lose a substantial portion of their funds to fees, and
8 some lose their entire balance.

9 Kitsap County Jail contracts with Keefe to convert cash into release cards. The
10 cards are issued by Cache Valley and Rapid pursuant to the contract between Keefe and
11 Kitsap County. Releasees receive the cards already activated and already accruing fees.
12 Plaintiffs represent a Washington State and a national class of individuals subject to these
13 practices.

14 Defendants contend that when releasees receive the card, they enter a contractual
15 relationship articulated in a Cardholder Agreement, which includes a binding individual
16 arbitration clause. Plaintiffs counter that no contractual relationship is formed—
17 Defendants provide no consideration, and releasees do not assent to be bound.

18 **B. Procedural History**

19 The original class representative, Jeffrey Reichert, did not receive any
20 documentation along with his release card. Dkt. 53 at 2. Defendants moved to compel
21 arbitration, arguing that Reichert was bound by the Cardholder Agreement available
22

1 through the website listed on the back of his card. *Id.* The Court denied the motion,
2 finding no mutual assent, and thus no contractual relationship. *Id.* at 5.¹

3 As a condition of certifying the classes, the Court required Plaintiffs to name an
4 additional class representative who received a copy of the Cardholder Agreement. Dkt.
5 94. Plaintiffs named Moyer. Dkt. 100. Defendants moved to compel arbitration of
6 Moyer’s claims, which the Court denied. Dkt. 116. The Court concluded that though
7 Moyer received a copy of the Cardholder Agreement, he did not assent to enter a
8 contractual relationship. *Id.*

9 Defendants appealed, and the Ninth Circuit vacated and remanded without
10 “express[ing] any views on whether a valid, enforceable agreement exists.” *Reichert v.*
11 *Rapid Investments, Inc.*, 826 F. App’x 656, 658 (9th Cir. 2020). The Circuit instructed the
12 Court to inquire into Moyer’s intent, as distinguished from Reichert’s, to determine
13 whether he had in fact assented to the terms of the Agreement. *Id.* at 657 (quoting *City of*
14 *Everett v. Sumstad’s Estate*, 95 Wn.2d 853, 855 (1981)). It emphasized that the record
15 lacked a declaration from Moyer, making it unclear whether the Court considered the
16 parties’ “outward manifestations and circumstances surrounding the transaction.” *Id.*
17 (quoting *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 50 (2020)).

18 On February 12, 2021, Defendants again moved to compel Moyer to individually
19 arbitrate his claims. Dkts. 134, 136. Keefe is not a party to the purported contract
20

21 ¹ The Honorable Ronald B. Leighton presided over this case from its filing through
22 August 31, 2020. Dkt. 124. It was transferred to the undersigned following Judge Leighton’s
retirement from the federal bench.

1 between Rapid and Moyer, so its motion is based on principles of equitable estoppel,
2 agency, and third-party beneficiary status. Dkt. 124. On March 8, 2021, Moyer responded
3 to both motions. Dkts. 139, 142. On March 12, 2021, Defendants replied. Dkts. 143, 144.

4 The record now contains both Moyer’s declaration and his deposition.

5 **C. Factual Background**

6 Moyer received release cards on three occasions: May 2017, December 2017, and
7 February 2018. Moyer declares that he never applied for the cards or requested any way
8 of getting his money back other than cash. Dkt. 140, ¶ 6. He never agreed to receive the
9 cards instead of his cash. *Id.* ¶ 7.

10 Rapid glues the card to a Cardholder Agreement “tri-folded around the release
11 card with only the bar code on the back of the release card visible through a cutout of the
12 Cardholder Agreement that allows the correctional facility to scan the release card to
13 assign it to an individual.” Dkt. 137, ¶ 12. Rapid began introducing this practice to the
14 detention facilities it works with in April 2017. *Id.* It is undisputed that Moyer received a
15 Cardholder Agreement on at least one occasion.

16 On May 15, 2017, Moyer was issued a release card loaded with \$14.62. *Id.* ¶ 24.
17 He believes he was given a document along with this card but does not specifically
18 remember looking at it. Dkt. 138-1 at 21. He attempted a transaction with Telmate that
19 same day for \$13.30 which failed. Dkt. 137, ¶ 25. Three days later, Rapid charged a
20 \$1.32 maintenance fee. Dkt. 137-3 at 3. Five days later, Moyer made a \$9.49 transaction
21 at a 7-Eleven. Dkt. 137, ¶¶ 25–26. Rapid charged \$3.81 in maintenance fees over the next
22 two weeks, and Moyer made no further transactions. Dkt. 137-3 at 3.

