June 23, 2012

Office of the Executive Secretary,
Consumer Financial Protection Bureau
1700 G Street NW.,
Washington, DC 20552
Via http://www.regulations.gov

Re: Docket No. CFPB-2012-0017

Comments of the National Association of Consumer Advocates

and

The National Consumer Law Center, *on behalf of its low income clients*

Regarding Docket No. CFPB-2012-0017

Notice and Request for Information on the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 FR 25148 et seq.

TABLE OF CONTENTS

INTRODUCTION

The National Association of Consumer Advocates (NACA) is a national non-profit organization of attorney and advocate members who represent and have represented millions of consumers victimized by fraudulent, abusive and predatory business practices. As an organization committed to promoting justice and fairness for consumers, NACA members and their clients are engaged in promoting a fair and open market place that forcefully protects the rights of consumers, particularly those of modest means. NACA is pleased that the CFPB is embarking upon the study of pre-dispute arbitration[1] as required by Dodd Frank and respectfully submits these comments as a response to the Bureau's request for information regarding the scope, methods, and data sources for conducting a study of pre-dispute arbitration clauses in financial service agreements.

NACA works with consumer advocates to bring attention to the ways in which pre-dispute arbitration agreements trap consumers into a private, non-judicial system that fundamentally favors businesses. NACA also works to educate consumers and consumer advocates about the pervasiveness of mandatory pre-dispute arbitration clauses in common consumer contracts and explain why these pre-dispute arbitration agreements are harmful to consumers.

The National Consumer Law Center, Inc. (NCLC) is a non-profit corporation specializing in low-income consumer issues, with an emphasis on consumer financial issues. NCLC publishes a series of treatises on consumer laws and provides legal, policy and technical consulting and assistance on to legal services, government, and private attorneys and advocates working on behalf of consumers across the country. One of the treatises, *Consumer Arbitration Agreements* (6^{th} ed. 2011), focuses exclusively on case law interpreting the enforceability of consumer arbitration agreements.

NACA and NCLC are extremely concerned about the overwhelming presence and use of pre - dispute binding mandatory arbitration clauses in consumer contracts. Today, a consumer can hardly hope to purchase a financial product or service without first agreeing to privately arbitrate any dispute that potentially might arise. This means that a consumer, regardless of their diligence in searching out and choosing a financial services product that otherwise best fits their need, has no choice but to accept the loss of their fundamental right to access our public justice system. This denial of access to justice is further exacerbated by the likelihood that when a dispute does arise, consumers will be unable to find a competent attorney willing to represent them, regardless of the strength of their claim, because of the attorney's understanding that real justice cannot be achieved in a private arbitration tribunal.

[1] We are using the term "pre-dispute arbitration" to mean pre-dispute binding mandatory arbitration.

Finally, recently we have seen a substantial increase in the use of arbitration clauses that contain class action waivers (we expect that every arbitration clause will soon contain this type of waiver in light of last year's Supreme Court decision in *AT&T Mobility v. Concepcion*.[2]) The presence of these waivers, in the very fine print of financial service contracts, further diminishes the opportunity for consumers to seek justice and fundamentally prevents them from taking action against bad practices that cost individual consumers a relatively small amount of money, but provide enormous profits for business engaged in unfair, deceptive and unlawful behavior.

Summary

As the primary agency responsible for ensuring that markets for financial products and services provide an even playing field for consumers, NACA and NCLC believe that it is critically important that the CFPB examine pre-dispute arbitration agreements - particularly agreements that prevent consumers from seeking collective redress through class actions. We believe that there is no question that consumers are harmed by arbitration clauses and that this problem must be addressed promptly by the CFPB. We strongly encourage the CFPB to conduct a study on pre-dispute mandatory arbitration agreements that examines the following:

(1) The CFPB should examine whether the presence of a unilateral requirement that binds consumers to use arbitration while not requiring the same of the company is fair to consumers.

While companies require consumers to resolve their disputes in arbitration, these clauses do not bind that same company to use arbitration. Simply, pre-dispute arbitration clauses are written in such a way that companies retain their rights to take any complaint to our public courts while consumers are forced to initiate their claims in private and secret arbitration forums. These businesses that sing the praises of the efficacy, efficiency and low cost of arbitration, somehow don't seem to prefer it as a suitable forum to resolve their own disputes against consumers.[3] Their hypocrisy is simply astounding.

No greater example of this "chutzpah" can be found in the "do as I say, not as I do" behavior of our nation's automobile dealers. In 2000, the National Automobile Dealers Association (NADA)

[2] *AT & T Mobility, LLC v. Concepcion*, 563 U.S. ---, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)

[3]See Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts (December 18, 2007). The empirical analysis in this study revealed that companies frequently use arbitration clauses in consumer contracts but do not use them in their non-consumer contracts. Firms' use of arbitration for consumer contracts but not for non-consumer contracts suggests that, ex ante, many firms prefer litigation over arbitration, at least for disputes with other repeat players. Moreover, the authors suggest, the use of arbitration clauses in consumer contracts may be an effort to preclude class actions — either in arbitration or court — rather than an effort to promote a fair and efficient dispute resolution mechanism for consumer disputes.

lobbied hard and ultimately testified before Congress about the inherent unfairness of pre-dispute arbitration clauses. [4] Their testimony asked the Congress to eliminate car manufacturers' ability to impose pre-dispute mandatory arbitration, because these clauses would allow "multinational motor vehicle manufacturers…to be able to unilaterally deny small business automobile and truck dealers rights under state laws that are designed to bring equity to the relationship between manufacturers and dealers." Ultimately, Congress passed the legislation protecting the dealers from the evils of pre-dispute mandatory arbitration. Unfortunately, car dealers don't have a problem imposing that very same arbitration on consumers, making it almost impossible for a consumer to buy or finance a car without giving up their access to our public justice system. The CFPB should examine the implications of consumers being required to participate in a process that financial service companies do not themselves choose to use.[5]

(2) The CFPB should examine the potential harm to consumers caused by the minimal procedural protections and lack of judicial oversight over the arbitration process.

Arbitration happens in secret, with minimal judicial oversight and with no well-established rules and procedures. Further, because the arbitration forum is chosen by the business, and the business is frequently a "repeat player," arbitrators have an implicit (and sometimes not so implicit) incentive to rule in favor of that very business.

The inherent unfairness of private arbitration forums is further exacerbated by the significant restrictions and limitations placed on consumers. Besides very limited due process protections, including no right to a fair and impartial decision maker, the arbitration process is almost always conducted in secret and typically requires strict confidentiality. Additionally, decisions (if a consumer actually receives one) are not published or public and are not subject to judicial review, even in the most extreme circumstances. The CFPB should examine the impact of arbitration proceedings that lack both fundamental fairness and public disclosure on consumers and the consumer marketplace.

(3) The CFPB should examine how the widespread use of pre-dispute arbitration clauses in consumer contracts impacts the development of and compliance with the law.

Because of the secretive and non-public nature of arbitration, financial service companies need not fear the discovery of their bad practices. Further, by eliminating consumers' ability to join in a class action and seek collective redress, businesses will effectively limit the cost of their non-

[4] http://69.20.85.180/Content/NavigationMenu/Newsroom/News_Releases/2000/Leg_03_01_00.htm

[5] It is notable that in Congress saw fit in the Dodd Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5518) to prohibit mandatory arbitration in mortgage and home equity loans--without the need for any further study or rulemaking (Sec. 1414) -- and mandatory arbitration that would waive protections for those who blow the whistle on securities fraud (Sec. 922) and commodities fraud (Sec. 748).

compliance with the law. Ultimately, this will help create a consumer marketplace where companies trying to behave responsibly will be unable to compete with companies profiting from their unfair and deceptive practices (look no further than the behavior in our all too recently collapsed mortgage market to see how this can turn out). Another less obvious, but extremely damaging potential impact of the prevalence of one-sided arbitration clauses, is the likelihood that our public courts will lose significant opportunities to hear important consumer law cases that could favorably shape the state of consumer protection laws. Instead, because companies will be the only "persons" able to bring a dispute to our public courtrooms, they will be given the ability to manipulate the common law by hand-picking cases that set up pro business precedents.

The CFPB should examine the potential impact of arbitration clauses on both the enforcement and development of consumer protection law.

(4) Pre-dispute arbitration clauses hinder the rights of consumers by imposing costs and prohibiting collective redress. The CFPB should examine whether pre-dispute arbitration agreements discourage consumers from pursuing and learning about the consumer laws that protect them.

Because companies often include one-sided provisions that impose costs on consumers and thereby suppress claims against the company – such as selecting an arbitrator with high fees or locating the arbitration in a distant forum – consumers are unable to assert their rights and pursue a valid claim against a covered entity. In addition, the exorbitant filing fees, continuous fees for procedures such as motions and written findings, and "loser pays" rules in arbitration are unaffordable to many individuals, particularly in this struggling economy. Class action bans further hinder consumer claims by increasing costs without the efficiency of collective action. Individual consumers may not have the resources to bring a claim against a company if they have been harmed by a small amount, but a group of consumers could consolidate their claims in and outside of arbitration to reduce the expenses that each individual would have to pay.

(5) The CFPB should examine the implication and impact of consumers purchasing financial products and services without any understanding of how pre-dispute arbitration clauses affect their fundamental rights.

Arbitration clauses are often buried within prolix printed form contracts, drafted in confusing legalese that even educated consumers do not understand. Consumers typically don't even discover the existence of a pre-dispute arbitration clause until they attempt to seek redress and justice from the company that insisted upon use of the pre-drafted form. This system makes a mockery of an essential term of contract, namely consent.

In a recent survey of consumer attorneys[6], NACA found that most consumers have no experience with arbitration and do not understand that these clauses deprive them of significant and fundamental rights. In the same way that the CFPB has determined that consumers should "know before they owe," a CFPB study on arbitration should examine whether consumers should "know before they sign." Specifically, we ask the CFPB to determine what the implications are for consumers and the consumer marketplace, when consumers are parties to financial service contracts that contain hidden and incomprehensible pre-dispute arbitration clauses.

In summary, we urge the Bureau in conducting this study to:

(1) Examine whether the presence of a unilateral requirement that binds consumers to use arbitration while not requiring the same of the company is fair to consumers.

(2) Examine the potential harm to consumers caused by the denial of all but minimal procedural protections and lack of judicial oversight over the arbitration process.

(3) Examine how the widespread use of pre-dispute arbitration clauses in consumer contracts impacts the development of, and compliance with, consumer protection laws.

(4) Examine whether pre-dispute arbitration agreements discourage consumers learning about and enforcing the consumer laws that protect them.

(5) Examine the impact of consumers purchasing financial products and services without any understanding of how pre-dispute arbitration clauses impair their fundamental rights.

In making these inquiries, the CFPB should consider whether companies use this lack of consumer protection to engage in predatory and deceptive practices that harm not just individual consumers, but also the marketplace as a whole.

In the comments below, we recommend the following: Section I of our comments examines the prevalence of arbitration agreements in different consumer financial markets and discusses which of those markets the CFPB must study. Section II of our comments focus on the consumer experience in arbitration and urges the Bureau to carefully examine the very typical consumer stories we've provided. Section III outlines arbitration's claim suppressive impact and how it discourages consumers from pursuing valid claims. Finally, because of the damage that arbitration currently does to consumers and the financial services marketplace, NACA and NCLC urge the CFPB to conduct this study expediently, and to act on existing data even as it engages in longer term studies.

[6] See Appendix B: 2012 Binding Mandatory Arbitration Survey Report, National Association of Consumer Advocates (2012)

Specific Responses to the Request for Information

Section 1 - Prevalence of Use

i. Other than with respect to credit card agreements, how should the Bureau determine the prevalence of pre-dispute arbitration agreements in different consumer financial services markets?

Pre-dispute arbitration agreements are not only pervasive in most consumer contracts[7], they are highly prevalent in contracts throughout the entire consumer finance industry. A 2004 study of all contracts found, that "(t)he prevalence of arbitration clauses is highest (69.2%) in the financial category (credit cards, banking, investment, and accounting/tax consulting)."[8] Those numbers appear to have only increased during the past decade. To get an accurate assessment of prevalence, the CFPB should survey all the markets over which it has authority, and ask for submission of all past and present consumer contracts that contain pre-dispute arbitration clauses. Further, in analyzing prevalence, the CFPB should examine financial service trade group model contracts (which often become standard for their industries) for the presence of arbitration clauses.

ii. Should the Bureau focus on particular markets for consumer financial products and services in reviewing prevalence?

Simply, the CFPB should focus on all financial service markets where pre-dispute arbitration clauses are present. Further, because financial services are now offered as an integral factor in the sale of non-financial consumer products (like automobiles and cell phones), the CFPB should also review pre-dispute arbitration agreements outside of the traditional consumer financial services market.

A recent NACA survey of consumer attorneys found that there are many industries that require credit arranged at the point of sale and use pre-dispute arbitration clauses. Similar to the "Buy Here, Pay Here" auto dealer market that provides financing for consumers purchasing a car, our survey identified a number of other markets where a business provides financing for a consumer

[7] *Mandatory Binding Arbitration – Is It Fair and Voluntary?, Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Congress 1st Sess. (2009) (statement of Stuart T. Rossman, Director of Litigation, National Consumer Law Center, *Recent Developments in the Forced Arbitration Market and the Continued Need for Protective Legislation*, at 1, *available at* http://judiciary.house.gov/hearings/pdf/Rossman090915.pdf ("Practically every credit card agreement, cell phone contract . . . now contains a pre-dispute mandatory arbitration clause.”))

[8] Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, Law & Contemp. Probs., Winter/Spring 2004, at 55, 62.

who purchases their product.[9] Because these purchase contracts/ financing agreements are important sources of credit for consumers, the CFPB should examine these contracts.

One such area ripe for examination by the CFPB are markets where "retail installment sales contracts " (RISCs) are a typical source of consumer credit. The use of RISCs most frequently occurs in the area of automobile financing where the financing contracts are originated by the car dealer and later sold/assigned to another entity. Similarly, RISCs are typically found in home solicitation sales, where the seller of the goods also serves as the originator of the credit being offered. Because these contracts typically contain arbitration clauses and because this type of "vendor lending" is within the CFPB purview, the Bureau should survey these markets for the prevalence of pre-dispute arbitration clauses.

Finally, we urge the CFPB to examine the prevalence of pre-dispute arbitration agreements in the telecommunications market. First, the typical terms of conditions of cell phone contracts are structured as a financing agreement, with providers advancing their service to consumers in exchange for future payment over a minimum period of time. Second, and maybe most importantly, it is clear that soon, the use of cell phones as mobile payment devices will become ubiquitous. Already, consumers can load pre-paid debit cards, and can pay for different goods through applications on their phones. The ability to use these devices for other financial transactions is certain to follow. Thus, we believe it is not only appropriate, but urgent, that the CFPB survey telecommunications contracts for the presence of arbitration clauses.

[9] See Appendix B, NACA 2012 Binding Mandatory Arbitration Survey. According to the survey, consumer attorneys are encountering arbitration agreements in most industries. Specifically: *damage insurance, debt adjusting, medical malpractice, legal malpractice, credit card agreements, pay day lending agreements, nursing home contract, used car transactions, construction, home Renovation/ home improvement, precious metals and numismatic cases, brokerage services, securities industry, door-to-door sales of water treatment devices and other goods, computer purchase contracts, cable tv service contracts, satellite tv service contracts, home improvement retail installment contracts, whole sale membership club contracts, FINRA, mobile telephone service contracts, employment applications, employment contracts, auto sales and financing agreements, debt settlement, products (electronics), home solicitations / door-to-door sales, mobile home sales contracts, cable TV service contracts, internet service provider, for-profit career colleges contracts, manufactured home contracts, all loans and credit sales agreements, debt consolidation agreements, warranty (mobile home or new home construction), service contracts, hospital contracts, title lending agreements, consumer installment loans, contractual agreements such as yellow pages, etc., recreational vehicle sales contracts, health club contracts, every day consumer products such as computers, every day consumer services such as satellite radio, auto warranty, crop insurance, construction contracts, wrongful repossession cases, employment background checks, securities purchases, utilities service contracts, timeshare contracts, internet purchase of goods and services, stock broker/ broker-dealer agreements, tax resolution services*

iii. Should the Bureau focus on the prevalence of particular terms in pre-dispute arbitration agreements?

Terms the CFPB should review. Yes. There are many terms in pre-dispute arbitration agreements that need to be reviewed, because "companies are increasingly using their arbitration clause not [just] to require arbitration but also to further limit consumers' procedural and even substantive rights."[10] The CFPB should examine the prevalence of the following terms:

- **Class waivers** – any term that prevents a consumer from joining collectively with other consumers in or out of arbitration.

In response to the recent Supreme Court *Concepcion* decision, pre-dispute arbitration clauses banning class actions are being written into all new consumer contracts. Historically, lawmakers have recognized the importance of consumers acting collectively in seeking redress for harm done to a wide swath of people and in deterring companies from reaping large profits by unjustly extracting small overages from large numbers of customers. With the stroke of a pen, companies are being allowed to undo the intent of legislatures and eliminate the ability of consumers to seek collective redress and without a practical forum in which to adjudicate their complaints.[11]

Elimination of the class action device enables businesses to engage in unfair and deceptive practices, without worrying about being held accountable. As one consumer attorney noted (see Appendix A), "consumer protection laws are only as strong as their enforcement" and effective consumer protection includes strong private AND public enforcement of the law. In addition to the important enforcement work of the CFPB and the FTC, consumers must be able to join collectively through class actions and class arbitrations to privately enforce the law, obtain proper relief and enjoin harmful business practices.

Finally, the presence of class waivers in consumer finance contracts means that many serious violations of law will go publicly undetected, either because cases are never brought or evidence presented and decisions rendered in private arbitration proceedings are kept out of the public eye. We offer powerful examples, shared by NACA members, of both class actions that can no longer proceed because of the inclusion of a class waiver clause, and class actions that provided significant and meaningful relief to consumers that would and could not have been brought had this type of provision been present. As painful as this exercise may be, we urge the Bureau to study these examples in detail, to understand that the issue of forced arbitration is not academic or abstract, but has real-life consequences for consumers with valid claims against unfair and

[10] Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, (April 2005).
[11] See 2012 NACA Survey on Binding Mandatory Arbitration in Appendix B.

predatory business practices. (Other examples are included in Appendix A):

"Labrador v. Seattle Mortgage Co.: Protecting Seniors From Unlawful Charges For Reverse Mortgages
(Northern District of California, San Francisco Division, Case No.CV-08-2270 SC)

Mary Labrador was a widow in her mid-80s when a mortgage broker came to call. The broker arrived at her home and convinced Mrs. Labrador to refinance her home with a home equity conversion ("reverse") mortgage that she did not need. Among the thousands of dollars in transaction fees she was required to pay was a $7,200 "origination fee." That fee was passed through from the lender (Seattle Mortgage Company, or SMC) to the loan broker.

Mrs. Labrador filed suit against SMC to recover her origination fee, alleging that SMC's imposition of the fee violated one of the applicable HUD regulations (24 C.F.R. §206.31(a)) enacted to protect the vulnerable population of senior citizens targeted for reverse mortgage transactions. The case presented an issue of first impression as to whether the payment of certain types of "correspondent fees" by a lender to a mortgage broker creates a "financial interest" between those parties under federal law, and thus prohibits the lender from charging the borrower an origination fee. Plaintiff sued in the Northern District of California on behalf of all senior citizens throughout the United States who had been charged similar fees by SMC. The case settled, with some 11,700 class members in 12 states being entitled to receive an equitable share of a significant Settlement Fund."

*"**Seifert v. Commonwealth Financial Systems: Protecting Consumers from unlawful debt collection practices**. We recently settled a case titled Seifert v. Commonwealth Financial Systems. Soon after this case was filed, the defendants moved to stay the case pending arbitration. The basis for this motion was an argument that the arbitration clause in a terms and conditions document published by Chase Bank, provided a right of arbitration to the debt buyer defendant. After extensive litigation, the trial court ruled that the arbitration clause did not apply. Following this ruling we conducted discovery and moved to certify. The trial court granted the motion to certify and the defendants appealed. While the appeal was pending, the parties reached a settlement agreement that provided money refunds to a number of individuals and equitable relief to a much larger number of individuals. Had the court ruled the arbitration clause was enforceable, not of the legal or equitable relief for the class would have been obtained."*

- **Consumer Fees and Loser Pay Provisions** – any language that mandates that the consumer should pay any fees if they lose at arbitration or any language that provides that each party shall bear the expense of arbitration.

Proponents of pre-dispute arbitration typically argue that arbitration is significantly less expensive and more cost efficient than traditional litigation. However, unlike a traditional court, "many arbitration clauses contain language requiring consumers to advance or pay for a significant portion of arbitration expenses" in order to begin the process of arbitration. For consumer transaction claims, the fees imposed by mandatory arbitration often may make it economically impossible for consumers to vindicate their rights. Many arbitrators require hundreds of dollars in filing fees and hundreds or thousands more in hearing fees. Frequently these fees are far higher than the value of the plaintiff's claims.[12] Some arbitration clauses also contain a provision requiring the loser in arbitration to pay the winning side's attorney and

[12] Appellant's Reply Brief, Wells v. Chevy Chase Bank, Md. Court of Appeals, No. C-99-000202, Trial Lawyers For Public Justice, at http://www.tlpj.org/briefs/51246_2.htm (visited May 8, 2002).

arbitration fees.[13] Such language may expose a consumer to catastrophic debt in return for the chance to pursue what is a relatively minor claim. [14]

- **Choice of venue** – any language that selects the venue for the consumer.

Arbitration clauses often include a venue selection that strongly favors the company and acts as an absolute disincentive to consumers to arbitrate. Remote venue clauses are pure intimidation for the purpose of claim suppression. Typically, such clauses might require that the arbitration occur at a location extremely inconvenient to the consumer. For example, Starbucks' arbitration clause in the agreement for its prepaid gift card agreement contains a clause that requires its customers to travel all the way to Seattle to arbitrate a dispute. Clearly, most consumers from around the country are not going to bear the expense of traveling to Seattle to resolve a dispute over a $25 gift card. Even when the amount in dispute is significant, the costs to a consumer of having a case heard in a distant venue can be severe, as the example below demonstrates.

Consumers must travel to Mexico to Arbitrate. *"My clients attended a timeshare presentation in Mexico (they were living in St. Louis, MO at the time), and were goaded into purchasing a timeshare. The timeshare agreement (see attached at paragraph 7) gave my clients 10 days to cancel, as long as it was done "in writing in the domicile of the Supplier." My clients used 2 different credit cards and made a down payment of $10,000. Once they returned to St. Louis, they re-considered their purchase and, within the 10-day grace period, FedEx'd AND e-mailed a notice of cancellation to the timeshare company. The company never responded and did not accept delivery of the FedEx packet.*

The following month, my clients noticed the timeshare charges on their credit card statements. They disputed with both companies Citibank and MBNA. Citibank removed the charge; MBNA would not. My clients then hired an attorney (me), and sued MBNA for violating the FCRA. MBNA requested and was granted arbitration. The case was administered by the National Arbitration Forum.

At the hearing, the representative from MBNA (a non-attorney who worked in the collections department) testified that my clients failed to properly cancel the arbitration contract. The reason my clients failed to properly cancel is because the language "in the domicile of the Supplier" meant my clients had to personally travel back to Mexico and hand-deliver the cancellation notice to the timeshare company. As incredible as it seems, the arbitrator found in favor of MBNA.

Now the story gets good. The arbitration order was dated March 21, 2005 (see attached). It was signed by "Professor Michael A. Middleton." However, Professor Michael A. Middleton never arbitrated the case. Mark D. Mittleman arbitrated the case. How could this be? Presumably, if Mark D. Mittleman drafted the Order he would surely have put his own name on it. Ergo, somebody else drafted the order (likely one of the flunkies at NAF). But how could this person affix the wrong name? Presumably,

[13] Lorne B. Sheren, *Arbitration Or Adjudication? An Examination Of Arbitration Clauses In Consumer. Contracts*, Seton Hall University School of Law. Fall 2002.
[14] Sheren at 55

"Middleton" and "Mittleman" sound similar enough (and both live in Missouri), where the flunky just got the names mixed up. However, the "right" arbitration order was then sent to the "wrong" arbitrator, who signed it. How is this possible? Presumably, Professor Middleton never read the Order before he signed it. How is this possible? Presumably, Professor Middleton received so many arbitration Orders from NAF that it was impossible for him to read everything that was sent to him. In August 2005, I received an Amended Order signed by Mark D. Mittleman (also attached). No harm, no foul!

I served a notice of deposition on Professor Middleton so I could get some of my questions answered. However, the Judge quashed the notice and the opposing counsel sent me a Rule 11 notice after I filed a motion to vacate the arbitration Order. Alas, I backed down and withdrew with my tail between my legs (it was pretty obviously at that point that something bad would happen if I persisted). So that is MY arbitration horror story."

- **Shortened statutes of limitation to file claims** – any language that makes the time period within which legal proceedings must start less than what is provided by the applicable statute.

It is inherently unfair for a company to unilaterally change well-settled law about the time-frame in which a consumer can raise a claim. Yet, consumer attorneys report that they frequently see contractual time bars in arbitration agreements. These clauses explicitly shorten statutorily provided for time limits for bringing claims. Companies have shortened two year statute of limitations from two years to six months, or even less, to thirty days.

- **Confidentiality** – any language binding parties to confidentiality.

Too often, parties to an arbitration agreement are bound by confidentiality. In stark contrast to court proceedings, the evidence presented, the submissions of the parties, the decision or award and even the existence of the dispute itself in arbitration are kept confidential. Beyond the obvious negative impact on an individual consumer, confidentiality/secrecy in arbitration proceedings raise serious public policy issues. The public has a significant interest in not only resolving individual disputes, but in learning about the unfair practices alleged and in making certain that consumer protection laws are enforced and wrongdoers punished. Clearly, confidentiality clauses serve to defeat all of these public interests and CFPB should examine their prevalence in consumer financial service contracts.

- **Prohibitions on particular forms of relief -** including injunctive relief, compensatory damages, punitive damages, and attorney's fees.

Pre-dispute arbitration agreements frequently limit the range of damages consumers may be awarded even if the arbitrator rules in their favor. These limitations are problematic for several reasons. In the consumer financial services context, almost all of the enumerated statutes provide for attorney fees to a prevailing party, which allows consumers with modest incomes to obtain

legal representation. Clearly a provision against fee-shifting is specifically designed to keep consumers from getting legal help. Statutes also typically allow for compensatory and punitive damages, to punish and deter companies from willfully engaging in bad behavior. Companies' attempt to void this type of legislative provision offends public policy. Finally, whether or not arbitration clauses explicitly bar injunctive relief, the inherent nature of an arbitration proceeding makes injunctive relief pretty much impossible to obtain and/or enforce. Leaving consumers unable to stop unfair and deceptive practices is a significant and dangerous consequence of arbitration.

Omitted Terms. Just as important as the prevalence of particular terms in pre-dispute arbitration agreements, the CFPB should also examine terms that are often omitted in pre-dispute arbitration agreements and how the absence of these terms impacts consumers' access to justice. Terms that are omitted in a contract with an arbitration clause are often embedded in the rules of the arbitral forums. Even more than the arbitration agreement itself, these rules are complicated and difficult to understand. Furthermore, the absence of certain terms (cost of arbitration, discovery limits, etc.) often leaves consumer unaware of what it will cost to go through arbitration. As the cost calculation is often a threshold issue for proceeding with any legal dispute, the absence of this term and others, will impact consumers ability to make an informed and financially viable choice.

- **limits or elimination of discovery** – not usually a term of an arbitration agreement but often in the arbitral forum rules; the rules often prohibit discovery and even a hearing for certain consumer claims.

Our civil litigation system sets out a requirement that each party disclose, well before trial, all relevant facts and information relevant to the issues in the lawsuit, whether or not it is helpful or harmful to the party's case. Though most arbitration clauses don't specifically set a limitation on discovery, the applicable arbitration procedures – to which a consumer is bound – often include such limitations in an effort to control costs. A lack of discovery is a significant obstacle to consumers who are seeking justice, as they are not privy to information that the company holds that could be helpful to their case. In examining "prevalence, " the CFPB should examine the frequency and degree in which consumers are denied the judicially available right of discovery.

iv. Should the Bureau address how the prevalence of pre-dispute arbitration agreements and the prevalence of particular terms within them have changed over time?

The CFPB should absolutely examine how the prevalence of pre-dispute arbitration agreements has changed over time. Our members report that arbitration clauses are now ubiquitous in consumer contracts, particularly financial service agreements. The CFPB should look at this

growth and ask about the reasoning behind this change, whether it was designed to provide consumers a chance to "manage disputes in a cost effective and timely way" or whether it is an improper claim suppression tactic benefitting businesses by reducing their liability and accountability when they engage in unfair, deceptive and unlawful behavior.

In particular, the CFPB should look at the growth of clauses containing class action waivers since the Supreme Court's ruling in *Concepcion*.

v. To address the questions above, what new data, if any, should the Bureau seek and from which entities? What existing studies or sources of empirical data should the Bureau rely upon to address any of the above questions?

The CFPB should seek to obtain prior and existing agreements containing pre-dispute arbitration clauses from all the industries over which they have jurisdiction.

The CFPB should also examine and obtain data from small claims courts in larger markets to look at how companies have filed lawsuits against consumers who are relegated to arbitration forums for filing their own claims. Consumer debt collections[15] and auto financing, are particularly good examples where companies avoid arbitration, but file civil actions against consumers in court in large numbers.

Further, the CFPB should examine instances where businesses have successfully eliminated pre-dispute arbitration agreements in their own contracts. Specifically, how did the auto dealers obtained an exemption from having pre-dispute arbitration agreements in their contracts with auto manufacturers? What was the state of litigation prior to and after this exemption became the law? Additionally, the Bureau should look at the rationale used by Congress when it banned pre-dispute arbitration in consumer mortgage contracts.

[15] See FTC Roundtable Report: *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration.* July 2010.

Section 2 - Use and Impact in Particular Arbitral Proceedings

A. Claims that Consumers Bring in Arbitration.

i. **Should the Bureau determine how often consumers bring claims in arbitration?**

Yes, the CFPB should determine how many consumers bring claims in arbitration. It should compare this data to the prevalence of arbitration clauses, and contrast this data both to the number of cases brought through the courts as well as the outcome of those cases. The CFPB should view this data through the lens of how unintelligible the arbitration clause is to consumers, as discussed above, and how likely consumers are to have a positive outcome compared to similar cases when consumers have access to the courts.

Additionally, the CFPB should examine claims consumers initially attempted to bring in court and were then forced into arbitration. Questions that should be asked include: how many consumers under these circumstances chose not to pursue their claim in arbitration and what were their reasons for making this choice? Why is forced arbitration evaluated on grounds of unconscionability? If the process were fair, why is it so often opposed and why has forced arbitration created a whole body of case law defining conscionability in contract. In other words, the answer to this particular question requires the CFPB to consider: why are we spending the enormous resources on this very debate?

ii. **Should the Bureau analyze the types of claims that consumers bring in arbitration?**

Yes. Specifically the CFPB should examine whether there are certain kinds of claims that are easier for consumers to both bring and then receive a modicum of justice in an arbitration forum. For example, should small claims be brought in arbitration where the cost of going to court might be less expensive for the consumer? Should statutory claims or claims involving sums in excess of a certain sum be excluded from arbitration unless both parties agree?

The CFPB should also examine whether there are certain kinds of arbitration that are more likely to be fairer for consumers. When comparing small claims versus statutory claims, multiple claims or claims for large amounts or substantial civil penalties, it is notable that each have significantly different parameters regarding proofs, expense of arbitration, etc. For example, a consumer's claim for unfair and deceptive practices coupled with RESPA violations can involve many days of testimony, expert witness testimony, significant discovery and many days of hearings before the arbitrator. In some instances, arbitrations can take years to resolve as the case story below demonstrates.

"A good example of this is a case in Illinois. It involves a foreclosure action filed against two homeowners by CitiMortgage, Inc. The homeowners filed a counterclaim against the lender for a fraudulent mortgage transaction,

seeking to rescind the mortgage and recover damages for violation of the Truth in Lending Act, 15 U.S.C. §1601 et seq. ("TILA"), and implementing Federal Reserve Board Regulation Z, 12 C.F.R. part 226. The homeowners also seek damages under the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA") and under common law. Part of the mortgage fraud as alleged by the homeowners also involves the NEIGHBORHOOD ASSISTANCE CORPORATION OF AMERICA. The homeowners filed a third-party complaint against them alleging a fraudulent mortgage transaction by them (in conjunction with CitiMortgage, Inc.) and seek damages under the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA") and under common law.

After the pleadings were filed, Neighborhood Assistance Corporation of America (NACOA) filed a Motion to Dismiss the Third-Party Complaint and to Compel Arbitration. They cited the existence of a "membership agreement" which contained this "arbitration agreement". Basically, when a homeowner seeks assistance from NACOA, they are given a booklet consisting of approximately 200 pages. The representative goes through the booklet and then pulls out a page near the back of the booklet that they ask the homeowner to sign – this is the "membership agreement" that contains the arbitration clause.

In this Illinois case, the homeowners sought the assistance of NACOA to refinance their mortgage. NACOA has an agreement with two national banks – one being CitiMortgage, Inc. – that would help these homeowners get purchase money mortgages or refinance mortgages in distressed neighborhoods in large cities. Our clients applied for such a refinance loan. One of the NACOA requirements is that an inspection of the property must be done by a NACOA approved inspector. Any property deficiencies would be noted, NACOA approved contractors would then provide an estimate of the cost to complete the remedial work, and NACOA would then get their cooperating lender to add the cost of the construction to the loan. In our case, the inspector found property deficiencies approximating $8,000. NACOA did not approve this inspection report for reasons yet to be determined. However, they did send another inspector to the property who now came up with remedial work costing approximately $100,000. That was ultimately reduced by about $30,000 and NACOA obtained a loan for our clients for the total amount, namely the refinance amount of approximately $135,000 PLUS the construction amount of approximately $70,000. At closing, NACOA then had CitiMortgage, Inc. finance the entire amount even though the $70,000 was, in essence, a construction loan. No formal escrow was set up by NACOA with CitiMortgage. Instead, when NACOA approved a disbursement request from a contractor, it would direct CitiMortgage to pay the amount to the contractor. Our clients were paying interest on money that they really never received and that should have not been funded until it was to be disbursed to a contractor.

The Illinois court ruled that the homeowners had entered into a valid arbitration agreement and granted NACOA's motion and ordered arbitration. For the past 2+ years, we have attempted to get the matter into arbitration with AAA, to no avail. We requested that AAA waive the arbitration fees – they refused. Instead the only offered to defer same. As our clients are literally penniless, they could not agree to this since they would never have the ability to pay the amount. The issue of the arbitrator's fees was never addresses by AAA. Due to the complexities of the case, the likelihood that there would be up to 20 witnesses, several of whom would be expert witnesses, the hearing would likely take quite some time. It is our understanding that AAA does have a "pro bono arbitrator" program, typically it involves an arbitrator donation his/her time for ONE (1) day only.

For three years now, our clients have been out of their home because they were required to move when construction began. They are both unemployed, with a small child and live in a tiny apartment. Because the Illinois courts have required them to arbitrate their case against NACOA, something they cannot do because they have to money to pay for the arbitration process, they have to literally try their case twice – once against CitiMortgage in court and once against NACOA in arbitration – if they can ever afford to do that. NACOA is now moving to dismiss the homeowner's complaint against NACOA for "failing to arbitrate"."

iii. For claims that consumers bring in arbitration, should the Bureau seek to analyze:

(a) the cost and speed of dispute resolution; and/or (b) the outcome of disputes?

Since cost, speed and outcome are aspects of arbitration that its proponents say benefit consumers the CFPB should certainly analyze this information. However in evaluating this, the CFPB should compare the same - cost, speed and outcome - for cases brought by consumers (particularly class actions) in the courts. This analysis should examine:

- How many times a business entity has lost in arbitration against consumers versus how many times has it won?
- How many times a business entity has chosen an arbitrator more than once ("repeat player effect") and whether this practice impacts the outcome for consumers?
- How do consumers fare in arbitration, particularly against businesses that are repeat users of arbitrators and arbitration providers?
- How long do consumer arbitrations take to resolve?
- How does the speed of dispute resolution in arbitration, compare with the speed of litigation for a class of consumers?
- What is the speed of the arbitration process from filing to award, in the aggregate and by claimant type (i.e., consumer or business).
- How much do consumers pay to bring and fully prosecute claims in arbitration?
- How does the cost of consumer arbitration (arbitrator plus administrative fees) compare with a judicial action?
- Various measures of outcomes such as win-rates, damages awarded, and evidence and explanations for any repeat-player effects.

