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6
7 SAMUEL VICKERY and RAE FULLER,
8 individually, on behalf of all others similarly
situated, and on behalf of the general public,

9 Plaintiffs,

10 v.

11 EMPOWER FINANCE, INC. d/b/a
12 EMPOWER,

13 Defendant.

14 Case No. 25-cv-03675-JSC

15 **ORDER RE: MOTION TO COMPEL
16 ARBITRATION AND STAY
17 LITIGATION**

18 Re: Dkt. No. 26

19 Plaintiffs' putative class action alleges Empower's short-term cash advance product
20 violates federal and Georgia lending statutes. (Dkt. No. 22.)¹ Now pending before the Court is
21 Empower's motion to compel arbitration and stay litigation. (Dkt. No. 26.) Having carefully
22 considered the parties' submissions, and with the benefit of oral argument on October 2, 2025, the
23 Court DENIES Empower's motion to compel arbitration. Based on the undisputed record
24 Empower is a creditor extending consumer credit to covered borrowers under the Military Lending
25 Act ("MLA"). So, the arbitration agreement between Empower and Plaintiffs is unenforceable.

26 **BACKGROUND**

27 **I. RELEVANT FACTS**

28 Empower, a financial technology company, offers an "earned wage access" program called
Cash Advance. (Dkt. No. 22 ¶ 2; Dkt. No. 26-3 ¶ 3.) Through Empower Cash Advance,
Empower offers workers funds approximating all or a portion of their unpaid wages before their

¹ Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 payday, and workers give Empower permission to collect repayment of the advance plus any fees
2 on the workers' next payday. (Dkt. No. 22 ¶¶ 51-53.) In its website, app, and marketing,
3 Empower advertises its "instant" cash advances. (*Id.* ¶ 61.)

4 To receive an advance, a user must register for an Empower account and then link their
5 bank account so Empower can decide whether the user is creditworthy and how large an advance
6 to extend. (*Id.* ¶ 86; Dkt. No. 26-8 at 5.) Users also "give Empower permission to initiate a
7 withdrawal" from their bank accounts or charge their debit card "for the amount of the Empower
8 Advance plus any applicable tip amount or delivery fee" when users receive their next paycheck.
9 (Dkt. No. 26-8 at 5.) Empower then advances funds to users and schedules users' repayment for
10 their following payday. (Dkt. No. 22 ¶ 87.) If users' bank accounts have sufficient funds,
11 Empower may withdraw the full amount owed; otherwise, Empower may "withdraw small
12 amounts . . . until the balance is repaid in full." (Dkt. No. 26-8 at 5.)

13 Empower's Terms of Service specify Cash Advances are offered "on a non-recourse
14 basis," and users have "no unconditional obligation to repay." (Dkt. No. 26-8 at 5.) Empower
15 also disclaims any "contractual or legal claim" and promises it will "not engage in debt collection
16 activities, place the amount advanced with or sell to a third party, or make any reports to credit
17 reporting agencies" regarding the Advance. (*Id.*) Users can contact Empower customer support to
18 "withdraw their authorization to pay back a Cash Advance through their linked bank account."
19 (Dkt. No. 26-2 ¶ 13.) Empower attests "of users who obtained a cash advance in the first quarter
20 of 2024, 33% had an Empower advance in 2024 where they either revoked their bank
21 authorization or did not pay Empower the amount of at least one such advance within 180 days."
22 (Dkt. No. 34-1 ¶ 3.) However, Empower "reserve[s] the right to deny [] access to Empower
23 Advance if [users] . . . do not repay the full balance of an Empower Advance." (Dkt. No. 26-8 at
24 5.) Ultimately, according to Empower's CEO, "repayment rates are in the high 90%'s." (Dkt. No.
25 22 ¶ 105.)