1 On December 15, 2017, Moyer was issued a release card loaded with \$40.00. Dkt.
2 137, ¶ 21. He testified initially that he assumes that he was given a document with this
3 card, but does not specifically remember looking at it, and does not remember whether he
4 had any conversation with the Kitsap County guard. Dkt. 138-1 at 22, 38. Later in his
5 deposition, he testified that if he said anything to the guard, it would have been that he
6 “had trouble with getting money off the card.” *Id.* at 39. He also testified that he recalls
7 the guard saying that they do not issue checks anymore, which he assumes was in
8 response to his request for a check. *Id.* at 55. Rapid charged a \$2.50 maintenance fee
9 three days after issuing the card. Dkt. 137-3 at 2. Moyer engaged in a \$20.00 transaction
10 at an ExxonMobil two days after that. Dkt. 137, ¶ 22. Rapid charged \$17.50 in
11 maintenance fees over the next month and a half, and Moyer made no further
12 transactions. Dkt. 137-3 at 2.

13 On February 8, 2018, Moyer was issued a release card loaded with \$95.26. Dkt.
14 137, ¶ 18. He declares that this card was accompanied by a document, and he
15 “understand[s] that the defendants claim it was an agreement for using the card.” Dkt.
16 140, ¶ 8. However, he “did not agree to any terms or conditions for the return of my
17 money.” *Id.* He declares that “I simply wanted my money back. I did not keep a copy of
18 that document.” *Id.* He withdrew \$80 from an ATM the day he received the card, Dkt.
19 137, ¶ 19, and was charged a \$2.95 issuer fee, Dkt. 137-3 at 2. Rapid charged \$12.31 in
20 maintenance fees over the next month, and Moyer made no further transactions. *Id.*

21 One of the release cards is reproduced below.
22



On the front, the release cards state “ATTENTION! This card has already been activated!” Dkt. 104-1.² On the back, the cards list a website, www.accessfreedomcard.com, and state:

By accepting and or using this card, you agree to the Account Agreement. Get cash and/or make purchase where you see these logos. For your protection, do not write your personal identification number (PIN) on this card. This card is issued by Cache Valley Bank pursuant to a license by MasterCard International. Customer Service Toll Free 877-592-1118

Id.

Rapid used two versions of its Agreement during the relevant period—one effective June 2016 and one effective February 2018. Dkt. 137-1 at 2; Dkt. 137-2 at 2.

² The pre-activation and listed PIN raise the additional question of whether a reasonable person would leave money behind in such an unsecured form.

1 The record does not conclusively establish which version Moyer received with his
2 February 8, 2018 release card, and Moyer questions whether Kitsap County would have
3 already started distributing the February 2018 version of the agreement by February 8,
4 2018. Dkt. 139 at 23 n.5.

5 The Agreements' appearance is substantially similar, and the first version of the
6 Agreement is reproduced below.³

CARDHOLDER AGREEMENT Case 3:17-cv-05848-BMS Document 133-1 Filed 02/12/21 Page 2 of 3
(Effective June 2016)

ATTENTION!
Online Registration will ensure the security of your funds.
Please visit accessfreedomcard.com for additional protection and benefits such as: Mobile Alerts, 24/7 Transaction Monitoring, Fraud Protection, and to Upgrade to a Reloadable Bank Card

Use your card where you see these symbols:


Non-Reloadable Prepaid Card. This Cardholder Agreement ("Agreement") sets forth the terms of your non-reloadable prepaid Card. Please read it carefully and retain it for your records. If you do not agree to these terms, do not use the Card and cancel it by calling Customer Service at 1-877-287-2446. Otherwise, your acceptance and/or use of the Card will be evidence of your agreement to these terms.

NOTE: THIS AGREEMENT REQUIRES CERTAIN DUES TO BE RESCUED BY WAY OF BINDING ARBITRATION, EARLIER THAN 60 DAYS AFTER THE END OF THE AGREEMENT.

Definitions. In this Agreement, the words "you" and "your" mean the Cardholder. "Bank," "we," "us" and "our" mean Cache Valley Bank, the issuer of the Card, or anyone to whom we assign our rights. "Card" means the network branded card that is issued to you.

Identification. To help the government track the funding of terrorism and money laundering activities, federal law requires us to obtain, verify, and record information that identifies each person who obtains a Card. When you request or agree to receive a Card, you authorize the party giving you the Card to provide us with your name, address, date of birth and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents and may use resources such as credit bureaus or other means to verify your identity information.

Using Your Card. Your Card is active right now and cannot be used to access available funds that have been "loaded" to the Card. You do not need to call us to activate the Card. If you find that your Card is not active, please visit www.accessfreedomcard.com to activate it.

You may use your Card to purchase goods and services anywhere MasterCard® debit cards are accepted and to access cash at ATMs of financial institutions displaying the MasterCard®, Plus®, or Maestro® name and/or logo. Each time the Card is used to purchase goods or services or to withdraw cash at ATMs, you authorize us to charge that amount (and any applicable fees) against your Card's available balance. You may not give or transfer your Card to another person for their use.

You will be required to input your personal identification number ("PIN") in order to access cash at ATMs and to purchase goods or services at some point-of-sale ("POS") terminals. Please refer to the activation label on your Card for your temporary PIN number. You should promptly change your temporary PIN by calling Customer Service at 1-877-287-2446. You agree not to disclose your PIN to others.

