

William R. Mettler, Esq.  
3115 S. Price Road  
Chandler, Arizona 85248  
Arizona State Bar No. 003438  
(480) 580-5025  
[wrmettler@wrmettlerlaw.com](mailto:wrmettler@wrmettlerlaw.com)

Attorney for Defendant *Zenith Financial Network, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

**CATHY BOPP**, on behalf of herself and  
Others similarly situated,

Plaintiff,

V.

**ZENITH FINANCIAL NETWORK, INC.**,  
a Florida corporation,

Defendant.

Debtors,

NO. 2:14-CV-00620-NVW

**MOTION TO DISMISS**

Oral Argument Requested

Defendant Zenith Financial Network Incorporated (hereinafter "Defendant" or "Zenith") moves the Court for an order dismissing this matter, pursuant to Section 3 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3-4, and for an order compelling Plaintiff Cathy Bopp ("Bopp" or "Plaintiff") to pursue her claims against the Defendant through arbitration in her individual (not class representative) capacity. This motion is supported by the attached Memorandum of Points and Authorities incorporated in this Motion to Dismiss by this reference as if fully set forth herein.

1 Respectfully submitted this is 11<sup>th</sup> day of September, 2014.

2  
3 

4  
5  
6 \_\_\_\_\_  
7 William Mettler  
8 Attorney for Defendant

9 **CERTIFICATE OF SERVICE**

10 I certify that on September 10, 2014 the foregoing document was filed with the  
11 Court using CM/ECF, which will send notification of such filing to:

12  
13 Russell S. Thompson IV  
14 5235 E. Southern Ave. D106-618  
15 Mesa, AZ 85206  
16 Thompson Consumer Law Group, PLLC  
17 Direct: (602) 388-8898  
18 E-mail: rthompson@consumerlawinfo.com

19 

20 By: \_\_\_\_\_  
21 William Mettler

1 William R. Mettler, Esq.  
2 3115 S. Price Road  
3 Chandler, Arizona 85248  
4 (480) 580-5025  
5 [wrmettler@wrmettlerlaw.com](mailto:wrmettler@wrmettlerlaw.com)

6 Attorney for Defendant *Zenith Financial Network, Inc.*

7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**

9 **CATHY BOPP**, on behalf of herself and  
10 Others similarly situated,

11 Plaintiff,

12 V.

13 **ZENITH FINANCIAL NETWORK, INC.**,  
14 a Florida corporation,

15 Defendant.

16 Debtors,

NO. 2:14-CV-00620-NVW

**MEMORANDUM OF POINTS AND**  
**AUTHORITIES FILED IN**  
**SUPPORT OF DEFENDANT’S**  
**MOTION TO DISMISS**

17 Defendant Zenith Financial Network Incorporated (hereinafter “Defendant” or “Zenith”)  
18 submits this Memorandum of Law in support of its motion pursuant to Section 3 and 4 of  
19 the Federal Arbitration Act (“FAA”), 9 U.S.C. § 3-4, to dismiss these proceedings and an order  
20 compelling Plaintiff Cathy Bopp (“Bopp” or “Plaintiff”) to pursue her claims against the  
21 Defendant through arbitration in her individual (not class representative) capacity.  
22

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 ***PRELIMINARY STATEMENT***

25 In her written loan agreement with the original creditor, Western Sky Financial, LLC  
26 (“Western Sky”), dated and signed March 2, 2011 (“Agreement” or “Western Sky  
27  
28