26 Empower charges two types of fees. First, following a 14-day free trial, users must pay a
27 Subscription Fee of \$8 per month to use Empower's mobile application. (Dkt. No. 26-3 ¶ 6.) The
28 mobile application provides access to Cash Advance alongside other tools "to help [users] save

1 money, monitor their budgets, notify users of updates like missed payments and bank fees, and
2 track their credit scores.” (*Id.* ¶¶ 3, 5.) Some users pay the Subscription Fee without ever seeking
3 a cash advance. (*Id.* ¶ 7.) Second, Cash Advance users can choose to, rather than receive an
4 advance in about one business day, pay an Instant Delivery Fee to receive the advance in minutes.
5 (Dkt. No. 26-8 at 5; Dkt. No. 22 ¶ 56.) The amount of the Instant Delivery Fee increases with the
6 size of the loan. (Dkt. No. 26-8 at 5; Dkt. No. 22 ¶¶ 57-58.)

7 **II. PROCEDURAL HISTORY**

8 In March 2025, U.S. Navy Petty Officer Samuel Vickery, a California resident, filed a
9 putative class action in the California Superior Court for the County of San Francisco and alleged
10 Empower charges fees that violate the MLA, 10 U.S.C. § 987, et seq., and the Truth in Lending
11 Act (“TILA”), 15 U.S.C. § 1601, et seq. (Dkt. No. 1-1; Dkt. No. 22 ¶ 13.) Empower removed the
12 case to this Court and moved to compel arbitration. (Dkt. Nos. 1, 18.)

13 Plaintiffs then filed an amended complaint, which added U.S. Army Sergeant Rae Fuller, a
14 Georgia resident, as a named plaintiff and alleged additional claims under the Georgia Payday
15 Lending Act (“GPLA”), O.C.G.A. § 16-17-2, et seq. (Dkt. No. 22 at 2, ¶ 14.) Together, Plaintiffs
16 seek to represent three classes:

17 **MLA Class:** All [United States active-duty service members
18 (“Covered Members”)] and dependents of Covered Members who
19 entered into an agreement with Empower to use its “Empower Cash
20 Advance” (or substantially similar) product, in which Empower was
21 paid a finance charge (including, without limitation, an instant
22 transfer fee or subscription charge).

23 **TILA Class:** All Covered Members, dependents of Covered
24 Members, and Georgia residents that entered into an agreement with
25 Empower to use its “Empower Cash Advance” (or substantially
26 similar) product, in which Empower was paid a finance charge
27 (including, without limitation, an instant transfer fee or subscription
28 charge).

29 **Georgia Class:** All Georgia residents that entered into an agreement
30 with Empower to use its “Empower Cash Advance” (or substantially
31 similar) product, in which Empower was paid a finance charge
32 (including, without limitation, an instant transfer fee or subscription
33 charge).

34 (*Id.* ¶ 134.) Given Plaintiffs’ amended complaint, the Court dismissed Empower’s motion to
35 compel arbitration without prejudice. (Dkt. No. 25.) Empower moved again to compel
36 arbitration. (Dkt. No. 26.)

1 **III. RELEVANT FACTS RE: AGREEMENT**

2 To access Empower's Cash Advance product, users must register on Empower's mobile
3 application. (Dkt. No. 26-2 ¶¶ 3, 5.) The application first prompts users to enter their phone
4 number and asks them to enter a one-time six-digit code delivered by text message. (*Id.* ¶¶ 5-6.)
5 Before August 2023, users were shown the following message directly above where they entered
6 the six-digit code: "You agree to our Privacy Policy, Terms, E-Sign & Subscription Agreement."
7 (*Id.* ¶ 6.) Each underlined phrase included a hyperlink to Empower policies. (*Id.*) Once users
8 entered the code, they could register with Empower. (*Id.* ¶¶ 7-9.)