ATM Receipts. You can get a receipt of the time you make any withdrawal with your Card using one of our ATMs.

Balance and Transaction Information. You can obtain information about the current available balance on your Card and a description of recent transactions by calling Customer Service at 1-877-287-2446 or visiting www.accessfreedomcard.com.

Limitations. Subject to your available balance, you may use your Card to make withdrawals at ATMs and purchase goods or services up to the aggregate amount of \$3,500 per day. You may not conduct more than five ATM or twenty purchase transactions on any single day. For security reasons, there may be times when we further limit these amounts. You may not use your Card for any unlawful purpose or to conduct Internet gambling transactions.

The maximum amount that can be loaded to the Card is \$5,000. Interest will not be paid to you for any amount loaded on the Card. The Card is non-reloadable. This means that you cannot add money to the Card balance after it is issued. There is no credit card, credit line, overdraft protection, or deposit account associated with your Card. Your Card is not transferable and may only be used by you.

FDIC Insurance. The money credited to your Card will be held in a custodial account at the Bank. Funds in the custodial account are insured by the FDIC to its maximum limits.

Unauthorized Payments. We may transfer (check) your Card balance to the appropriate state if no activity occurs in the Card and you fail to communicate with us regarding your Card within the time period specified by state law. If funds are transferred to the state, you may file a claim with the state to recover the funds.

Cancellation and Suspension. We may cancel or suspend Card privileges without cause or prior notice, except as otherwise required by law. We may refuse to process any transaction that we believe may violate the terms of this Agreement or may be unauthorized. You may cancel your Card by calling Customer Service at 1-877-287-2446.

We will attempt to notify you if we decide to cancel or suspend your use of the Card. You agree not to use or allow others to use an expired, cancelled, suspended or otherwise invalid Card. Our cancellation or suspension of Card privileges will not otherwise affect your rights and obligations under this Agreement. If we cancel or suspend your Card privileges through no fault of yours, you will be entitled to a refund of the remaining balance without charge.

Card Expiration. Subject to applicable law, you may use the Card only through its expiration date. The expiration date is shown on your Card. If you attempt to use the Card after the expiration date, the transactions may not be processed.

Although the Card expires, the underlying funds do not expire. If there is a balance remaining on the Card at the time of its expiration, you may request a replacement Card by calling Customer Service at 1-877-287-2446. Otherwise, we will neither send you a replacement Card or refund the balance remaining on the Card to you, less any amounts owed to us. The replacement Card or a check for the Card balance may be mailed to you at the labeled postal address reflected in our records. We do not impose a fee for any replacement Card or check sent to you as a result of your Card's expiration.

Arbitration of Disputes. Except as expressly provided below, any controversy that arises out of or is related to (a) the Card, (b) any service relating to the Card, or (c) this Agreement, whether based on statute, contract, tort or any other legal theory, in which the aggregate amount in controversy for all claimants exceeds \$15,000, including interest and attorney fees, (any "claim") will be settled on an individual basis by binding arbitration under the Federal Arbitration Act ("FAA"). Judgment on the arbitration award may be entered in any court having jurisdiction. Any dispute regarding whether a particular controversy is subject to arbitration will be decided by the arbitrator(s). If any part of the damages or other relief requested is not expressly stated as a dollar amount, the controversy will be a claim that is subject to arbitration. You and Bank acknowledge and agree that the transactions contemplated by use of the Card, and any controversy that may arise out of or relate to the Card, Card services, or this Agreement involve "commerce" as that term is defined and used in the FAA.

The arbitration will be administered by the American Arbitration Association (the "AAA") under its Commercial Arbitration Rules (the "Arbitration Rules"). We will tell you how to contact the AAA and how to get a copy of the Arbitration Rules without cost if you ask us in writing to do so. The Arbitration Rules permit you to request deferral or reduction of the administrative fees of arbitration if paying them would cause you a hardship. Any in-person arbitration hearing will be held in Cache County, Utah, where our employees and records of the Card are located. It is within the arbitrator's discretion to order the arbitration to take place by telephone.

Each arbitrator shall be a licensed attorney who has been engaged in the private practice of law continuously during the 10 years immediately preceding the arbitration or a retired judge of a court of general appellate jurisdiction. The arbitration award shall award only such relief as a court of competent jurisdiction could properly award under applicable law, including attorney fees if allowed by applicable state or federal law, and may award to the prevailing party all pre- and post-award expenses of arbitration. All statutes of limitation, defenses, and attorney-client and other privileges that would apply in a court proceeding will apply in the arbitration. The filing of a demand for arbitration in accordance with the Arbitration Rules will be deemed the commencement of an action for purposes of any applicable statute of limitations. There will be no class claims—Claims by or on behalf of other persons will not be considered in or consolidated with the arbitration proceedings between you and Bank.