Further, in examining the arbitration process, the CFPB should analyze both the existence and enforcement of arbitration due process protocols. These protocols purport to be privately created standards setting out minimum requirements of procedural fairness for consumer arbitrations. Comparable due process protocols required by the courts commonly provide independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court. Leading arbitration providers have pledged not to administer arbitrations arising out of arbitration clauses that violate these protocols. Unfortunately, empirical evidence on the effectiveness and fair enforcement of these private enforcement protocols does not conform to the providers' promises. The CFPB should collect this information and determine whether the process/protocols provided in arbitration are in reality comparable to judicial due process protections. The CFPB should perform this analysis across all arbitration providers.

The CFPB should also examine the conditions under which businesses enforce pre-dispute arbitration agreements and how consumers end up in arbitration. There are far too many instances where consumers receive the terms and conditions for a service or product after their transaction is completed and particularly after the cancellation period provided for by their contract runs out. Internet transactions are a particular problem; consumers typically don't see the

terms of a contract, but merely are directed to a website that contains the terms and conditions. Further, many consumers often receive terms with their receipt after purchase of a product. Simply, the CFPB should examine the prevalence of post contract arbitration agreements. The story below, as well as all the stories in Appendix A, demonstrates why this practice can be so unfair to consumers:

"The facts of this case are that the consumer never knew about a contract or he was party to it before it was too late and he was ruled to have been governed by this alleged contract. My client bought a car where he received a 3 month free trial satellite radio. The radio was activated on the date of sale of car. Sirius sent him a welcome pack one month later with a contract in it. The contract stated that if he did not want to be bound by this contract, he would have had to cancel the contract by deactivating the radio with THREE DAYS of activation. By the time my client had received this, it was almost a month after it was too late. At the outset, my client was not aware of a contract, its terms (specifically the arbitration clause) and other terms that could have affected his adversely. The court in this case upheld the validity of this contract and enforced its arbitration agreement. Essentially, what the court is saying, is that the corporation (who is already greatly advantaged due to the fact that it gets to draft the contract) is allowed to create arbitrary terms, not show them to the consumer/s (perhaps we can even go as far as saying that they can hide them), and not show the contract to the consumer until it is too late for the consumer to reject the contract. Note that we are not asking for the ability to negotiate the terms, as contracts of adhesion have long been upheld by courts - but a true contract of adhesion has to be one where the consumer gets to either "take it or leave it." However, this ruling is now saying that the consumer does not even get to "leave it." "

The CFPB should also examine the circumstances in which a consumer is forced to arbitrate even when the original contract and resulting dispute is so far removed that it would be unfair to enforce the arbitration provision. In *Mangioni v. Midland Credit Management, Inc. et al.,* (see Appendix C) the consumer brought a class action claim against a debt buyer for its attempts to collect a debt, which had been discharged in bankruptcy. The debt is now owned by Midland Funding, and its chain of title contains at least two glaring gaps, but nonetheless, Midland produced a "sample", undated, unsigned generic Card member Agreement from the initial creditor (*see, Exhibit B of Phillips statement in Appendix C*) and claimed the right to arbitrate based on this sample. Though the dispute in this instance is with a debt buyer and though the debt has been discharged in bankruptcy, it is a miscarriage of justice that a debt buyer can enforce an arbitration clause that it cannot show was even signed by the consumer.

iii. **For consumers who bring claims in arbitration, should the Bureau seek to assess their understanding of, and satisfaction with, the resulting dispute resolution process? Should the Bureau seek to determine the factors that impact consumer understanding and satisfaction?**

Yes, the CFPB should seek to assess consumer understanding of and satisfaction with the dispute resolution process. Additionally, the CFPB should seek to determine the factors that impact consumer understanding and satisfaction. Specifically, the CFPB should examine whether there are any mechanisms/processes to factor in consumer satisfaction with the process and/or to improve the process as a result of that feedback. As many of the stories included in Appendix A

demonstrate, most consumers have no understanding of the arbitration process before they have a dispute with a company.

It appears that the number of consumers who actually use arbitration is very small; thus, the CFPB should examine the number of claims brought in arbitration and whether there is any relationship between consumer understanding of arbitration and their willingness to bring a claim. Of course, when the arbitration clause and forum rules are drafted in unintelligible legalese, no level of consumer literacy will solve the problem. The fact that not many people bring claims in arbitration might be reflective of consumer lack of awareness and understanding of arbitration but also might suggest that arbitration is not accessible to and easy to pursue for consumers. In 2011 alone, the Federal Trade Commission (FTC) received 1.8 million consumer complaints;[16] by contrast, the American Arbitration Association (AAA), the country's largest arbitration provider claims to have handled only 2 million cases during the past eight decades (i.e., 80 years) of its existence.[17] If arbitration is as accessible and fair as its proponents claim, the number of consumers utilizing it would be higher than it is.

It is unclear from the FTC complaints whether consumers who complained to the FTC could have resolved their disputes through arbitration, nonetheless, the prevalence of these clauses in consumer contracts begs the question why the number of consumers using the process is so low, and the number of consumers complaining to the FTC is so high. The CFPB should examine why there is such a low number of arbitration cases brought by consumers.

v. If the Bureau should address some or all of the issues addressed in 2.A.i-iv above, should the Bureau distinguish between claims that a consumer brings in arbitration: (a) in some consumer arbitrations, the consumer files his or her claim in arbitration in the first instance, relying on the terms of the pre-dispute arbitration agreement to do so. In other cases, however, the consumer may first file in court and only later file a claim in arbitration after acceding to¡ X or opposing and then losing on¡ a covered person¡¦s (or third party¡¦s) demand, under the same arbitration clause, that the consumer¡¦s dispute proceed, if at all, in arbitration. The Bureau intends to cover both types of consumer arbitration within the terms of this set of questions, except to the extent specifically noted in question 2.v. the first instance; and (b) after a covered person (or third party3) successfully invokes the terms of a pre-dispute arbitration agreement to end or limit that consumer¡¦s earlier court proceeding? Or should the Bureau consider both forms of arbitration as a single, combined category of consumer use?

[16] See FEDERAL TRADE COMMISSION, Consumer Sentinel Databook 2011 at 4 (Feb. 2012)
[17] See Testimony of Richard W. Naimark, on behalf of the American Arbitration Association, Domestic Policy Subcommittee Oversight and Government Reform Committee, U.S. House of Representatives, July 22, 2009.

The CFPB should examine all instances where a consumer has no choice but to use arbitration, regardless of how they ended up in the process. However, if the data is available, we believe it would be useful to compare the few consumers who willingly pursue arbitration versus the consumers who were forced into the process. We expect that this line of inquiry will find what other studies have shown[18], that more consumers oppose arbitration than those that try to go through arbitration.

The CFPB should also examine the conditions under which consumers are given contracts that contain arbitration agreements and examine how many of these arbitration agreements are entered into after a consumer has already agreed to a service or product. Many internet transactions direct consumers to a website that contains terms and conditions after a purchase. Additionally, as demonstrated by stories found in Appendix A, many consumers often receive terms with their receipt after purchase of a product.

vi. If the Bureau should address some or all of the issues identified in 2.A.i-v above, what methods of study should it use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?

The Bureau should also consider other relevant factors to determine whether data and conclusions from studies on arbitration proceedings are reliable, such as:

- How does a study or report determine a "consumer win"? Is the arbitrator award counted as a win regardless of its relation to the amount sought?
- Were the contracts in the study individually negotiated between the individual and the business or were these standard adhesion contracts, written by the business?
- If the CFPB is considering surveys regarding experiences in arbitration proceedings, is the arbitration experience related to pre-dispute arbitration clauses or is the arbitration experience related to voluntary arbitration (that is, arbitration entered into voluntarily after a dispute arises)?
- The author, the source and any indicia of objectivity, should be an important part of the CFPB's analysis. Whether it is a study done by consumer advocates or industry or a law review, it is important for the CFPB to know the provenance of the study and how this may impact the methodology used and outcomes achieved.

[18] See: Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 Harv. Negot. L. Rev. 115, 116-172 (Spring 2010)

We urge the CFPB to continue to study this issue by conducting these suggested studies. However, we also point out that the currently available data - including that provided here and otherwise in response to the CFPB's request for comment – compels the conclusion that forced pre-dispute arbitration should not be enforced in consumer contracts.

B. Claims That Covered Persons Bring in Arbitration

i. The Bureau is not aware of recent practice by covered persons to bring claims against consumers in arbitration. Do such arbitrations, in fact, exist at this point? If there In some cases, an entity that is not a party to a particular pre-dispute arbitration agreement has invoked that agreement to demand that a consumer is claim proceed only in arbitration. The Bureau intends the following set of questions to cover such third-party claims as well.

ii. Should the Bureau analyze the types of claims that covered persons bring in arbitration? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer this question for a period in which they did?

The CFPB should certainly first examine whether arbitrations of this type actually occur (since the forced shutdown of the National Arbitration Forum we have seen no examples of this). We believe that corporate **non-use** of arbitration claims against consumers is substantial proof of companies real feeling about the "fairness" of arbitration. Beyond the inherent unfairness of requiring consumers to dispute their claims in arbitration, while scrupulously avoiding the process themselves, this fact really points to the asymmetrical nature of arbitration agreements, which was specifically noted in *Discover Bank v. Superior Court,* when the court opined that "corporations will not sue their customers in class actions." [19]

While corporations continue to favor the judicial system, we have seen numerous examples of non-parties to a particular pre-dispute arbitration agreement invoke that agreement to demand that a consumer proceed with his claim in arbitration. The story below (as well as other stories in Appendix A) are all typical of how debt buyers, in particular, attempt to invoke a contract to which they clearly were not a part:

*"**Gregory v. NCO Financial Systems, Inc., et al., U.S.D.C. E.D. Pa. No. 07-CV-05254.***

[19] *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161. "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits." Such one-sided, exculpatory contracts in a contract of adhesion at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable. (Internal citations omitted).

Debt collector NCO sent Donna Gregory a letter stating that an alleged account it was trying to collect would be submitted to "binding arbitration" if she didn't pay. NCO then initiated arbitration proceedings with the now-defunct NAF – former darling of the credit and collections industry – and attained an "award" against Ms. Gregory. But, under the Pennsylvania Rules of Civil Procedure, a creditor in a consumer transaction may not confirm any arbitration award obtained by default unless it first applies to court to compel an arbitration proceeding (or the consumer participates or waives participation in writing.). Yet, NCO unilaterally went ahead with arbitration against Ms. Gregory and over 2300 PA consumers, obtaining bogus "awards" from NAF, larded with fees and charges. In 42 instances, NCO even had these faulty awards entered as judgments in state court. Gregory sued NCO under the FDCPA, claiming that the collection of these unenforceable arbitration awards was a misleading, unfair and unconscionable collection tactic. 15 U.S.C. § 1692e, f. After two years of litigation, the parties settled on a class basis for substantial cash relief, $6 million in credits to outstanding balances, and vacatur of nearly a half-million dollars in ill-gotten judgments."

iii. For claims that covered persons have brought in arbitration, should the Bureau seek to analyze: (a) the cost and speed of dispute resolution; and/or (b) the outcome of disputes? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer these questions for a period in which they did?

To the extent that covered persons do bring arbitration, the bureau should examine cost, speed and outcome all from the perspective of whether consumers have been harmed or if there is any benefit.

iv. For consumers involved in any such cases, should the Bureau seek to assess their understanding of, and satisfaction with, the resulting arbitration process? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer this question for a period in which they did?

Yes, see answer to 2.B i & ii above.

v. If the Bureau should address some or all of the issues identified in 2.B.i-iv above, what methods of study should it use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?

We encourage the CFPB to do ongoing studies, but we hope that the existing data and studies of pre-dispute arbitration referred to in this response (and other responses that the CFPB will receive), will provide the bureau the minimum data to understand that some regulatory action is needed and compel prompt action.

Section 3. Impact and Use Outside Particular Arbitral Proceedings

i. Should the Bureau seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons in one or more of these ways?

The incidence and nature of consumer claims against covered persons;

The suppression of claims is NACA and NCLC's primary concern with pre-dispute arbitration. Our attorneys report[20] – based on the large number of good cases they turn away and the many instances in which courts now routinely compel arbitration – that many otherwise viable consumer actions are no longer being pursued. This should not be surprising as it is extremely clear that claim suppression is the driving force behind businesses' inclusion of arbitration clauses in their consumer contracts.[21]

Simply, companies believe, and our survey demonstrates, that pre-dispute arbitration is the most effective way to ensure that consumer claims are suppressed. This suppression not only ensures that consumers don't receive the justice they deserve, but also serves to significantly hinder the necessary and proper development of consumer protection law. It is therefore absolutely essential that the CFPB carefully examine the claim suppressive effects of arbitration.

The price and availability of financial services products to consumers;

The financial services industry often makes the claim that the presence of pre-dispute arbitration clauses makes financial services and products cheaper to the consumer. We have seen no evidence that this claim has any validity, but instead we continue to see unfair, abusive and overpriced financial service products. Exhibit 1 in Appendix C (a title loan with an interest rate of 183% and an arbitration clause) demonstrates that the purported efficiencies of arbitration do not result in cheaper financial products for consumers, but rather insulate lenders from judicial scrutiny of predatory practices. This has been referred to as a "get out of jail free card". The CFPB should carefully examine whether the presence of arbitration clauses results in less expensive financial services and products. We believe that the exact opposite is true, that the claim suppressive impact of arbitration clauses leads to higher prices and an increase in unfair products and services in the consumer financial market.

NACA and NCLC are also concerned about the "take it or leave it" aspect of pre-dispute arbitration agreements and how this impacts the availability of financial services and products to

[20] See NACA 2012 Binding Mandatory Arbitration Survey for additional stories demonstrating claim suppression in Appendix B

[21] Thomas B. Hudson, *Arbitration Agreements Can be Helpful in Class Action Lawsuits*, The Auto Dealer Monthly (December 26, 2011) found at: http://www.autodealermonthly.com/79/4369/ARTICLE/Arbitration-Agreements-Can-be-Helpful-in-Class-Action-Lawsuits.aspx (noting that "[t]he biggest legal risk to the industry at the moment is still the class action lawsuit, which in the hands of a skilled plaintiffs' lawyer, can still ruin your entire day. I've been advising dealers for years that the best first line of defense against class action suits is the practice of requiring consumers to sign mandatory arbitration agreements as part of the car purchase and finance transactions they enter into. The use of arbitration agreements will not ensure victory when the class action lawyers come calling, but there is little downside to using them. And they can occasionally save the day."

consumers. "Consumer contracts requiring arbitration have become widespread, and in certain types of transactions, entire segments of the market for certain goods may become closed to a party seeking to preserve her constitutional rights to have her complaints adjudicated by the courts.[22]" Consumers, when agreeing to arbitration, are waiving these rights, not in a knowing, willful, and voluntary fashion, but rather in a coerced fashion, as a pre-condition to receiving basic goods and services. The CFPB should examine what financial products and services consumers can purchase without being required to accept an arbitration clause. The CFPB should review what products or services are actually still available to consumers if a consumer declines to sign a contract containing an arbitration clause. This review should also include an examination of:

- the implications for consumers if certain products and services are not available to them if they refuse to sign an arbitration clause
- whether the consumers ability to refuse the arbitration is presented to consumers contemporaneously with the transaction
- whether there are any add-on costs or fees to consumers if they do not accept the arbitration clause

Compliance with consumer financial protection laws;

"Arbitration clauses…deprive consumers of their statutory rights" such as those remedies available under the Servicemember Civil Relief Act, the Fair Debt Collection Practices Act, the Truth in Lending Act, the Sherman Act, and other state unfair and deceptive acts and practices statutes. [23] Numerous courts have found that an arbitrator, unlike a judge, is not bound by the facts or law. Even the low threshold of "manifest disregard for the law" is open to question. Thus the arbitration clause may act as an exculpatory clause, insulating the business from its statutory obligation[24] and unfairly deprive the consumer of the protection intended by the legislature.[25] Arbitration advocates, in unfiltered moments, freely admit that arbitration may be used a "defense" for banks against consumer claims, and as a "powerful deterrent to class action lawsuits."[26]

[22] Sheren at 65
[23] See Sheren, at 56

[24] Wilko v. Swan, 346 U.S. 427, 436 (1953). The Court did rule in this case, however, that it had the ability under FAA §10 to vacate an award if made in "manifest disregard" of the law.
[25] Brief of Amicus Curiae, Green Tree Financial Corp.- Alabama v. Larketta Randolph, No. 98-6055, Brief to U.S. Court of Appeals for the 11th Cir. at 8., Trial lawyers for Public Justice, at http://www.tlpj.org (visited May 8, 2002).
[26] Alan Kaplinsky, Excuse Me, But Who's The Predator: Banks Can Use Arbitration Clauses As A Defense, BUS. LAW, May/June 1998, at 24, 25-26.

Research has confirmed that some companies have used pre-dispute arbitration clauses in non-negotiable form contracts to their unfair advantage.[27] Other studies have shown that in certain areas, such as credit card and wireless service contracts, companies often preclude class proceedings and effectively lead consumers to forego legal rights or bear the high costs of individual arbitration proceedings.[28] For these reasons, the CFPB should examine whether and how pre-dispute arbitration clauses enable companies to violate the law if arbitrators do not have to strictly follow or apply the law.

Specifically, the CFPB should examine:

- the impact of arbitration clauses on companies that violate the law.
- the impact that the potential disappearance of class actions will have on corporate behavior.
- the impact of unlawful and deceptive practices being hidden from public view

Consumer awareness of potential legal claims against covered persons

The CFPB should examine the impact of arbitration on consumers' ability to learn about potential legal claims against covered persons. Fundamentally, our public justice system works for consumers on many different levels. First and foremost, it provides consumers with significant due process protections, in particular a right to a public hearing before a neutral judge and/or jury. Second, and maybe just as important, is the **public** nature of the process including the right to a decision based on the law and the right to appeal that decision to a higher court. This transparent process not only gives an individual consumer a basic reason to trust in the fairness of our system of justice, it all also provides public disclosure of complaints, concerns and potential legal claims that other consumers might have against specific companies or markets. Unfortunately, arbitration and its intentionally non-public, non-transparent rules specifically serves to eliminate this public disclosure, keeping consumers unaware of potential claims.

[27] Florencia Marotta-Wurgler, Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements, 5 J. Empirical Legal Stud. 447 (2008) (creating seven categories of standard terms and using a system of adding/subtracting points depending on her assessment of terms as more "pro-buyer" or "pro-seller" than the applicable U.C.C. Article 2 default rules).

[28] Id. (discussing studies comparing companies' use of arbitration clauses in consumer versus non-consumer contracts); see also In re Am. Express Merchs.' Litig., 554 F.3d 300, 300-09 (2d. Cir. 2009) (holding that a ban on class-wide arbitration in credit card agreements was unenforceable because it would effectively insulate American Express from antitrust liability by cutting off consumers' only meaningful access to recovery).

It has been said that one of the purposes of the class action is to bring litigation for people who have no idea about their rights. A perfect example of this is seen in Exhibit 2, included in Appendix C, which demonstrates that there are significant, but sometimes arcane rights (in this instance, anti-deficiency laws) that not even some consumer attorneys know about. If arbitration clauses had been present, the near $26 million dollars of restitution and injunctive relief provided in this case would have been lost.

The CFPB should examine whether arbitration, because of its lack of sunlight and because of its suppression of class actions, serves to deprive consumers, unaware of their rights under the law, of potential meritorious claims.

Consumer awareness and understanding of how potential legal claims against covered persons may be resolved

Consumers currently have no meaningful ability or opportunity to make choices or weigh their options at the point of contract.[29] Consumers generally do not negotiate or try to negotiate the arbitration provisions in their consumer financial service contracts. A number of participants stated that consumers are unlikely to negotiate about these terms, because they may not believe they have any alternative given that all of the companies in the relevant industry (e.g., banks that issue credit cards) have arbitration provisions in their contracts.[30] Other consumers may not negotiate about arbitration provisions because they are purchasing goods or services (e.g., urgent medical care) in circumstances in which time is of the essence.

The development, interpretation, and application of the rule of law

We believe that the potential negative impact on the development, interpretation and application of the rule of law, cannot be understated. As has been well established, private arbitrators, unlike judges, have no duty to properly apply and interpret the law. This significant problem is exacerbated by the fact that an arbitrator's "ruling," regardless of how careless, thoughtless or inapposite of the law it is, is final and practically impossible to appeal.

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[29] *See* Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, 6 (May 2009), *available at* http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf (stating that "[e]ven when a consumer can shop for loans, they typically cannot renegotiate the key terms of the standard contract. They have no choice or control over which arbitration forums can be used in a forced arbitration clause.") (hereinafter Stacked Deck).

[30] Frank, Tr. II at 88-89 ("You want a phone, you're going to get arbitration. You want a credit card, you're going to get an arbitration clause."); *see* Sternlight, Tr. III at 56-57 (stating that, "if you define the word choice in any kind of remotely meaningful way, consumers do not have a choice because all or certainly virtually all credit card companies currently require consumers' debt to be sent to arbitration.").

There is also a risk that on a given set of facts different arbitrators will reach different conclusions. Since arbitral awards are only binding on the parties to the arbitration clause, arbitral awards cannot be used as precedents in future disputes – in other words the doctrine of stare decisis does not operate in arbitration. Confidentiality agreements, as discussed above, also ensure that arbitral awards are not available as precedent for future disputes.

Both consumers and business benefit from the doctrine of precedent. If a consumer wins in arbitration, that victory will only benefit that individual. In contrast, a victory by a consumer in court assists other consumers because that decision is binding on future trials where the facts in dispute are substantially the same. The precedent operates as an incentive for the company to settle future claims or change its behavior because they know that it is more likely that they will lose similar disputes in the future.

Relying on precedent also reduces economic uncertainty for business. If business firms can rely upon future courts to apply the law in the same way they have in the past—that is in accordance with the doctrine of precedent or stare decisis—they will be able to make business decisions with less uncertainty and therefore lower transaction costs. This development can be an enormous "public good" in any economy. Even in a totally honest system, there will always be an uncertainty about how a new issue will be resolved. But, as a body of case law develops and builds, that community which uses that area of law will experience less and less economic uncertainty and thus lower costs. Accordingly, each litigated case with a published opinion—and therefore a settled rule of law—adds to the social capital of the economy.

If, on the other hand, disputes are privately settled with no publication of the results and no way of enforcing the doctrine of precedent, this enormous positive externality will be lost to the economy.

Finally because of the asymmetrical nature of arbitration, consumers will have little or no opportunity to bring good and substantial cases in a court of law that could lead to rulings (at the trial and appellate levels) that would interpret and appropriately develop important consumer statutes and common law. Instead, corporations, who have not subjected themselves to arbitration, will be able to pick and choose cases to bring to court that they believe will limit the impact and effectiveness of consumer protection laws ("bad facts, make bad law").

ii. Should the Bureau seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons in any other ways that are independent of their role in particular arbitral proceedings?

Yes, the CFPB should examine whether arbitration allows predatory or deceptive practices to exist in a manner that is, in a macroeconomic context, anti-competitive and injurious to a healthy, competitive and free market. In this fragile economic climate, if arbitration is having a claim suppressive effect, predatory and deceptive practices will persist in the market and good businesses will not be able to compete. Claim suppression, specifically, class action claim

suppression will make it more difficult to address these injurious claims that consumers don't know exists.

The CFPB should examine how pre-dispute arbitration clauses impact consumers' right to a jury trial. The concept of having open courts and the right to a jury trial is fundamental to American democracy and our concept of due process of law. Pre-dispute arbitration agreements are highly prevalent in today's consumer financial transactions where consumer's ability to seek justice has been taken away. As referenced above, arbitration agreements are involved in practically all agreements and a consumer can little expect to obtain a product or service that does not come with a pre-dispute arbitration clause.

The concept of a civil jury trial is a protected right in the US Constitution and in many, if not all, state constitutions. The founders of our democracy were very skeptical of using professional judges to decide disputes. A trial by jury is a protection against both abuses of power and the corrupting of a professional dispute resolution process. Pre-dispute arbitration creates an environment that puts an incentive in place for abuse of power and corruption. Even if arbitration process does not actually result in corruption, the appearance and potential for corruption negatively impacts on the consumer trust in our justice system, thus, undermining our democracy as a whole.

Simply, the promise of neutrality as found in our judicial system, does not exist in arbitration. A review of pre-dispute arbitration agreements and arbitration forum processes will show the following factors that make arbitration fundamentally unfair to consumers and inevitably pre-disposed to rule in favor of the business:

- The business' economic superiority compared to the consumer.
- The business' superior knowledge, expertise, and information control compared with the consumer on the subject of the transaction.
- The arbitrator's accurate belief that the business will have multiple disputes requiring resolution through arbitration.
- The business' ability to select the arbitration forum.
- The business pays the arbitration forum for their services.
- The likelihood that the business was solicited by an arbitration service.
- The likelihood that a business will not use an arbitrator a second time when that arbitrator has ruled against them.

The consumer will have none of these advantages. Instead, consumers are likely to use the arbitration process only once and will likely not have the opportunity to select an arbitrator who

previously ruled in favor of a consumer. Thus the arbitration system, at its core, creates very real economic incentives for arbitrators to rule in favor of the party who will be a "repeat player."

The CFPB should examine – perhaps through surveys of consumers who have arbitrated their claims – how arbitration impacts consumer trust and faith in the consumer financial market. Simply, trust and faith that we will be treated fairly (both at the time of a transaction, and if and when a dispute later arises) is a fundamental principle for a well-functioning free market system. If consumers believe that the justice system available to them is and that they will have no recourse against a business that treats them unfairly, our overall market will suffer significantly. One need only look at consumer's loss of trust in banks and our financial markets, to understand how damaging this can be.

The CFPB should carefully examine the impact on consumers of the private and secret nature of arbitration. Arbitrations happen behind closed doors, without significant due process protections and without a right of review. The CFPB should examine how this lack of transparency impacts both an individual consumer's ability to have a successful outcome in arbitration, as well as other consumers' ability to learn about their claims and rights.

Finally, the Supreme Court's *Concepcion* decision is likely to allow arbitration clauses to provide corporations with a very real and very expansive insulation from liability. The CFPB should look at the ability and likelihood of consumers seeking redress for small (but collectively significant) small dollar claims absent the ability to act in concert through a class action.

iii. If so, and in either case, what methods of study should the Bureau use?

The CFPB should use all methods of study that can appropriately determine the impact of arbitration on consumers. Short of future longitudinal studies, which should be done on an ongoing basis, and beyond the data that has been provided in this request for information, the CFPB should use consumer surveys, study exemplar arbitration agreements from all industries that contract directly with consumers, create and offer questionnaires to covered entities about their use of arbitration, including: how much they paid in claims pre and post use of arbitration agreements;, and the changes in consumer fees post-use of arbitration agreements in their contracts.

There are a few kinds of surveys we would recommend that the CFPB undertake, including:

- Survey of consumer's knowledge and understanding of pre-dispute arbitration
- Survey of businesses that use pre-dispute arbitration
- Survey business trade organizations that promote, recommend or lobby for pre-dispute arbitration.
- Survey trade organizations that oppose pre-dispute arbitration

- Survey of consumer attorneys that represent consumers against covered persons

iv. What new data, if any, should the Bureau seek and from which entities?

The CFPB should seek information, from covered persons and all other entities, which might have information:

From covered persons:

- Can the consumer opt-out of the arbitration agreement?
    - If yes, how?
    - If yes, can the consumer obtain the same services as one who accepts the arbitration clause?
    - If no, how do the services or products offered to the consumer who refuses arbitration differ from that offered to the consumer who accepts arbitration?
- How do they select/draft an arbitration clause?
- Who do they use for an arbitration forum?
    - How was the forum selected?
    - Criteria for selection?
    - What forum were reviewed and not selected?
- How many disputes have gone to arbitration?
    - How often did the drafting entity prevail?
    - How often did the consumer prevail?
    - What criteria are used to select an arbitrator or arbitration panel?
- When and how often and under what circumstances does the business invoke a pre-dispute arbitration clause?
- Do they agree to arbitration clauses in their commercial agreements with vendors?

The information above should also be sought from

- AAA, JAMS and all other entities that contracts with businesses to provide arbitration of consumer disputes

- Trade organizations that promote or recommend to their members that they use pre-dispute arbitration for consumer disputes

v. What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact of particular terms in pre-dispute arbitration agreements?

The CFPB should study all industries that contract directly with consumers, e.g., mortgage brokers, lenders, credit card companies, telecommunications providers, automobile dealers, automotive lenders, insurance companies, etc. See Section 1(iii) re particular terms including, damage limitations, choice of arbitration companies, choice of particular arbitrators, limits on discovery.

The CFPB should include in its inquiry and review the following reports, studies and articles:

- FTC Roundtable Report: *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*. July 2010

- Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration; 24 Loyol*a Consumer Law Review 586 (2012).

- Maureen L. Ambrose & Carol T. Kulik, How Do I Know That's Fair? A Categorization Approach to Fairness Judgments, in Research in Social Issues in Management: Theoretical and Cultural Perspectives on Organizational Justice 35, 37-43 (S.W. Gilliland et al. eds., 2001).

- Lisa B. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, McGeorge Law Review (Winter), (1998).

- Shmuel I. Becher & Esther Unger-Aviram, Myth and Reality in Consumer Contracting Behavior (Aug. 4, 2009) (unpublished manuscript, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443908) (highlighting lack of empirical data and policymakers' consideration of that data in designing contract reforms, relying instead on theoretical assumptions). This is subject to the tandem need for more research regarding the cognitive processes that underlie individuals' "fairness" judgments.

- Black, Barbara, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?* 75 Law & Contemp. Probs. 107-128 (2012).

- Mark E. Budnitz, Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection, 10 OHIO ST. J. ON DISP. RESOL. 267, 319 (1995).

- Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, Law & Contemp. Probs., Winter/Spring 2004, at 55, 62.

- John O'Donnell, The Arbitration Trap: How Credit Card Companies Ensnare Consumers, Public Citizen (2007), available at http://www.citizen.org/documents/ArbitrationTrap.pdf

- Theodore Eisenberg et. al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871 (2008).

- Michael A. Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP, SSRN* (August 2001).

- Ann Marie Tracey and Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, Loyola of Los Angeles Law Review, Page 435, 2012.

- Andrew Powell & Richard Bales, *Ethical Problems in Class Arbitration*, J. Disp. Resol. 309 (2011).

- David S. Schwartz, *Claim Suppressing Arbitration: The New Rules.*, 87 Ind. L. J. (forthcoming 2012)

- Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 Harv. Negot. L. Rev. 115, 116-172 (Spring 2010)

- Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 Stan. L. Rev. 1631, (April 2005).

- Thomas J. Stipanowich,*Mediation Holds Steady, Arbitration Usage is Down in a New 2011 Fortune 1,000 Corporate Survey*, Daily Journal (Mar. 19, 2012).

- Stephen J. Ware, Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto, 31

- *Stacked Deck: A Statistical Analysis of Forced Arbitration*, By Joshua M. Frank, Center for Responsible Lending, May 2009 WAKE FOREST L. REV. 1001, 1001 (1996)

- The Pew Charitable Trust: The Safe Checking in the Electronic Age Project, *Still Risky: An Update on the Safety and Transparency of Checking Accounts*, June 6, 2012, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe_Checking_in_the_Electronic_Age/Pew_Safe_Checking_Still_Risky.pdf.

- Ann Marie Tracey and Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, Loyola of Los Angeles Law Review, Page 435, 2012.

- Andrew Powell & Richard Bales, *Ethical Problems in Class Arbitration*, J. Disp. Resol. 309 (2011).

- David S. Schwartz, *Claim-Suppressing Arbitration: the New Rules*, 87 Ind. L. J. (forthcoming 2012).

- Stephen J. Ware, *Paying the price of Progress: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (2001)

- Public Citizen and National Association of Consumer Advocates, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident*, April 2012, http://www.naca.net/sites/default/files/Justice%20Denied%20Concepcion%20Anniversary%20Report.pdf.

- National Consumer Law Center, Consumer Law Treatise: *Consumer Arbitration Agreements* (6th ed. 2011)

The CFPB should include in its review the following recent cases where the arbitration clause was at issue:

- Alfeche v. Cash Am. Int'l, Inc., CIV.A. 09-0953, 2011 WL 3565078 (E.D. Pa. Aug. 12, 2011) (financial lending practices)

- Bailey v. Household Fin. Corp. of California, 10CV857 WQH RBB, 2011 WL 5118723 (S.D. Cal. Oct. 28, 2011) (financial lending practices/credit card/debt collection)

- Beard v. Santander Consumer USA, Inc., 1:11-CV-11-1815 LJO, 2012 WL 1292576 (E.D. Cal. Apr. 16, 2012). (financing for auto)

- Bellows v. Midland Credit Mgmt., Inc., 09CV1951-LAB WMC, 2011 WL 1691323 (S.D. Cal. May 4, 2011) (credit card, debt collection)

- Black v. JP Morgan Chase & Co., CIV.A. 10-848, 2011 WL 3940236 (W.D. Pa. Aug. 25, 2011) report and recommendation adopted, 2:10CV848, 2011 WL 4089411 (W.D. Pa. Sept. 14, 2011) (credit history, loan pricing)
- Clerk v. Cash Am. Net of Nevada, LLC, CIV.A. 09-2245, 2011 WL 3740579 (E.D. Pa. Aug. 25, 2011) (financial lending practices)
- Clerk v. Cash Cent. of Utah, LLC, CIV.A. 09-4964, 2011 WL 3739549 (E.D. Pa. Aug. 25, 2011) (financial lending practices)
- Coiro v. Wachovia Bank, N.A., CIV. 11-3597, 2012 WL 628514 (D.N.J. Feb. 27, 2012) (banking)
- Cottonwood Fin., Ltd. v. Estes, 2012 WI App 12, 339 Wis. 2d 472 (payday lending)
- Day v. Persels & Associates, 8:10-CV-2463-T-33TGW, 2011 WL 1770300 (M.D. Fla. May 9, 2011) (credit counseling)
- Estrella v. Freedom Fin., C 09-03156 SI, 2011 WL 2633643 (N.D. Cal. July 5, 2011) (debt counseling)
- Giles v. GE Money Bank, 2:11-CV-434 JCM CWH, 2011 WL 4501099 (D. Nev. Sept. 27, 2011) (credit cards, banking)
- Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339 (N.D. Ga. 2011). (lending, fees)
- In re Checking Account Overdraft Litig. MDL No. 2036, 672 F.3d 1224 (11th Cir. 2012)(banking)
- Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947 (9th Cir. 2012) (student loan lenders)
- King v. Advance America, CIV.A. 07-237, 2011 WL 3861898 (E.D. Pa. Aug. 31, 2011) (payday loans)
- Sakalowski v. Metron Services, Inc., 4:10CV02052 AGF, 2011 WL 4007982 (E.D. Mo. Sept. 8, 2011) (debt settlement)
- Tory v. First Premier Bank, 10 C 7326, 2011 WL 4478437 (N.D. Ill. Sept. 26, 2011) (credit card)
- Willis v. Debt Care, USA, Inc., 3:11-CV-430-ST, 2011 WL 7121456 (D. Or. Oct. 24, 2011) (debt settlement).

- Willis v. Nationwide Debt Settlement Group, 3:11-CV-430-BR, 2012 WL 1093618 (D. Or. Mar. 30, 2012) (debt settlement)

Conclusion

The data and responses to the questions presented in the CFPB notice will demonstrate that pre-dispute arbitration is a predatory practice that inhibits the CFPB's work and should be eliminated from consumer financial services contracts and any other consumer contracts within the Bureau's purview. The CFPB will find that few consumers use, understand or like arbitration and the mere existence of the practice has significant consequence for consumers, the development of consumer protection law, and the ability of stakeholders to properly enforce the law. The CFPB will also find that pre-dispute arbitration clauses are used by business for claims suppression. We urge the CFPB to thoroughly examine these matters and issue appropriate regulations to protect consumers against the adverse consequences of pre-dispute arbitration.