9 Empower's records show Sergeant Fuller registered on Empower's mobile application on
10 June 4, 2021, and Petty Officer Vickery registered on June 5, 2022. (Dkt. No. 26-3 ¶¶ 14-15.) On
11 June 4, 2021, the Terms linked to Empower's Terms of Service, which included: "You agree that
12 any and all disputes or claims that have arisen or may arise between you and Empower . . . will be
13 resolved exclusively through final and binding arbitration, rather than a court." (*Id.* ¶¶ 8-9; Dkt.
14 No. 26-4 at 13.) And on June 5, 2022, the Terms linked to revised Terms of Service including the
15 same language. (Dkt. No. 26-3 ¶¶ 9-10; Dkt. No. 26-5 at 8.)

16 Empower last updated its Terms of Service on February 6, 2025. (Dkt. No. 26-3 ¶ 12.)
17 The current Terms of Service state: "You agree that any and all disputes or claims that have arisen
18 or may arise between you and us . . . will be resolved exclusively through final and binding
19 arbitration, rather than a court." (Dkt. No. 26-8 at 8.) On February 19, 2025, Empower sent an
20 email to its users, including named Plaintiffs, which stated:

21 We have also made updates to our **Terms of Service, including an**
22 **updated arbitration agreement**, such that we can provide you with
23 one consolidated Terms of Service that govern your interactions with
24 all Empower and Petal branded products and services.

25 **By continuing to use our products and services you agree to these**
26 **updated terms.**

27 (Dkt. No. 26-3 ¶ 13; Dkt. No. 26-9 at 2.) Empower's records show Sergeant Fuller received a
28 Cash Advance on May 24, 2025, and Petty Officer Vickery received Cash Advances on April 30,
29 2025; May 13, 2025; May 30, 2025; June 14, 2025; June 28, 2025; July 3, 2025; July 12, 2025;
30 and July 26, 2025. (Dkt. No. 26-3 ¶¶ 15-16.)

DISCUSSION

The Federal Arbitration Act (“FAA”) governs arbitration agreements “evidencing a transaction involving commerce.” 9 U.S.C. § 2. Such agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* In resolving a motion to compel arbitration under the FAA, “a court’s inquiry is limited to two gateway issues: (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 999 (9th Cir. 2021) (quotation marks and citation omitted). “If both conditions are met, the FAA requires the court to enforce the arbitration agreement in accordance with its terms.” *Id.* (cleaned up).

The party seeking to compel arbitration “bears the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence.” *Johnson v. Walmart Inc.*, 57 F.4th 677, 681 (9th Cir. 2023). Empower attests, and Plaintiffs do not dispute, Plaintiffs agreed to binding arbitration provisions in Empower’s Terms of Service when registering for Empower accounts and by continuing to obtain Cash Advances after Empower’s February 19, 2025 email. Plaintiffs also do not dispute the Terms of Service require arbitration of “any and all disputes or claims,” and thus encompass Plaintiffs’ MLA, TILA, and GPLA claims. (Dkt. No. 26-4 at 13; Dkt. No. 26-5 at 8; Dkt. No. 26-8 at 8.)

Instead, Plaintiffs argue the MLA prohibits enforcement of any arbitration agreement.

I. ARBITRATION OF MLA CLAIMS

“Although the FAA imposes ‘a liberal policy favoring arbitration agreements’ that ‘requires courts to enforce agreements to arbitrate according to their terms,’ its mandate can be ‘overridden by a contrary congressional command.’” *Laver v. Credit Suisse Secs. (USA), LLC*, 976 F.3d 841, 845 (9th Cir. 2020) (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)). “The burden rests on the party challenging arbitration ‘to show that Congress intended to preclude a waiver of a judicial forum’ for the claims at issue.” *Ziober v. BLB Resources, Inc.*, 839 F.3d 814, 817 (9th Cir. 2016) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). “Such congressional intent ‘will be discoverable in the text of the [statute], its legislative

1 history, or an inherent conflict between arbitration and the [statute's] underlying purposes.”” *Id.*
2 (quoting *Gilmer*, 500 U.S. at 26).