The Agreement does not limit the right of you or us, whether before, during or after the arbitration proceeding, to obtain provisional or ancillary remedies or injunctive or other traditionally equitable relief (other than a stay of arbitration) necessary to protect the rights or property of the party seeking relief pending the arbitrator's determination of the merits of the claim or the Bank's or issuer's willful remedial, such as the right of set-off. The taking of any of the actions described in the preceding sentence by either party or the filing of a court action by a party shall not be deemed to be a waiver of the right to demand arbitration of any claim asserted as a counterclaim or the file in response to any such action. This arbitration provision will survive the termination of your relationship with Bank, whether evidenced by this Agreement or otherwise.

You understand, acknowledge and agree that: you have read carefully this provision in which you and Bank have agreed to arbitrate disputes; the provision limits or waives certain of your rights, including the right being a court action and to have a jury trial; there will be no class claims in arbitration; discovery may be more limited in arbitration than in a court proceeding; the right and grounds to appeal from an arbitrator's award are more limited than in an appeal from a court judgment; and certain other rights you have in a court proceeding also may not be available in arbitration.

³ When presented to the release, the Agreement appears on a single page.

Privacy. We may release information about you, your Card and the transactions you perform to third parties where it is necessary or helpful in verifying or completing a transaction; to disclose the address, history, and condition of your Card for consumer reporting agencies; when you give us your consent; to comply with the law or a court or governmental order; to local, state and federal authorities if we believe a crime may have been committed involving your Card; and as permitted by law. Please see our Privacy Policy at www.cardservicesbank.com/privacy.pdf for further information. Although no credit history is required to obtain a Card, you authorize us to obtain information about you from time to time from credit reporting agencies and other third parties to assist us in verifying your identity, to prevent fraud, and to investigate potential misuse of the Card.

Notice of Lost or Stolen Cards/Unauthorized Activity. You agree to notify us AT ONCE of the loss, theft or unauthorized disclosure of any PIN or code that might be used to access Card funds. If you believe your Card or PIN has been lost or stolen or that someone has transferred or may transfer money from the Card without authorization, call Customer Service at 1-877-287-2448. You agree to cooperate reasonably with us in our attempts to recover funds from, and to assist in the prosecution of, any unauthorized users of your Card. If you allow another person to use the Card, you agree to be responsible for all transactions conducted by that person, even if the transactions exceed the amounts or use authorized by you.

Our Liability for Failing to Make Transfers. If we do not complete a transaction to or from the Card on time or in the correct amount according to this Agreement, we may be liable for your losses or damages. However, there are some exceptions. We will not be liable, for instance: (a) if your Card funds are insufficient for the transaction or are unavailable for withdrawal (e.g., because they are subject to a hold or legal process); (b) if a computer system, ATM, or POS terminal was not working properly and you know about the problem when you started the transaction; (c) if a merchant refuses to honor the Card; (d) if circumstances beyond our control (such as fire, flood, terrorist attack or national emergency) prevent the transaction, despite reasonable precautions that we have taken; (e) if we refuse a transaction because the Card has been reported as lost or stolen, has been suspended by us, or we have reason to believe the transaction is not authorized by you; or (f) as otherwise provided in this Agreement.

In Case of Errors or Questions About Card Transactions. Call us at 1-877-287-2448, or write to Customer Service at P.O. Box 6425, North Logan, Utah 84341 as soon as you

postal address change; you agree to notify Customer Service immediately. Failure to do so may result in Card information being mailed to the wrong person or your transactions being declined. You agree to provide notice to us by calling us at 1-877-287-2448 or writing us at Customer Service, P.O. Box 6425, North Logan, Utah 84341.

Third-Party Service Providers. We may engage a third party such as Rapid Financial Solutions to assist us in administering, supporting, and/or marketing the Card program and otherwise performing our obligations under this Agreement.

Delay of Rights. We can waive or delay enforcement of any of our rights under this Agreement without losing them.

No Assignment by You. You may not assign or transfer this Agreement or any of your rights or obligations under this Agreement. Any attempt to the contrary (such as the grant

Card Fees	
Card Activation:	\$0.00
Calls to Customer Service:	\$0.00
PIN Change:	\$0.00
Point of Sale Transactions (PIN or Signature):	\$0.00
Cash Back Option with POS Transactions:	\$0.00
Cash Back at MasterCard Principal Locations:	\$0.00
Transfer from Card to Bank Account:	\$0.00
POS Declines:	\$0.00
Card Maintenance ^a :	\$2.50 per week
ATM Inquiry:	\$1.50 per inquiry
ATM Withdrawal (Within USA):	\$2.95 per transaction
ATM Withdrawal (Outside USA):	\$3.95 per transaction
ATM Decline (Within USA):	\$2.95 per transaction
ATM Decline (Outside USA):	\$3.95 per transaction
Foreign Transactions: (See paragraph titled "Foreign Transactions" above)	3% of total transaction amount
Card Replacement ^b :	\$10.00
Close Account with Check Disbursement ^c :	\$10.00

^a Weekly maintenance fee begins a calendar day after the Card is issued and will be deemed due even when unused.
^b Applies to replacement for lost or stolen Card.
^c Does not apply when checked in via email or Card expiration or we cannot or suspend our Card privileges through no fault of ours.