Appendix A – Consumer Stories

Arbitration – consumer protection laws unable to be enforced

My client, out of financial desperation, acquired a title loan on her car by going to Delaware. She received $2,000. The interest rate on the loan is 300%. She is unable to pay it back. The arbitration clause is strongly worded such that it is unlikely that I will be able to keep it out of arbitration if the other side objects to court. If the matter goes to arbitration she may lose if Delaware law applies. If it goes to court she is likely to win because NJ courts will not uphold a contract that imposes usurious interest.

The title loan company is currently threatening repossession. This is causing the client to keep her car in the garage. If she keeps her car in the garage too long without using it, it will become useless. It has currently been useless for her because she cannot drive it without the fear of repossession. Cl is in a holding pattern because it is possible that if the title co sues her, then we may be able to stay out of arbitration. The arbitration choices are JAMS and AAA.

Cl is ok with talking with NACA , her name is Belinda Scott, please try to call her only in the late afternoon though because she works at night. Her tele # is (856) 629-1602

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Arbitration – inequitable treatment for consumers with arbitration clause.

Aho v. AmeriCredit Financial Services, Inc., 10 cv 1373, (S.D. Cal.). [complaint attached] Court certified a class of California consumers, but required the exclusion of those with arbitration clauses in their car purchase contracts. Certified class wins summary judgment, holding several hundred million dollars of consumer debt invalid, and never owed. AmeriCredit is cleaning credit reports and forgiving the debt (although still trying desperately to hold on to what has been paid already) for the class members. Meanwhile, although they have the same case as the class members in all other respects, those AmeriCredit customers with arbitration clauses are still being reported and collected upon. AmeriCredit knows that, without a class action (the arb clauses ban group action), it will never get sued or only one by one, so it still collects and reports. [Additional related documents in Appendix C]

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Arbitration – Consumer had no opportunity to refuse arbitration.

Take it or Leave It, the Consumer never given an opportunity to leave it. The facts of this case are that the consumer never knew about a contract or he was party to it before it was too late and he was ruled to have been governed by this alleged contract. My client bought a car where he received a 3 month free trial satellite radio. The radio was activated on the date of sale of car. Sirius sent him a welcome pack one month later with a contract in it. The contract stated that if he did not want to be bound by this contract, he would have had to cancel the contract by deactivating the radio with THREE DAYS of activation. By the time my client had received this, it was almost a month after it was too late. At the outset, my client was not aware of a contract, its terms (specifically the arbitration clause) and other terms that could have affected his adversely. The court in this case upheld the validity of this contract and enforced its arbitration agreement. Essentially, what the court is saying, is that the corporation (who is already greatly advantaged due to the fact that it gets to draft the contract) is allowed to create arbitrary terms, not show them to the consumer/s (perhaps we can even go as far as saying that they can hide them), and not show the contract to the consumer until it is too late for the consumer to reject the contract. Note that we are not asking for the ability to negotiate the terms, as contracts of adhesion have long been upheld by courts - but a true contract of adhesion has to be one where the consumer gets to either "take it or leave it." However, this ruling is now saying that the consumer does not even get to "leave it."

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Arbitration – not as cost efficient as companies purport.

McCarty v. Anthem Blue Cross & California's Valued Trust. Anthem Blue Cross and California's Valued Trust denied reimbursement to the parents of Erin McCarty for institutionalized treatment under the insurance policy for anorexia. They denied reimbursement of in-patient care beyond the limitations set forth for physical trauma and denied reimbursement for in-patient care based upon the psychological effects of the eating disorder. We have an expert who will testify at the arbitration that eating disorders, including anorexia and bulimia, have both a physical and psychological component and that appropriate treatment must include both.

When we filed the claim in arbitration, as required by the provisions of the insurance policy with Anthem Blue Cross, we paid the initial administrative portion of the arbitration fee. Neither defendant responded. Although JAMS, the designated arbitration provider, waived the arbitration administrative fee for McCarty, it will not institute any proceeding unless the defendants' portion of the administration arbitration fee is paid. Thus, to trigger any proceedings whatsoever, McCarty would have to pay an additional $400 to cover the defendants' administrative portion of the arbitration provider's fees. In addition, neither defendant has responded. The claim was filed in March, 2012, and no proceedings have been scheduled or are forthcoming.

The McCarty claim presents the real possibility that by failing to respond or show up, a defendant or respondent can defeat the arbitral process, which it has compelled through its form agreement, altogether, thereby denying any resolution of the claim. This example renders false the promise that arbitration in lieu of litigation in court before a jury, is more cost effective and prompt. Indeed, if the arbitration goes forward, McCarty will have to front her portion of the arbitrator's fees, the arbitrator's hourly fees which will be at least $400 per hour and likely more. Such a cost is not chargeable in a public forum.

Sylvester v. Wells Fargo Bank. In February, 2005, Ms. Sylvester instituted a statewide class action in San Francisco Superior Court challenging the bank's practice of blocking third-party levies on exempt funds and then collecting a $60 "legal process fee" from the same exempt funds. Sylvester's claim was premised on California law which prohibits the imposition and collection of that fee from exempt funds. After protracted litigation in both state and federal court, a superior court in San Francisco last summer granted Wells Fargo Bank's motion to compel arbitration, first filed in 2012 following the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), claiming that to have moved to compel arbitration previously would have been futile.

Sylvester opposed the motion on numerous grounds, including that the bank failed to produce any evidence whatsoever of any agreement between her and the bank providing for arbitration. The trial court, nevertheless, granted the motion after finding that the absence of a physical agreement was not relevant where Wells Fargo claimed that it mailed changes of terms to all of its deposit account holders, although it had no copy of the change in terms it mailed to Sylvester or any evidence of the mailing or any evidence of an original agreement.

Rather than face two additional years of appellate litigation, the disabled, elderly claimant decided to pursue arbitration. We filed the claim before AAA in February, 2012, after a significant period of time we were able to secure a waiver of Ms. Sylvester's portion of the administrative fee based on her sole source of income being Social Security benefits, but AAA requires that she pay her share of the arbitrator's hourly rate. It claims that that substantial cost may not be waived based upon the financial hardship of the claimant.

To date, no arbitration has been set and no arbitrator has been designated. The hourly rate for the arbitrator at AAA will be substantial to oversee necessary discovery and a contested evidentiary process by defendant Wells Fargo Bank.

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Arbitration – not always faster than litigation; consumer in arbitration for 3 years.

A good example of this is a case in Illinois. It involves a foreclosure action filed against two homeowners by CitiMortgage, Inc. The homeowners filed a counterclaim against the lender for a fraudulent mortgage transaction, seeking to rescind the mortgage and recover damages for violation of the Truth in Lending Act, 15 U.S.C. §1601 et seq. ("TILA"), and implementing Federal Reserve Board Regulation Z, 12 C.F.R. part 226. The homeowners also seek damages under the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA") and under common law. Part of the mortgage fraud as alleged by the homeowners also involves the NEIGHBORHOOD ASSISTANCE CORPORATION OF AMERICA. The homeowners filed a third-party complaint against them alleging a fraudulent mortgage transaction by them (in conjunction with

CitiMortgage, Inc.) and seek damages under the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA") and under common law.

After the pleadings were filed, Neighborhood Assistance Corporation of America (NACOA) filed a Motion to Dismiss the Third-Party Complaint and to Compel Arbitration. They cited the existence of a "membership agreement" which contained this "arbitration agreement". Basically, when a homeowner seeks assistance from NACOA, they are given a booklet consisting of approximately 200 pages. The representative goes through the booklet and then pulls out a page near the back of the booklet that they ask the homeowner to sign – this is the "membership agreement" that contains the arbitration clause.

In this Illinois case, the homeowners sought the assistance of NACOA to refinance their mortgage. NACOA has an agreement with two national banks – one being CitiMortgage, Inc. – that would help these homeowners get purchase money mortgages or refinance mortgages in distressed neighborhoods in large cities. Our clients applied for such a refinance loan. One of the NACOA requirements is that an inspection of the property must be done by a NACOA approved inspector. Any property deficiencies would be noted, NACOA approved contractors would then provide an estimate of the cost to complete the remedial work, and NACOA would then get their cooperating lender to add the cost of the construction to the loan. In our case, the inspector found property deficiencies approximating $8,000. NACOA did not approve this inspection report for reasons yet to be determined. However, they did send another inspector to the property who now came up with remedial work costing approximately $100,000. That was ultimately reduced by about $30,000 and NACOA obtained a loan for our clients for the total amount, namely the refinance amount of approximately $135,000 PLUS the construction amount of approximately $70,000. At closing, NACOA then had CitiMortgage, Inc. finance the entire amount even though the $70,000 was, in essence, a construction loan. No formal escrow was set up by NACOA with CitiMortgage. Instead, when NACOA approved a disbursement request from a contractor, it would direct CitiMortgage to pay the amount to the contractor. Our clients were paying interest on money that they really never received and that should have not been funded until it was to be disbursed to a contractor.

The Illinois court ruled that the homeowners had entered into a valid arbitration agreement and granted NACOA's motion and ordered arbitration. For the past 2+ years, we have attempted to get the matter into arbitration with AAA, to no avail. We requested that AAA waive the arbitration fees – they refused. Instead the only offered to defer same. As our clients are literally penniless, they could not agree to this since they would never have the ability to pay the amount. The issue of the arbitrator's fees was never addresses by AAA. Due to the complexities of the case, the likelihood that there would be up to 20 witnesses, several of whom would be expert witnesses, the hearing would likely take quite some time. It is our understanding that AAA does have a "pro bono arbitrator" program, typically it involves an arbitrator donation his/her time for ONE (1) day only.

For three years now, our clients have been out of their home because they were required to move when construction began. They are both unemployed, with a small child and live in a tiny apartment. Because the Illinois courts have required them to arbitrate their case against NACOA, something they cannot do because they have to money to pay for the arbitration process, they have to literally try their case twice – once against CitiMortgage in court and once against NACOA in arbitration – if they can ever afford to do that. NACOA is now moving to dismiss the homeowner's complaint against NACOA for "failing to arbitrate".

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Arbitration – not faster than litigation. Consumer trying to arbitrate for over 5 years

Jon Perz v. Mossy Toyota. Jon's been waiting over 5 years without a hearing in arbitration, even though the court ordered his case to arb years ago. The dealer refused to pay the fee to initiate the process. So Jon's been in limbo, and had to keep making payments -- totaling approx. $12,000 -- for a car he's never been able to drive, because the water damage rendered it unsafe.

Finally, AAA dropped the dealer from its program, due to the non-payment, but -- Jon still doesn't have a court date.

1. February 16, 2007, Date of purchase. Mossy sold plaintiff a water damaged and wrecked used car without disclosure. Plaintiff noticed a vibration during the test drive. To make the sale, Mossy promised to repair the vehicle for the engine vibration. [Subsequent document production shows that Mossy knew about the vibration and determined that it was irreparable during its presale vehicle inspection.] The representation was a CLRA violation. After the sale, Mossy breached its express 90 day/3,000 mile 100% warranty by failing to make the repair. Before filing suit plaintiff attempted to have this matter resolved himself, without counsel. He asked in person. They laughed at him. He sent a letter asking for repurchase. He was rebuffed.

2. February 17-28, 2007, Perz takes the vehicle to Mossy for repair of the vibration problem per their promise. He is told it's a condition of the vehicle and cannot be repaired. He also has electrical problems with the vehicle and discovers large areas of rust, water marks, and sediment in and on the vehicle.

3. March 30, 2007, Perz checks Carfax and learns of a prior undisclosed collision. Perz makes a formal request for repurchase to Mossy. There is no response.

4. April 3, 2007, Perz has the vehicle inspected by a professional who documents the extensive rust, water damage, electrical problems, and collision damage.

5. The complaint was filed May 9, 2007.

6. July 16, 2007, counsel for Mossy prepares and faxes a stipulation to submit toJAMS. Counsel for plaintiff makes one change to clarify that Mossy will pay the arbitration fees and costs per Code of Civil Procedure § 1284.3. Mossy rejects and per phone call of its counsel, Michael C. Rogers, flatly refuses to pay the fees and costs of arbitration. Per Mr. Rogers, Mossy is going to "make a stand".

See Appendix C for further details and http://www.youtube.com/watch?v=9sCUmXfy03c

Arbitration – covered persons choosing not to arbitrate and using courts to obtain default judgments.

The current class action is on behalf of borrows against a payday lender. The payday lender filed over 16,000 cases against borrowers who later defaulted on their loans. Instead of exercising its arbitration clause, the payday lender filed suit in Las Vegas Justice Court securing default judgments against each and every one of the borrowers and, in many cases, enforced those judgments via garnishment. It was later discovered that the process server used to serve these borrowers was engaging in sewer service. He was later tried and convicted.

Legal Aid Center of Southern Nevada brought a class action against the payday lender for the sewer service. In response to the complaint, and pre-*Concepcion*, the payday lender submitted a motion to compel arbitration. The motion was denied. Further litigation resulted in a First Amended Complaint. Based on the First Amended Complaint the lender filed a second motion to compel arbitration which was filed post-*Concepcion*. The court denied this motion stating that the lender had waived the arbitration clause because it chose to file over 16,000 cases, secured default judgments against the all of the borrowers, and had not once gone to arbitration.

The lender filed a writ of mandamus based on the denial of the first motion to compel, which is the incorrect response because an appeal is immediately available, which the court denied. After denial of the writ the lender filed an untimely appeal as well as a petition for en banc reconsideration on denial of the writ, both of which are currently before the Nevada Supreme

Court. The lender also filed a timely appeal of the second motion to compel arbitration which is also currently before the Nevada Supreme Court.

The arbitration clause in this class action lawsuit has created unnecessary pleadings, litigation, and has forced the class to defend claims which detract from the merits of the case.

[Additional related documents in Appendix C]

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Arbitration – used to hide illegal conduct.

A disabled vet bought a used car from a dealer in MD. When he took it back for repairs, the dealer kept it -- and his money. When he sued to get a refund, the dealer forged his name on an arbitration contract to keep him from being able to litigate. The vet then had to prove the forgery in order to have his day in court. That took years, including an appellate decision. Then he finally got to present the case, and won -- but it was a Pyrrhic victory because by then the dealer declared BK and closed shop. He never did collect on what he was owed.

This shows how arbitration can be used illegally as a weapon against consumers to deny them justice -- even if they don't agree to it, at all. Simply the existence of arb as an option allows unscrupulous companies to evade the law. All they have to do is forge a signature and voila! their victims are powerless.

In auto cases, such conduct is particularly egregious, because people rely on their vehicles to get to work, to medical appointments, get their kids to school, etc. So they need immediate relief, or they often suffer devastating consequences. Due to arb, they also lose the deterrent effect of having the laws on their side.

Submitted by:

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Arbitration – Unconscionable agreement

My client, Ms Danielle Finelli, who lives in Sunnyvale, CA (near San Jose) took out an auto title loan from California Check Cashing on 7/23/11. It has a 60% APR auto title loan. They had her sign a truly unconscionable arbitration agreement, copy included.

Note that after an arbitrator makes a ruling, if the "amount in controversy" is over $50K, "any party" has a right of appeal to a three person who will rule de novo. The person who appeals has to pay for the proceeding "regardless of the outcome of the appeal." A second bite on the apple with a vengeance! [Agreement below in Appendix C]

Submitted by:

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Arbitration – AAA bends the rules for the business to the disadvantage of the consumer.

"I just finished the argument to AAA. Arbitrator Ed Schuchman did not tip his hand. I'm sendin you the business parties' briefs, w/o attachments, and a couple of additional exhibits I used during the argument. I think there are some real due process and fundamental fairness issues. You will see in the respondent briefs that they admitted not paying the fees and trying to get AAA to stay the arb while they pursued and awaited decision on dispositive motions with at least two courts. They admit that they AAA dismissed original arb that I filed, because they didn't pay the fees, and refused to reopen the case and told them that AAA would not administer the instant arb or any of the arb involving them and instructed them to remove AAA from their contracts.

They admit that they then called AAA and spoke to the administrator's boss and came to some "agreement" whereby AAA accepted late payment and accepted the arb despite the fact that it was covered by the moratorium. Here is a case that says that as well. [related attachments in Appendix C]

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Class Actions that would not have been possible if arbitration clause was either involved or Class Actions that can't move forward because attorney was unable to beat the arbitration clause.

Payday lending cases which brought significant relief to consumers: The North Carolina "Rent a Charter" Payday Loan Cases. Five cases were filed in 2004 and 2005 against the principal payday lenders operating in North Carolina and engaged in so-called "rent a charter" payday lending. Three of those cases were settled in 2010-2011, and two remain pending. A sixth case, not addressed in this memo, was filed in 2006 against a payday lender engaged in providing rebates and then recovering the rebates through "lease payments" for leasing "office services."

Payday loans. Payday loans are short-term consumer loans, typically in amounts of up to $500 for terms of two weeks, with annual interest rates of 300% to over 400%. A typical payday loan in North Carolina during the period 2001-2005 involved a loan amount of $425 and a fee of $75 paid every two weeks, an annual interest rate of 459%. The loan process requires the borrower to write a post-dated check to the lender for the amount of the loan plus the fee. The date on the post-dated check is the due date of the loan.

On the date the loan comes due, the borrower either paid off the loan (either through a cash payment or by the lender presenting the post-dated check to the drawee bank), or paid a further fee so the loan can be "rolled over."

A description of payday loans can be found in the 10-K annual report SEC filings made by Advance America, a publicly traded company (ticker symbol AEA) and a defendant in one of the North Carolina cases.

Payday borrowers. North Carolina Payday borrowers were necessitous persons of modest means who had bank accounts and some sort of regular income, either from employment or through pension or disability payments.

Payday loans were marketed as an easy way to get funds for an occasional "cash crunch," but payday customers often found it impossible to muster the funds to pay off the loans when they came due. As a consequence, many borrowers were forced to keep the loans in effect by paying the fees every two weeks. On average, payday borrowers obtained nine loans per year from a particular lender. This nine-loans-per-year average understates the payday "debt treadmill" problem, since many borrowers obtained loans at multiple locations in an effort to keep afloat.

Because payday lenders held borrowers negotiable checks as security for payment, the lenders had substantial leverage in persuading borrowers to make payments. Many borrowers feared criminal prosecution if they failed to cover the outstanding checks. One borrower testified:

I was trying to pay one to get at to pay another. I was borrowing from Peter to pay Paul, so I started going on the internet. At that time I really didn't even know much about computers, but I just went in and put "payday loans." Just, you know, I had the phone calls calling and I was just trying to get these people paid so they wouldn't throw me in jail like they said they would.

Q: Where was -- where was the Advance America location that you went to? [Answer given.]

Q: That's pretty far away from where the Nationwide Budget facility -

A: It was. And I was catching a bus, but I was doing what I needed to do so that way I didn't go to jail. And at that time, I didn't drive. But I was trying to keep -- maintain and continue live out on my own. I did not want to go back to where I came from. I wanted a better life for me and my kids, and I did what it took to make sure that we didn't lose what little bit we had, and that was just having a place to stay.

Borrowers were, as a general rule, unaware that a bounced payday loan check was not a violation of the NC bad check law.

If the loan was not paid when due, the lender presented the check to the borrower's bank for payment. When the check could not be covered by funds on deposit in the borrower's account

(and no payday borrowers carried surplus funds in their checking accounts), the consequences of presenting a check that was returned "NSF" (not sufficient funds) were substantial, resulting in fees charged by the borrower's bank and dishonor of the borrower's other outstanding checks, and sometimes closure of the bank account.

The North Carolina law prohibiting payday lending. Payday lending is governed by state law: some states permit such lending, some states do not. North Carolina consumer lending law prohibits lending to consumers at rates in excess of 36% per annum.

A North Carolina law permitting deferred deposit check cashing, and effectively allowing lending at interest rates in excess of 400%, was enacted in 1997 on a test basis, but with a clause calling for the statute to expire in 2001. The statute did expire in 2001 notwithstanding intense efforts by payday lenders to secure reenactment.

Payday lenders' reaction. Despite the 2001 expiration of the authorizing legislation, and despite cautionary memos from the North Carolina Commissioner of Banks, payday lenders continued to operate in North Carolina. The larger payday lenders (including Advance America, Check 'n Go and Check Into Cash) entered into arrangement with banks, contending that the loans were "made by the banks" and therefore were exempt from North Carolina interest laws pursuant to federal statutes authorizing banks to export interest rates.

The initial cases. Three cases were field on July 27, 2004, in New Hanover County Superior Court, against Advance America, Check 'n Go and Check Into Cash. The defendants sought to require the claims to be submitted to one-case-at-a-time arbitration. Plaintiffs opposed the efforts to require that all claims be arbitrated on an individual (non-class) basis. In December of 2005 the North Carolina court ruled that the cases must be arbitrated in one-case- at-a-time arbitrations. Plaintiffs appealed that decision to the North Carolina Court of Appeals, which remanded for further determinations in light of a 2008 North Carolina Supreme Court case holding that arbitration clauses could be rejected as unenforceable if they violated North Carolina unconscionability rules. Kucan v. Advance America, 190 N.C. App. 396, 660 S.E.2d 98 (2008), citing Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 655 S.E.2d 362 (2008).

In 2009 the trial court ruled that the Advance America, Check 'n Go and Check Into Cash arbitration clauses were unconscionable and therefore unenforceable. In 2010 the three cases were settled.

Two other cases, against QC Holdings (ticker symbol QCCO) doing business as Nationwide Budget Finance, and against CompuCredit (now operating as a subsidiary of CompuCredit Holdings, ticker symbol CCRT) doing business as First American Cash Advance and First Southern Cash Advance, remain pending.

The three settled cases: class size and settlement terms. The 2010 settlements were judicially approved in 2011.

The Advance America case involved 135,136 class members and settled for $18.75 million. The settlement amount is being paid into a settlement fund in installments that will continue until early 2012. After deduction for expenses, attorney fees and costs of administration, $12 million will be available for distribution to class members. To date $6,422,434.85 has been distributed to class members. All $12 million will be distributed to members of the class: to the extent class members cannot be located, the funds designated for the missing class members will be distributed to those class members who can be located.

The Check 'n Go case involved 119,434 class members and settled for $14 million. The $14 million has all been paid into a settlement fund. After deduction for expenses, attorney fees and costs of administration, $8.8 million is available for distribution to class members. To date $6,694,286.09 has been distributed. All $8.8 million will be distributed to members of the class: to the extent class members cannot be located, the funds designated for the missing class members will be distributed to those class members can be been located.

The Check Into Cash case involved 109,760 class members and settled for $12 million. The settlement amount is being paid into a settlement fund in installments that will continue until December of 2011. After deduction for expenses, attorney fees and costs of administration, $7.5 million will be available for distribution to class members. The initial distribution will occur in October of 2011. All $7.5 million will be distributed to members of the class: to the extent class members cannot be located, the funds designated for the missing class members will be distributed to those class members who can be located.

The settlement amounts in each case are being divided among class members in proportion to the fees paid by each class member, but subject to minimum payments of $10 to all class members who paid any payday fees.

The remaining cases. Two other cases against rent-a-charter payday lenders QC Holdings doing business as Nationwide Budget Finance and against CompuCredit subsidiary First American (or First Southern) Cash Advance remain pending. These cases are being defended vigorously, principally on the ground that arbitration clauses require the cases to be pursued in one-case-at-a-time arbitrations. Plaintiffs have presented extensive testimony that it is not practicable to pursue cases of this complexity, involving analysis of whether payday lenders are permitted to enter into business arrangements that allow them to avoid state laws by through so-called "rent a charter" arrangements with banks, in one-case-at-a-time arbitrations. The trial court conducted a multi-day evidentiary hearing in late June of 2011, and the court is expected to rule soon. In their arguments defendants have relied heavily on the United States Supreme Court's decision in AT&T Mobility v. Concepcion, contending that this case wipes away the North Carolina Supreme Court's unconscionability law as set out in Tillman v. Commercial Credit.

Attorneys. Plaintiffs attorneys in all of the cases were public interest attorneys Carlene McNulty of the North Carolina Justice Center in Raleigh, Mallam J. Maynard of the Financial Protection Law Center in Wilmington, and Paul Bland of Public Justice in Washington; and private practice attorneys Jerry Hartzell of Raleigh, Mona Wallace and John Hughes of Salisbury, and Richard A. Fisher of Cleveland, Tennessee.

Opposing counsel in the three settled cases included numerous firms. Principal counsel for Advance America were Lewis Wiener and Gail Westover of Sutherland Asbill & Brennan; principal counsel for Check 'n Go were Amy Brown and Pierre Bergeron of Squire Sanders & Dempsey; and counsel for Check Into Cash were Matt McGuire and Frank Hirsch of Alston & Bird.

[Additional related documents in Appendix C]

Submitted by:

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Pennsylvania Payday Lending cases. *Clerk v. Cash America Net of Nevada, LLC*, 2011 WL 3740579 (E.D. Pa. Aug. 25, 2011); *Alfeche v. Cash International, Inc.*, 2011 WL 35650578 (E.D. Pa. Aug. 12, 2011)

Each of these cases are class actions arising under Pennsylvania's usury laws against payday lender defendants for charging excessive amounts of interest. The two *Clerk* cases and *Alfeche* were compelled to arbitration in written opinions. A motion for reconsideration on the Judge's order to compel arbitration in the *Johnson v. Advance America* case was argued August 17, 2011. UPDATE: motion was denied by opinion in King v. Advance America, Slip Copy, 2011 WL 3861898.

Each of these cases is a good example of how payday lenders and internet pay day lenders are insulated from state laws simply by including an arbitration clause.

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Claims That Previously Succeeded Against a for-Profit Education Institution Are Now in Jeopardy.

Career Education Corp. (CEC), a company that owns a chain of for-profit culinary schools, has been sued numerous times by students alleging that it misrepresented the earnings potential of its graduates, thereby causing the students to take on debilitating loans. Two class action lawsuits against CEC's San Francisco subsidiary resulted in a joint settlement in which the company agreed to reimburse students up to $20,000 each. Cases involving similar allegations in Southern California and in Oregon are pending. But since the Supreme Court's ruling in AT&T Mobility v. Concepcion, CEC has inserted language in its contracts requiring students both to resolve disputes in arbitration and to waive their right to seek redress as a class. An attorney whose case in Oregon is pending said he has opted not to pursue cases on behalf of students with similar claims in Washington state and Minnesota because CEC's class action ban would be too difficult to overcome in light of Concepcion. Students around the country have made allegations against CEC similar to those in the cases that have made their way to court, but their chance of pursuing cases has been jeopardized by Concepcion.

Career Education Corp. (CEC), a company that runs for-profit educational institutions, has been the subject of several lawsuits alleging that its culinary schools have provided fraudulent information to students to entice them to enroll.

In general, the lawsuits have alleged that recruiters for CEC's culinary schools have misrepresented the schools' job placement rates, exaggerated the schools' prestige, and falsely suggested that the schools had selective qualifying processes. Many enrollees needed to take out tens of thousands of dollars in loans to pay for their programs. The lawsuits alleged that admissions recruiters led students to believe that upon graduation from a CEC culinary school, they would likely become chefs and have no trouble paying off their student loans on the salaries they were likely to earn. In two lawsuits, students alleged that they were told that they Plaintiffs alleged that admissions interviews "were specifically and carefully designed to require each salesperson to mislead each prospective student into believing that the school was selective, that admissions were competitive, and that [subsidiary California Culinary Academy (CCA)] was a highly respected institution that the applicant would be lucky to attend." But, according to one of the lawsuits, CCA did not even have an admissions committee. The only admissions requirement, in reality, was a high school diploma or equivalent and an ability to pay.

The sales staff "showed each prospective student flip charts that suggested CCA graduates would avoid low paying jobs and long hours." According to plaintiffs, the school's catalog promised that it would provide career services support for graduates throughout their careers. But "career services did little more than direct graduates to websites with job listings they could find for themselves." Plaintiffs alleged that CEC's recruiters "were under great pressure to fill classes,"

leading many to resort misleading recruiting methods. “If a CCA salesperson could not fill his or her quota he or she was terminated. And to meet CCA’s endless need for students and their money, CCA and its salespeople committed the frauds alleged in this complaint,” plaintiffs said.

According to one of the lawsuits, an applicant to the San Francisco school was told that 97 percent of its culinary arts graduates were placed in jobs. This representation was untrue, the plaintiffs charged, because it counted placements in unskilled entry-level jobs (the substantial majority of which paid $12 or less), which could have been obtained without the school’s degree.

Under California’s Private Postsecondary Education Reform Act of 1989, such unskilled placements “could not legally be counted … because they were not cases to which CCA training was represented to lead,” plaintiffs charged. CEC sought to block the class action lawsuit on the basis that its contracts had an arbitration clause. But its contracts did not include class action ban.

In the Superior Court of California, the judge held the arbitration clause was procedurally and substantively unconscionable and therefore unenforceable because the contact had “several one-sided terms.” He allowed the case to proceed in court.

The two class action lawsuits against CEC’s San Francisco culinary school subsidiary resulted in a joint settlement of $40 million. The company agreed to reimburse 8,500 students who attended the culinary schools between 2003 and 2008 up to $20,000 each. Pending cases against CEC in Pasadena, Calif., and in Portland, Ore., were filed prior to the Supreme Court’s Concepcion decision and included allegations similar to those in the San Francisco cases. Shortly after the Supreme Court’s ruling in Concepcion, CEC filed motions seeking to force pending cases into arbitration.

In the Pasadena case, the Superior Court denied CEC’s motion to compel arbitration because CEC had been litigating the case for the previous three years and thus, the court concluded, had waived its right to compel arbitration. In the Oregon case, the court likewise denied CEC’s motion to compel arbitration. The Pasadena lawsuit claimed that graduates of the CEC culinary school “had a less than 2 percent chance of ever becoming chefs.” The plaintiffs’ complaint, filed on behalf of six former students, stated that “most will never be able to pay off this debt, even if they work all their lives. In effect, plaintiffs and class members have been put in a position of indentured servitude, as under current law, student loans are not dischargeable, in whole or in part, in bankruptcy.”

The lawsuit against CEC’s subsidiary in Portland, Ore., alleged that admissions recruiters claimed that more than 90 percent of graduates ended up with a job upon graduation. However, CEC allegedly concealed earnings data in Oregon that showed the vast majority of these placements barely paid above minimum wage, according to the plaintiffs. CEC’s practice of counting jobs that did not require CEC training as “placements” violated Oregon law, plaintiffs alleged. The lawsuit seeks refunds for the class members on the ground that students would not have enrolled in CEC’s program if they knew the truth.

From:

Public Citizen and NACA report: Justice Denied One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision Are Plainly Evident

Based on submissions by

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***Kimberly Pellett v. TCF Bank*, D. Minn. - Major banks re-order consumer transactions to prompt overdraft fees.**

I was hired by Kimberly Pellett—of Savage Minnesota—to represent her when she discovered that TCF Bank was engaging in a predatory practice now know as high-to low-reordering.

Many banks charge significant fees for every time their customers overdraft their accounts. Usually the fee is between $25-$35 per overdraft.

When you use your debit card, many banks let you buy things even when you don't have money in your account. Even though they didn't stop the transaction or warn you that you would be overdrafting, they charge you a fee.

Result is consumers pay $40 for a cup of coffee and many banks are making billions of dollars.

Several years ago, some brilliant bankers and consultants realized that banks could make a killing on overdraft fees if they manipulated, or re-ordered the debit card transactions from high to low. So instead of taking them in the order you use your debit card, they start with the highest charger first.The result is that it depletes the account faster, and consumers end up incurring many more overdraft charges.

This happened to our client a number of times. Numerous instances where she would have only incurred one overdraft fee if they were ordered properly but instead incurred as many as five.

This Practice Has Been Condemned By The Courts And Many Banks Are Being Brought to Justice

Wells Fargo

After a full trial, Wells Fargo was ordered to pay $203 million to its CA consumers for this practice, which the judge **decried as a**

"<u>draconian</u>" practice of "<u>profiteering</u>" which is "<u>motivated by avarice</u>"

Bank of America settled for $410 million

I have settled numerous other cases against smaller banks for tens of millions of dollars.

Over 80 banks are being held accountable in litigation all across the country.

But Not TCF

We estimate that TCF made over ***$80 million*** through this draconian high-to-low reordering. We could not litigate these cases as individual cases, so **we brought a class action** on behalf of the hundreds of thousands of TCF customers who were gouged by this practice.

When we sued in Minnesota, hundreds of consumers came forward asking for our help. But the bank had hired a top law firm to insert a "state of the art" arbitration agreement into the account agreements

Buried in the fine print

Prohibits class actions

Requires arbitration

TCF immediately moved to compel arbitration. We fought it—arguing that it was unconscionable—especially in light of a Minnesota statute called the "**Plain Language Contract Act**"—which requires contracts to be written in a "clear and coherent manner using words with common and everyday meaning."

The district court held that it did not matter if the arbitration agreement violated this clear Minnesota law because it was preempted by the Federal Arbitration Act preempts this state law adopted by Minnesota's legislature and signed by its governor to protect consumers.

Future for TCF consumers—and consumer of other banks with arbitration agreements—is uncertain.

While other consumers from other banks are being compensated for this draconian practice, those banks with arbitration agreements stand to get away with hundreds of millions of dollars in ill-gotten profits.

Submitted by:

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The Payment Protection Insurance Case - *Zarandi v. Alliance Data Systems Corporation and World Finance Network National Bank* (No. 10-8309, C.D. Ca.)

Payment Protection Insurance (branded as Account Assure) is a fee-based service marketed to credit cardholders. Under specific circumstances, the service purports to suspend or cancel the minimal monthly payment due on the subscriber's credit card account and excuse the subscriber from paying the monthly interest charge and the payment protection fee for a limited period of time. Subscribers pay a monthly fee which is 1-10% of their monthly balance.

Payment Protection Insurance policies are rife with exceptions from coverage. The language of the policies is incomplete, indecipherable and misleading. Commonly, the unemployed, elderly, disabled and self-employed are not covered or only granted limited coverage. These exceptions are not explained to subscribers at the time of purchase of Payment Protection Insurance, which usually takes place over the phone. Marketers make no effort to determine if cardholders are eligible for the insurance at the time they subscribe, or afterwards. This causes numerous unemployed, retired and disabled subscribers to pay for a service for which they were never eligible in the first place. Payment Protection Insurance is offered to all credit card applicants, but is aggressively marketed to vulnerable consumers with impaired credit ratings.

Although a customer service telephone number is provided to subscribers it is difficult for subscribers to cancel Payment Protection Insurance or receive detailed information about coverage. In some instances, subscribers were billed for the service even when they did not expressly agree to subscribe or even request the service. In addition, the credit card companies do not identify Payment Protection Insurance as an insurance product to the relevant authorities. They do this to avoid state regulation and charge higher fees for the product.

<u>The Plaintiff</u>

Plaintiff, Negin Zarandi, signed up for an Ann Taylor Loft credit card while shopping at an Ann Taylor Loft store in 2008. The card was issued by the defendants. She was pre-approved for the card at the store, and used it for her purchases that day. She also signed up for Payment Protection Insurance. A few weeks later, she received the terms and conditions for the card. 3-4 months after she signed up for the card, Ms. Zarandi became unemployed. Ms Zarandi attempted to invoke the Payment Protection Insurance. Her claim was initially approved, but only one monthly minimum payment was made, and then the payments stopped completely. Defendants continued to charge her for Payment Protection Insurance but eventually cancelled her credit card for failure to make timely payments. Plaintiff was harassed by collection agencies for her unpaid credit card bill.

The Defendants

Alliance Data Systems manages 90 branded credit card programs for leading retailers in the United States. World Financial Network National Bank is a credit card banking subsidiary of Alliance Data Systems.

The Lawsuit

Plaintiff, represented by firms, Golomb & Honik, PC, Philadelphia, PA and Milstein, Adelman & Kreger LLP, North Santa Monica, CA, filed a class action lawsuit in the Central District of California alleging breach of contract and breach of covenant of good faith and fair dealing, also violations of California state law prohibiting unconscionable contract clauses, unfair and fraudulent business practices, unlawful conduct for selling insurance without registering with the California Department of Insurance and false and misleading advertising. Plaintiff also sought injunctive relief to enjoin defendants from continuing to commit these wrongful acts. Plaintiff's counsel believes there could have been several million class members.

In response to the complaint, defendants filed a motion to compel arbitration. The court chose to defer ruling on this motion until after the US Supreme Court decided *Concepcion*.