3 The MLA protects members of the armed forces on active duty or active Guard and
4 Reserve Duty (“Covered Members”) and their dependents from certain lending practices. *See 10*
5 U.S.C. §§ 987(a), (i)(1)-(2). To do so, the MLA imposes restrictions and obligations on
6 “creditor[s] who extend[] consumer credit to a covered member of the armed forces or a
7 dependent of such a member.” *Id.* § 987(a). Under the MLA, “[i]t shall be unlawful for any
8 creditor to extend consumer credit to a covered member with respect to which . . . the creditor
9 requires the borrower to submit to arbitration.” *Id.* § 987(e)(3); *see also id.* § 987(f)(4) (“[N]o
10 agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable
11 against any covered member or dependent of such a member, or any person who was a covered
12 member or dependent of that member when the agreement was made.”).

13 Plaintiffs argue, and Empower does not dispute, the MLA overrides the FAA by deeming
14 “unlawful” creditors’ extensions of consumer credit to covered members which “require[] the
15 borrower to submit to arbitration.” *Id.* § 987(e)(3); *see also Epic Sys. Corp. v. Lewis*, 584 U.S.
16 497, 514 (2018) (“Congress has [] shown that it knows how to override the Arbitration Act when
17 it wishes—by explaining, for example, . . . that requiring a party to arbitrate is ‘unlawful’ in other
18 circumstances.” (quoting 10 U.S.C. § 987(e)(3))).

19 Instead, Empower argues the MLA does not prohibit arbitration because Empower is not a
20 “creditor [] extend[ing] consumer credit.” 10 U.S.C. § 987(e)(3). The MLA directs the U.S.
21 Department of Defense (“DOD”) to define “creditor” and “consumer credit.” *Id.* §§ 987(h)(2)(D);
22 987(i)(5)-(6). Under DOD regulations, a “creditor” is a person “[e]ngaged in the business of
23 extending consumer credit.” 32 C.F.R. § 232.3(i)(1). Consumer credit, in turn, is “credit offered
24 or extended to a covered borrower primarily for personal, family, or household purposes, and that
25 is: (i) Subject to a finance charge; or (ii) Payable by a written agreement in more than four
26 installments.” *Id.* § 232.3(f)(1). And “credit” is “the right granted to a consumer by a creditor to
27 defer payment of debt or to incur debt and defer its payment.” *Id.* § 232.3(h). DOD further
28 defines these terms by reference to TILA and its implementing Regulation Z. *See id.* § 232.2(i)(3)

1 (noting creditor must “meet[] the transaction standard for a ‘creditor’ under Regulation Z”);
2 Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 Fed.
3 Reg. 43560, 43560 (July 22, 2015) (“[C]onsumer credit covered under the MLA [will] be defined
4 consistently with credit that for decades has been subject to the disclosure requirements of the
5 Truth in Lending Act (TILA), codified in Regulation Z.”).

6 At oral argument, the parties agreed the facts relevant to whether Empower is a “creditor []
7 extend[ing] consumer credit” were not in dispute, so the Court makes the determination as a
8 matter of law. *See* 10 U.S.C. § 987(e)(3).

9 **A. Whether Empower Cash Advance Extends “Credit”**

10 Empower first argues Cash Advance does not extend credit because users do not have any
11 legal obligation to repay advances. The Court disagrees.

12 To receive a cash advance, users must connect their bank accounts to their Empower
13 accounts and “give Empower permission to initiate a withdrawal” from their bank accounts or
14 charge their debit card “for the amount of the Empower Advance plus any applicable tip amount
15 or delivery fee” when users receive their next paycheck. (Dkt. No. 26-8 at 5.) Empower then
16 advances funds to users and schedules withdrawals for the following payday. (Dkt. No. 22 ¶ 87.)
17 By providing users funds and imposing a procedure to collect those funds at a later date,
18 Empower’s Cash Advances provide consumers the right to “incur debt and defer its payment” to
19 Empower and therefore extend “credit.” *See* 32 C.F.R. § 232.3(h).