1 Obligation”), Ms. Bopp agreed and bound herself to individually arbitrate the claims, which  
2 are the subject of this Complaint. Ms. Bopp also agreed and bound herself not to bring, join or  
3 participate in any putative class actions with respect to these claims. A copy of the original  
4 Agreement is attached to the Ziwiac Declaration as *Exhibit “B.”* Western Sky is the original  
5 creditor of the Agreement. National Credit Adjusters (“NCA”) purchased the defaulted loan  
6 from Western Sky and placed it with Zenith to collect. NCA is “the holder” of the Note, and  
7 Zenith, as NCA’s servicer and collection representatives and agents of NCA, is included within  
8 the definition of the term “the holder.” Therefore, as the holder of the Note, Defendant is entitled  
9 to invoke the arbitration provisions. Defendant formally requested arbitration by written  
10 demand, mailed certified return receipt requested on July 30, 2014 to Plaintiff as required by the  
11 Agreement’s arbitration section. A copy of the demand for arbitration is attached to the Mettler  
12 Declaration as *Exhibit “C.”* Plaintiff responded on August 6, 2014 refusing to agree to arbitrate.  
13 A copy plaintiff’s response to the demand to arbitrate is attached to the Mettler Declaration as  
14 *Exhibit “D.”*

15  
16  
17  
18 Since the FAA mandates the federal courts enforce arbitration agreements such as the one  
19 Ms. Bopp signed and agreed to, defendant respectfully submits that this Court should grant  
20 defendant’s motion to dismiss these proceedings and issue an order compelling Plaintiff to  
21 pursue her individual claims against the defendant through arbitration in her individual (not class  
22 representative) capacity. Nothing in the Agreement deprives Ms. Bopp of her rights and  
23 remedies to pursue her individual claim against the Defendant in binding arbitration.  
24

### 25 **FACTUAL BACKGROUND**

26 On March 2, 2011, Ms. Bopp incurred a financial obligation to Western Sky. In the  
27 signed Agreement with Western Sky, Ms. Bopp agreed as follows:  
28

1                   **WAIVER OF JURY TRIAL AND ARBITRATION**  
2                   **PLEASE READ THIS PROVISION OF THE**  
3                   **AGREEMENT CAREFULLY.** Unless you exercise your  
4                   right to opt-out of arbitration in the manner described below,  
5                   any dispute you have with Western Sky or anyone else under  
6                   this loan agreement will be resolved by binding arbitration.  
7                   Arbitration replaces the right to go to court, including the  
8                   right to have a jury, to engage in discovery (except as may be  
                    provided in the arbitration rules), and to participate in a class  
                    action or similar proceeding...Any Arbitration will be  
                    limited to the dispute between yourself and the holder of the  
                    Note and will not be part of a class-wide or consolidated  
                    Arbitration proceeding.

9                   ***Exhibit "B."***

10  
11                   On or about April 1, 2013, the original creditor of the Western Sky Obligation,  
12                   either directly or through intermediate transactions, placed the debt and its rights and  
13                   obligations with Zenith.

14  
15                   Despite agreeing to individually arbitrate any claims she may have against the  
16                   Defendant, on March 26, 2014, Bopp filed a class action Complaint in this Court alleging  
17                   that the Defendant's collection practices violated the Fair Debt Collection Practices Act, 15  
18                   U.S.C., §§ 1692, *et seq.* ("FDCPA"), and the Telephone Consumer Protection Act 47 U.S.C  
19                   §§ 227 *et seq.* ("TCPA"). A copy of Plaintiff's Complaint is attached to the Mettler Declaration  
20                   as ***Exhibit "A."***

21  
22                   The Complaint alleges that within one year immediately preceding the filing of  
23                   this Complaint, the defendant's collection practices violated the FDCPA and TCPA.

24  
25                   **LEGAL ARGUMENT**

26  
27                   Defendant moves pursuant to Section 3 and 4 of the FAA, 9 U.S.C. § 3-4, to  
28                   dismiss these proceedings and an order compelling Plaintiff to pursue her individual claims

1 against the Defendants through arbitration.

2 "With limited exceptions, the Federal Arbitration Act (FAA) governs the  
3 enforceability of arbitration agreements in contracts involving interstate commerce." Kramer  
4 v. Toyota Motor Corp., 705 F.3d 1122, 1126 (9<sup>th</sup> Cir., 2013). "The FAA states that [a] written  
5 provision in any...contract evidencing a transaction involving commerce to settle by arbitration  
6 a controversy thereafter arising out of such contract...shall be valid, irrevocable, and  
7 enforceable..." (internal quotation marks and citation omitted). Id. "The FAA reflects both a  
8 liberal federal policy favoring arbitration and the fundamental principal that arbitration is a  
9 matter of contract." (internal quotation marks and citations omitted.) Id.