Note: When you use an ATM not owned by us, you may be charged a fee by the ATM operator or any network used (and you may be charged a fee for a balance inquiry even if you do not complete a withdrawal).

You can obtain more information about Card fees by calling Customer Service at 1-877-287-2448 or visiting www.cardservicesbank.com.

Questions. If you have questions regarding your Card, you may call us at 1-877-287-2448 or write to Customer Service, P.O. Box 6425, North Logan, Utah 84341.

When you use your Card to initiate a transaction at certain merchants (e.g., gas stations, hotels, restaurants, and car rentals), the merchant may request confirmation of the Card's validity and authorization for the transaction. Note: The amount may be debited by the merchant and may include a gratuity. You agree that we may place a temporary hold on your Card balance for the withheld amount, even if it exceeds the amount of your allowable transaction. Any excess will be released later after the transaction is finally settled through the system.

Your Obligation for Overdrafts. You agree not to conduct transactions which would cause your Card balance to become overdrawn. If a merchant attempts to process a transaction for more than your Card's available balance, the transaction may be declined. If you conduct transactions in an amount that exceeds the balance on your Card, you agree to pay us the overdraw amount immediately, without further demand.

Merchant Refunds and Disputes. Depending on the merchant, any refund for goods or services purchased with the Card may be made in the form of a credit to the Card. You are not entitled to receive a cash refund. We are not responsible for the delivery, quality, safety, legality or any other aspect of goods and services that you purchase from others with the Card. All such disputes should be addressed to the merchants from whom the goods and services were purchased.

Foreign Transactions. If you conduct a transaction in a currency other than U.S. dollars, the merchant, network or card association that processes the transaction may convert any related debit into U.S. dollars in accordance with its then current policies. MasterCard currently uses a conversion rate that is either: (a) selected from a range of rates available in the wholesale currency markets on or one day prior to its central or transaction processing date (note: this rate may be different from the rate the association itself receives); or (b) the government-mandated rate. The conversion rate may be different from the rate in effect on the date of your transaction and the date it is posted to your Card. We may impose a charge on the transaction amount (including reversals) for each transaction that you conduct outside the United States or in a foreign currency. This charge is in addition to any applicable ATM fee. See Fees and Charges section.

Fees and Charges. We will charge you, and you agree to pay, the fees and charges set forth below. We normally deduct fees and charges automatically from the Card balance at the time a fee or charge is incurred.

Each Agreement states at the outset:

This Cardholder Agreement (this “**Agreement**”) sets forth the terms of your non-reloadable prepaid Card. Please read it carefully and retain it for your records. If you do not agree to these terms, do not use the Card and cancel it by calling Customer Service at 1-877-287-2448. Otherwise, your acceptance and/or use of the Card will be evidence of your agreement to these terms.

Dkt. 137-1 at 2; Dkt. 137-2 at 2. The next clause states:

NOTE: THIS AGREEMENT REQUIRES CERTAIN DISPUTES TO BE RESOLVED BY WAY OF BINDING ARBITRATION, RATHER THAN BY JURY TRIAL. THE TERMS OF THE ARBITRATION CLAUSE APPEAR AT THE END OF THIS AGREEMENT.

Dkt. 137-1 at 2; Dkt. 137-2 at 2. The arbitration provision, which appears in the middle of the right column of text, states in part:

Except as expressly provided below, any controversy that arises out of or is related to (a) the Card, (b) any service relating to the Card, or (c) this Agreement, whether based on statute, contract, tort, or any other legal theory, in which the aggregate amount in controversy for all claimants exceeds \$15,000, including interest and attorneys’ fees, (any “Claim”) will be settled on an individual basis by binding arbitration under the Federal Arbitration Act (“FAA”).

1 Dkt. 137-2 at 2; Dkt. 137-3 at 2. In apparent contradiction, a preceding provision,

2 “Governing Law/Jurisdiction,” states:

3 All matters . . . relating to the validity, construction, interpretation or
4 enforcement of this Agreement shall be determined by the laws of the
5 United States You consent and submit to the exclusive jurisdiction of
6 the state and federal courts located in Cache County, Utah in all
7 controversies arising out of or in connection with your use of the Card and
8 this Agreement.

9 Dkt. 137-2 at 2; Dkt. 137-3 at 2.

10 The earlier version of the Agreement listed the fee to “Close Account with Check
11 Disbursement” as \$10.00. Dkt. 137-1 at 2; Dkt. 137-2 at 2. Rapid’s Managing Partner,
12 Daren Jackson, declares that Rapid did not in fact assess this fee when releasees
13 requested checks. Dkt. 137, ¶ 8. The later version of the Agreement has a “Consent”
14 provision which states:

15 Individuals who believe they have received this card non consensually [sic]
16 will be entitled to full refund of any fees charged to the card. Individuals
17 can claim their full balance by visiting dailypay.me or calling the number
18 on the back of the card.