20 Furthermore, Empower Cash Advances fall within Regulation Z’s scope of “credit,” which
21 aligns with the MLA’s definition. *See* Limitations on Terms of Consumer Credit Extended to
22 Service Members and Dependents, 80 Fed. Reg. at 43560. Regulation Z clarifies in its definition
23 of credit:

24 ***Payday loans; deferred presentment.*** Credit includes a transaction in
25 which a cash advance is made to a consumer in exchange for the
26 consumer’s personal check, or in exchange for the consumer’s
27 authorization to debit the consumer’s deposit account, and where the
28 parties agree either that the check will not be cashed or deposited, or
that the consumer’s deposit account will not be debited, until a
designated future date. This type of transaction is often referred to as
a “payday loan” or “payday advance” or “deferred-presentment loan.”

12 C.F.R. pt. 1026, Supp. I, Paragraph 2(a)(14) Credit, ¶ 2. Empower Cash Advances are “cash advance[s] [] made to a consumer . . . in exchange for the consumer’s authorization to debit the consumer’s deposit account . . . [at] a designated future date.” *Id.* Because Congress directed DOD and the Federal Reserve Board “to fill up the details of [the] statutory scheme[s]” of the MLA and the TILA, respectively, the agencies’ reasoned interpretations, within the constitutional bounds of its delegated authority, are entitled to deference. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024) (cleaned up); *see also Household Credit Servs. v. Pfenning*, 541 U.S. 232, 244-45 (2004) (“Congress has authorized the [Federal Reserve] Board to make ‘such classifications, differentiations, or other provisions . . . as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA].’” (quoting 15 U.S.C. § 1604(a))).

Empower nevertheless contends Cash Advances do not provide “credit” because Empower describes its advances as “non-recourse” and disavows users’ legal obligation to repay them. (Dkt. No. 26-8 at 5.) Empower primarily relies on Black’s Law Dictionary, which defines “debt” as “Liability on a claim; a specific sum of money due by agreement or otherwise.” *Black’s Law Dictionary*, “Debt” (12th ed. 2024). But neither Black’s Law Dictionary nor the MLA and its implementing regulations require a consumer receiving money and entering into debt to have a *legal* obligation to repay that debt. *See also Olson v. Unison Agreement Corp.*, No. 23-2835, 2025 WL 2254522, at *3 (9th Cir. Aug. 7, 2025) (finding statute’s definition of “consumer credit obligation” did not require legal recourse). Instead, users incur debt because, upon receiving a Cash Advance, “a specific sum of money [becomes] due by agreement” with Empower, which Empower will automatically collect.

Empower’s argument users have no obligation to repay Empower because they can disconnect—and have disconnected—their bank accounts prior to Empower’s withdrawals is unavailing. First, users who later disconnect their bank accounts still at the time of registration give Empower permission to collect repayment at a later date. Second, Empower’s Terms of Service recognize Empower retains some right to repayment by “reserv[ing] the right to deny [] access to Empower Advance if . . . [a user] do[es] not repay the full balance of an Empower Advance.” (Dkt. No. 26-8 at 5.) Empower’s reliance on *Consumer Financial Protection Bureau*

1 v. *Snap Finance LLC*, No. 2:23-cv-00462-JNP-JCB, 2024 WL 3625007 (D. Utah Aug. 1, 2024), is
2 therefore misplaced. *Id.* at *8 (considering agreement’s “formal terms” rather than its “practical
3 operation” to decide whether “credit” was extended). That some users avoid their obligation to
4 repay Empower does not mean no obligation ever exists.

5 So, based on the undisputed facts, Empower Cash Advances extend “credit” within the
6 meaning of the MLA.

7 **B. Whether Empower Extends Credit “Subject to a Finance Charge”**

8 Empower argues even if Cash Advances extend credit, “consumer credit” must be
9 extended “[s]ubject to a finance charge,” and Empower’s Subscription Fee and Instant Transfer
10 Fee are not finance charges.² *See* 32 C.F.R. § 232.3(f)(1).