The Arbitration Clause and Decision to Compel Arbitration

The credit card agreement contained an arbitration clause, which stated:

> "If arbitration is chosen by any party with respect to a claim, neither you nor we will have the right to litigate that claim in court or have a jury trial on that claim . . . . Further, if arbitration is chosen by any party with respect to a claim, you may not participate in a class action or class-wide arbitration, either as a representative or member of any class of claimants pertaining to any such claim or act as a private attorney general in court or in arbitration. . . . "

Judge Dale Fischer granted defendants' motion to compel arbitration finding that plaintiff received the terms and conditions of arbitration and that plaintiff's argument that a class action ban was unconscionable pursuant to state law was "no longer viable" post-*Concepcion*. 2011 U.S. Dist. LEXIS 54602 at *4-*5 (C.D. Ca. May 9, 2011).

After this decision, the lawsuit was dropped against defendants. The average plaintiff's claims are about $200-$300 and the cost of pursuing arbitration made further litigation uneconomical.

Other Class Actions Against Credit Card Companies Marketing and Selling Payment Protection Insurance

About 24, nearly identical pre-Concepcion lawsuits involving Payment Protection Insurance have been filed nationwide and are at different stages of litigation. Several have ended in multi-million dollar settlements.

Examples:

• *Kardonick v. JPMorgan Chase & Co. et al*, (No. 10-23023, S.D. Fla.), settled for $20 million. In the pre-*Concepcion* era, the court denied Chase's motion to compel arbitration finding that the arbitration clause was unconscionable because of the class action ban in conjunction with other factors. 2011 U.S. Dist. LEXIS 20591 (S.D. Fla. Feb. 17, 2011).

• *Spinelli v. Capital One Bank (USA), N.A. et al.* (No. 10-23235, M.D. Fla.), claims-made settlement estimated at $250 million (actual settlement was $60 million). Before the case settled, class certification was granted. 2009 U.S. Dist. LEXIS 85422 (M.D. Fla. Sept. 18, 2009).

• *In Re: Discover Card Payment Protection Plan Marketing and Sales Practices Litigation*, (MDL No. 2217, N.D. Ill.) settled mid-summer 2011 and prompted an FDIC investigation of Discover Bank's marketing of payment protection insurance.

There are approximately 24 million subscribers to Payment Protection Insurance. The success of their claims relies, not upon their merits, but whether there is an arbitration clause with a class action ban in the fine print.

Submitted by:

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Golomb & Honik, Philidelphia, PA

and
Isaac Miller at

Milstein, Adelman & Kreger, North Santa Monica, CA.

Service member denied payments entitled to under FCRA. *Wolf v. Nissan Motor Acceptance Corporation*, 2011 WL 2490939 (D.N.J. June 22, 2011). Plaintiff Matthew S. Wolf is a Captain in the Judge Advocate General's Court of the United States Army Reserves. On or around November 25, 2006, he entered into an agreement to lease a 2007 Infinity G35 sedan for 39 months. At the inception of his lease, Wolf paid $595.00 in "capitalized cost reduction" ("CCR"), an advance towards the lease's rent. He also prepaid other items for which, alternatively, he could have paid on a monthly basis. During the life of the lease, Wolf was deployed. On or around October 30, 2007, he returned his leased vehicle to Nissan.

Wolf invoked the FCRA to recoup the pro-rated refund of lease payments that he made at the inception of the lease, which he is entitled to recoup under the FCRA. Nissan refused to refund Wolf any pro-rated CCR payments, and Wolf sued on behalf of himself and a class of similarly situated service persons. By way of Opinion dated June 22, 2011, United States District Court Judge Noel Hillman dismissed the case and compelled arbitration on the strength of *Concepcion*.

Plaintiffs have filed a motion for reconsideration. Their basis for their motion is that Plaintiff never got an opportunity to respond to Defendant's letter brief which was filed late and without their consent. The letter brief contained Defendant's first mention of the *Concepcion* case.

This case presents a very sympathetic class of United States service people who, after being deployed in service of our Country, were wrongfully denied a refund of those CCR pre-payments to which they were entitled under the FCRA. Nissan kept the refunds with impunity, and Nissan is insulated from having to account for its behavior whatsoever. Tom estimates that there are conceptually over 1000 class members; however was unable to obtain discovery because the case was dismissed in favor of arbitration. He stated he will "do anything to help." The lawyers in the case are themselves servicemen and Republicans. This is the type of case that would touch lawmakers on both sides of the aisle.

Submitted by:

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Debt Settlement Scams; violations of Federal Credit Repair Organizations Act. *Delrio v. CreditAnswers, LLC*, 2010 WL 1869881 (S.D. Cal. May 16, 2011). Plaintiff Luis Delrio is a blue collar guy, very likeable, who is trying to take care of his responsibilities. However, he got duped into paying the Defendant credit counseling services $4,000.00 before it resolved a single debt on his behalf. Delrio sued for violations of state law and the Federal Credit Repair Organizations Act. The Defendant Credit Answers filed a motion to compel arbitration which was granted on the strength of *Concepcion*. Eventually the case settled on an individual basis. The attorney working on this case intended to bring a class action but could not because of the arbitration clause.

Josh Swigart is willing to help out and said that his client Mr. Delrio is affable and a sympathetic character and would likely be interested in helping out as well. This seems like a decent case to work as an example of an average everyday person duped by a credit repair organization only to get taken for yet more cash and then be unable to obtain sufficient relief due to the presence of the arbitration clause.

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Bill Payment treated as Cash Advance. Client paid his car payment using his CitiBank card. CitiBank treated this as cash advance, which means the client had to pay a cash advance fee and immediately begin paying interest on it. When he asked why, they said they have coded all payments to financial institutions as cash advances. According to definition of cash advance in the credit card agreement, all payments to financial institutions do not constitute cash advances, such as loan payments or payments for checks. Only a transaction where you are borrowing money is a cash advance. Although this seemed to be a slam dunk breach of contract case, I did not bring it because of the arbitration clause which included a class waiver.

Submitted by:

Roger l. mandel

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Appendix B – NACA 2012 Binding Mandatory Arbitration Survey

Consumer Attorneys report: Arbitration clauses are everywhere, consequently causing consumer claims to disappear.

June 23, 2012

A June 2012 survey by the National Association of Consumer Advocates (NACA) demonstrates:

pre-dispute arbitration clauses are depriving consumers of their rights; fewer cases are being brought as consumer claims are suppressed by companies' increased use of forced arbitration clauses.

Summary

According to NACA's survey of nearly 350 consumer attorneys, it is clear that private arbitration does not compare at all well to our nation's traditional justice system. consumers have lost the opportunity to assert their rights under many state and federal consumer protection statutes because of pre-dispute binding mandatory arbitration. Arbitration clauses are often entered into without consumer knowledge of the fact that they have signed away their rights. As a result, many consumer cases won't move forward if the underlying contract has an arbitration clause in it. In responding to the survey, many consumer lawyers note that in the last year since the Supreme Court's decision in *AT&T Mobility v. Concepcion*[31], consumer attorneys are noticing that courts are summarily approving motions to compel arbitration and dismissing cases if there is an arbitration clause, even where there are clear abuses and violations of the law and without even examining the merits of the case[32].

The presence of an arbitration clause in a contract, particularly one that includes a waiver of the consumer's right to join in a class proceeding, means that consumer claims will be suppressed. For consumers who don't understand what arbitration is or who do the cost benefit analysis and decline to pay arbitration fees or travel long distances to arbitrate their claim, it means that companies get a free pass as many consumer claims cannot proceed forward as a class action and

[31] *AT & T Mobility, LLC v. Concepcion*, 563 U.S. ---, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)
[32] See also the recent report published jointly with Public Citizen, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident*, April, 2012. http://www.naca.net/sites/default/files/Justice%20Denied%20Concepcion%20Anniversary%20Report.pdf

certainly not arbitrated. This survey demonstrates - through consumer lawyer experiences and stories of their experience representing consumers and having to turn away consumers – that arbitration is having a class suppressive effect and many consumer claims will never be heard. Instead of leveling the playing field, as proponents of arbitration claim the process does, consumer attorneys believe that arbitration clauses are becoming exculpatory. Many, many good claims are not being brought; consumers are neither going to court but they are also not going to arbitration.

Surveys of Consumer Attorneys

NACA surveyed lawyers in 46 states who regularly represent consumers in disputes against businesses. To reach consumer lawyers, NACA used a segmented membership roster of both the National Association of Consumer Advocates, and the American Association of Justice. Outreach was made to attorneys who represent consumers both as individuals and in class actions, and across a wide range of consumer protection issues. Over seven hundred consumer attorneys were contacted by email with a link to the survey questionnaire. The survey was completed by 340 consumer lawyers.

The NACA survey included questions that called for both experiential and perceptual responses about the practice of consumer law and practitioner experience with and perception of pre-dispute arbitration clauses. Specifically, questions were asked about attorney's willingness to represent consumers when pre-dispute arbitration clauses were present , the likelihood of those claims being pursued at all, the, pre-adjudication resolution potential and anticipated outcomes of these claims , and the cost and fees of pursuing a matter through the arbitration process. The Survey also asked respondents' opinions about the advantages and disadvantages of arbitral and judicial forums.

<u>Consumer Lawyer Practice Information.</u>

The survey first examined demographics and obtained information about the consumer attorneys' practice. For most survey respondents, consumer law represented 70% to 100% of their legal practice, though there was a significant degree of variation regarding the number of cases typically handled. 52% of respondents handle 10-20 consumer cases per year, while 22% of respondents handled 20-25 cases, 15% handled 40 to 50 cases, and another 11% handled 90-100 cases. When asked to indicate the proportion of all consumer disputes which are arbitrated rather than litigated, 61% of the consumer attorneys responded that they have arbitrated a consumer case although consumer arbitrations represented less than 5% of these attorneys' practices. This data reinforces our notion that very few consumer cases are actually arbitrated. This may be attributable to the fact that mandatory arbitration is a common feature of consumer contracts but many consumers, not knowing about the arbitration clause, expect to go to court.

Consumer Attorney Experience with Binding Mandatory Arbitration

The survey asked respondents about their perception of the prevalence of pre-dispute binding mandatory arbitration clauses. Specifically, respondents were asked to identify areas in their consumer law practice where they were confronted with pre-dispute arbitration agreements.. The responses we received reveal that arbitration clauses are not just present in financial service consumer contracts, they are everywhere. Specifically, pre-dispute arbitration clauses, have been found in contracts involving:

- Auto Property Damage Insurance
- debt adjusting
- phone industry (cramming, overcharging, etc.)
- medical malpractice
- legal malpractice
- credit card agreements
- pay day lending agreements
- nursing home contract
- used Car Transactions
- construction
- home Renovation/ home Improvement
- precious metals and numismatic cases
- brokerage services, securities industry
- door-to-door sales of water treatment devices and other goods
- computer purchase contracts
- cable tv service contracts
- satellite tv service contracts
- home improvement retail installment contracts
- whole sale membership club contracts
- FINRA
- mobile telephone service contracts
- employment applications
- employment contracts
- auto sales and financing agreements
- debt settlement
- products (electronics)
- home solicitations / door-to-door sales
- mobile home sales contracts
- cable TV service contracts
- internet service provider
- for-profit career colleges contracts
- manufactured home contracts
- all loans and credit sales agreements
- debt consolidation agreements
- warranty (mobile home or new home construction)
- service contracts
- hospital contracts
- title lending agreements
- consumer installment loans
- contractual agreements such as yellow pages, etc.
- recreational vehicle sales contracts
- health club contracts
- every day consumer products such as computers
- every day consumer services such as satellite radio
- auto warranty
- crop insurance
- construction Contracts
- wrongful repossession cases
- employment background checks
- securities purchases
- utilities service contracts
- timeshare contracts
- internet purchase of goods and services
- stock broker/ broker-dealer agreements
- tax resolution Services

<u>Case Settlement Prior to Final Adjudication.</u>

Survey respondents were asked for an estimate of the proportion of cases that they settled prior to final adjudication, depending on whether the claim was in court or before an arbitrator.

Attorneys reported that while 76% of judicially litigated consumer cases are settled prior to final adjudication, that less than 5% of the cases subject to arbitration were settled prior to a final ruling. It is interesting to note that many consumer lawyers perception is that they would avoid cases with arbitration clauses and see no advantages of arbitration to consumers.

Consumer Lawyer Perceptions about Arbitration

Consumer attorneys were then asked about the principal advantages and disadvantages of arbitration versus the judicial system. Though a significant number (45% of survey respondents) identified some advantages to arbitration (speed, simplicity or lower cost), the majority of respondents (53%) answered that there were no advantages of arbitration. As one respondent put it: "I have seen NO advantages [to arbitration] -- most consumers when faced with arbitration costs choose to avoid the costs and conclude the case[.]"

By contrast, when asked about the disadvantages of arbitration contrasted to litigation, the overwhelming majority of consumer attorneys responded that arbitration was wholly disadvantageous to the consumer, with specific problems identified as: an uneven playing field, limited recourse for the consumer, questionable objectivity of the arbitrator and lack of transparency in the arbitration process. See chart below in Appendix I.

Consumer Lawyer experiences with Arbitration clauses

The final part of the survey asked consumer lawyers about their personal experience with cases where arbitration clauses were present. Attorneys s were asked to describe cases where a consumer was denied relief because of the existence of an arbitration clause, and class action cases that provided a substantial recovery and/or injunctive relief for consumers, that would not have been attainable if an arbitration clause was present. Respondents provided over 250 stories (see below) that provide a wide variety of vivid examples of how justice can either be achieved or denied, merely based on whether or not a contract contains an arbitration clause.

Consumer attorneys were also asked about the claim suppressive effects of arbitration. Specifically, respondents were asked if they had ever turned down a meritorious consumer case (there was a clear legal claim of harm, statutory violation, or breach of contract), because of the presence of an arbitration clause.

In other words, have they observed consumer claims being suppressed?

- 84% of all consumer attorney respondents answered that they had, in fact, rejected a client with a meritorious consumer claim because of an arbitration clause.

- Of those vast majority of attorneys who turned away good cases, the median number of consumers they turned away was 10 cases, while 11% of survey respondents reported that they had turned away as many as 90-100 cases because of an arbitration clause.

Finally, the survey asked class action attorneys about their experience bringing consumer class actions. Specifically, what was the impact of arbitration clauses on their cases and the injunctive relief that can be provided to consumers by class actions.

- A full 91.4% of class action attorneys answered that relief they had obtained for consumers could not have been achieved had an arbitration clause been present.
- Additionally, many of these attorneys noted, that since the Supreme Court *Concepcion* decision, they have seen a significant decrease in the number of consumer claims that are being raised.

Survey Outcome and Conclusion

The data collected in this survey reveal a few key observations about how the corporate use of binding mandatory arbitration clauses in consumer contracts has impacted consumer's ability to seek appropriate redress when they have a claim against a company.

First, the settlement data that shows that cases in arbitration are significantly less likely to settle prior to a final decision suggests that arbitration may not be as time efficient as its proponents claim. This seems to be a question that the CFPB should further examine in its study of pre-dispute arbitration.

Second, consumer attorneys have seen a significant correlation between the increase in arbitration clauses in consumer contracts and the suppression of meritorious consumer claims. As many consumer attorneys reported they "won't even look at a case if there is an arbitration clause involved." (see consumer attorney stories below in Appendix I.). Clearly, the growing ubiquity of arbitration clauses and its impact on consumer's ability to achieve a fair measure of justice requires additional study

Third, the stories provided and concerns expressed in this survey highlights some of NACA's key policy concerns about arbitration clauses in consumer contracts. Most significantly, it appears that arbitration clauses are succeeding in significantly suppressing both

meritorious individual and consumer class action claims.[33] Unfortunately, this intentional claim suppression will only further increase as the full effect of the *Concepcion* decision takes hold in the consumer market place.

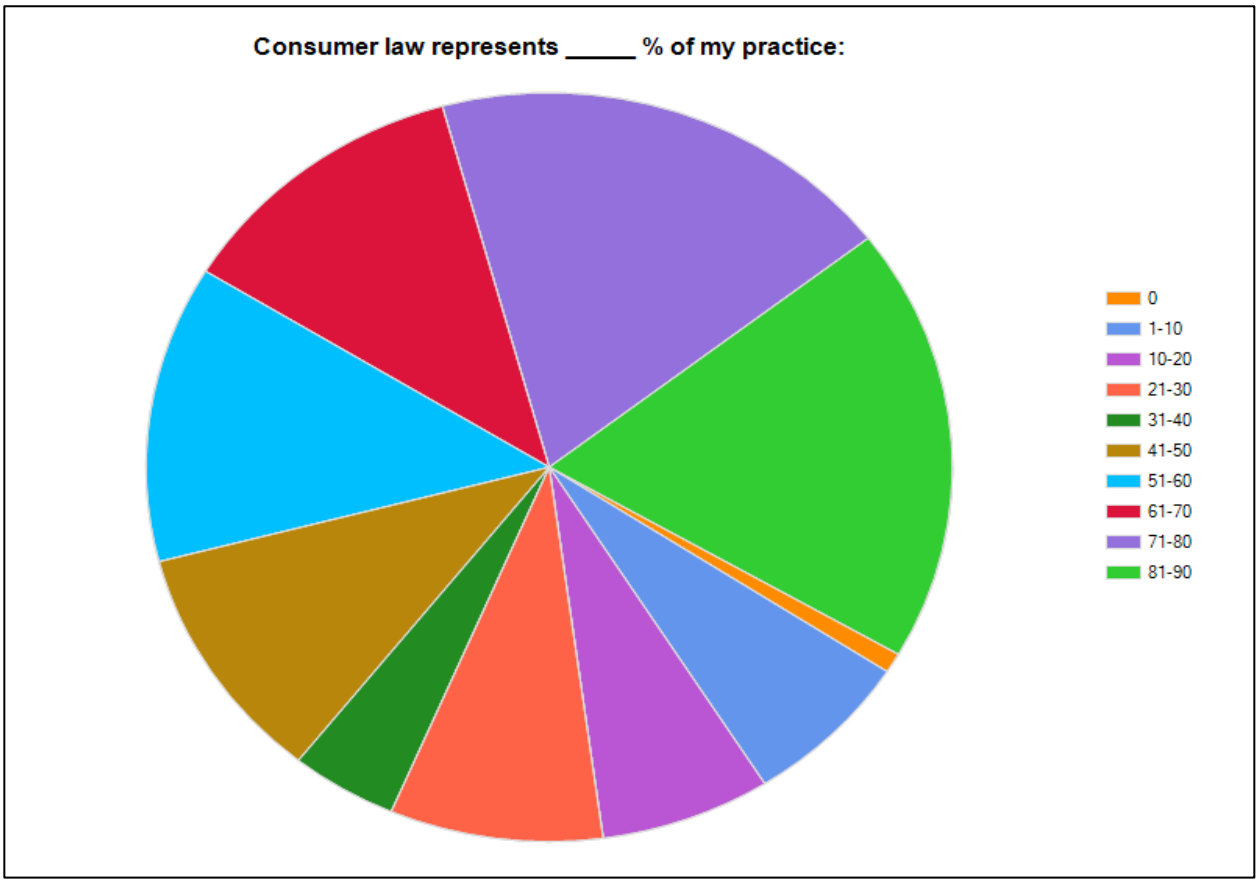
Policy Recommendations

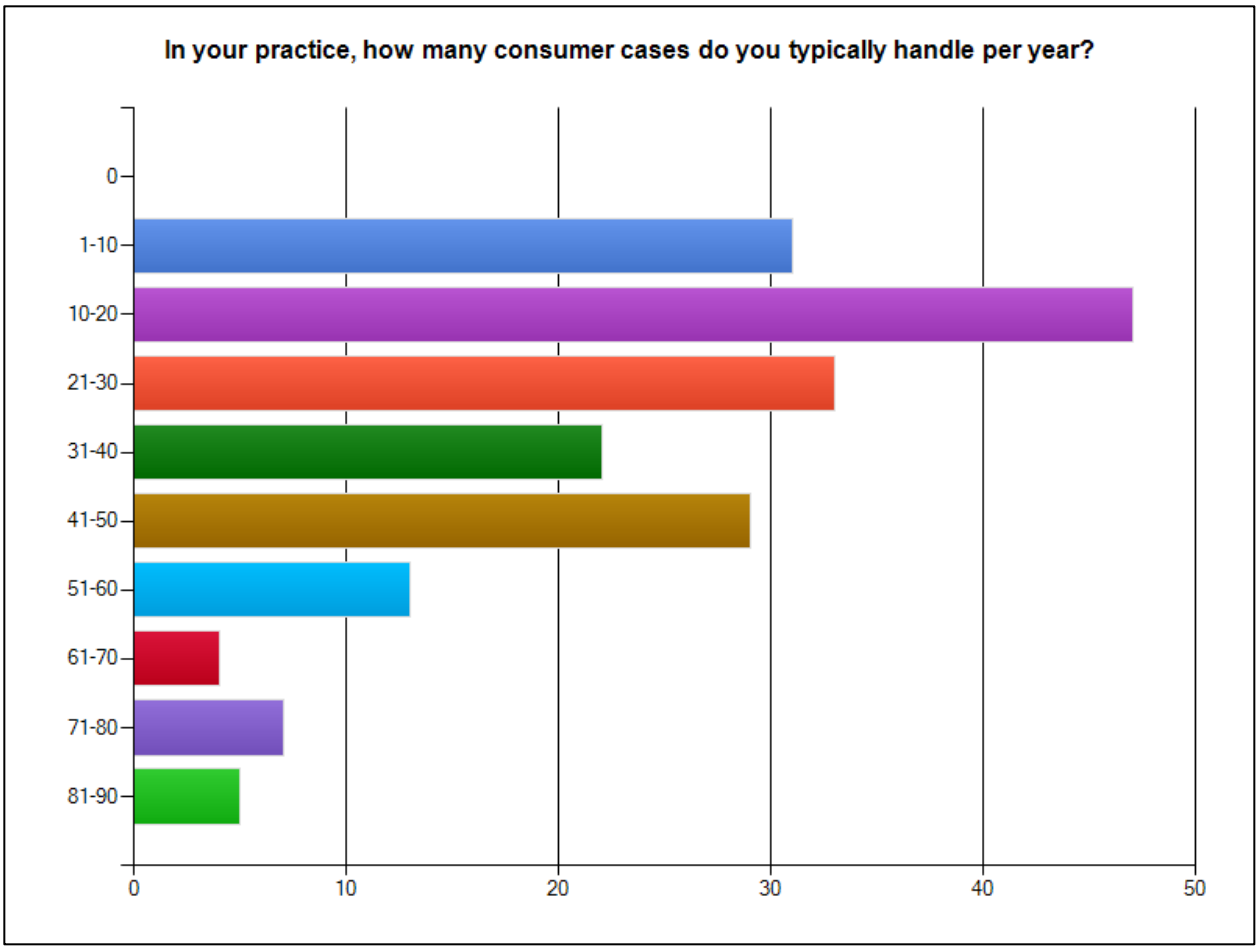
The National Association of Consumer Advocates has and will continue to call for legislation that will amend the Federal Arbitration Act so that it reflects its true legislative intent and bans the use of binding mandatory arbitration clauses in consumer to business contracts. While we will continue this legislative effort, we believe that the CFPB has a unique opportunity when it conducts its study of arbitration clauses. We hope that once the CFPB has gathered and studied all the empirical evidence available, it will act to protect consumers from the harm caused by binding mandatory arbitration in consumer financial service contracts.

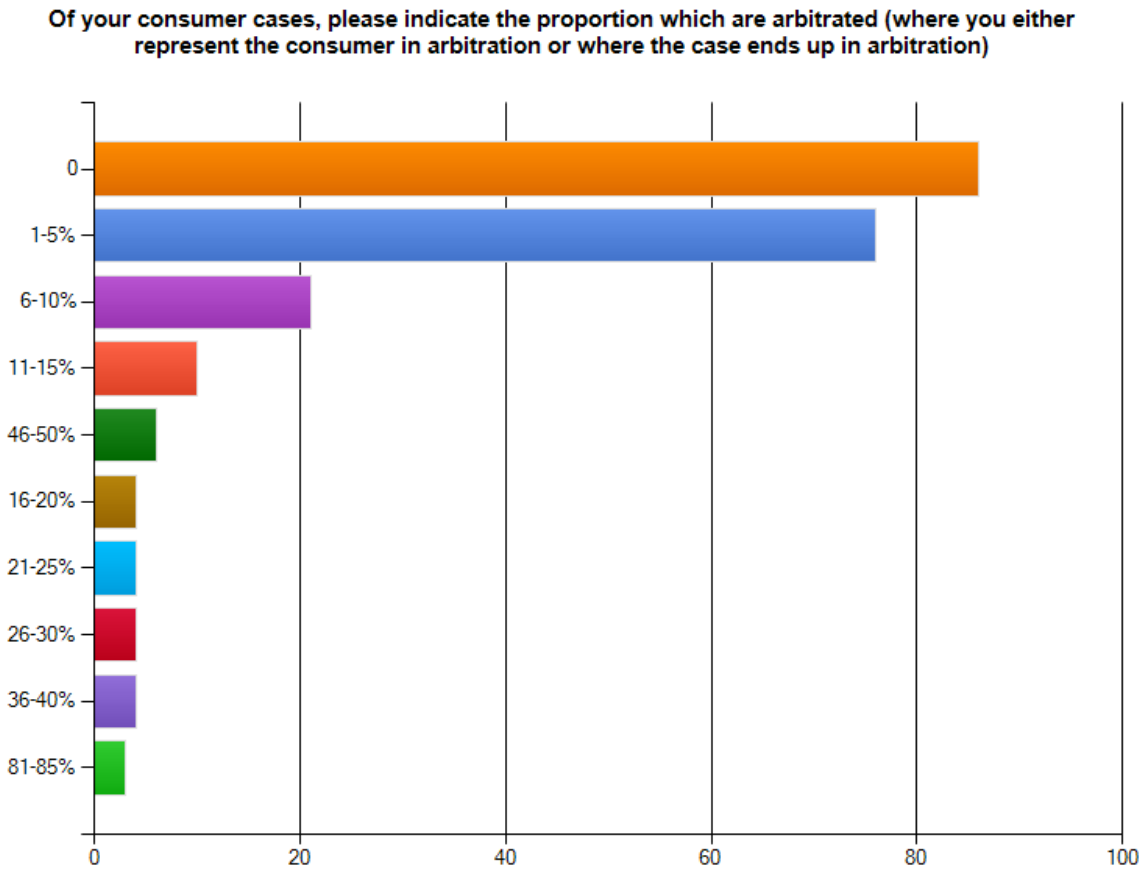
[33] Thomas B. Hudson, *Arbitration Agreements Can be Helpful in Class Action Lawsuits*, The Auto Dealer Monthly (December 26, 2011) found at: http://www.autodealermonthly.com/79/4369/ARTICLE/Arbitration-Agreements-Can-be-Helpful-in-Class-Action-Lawsuits.aspx (noting that "[t]he biggest legal risk to the industry at the moment is still the class action lawsuit, which in the hands of a skilled plaintiffs' lawyer, can still ruin your entire day. I've been advising dealers for years that the best first line of defense against class action suits is the practice of requiring consumers to sign mandatory arbitration agreements as part of the car purchase and finance transactions they enter into. The use of arbitration agreements will not ensure victory when the class action lawyers come calling, but there is little downside to using them. And they can occasionally save the day."

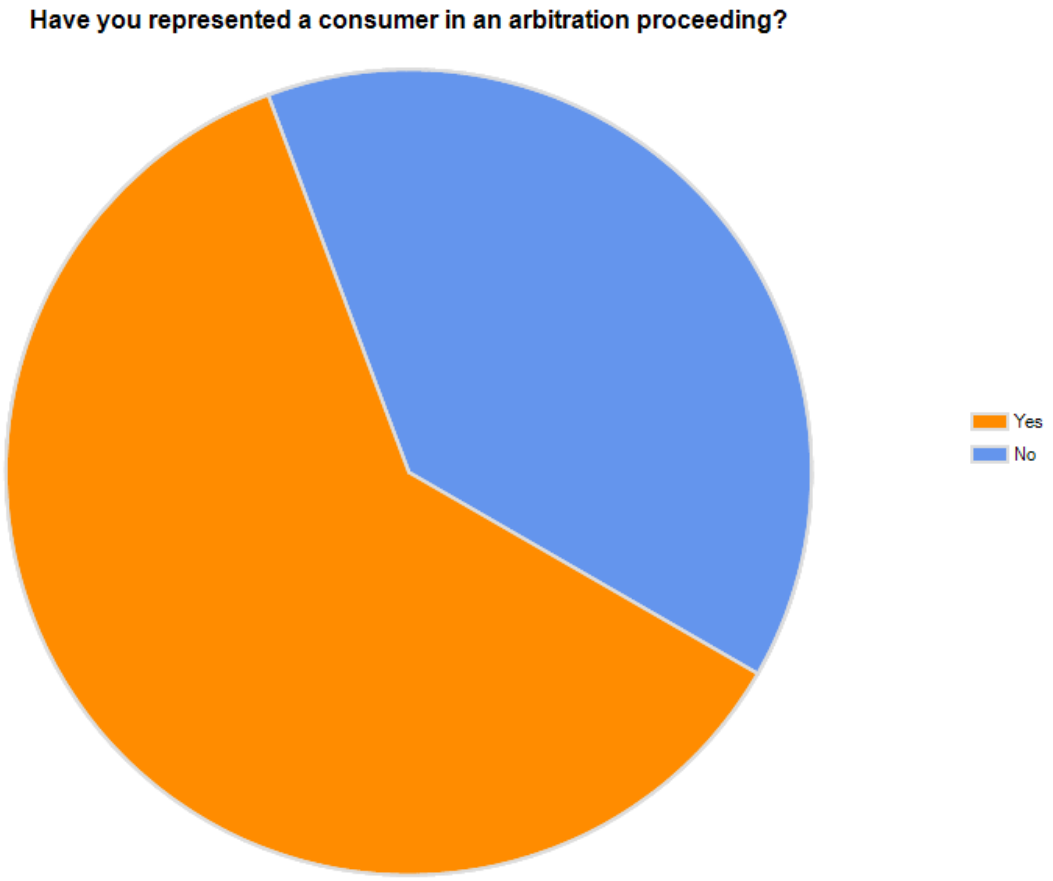
2012 NACA Binding Mandatory Arbitration Survey: APPENDIX I

Survey Data

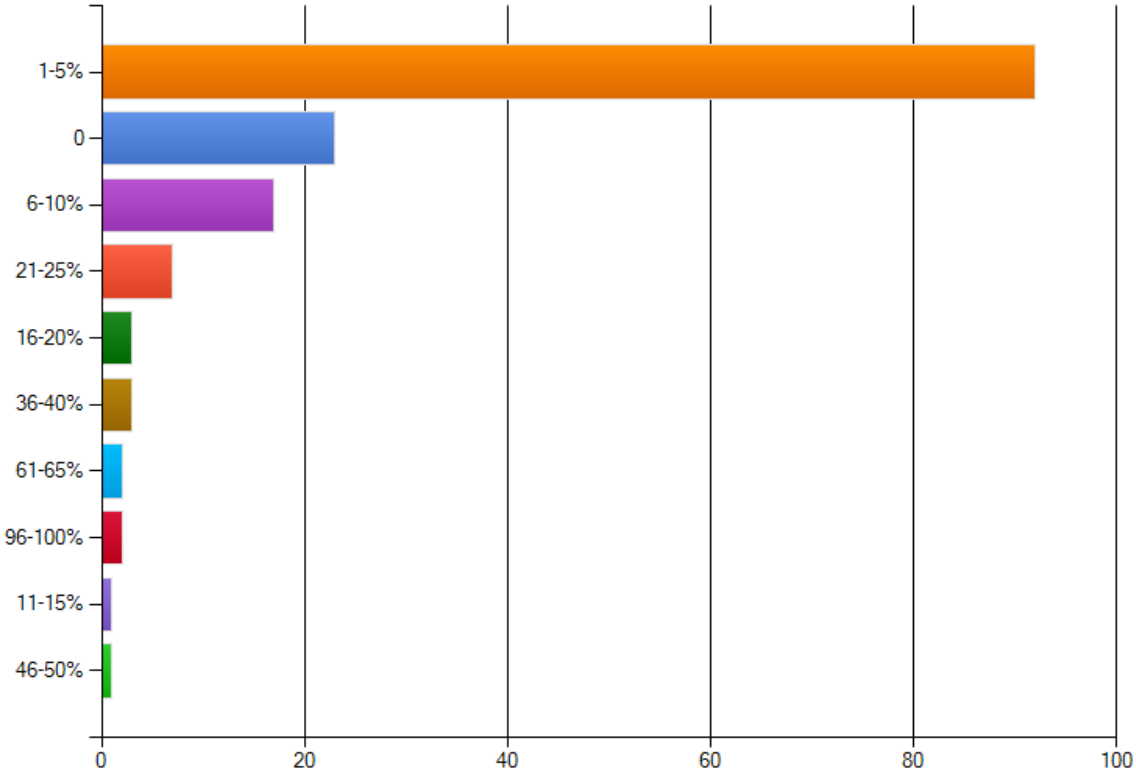


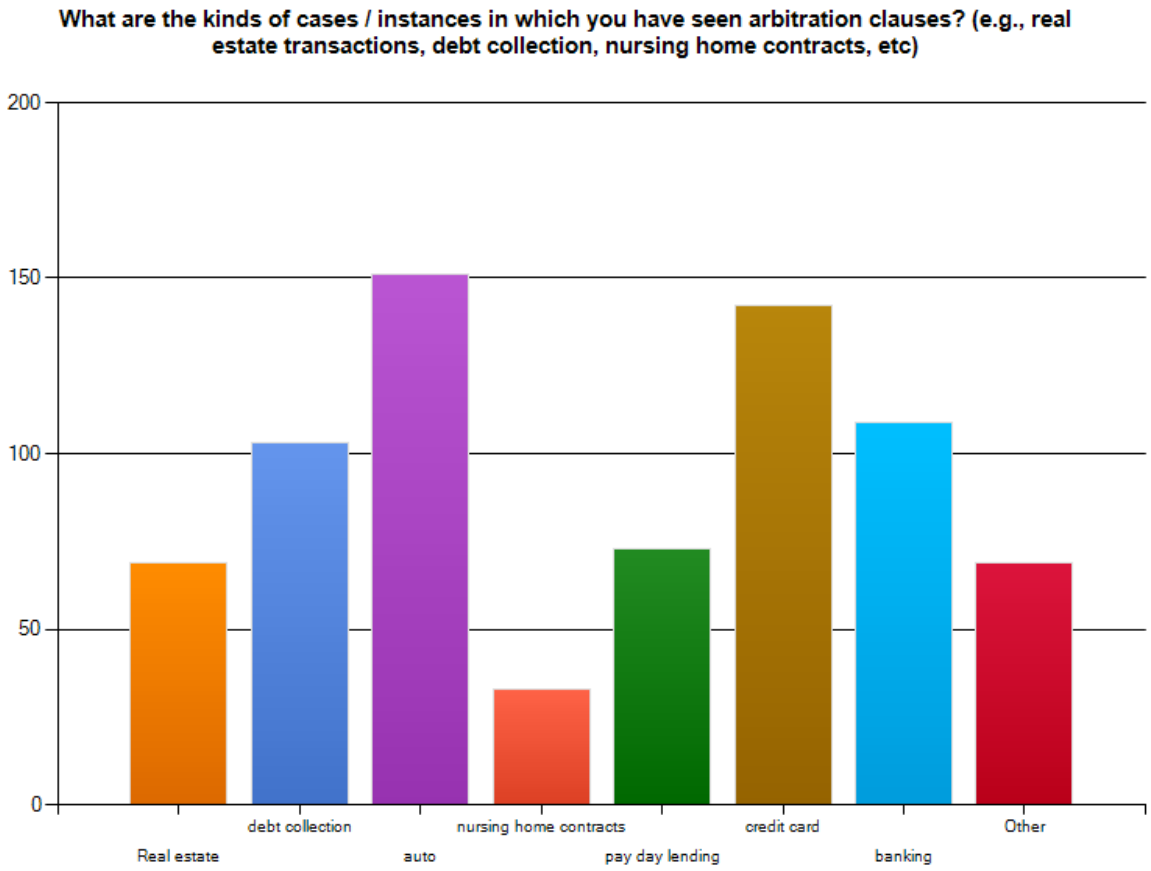

In your practice, how many consumer cases do you typically handle per year?
0
1-10
10-20
21-30
31-40
41-50
51-60
61-70
71-80
81-90
0
10
20
30
40
50