19 Dkt. 137-2 at 2.

20 II. DISCUSSION

21 Moyer contends that he cannot be forced to arbitrate his claims because he never
22 entered a contractual relationship with Defendants. Defendants counter that his receipt of
23 their Cardholder Agreement and use of the release cards formed a contract.

24 “Issues regarding the *validity* or *enforcement* of a putative contract mandating
25 arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract
26 as a whole must be determined by the court prior to ordering arbitration.” *Sanford v.*

1 *Member Works*, 483 F.3d 956, 962 (9th Cir. 2007) (citing *Three Valleys Mun. Water Dist.*
2 *v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140–41 (9th Cir. 1991)) (footnote omitted)
3 (emphasis in original). The party seeking to compel arbitration has the burden of proving
4 the existence of an agreement to arbitrate by a preponderance of the evidence.” *Knutson*
5 *v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (citing *Rosenthal v. Great W.*
6 *Fin. Sec. Corp.*, 14 Cal.4th 394, 413 (1996)).

7 “To determine ‘whether a valid agreement to arbitrate exists,’ *Chiron Corp. v.*
8 *Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000), [courts] apply ‘ordinary
9 state-law principles that govern the formation of contracts[,]’ *Nguyen v. Barnes & Noble,*
10 *Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014).” *Reichert*, 826 Fed. App’x at 657 (citation
11 omitted). The parties agree that Washington law applies. *Id.* at 657 n.1.

12 “‘If there is doubt as to whether [an agreement to arbitrate] exists, the matter
13 should be resolved through an evidentiary hearing or mini-trial When considering a
14 motion to compel arbitration which is opposed on the grounds that there is no binding
15 agreement to arbitrate, the district court should give the opposing party the benefit of all
16 reasonable doubts and inferences that may arise.’” *Garbacz v. A.T. Kearny, Inc.*, No. C
17 05-05404 JSW, 2006 WL 870690, at *2 (N.D. Cal. Apr. 4, 2006) (quoting *McCarthy v.*
18 *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *2 (N.D. Cal. July 19,
19 1994)).

20 **A. Consideration**

21 Though the Ninth Circuit’s remand focused on mutual assent, Moyer also
22 contends that contract formation fails for lack of consideration. First, Moyer argues

1 Defendants had a preexisting legal duty to return his money, so any promise to do so is
2 not consideration. Dkt. 139 at 13–14. Second, he argues that a release card is not
3 equivalent to the funds he was entitled to receive because fees deplete the card’s value.
4 *Id.* at 14 (citing *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 575 (9th Cir. 2020)).
5 Defendants counter that the consideration Moyer received is the services and features
6 associated with the card, rather than the return of his money. Dkt. 144 at 3.⁴ Upon
7 examination, the points the parties raise collapse into the mutual assent analysis.

8 “Consideration is ‘any act, forbearance, creation, modification or destruction of a
9 legal relationship, or return promise given in exchange.’” *Labriola v. Pollard Grp.*, 152
10 Wn.2d 828, 833 (2004) (quoting *King v. Riveland*, 125 Wn.2d 500, 505 (1994)).

11 “Consideration is a bargained-for exchange of promises.” *Id.* (citing *Williams Fruit Co. v.*
12 *Hanover Ins. Co.*, 3 Wn. App. 276, 281 (1970)).

13 Defendants are correct that courts “generally do not inquire into the adequacy of
14 consideration.” *Id.* at 834 (citing *Browning v. Johnson*, 70 Wn.2d 145, 147 (1967)). If
15 Moyer in fact assented to receive a card with services and features, those services and
16 features could constitute consideration for Moyer’s agreement to forgo his right to a jury

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18 ⁴ Defendants also argue the Court should follow *Allbaugh v. Perma-Bound*, No. C088-
19 5713-JCC, 2009 WL 10676437, at *7 (W.D. Wash. Aug. 14, 2009). There, the Court found a
20 modification to an employment contract was supported by consideration because “[t]he
21 arbitration agreement contains an exchange of promises such that both parties for the first time
22 agreed to waive their right to a jury trial to resolve disputes between them.” *Id.* *Allbaugh* is
distinguishable and persuasive authority only. Unlike Moyer, the plaintiff negotiated terms of the
agreement and signed it (albeit under duress). *Id.* at 2. Moreover, *Allbaugh* relied on *Labriola*,
where the Washington Supreme Court held that modification to an employment relationship
requires independent consideration such as “continued employment and/or continued training,”
rather than a “mutual” promise to give up rights. *Labriola*, 152 Wn.2d at 838.

1 trial and abide by Defendant’s fee schedule. However, that construction of consideration
2 depends on a conclusion that Moyer assented to receive the card’s features.

3 **B. Illegality**

4 Moyer also contends that he cannot be compelled to arbitrate because the
5 agreement is void as illegal under the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693–
6 1693r, because the cards are not voluntarily requested and because the fees are not
7 permissible. Dkt. 139 at 7 (citing *Brown*, 953 F.3d at 569). He contends that, even if the
8 contract was permitted under state law, the EFTA preempts state law and a contract that
9 is illegal is null from the beginning and unenforceable. Dkt. 139 at 28 (quoting *In re*
10 *Marriage of Hammack*, 114 Wn. App. 805, 810–11 (2003)).