11 “Finance charge has the same meaning as ‘finance charge’ in Regulation Z.” *Id.* §
12 232.3(n). Under Regulation Z, a “finance charge” is “the cost of the consumer credit as a dollar
13 amount,” and “includes any charge payable directly or indirectly by the consumer and imposed
14 directly or indirectly by the creditor as an incident to or a condition of the extension of credit.” 12
15 C.F.R. § 1026.4(a). The Supreme Court has explained “the phrase ‘incident to or in conjunction
16 with’ implies some *necessary* connection between the antecedent and its object,” but “does not
17 make clear whether a substantial (as opposed to a remote) connection is required.” *Pfenning*, 541
18 U.S. at 240-41 (citation omitted); *see also Orubo v. Activehours, Inc.*, 780 F. Supp. 3d 927, 937
19 (N.D. Cal. 2025) (“All that is required is a connection between the imposition of the charge and
20 the extension of credit.”).

21 Plaintiffs have shown Empower’s Instant Transfer Fee is a finance charge. Users must pay
22 the Instant Transfer Fee to obtain an Empower Cash Advance instantly, so the Instant Transfer Fee
23 is at least “incident to” Empower’s *instant* extension of credit. And, by advertising and
24 encouraging Cash Advance’s ability to provide instant funds, Empower has made instant
25 extension of credit a material term of its Cash Advance product. *See Orubo*, 780 F. Supp. 3d at

27 ² “Consumer credit” includes credit “(i) Subject to a finance charge; or (ii) Payable by a written
28 agreement in more than four installments.” 32 C.F.R. § 232.3(f)(1). Because Plaintiffs do not
argue an Empower Cash Advance is payable in installments, only the “subject to a finance charge”
element is at issue.

1 938 (“The time at which funds are received is a material term of credit.”); *see also* Truth in
2 Lending, 61 Fed. Reg. 42937, 49239 (Sept. 19, 1996) (“[E]ven though a lender may not require a
3 particular loan feature, the feature may become a term of the credit if it is included.”). Empower
4 advertises its Cash Advance product in its website, app, and marketing as a service offering
5 “instant cash.” (Dkt. No. 22 ¶ 61.) Empower’s website also “emphasizes the ability of users to
6 use Empower Advance to cover emergencies and provide funds when the borrower is at the point
7 of sale” and lists examples of “[r]eal-life moments when [] customers used Cash Advance,”
8 including “Flat tire,” “Grocery checkout,” “Gas for the car,” and “Vet bills.” (*Id.* ¶ 68 n.24.) In
9 addition, Empower has designed its app’s user interface for Cash Advance to encourage users to
10 pay the fee by “pre-selecting the fee option,” and, when users choose not to pay the fee, presenting
11 a pop-up warning: “It can take up to 2 business days for your funds to arrive . . . Consider
12 selecting Instant or Empower delivery if you need your funds sooner.” (*Id.* ¶¶ 63, 65 fig. 2.) So,
13 receiving funds instantly—and thus paying Instant Transfer Fees—is necessary to receive credit
14 on the terms Empower advertises and encourages. Instant Transfer Fees are therefore incident to
15 obtaining Empower Cash Advance’s credit on its offered terms and constitute finance charges.