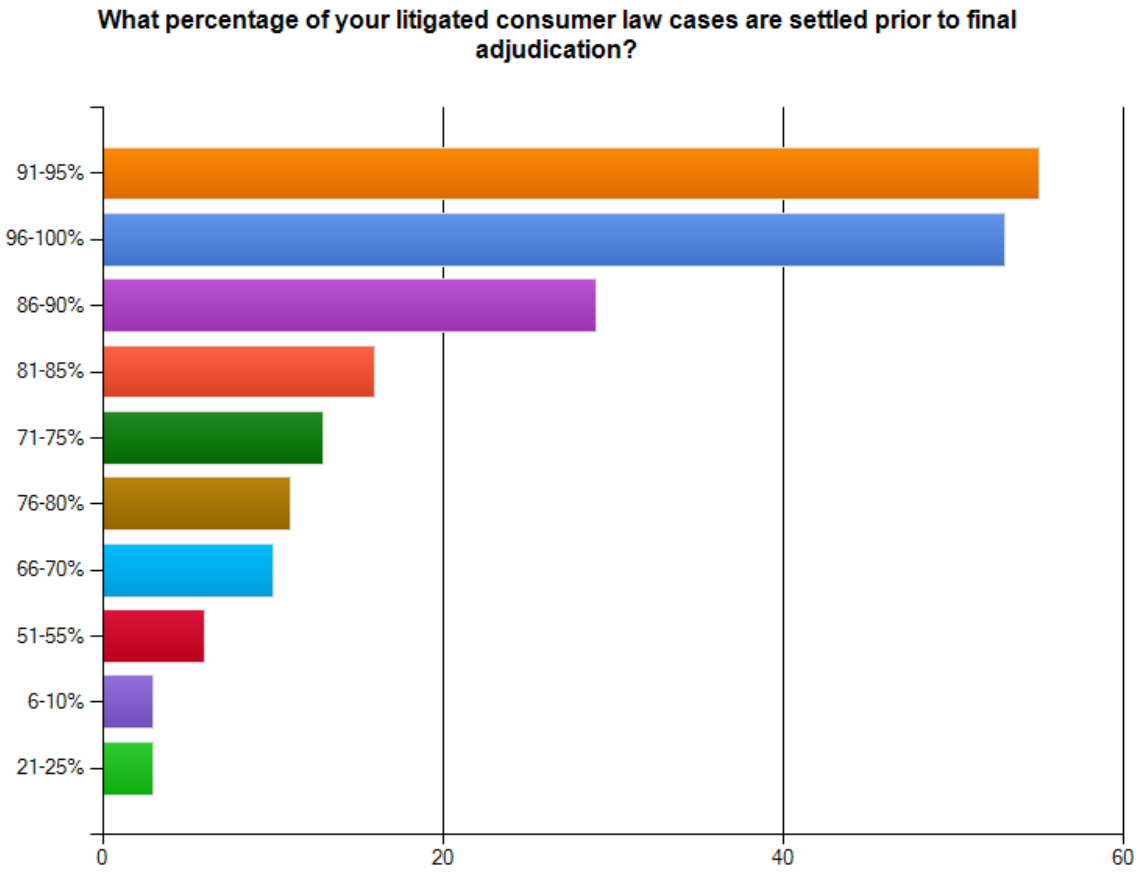

Of your consumer cases, please indicate the proportion which are arbitrated (where you either represent the consumer in arbitration or where the case ends up in arbitration)
0
1-5%
6-10%
11-15%
46-50%
16-20%
21-25%
26-30%
36-40%
81-85%
0
20
40
60
80
100

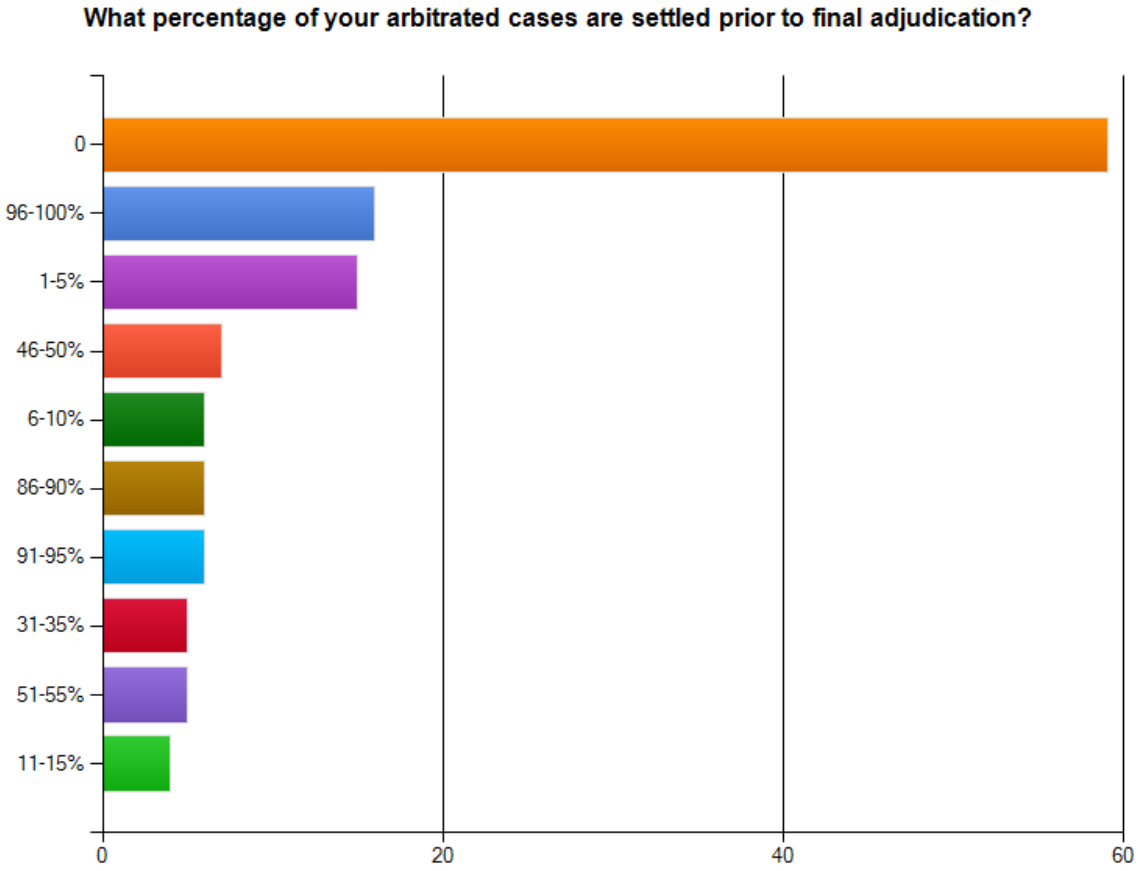

Have you represented a consumer in an arbitration proceeding?
Yes
No

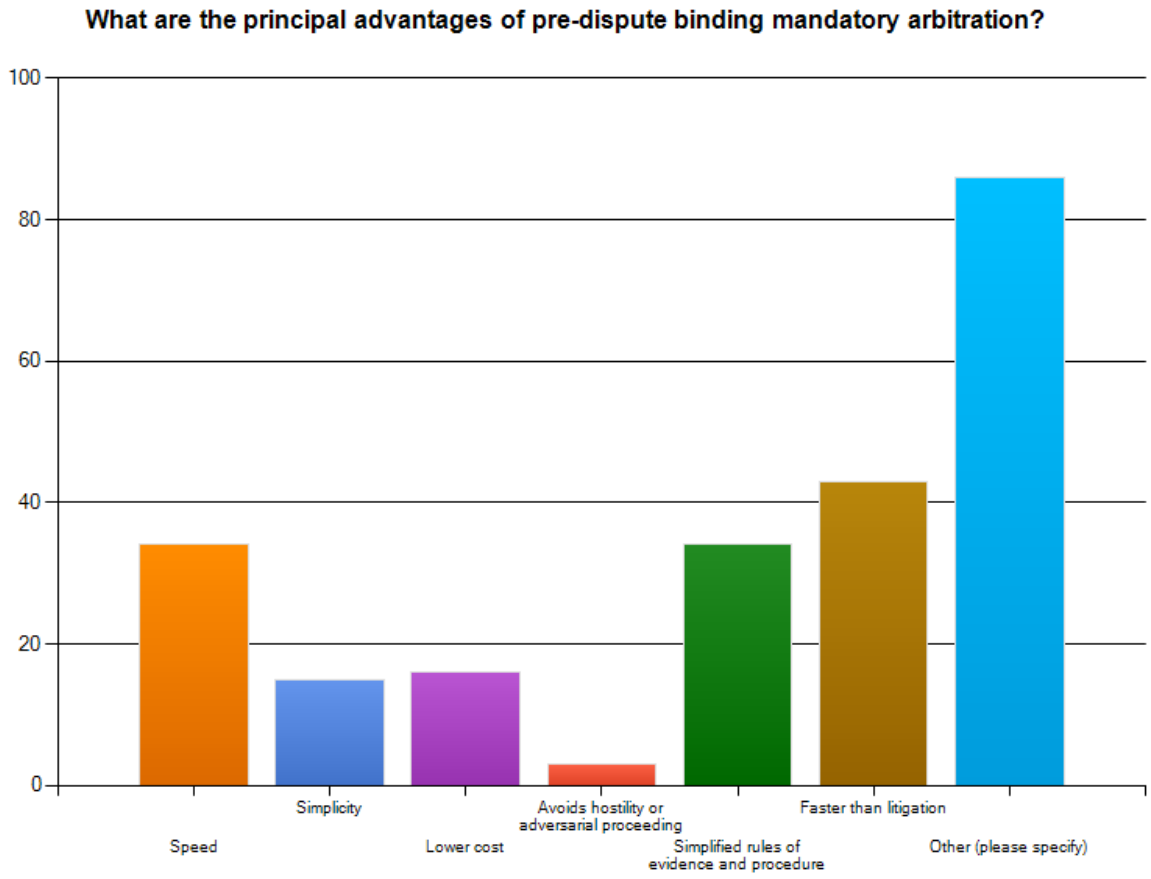
If yes to the previous question, how many times, as a percentage of your practice, have you represented a consumer in arbitration?




What are the kinds of cases / instances in which you have seen arbitration clauses? (e.g., real estate transactions, debt collection, nursing home contracts, etc)
200
150
100
50
0
Real estate
debt collection
auto
nursing home contracts
pay day lending
credit card
banking
Other


What percentage of your litigated consumer law cases are settled prior to final adjudication?
91-95%
96-100%
86-90%
81-85%
71-75%
76-80%
66-70%
51-55%
6-10%
21-25%
0
20
40
60

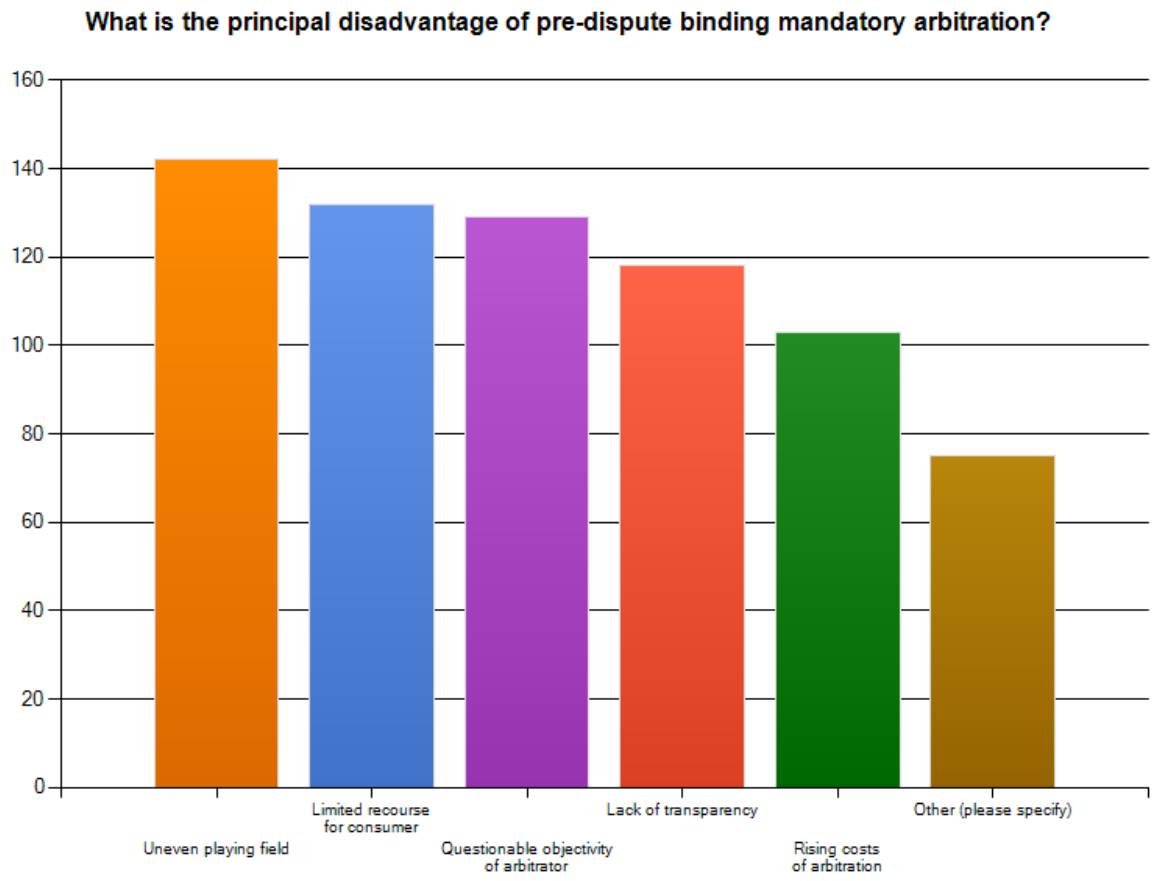

What percentage of your arbitrated cases are settled prior to final adjudication?
0
96-100%
1-5%
46-50%
6-10%
86-90%
91-95%
31-35%
51-55%
11-15%
0
20
40
60



OTHER – 52% of respondents reporting there are little to no advantages.

- none--it is NOT cheaper NOR faster, and it is heavily favorable to corporate interests, because the arbitrators want repeat business
- Client discovery is more limited
- None
- advantages are illusory in most instances, device suppresses vindication of claims
- none
- I don't like arbitration so I view it as having few advantages
- None
- None for consumer cases.
- None.
- N/A
- It is the worst system including all other alternatives
- None
- none
- It is never advantageous to clients.
- I do not think there are any advantages for the consumer
- I see no advantage to opt-out of the American system of justice before knowing what is at issue
- None
- none
- there are no advantages to the consumer
- none
- none - setup is adverse to consumer's interest
- No appeal
- None to a Consumer
- There are none, in my opinion. Consumers rarely prevail.
- None
- Can sometimes be used against corp suing consumer
- None

- I see absolutely not benefit to predispute binding mandatory arbitration.
- where class-action waivers are involved, to allow the criminals to keep their crime's spoils
- None. They seem to take as long or longer. The dispute about the arbitration clause tends to delay the case. It is more expensive for all parties involved.
- none, for our clients
- None
- None
- My experience shows none of the above are actually true.
- NONE.
- No advantage. Bad rules hurt both sides.
- Don't see benefit
- None.
- No advantage for consumers. Non arb cases settled more frequently and quickly and for greater amts.
- There are none
- None
- no advantages
- NONE
- I see no advantages
- I don't see any.
- none
- Privacy
- None, in my work
- I do not see any advantage to pre-dispute binding mandatory arbitration
- There are none
- there are NO advantages to the consumer
- never get to this point. in my 20 plus years of experience it takes a lawsuit to get the matter resolved
- None of the above
- none
- None for a consumer
- None
- none that I see
- In Alabama these agreements are not used as an alternative to litigation. They are used as a shield against consumer claims because of the difficulty, the costs and the unfairness of the process.
- too many negatives
- better forum where draw an unfavorable judge
- I don't see any consumer advantages.
- I see no substantial advantage. The lack of protection of evidence rules results in a deterioration of the burden of proof.
- None, arbitration is generally more expensive, more time consuming, and requested excessive briefing, including discovery motion practice
- I don't take (try to avoid) cases with binding arbitration;
- None
- NONE
- None of the above - there is no advantage whatsoever
- None
- None that I see.
- NONE - much worse for consumers
- Little if any.
- None. Virginia courts are fast and cheap.
- not aware of any
- none
- only faster than state court litigation.
- I have seen NO advantages -- most consumers when faced with arbitration costs choose to avoid the costs and conclude the case
- None for the consumer
- none
- None
- none
- NONE THAT I PERCEIVE
- None
- In our practice we see no advantages of pre-dispute mandatory arbitration
- None
- None
- The only advantages are for the corporation

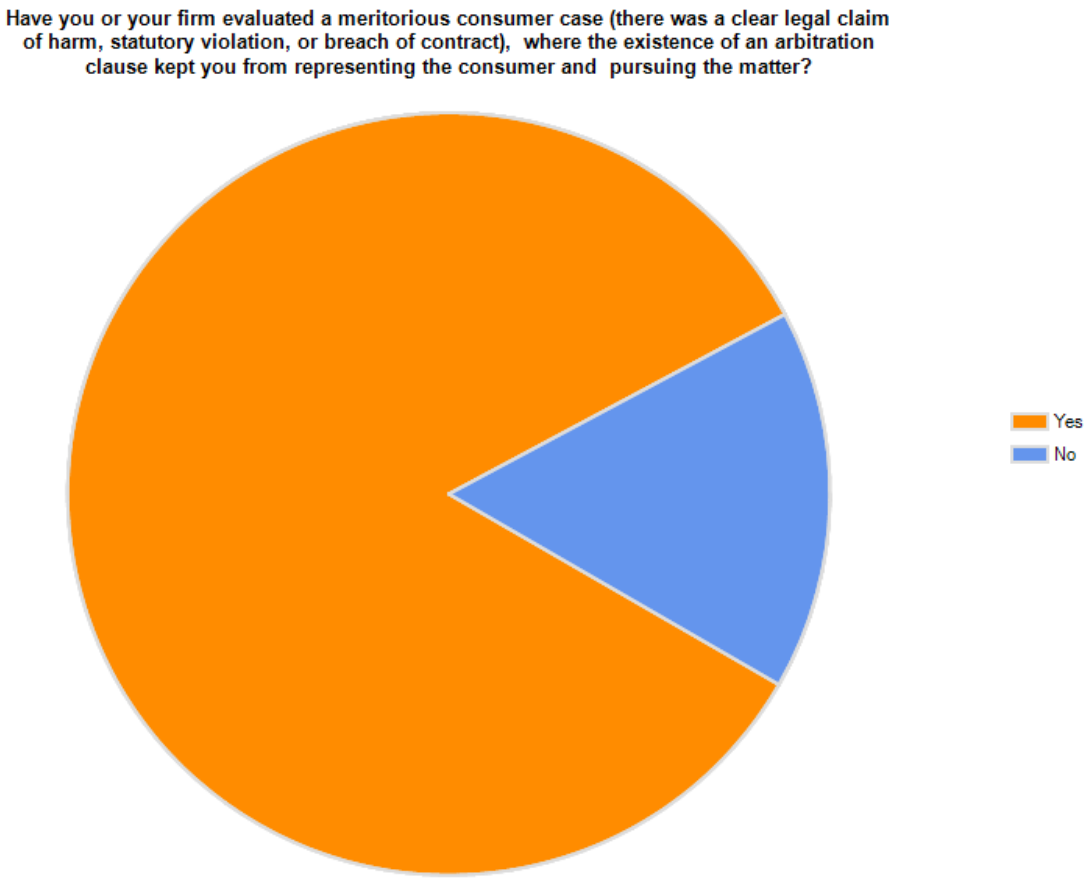


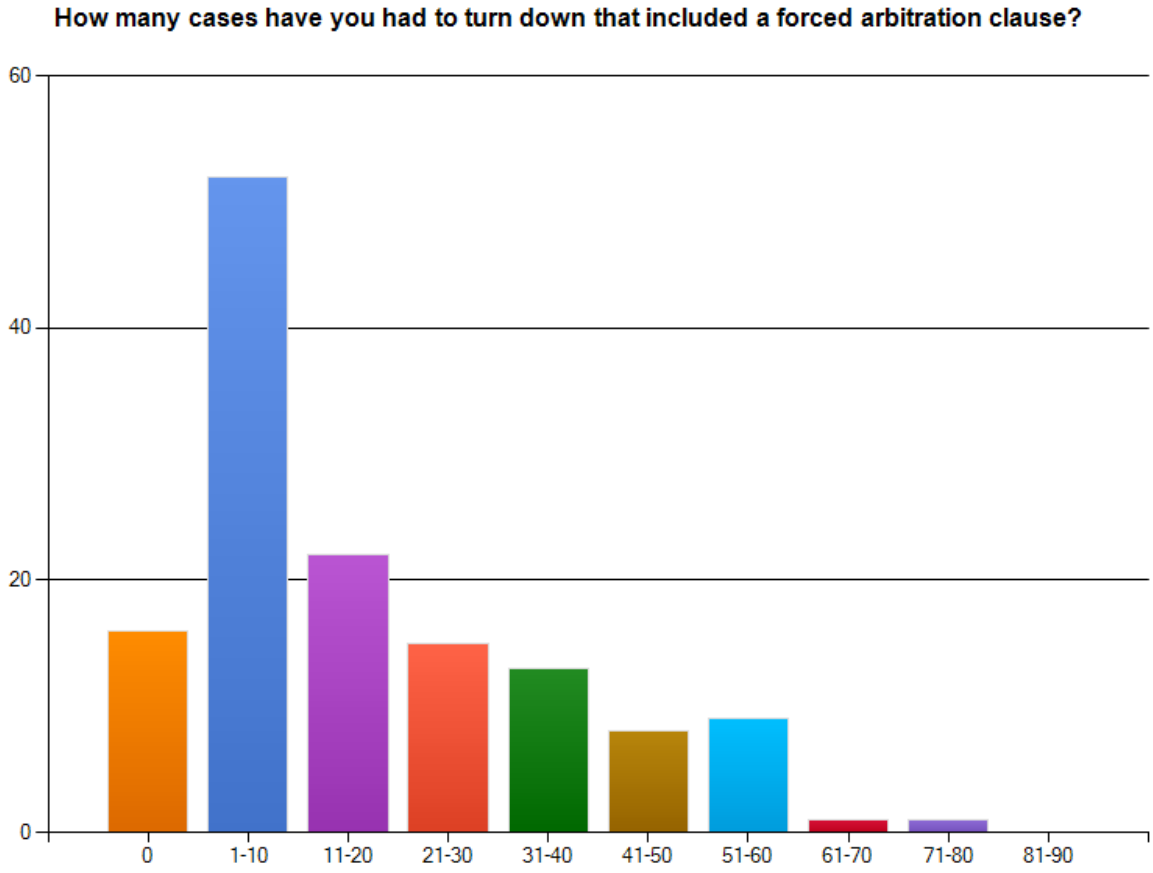
OTHER:

- Some fora are retired judge fast track litigation instead of subject matter expert streamlined proceedings
- Cost of arbitration of individual (non-class) claim is prohibitively outweighed by the chance of small, single recovery
- Risk of attorneys fees being denied.
- prevents aggregation, inhibits development of law, allows business to suppress corrective enforcement efforts
- Lack of legal precedent, preventing development of the law to keep pace with modern business practices
- unavailability of discovery
- arbitrators do not follow the law.
- limits on class treatment -- consumer often does not even know she is harmed
- Class action waiver
- Poor quality arbitrators
- lack of class remedy
- impedes new, novel claims under broad UDAP; prevents development of precedent; prevents res judicata/test cases; prevents class actions
- Lack of class action is denial of access to courts for most consumers, if not all.
- N/A
- No meaningful appellate review. 2. Inability to bring class claims, particularly in consumer cases where it would not make sense to start an arbitration where there is no material likelihood of review of a decision and the ability to be paid depends on a fee shifting

statute that may or may not be applied.
- Limited procedural protections and limited discovery
- There is no genuine advantage to arbitration. It takes just as long as litigation and costs clients much more money.
- Lack of discovery
- Opting out of the American system of justice before knowing what is at issue
- lack of review
- no jury or judge
- costs and risks of litigating with unique rules.
- No due process, rules of evidence, inability to add parties to law suit
- limited discovery
- Limited discovery
- No viable choice between a Court of Record and Arbitration
- no appeal
- inadequate discovery, no appeal
- Unable to obtain legal representation
- no appeal, limited information about party deciding case, unknown rules, plays out similar to litigation but costs more and is less certain
- Rules of Evidence don't apply
- Simplified rules of evidence is double-edged sword
- very limited discovery; class action bans
- but especially the uneven playing field
- Law not applied
- arbitral forum bias
- I have found arbitrations often take longer than trials.
- Everything about binding arbitration is bad
- The unwitting waiver of rights. 100% of clients are unaware they agreed to waive their rights to court system, to jury trial, to class action. The Arb is hidden in the maze of terms, or in the maze of documents presented. Even if it was fairly presented, most consumers would agree because they do not anticipate ever having a lawsuit issue, and because they ultimately have no choice if they want the product.
- Foreign venue precludes ACTUAL participation
- Lower recovery and risk to defendant
- Arbitrator pools are stocked with biased arbitrators. They are all defendant/corporate leaning. Consumer leaning arbitrators do not exist.
- Secret, non-precedential nature of the process
- All of the above.
- no set procedures or procedural protections.
- arbitrary case management and application of procedural rules without oversight.
- bans on class actions make cases infeasible
- upfront fee, which you don't have for defenses in a court case
- Cannot do class actions
- All of the above. If a company has a panel of three to five arbitrators they will agree to and the arbitrators will only see a consumer one time who is the arbitrator naturally inclined to favor, regardless of their desires for objectivity? As all the studies show, bias, in even the most well intentioned person, can be subconscious.
- limited discovery
- Arbitrator ignorant of the law and unwilling to learn
- See comments to prior response.
- No appellate rights and arbitrators need not follow or even know the law. Confidentiality requirements. Sweeps massive wrongdoings against consumers under the carpet.
- lack of ability to appeal blatantly wrong decisions
- No requirement for arbitrator to follow the law. No requirement that consumer who entered into arb agreement even knew what s/he was entering into. No chance to help others vindicate their rights against corporate wrongdoers.
- Defense oriented "neutrals" and 2 Plaintiff oriented and then striking ALWAYS end up with a Defense oriented neutral that is sympathetic if not protective of companies.

- lack of reasonable appeal opportunity
- consumers have a large hurdle of finding counsel
- no requirement for basis of decision and, often, the applicable law is ignored in whole or in part
- Procedural Protections are Absent
- limited discovery for consumer; arbitrators don't know consumer law or care to do the research
- lack of discovery
- lower quality adjudication than federal court.
- inability to bring class actions
- no real appeal, rigged forum
- It's cheaper to go to small claims court than to arbitrate; at least there is an appeal from a magistrate judge's opinion
- Absence of discovery into creditor's records
- The punishing costs of arbitration
- usually prohibits treatment as a class
- hard to appeal
- Arbitrator can ignore discovery and case law with impunity by just not giving any reasons.
- Not ultimately faster or easier than litigation
- Consumers rarely win; arbitrators rarely award attorney's fees


Have you or your firm evaluated a meritorious consumer case (there was a clear legal claim of harm, statutory violation, or breach of contract), where the existence of an arbitration clause kept you from representing the consumer and pursuing the matter?
Yes
No


How many cases have you had to turn down that included a forced arbitration clause?
60
40
20
0
0
1-10
11-20
21-30
31-40
41-50
51-60
61-70
71-80
81-90

2012 NACA Binding Mandatory Arbitration Survey: APPENDIX II

Consumer claims suppressed because of an Arbitration Clause

The following case stories were submitted by survey respondents to demonstrate the cases they were not able to bring because of an arbitration clause. Survey respondents were responding to the question:

Briefly describe a deserving case that you could not bring because of an arbitration clause. In answering this question, please be sure to include information about: 1. Nature of Case 2. Describe wrong that could not be addressed 3 Corporate Wrongdoer 4. Nature of Arbitration Clause (Scope/Implications) 5. Implications of Provision

The stories below demonstrate three patterns:

1. In some instances attorneys managed the case as far as they could – starting litigation and eventually being compelled / ordered to arbitrate.
2. In other instances the attorneys made an early determination that, even though the consumer had an actionable claim, the arbitration clause was an obstacle and the case was not worth bringing individually.
3. In other instances attorneys note that all cases include an arbitration clause.

Name: - David Cialkowski

Company: - Zimmerman Reed, PLLP

City/Town: - Minneapolis

State: - MN

Email Address: - david.cialkowski@zimmreed.com

Phone Number: - 612-341-0400

1. Consumer Class Action – consumer cell phone. 2. AT&T charged iPhone users on their phone bill for text messaging plans that expressly included "Multimedia Messaging." Multimedia messaging was not available on iPhones for several years prior to September 2009. Class action lawsuits were filed resulting in a coordinated, single judge multi-district litigation. Concepcion was then decided. Plaintiffs were forced to drop the suit against AT&T and the court compelled arbitration against Apple based on an "equitable estoppel" theory, essentially bootstrapping AT&T's arbitration clause onto Apple. 3. AT&T and Apple, Inc. 4. Same arbitration clause as in Concepcion, but enforcing it in favor of third party Apple as well, who did not even have an arbitration clause. 5. Collective action was not allowed and the cost of arbitration could not support individual arbitration.

Name: - Jeff Crabtree

Company: - Law Offices of Jeff Crabtree

City/Town: - Honolulu

State: - HI

Email Address: - lawyer@consumerlaw.com

Phone Number: - 808-536-6260

1. Auto dealership selling car without having title. 2. Ongoing illegal behavior, client wanted injunctive and class relief to stop the harm to others in the future. 3. Dealership threatened to trigger arbitration clause if case did not settle immediately after filing, so we were not able to ask Court for injunctive relief--would not have gotten injunctive relief in arbitration. 4. Arb clause said all issues to be arbitrated, and no allowance for injunctive relief, punitive damages, or class relief. 5. Given USSC's ruling on arb clauses and class relief, and other rulings on no injunctive relief, there was no point in going to arbitration. The threat of arbitration and no relief triggered settlement. In effect, defendant was able to threaten limited remedies of arbitration, buy a settlement, and will probably continue the illegal practices.

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South Florida is littered with non-registered commodities firms selling precious metals. The FTC has issued multiple releases that these places operate as boiler-rooms. We have rejected multiple cases because the damages make the cases economically unjustifiable to pursue. Many of the firms use a generic arbitration clause which requires arbitration before the AAA.

Name: - John Roddy

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American General Financial Services sold credit insurance products in violation of law, failed to refund unearned insurance premiums as well. Arbitration clause contained class action waiver. Without class mechanism the stakes are too small to warrant a lawyer's intervention, and the nature of the violation would not even be noticed by 99% of consumers

Name: - Glenn Danas

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There are several compelling consumer issues we've passed on recently at the investigation stage, prior to getting a client signed up, due to arbitration clauses and class action waivers. For example, Sam's Club (Wal-Mart) sells certain products "as-is," and offers customers the option to buy service plans for those products. Customers aren't told that the service plan doesn't cover their "as-is" product until they actually make a claim under the plan. At that point, they are denied coverage under the plan and denied a refund of their service plan fees, too. We could not pursue this due to an arbitration agreement, even though Sam's Club's practice is plainly quite unfair to its consumers. Another example is H&R Block's "compliance fee." The company advertises an appealing price for their tax preparation services, and then tacks on additional "compliance" fees that sound like, but are not actually, required IRS fees. Finally, Metro PCS

offered a gift card to customers in lieu of rebate checks. The gift cards featured many restrictive terms and fees that were not disclosed at the time of purchase. We passed on both the H&R Block and Metro PCS issues due to arbitration agreements. It may go without saying, but we've also had to pass on potential cases against wireless companies other than Metro PCS, due to Concepcion.

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I filed a case against a finance company affiliated with a door-to-door seller of education materials of questionable value to primarily Spanish speaking consumers. After the consumer informed the finance company that she wanted to cancel the contract, the finance company began making repeated phone calls to the three "references" which she had listed on original credit application, disclosing the debt to the references. These acts are prohibited by the California Fair Debt Collection Practices Act, Civil Code section 1788 et seq. We believed that these calls were a regular business practice but due to an arbitration/class action waiver clause we could not pursue it as a class action. We pursued it as an individual action with AAA instead and received an award of $28,150. I also was unable to bring a class action against a cell phone provider who refused to honor their warranty unless the consumer first supplied them with a credit card number due to a class action waiver. Basically, since the Concepcion decision, class actions cannot go forward in most cases unless there is no arbitration clause (rare) or the arbitration clause is so unfair as to be declared unconscionable by the court.

This case was originally filed as Casini v. Hy Cite Corporation, Santa Cruz County Superior Court Case No. CV169374, but we were unable to continue the court action due to the arbitration clause.

I also was unable to bring a class action against a cell phone provider who refused to honor their warranty unless the consumer first supplied them with a credit card number due to a class action waiver. Basically, since the Concepcion decision, class actions cannot go forward in most cases unless there is no arbitration clause (rare) or the arbitration clause is so unfair as to be declared unconscionable by the court.

Name: - Eric Calhoun

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Overcharging consumers for title insurance on a comprehensive scale. Consumers not parties to clause, but compelled as non-signatories to arbitrate.

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Home improvement giant, Empire Today, LLC, entered into retail installment contracts (RICs) with Tiona Webb and over (at least) 100 Pennsylvania consumers w/ mid prime or subprime credit. The RICs charged 18% APR, well above PA's 14% usury ceiling on home improvement contracts. Ms. Webb filed a class action against Empire seeking statutory treble damages and a declaration that the RICs were usurious. Empire moved to compel arbitration on the strength of AT&T v. Concepcion, and the motion was granted, with the court sending Ms. Webb to arbitrate her claims on an individual basis. There would be no class wide relief. Ms. Webb initiated arbitration proceedings at AAA. Empire objected to having to pay for the arbitration proceedings

(per the arb clause that IT drafted) and objected to Webb's requests for discovery depositions and subpoenas. Ms. Webb was foreclosed from the probing discovery required to prove that Empire profited from its usurious contracts. Despite having her hands tied by limited discovery in arbitration, Ms. Webb was successful at obtaining an arbitration award that Empire's RIC was usurious. She has asked the Pennsylvania state court to confirm and enter the arbitrator's judgment. The case is Webb v. eCon Credit Acceptance & Empire Today, LLC, Pa C.C.P. Phila. Co. No. 2010-000892.

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Jon Perz bought a water/flood damaged vehicle in 2/2007 and has not had his case heard in five years. Dealer was recently banned from arbitration by the AAA for failure to follow its rules (i.e., failure to pay its fees).

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Consumer Home equity line suspended by bank without proper foundation in breach of contract and fees still charged to consumer. Equity line agreement had arbitration clause. Absent the ability to file in court and as a class, case not economically feasible to bring.

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In Missouri Title Lenders ignore the consumer protections contained in the Missouri Title Lending law and we cannot stop them and obtain a judicial decision that their lending practices fall within the purview of the law because of the forced arbitration clauses.

Name: - Lee Anderson
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I represented a case against numerous payday lending companies who violated interest, fee, and disclosure requirements of state and federal consumer laws. The arbitration clause had an unlimited scope, including express ban on class actions. I decline virtually all cases in which an arbitration clause applies. Only in commercial disputes does arbitration ever appear to make sense, and even then only rarely.

Name: - Andrew Friedman
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I represented a case against Verizon, ATT for cramming text services. The unauthorized charges were not remedied due to a class action ban in the arbitration clause. There was no effective remedy for consumers.

Name: - Henry Wolfe
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A client borrowed $10,000 secured by his personal injury claim from a "lawsuit advance" company, and ended up paying back $35,000 after a year and a half, losing most of his eventual settlement to usurious interest. New Jersey case law is undecided whether these transactions are subject to usury statute, but we had developed strong arguments, this case presented ideal facts, and we had a smart judge. The case was compelled to arbitration (by appellate court, after trial court denied motion to compel) and settled for nominal settlement because of our doubt that arbitrator would be willing to entertain a new / novel theory. New Jersey courts still without guidance on this issue and lawsuit lenders still giving small consumer loans with 150 plus% annual interest to desperate injury victims with impunity.