11 However, the Supreme Court distinguishes challenges to the agreement to
12 arbitrate, such as argument that state law prohibits arbitration of certain claims, from
13 challenges to the whole contract “either on a ground that directly affects the entire
14 agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the
15 illegality of one of the contract’s provisions renders to the whole contract invalid.”
16 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). It held that
17 arguments that the entire contract is illegal and void *ab initio* remain subject to an
18 arbitration clause “unless the challenge is to the arbitration clause itself.” *Id.* at 445–46.
19 Otherwise, a court would be permitted “to deny effect to an arbitration provision in a
20 contract that the court later finds to be perfectly enforceable.” *Id.* at 448–49.

21 Moyer’s challenge is not directed to the arbitration clause itself—it squarely
22 challenges the entire contract. Therefore, if a contract was formed, Moyer’s claims

1 remain subject to the arbitration clause despite his contention that the entire contract is
2 illegal and void *ab initio*.

3 **C. Mutual Assent**

4 Moyer argues that he did not assent to anything when he took the card to get his
5 own money returned. Dkt. 139 at 15. He argues that he negotiated nothing, made no
6 statement of acceptance, and had no duty to object to the unrequested card. *Id.* at 15–16.
7 Defendants counter that Moyer could have rejected the contractual relationship by calling
8 customer service to request a check for the balance of his card, and his “ability to decline
9 [the release card] shows the voluntary nature of his assent.” Dkt. 144 at 6.

10 To determine mutual assent to contract, the Court must assess Moyer’s intent
11 “based on ‘the reasonable meaning of [his] words and acts’—to assent to the terms of the
12 Agreement.” *Reichert*, 826 Fed. App’x at 658 (quoting *City of Everett*, 95 Wn.2d at 855).
13 Relevant facts are Moyer’s “‘outward manifestations’” and the “‘circumstances
14 surrounding the transaction[s].’” *Id.* (quoting *Burnett*, 196 Wn.2d at 50).

15 The record evidence of Moyer’s outward manifestations and the surrounding
16 circumstances is sparse. As noted, it is possible that Moyer received a Cardholder
17 Agreement with each card. It is undisputed at a minimum that he received an Agreement
18 with his February 2018 card, so the Court focuses its analysis on that interaction.

19 Moyer received a release card from Kitsap County Jail on February 8, 2018. The
20 card was credited with \$95.26 at 9:00 p.m., Dkt. 137-3 at 2, and was accompanied by a
21 Cardholder Agreement, most likely tri-folded around the card, *see* Dkt. 137, ¶ 12. As
22 noted, the card’s sticker announced that it had already been activated, and the card stated

1 “[b]y accepting and or using this card, you agree to the Account Agreement,” Dkt. 104-1,
2 while the Cardholder Agreement stated “[i]f you do not agree to these terms, do not use
3 the Card and cancel it by calling Customer Service at 1-877-287-2448. Otherwise, your
4 acceptance and/or use of the Card will be evidence of your agreement to these terms.”
5 Dkt. 137-1 at 2; Dkt. 137-2 at 2.

6 Moyer recalls telling a guard that they should return to issuing checks because he
7 could never get all his money back from the cards. Dkt. 138-1 at 37. The guard told him
8 that if he wanted his money back “that’s what I was going to do to get it back, take that
9 card.” *Id.* There is no evidence of any further conversation. At 10:18 p.m., Moyer
10 withdrew \$80.00 from an ATM and incurred a \$2.95 fee. Dkt. 137-3 at 2; Dkt. 137, ¶ 19.
11 The card balance was entirely depleted by fees by March 11, 2018, Dkt. 137-3 at 2.

12 The Court continues to conclude that Moyer’s use of the card did not constitute
13 assent to contract. Under Washington law, “an offeree has a right to make no reply to
14 offers, and his silence in an action cannot be construed as assent to the offer.”
15 *Roethemeyer v. Milton*, 177 Wash. 650, 658 (1934). “And the courts hold that even
16 though the offer states that silence will be taken as consent, silence on the part of the
17 offeree cannot turn the offer into an agreement, as the offeror cannot prescribe conditions
18 so as to turn silence into acceptance.” *Id.* While Defendants contend that they only
19 consider a contractual relationship formed upon use of the card, the contractual language
20 says otherwise—the card states that “[b]y accepting or using this card, you agree,” and
21 the Agreement instructs the recipient to call to cancel, otherwise acceptance or use of the
22 card is evidence of agreement. Had Moyer taken the card to the nearest telephone and

1 called to cancel his card, he would have already “accepted” it—he would have taken it
2 from the Kitsap County guard into his possession. Unless Moyer left his money behind,
3 on Defendants’ activated card, leaking money to Defendants’ fees, the Court is entirely
4 skeptical that Defendants would not contend he had entered a contractual relationship.