16 Empower’s mantra finance charges must be a mandatory condition of obtaining credit is
17 incorrect. Regulation Z, and thus the MLA, defines a “finance charge” as a charge imposed by the
18 creditor “as an incident to *or* a condition of the extension of credit.” 12 C.F.R. § 1026.4(a)
19 (emphasis added). Empower’s insistence the fee must be a condition of the extension of credit
20 ignores the language “as an incident to” even though Regulation Z uses that phrase as an
21 alternative to a “condition of” the extension of credit. And, in *Pfenning* the Supreme Court held
22 “incident to” requires “some *necessary connection*” between the fee and the extension of credit,
23 not that the fee be a necessary condition to the extension of credit. *See Pfenning*, 541 U.S. at 240-
24 41; *see also Orubo*, 780 F. Supp. 3d at 937 (“A necessary *connection* is not the same as a
25 necessary *condition*.”). Empower’s interpretation of *Pfenning* as requiring the fee be a condition
26 to the extension of credit relies on *Golubiewski v. Activehours, Inc.*, No. 3:22-cv-02078, 2024 WL
27 4204272 (M.D. Pa. Sept. 16, 2024), but the court subsequently reversed its interpretation upon “a
28 deeper review of the law” and held plaintiffs only needed allege “a *connection* between [fees] and

1 the extension of credit.” *See Golubiewski v. Activehours, Inc.*, No. 3:22-cv-02078, 2025 WL
2 2484192, at *6 (M.D. Pa. Aug. 28, 2025).

3 Empower’s Instant Transfer Fee is also distinguishable from the Federal Express fee in
4 *Veale v. Citibank, F.S.B.*, 85 F.3d 577 (11th Cir. 1996), and the expedited delivery fees for credit
5 cards in the Federal Reserve Board’s 2003 rule. *See* Truth in Lending, 68 Fed. Reg. 16185, 16187
6 (Apr. 3, 2003). First, in *Veale*, the Eleventh Circuit held the Federal Express Fee plaintiffs paid
7 for Citibank to send a portion of its extended credit to repay plaintiffs’ debts to other financial
8 institutions was not a finance charge. *Id.* at 579. As an initial matter, the Eleventh Circuit
9 assumed “incident to” requires the fee be a necessary condition of the extension of credit, but
10 *Pfenning* later rejected that assumption. *See id.* (relying on plaintiffs’ failure to “produce any
11 evidence that Citibank required the fee before it would extend credit”). Further, whereas the
12 Federal Express fee did not relate to Citibank’s own extension of credit but rather the plaintiffs’
13 repayment to other creditors, Empower’s Instant Transfer Fee is a condition of Plaintiffs’ receipt
14 of instant credit from Empower. Second, expedited delivery fees for credit cards are not
15 “incidental to the extension of credit” because they are paid to receive a card, rather than the
16 extension of credit itself, more quickly. *See* Truth in Lending, 68 Fed. Reg. at 16187.
17 Furthermore, absent advertisements and statements like Empower’s, which make the instant
18 extension of credit a material term of its Cash Advance product, an expedited receipt of credit may
19 not be a material term of the extension of credit. So, Empower’s analogies to the Federal Express
20 Fee and credit card expedited delivery fees are unavailing.

21 Indeed, while several district courts have recently held fees charged to receive cash
22 advances instantly are finance charges, Empower does not cite any case holding otherwise. *See*
23 *Moss*, 2025 WL 2592265, at *4 (finding Express Fees were “intertwined with Cash Advance” and
24 therefore finance charges); *Orubo*, 780 F. Supp. 3d at 938 (finding “lightning fee is a necessary
25 condition of EarnIn’s extension of credit on the terms offered” and therefore finance charge); *see also*
26 *Johnson v. Activehours, Inc.*, No. 1:24-cv-02283-JRR, 2025 WL 2299425, at *9 (D. Md.
27 Aug. 8, 2025) (finding lightning speed fee necessary to cash advance’s “intended and advertised
28 purpose” and therefore finance charge); *Golubiewski*, 2025 WL 2484192, at *6 (finding “lightning

1 speed fees” finance charges because “EarnIn makes it difficult to obtain the promised credit
2 without paying the[m”]).

3 So, because Empower’s Instant Transfer Fee is a finance charge, Empower extends
4 consumer credit. Therefore, Empower is a creditor extending consumer credit to covered
5 borrowers, and the MLA prohibits Empower from compelling Plaintiffs to arbitrate their MLA
6 claims.