Name: - Michael D. Donovan
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I represented a meritorious claim against Greentree Financial related to a fraudulent home improvement contract. The case involved over 1,000 persons victimized by door-to-door home improvement contractors who signed people to a home improvement mortgage contract that was financed by Greentree. The home improvements were never performed. *Harris v. Greentree Financial Corporation*, 183 F.3d 173 (3d Cir.1999).

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If damages are small I would not take any arbitration case since recovery of fees would be very doubtful. I probably get 1-3 cases a year that I screen, mostly for automobile fraud, which I decline to take because arbitration is arbitrary, and attorney fees are often not awarded.

Name: - Kenneth A. Wexler

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Antitrust case which could not economically be brought by an individual.

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Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., No. 08-1198. We brought the case, but it cratered with the Supreme Court decision.

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Over the last several years, I have been faced with various telephone and credit card cases where companies changed or failed to comply with the terms of the contract into which the companies had entered with the consumer but I've turned down such cases because the individual amounts damage amounts were relative small (no more than $250 per person) and arbitration and anti-class provisions in the contracts made the cases untenable to be brought. Accordingly, aside from telling potential clients to complain to a regulatory agency or law enforcement office, there was nothing that could be done and, in all likelihood, no governmental actions were ever brought.

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I represented a home solicitation sales case involving California state violations (technical violations in contract) and debt collection violations. Because of the arbitration clause, we were able to bring only an individual case, not a class action. Although we vindicated the rights of one client, the community at large still suffered violations. The wrongdoer included both a major player in home solicitation sales in the immigrant community, Brainstorm, and the financing company and debt collector, a Wisconsin corporation, Hy Cite. The arbitration clause covered all claims related to the contract. The class action prohibition mandated AAA arbitration. Fee-splitting was not explicit, as AAA rules governed. We brought only an individual case, in arbitration. As a result, a year later, a similar client with the same defendant came to our office with the same issue. Had we been able to obtain class-wide and/or injunctive relief, that person--and all the others who do not come into our office--would not have suffered that violation.

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We have had a court grant an order compelling our client to arbitrate on an individual basis. That meant that even though we did all the work to prove the lender violated the law and was not entitled to collect any of the deficiencies, it got to keep all it collected except our client's money.

One of my cases where arbitration was ordered is ***Finance and Thrift Company, Inc. v Zavala***, Monterey County (California) Superior Court, Case No M99589. There were approximately 2,000 consumers in the class. Because Zavala's claim was sent to arbitration on an individual basis only, none of the other class members got any relief from the case.

Another case is ***Cardenas v. AmeriCredit Financial Services, Inc***. US District Court for the Northern District of California, case no. 09-4978 SBA. The district court denied AmeriCredit's motion to compel arbitration, but AmeriCredit appealed and the district court stayed the action pending that appeal.

There were other cases pending against AmeriCredit and they continued in litigation. When one of the other cases got to the verge of trial, AmeriCredit asked for mediation and eventually agreed to a global settlement of all the cases, including my ***Cardenas*** case. That settlement has been preliminarily approved by the court in a consolidated action entitled "***In re AmeriCredit Financial Services, Inc. Litigation,***" United States District Court, Southern District of California, Case No. 10-cv-1373 DMS BLM.

Under the ***AmeriCredit*** settlement, consumers *with* arbitration clauses will only 57% of their money back, whereas consumers without arbitration clauses will get about 90% of their money back. There are more than 35,000 in the *AmeriCredit* classes. About 50% of them had arbitration provisions in their contracts.

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I represented a case against a buy-here pay-here car dealer, Car Hop Auto Sales and Finance, selling cars in need of numerous mechanical repairs to low income workers with bad credit who need dependable transportation to get to work, who often lose their jobs and/or car because they have no money after down payment to keep the car running. I could not get injunction to stop dealer from misrepresenting the mechanical condition of the vehicle. The arbitration clause required arbitration for all disputes and contained a class action waiver. I could not help consumer, individually or class-wide, because arbitrator has no obligation to follow the law with respect to the consumer claim, no obligation to award attorney fees, and no assurance that I would get fair compensation for the client or my firm even if we won, with no right for judicial review of arbitrator's decision.

Name: - Joe Earley
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I turn away many otherwise meritorious employment cases (retaliatory discharge) because the arbitral forum is so unfair. I turn away meritorious nursing home abuse cases because the

arbitral forum is unfair and the client is required to pay for half of the arbitration cost - a fact they learn about only after their loved one has been harmed by a facility.

Name: - Paul G. Minoletti
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I represented a landlord tenant case that limited fee recovery to $5000 - which favors landlord only on eviction cases.

Name: - Ronald Burdge
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"The wrong model year doesn't matter anymore." Consumer buys recreational vehicle after seeing sign in window that says it is a current model year coach. The price is $125,000 in the sales contract and finance contract and all paperwork says current model year number. My client gets title in the mail later. It's the prior model year. My client sues and the dealer compels arbitration with court's blessing and case goes off to BBB. At BBB hearing, copies of all laws given to arbitrator. Dealer says chassis is prior year and box is this year and it's not our fault if title says last year since federal law says they can put a box on a chassis that is up to 2 years old and still call it a current model year. Copies of laws are given to arbitrator, including UDAP law that says a merchant can't do anything that is unfair or deceptive to consumer. We explain that a sign in the window and sales paperwork that calls it this model year and delivering a title that says last year is actual model year on the title is breach of warranty of description of goods, breach of contract, and it's unfair to do all that and then deliver a one year old model year number on the BMV title. Befuddled BBB arbitrator ignores state motor vehicle title laws, state UCC, state UDAP law and says the dealer just passed the title on as it got it so it's not the dealer's fault. Huh? "So, explain this arbitration thing again to me…" Bad car sold with dealer providing 3 month drive train warranty and arranging loan with 3rd party lender. When car engine blows less than a month later because of internal part failure (not maintenance and beyond any factory warranty or TSB possibilities) the dealer says sorry about that and won't fix and won't pay for fix. Consumer sues to get repair cost so they can get it fixed elsewhere. Dealer files motion to stay and force arb through AAA. Memo's fly back and forth. Dust settles. We

wait on judge to rule. Nothing happens. 8 months later we file motion for oral argument. Nothing happens. Month later we call staff attorney and ask for status. “we’re busy but will get to it. It’s a complex question.” Nothing happens. We file another motion for oral argument. Oral argument is scheduled 6 wks out. Attorneys show up in court and argue – to the staff attorney because judge is tied up elsewhere. We go home. Nothing happens. 3 months later the dealer’s attorney files motion to withdraw from case, not getting paid. Nothing happens. 2 months later we file another motion for oral argument on dealer attorney’s motion to withdraw. Nothing happens. After case is pending about 3 years, the judge grants dealer attorney motion to withdraw and orders case to arb. Lender agrees to settle by turning over a clear title. Disgusted, consumer gives up and gives car to brother, a mechanic who buys a junk engine and does it himself. 14 months later I get in the mail a notice from the bailiff setting the case for a pretrial conference to review status of arb proceedings, which of course never happened because consumer couldn’t afford the arb filing fee and the dealer wouldn’t pay it. Dealer still in business. New GSM calls me and says we didn’t know there was a court case going on; we’ll turn this over to our attorney again. The merry go round goes on.

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I have had several auto fraud cases where the costs of private arbitration and lack of a jury reduced cost/benefit so pursuing case is not feasible.

Name: - Ian Lyngklip
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We regularly see car fraud cases, and credit card fee cases that we could formerly have litigated to a summary judgment in the consumer's favor that we simply cannot successfully arbitrate. Bias in forums, lack of enforceable discovery and cost render many of these cases unsuitable for litigation on a contingency basis. We simply cannot afford the risk associated with an unreviewable process.

Name: - Michael D. Hurtt
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I turn down arbitration cases. The ones I have had in the past show a stacked deck against the consumer. Juries and judges are much more sympathetic to consumers than arbitrators and arbitration is much more expensive.

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I had a fraud case, prior wrecked car, but because proof of the knowledge of the wreck by the selling dealer was unclear, decided not worth raking because it was arbitration, and did not want to invest the time into the case where we had to deal with a AAA arbitrator. Most consumer auto contracts with arbitration clauses have the AAA as the arbitrator, or NAF. Neither one is a good arbitration group since the arbitrators are not retired judges, not in this area, are not neutral nor will necessarily follow the law.

Name: - Wilson Webb
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I had client with an arbitration clause that allowed Small Claims jurisdiction ONLY, and any appeal from Small Claims would be solely to BM Arbitration. Thus, borrower was severely limited in the remedy she could seek ($3k max ceiling of Small Claims Court) and of the forum of Small Claims or BMA.

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I will no longer bring any case that has an arbitration clause unless the client is willing to pay on an hourly basis.

Name: - John Campbell
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I have had to turn down dozens of payday lending cases in which the APR exceeds 450%, there is no underwriting of the loan, and the process is designed to create long-term debt cycles. Although I have litigated two payday lender cases to conclusion and know that the law in Missouri supports our claims, given the new jurisprudence on arbitration clauses, I cannot pursue the class claims at this time. It is almost certain that in federal court, where most would be due to the Class Action Fairness Act (CAFA), the consumer will be forced into individual arbitration. The risk of this, coupled with the complexity of the cases, prevents us from pursuing claims that we 1) know are meritorious and 2) before the newest rulings on arbitration have successfully litigated, resulting in $30 million in relief to consumers. The arbitration clause is truly serving as a complete immunity shield for lenders who are blatantly breaking the law and hurting some of the most vulnerable consumers around.

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I represented a payday loan collection where the consumer was threatened with arrest that had a broad arbitration clause that included every conceivable cause of action.

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I represented a case against a pay day lending operation, eventually courts decided no class case, only individual arbitration. Result was that many, many borrowers paid exorbitant interest on such loans, but individual amounts weren't enough to justify hiring an attorney.

Name: - Daniel Karon
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I represented a consumer case against a credit-reporting service, consumerinfo.com who charged people for providing sham reporting services. It contained a typical class-action waiver. The court ordered individual arbitration (typical scenario after Concepcion).

Name: - Ronald Frederick
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I represented a class action counterclaim against Advance Pay of Ohio. The payday loan company is accused of violating numerous consumer protection statutes, including but not limited to, the truth in lending act, consumer sales practices act, the short term loan act and usury. The arbitration clause applied to all cases except those brought in small claims court. When a counterclaim was filed in excess of the jurisdiction of the small claims court APU sought to have the case arbitrated. In fact, even if there is an appeal of a small claims judgment, that appeal must be conducted in arbitration. There is also a class action ban and it is the

contention of APU's attorneys that the arbitrator is prohibited from enjoining APU from engaging in this scheme of illegal conduct.

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We received a potential FDCPA action for false threats in collection activity by major debt buyer, with no actual damages to debtor. I refused to take the case because of the arbitration provision with a class action waiver. This left only an individual action with a possible $1,000 statutory damage claim that did not justify taking the case.

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I represented a mortgage rescue fraud case that was referred to mandatory arbitration with limited discovery and time. Arbitrator ruled in favor of the rescue company and allowed eviction of clients.

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I no longer accept any cases involving an arbitration clause. Blatant fraud in auto transactions goes without remedy.

Name: - T. Michael Flinn
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I have had a number of cases I could not bring because of arbitration clauses and the cost of arbitration. Recently I have turned down a number of used car sales involving the failure to pass required emissions testing. The consumer is sold a car that will not pass the required emissions testing and the consumer cannot get a tag for their car and cannot drive their car. The dealer refuses to repair the car and refuses to buy back their car. They point to their arbitration clause when suit is threatened. The sum of money involved does not typically justify the cost of arbitration. Georgia does not allow class actions for consumer violations.

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Client was sold a car and told three days later that there was no financing and he had to bring the car back. The dealership "canceled the deal" but kept most of his down payment. We believe there were unfair and deceptive practices and Truth in Lending violations. The arbitration clause included making consumer pay some costs, a provision that loser may have to pay the winner's attorney's fees, a ban on class actions. The corporate wrongdoer was a car dealership. I could not take the case and the client was hesitant given the fee shifting provisions and costs involved in the arbitration. The dealership has the car and the client's money.

Another example of the harmful effect of an arbitration clause occurred in the case *Lane v. Antwerpen*. The Lane case was filed after winning a similar case against the same dealer in *Anthony v. Antwerpen*, CASE No. 24-C-06-004512, which resulted in a $100,000 settlement. The Lane case was kicked into arbitration, resulting in an award of approximately $400.

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We turned down a class action because of the arbitration clause--the case involved un-returned deposit for a car purchase.

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I am currently hesitating to file cases involving auto dealer claims on a class basis because of the prevalence of arbitration clauses in dealer contracts. I believe car dealers are involved in a systematic rip off of consumers in relation to certain items, yet I have only one such case filed, and it did not involve an arbitration clause.

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I represented a case against Gateway for an alleged manufacturing and design defect in laptop computer costing in excess of $1,000 that is irreparable and causes laptop to be inoperable. The consumers reported same defect with no recourse due to arbitration. Arbitration clause required individual arbitration, no class case. The case was dismissed in district court due to arbitration provision.

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We had a case involving AT&T throttling of data speed. It contained a standard Concepcion class action waiver clause. I passed on the case.

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I had consumer credit card disputes and a credit reporting dispute that was unable to be brought against bank due to arbitration clauses.

Name: - Ellen Holland Keller
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We have a pending case in which the defendants urge (after a year or so of litigation) that the dispute must be arbitrated because of the Concepcion case. At issue are small overcharges that the lender or insurance company collected due to improper credit insurance rebates on loans that were rolled over.

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I have a case with a dealer that sells a vehicle denying accident history and denying any accidents or damage. The finance company refuses to acknowledge assignee liability and insist on payment. The arbitration clause ostensibly subjects all claims and defenses of any kind to arbitration, limits discovery so that it is non-existent, prohibits the aggregation of cases (in short prohibits all of the necessary tools to prove a fraudulent state of mind). Consequently, the case(s) is not cost-effective to pursue. There is little hope of prevailing and even less hope of obtaining a sizable award.

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I have a case where a securities broker cheated disabled and retired coal miners who had to move their retirement and disability funds. The broker put the coal miners in high fee, risky investments, which resulted in big commissions for the broker and large losses for the coal miners. The arbitration provision required large upfront payments by the miners, out of state arbitration proceedings, and no punitive damages. Wrongdoer's employer was Prudential Securities. The miners probably lost $1-20 million in potential recoveries.

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I had a nursing home neglect case in which patient suffered malnutrition that led to infections and death. The case was forced to go to arbitration against Life Care Centers of America, Inc. The arbitration provision eliminated right to jury trial, attorney fees and right to appeal. Arbitrators are not as accustomed to being "shocked" by the evidence as a jury would be.

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I had a worker's compensation retaliation claim probably worth $25,000 to $30,000. The Court granted the employer’s Motion to Compel arbitration. The arbitrator wanted a retainer of $8,000 per party. I could not possibly justify that expense in light of the anticipated actual value. The case settled for a mere $7,000 instead.

Name: - Jay Dunham

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I have an interesting situation brewing with two consumers that were defrauded in exactly the same way by exactly the same auto dealer. In each case, the client purchased a "new" vehicle that later proved to be used. In one case, the judge forced the client to arbitration, and she was awarded nothing due to an unjust arbitrator. That case is on appeal to our Supreme Court. *In the other case, the trial judge has refused to send the client to arbitration and I think we will get to a jury.* These cases have many, many facts in common, right down to the attorneys involved, so we will be able to objectively compare the arbitration track vs. the litigation track.

BOTH are now before the Oklahoma Supreme Court and both are at critical points.

The first is House v. Vance Ford-Lincoln-Mercury, Inc. and Ford Motor Credit Company, LLC. It was in Ottawa County, Oklahoma (Case No. CJ-2010-287), but bears case No. DF – 109314 in the Supreme Court. I will be submitting a Supplemental Brief in Chief requesting that the arbitrator's award be vacated because he exceeded his authority and because the award is in manifest disregard of Oklahoma law.

The other, Hoffman v. Country Ford-Mercury, was in Oklahoma County, CJ-2011-9643. Defendant has appealed the Judge's refusal to send the case to arbitration, Supreme Court case No. PR - 110718. They have asked that an Extraordinary Writ be issued compelling the trial court to order arbitration. Oral arguments were made 6/12 and I await a decision.

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In most of the consumer cases involving arbitration clauses, I look for those where there is no signed agreement. I've stayed away from claims of deceptive or hidden fees (surcharges, fees,

etc.) or "didn't get what you paid for" type cases where there is a signed arbitration clause, and the arbitration clause doesn't have obvious substantive unconscionability problems. In fact, there have been several instances where I have chosen not to sue AT&T.

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I have had several FDCPA cases that were ripe for class adjudication which I brought only on an individual basis because there was an arbitration clause. Claims include deceptive letters and improper phone messages.

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I have been counsel in several cases where individual arbitration was compelled and that made the cases infeasible, and forced us to abandon the cases. The liability was straightforward, the cases would almost certainly have been favorably resolved. These cases include credit card issuers, car dealers and lenders on car loans, pay day lenders, cell phone companies.

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Car dealer totally misrepresents condition of car, collects unlawful charges. Contract requires all disputes to be arbitrated. Great case, but I would not accept it because of arbitration requirement.

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we brought an FCRA case against a credit card company and it is claiming that "any dispute" arising out of the use of the card is arbitrable. That case is being argued tomorrow 4-4-12 and I won't have the court's ruling for some time. So a federal statute implemented to protect consumers and all the rights of the legal process are tossed in favor of an arbitration, makes no sense. Arbitration is for those of equal standing: business to business etc

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Our clients were a couple that lost their jobs, because of the recession. They had to live off their credit cards, and the debt became too large. They saw debt settlement companies on the internet, and signed up for their services. The debt settlement companies charged our clients way more than is allowed by state and federal law. We brought a class action on behalf all of the consumers that had been treated this way by this debt settlement company. The debt settlement company moved to compel arbitration, and the court granted the motion based on AT&T v. Concepcion. These clients (and all the putative class members) were deprived of a remedy, because you cannot economically do these cases on an individual basis. The debt settlement company can continue to take advantage of those most vulnerable.

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Class action filed against Advance America for damages arising out of payday lending scheme declared illegal by PA Supreme Court - contracts contain arbitration clause and class action, which were avoidable under PA law until AT&T v. Concepcion decision - case now sent to individual arbitration by E.D. Pa. Dist. Ct. - this will make it impossible to vindicate the rights of thousands of PA citizens and allow Advance America to retain millions of dollars illegally obtained

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1. Breaking and entering. 2. Unauthorized entry into home to retrieve window unit air conditioners during heat wave. 3. Rent-A-Center. 4. All-encompassing arbitration clause. 5. Barred consumer from seeking jury trial in a case with good potential for substantial assessment of punitive damages against corporate burglar.

Name: - Steve Broadwater
Company: - Hamilton, Burgess, Young & Pollard, pllc
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State: - WV
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Ever since the Attorney General in Minnesota struck a blow to NAF and AAA we haven't turned down a case because of an arbitration clause.

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Identity theft case against Verizon Wireless; consumer returned phone within 30 day trial period; store employee reactivated and used the phone illegally. Verizon promised to rectify, but instead turned consumer over to 3 separate collection agencies, and reported the account as a charge-off on the consumer's otherwise unblemished credit. When consumer disputed to the credit reporting agencies, Verizon failed to conduct any meaningful investigation, and simply told the agencies that it's reporting was accurate.

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Class action where servicer was illegally charging attorney's fees

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Car dealership engaged in predatory lending and unlawful repossession and collection activity. Arbitration clauses in all contracts. Would not be worthwhile on an individual action and need the ability to conduct discovery.

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I just turned down a case involving a young man being sold a wreck that the dealership lied about, because it had a mandatory binding arbitration clause with AAA. I had just "prevailed" in another arbitration with AAA, which awarded actual damages but no punitives and no attorney fees.

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See, e.g., Anderson v. Maronda Homes, Case No. 06-1421, 13th Judicial Circuit (Tampa, FL)(consumer dispute over less than $5,000; RISA statutory claims; class relief sought; motion to compel arbitration granted; class relief denied in arbitration based on provision being silient as to class-wide relief; subsequent appeal pending, Second District Court of Appeal, Florida, Case No. Fla. 2DCA 2D11-4203).

Name: - Floyd Bybee
Company: - BYBEE Law Center, PLC
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State: - AZ
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Phone Number: - 480-756-8822

Any auto fraud type cases that has binding arbitration I simply won't take. the only cases I have that have gone to arbitration is court ordered arbitration in Arizona Superior court cases. Poor results. Nearly always appeal, which at least I have the option to appeal back to the superior court.

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1) Failure to pay warranty claims for vehicle 2) Disabled client left with vehicle that can't afford to have repaired 3) AUL 4) Binding arbitration, AAA or JAMS, under NY Law and to take place in NY 5) Client unable to afford arbitration and case closed

Name: - DeVonna Joy
Company: - Consumer Justice Law Center LLC

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Hard to say. If I know a defendant will move for arbitration, I will not even accept the case. Period. If a defendant were to move for arbitration, that is grounds for my withdrawal as counsel -- it's right in my fee agreement. I cannot afford to work for free.

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All Wireless Phone Companies: cramming, deceptive marketing, hidden fees, deceptive fees, unilateral changes to plan contracts. Arbitration clauses identical to that in Concepcion.

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Any class action involving a car dealer or car finance company, because there is a class action waiver in the arbitration clause

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State: - CA
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Phone Number: - 408-886-1440

Caveat: I am still thinking about bringing this case. Client buys car and GAP insurance. Dealer pockets money for GAP and never sends it to GAP administrator, so, she has no coverage. Car wrecks. Insurance pays off loan except final $955.00. Wells Fargo, the assignee wants client to pay the outstanding amount regardless of the rip off and regardless of the holder language and regardless of the fact that IT is contractually liable to pay off or forgive the loan. There are three separate arbitration clauses in play that have varying levels of unfairness and conflict with each other. Class actions are banned, review is limited, panels are limited, commercial rules seem to be preferred. Taking on this very important matter actually feels like knowingly walking into a minefield.

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I have turned down numerous cases against cell phone providers and credit card companies due to arbitration clauses that contain class action bans. Most involved ripping off consumers repeatedly for small amounts of money. After Concepcion, if the arbitration clause does not contain clear flaws I decline these cases.

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Numerous cases involving unlicensed, blatantly illegal payday/ high interest lenders

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Almost every case that involves an arbitration clause.

Name: - Laura E. Nolan
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I have had a few consumer collection cases which might have had a counter-claim available which our office was unable to handle but no attorney would take the case because of an arb clause.

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There have been a number of cases in the past that I have avoided being involved in due the unfairness of consumer arbitration. Given the abuses that have been perpetrated by the credit card industry with arbitration, I am reluctant to deal with such a forum. Lack of objectivity and bias have eroded my confidence in private court systems that are funded by the powerful banking industry.

Name: - Marrie Appel
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N/A at this time because until the Concepcion decision, arbtration clauses were not enforced in my class action cases. This has changed since the Concepcion decision.

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Unfair and deceptive practices by a trade school. Wrongful termination from program immediately after accepting full tuition for the year. Arbitration clause had a no punitive damages and winner gets fees provisions. Could not accept case on contingency and consumer afraid of the liability of paying their fees if not successful.

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I'm afraid these clauses will find their way into real estate leases, preventing me from vindicating tenants' right to rent abatement and other relief from bad conditions.

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I have turned down numerous truth in lending cases against payday lenders, such as Illinois Payday Loan Store, and Illinois Consumer Fraud Act cases against a giant dent settlement company, because of arbitration clauses. The arbitration clause of the debt settlement company included a limit on damages, and fee shifting if the consumer loses a challenge to the arb clause. Both were fine print, contained class action waivers and sought to compel arbitration on any issue at all, except when the company sought to collect from the consumer.

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Fraudulent inducement - Company received $5K from client on expectation that they would stay in the area. They left less than a month afterward. contract was with corporate. Other suits had already been brought and dismissed because of arbitration clause with BBB. I was unable to get any information of substance from BBB and discovered the past results of arbitration on this issue had gone against client consistently. I thought client was entitled to relief, but did not take the case because of the low likelihood of success.

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I now rarely, if ever, take cases which are going to arbitration. Even if you win something, attorney fees are dramatically reduced

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1. Numerous auto fraud cases. 2. Wrongs ranged from illegal bait-and-switch to unconscionable interest rates to defective vehicles. 3. Virtually all major car dealers in central Florida, and the vast majority of smaller dealers as well. 4. Arbitration typically mandated for everything related to vehicle, including sales, purchase, financing, product defect, etc. 5. I advised my potential clients that I would not accept their case due to arbitration provision, since I do not believe arbitration will allow them a fair way to resolve their dispute.

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Company: - Joseph & Mabrito, PLLC
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We had many inquiries about abusive practices from TaxMasters, a local tax resolution services firm. There were a wide range of deceptive practices that are now being litigated by the Texas Attorney General. TaxMasters has since declared bankruptcy. Our firm wished to pursue TaxMasters; however, in an "agreement" provided to the TaxMasters customer (after their credit card had already been charged over the phone), there was a strongly-worded arbitration clause. Because of that, and our perception of the current legal environment in Texas, we declined the cases for fear that it would be enforced, and our case would be removed to arbitration.

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Prospective client was overcharged by auto finance company for property taxes incurred after his lease had terminated. Not worth pursuing in individual arbitration.

Name: - Mark Tischhauser
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State: - FL
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I have dozens of examples of such instances. Most of the cases revolve around being forced to attend arbitration with dubious companies picked by the creditors who provide millions of dollars in revenue to the arbitration companies collectively or clients that drop cases because they don’t think they will get a fair shake from a hired gun judge by the banks

Name: - David F Addleton

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Phone Number: - 4782279007

When I worked at UAW Legal Services I frequently opposed arbitrations at NAF and opposed motions to confirm NAF arbitration awards. I successfully arbitrated a residential construction dispute against a fraudulent builder in which my client tendered the final payment to the builder who refused to accept it because the builder demanded over three times the amount of the contract final payment from the consumer. The arbitrator limited the builder's recovery to the amount of the contracted final payment + interest [!], even though the builder had refused to accept the full contracted final payment. I do not accept cases involving arbitration clauses.

Name: - Mark Ankcorn
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Phone Number: - 619-870-0600

I have [several]TCPA class actions in USDC that are facing motions to compel arbitration. The case names and statuses are below. If successful, [the arbitration clause] will eliminate any chance of changing business practices in this industry as it relates to debt collection calls.

O'Brien v. American Express Company, 11-cv-1822 BTM (S.D.Cal.)
arbitration motion filed, discovery granted as to unconscionability; Amex is seeking review by the USDC of the magistrate's order granting discovery. Hearing date is July 27, 2012.

Ramirez v. Bank of America, N.A., 11-cv-2008 LAB (S.D.Cal.)
mortgage servicing case, no arbitration provision in the promissory note

McNamara v. RBS Citizens, N.A., 11-cv-2137 L (S.D.Cal.)
motion to compel arbitration heard April 9, 2012; awaiting ruling

Bradley v. Discover Financial Services, 11-cv-5746 YGR (N.D.Cal.)
motion to compel arbitration to be heard August 7, 2012

Cloud v. Real Time Group, Inc., 12-cv-1470 JAH (S.D.Cal.)
complaint filed June 15, 2012; not yet served

Cayanan v. Citi Financial, Inc., 12-cv-1476 MMA (S.D.Cal.)
complaint filed June 15, 2012; not yet served. Citi's GC has said that he will be filing an arbitration motion and will appeal any adverse ruling.

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We have turned down several cases identical to that described in No. 4 above because an arbitration clause in the auto purchase agreement prevented judicial actions and class recovery.

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Potential clients call all the time regarding billing or accounting mistakes with their credit card accounts. Virtually every credit card agreement I have seen has an arbitration provision that either bars class actions or is silent on class actions such that no class would be allowed in arbitration. Because the claims are usually small (although with compounding interest they add up) and because we would never get the discovery in arbitration to show any systematic mistake/fraud to even prevail on an individual claim, we don't take those cases. As such, credit card companies can continue to unfairly charge customers and if caught, they may just give that one consumer their money back, but keep everyone else's money.

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Cases against car dealers involving undisclosed mechanical defects are difficult unless you have a very experienced and consumer savvy arbitrator, which are hard to come by. Too risky unless you have a jury trial as a back up.

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We don't even look at the case if there is an arbitration clause.

Name: - Harry Shulman
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I turned down at least one claim against a for-profit school because of an arbitration clause/class action waiver. The school misrepresented its placement rates. Many people enrolled on the basis of these rates, then were appalled to find that they couldn't get jobs after they graduated. Had they known the placement rates were bogus, they never would have attended. Trade school fraud is particularly pernicious; students usually have to take loans to attend them. The loans are not dischargeable in bankruptcy, and there is no statute of limitations on suits to collect them. So, when a student learns that her credential won't get her a job, she is stuck with the loan for the rest of her life. Unless, that is, she can find an attorney to sue the school. But those cases only make sense as class actions; they are discovery intensive, and the cost of pursuing a case for one person would be prohibitive.

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We decline many yo-yo cases and other auto fraud cases if they contain arbitration clauses. We no longer accept any cases with arbitration clauses because of the recent court decisions mandating arbitration clause enforcement. It just isn't worth it for us to get involved with them.

Arbitration Stories – Meritorious cases evaluated and turned away because of arbitration clause

1. Have you or your firm evaluated a meritorious consumer case (there was a clear legal claim of harm, statutory violation, or breach of contract), where the existence of an arbitration clause kept you from representing the consumer and pursuing the matter?

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Company: - Zimmerman Reed, PLLP

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State: - MN

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Debit charge post-reordering case in Minnesota against large bank. Courts have determined the practice violates consumer fraud statutes, but the presence of the arbitration clause made the case too risky.

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home security contract with overreaching term, price, and deceptive advertising, but arbitration clause was so bullet proof it made no sense to even attempt litigation

Name: - Andy Milz
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Usurious payday loans and the harassing collection conduct that follows; cases for UCC statutory damages stemming from improper auto repossession tactics; potential class actions for over charges in health club contracts; cases against credit furnishers (e.g. telecom companies) for furnisher violations of the fair credit reporting act, etc...

Name: - Chandler Bisher
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Breach of contract and statutory requirement for Spanish version of contract case against US Bank with small damages will not be able get class restitution due post-Concepcion enforcement of class action waiver. Still pending arbitration, so may be able get injunctive relief

Name: - Henry Wolfe
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Auto sales fraud cases, which this firm has had success litigating as state court class actions. Last week, we turned down a case in which the dealership added small overcharges to title/registration fees because the retail order contained an arbitration clause with class ban (as do almost all car retail orders do these days).

Name: - Michael D. Donovan
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State: - PA
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Home improvement financing contracts; payday loans; credit card contracts; cell phone contracts; employment contracts; car purchase and financing contracts; nursing home contracts.

Name: - Terry J. Adler
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Client purchased a used vehicle from a used car dealer. The dealer failed to disclose that the vehicle had been a previously wrecked, salvaged vehicle. Pre-dispute binding arbitration clause in the Retail Installment Sale Contract required the client come up with a significant filing fee, which should have been reimbursed to client, but client could not afford initial filing fee. Additionally, the uncertainty of client being able to recoup his legal fees in an arbitration award chilled the client's desire to seek a remedy for the fraud he had been subjected to by the dealer.

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Phone Number: - 713-552-0008

Most deceptive auto sales deals will include an arbitration clause to protect the dealership.

Name: - Kenneth A. Wexler
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State: - IL

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There is virtually no individual consumer claim that justifies the time and expense required to bring it, either on an hourly basis or for a contingent fee.

Name: - Eric Holland
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State: - MO
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Cable company illegally charging customers. Arbitration clause with class waiver made the case impossible to pursue on behalf of class members whose damages are around $150 each.

Name: - Andrew Ogilvie
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State: - CA
Email Address: - andy@aoblawyers.com
Phone Number: - 415-651-1952

We do not take consumer cases where the consumer signed a contract with an arbitration clause and class action waiver.

Name: - Wilson Webb
Company: - Webb Law Firm
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State: - AL
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Phone Number: - 256-543-0150

The worst offenders in my practice are auto dealers and payday lenders. I see these cases every week. Someone has been truly ripped off, and the BMA is so tight (and our appellate courts so supportive of BMA), that I reject the case or the Client becomes disheartened because of their lack of choice between a real court of record and the private nature of BMA.

Name: - Daniel Karon
Company: - Goldman Scarlato Karon & Penny, P.C.
City/Town: - Cleveland
State: - OH
Email Address: - karon@gskplaw.com
Phone Number: - 216-622-1851

I've received countless calls concerning Verizon overbilling that I've been unable to pursue.

Name: - WILLIAM KRIEG
Company: - Kemnitzer, Barron & Krieg
City/Town: - Frenso
State: - CA
Email Address: - wmkrieg@yahoo.om
Phone Number: - 559-441-7485

The costs of arbitration do not justify many small or limited jurisdiction cases [small damages] Arbitrators seems very negative about small value cases where arb. costs and/or attorneys fees exceed damages/recovery.

Name: - Laura McDowall
Company: - McDowall Co. L.P.A.
City/Town: - Akron
State: - OH
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Phone Number: - 330.807.8251

Clear cases of auto fraud are rejected by my firm if consumer signed arbitration clause unless there is clear evidence of fraud by the dealer in getting the

Name: - William Bielecky
Company: - William C. Bielecky, P.A.
City/Town: - Tallahassee
State: - FL
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Phone Number: - 850-521-0022

I am currently sitting on a half dozen cases I believe to be both highly beneficial to consumers at large, but also highly likely to succeed. Arb clauses preventing class actions prevent a jump into this new theory. As a result, consumers are paying more each year for their cars. (I'm sorry I can't be more specific. It is a novel theory that I presently cannot discuss.)

Name: - John lenderman
Company: - Attorney
City/Town: - El centro
State: - CA
Email Address: - Lendermanlaw@gmail.com

Real estate and auto cases with AAA mandatory provision but nearest AAA is 120 miles away. I say let the courts do the job, that's what they get paid for and the system works even if a defense verdict.

Name: - Andrew N. Friedman
Company: - Cohen Milstein Sellers & Toll
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State: - DC
Email Address: - afriedman@cohenmilstein.com
Phone Number: - 202 408 4600

Numerous instances of post-transaction marketing by unscrupulous companies, but the arbitration clause prevents class relief.

Name: - micheal
Company: - wright
City/Town: - mesa
State: - AZ
Email Address: - hmw@udallshumway.com
Phone Number: - 480-461-5347

Several cases were turned down because the damages were not great enough to justify the high cost of arbitration.

Name: - F. Paul Bland, Jr.
Company: - Public Justice

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State: - DC
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I was approached with a clear cut case involving a bait and switch by a lender, but with an arbitration clause that banned class actions and could not be challenged. The case was not feasible because of the arbitration clause.

Name: - Jerard Heller
Company: - The Law Offices of Jerard C. Heller
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State: - FL
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Phone Number: - 9547635434

yes; see above for typical case. I turn away about 2 or 3 cases a month solely because of arbitration.

Name: - Steve Larson
Company: - Stoll Berne
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Phone Number: - 503 227 1600

Any case where there is an arbitration clause that does not allow for class actions, we no longer take.

Name: - Nick Wooten
Company: - Nick Wooten, LLC
City/Town: - Auburn
State: - AL
Email Address: - nick@nickwooten.com
Phone Number: - 334 887 3000

As a matter of course my firm rejects every case that includes an arbitration clause now because the last five years have demonstrated that the industry is going to win these cases nearly 100%

of the time. In fact, in every case I have arbitrated personally but one, the consumer has lost even when there was clear liability or admitted testimony from experts indicating liability.

Name: - Lara Strandberg
Company: - Strandberg Law Office
City/Town: - Spokane
State: - WA
Email Address: - Lara.Strandberg@gmail.com
Phone Number: - 50099918277

There have been cases that we chose to handle as individual actions rather than seeking class certification because of the existence of an arbitration clause.

Name: - J. Daniel Clark
Company: - Clark & Martino
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State: - FL
Email Address: - dclark@clarkmartino.com
Phone Number: - 813-879-0700

Consumer claim for statutory violations under federal and state law; damages were less than $5,000; arbitration provision prohibited class relief; and due to arbitration costs and prevailing party fee recovery permitted under statute, our firm could not recommend pursuing on an individual basis.