10  
11  
12 **I. Ms. Bopp Agreed to Arbitrate Her Claims**

13 In determining whether an agreement to arbitrate exists, courts use general  
14 principles of state contract law. See, e.g., Goldman, Sachs & Co. v City of Reno (9<sup>th</sup> Cir.  
15 2014). ("When determining whether parties have agreed to submit to arbitration, 'we apply  
16 general state-law principles of contract interpretation, while giving due regard to the  
17 federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration  
18 in favor of arbitration.>"). "Whether the parties agreed to arbitrate is determined by state  
19 contract law." citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct.  
20 1920, 131 L. Ed. 2d 985 (1995)).

21  
22  
23 Even granting all inferences in Ms. Bopp's favor, it is clear that the Court should  
24 find the existence of an agreement to arbitrate. The Agreement states:

25  
26 **Agreement to Arbitrate.** You agree that any Dispute,  
27 except as provided below, will be resolved by Arbitration,  
28 which shall be conducted by the Cheyenne River Sioux Trial  
Nation by an authorized representative in accordance with its  
consumer dispute rules and the terms of this Agreement.

1  
2 **Exhibit “B.”**

3 Included in the Agreement was language that allowed Ms. Bopp to opt-out of the  
4 arbitration clause. The Agreement states, in part:

5  
6 **RIGHT TO OPT OUT.** If you do not wish your account to  
7 be subject to this Arbitration Agreement, you must advise us  
8 in writing at P.O. Box 370, Timber Lake, South Dakota,  
9 57565, or via e-mail at info@westernsky.com. You must  
10 clearly print or type your name and account number and state  
11 that you reject Arbitration. You must give written notice; it  
12 is not sufficient to telephone us. We must receive your letter  
13 or e-mail within sixty (60) days after the date your loan funds  
14 or your rejection of Arbitration will not be effective.

15 **Id.**

16 Ms. Bopp was given multiple options from which she could choose to remove the obligations  
17 to arbitrate, one of which was simply sending an e-mail to the company stating that she rejects  
18 arbitration. Ms. Bopp chose not to contact Western Sky of her intention to reject arbitration and  
19 should therefore be held to the terms of the Agreement that she signed and bound herself to.

20 **II. Zenith Financial Network Incorporated Has an Interest in the Agreement**

21 Even though the Defendant was not a party to the original Agreement, according to  
22 the agreed upon terms of the Bopp Obligation, the Defendant is entitled to the benefit of the  
23 arbitration provisions. The agreement states, in relevant part:

24 **Assignment.** We may assign or transfer this Loan  
25 Agreement or any of our rights under it at any time to any  
26 party.

27 **Other Provisions.** This Arbitration provision will survive:  
28 (i) termination or changes in this Agreement, the Account, or  
the relationship between us concerning the Account; (ii) the  
bankruptcy of any party; (iii) any transfer, sale or assignment

1 of my Note, or any amounts owed on my account, to any  
2 other person or entity. This Arbitration provision benefits  
3 and is binding upon us, our successors *and assigns, and*  
4 *related third parties.*

(emphasis added)

5 This language is broad enough to encompass Defendant, as a servicer and  
6 collection agent of the assignee of the Bopp Obligation. The Agreement states that  
7 Western Sky may transfer, sell or assign the Agreement, and any amounts owed on the  
8 Obligation. The Agreement specifically states the Arbitration provision benefits are  
9 binding upon Western Sky, Plaintiff, and any assigns and related third parties. NCA  
10 purchased the subject debt and placed it for collections with Zenith. The Agreement  
11 specifically states that the arbitration provision applies to “any controversy or claim  
12 between you and Western Sky or **the holder of the Note.**” (emphasis added) The  
13 Section defining arbitration continues by defining “the holder” as “the then-current  
14 holder’s employees, officers, directors, attorneys, affiliated companies, predecessors, and  
15 assigns, **as well as any marketing, servicing, and collection representatives and**  
16 **agents.**” (emphasis added) Therefore, Zenith, as NCA’s servicer and collection agent,  
17 falls within the definition of “the holder of the Note” and clearly is entitled to arbitration.  
18  
19  
20