5 Just like in *Brown v. Stored Value Cards*, No. 3:15-cv-01370-MO, 2016 WL
6 755625, at *4 (D. Or. Feb. 25, 2016), Moyer was required to take the card when leaving
7 jail if he wanted a return of his money, and had to work through Defendants’ systems,
8 whether by telephone or online, to get it back. And like the plaintiff in *Regan v. Stored*
9 *Value Cards, Inc.*, 85 F. Supp. 3d 1357, 1264 (N.D. Ga. 2015), *aff’d* 608 F. App’x 895
10 (11th Cir. 2015), Moyer made no application for the card, was not offered a line of credit
11 he could choose to use, and did not use the card for a long period of time or make
12 payments on it (though he did received the Cardholder Agreement), so analogies to cases
13 involving consumer-initiated transactions where the plaintiff failed to read terms are
14 inapposite. Critically, though, like the plaintiff in *Regan*, he “received the Card while he
15 was being discharged *from jail, i.e. from a condition of absence of liberty of choice which*
16 *Defendant reasonably could have anticipated.”* *Id.* (emphasis in original). The district
17 courts in *Brown* and *Regan* found disputes of fact on acceptance. The plaintiff in *Brown*
18 understood she could reclaim her money by creating an online account but did not wish
19 to engage with the unknown defendant bank, 2016 WL 755625, at *3–4. The contractual
20 language in *Regan* stated that use constitutes acceptance, but the plaintiff was not aware
21 of the language, was minimally familiar with ATM cards, and unsuccessfully attempted
22 to retrieve his funds through his bank before using the card. 85 F. Supp. 3d at 1361.

1 While the courts in *Brown* and *Regan* found questions of fact on acceptance
2 requiring a trial on the issue of arbitrability, the Court does not find a question of fact in
3 this case. Here, the cards clearly state that acceptance constitutes agreement, so there was
4 no way for Moyer to leave the jail with the card and work through Defendants’
5 instructions for reclaiming his funds without being bound to individual arbitration.

6 Unlike the plaintiff in *Pope v. EZ Card & Kiosk LLC*, Case No. 15-61046-CIV-
7 MARRA, 2015 WL 5308852, at *2 (S.D. Fla. Sept. 11, 2015), who signed a form telling
8 the jail he preferred a card over a mailed check and was compelled to arbitrate, Moyer
9 signed nothing and had no opportunity to avoid Defendants at the point of departure from
10 jail. And unlike the plaintiff in *Reyes v. JPay, Inc., et al.*, No. CV 18-315-R, 2018 WL
11 10811497 (C.D. Cal. June 26, 2018), who could at least avoid a contractual relationship
12 by refraining from using the card while he attempted to cancel it, Moyer lacked even that
13 option.

14 The Court agrees with Moyer that this case should be governed by the Ninth
15 Circuit’s decision in *Knutson*. In *Knutson*, the plaintiff purchased a Toyota truck which
16 came with a pre-activated trial subscription to Sirius XM radio. 771 F.3d at 563. The
17 customer agreement followed in the mail. *Id.* at 555. The plaintiff did not read the
18 agreement and continued to use the subscription. *Id.* The Ninth Circuit reasoned that the
19 plaintiff had no reason to act to cancel the relationship when “[h]e was, as far as he knew,
20 only in a contractual relationship with Toyota. A reasonable person in [the plaintiff’s]
21 position could not be expected to understand that purchasing a vehicle from Toyota
22

1 | would simultaneously bind him or her to any contract with Sirius XM, let alone one that
2 | contained an arbitration provision without any notice of such terms.” *Id.* at 566.

3 | Moyer, as far as he knew, was simply getting his money back when he left jail. A
4 | reasonable person in Moyer’s position could not be expected to understand that he could
5 | not leave jail with his own money, a right protected by Washington law, without being
6 | bound to a contract with an unknown bank (subject to potentially illegal fees) and
7 | renouncing his right to sue or bring a class action. “Accepting” one’s own money, in the
8 | only form available, cannot be construed as assent to contract. To decide otherwise would
9 | violate the offeree’s right to make no reply to an offer. *Roethemeyer*, 177 Wash. at 658.

10 | The Court thus concludes that Defendants have not met their burden to show by a
11 | preponderance of the evidence that an agreement to arbitrate exists. *Knutson*, 771 F.3d at
12 | 565. Defendants’ motion to compel arbitration is DENIED.

13 | **D. Keefe’s Motion**

14 | As Moyer formed no contractual relationship with Rapid and Cache Valley, there
15 | is no contractual arbitration provision for Keefe to enforce. Therefore, Keefe’s motion to
16 | compel arbitration is DENIED.

1 **III. ORDER**

2 Therefore, it is hereby **ORDERED** that Rapid and Cache Valley Bank’s motion to
3 compel arbitration, Dkt. 136, is **DENIED**, and Keefe’s motion to compel arbitration, Dkt.
4 134, is also **DENIED**.

5 Dated this 2nd day of June, 2021.

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8 BENJAMIN H. SETTLE
United States District Judge

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