Name: - Amy Wells
Company: - WELLS LAW OFFICE, INC.
City/Town: - Dayton
State: - OH
Email Address: - awells@ohioconsumerhelp.com
Phone Number: - 937.435.4000

It has happened on a number of occasions. Due to the risks of recovery, we only offered representation where the consumer was responsible for a portion of the fee during the pendency of the case. Most consumers can not afford to do so, and are hesitant to assume this risk.

Name: - Ian Crawford
Company: - Crawford, Lowry & Associates, LLC

City/Town: - Canton
State: - OH
Email Address: - icrawford@crawford-lowry.com
Phone Number: - 330-452-6773

I routinely tell clients that if there is an arbitration clause, I am much more unlikely to be able to proceed because of the inherent difficulties involved, including arbitrators unwillingness to award attorney fees even where there is an obvious violation and a fee-shifting requirement involved.

Name: - Brian Shaw
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State: - PA
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Phone Number: - 484-680-4977

This has happened in the realm of debt defense. There was a time when the broader public did not understand the unfairness that existed by certain players in the credit card industry and the forum that they funded to "resolve" disputes.

Name: - Stephen Kirby
Company: - Kirby Law Office, PLLC
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State: - WA
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Phone Number: - (509) 863 9596

Fraudulent inducement - Company received $5K from client on expectation that they would stay in the area. They left less than a month afterward. contract was with corporate. Other suits had already been brought and dismissed because of arbitration clause with BBB. I was unable to get any information of substance from BBB and discovered the past results of arbitration on this issue had gone against client consistently. I thought client was entitled to relief, but did not take the case because of the low likelihood of success.

Name: - Mark Tischhauser
Company: - Tischhauser Law Group
City/Town: - Tampa

State: - FL
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Phone Number: - 813-877-6442

Dozens. Lots of smaller harassment FDCPA type cases fall in this category. Hired gun arbitrators rarely sympathetic to consumers

Name: - David F Addleton
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State: - GA
Email Address: - dfaddleton@gmail.com
Phone Number: - 4782279007

I simply will not accept any arbitration matter for a consumer

Name: - Scott Ray
Company: - Scott Ray Law Firm
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State: - OK
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Phone Number: - 580-248-5557

client bought used car; dealer sold trade-in; dealer says financing didn't go through so must return the car; car returned, dealer says they can do financing deal if client buys two cars; client agrees; later finance company calls client for interview; client tells them of the two car deal--finance company only knew about one car purchase using two trade-ins.; finance company refuses loan; car dealer claimed it was buyer's fault for telling finance company about two car deal instead of saying it was a one car deal (another finance company was to be used for second car but that was not known by buyer)

Arbitration Stories – Attorneys not turning away cases because of arbitration clauses

Name: - Hawk Barry
Company: - Rosner, Barry & Babbitt, LLP
City/Town: - San Diego

State: - CA
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Phone Number: - 858-348-1005

I have not refused cases because of arbitration clauses. I challenge them in court, and have 3 published opinions finding clauses unenforceable.

Name: - Mitch Stoddard
Company: - Consumer Law Advocates
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State: - MO
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Phone Number: - 31-692-2033

I will accept any meritorious arbitration case, but I caution my clients about the arbitrariness of process.

Name: - Lara Strandberg
Company: - Strandberg Law Office
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State: - WA
Email Address: - Lara.Strandberg@gmail.com
Phone Number: - 50099918277
I have not yet come across a case where the debt collector sought arbitration. With the exception of local debt collectors collecting for local creditors, in individual debt collection lawsuits if the plaintiff cannot prevail on summary judgment then the case is judicially dismissed for inaction or the plaintiff voluntarily dismisses.

2012 NACA Binding Mandatory Arbitration: APPENDIX III

Class actions that have provided significant relief and justice to consumers that would not exist if the underlying contract contained an arbitration clause.

The following case stories were submitted by survey respondents to demonstrate good class actions which provided significant recovery or injunctive relief to consumers.

4. Briefly describe a case (class action or individual) you handled that produced a great recovery and/or injunctive relief for your client, class members or consumers in general.

Name: - David Cialkowski

Company: - Zimmerman Reed, PLLP

City/Town: - Minneapolis

State: - MN

Email Address: - david.cialkowski@zimmreed.com

Phone Number: - 612-341-0400

Class action -- Major retailer and clothing manufacturers promised a "free round trip flight" with the purchase of $125 of branded clothing. Tens of thousands of people qualified but did not receive flights. Class representatives were able to sue in court, conduct discovery, and settle on a class-wide basis. Class members who had completed all the required paperwork were reimbursed their purchase price and given additional compensation. Costs to prosecute the action to settlement were over $90,000. Had the arbitration clause been honored, the lawyers could not afford to conduct the necessary discovery or pay the forensic expert to necessary to interpret the qualification data. The cost of arbitrating a single claim would have, by an order of magnitude, exceeded the value of the single claim. The settlement was well supported by the class, and class counsel received thank you notes from people who thought they would never be reimbursed.

Name: - Jeff Crabtree

Company: - Law Offices of Jeff Crabtree

City/Town: - Honolulu

State: - HI

Email Address: - lawyer@consumerlaw.com

Phone Number: - 808-536-6260

Injunctive relief by the court to stop defendant from continuing to violate consumer laws.

Name: - Scott silver
Company: - silver law group
City/Town: - coral springs
State: - FL
Email Address: - ssilver@silverlaw.com
Phone Number: - 954-755-4799

We represented an elderly person convinced to purchase rare coins from Stanford Coin & Bullion. We prevailed on the motion to dismiss in federal court because the Judge ruled that the Florida Securities Act included all "investments" including the recommendation to invest in rare coins. Unfortunately, our case could not be seen to conclusion because Stanford was accused shortly thereafter of operating a massive ponzi scheme.

Name: - Wesley Barr
Company: - Reasonover & Olinde, LLC
City/Town: - New Orleans
State: - LA
Email Address: - wbarr@reasonoverolinde.com
Phone Number: - 504-587-1440

Retired teacher brought an arbitration claim against a brokerage firm that invested all of her retirement savings in junk bonds and left her without any retirement which caused her to have to return to work as a teacher at 65 years old. She received a recovery of a substantial portion of her losses in arbitration.

Name: - John Roddy
Company: - Bailey & Glasser LLP
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State: - MA
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Phone Number: - 617-439-6730

Sears and other major retailers induced unwitting consumers to waive rights to bankruptcy discharge by having them secretly reaffirm dischargeable debts. Obtained class relief of more than $300M for class of about 300,000 c0nsumers, with recovery of approximately 175% of actual damages

Name: - Glenn Danas
Company: - Initiative Legal Group, APC
City/Town: - Los Angeles
State: - CA
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Phone Number: - 9176646513

In Baumann v. Verizon, we settled a consumer class action with total benefit to the class in terms of refunds and settlements was equal to approximately $55M. Our case initially was *Baumann v. Cellco Partnership et al.*, cv10-00474 (C.D. Cal.). The case settled as part of *In re Verizon Wireless Data Charges Litigation*, 3-cv-01749 (D. N. J.). This was a consumer class action that alleged that Cellco Partnership (dba Verizon Wireless) improperly billed data charges to customers who subscribed to "pay as you go" plans. The plaintiffs alleged they were charged for data services that they never authorized or received.

Name: - William E. Kennedy

Company: - Consumer Law Office of William E. Kennedy

City/Town: - Santa Clara

State: - CA

Email Address: - wkennedy@kennedyconsumerlaw.com

Phone Number: - (408) 241-1000

I recently represented three different classes who were subject to collection attempts from banks and collection agencies after losing their house to foreclosure. California's anti-deficiency statutes prohibit banks from taking a judgment for the deficiency after foreclosure of purchase money loans. The case was brought under the Fair Debt Collection Practices Act. A settlement was reached in all three cases, and the class members received $4.05 each, in one case, to $1,000.00 each, in another case. In the third case, the class members received from $27 to $167, depending on they type of collection attempt they were subject to. All three defendants modified their practices to prevent future occurrences. I also represented a class of insured's whose insurance claims following collision were reduced due to a "betterment" deduction. A

"betterment" deduction is where the insurance company fails to pay the full cost of a needed replacement part (such as a tie rod) based on the theory that the part was already used at the time of the accident. The class action was settled and the class received 95% of their betterment deductions back.

Concerning the three classes regarding collection attempts following foreclosure, the first two classes were in the litigation which resulted in the three decisions listed below. One class was against defendant LCS Financial Services Corp. and one was against defendant Ocwen Loan Servicing, LLC. They settled separately, at different times, and were approved by the court and administered separately. The case number is **C09-02843 TEH**

Herrera v. LCS Financial Services Corp. 2009 WL 5062192 (N.D.Cal. 2009)
Herrera v. LCS Financial Services Corp., 2009 WL 2912517 (N.D.Cal. 2009)
Herrera v. LCS Financial Services Corp., 274 F.R.D. 666 (N.D.Cal. 2011)

The third class is Soto v. Chase Home Finance, LLC, Napa County Superior Court Case No. **26-50251.**

The "betterment" case was *Latora v. Unitrin Direct Insurance Company,* Alameda County Superior Court Case No. VG 06275384. The following is a summary of the case facts, which explains what "betterment" is:

Plaintiff Alessandro Latora purchased auto insurance from defendant Unitrin Direct in 2005. On April 22, 2006, Mr. Latora was involved in a single car accident. His vehicle was subsequently towed to a repair shop. Unitrin authorized repairs to be done to Mr. Latora's vehicle. Upon completion of necessary repairs, Mr. Latora attempted to pick-up his vehicle and was asked to pay a bill of nearly $1,600.00 by the repair shop because Unitrin had not paid for the full cost of repairs.
When Mr. Latora questioned Unitrin about the balance, the defendant stated that the balance related to "betterment" adjustments. Among the items Unitrin applied betterment to where the vehicle's tie rods, ball joints, and bearings which normally would never need replacing during the vehicle's life. Unitrin contends that by replacing the existing parts with new parts, it "bettered" the vehicle. Mr. Latora's vehicle had approximately 72,000 miles at the time of the accident. Unitrin apparently projected a vehicle life of 100,000 miles, and contends that Mr. Latora's vehicle parts were 72% "used up." Accordingly, Unitrin only paid for the remaining 28% of the repair costs.

Mr. Latora's insurance contract requires Unitrin to "repair or replace the property with other property of like kind and quality." Only a single sentence of the policy addresses "betterment." It

states: "If a repair or replacement results in *better than like kind or quality*, we will not pay for the amount of the betterment" (emphasis added). Plaintiff contends that all replacement parts were of the same or lesser "kind or quality." Unitrin contends that the replacement parts were of better "kind or quality" then the original parts because they were new. Unitrin's position is not supported by the case law. Lebrilla v. Farmers Group, Inc. 119 Cal.App.4th 1070, 1083 (2004)("[T]he age and use of an individual Class Member's OEM parts is not pertinent to determining whether the replacement parts are of 'like kind and quality. . . . We agree and adopt this sound analysis and reasoning.")

Mr. Latora repeatedly asked Unitrin to pay the balance of charges but the defendant refused.

Name: - Eric Calhoun
Company: - Travis & Calhoun PC
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State: - TX
Email Address: - eric@travislaw.com
Phone Number: - 9729344100

Class action achieved $26,000 per class member that submitted a claim.

Name: - Andy Milz
Company: - Flitter Lorenz PC
City/Town: - Narberth
State: - PA
Email Address: - amilz@consumerslaw.com
Phone Number: - 61066800018

Debt collector NCO sent Donna Gregory a letter stating that an alleged account it was trying to collect would be submitted to "binding arbitration" if she didn't pay. NCO then initiated arbitration proceedings with the now-defunct NAF – former darling of the credit and collections industry – and attained an "award" against Ms. Gregory. But, under the Pennsylvania Rules of Civil Procedure, a creditor in a consumer transaction may not confirm any arbitration award obtained by default unless it first applies to court to compel an arbitration proceeding (or the consumer participates or waives participation in writing.). Yet, NCO unilaterally went ahead with arbitration against Ms. Gregory and over 2300 PA consumers, obtaining bogus "awards" from NAF, larded with fees and charges. In 42 instances, NCO even had these faulty awards entered as judgments in state court. Gregory sued NCO under the FDCPA, claiming that the

collection of these unenforceable arbitration awards was a misleading, unfair and unconscionable collection tactic. 15 U.S.C. § 1692e, f. After two years of litigation, the parties settled on a class basis for substantial cash relief, $6 million in credits to outstanding balances, and vacatur of nearly a half-million dollars in ill-gotten judgments. The case is Gregory v. NCO Financial Systems, Inc., et al., U.S.D.C. E.D. Pa. No. 07-CV-05254.

Name: - Michael E. Lindsey
Company: - Attorney at Law
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State: - CA
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Phone Number: - 858/270-7000

This was my case. "In the notice of intention (NOI) sent to defaulting car buyers by creditor under conditional sale contract prior to disposing of buyers' repossessed vehicle, creditor is required by the Rees-Levering Automobile Sales Finance Act to inform the consumer of any amounts the consumer must pay to the creditor and/or to third parties in order to obtain reinstatement of the contract, and provide the consumer with the names and addresses of those who are to be paid; the creditor must also inform the consumer regarding any additional monthly payments that will come due before the end of the notice period, as well as of any late fees, or other fees, the amount of these additional payments or fees, and when the additional sums will become due. "West's Ann.Cal.Civ. Code § 2983.2(a)(2). Juarez v. Arcadia Financial, Ltd., (2007) 152 Cal.App.4th 889, 904-905

Name: - jack landskroner
Company: - landskroner grieco merriman
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State: - OH
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Phone Number: - 216-522-9000

Sanford v. West: consumer class case in Ohio and CA state courts - obtaining 100-150% recovery for consumers improperly charged on credit card for membership to wholesale club they did not agree to.

Name: - Chandler Bisher
Company: - Law off S. C Vidher
City/Town: - San Francisco

State: - CA
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Phone Number: - 415-901-0500

We received a 100% recovery for class of 7,000 veterans who had tax refunds illegally seized to pay debts.

Name: - Andrew Friedman
Company: - Bonnett, Fairbourn, Friedman & Balint PC
City/Town: - Phoenix
State: - AZ
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We recently obtained a preliminary injunction and class certification halting a threatened cost of insurance rate increase.

Name: - Michael D. Donovan
Company: - Donovan Axler, LLC
City/Town: - Philadelphia
State: - PA
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Phone Number: - 215-732-6067

I obtained a class action verdict on behalf of 187,000 Walmart hourly employees who were deprived of wages for off-the-clock work and promised but unpaid rest breaks. The judgment was entered for $187 million plus interest. *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. 2011).

Name: - Daniel G. Deneen
Company: - 202 S. Eldorado Rd.
City/Town: - Bloomington
State: - IL
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Phone Number: - 309.663.0555

In one rebuilt wreck case we obtained actual damages plus $50,000 for our clients. In another auto rebuilt wreck case we obtained actual damages plus $67,500 for our clients.

Name: - Douglas Richards
Company: - Cohen Milstein Sellers & Toll PLLC
City/Town: - New York
State: - NY
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We obtained over $100 million in recoveries for the class in a New York state Microsoft anti-trust case.

Name: - NEIL FINEMAN
Company: - FINEMAN & ASSOCIATES
City/Town: - ANAHEIM HILLS
State: - CA
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Phone Number: - 714-620-1125

Our lawsuit stopped retailers from requesting and recording personal identification information from consumers who paid for goods or services with a credit card (*Florez v. Linens 'N Things, Inc.* (2003) 108 Cal App 4th 447).

Name: - Seth Lesser
Company: - Klafter Olsen & Lesser
City/Town: - 10573
State: - NY
Email Address: - seth@klafterolsen.com
Phone Number: - 914-934-9200

I had a case against AT&T (In re AT&T Wireless Consumer Class Action), Docket No. SOM-L-2070-98 (NJ), which settled for 100% on the class's damages ($2 million) for overcharges on a rate plan. This case could not be brought today where the contract would have an arbitration and/or anti-class clause.

I represented another case, Perez v. Rent-a- Center, Inc., Docket No. CAM-L-21-03 (Sup. Ct. N.J.), in which a $109 million settlement was returned to consumers. On average, $800 was given to each of the 100,000 New Jersey consumers who paid hidden usurious interest rates. Arbitration clauses in similar contracts would make such a claim unable to be brought today.

Name: - Andrew Ogilvie
Company: - Anderson, Ogilvie & Brewer, LLP
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Phone Number: - 415-651-1952

We represent people whose cars have been repossessed and sold for less than the unpaid balance on the contract, which is called "the deficiency." California law expressly provides that the consumer does not owe the deficiency unless the lender sent a post-repossession Notice that fully complies with the California statute. Lenders routinely send Notices that do not comply with the statute and then demand payment of the deficiency from the consumer. Most consumers do not know they are not liable and many have paid thousands of dollars on these invalid deficiencies. In our consumer lawsuits, we have forced the lenders who have violated this statute to return millions of dollars they have collected from consumers who did not owe these deficiencies.

Name: - Michael R. Quirk
Company: - Law Office of Michael R. Quirk
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State: - CA
Email Address: - mquirk@pacbell.net
Phone Number: - 925-943-6400

We obtained 100% security deposit recoveries for 150 prior low income tenants from a landlord who routinely returned nothing, and avoided service of small claims summons.

Name: - Joe Earley
Company: - Law Offices of Joseph Earley
City/Town: - Paradise
State: - CA
Email Address: - joe@josephearley.com
Phone Number: - 5308761111

We had wage and hour case against a large nursing home chain, which chronically understaffed resulting in the inability of nursing staff to take needed breaks.

Name: - Robert S. Belovich
Company: - Robert S. Belovich, Esq.
City/Town: - Broadview Heights
State: - OH
Email Address: - rsb@belovichlaw.com
Phone Number: - 440-838-8883

We recently settled a case titled *Seifert v. Commonwealth Financial Systems*. Soon after this case was filed, the defendants moved to stay the case pending arbitration. The basis for this motion was an argument that the arbitration clause in a terms and conditions document published by Chase Bank, provided a right of arbitration to the debt buyer defendant. After extensive litigation, the trial court ruled that the arbitration clause did not apply. Following this ruling we conducted discovery and moved to certify. The trial court granted the motion to certify and the defendants appealed. While the appeal was pending, the parties reached a settlement agreement that provided money refunds to a number of individuals and equitable relief to a much larger number of individuals. Had the court ruled the arbitration clause was enforceable, not of the legal or equitable relief for the class would have been obtained.

Name: - Paul G. Minoletti
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State: - CA
Email Address: - pgmlaw@gmail.com
Phone Number: - 650-638-9600

We had class action against a mobile home park owner for water overcharges, resulted in a refund and injunction.

Name: - David Sugerman
Company: - David F Sugerman Attorney, PC
City/Town: - Portland
State: - OR
Email Address: - david@davidsugerman.com
Phone Number: - 503.228.6474

I have two cases pending in Oregon and Washington states against Career Education Corporation, previously submitted to NACA. Career Education Corp. (CEC), a company that runs for-profit educational institutions, has been the subject of several lawsuits alleging that its culinary schools have provided fraudulent information to students to entice them to enroll.

In general, the lawsuits have alleged that recruiters for CEC's culinary schools have misrepresented the schools' job placement rates, exaggerated the schools' prestige, and falsely suggested that the schools had selective qualifying processes. Many enrollees needed to take out tens of thousands of dollars in loans to pay for their programs. The lawsuits alleged that admissions recruiters led students to believe that upon graduation from a CEC culinary school, they would likely become chefs and have no trouble paying off their student loans on the salaries they were likely to earn.

The lawsuit against CEC's subsidiary in Portland, Ore., alleged that admissions recruiters claimed that more than 90 percent of graduates ended up with a job upon graduation. However, CEC allegedly concealed earnings data in Oregon that showed the vast majority of these placements barely paid above minimum wage, according to the plaintiffs. CEC's practice of counting jobs that did not require CEC training as "placements" violated Oregon law, plaintiffs alleged. The lawsuit seeks refunds for the class members on the ground that students would not have enrolled in CEC's program if they knew the truth.

Name: - Ronald Burdge
Company: - Burdge Law Office
City/Town: - Dayton
State: - OH
Email Address: - ron@burdgelaw.com
Phone Number: - 9374329500

I had a case with a couple with kids who bought a minivan for $26,000 from dealer that later turned out to have been wrecked 3 times and badly repaired each time with total repair bills of $22,000 while the dealer's general manager had owned it privately. The couple then had an accident and it was towed to another dealer who gave an $8,000 repair estimate but said they couldn't do the work until the last repair was done right and that would cost $5,000 just for that. The dealer refused to take the car back and the lawsuit filed. The couple received a jury verdict of $220,000 against the dealer for fraud and $22,000 actual damages.

Name: - Heather Gomes
Company: - Legal Aid Bureau

City/Town: - Riverdale
State: - MD
Email Address: - hgomes@mdlab.org
Phone Number: - 301-560-2151

I filed an adversary proceeding against a payday lender which engaged in misleading advertising. Payday lender moved for arbitration. We settled for a small amount already collected by payday lender.

Name: - Robert Sola
Company: - Robert S. Sola, P.C.
City/Town: - Portland
State: - OR
Email Address: - rssola@msn.com
Phone Number: - 503 295 6880

I represented a FCRA case against Trans Union. We received a jury verdict for $30,000 actual damages and $5 million punitive damages. *Judy Thomas v. Trans Union, District of Oregon 2002*

Name: - John Gayle
Company: - The Consumer Law Group, P.C.
City/Town: - Richmond
State: - VA
Email Address: - jgayle@theconsumerlawgroup.com
Phone Number: - 804-282-7900

Sale of prior wrecked car that dealer knew about. $100,000 recovery inclusive of atty. fees awarded. Retired judge also awarded punitive damages

Name: - Wilson Webb
Company: - Webb Law Firm
City/Town: - Birmingham
State: - AL
Email Address: - awilsonwebb@gmail.com
Phone Number: - 256-543-0150

Borrower on Payday loan was sued by Payday Lender in Small Claims Court, We filed Answer alleging illegal loans, and Counterclaims under TILA, Negligence and UDAP based upon gross violations of Payday Loan statutes. Lender did not seek to enforce its Arb clause. Before case was adjudicated, Borrower filed a Ch 7 bankruptcy, and we Removed the Counterclaim to Bnk Crt, and then to USDC upon the TILA claim. Case was tried without jury and DC Judge awarded $3,000 to the Borrower on the Negligence claim (and debt was discharged in ch 7)

Name: - Jack Malicki
Company: - Law Office of Jack Malicki, LLC
City/Town: - Elyria
State: - OH
Email Address: - jackm@ohioconsumerrights.com
Phone Number: - 440-284-1601

I represented a class repossession case where the defendant did not provide the disclosure required under Ohio law. We were able to eliminate all of the deficiency balances and recover a good percentage of the deficiency payments that had been made.

Name: - John Campbell
Company: - The Simon Law Firm, PC
City/Town: - St. Louis
State: - MO
Email Address: - jcampbell@simonlawpc.com
Phone Number: - 314-241-2929

We pursued a claim for individuals who were stripped of their retirement benefits in violation of ERISA. Recovery for some individuals was as much as $100,000. It was life changing for many of the people we represented.

Name: - Jerry J. Jarzombek
Company: - The Law Office of Jerry Jarzombek, PLLC
City/Town: - Fort Worth
State: - TX
Email Address: - jerryjj@airmail.net
Phone Number: - 817-348-8325

A judge awarded $67,500 to a consumer where a debt collector asked if anyone was home with her, and what she was wearing.

Name: - David A. Searles
Company: - Francis & Mailman, P.C.
City/Town: - Philadelphia
State: - PA
Email Address: - dsearles@consumerlawfirm.com
Phone Number: - 215-735-8600

We received a $26 million settlement, including practice changes, against a background reporting company for violating rights under Fair Credit Reporting Act.

Name: - Adam Alexander
Company: - Alexander Law Firm
City/Town: - Southfield
State: - MI
Email Address: - adam@alexanderfirm
Phone Number: - 2482466353

I have handled dozens of "stop foreclosure" cases where I was able to stop the foreclosure or eviction, with either a TRO or with the stipulation of the lender's counsel.

Name: - Daniel Karon
Company: - Goldman Scarlato Karon & Penny, P.C.
City/Town: - Cleveland
State: - OH
Email Address: - karon@gskplaw.com
Phone Number: - 216-622-1851

I sued Alltel for bait-and-switching cell-phone users. Without a class-action lawsuit - and instead with individualized arbitration - Alltel would never have had to return its victims' money.

Name: - Daniel P. Lindsey
Company: - LAF
City/Town: - Chicago
State: - IL
Email Address: - dlindsey@lafchicago.org

Phone Number: - 312-347-8365

I had a mortgage rescue fraud case, which we won a house free and clear.

Name: - Laura McDowall
Company: - McDowall Co. L.P.A.
City/Town: - Akron
State: - OH
Email Address: - LM@LauraMcDowall.com
Phone Number: - 330.807.8251

I represented a number of consumers whose cars had been repossessed by a local finance company associated with a chain of car dealerships. We proved that the dealer priced the vehicles based on a formula of how much they could wring out of the buyer. Sale prices were 2-3 times higher than retail book value. Sale price was never discussed or disclosed. The sale presentation was focused on the buyer's bad credit rating, and how the dealer was doing the buyer a favor by getting them financed on the new car. After the dealer got the buyer to sign the contract, the dealer sold the contract to its wholly owned finance company for approximately 60% of the face value of the contract. Although the clients in my cases had in fact defaulted on the loans, we proved that if the contracts had been written for the true amount loaned, the cars would have been paid off in full before the repossessions.

Name: - T. Michael Flinn
City/Town: - Carrollton
State: - GA
Email Address: - michael@georgiaconsumerlawyer.com
Phone Number: - 770-832-0300

I obtained a verdict of $150,000 for a consumer who was sold a previously wrecked car when she directly asked and was told it was not previously wrecked, the dealer also violated the FTC Used Car Buyer's Guide regulation.

Name: - Jane Santoni
Company: - Williams & Santoni LLP
City/Town: - Towson
State: - MD
Email Address: - jane@williams-santonilaw.com
Phone Number: - 410-938-8666 x 15

Client was sold a vehicle which was a prior lemon buy back. The dealership lost the case. Perdomo's case number was 03-C-07-012469.

We sued a second time for the same behavior. That case settled and the dealership said it did not intend to buy these "lemons" any more. Carothers' case number was # 03-C-10-009549

Name: - Howard Goffen
Company: - LAF
City/Town: - Chicago
State: - IL
Email Address: - hgoffen@lafchicago.org
Phone Number: - 312-229-6355

I represented clients in two separate cases in which their insurers refused to pay claims. The cases eventually went to mandatory arbitration. In one case we were awarded the full damages of the claim, plus statutory interest and attorneys' fees. In the other case we were awarded full damages.

Name: - Dmitry Feofanov
Company: - ChicagoLemonLaw.com, P.C.
City/Town: - Lyndon
State: - IL
Email Address: - Feofanov@ChicagoLemonLaw.com
Phone Number: - (815) 986-7303

I had a FrankenCar case, in a conservative downstate county where we obtained a six-figure verdict.

Name: - William Bielecky
Company: - William C. Bielecky, P.A.
City/Town: - Tallahassee
State: - FL
Email Address: - bilek@nettally.com
Phone Number: - 850-521-0022

I handled a number of etch cases in the early to mid 2000's. Theft protection window etching. I never got a judgment or injunctive relief, but the practice of packing this product onto every

sales transaction by many dealers ended. The car dealers also lobbied (successfully) to enact a law protecting them from lawsuits like mine.

Name: - Jennifer Duffy
Company: - Law Offices of Jennifer Duffy
City/Town: - Los Angeles
State: - CA
Email Address: - jennifer@classaction.com
Phone Number: - 3107149779

I have a case with truck drivers who were cheated of compensation for delivery fees by large corporation are seeking relief via class action. No settlement yet. No arbitration clause so they are allowed to join and be represented by counsel who would otherwise not represent them individually.

Name: - William C. Bensley
Company: - Bensley Law Offices, LLC
City/Town: - Philadelphia
State: - PA
Email Address: - wcbensley@bensleylawoffices.com
Phone Number: - 2673224000

Most consumer lawyers will not take a case they believe will be subject to arbitration, and/or will abandon it once it is compelled to arbitration. I had an auto fraud sale case where a vehicle was sold with a damaged and distorted A-Pillar (forward most support for roof). The pillar was distorted by 10 mm over the 4.5 foot run of the pillar. This is not detectable by the naked eye, but is manifest and discernable by the movement of bolts from their factory positions, etc. The trial judge did not get it, and did not permit punitive damages to go to the jury. The jury got it and awarded $30,000. The defendants had rejected a settlement master's recommendation of a settlement of $40,000 pre-trial. An arbitrator never would have awarded anything. Both parties appeal. The defendants eventually paid much more than $40,000. In another case, an arbitrator completely disregarded the law and diminished a consumer's recovery to nothing. A dealer had sold the same vehicle multiple times with the same mileage, denied that it had been in an accident, and failed to disclose that it had been a rental (disclosure of former rentals is required in PA). While the case was pending, the defendants unlawfully repossessed the vehicle. The defendant dealer admitted that they resold the vehicle again without disclosure of the accidents and odometer discrepancy, but refused to put into evidence how much they paid to finance company to buy back the retail installment sales contract or how much they sold the vehicle for to the next consumer. Under the UCC and the PA MVSFA, defendants should have been

subjected to statutory damages in excess of $20,000, and should only have been entitled to at most the difference between what plaintiff owed and what they paid to recondition the vehicle minus what they got for reselling it. In refusing to disclose what they paid to buy back the contract and refusing to disclose that they got for reselling it, defendants obviously should not have been entitled to any payment or set-off. Nevertheless, the arbitrator gave the dealer a credit for the amts it claimed to have spent to recondition the vehicle, and refused to award plaintiff the statutory damages she was entitled to under the UCC. No surprise. I had another financed auto sale case compelled by the Court to arbitration. The contract specified either AAA or NAF. NAF went out of business. I initiated with AAA. The defendants failed after several warnings to pay the fees. AAA dismissed and demanded that the dealer and the bank (Chase) remove it from their contract and notified that it would refuse to administer any further arbitration involving them. Little more than a week later, after I moved to have the case re-listed for trial in the Court, AAA accepted an arbitration filed by the same defendants in violation of its moratorium. AAA placed a moratorium on any business initiated arbitrations involving consumer finance matters. AAA is in the pocket of the dealers, banks, and corporations.

Name: - James T. Gilbert
Company: - Coy, Gilbert & Gilbert
City/Town: - Richmond
State: - KY
Email Address: - jt@coygilbert.com
Phone Number: - 859.623.3877

I represented a counterclaim against a mortgage company for improper mortgage servicing tactics.

Name: - Scott Poynter
Company: - Emerson Poynter LLP
City/Town: - little rock
State: - AR
Email Address: - scott@emersonpoynter.com
Phone Number: - 501-907-2555

In cases where mandatory arbitration was an issue, I've settled at least two class cases involving wireless telephone carriers that resulted in recoveries by class members of about 50% of their total potential damages.

Name: - Raymond Mullman Jr

Company: - Poliakoff and Associates
City/Town: - Spartanburg
State: - SC
Email Address: - RMullmanjr@aol.com
Phone Number: - 864-582-5472

I represented a lawsuit against Lee County Landfill for odor problems. We received an injunctive relief and $2.3 million jury verdict.

Name: - Philip D. Stern
Company: - Philip D. Stern & Associates, LLC
City/Town: - Maplewood
State: - NJ
Email Address: - pstern@philipstern.com
Phone Number: - 19733797500

Palisades Collections was leaving non-Foti compliant messages for consumers. They avoided class liability which is expressly authorized under the FDCPA because they had purchased my client's Chase account which had a class action waiver and arbitration clause. Once it was referred to arbitration, we settled.

Name: - Leonard Aragon
Company: - Hagens Berman
City/Town: - Phoenix
State: - AZ
Email Address: - leonard@hbsslaw.com
Phone Number: - 602-224-2629

nationwide consumer fraud case that resulted in full recovery for clients and attorney's fees paid separately

Name: - F. Paul Bland, Jr.
Company: - Public Justice
City/Town: - Washington

State: - DC
Email Address: - pbland@publicjustice.net
Phone Number: - (202) 797-8600

In Wells v. Chevy Chase Bank, there was a settlement of $16.1 million. After fees and administrative costs, we sent checks to more than 200,000 consumers. We also got important injunctive relief, clearing the consumers' credit records.

Name: - Christine Anderson
Company: - Anderson Law Offices
City/Town: - New Bedford
State: - MA
Email Address: - info@anderson-lawoffices.com
Phone Number: - 5089167538

I was able to get back closing costs for clients (10,000), reformation of the mortgage decrease of 1%, and clients' attorney fees (9,000) without resorting to litigation.

Name: - Gloria Einstein
Company: - Jacksonville Area Legal Aid, Inc
City/Town: - Green Cove Springs
State: - FL
Email Address: - gloria.einstein@jaxlegalaid.org
Phone Number: - 904/384-8410 ex. 3002
overturned Georgia justice of the peace system, because justices got their income from the fees of plaintiffs who were collectors

Name: - Jerard Heller
Company: - The Law Offices of Jerard C. Heller
City/Town: - Ft Lauderdale
State: - FL
Email Address: - gotoheller@comcast.net
Phone Number: - 9547635434

class action enjoining car dealer from unlawfully collecting "dealer prep" fees

Name: - Thomas J. Lyons
Company: - Consumer Justice Center P. A. and Lyons Law Firm P.Aa.
City/Town: - Vadnais Hts
State: - MN
Email Address: - tlyons@lyonslawfirm.com
Phone Number: - 651-294-3960

too many to list; I can provide a list of those cases if you wish

Name: - Steve Larson
Company: - Stoll Berne
City/Town: - Portland
State: - OR
Email Address: - slarson@stollberne.com
Phone Number: - 503 227 1600

In four different class actions, we have recovered statutory penalties against insurance companies who used credit scores, but did not disclose the use as required by the FCRA. This changed the behavior of the insurance companies.

Name: - Dale Irwin
Company: - Slough Connealy Irwin & Madden LLC
City/Town: - Kansas City
State: - MO
Email Address: - dirwin@scimlaw.com
Phone Number: - 816 531-2224

Class claim for statutory damages under UCC Article Nine for debtors whose cars were repossessed and who were subjected to interest overcharges. Recovery of $13,000,000 for class, relief from $75,000,000 in deficiency debt and cleared credit reports of class members. Several like class actions, with similar results on a smaller scale (i.e., $2,500,000 cash, $7,500,000 debt relief and credit reports cleared. Individual cases involving odometer fraud ($1,000,000+) and finance company unfair and deceptive conduct in collection on auto installment contract that was void for dealer's failure to deliver title to consumer $1,000,000+)

Name: - Steve Broadwater
Company: - Hamilton, Burgess, Young & Pollard, pllc

City/Town: - Fayetteville, wv
State: - WV
Email Address: - sbroadwater@hamiltonburgess.com
Phone Number: - 304-574-2727

A vast majority of our cases are phone call cases. Under the WV Consumer Credit and Protection Act, it is illegal to call a consumer that creditor knows is represented by an attorney. We get a penalty (adjusted for inflation) for every call after Defendant knows the attorney info. If there are more than 20 or 25 calls, we get a recovery of $55,000+. I think most creditors and banks feel this is a pretty steep penalty for calling our consumer clients.

Name: - bren pomponio
Company: - mountian state justice
City/Town: - charleston
State: - WV
Email Address: - bren@msjlaw.org
Phone Number: - 3043445565

in a predatory lending case, arbitrator voided the loan , ordered statutory penalties and attorney's fees

Name: - David H. Abrams
Company: - Law Office of David H. Abrams
City/Town: - Tallahassee
State: - FL
Email Address: - david@dhabramslaw.com
Phone Number: - (850)224-7653

Class action where credit union was engaged in unlawful repossessions and suing consumers for deficiencies. Obtained monetary relief, credit repair, and injunctive relieve valued at $5.1 million

Name: - Lara Strandberg
Company: - Strandberg Law Office
City/Town: - Spokane
State: - WA
Email Address: - Lara.Strandberg@gmail.com

Phone Number: - 50099918277

I obtained a voluntary dismissal with prejudice on a case against Fortis Capital after a CR 26(i) conference when the debt collection attorney realized he would have to appear at trial with a records custodian from the original creditor and each subsequent debt buyer. That particular client had no clear-cut FDCPA claim. Upon dismissal, we moved for attorney fees under RCW 4.84.250 and 270. Especially with recent holdings indicating that a failed debt collection lawsuit alone does not give rise to a FDCPA claim, the ability to recover fees upon prevailing in a debt collection lawsuit is vital to many consumer lawyers' business plans.