21 **III. The Scope of the Agreement Covers Ms. Bopp's FDCPA and TCPA Claims.**

22 After determining that an agreement to arbitrate does, in fact, exist, the Court  
23 turns to the question of whether the scope of that agreement covers the claims at issue  
24 here. The United States Supreme Court instructs that “any doubts concerning the scope of  
25 arbitrable issues should be resolved in favor of arbitration.” Mitsubishi Motors Corp. v.  
26 Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).  
27

28 Plaintiff’s FDCPA and TCPA claims are within the scope of the agreement to



1 arbitrate. In the case at bar, the arbitration provisions specify that:

2 any dispute you have with Western Sky or anyone else under  
3 this loan agreement will be resolved by binding arbitration....  
4 Any Arbitration will be limited to the dispute between  
5 yourself and the holder of the Note and will not be part of a  
6 class-wide or consolidated Arbitration proceeding.

7 ***Exhibit "B."***

8 The Agreement further provides that, "A "Dispute" is **any controversy or claim**  
9 between you and Western Sky or the holder of the Note." As shown above, Zenith falls within  
10 the definition of "the holder" and so any controversy or claim, including the one before this  
11 Honorable Court, between the borrower (Plaintiff) and Zenith must be submitted to arbitration  
12 for resolution. The entitlement to arbitration is plain and clear, and beyond the minimal  
13 requirement of a presumptive right.

14 **IV. Ms. Bopp Agreed Not to Bring, Join or Participate in Class Actions,**  
15 **Therefore, Ms. Bopp May Only Arbitrate her Individual Claims.**

16 In relevant part, the Agreement states clearly in all capitals:

17 **WAIVER OF RIGHTS. YOU HEREBY AGREE**  
18 **THAT YOU ARE WAIVING YOUR RIGHT TO A**  
19 **JURY TRIAL, TO HAVE A COURT DECIDE YOUR**  
20 **DISPUTE, TO PARTICIPATE IN A CLASS ACTION**  
21 **LAWSUIT, AND TO CERTAIN DISCOVERY AND**  
22 **OTHER PROCEDURES THAT ARE AVAILABLE IN**  
23 **A LAWSUIT.**

24 Thus, according to the terms of the Agreement, Ms. Bopp may only arbitrate her  
25 individual claims. She cannot act as a class representative or bring a putative class action.

26 Class action waivers are enforceable. See AT&T Mobility LLC v. Concepcion, 131  
27 S. Ct. 1740 (U.S. 2011) (holding the overarching purpose of the FAA is to ensure the  
28 enforcement of arbitration agreements according to their terms so as to facilitate streamlined  
proceedings. Requiring the availability of class-wide arbitration interferes with fundamental

1 attributes of arbitration and thus creates a scheme inconsistent with the FAA).

2 The principal purpose of the FAA is to ensure that private arbitration agreements  
3 are enforced according to their terms. This purpose is readily apparent from the FAA's text.  
4 Section 2 of the FAA makes arbitration agreements valid, irrevocable, and enforceable as  
5 written. Section 3 requires courts to stay litigation of arbitral claims pending arbitration of those  
6 claims in accordance with the terms of the agreement. Section 4 requires courts to compel  
7 arbitration in accordance with the terms of the agreement upon the motion of either party to the  
8 agreement.  
9