7 **II. ARBITRATION OF TILA AND GPLA CLAIMS**

8 Plaintiffs argue the MLA also prohibits arbitration of Plaintiffs’ TILA and GPLA claims.
9 The MLA makes it “unlawful for any creditor to extend consumer credit to a covered member or a
10 dependent of such a member with respect to which . . . the creditor requires the borrower to submit
11 to arbitration . . . in the case of a dispute.” 10 U.S.C. § 987(e)(3); *see also id.* § 987(f)(4) (“[N]o
12 agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable
13 against any covered member or dependent of such a member.”) Under a straightforward reading
14 of Sections 987(e)(3) and 987(f)(4), because Empower is a creditor extending consumer credit, no
15 lawful or enforceable arbitration agreement exists between Empower and Plaintiffs, who Empower
16 does not dispute are Covered Members.

17 Empower’s argument the MLA only bars arbitration of claims arising from the MLA
18 conflicts with the statute’s stated application to “any dispute.” *Id.* § 987(f)(4). At the very least,
19 the MLA’s prohibition on arbitration agreements with Covered Members prohibits arbitration
20 here, where the same Terms of Service form the basis for Empower’s motion to compel arbitration
21 on all Plaintiffs’ claims. *See Steines v. Westgate Palace, L.L.C.*, 113 F.4th 1335, 1344 (11th Cir.
22 2024) (“If the MLA applies to a contract involving the extension of consumer credit, the district
23 court cannot enforce any agreement in that contract to arbitrate any dispute.”). Empower’s
24 argument relies on *Espin v. Citibank, N.A.*, 126 F.4th 1010 (4th Cir. 2025), but the case is
25 inapposite because the district court had not yet considered the MLA’s applicability, and the
26 Fourth Circuit therefore refused to rule on it. *Id.* at 1020. Given the intertwined factual bases of
27 both the purported arbitration agreement and the merits of Plaintiffs’ claims, the MLA’s
28 prohibition bars arbitration of Plaintiffs’ TILA and GPLA claims. *See Moss*, 2025 WL 2592265,

1 at *5 (distinguishing *Espin* and refusing to compel arbitration of TILA claim “inextricably linked”
2 to MLA claim).

3 Plaintiffs’ proposed TILA and GPLA classes also include Georgia residents who are not
4 Covered Members or dependents of Covered Members. The MLA’s prohibition on arbitration
5 agreements with Covered Members and their dependents may not extend to these Georgia
6 residents, so Empower may have enforceable arbitration agreements as to these purported class
7 members which preclude class certification. *See Lawson v. Grubhub, Inc.*, 13 F.4th 908, 913 (9th
8 Cir. 2021) (affirming denial of class certification for proposed class including individuals who had
9 waived class action participation rights). However, Empower’s motion only demonstrates the
10 existence of an arbitration agreement with named Plaintiffs, so the Court will not compel
11 arbitration as to purported class members.

12 So, the Court denies Empower’s motion to compel arbitration of Covered Member
13 Plaintiffs’ TILA and GPLA claims.

14 CONCLUSION

15 Because the MLA prohibits enforcement of an arbitration agreement between Empower
16 and named Plaintiffs as a matter of law, the Court DENIES Empower’s motion to compel
17 arbitration and stay litigation pending arbitration. The Court sets an initial case management
18 conference for **November 19, 2025 at 2:00 p.m. via Zoom video**. A joint case management
19 conference statement is due November 12, 2025. If Empower appeals the denial of the motion to
20 compel arbitration, the Court will stay the case and vacate the initial case management conference.
21 *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 747 (2023).

22 This Order disposes of Docket No. 26.

23 **IT IS SO ORDERED.**

24 Dated: October 7, 2025

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JACQUELINE SCOTT CORLEY
United States District Judge