10 In light of these provisions, parties may agree to limit the issues subject to  
11 arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate  
12 its disputes. Id. Here, Bopp's statutory rights under the FDCPA and TCPA could effectively  
13 be vindicated through individual arbitration. The Agreement does preclude any of Ms. Bopp's  
14 individual rights under the FDCPA or TCPA. Thus, Bopp's agreement to individually arbitrate  
15 her claims against the Defendant is enforceable. See Kilgore v. Keybank, Nat' Ass'n, 673 F. 3d  
16 947, 957, (9<sup>th</sup> Cir., 2012) citing Concepcion at 1788-89, 1750-51 ("Requiring the availability  
17 of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a  
18 scheme inconsistent with the FAA. Just as the FAA guarantees that contracting parties may  
19 agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to  
20 limit *with whom* a party will arbitrate, so too does it allow them to agree to limit *in what capacity*  
21 they arbitrate.") (internal citation and quotation marks omitted).  
22  
23  
24

## 25 CONCLUSION

26 WHEREFORE, it is respectfully requested that the Defendant's motion to dismiss  
27 these proceedings and an order compelling Plaintiff to pursue her claims against the Defendant  
28 through individual arbitration be granted, together with such other and further relief as this Court

deems just and proper.

Respectfully submitted this is 11<sup>th</sup> day of September, 2014.



\_\_\_\_\_  
William Mettler  
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I certify that on September 11, 2014 the foregoing document was filed with the Court using CM/ECF, which will send notification of such filing to:

Russell S. Thompson IV  
5235 E. Southern Ave. D106-618  
Mesa, AZ 85206  
Thompson Consumer Law Group, PLLC  
Direct: (602) 388-8898  
E-mail: rthompson@consumerlawinfo.com



By: \_\_\_\_\_  
William Mettler

William R. Mettler, Esq.  
3115 S. Price Road  
Chandler, Arizona 85248  
Arizona State Bar No. 003438  
(480) 580-5025  
[wrmettler@wrmettlerlaw.com](mailto:wrmettler@wrmettlerlaw.com)

Attorney for Defendant *Zenith Financial Network, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

**CATHY BOPP**, on behalf of herself and  
Others similarly situated,  
  
Plaintiff,  
  
V.  
  
**ZENITH FINANCIAL NETWORK, INC.**,  
a Florida corporation,  
  
Defendant.  
  
Debtors,

NO. 2:14-CV-00620-NVW

**WILLIAM R. METTLER  
DECLARATION**

WILLIAM METTLER declares, pursuant to the provisions of 28 U.S.C. § 1746:

1. I am an attorney admitted to practice in the State of Arizona and in this Court. I am also the counsel for Zenith Financial Network Incorporated (“Zenith”). I declare upon information and belief the following:

2. I respectfully submit this declaration in support of the Defendant’s motion pursuant to Section 3 and 4 of the Federal Arbitration Act, 9 U.S.C. § 3-4, to dismiss these proceedings and an order compelling Plaintiff to pursue her claims against the Defendant through arbitration in Plaintiff’s individual capacity.

3. Annexed to the Affidavit of Dave Ziwiiec as Exhibit “B” is a true and accurate

1 copy of Ms. Bopp's written loan agreement with the original creditor, Western Sky Financial,  
2 LLC, dated March 2, 2011. However, pursuant to Federal Rule of Civil Procedure 5.2  
3 governing privacy protection for filings made with the Court, Ms. Bopp's social security  
4 number, date of birth and financial-account numbers have been redacted from the Agreement.  
5 Defendant will make unredacted copies of the Agreement available to the Court and Plaintiff's  
6 counsel upon request.  
7

8 4. Annexed hereto as Exhibit "C" is a true and accurate copy of Defendant's  
9 request to Plaintiff for arbitration.

10 5. Annexed hereto as Exhibit "D" is a true and accurate copy of Plaintiff's  
11 response to Defendant's demand for arbitration.

12 6. Upon information and belief, the fourth page of Exhibit "B" requires the  
13 borrower to acknowledge the borrower read and understood the Arbitration Section of the Note  
14 and to agree to be bound to the terms and conditions. Upon information and belief, the fourth  
15 page of Exhibit "B" requires the borrower to acknowledge they have read all of the terms and  
16 conditions of the Note and Disclosure Statement and agree to be bound thereto. It continues,  
17 the execution of the note "shall have the same legal force and effect as a paper contract." Upon  
18 information and belief, the fifth page of Exhibit "B" requires the borrower to acknowledge the  
19 payment collection procedure of the lender.  
20  
21

22 7. Upon information and belief, the Western Sky Agreement is in original  
23 format an electronic document fully compliant with the Electronic Signatures in Global and  
24 National Commerce Act ("E-SIGN) and the original Agreement is retained with Western  
25 Sky.  
26

27 WHEREFORE, it is respectfully requested that (1) the Defendant's motion to dismiss  
28

1 these proceedings and an order compelling Plaintiff to pursue her claims against the  
2 Defendants through individual arbitration be granted; and (2) for such other and further relief  
3 as this Court deems just and proper.

4 Respectfully submitted this is 11<sup>th</sup> day of September, 2014.

5  
6 

7  
8 \_\_\_\_\_  
9 William Mettler  
10 Attorney for Defendant

11 **CERTIFICATE OF SERVICE**

12 I certify that on September 11, 2014 the foregoing document was filed with the  
13 Court using CM/ECF, which will send notification of such filing to:

14  
15 Russell S. Thompson IV  
16 5235 E. Southern Ave. D106-618  
17 Mesa, AZ 85206  
18 Thompson Consumer Law Group, PLLC  
19 Direct: (602) 388-8898  
20 E-mail: rthompson@consumerlawinfo.com

21 

22 By: \_\_\_\_\_  
23 William Mettler

William R. Mettler, Esq.  
3115 S. Price Road  
Chandler, Arizona 85248  
(480) 580-5025  
[wrmettler@wrmettlerlaw.com](mailto:wrmettler@wrmettlerlaw.com)

Attorney for Defendant *Zenith Financial Network, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

**CATHY BOPP**, on behalf of herself and  
Others similarly situated,

Plaintiff,

V.

**ZENITH FINANCIAL NETWORK, INC.**,  
a Florida corporation,

Defendant.

Debtors,

NO. 2:14-CV-00620-NVW

**AFFIDAVIT OF DAVID SIWIEC**

**AFFIDAVIT OF DAVID SIWIEC**

I, DAVID SIWIEC., hereby declare under the penalties of perjury, upon information and belief, the following:

1. I am a citizen of the United States of America residing in the State of Florida, and I am over the age of eighteen (18).
2. I have personal knowledge of the facts contained within this affidavit derived from my own witnessing and or records prepared and maintained in the ordinary course of business. If requested to do so, I would testify in accordance with the facts contained within this affidavit.
3. I am the President of Zenith Financial Network, Incorporated (hereinafter "Zenith").
4. On March 2, 2011, Ms. Bopp applied for and received a loan from Western Sky Financial pursuant to an agreement annexed hereto as Exhibit B.

5. The attached Agreement in Exhibit B is a true and accurate copy of the original of said Agreement, which was produced and maintained in the ordinary course of business.
6. As part of the application process, Ms. Bopp checked several boxes, all indicating, in part, she had read and understood the terms and conditions of the Agreement.
7. Ms. Bopp was also required to provide a voided check from her bank and a copy of her driver's license before the application was processed.
8. Ms. Bopp defaulted on the Western Sky Financial loan account, number 5526636, which was then purchased by and assigned to National Credit Adjusters ("NCA").
9. Sometime after that, NCA placed Ms. Bopp's, with Zenith for servicing and collection, pursuant to an agreement between NCA and Zenith for such services.
10. This Affidavit is made in support of Defendant's Motion to Dismiss and Compel Arbitration.

David Siwiec  
 DAVID SIWIEC

9-5-14  
 DATE

STATE OF )  
 ) ss.:  
 COUNTY OF )

On the 5 day of September, in the year 2014, before me, the undersigned, a Notary Public in and for said state, personally appeared DAVID SIWIEC., personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

J. Sharifi  
 NOTARY PUBLIC