Name: - Patty Anderson
City/Town: - Richmond
State: - VA
Email Address: - panderson@theconsumerlawgroup.com
Phone Number: - 804.282.7900

One case that went to trial was an oil-change case in which a nationwide oil-change corporation simply forgot to add new oil to a retired police officer's new truck (9,000 miles on it). The corporation would not admit what it had done, sent a field representative who insisted on tearing the engine apart to inspect, then still denying the claim, insisting my client had tampered with the engine. It maintained that defense when the truck had been driven into the bay, but had to be towed out. I ended up getting treble damages under our UDAP.

Name: - J. Daniel Clark
Company: - Clark & Martino
City/Town: - Tampa
State: - FL
Email Address: - dclark@clarkmartino.com
Phone Number: - 813-879-0700

See, e.g. Galura, et al. v. Sonic Automotive, Inc., Case No. 02-12274, 13th Judicial Circuit (Tampa, FL)(consumer class action; certified; prior to trial, multi-million dollar recovery; significant cy pres award); Gilley v. Ernie Haire Ford, Inc., Case No. 02-8101, 13th Judicial Circuit (Tampa, FL)(consumer class action; certified; prior to trial, multi-million dollar recovery; significant cy pres award).

Name: - Laura Boeckman

Company: - Florida Coastal School of Law

City/Town: - Jacksonville

State: - FL

Email Address: - lboeckman@fcsl.edu

Phone Number: - 904-680-7654

I routinely handle debt collection cases where the debt buyer has no proof of the debt. Sometimes there is a counterclaim and then we are able to not only have the debt satisfied but the client walks away with some money and we get paid our fees.

Name: - Mitch Stoddard
Company: - Consumer Law Advocates
City/Town: - St. Louis
State: - MO
Email Address: - mbs@clalaw.com
Phone Number: - 31-692-2033

Auto case where client's car caught fire within a few hours after purchase. Case went up to the Missouri Court of Appeals, which ordered arbitration. Arbitrator awarded $33,000, most of which was attorney's fees.

Name: - Gregory Babbitt
Company: - Rosner, Barry & Babbitt, LLP
City/Town: - San Diego
State: - CA
Email Address: - greg@rbblawgroup.com
Phone Number: - 858-348-1005 x 104

I obtained refunds and waivers of deficiencies in the amount of over $11,000,000 in a settlement with a credit union. The credit union's post repossession notices did not comply with California law.

The case was Selimi v. Mission Federal Credit Union and Advantage Automotive Center, San Diego County Superior Court Case No. 37-2009-00086697-CU-CO-CTL. Arben Selimi purchased a vehicle from Advantage Automotive. Advantage violated various California laws

as in pertains to the purchase. In addition, Advantage did not pay off his trade in vehicle right away. Advantage sold the purchase contract with Mr. Selimi to Mission Federal Credit Union. Shortly after the purchase, Mr. Selimi defaulted on the purchase contract and Mission Federal repossessed and sold the vehicle. In California, a finance company is required to give a buyer a notice after the repossession and before the sale of the vehicle. The notice must provide the buyer with all of the information necessary to redeem the vehicle (payoff the entire balance owed), or reinstate on the contract (pay the amount that is past due, plus collection costs). The notice sent to Mr. Selimi did not comply with California law in that it did not tell have everything he needed to do to reinstate. The notice allegedly overstated the amount necessary to pay to reinstate or redeem. In addition, the notice did not provide a physical address to send a request for extension on the time period before the vehicle would be sold.

The case was filed as a class action and the class was certified. The case then settled at mediation. Mission Federal agreed to waive deficiencies on vehicles repossessed and sold, refund payments made by individuals after their vehicles were repossessed and sold, and delete the repossession from individual's credit reports. Approximately $11,000.000 in deficiencies for customers were waived by Mission Federal.

California's standard form retail installment sales contract includes an arbitration clause that also bans class actions. Thus, if this case was forced to arbitration Mr. Selimi would have only been able to obtain relief for himself.

Name: - Scott Kaufman
Company: - Kaufman Law Offices, Inc.
City/Town: - Santa Clara
State: - CA
Email Address: - LemonAtty@Gmail.com
Phone Number: - 408-886-1440

Tracy Liu v. BMW. Ms. Liu's power steering failed while driving. She pulled over and the car caught on fire. She got out just in time. She asked BMW to buy it back but it offered her $1,500 in goodwill money instead, stating that its warranty does not cover fires, even though it was well aware of this problem. A week after we filed the case, BMW caught with their hand in the cookie jar, offered a full buy back.

Name: - Chris Casper
Company: - James Hoyer
City/Town: - Tampa

State: - FL
Email Address: - cccasper@gte.net
Phone Number: - 8133972300

We have successfully settled 4 class actions against payday lenders, but only after defeating arbitration clauses.

Gladly. Upon review, one of the payday loan cases we settled did not involve an arbitration clause, so we should only reference these 3, all of which settled after we had either successfully challenged the arbitration provision, or were in the process of doing so. There's no confidentiality concerns, they were all judicially approved class settlements. Interestingly the first on the list was settled as a class arbitration, the settlement "award" was then confirmed by the court after the arbitrator approved it, so class arbitrations can work if they are permitted to exist. In that case the arbitration provision was silent on class actions, we were in the process of briefing clause construction before the arbitrator when the settlement was reached. Paul Bland was co-counsel on all these, too. (That's why we had success in challenging the class bans in the latter two cases listed.)

Column 1 is the case, 2 is the date of settlement, 3 is the nature of the claims, 4 is the recovery.

Cardegna v. The Check Cashing Store 15th Circuit (Palm Beach County) No. 502000 CA 005099XXXXOC AG	October 26, 2007	Usury claims based on payday loans	Common fund of $7,000,000 Approximate average payment to claiming class members: $260
Reuter v. Check N' Go 15th Circuit (Palm Beach County) No. 502001 CA 001164XXCAI	May 16, 2008	Usury claims based on payday loans	Common fund of $10.275 million Approximate average payment to claiming class members: $314

Cardegna v. Buckeye Check Cashing 15th Circuit (Palm Beach County) No. 502001 CA 001162XXXOCAJ	Jan. 16, 2009	Usury claims based on payday loans	Common fund of $1,562,204 Approximate average payment to claiming class members: $222

Name: - Ian Crawford
Company: - Crawford, Lowry & Associates, LLC
City/Town: - Canton
State: - OH
Email Address: - icrawford@crawford-lowry.com
Phone Number: - 330-452-6773

Classic car broker not registered with state as a dealer made fraudulent misrepresentations on internet to out-of-state consumer. There is now state precedent that such behavior is unfair and unlawful.

Name: - Laura E. Nolan
Company: - Legal Services Alabama
City/Town: - Montgomery
State: - AL
Email Address: - bnolan@alsp.org
Phone Number: - 334-832-4570, ext 3019

Client was served with an arbitration claim, it was defeated. The company simply copied the original and filed for award in another county which we caught and got thrown out. The company then filed a civil collection suit which we obtained a judgment for client based on res judicata!

Name: - Brian Shaw
Company: - Consumer Litigation Group
City/Town: - Media

State: - PA
Email Address: - BShaw@ConsumerLitigators.com
Phone Number: - 484-680-4977

I handled a consumer fraud case that resulted in essentially a full refund of monies paid to a consumer for the purchase of a modular home with the consumer being permitted to keep the home.

Name: - Edward Hanratty
Company: - Tomes & Hanratty
City/Town: - Freehold
State: - NJ
Email Address: - thanratty@tomeslawfirm.com
Phone Number: - 7327189766

Illegal debt settlement firm, was able to get full refund of fees paid to class members

Name: - Alex Burke
Company: - Burke Law Offices, LLC
City/Town: - Chicago
State: - IL
Email Address: - aburke@burkelawllc.com
Phone Number: - 312-729-5288

Class action against an Illinois payday lender that was flipping auto title loans so that consumers paid thousands of dollars without paying down the debt was compelled to arbitration and settled individually. Would-be class members were not notified of their rights, and payday lender was permitted to keep the ill-gotten funds.

Name: - Hawk Barry
Company: - Rosner, Barry & Babbitt, LLP
City/Town: - San Diego
State: - CA
Email Address: - hawk@rbblawgroup.com
Phone Number: - 858-348-1005

Nelson v. Pearson Ford Co. 186 Cal.App.4th 983 - court of appeal found backdating contracts violated 3 California laws, consumers entitled to rescind contracts. Pearson Ford would sell cars to customers under contracts whereby it was the creditor. When Pearson Ford could not sell the contracts to financial institutions, it would call the customer back to the dealership to sign a new contract with terms acceptable to a financial institution, and would cancel the first contract. Pearson Ford would date the second contract the same date as the first contract. This meant buyers were being charged undisclosed finance charges for the time period between the first contract and the second contract, even though the first contract was cancelled. This happened approximately 1,500 times over a four-year period.

Name: - Taras Rudnitsky
Company: - Rudnitsky Law Firm
City/Town: - Lake Mary
State: - FL
Email Address: - Taras@HelpingFloridaConsumers.com
Phone Number: - 407-323-4949

Numerous cases, such as wrong person sued for debt they didn't owe, etc.

Name: - Todd Turner
Company: - Arnold, Batson, Turner & Turner, PA
City/Town: - Arkadelphia
State: - AR
Email Address: - todd@abtt.us
Phone Number: - 8702464635
We prosecuted several class action lawsuits against payday lenders which, after defeating arbitration clauses that precluded class action treatment, led to the elimination of payday lending in the state.

Name: - Dan Schlanger
Company: - Schlanger & Schlanger, LLP
City/Town: - White Plains
State: - NY
Email Address: - daniel@schlangerlegal.com
Phone Number: - 914 946 1981, ext. 101

We routinely get great outcomes in federal court for individual consumers who have been taken advantage of, despite the amount of damages being relatively small. We are only able to do so because we know that fee shifting provisions will be handled according to the law and that we can appeal if they are not.

Name: - Colin Mabrito
Company: - Joseph & Mabrito, PLLC
City/Town: - Houston
State: - TX
Email Address: - scm@josephmabrito.com
Phone Number: - 713-370-7194

Wrongful debt collection and TCPA case where a consumer who was not the debtor that the collection agency was looking for continued to receive many pre-recorded phone calls to his cell phone subsequent to demanding that the calls cease and desist.

Name: - Daniel Blinn
Company: - Consumer Law Group, LLC
City/Town: - Rocky Hill
State: - CT
Email Address: - dblinn@consumerlawgroup.com
Phone Number: - 8605710408

Class action against Credit Acceptance Corporation; relieved thousands of consumers of millions of dollars in deficiencies; cash recovery obtained.

Name: - Mark Tischhauser
Company: - Tischhauser Law Group
City/Town: - Tampa
State: - FL
Email Address: - tischhauserlaw@aol.com
Phone Number: - 813-877-6442

I was able to force a notorious consumer collections violator to agree to a 10 year injunction re further consumer collections

Name: - David F Addleton
Company: - Addleton Ltd Co

City/Town: - Macon
State: - GA
Email Address: - dfaddleton@gmail.com
Phone Number: - 4782279007

My debt collection defense cases have uniformly resulted in a settlement favorable to the consumer.

Name: - Mark Ankcorn
Company: - Ankcorn Law Firm PC
City/Town: - San Diego
State: - CA
Email Address: - mark@markankcorn.com
Phone Number: - 619-870-0600

Husband was riding his bike during lunch hour and was hit by a car. In a coma for a week, in ICU for months. Family's finances were devastated and credit card companies began calling home and cell phones. Multiple lawsuits against the family followed and they consulted an attorney "debt settlement" law firm that did nothing but take thousands of dollars of their money, draining their savings. I was referred the case and brought suit in USDC against major bank. Settled for more than $175,000 including debt forgiven and credit restored. Other lawsuits are pending against other banks for their harassment. Because of confidentiality agreement in the settlement, no further case details can be shared.

Name: - Mordechai L. Breier, Esq
Company: - Consumer Law Office, PA
City/Town: - Miami
State: - FL
Email Address: - MLB@myconsumerlawoffice.com
Phone Number: - 3059400924

FDCPA violations are a great example of clients at minimum getting relief from the harassment of debt collectors.

Name: - Martin E. Wolf
Company: - Gordon & Wolf, Chtd.
City/Town: - Towson
State: - MD

Email Address: - mwolf@gordon-wolf.com
Phone Number: - 410-825-2300

I have handled a number of wrongful repossession cases in which consumers had cars repossessed in violation of financing laws and were sued for deficiencies they did not owe. We recovered tens of millions of dollars in cash payments, vacated judgments, waived deficiencies, and credit repaid for the individual consumers. We also changed the practices, documents and forms of auto finance companies in Maryland.

Name: - Keith J. Keogh
Company: - Keogh Law, Ltd.
City/Town: - Chicago
State: - IL
Email Address: - Keith@Keoghlaw.com
Phone Number: - 3127261092

Catalan v GMACM (622 F.3d 676; 2011 U.S. App.) was a RESPA servicing case where the servicer wrongfully foreclosed on my client. It is a reported 7th Cir. case in which it outlines the harm that my clients suffered. I would never have brought that case if there was an arbitration provision. The case was an individual RESPA action where GMACM filed a foreclosure complaint instead of responding to plaintiffs' letter that identified loan servicing errors. RESPA required GMACM to respond and take corrective action.

The opinion describes the harms suffered by my clients in this case. Page 2 of the opinion lays out the facts of the case and sums up the genesis of the problem: "Before digging into the details of plaintiffs' maddening troubles with their mortgage..." "Plaintiffs' Problems with RBC Mortgage: In June 2003, [**6] the plaintiffs bought a home in Matteson, Illinois. They obtained a Federal Housing Administration loan by executing a mortgage and note in favor of RBC. At the outset, theirs was a 30-year fixed loan at 5.5% annual interest with a monthly payment of $1,598 that included principal, interest, and escrow. Although the plaintiffs' first payment was not due until August 1, 2003, RBC incorrectly entered the plaintiffs' mortgage into its computer accounting system to show a first payment due date of July 1, 2003. Because of this error, when the plaintiffs made their first payment they were already behind--at least according to RBC's system. By the time the plaintiffs made their second payment, RBC had determined that their loan was in default, and it increased their monthly payment amount to $1,787. The plaintiffs, at first unaware of the increase, and then, without receiving an explanation of the increase, continued to send their mortgage payments the original amount. RBC returned those checks un-cashed.

Name: - TIM QUENELLE
Company: - TIM QUENELLE, PC
City/Town: - PORTLAND
State: - OR
Email Address: - TIM.QUENELLE@GMAIL.COM
Phone Number: - 503.675.4330

Sued bad car dealer and as a result of winning and news coverage he was forced to resolve a number of pending disputes with other consumers.

Name: - Krishnan Chittur
Company: - Chittur & Associates PC
City/Town: - New York
State: - NY
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Phone Number: - 2123700447

Credit card consumer being socked with unwarranted fees, extortionate interest rates despite a promise of "lifetime fixed" rate. We brought class action, which had to be moved to arbitration. We strenuously contested arbitrability, and Defendants were on the verge of losing when they agreed to go back to court and settle case. This was several years later.

Name: - Harry Shulman
Company: - Shulman Law
City/Town: - San Francisco
State: - CA
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Phone Number: - 4159010505

Boltz v. Buena Vista: DVD producers agreed to close caption DVD special features for the benefit of the hearing impaired. Would have been difficult or impossible to get this result in arbitration.

Boltz v. Buena Vista Home Entertainment, et al., Case No. BC 323842 (Los Angeles Superior Court). The real point here is that it would have been impossible to get this result if there were a class action waiver. The plaintiff was a lawyer who was partially deaf. He was a movie buff; he

bought DVDs so that he could hear what the directors had to say about their films. But, he discovered that even though the package was labeled "cc", only the feature film was close captioned. The special features, which often make up the bulk of newly released DVDs, were not captioned. There was no law requiring manufacturers to caption DVDs; our leverage came from asserting the case as a class action, and telling the defendants that we would seek to recover the proportion of purchase price represented by the content of each mislabeled DVD that was not close captioned. This would have been hundreds of millions of dollars, and would have been very hard to get. We weren't interested in the money, though. We just wanted them to caption everything for the benefit of hard of hearing Americans. They eventually agreed to do so, on 85% of their annual DVD releases. It was a great result, but without the threat of a class action, it would have been impossible.

Appendix C – Exhibits

EXHIBIT 1

LOAN AGREEMENT, PROMISSORY NOTE AND SECURITY AGREEMENT

RPM Lenders. Inc. ress: 8407 EDGEWATER DR. OAKLAND, CA 94621 (510)633-0734	Today's Date: 12/07/2010 02:18 PM Maturity Date: 12/07/2013	Contract #: TL-RR- Motor Vehicle: Make: VOLVO Model: V40 Year: 2004 Vin#: Licer
Borrower: Addres	Co-Borrower: Address:	
Date of Birt'	Date of Birth:	California Finance Lenders License Number: 605-3861

Disclosures Made in Compliance with Federal Truth in Lending Act

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.
183.84 %	$ 12584.92	$ 2768.00	$ 15352.92

Your Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments are Due
35	426.59	Monthly, beginning 01/07/2011
1	422.27	12/07/2013

Security: You are giving a security interest in the above described motor vehicle.

Late Charge: We will assess a late charge of ten dollars ($10) for each payment received ten (10) or more days after its due date or fifteen dollars ($15) for each payment received fifteen (15) or more days after its due date.

Prepayment: If you pay off early, you will not have to pay a penalty and will not be entitled to a refund.

See below for any additional information about nonpayment, default, any required repayment in full before the scheduled date, prepayment refunds and penalties and security interests.

Itemization of Amount Financed:

$ 2600.00	Amount given to you directly
$ 0.00	Amount paid on your prior account
$ 75.00	Administrative Fee
Less	
-$ 75.00	Prepaid Finance Charge (Administrative Fee)
Amount paid to others on your behalf	
$ 153.00	Vehicle Registration Fee
$ 15.00	Amount paid for lien fees to the Dept. of Motor Vehicles
$ 2768.00	**Amount Financed** (Total)

30-Day Rate 14.71 %

This Loan Agreement, Promissory Note and Security Agreement ("Agreement") is executed by and between the BORROWER and LENDER on the date set forth above.

1. **Promise to Pay.** Borrower and Co-Borrower, jointly and severally, (collectively hereinafter referred to as "BORROWER") promise to pay to LENDER, in immediately available United States currency, the "Principal" amount of the loan (the Amount Financed, plus the Prepaid Finance Charge), together with interest and other fees and charges as provided in this Agreement. All sums due hereunder shall be paid without prior demand, notice or claim of set off.

2. **Interest Rate.** Interest under this Agreement will be calculated on a simple interest basis and shall accrue at a daily rate of **1/30th** of the 30-Day Rate multiplied by the unpaid principal balance (the Principal, less the amount the Principal has been reduced by payments) for each day that any amount remains due to LENDER. Interest is computed on the basis of the number of days actually elapsed.

3. **Payments.** BORROWER agrees to pay LENDER interest and Principal in accordance with the Payment Schedule shown above. LENDER will apply all payments on the date received by LENDER in the following order: (1) unpaid costs and expenses which you have agreed to pay LENDER pursuant to this Agreement; (2) accrued but unpaid interest; and (3) unpaid principal balance. Payments made in addition to regularly scheduled payments will be applied in the same manner.

4. **Scheduled Payment Amounts.** The Payment Schedule shown above assumes that all of your payments are made on time. If you are late making a payment, the amount of your last scheduled payment may be greater than disclosed in the Payment Schedule. Likewise, if you are late making a payment, the Finance Charge and Total of Payments may be greater than disclosed above. Interest continues to accrue on the unpaid principal balance, regardless of whether you have been charged a delinquency fee because of a delinquent payment. BORROWER, without penalty, has the right to fully prepay the unpaid principal balance at any time prior to maturity and will not be obligated to pay any unaccrued interest. Any prepayment (except for a prepayment in full) will not relieve BORROWER's obligation to make any later scheduled payment, according to the Payment Schedule above, until all sums due are fully repaid.

5. **Security.** To secure the BORROWER's obligations under this Agreement, BORROWER hereby grants to LENDER a security interest in the Motor Vehicle described above ("Vehicle"), all accessories and accessions to the Vehicle, and all proceeds related thereto, including all insurance proceeds related to the Vehicle (all such property referred to as "Collateral"). BORROWER agrees to provide an original certificate of title to the Vehicle and to pay any

Initials: _____ _____

d by LENDER to the Department of Motor Vehicles associated with the recording of LENDER's security interest, as itemized above (Vehicle
n Fee and Amount paid for lien fees to the Dept. of Motor Vehicles), and that such amounts are non-refundable.
Administrative Fee. BORROWER agrees to pay to LENDER the Administrative Fee. The Administrative Fee shall be fully earned as of the date this
ment is executed. No Administrative Fee shall be due under this paragraph if this Agreement is a refinancing of an existing loan with LENDER and
BORROWER has already paid an Administrative Fee on the existing loan and less than one year has elapsed since BORROWER paid a previous
dministrative Fee to LENDER.

7. **Late Charge.** BORROWER agrees to pay to LENDER a delinquency fee of ten dollars ($10) for each payment received ten (10) or more days after its due date or fifteen dollars ($15) for each payment received fifteen (15) or more days after its due date. The delinquency fee will not be collected more than once for the same default and may be collected at the time of the default or at any time thereafter. If the delinquency fee is deducted from any payment received after default occurs, and the deduction results in the default of a subsequent installment, no fee will be collected for the resulting default.

8. **Additional Products & Services.** BORROWER understands that the purchase of any other product or service offered by LENDER is not a requirement of obtaining a loan from LENDER. BORROWER further understands that the purchase of any other product or service can be in cash and does not need to be financed as part of this Agreement.

9. **BORROWER's Representations and Warranties.** BORROWER represents and warrants that BORROWER has the right to enter into this Agreement and is at least 18 years of age. BORROWER represents and warrants that the Vehicle is not stolen and has no liens or encumbrances against it, and that BORROWER will not attempt to transfer any interest in the Vehicle, nor permanently remove it from the state of the BORROWER's residence, until all obligations under this Agreement have been paid in full. BORROWER further warrants and promises that until such time all amounts due hereunder are fully repaid, BORROWER will maintain the Collateral in good condition and repair and preserve it against loss or damage, will not attempt to seek a duplicate title to the Vehicle and, unless the amount of the unpaid principal balance or the reasonable value of the Vehicle is less than five hundred dollars ($500), will maintain comprehensive and collision insurance on the Vehicle in an amount equal to the reasonable value of the Vehicle, or an amount sufficient to repay this Agreement in the event of a total loss of the Vehicle, whichever is less.

10. **Events of Default.** The following constitute events of default under this Agreement: (a) BORROWER does not pay the full amount of any payment when due; (b) BORROWER fails to keep any of BORROWER's promises under this Agreement; or (c) any representation, warranty, or information given to the LENDER by BORROWER is false or misleading, other than any misstatement with reference to BORROWER'S credit or financial standing.

11. **LENDER's Rights in the Event of Default.** Upon the occurrence of any event of default, LENDER may, at its option and without notice or demand, do any one or more of the following: (a) declare the whole outstanding balance due under this Agreement due and payable at once and proceed to collect it; (b) foreclose upon its lien, including repossession and liquidation of Vehicle; (c) exercise all other rights, powers and remedies given by law; and (d) recover from BORROWER all charges, costs and expenses, including all court costs and reasonable attorney's fees (to the extent allowed by law) incurred or paid by LENDER in exercising any right, power or remedy provided by this Agreement or by law. In the event of monetary or non-monetary default, the finance charge shall continue to accrue until the unpaid principal balance, together with all accrued and unpaid finance charges and costs, is fully repaid.

12. **General.** (a) BORROWER agrees to pay a returned check fee of fifteen dollars ($15) for the return by a depositary institution of a dishonored check, negotiable order of withdrawal or share draft; (b) BORROWER shall bear the entire risk of loss or damage to the Vehicle while it is in BORROWER's possession and agrees to indemnify and hold LENDER harmless from any and all claims for property damages or personal injuries arising from the operation of the Vehicle, including but not limited to all judgments, attorney's fees, court costs and any incurred expenses; (c) if more than one BORROWER executes this Agreement, each BORROWER will be jointly and severally liable; (d) this Agreement shall be construed, applied and governed by the laws of the State of California; (e) the unenforceability or invalidity of any portion of this Agreement shall not render unenforceable or invalid the remaining portions hereof; (f) time is of the essence of this Agreement; (g) this Agreement constitutes the entire Agreement between the parties, and no other agreements, representations or warranties other than those stated herein shall be binding unless reduced to writing and signed by both parties; and (h) BORROWER agrees that in the event Vehicle is impounded or abandoned that LENDER shall have the right to obtain possession of Vehicle and LENDER is authorized to add any costs associated with recovering Vehicle to the amount due hereunder.

13. **Installation of Vehicle Recovery System.** PLEASE READ THIS SECTION IN ITS ENTIRETY, IT CONTAINS IFORMATION REGARDNG YOUR OBLIGATION TO MAKE YOUR LOAN PAYMENTS AS WELL AS THE INSTALLATION OF VEHICLE RECOVERY SYSTEM ON YOUR VEHICLE WHICH MAY BE UTILIZED WHEN PAYMENTS ARE NOT RECEIVED BY LENDER. BORROWER consents to the installation of Vehicle Recovery System (hereinafter "System") in the above secured Vehicle, and acknowledges that the System is the property of LENDER. Borrower understands that the System tracks BORROWER's scheduled payments and the Vehicle's location and will prevent the Vehicle from operating after the occurrence of any event of default. By signing this Agreement BORROWER acknowledges and consents to the installation of the System and the ongoing utilization of the System until BORROWER fulfills all obligations under this Agreement. Upon BORROWER's fulfillment of all obligations under this Agreement, LENDER will remove the System at no charge to BORROWER. BORROWER understands that System will require a six-digit code to continue operation of the Vehicle, and that LENDER will provide BORROWER this six-digit code after payment is received at LENDER's address. BORROWER promises not to tamper with, alter, disable, disconnect or remove the System, and BORROWER understands that to do so will constitute an event of default, and shall authorize LENDER to invoke all of LENDER's rights in default. BORROWER understands that if a scheduled payment is not received when due, LENDER may employ the System, which will result in the disabling of the Vehicle, and LENDER may then immediately seek to locate and recover the Vehicle. BORROWER understands that only LENDER or its authorized representatives are permitted to perform maintenance on the System or any of its components. Should maintenance be required BORROWER will make the Vehicle available to the LENDER or its authorized representative. LENDER shall be fully responsible for costs of all repairs to the System, except for repairs caused by BORROWER's tampering with, altering, disconnecting, disabling, or removing the System. BORROWER will be provided with an emergency code, good for 24 hours of operation of the Vehicle in the event an emergency situation arises. BORROWER understands that BORROWER will not be provided with an additional emergency code, unless LENDER, at LENDER's sole option, agrees to provide an additional emergency code.

14. **Important Additional Disclosures.** This loan is made pursuant to the California Finance Lenders Law, Division 9 (commencing with Section 22000) of the Financial Code.

15. **Comprehensive and Collision Liability Insurance Coverage.** BORROWER understands that the State of California requires liability insurance in order to operate this Vehicle upon the public highways. BORROWER understands that LENDER requires comprehensive and collision insurance on this Vehicle with an insurance company licensed to do business in the State of California. Accordingly, BORROWER agrees to acquire and maintain comprehensive and collision insurance coverage in addition to Liability insurance, with an insurance company licensed to do business in California, and to place LENDER as the additional insured lienholder on the Vehicle, and to provide LENDER proof on the same. BORROWER further understands, that failure to maintain the required comprehensive and collision insurance shall constitute an event of default, and shall authorize LENDER to invoke all of LENDER's rights in default. Not withstanding LENDER's rights in default, upon BORROWER's expiration, cancellation, or modification of, or failure to supply any insurance required herein, prior to BORROWER's fulfilling all obligations under this Agreement, LENDER may, at its option, place, renew, or replace comprehensive and collision insurance in any company of LENDER's choice. In such event, LENDER is authorized to add premiums for the insurance procured by LENDER to the amount due hereunder plus charges at the agreed rate of charge and payable in installments over the remainder of the

Initials: _____

ad is authorized to cancel such insurance at any time in LENDER's sole discretion. BORROWER assumes all risks damage to or loss of Vehicle sured against or not.

BITRATION PROVISION. This Arbitration Provision describes when and how a Claim (as defined below) may be arbitrated. Arbitration is a d of resolving disputes in front of one or more neutral persons, instead of having a trial in court in front of a judge and/or jury. It can be a quicker and pler way to resolve disputes. As solely used in the Arbitration Provision, the terms "we," "us" and "our" mean the LENDER (listed on the top of the first ge of this Agreement), its parent companies, wholly or majority-owned subsidiaries, affiliates, successors, assigns and any of their employees, officers and directors, and "you" means BORROWER (listed on the top of the first page of this Agreement). These terms for purposes of this Arbitration Provision also mean any third party providing any goods and services in connection with the origination, servicing and collection of this Agreement if such third party is named as a party by you in any lawsuit between you and us.

(a) *Your Right to Reject*: **If you don't want this Arbitration Provision to apply, you may reject it by mailing us a written rejection notice which contains all of the following: (i) the date of this Agreement and a description of the Vehicle; (ii) the names, addresses and phone numbers of each of the Borrowers for this Agreement; and (iii) a statement that all of the Borrowers reject the Arbitration Provision of this Agreement. The rejection notice must be sent to LENDER at: P.O. Box 500785 Atlanta, Georgia, 31150. A rejection notice is only effective if it is signed by all Borrowers and cosigners and if we receive it within fifteen (15) days after the date of this Agreement. If you reject this Arbitration Provision, that will not affect any other provision of this Agreement or the status of your Agreement. If you don't reject this Arbitration Provision, it will be effective as of the date of the Agreement.**

(b) *What Claims Are Covered*: "Claim" means any claim, dispute or controversy between you and us that in any way arises from or relates to this Agreement or the motor vehicle (excluding either party's right to file and maintain a claim in an appropriate small claims court) securing this Agreement ("Vehicle"). "Claim" has the broadest possible meaning, and includes initial claims, counterclaims, cross-claims and third-party claims. It includes disputes based upon contract, tort, consumer rights, fraud and other intentional torts, constitution, statute, regulation, ordinance, common law and equity (including any claim for injunctive or declaratory relief). Subject to paragraph (f) below, it also includes disputes about the validity, enforceability, arbitrability or scope of this Arbitration Provision or this Agreement. However, "Claim" does not include: (i) our right to enforce our security interest and to obtain possession of the Collateral by seeking a replevin judgment or by using self-help, provided such an action seeks only possession of the Collateral and not a personal monetary judgment against you, or (ii) any individual action in court by one party that is limited to preventing the other party from using a self-help remedy and that does not involve a request for damages or monetary relief of any kind. But if that Claim is transferred, removed or appealed to a different court, we then have the right to choose arbitration. The parties agree that this Arbitration Agreement is not applicable to "small claims" meaning those claims that either party is entitled to file and maintain in an appropriate small claims court, or your State's equivalent.

(c) *How Arbitration Is Started*: Either you or we may require any Claim to be arbitrated. Arbitration is started by giving written notice to the other party of the intent to start or to compel arbitration. This notice may be given before or after a lawsuit has been started over the Claim or with respect to other Claims brought later in the lawsuit. Arbitration of a Claim must comply with this Arbitration Provision and, to the extent not inconsistent or in conflict with this Arbitration Provision, the applicable rules of the arbitration Administrator.

(d) *Choosing the Administrator*: The party requiring arbitration must choose one of the following arbitration organizations as the Administrator: American Arbitration Association 335 Madison Avenue, New York, NY 10017, (800) 778-7879 ("AAA") (www.adr.org) or National Arbitration Forum ("NAF") P.O. Box 50191, Minneapolis, MN 55405, (800) 474-2371 (www.arb-forum.com). In all cases, the arbitrator(s) must be a lawyer with more than 10 years of experience. However, no arbitration may be administered by an arbitration organization that will not follow, or has in place a formal or informal policy that is inconsistent with or purports to override, the terms of this Arbitration Provision. If for any reason the chosen organization is unable or unwilling or ceases to serve as the Administrator, the party requiring arbitration will have 20 days to choose a different Administrator consistent with the requirements of this Arbitration Provision.

(e) *Court and Jury Trials Prohibited and Other Limitations on Legal Rights*: **If arbitration is chosen with respect to a Claim, all of the following apply:**

- **There will be no right to try that Claim in court.**
- **There will be no jury trial on that Claim.**
- **There will be no discovery, except as allowed by the arbitration rules of the Administrator or this Arbitration Provision.**
- **We and you are prohibited from participating in a class action or class-wide arbitration with respect to that Claim (the "Class Action Waiver"). This means that neither we nor you can be a representative or member of any class of claimants or act as a private attorney general in court or in arbitration with respect to that Claim. This also means that the arbitrator has no power or authority to conduct any class-wide arbitration.**
- **Claims brought by or against one Borrower (or Co-Borrower) may not be joined or consolidated in the arbitration with Claims brought by or against any other borrower who obtained a different loan.**
- **Except as allowed by this Arbitration Provision and the Federal Arbitration Act, the arbitrator's decision will be final and binding.**
- **Other rights that you or we would have in court may also not be available in arbitration.**

(f) *Effect of Class Action Waiver*: Regardless of anything else in this Arbitration Provision, the validity and effect of the Class Action Waiver must be determined only by a court and not by an arbitrator or by any policies or procedures of the Administrator. If the Class Action Waiver is invalidated or not enforced, then this entire Arbitration Provision (except for this sentence) shall be null and void. Nothing in this paragraph (f) shall affect the right of any party to appeal any invalidation or nonenforcement of the Class Action Waiver.

(g) *Location of Arbitration*: Any arbitration hearing that you attend must take place at a location reasonably convenient to your residence.

(h) *Cost of Arbitration*: Each Administrator charges fees to administer an arbitration proceeding. This may include fees not charged by a court. When you choose an Administrator, you should carefully review the fees charged by the Administrator. If either we or you require a Claim to be arbitrated, you may tell us in writing that you can't afford to pay the fees charged by the Administrator or that you believe those fees are too high. If you do so, we will pay or reimburse you for up to all of the fees that would otherwise be charged to you by the Administrator if your request is reasonable and in good faith. We will always pay the fees if applicable law requires us to. We will not ask you to pay or reimburse us for any fees we pay the Administrator. Each party must pay the expense of that party's attorneys, experts and witnesses, regardless of which party prevails in the arbitration, unless applicable law and/or this Arbitration Provision and/or this Agreement gives a party the right to recover any of those fees from the other party.

(i) *Governing Law*: This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1, (the "FAA"), and not by any state arbitration law. The arbitrator must apply applicable substantive law consistent with the FAA and applicable statutes of limitations and claims of privilege recognized at law. The arbitrator is authorized to award all remedies permitted by the substantive law that would apply if the action were pending in court. At the timely request of either party, the arbitrator must provide a brief written explanation of the basis for the award.

(j) *Right to Discovery*: In addition to the parties' rights to obtain discovery pursuant to the arbitration rules of the Administrator, either party may submit a written request to the arbitrator to expand the scope of discovery normally allowable under the arbitration rules of the Administrator. The Arbitrator shall have discretion to grant or deny that request.

ation Result and Right of Appeal: Judgment upon the award given by the arbitrator may be entered in any court having jurisdiction. s decision is final and binding, except for any right of appeal provided by the FAA. However, if the amount of the Claim exceeds $100,00 r denies any claim for injunctive relief, any party can appeal the award to a three-arbitrator panel administered by the Administrator which s sider any aspect of the initial award requested by the appealing party. The decision of the panel shall be by majority vote. Reference in this Arbitrat vision to "the arbitrator" shall mean the panel of arbitrators if an appeal of the arbitrator's decision has been taken. Subject to applicable law, costs ach an appeal will be borne by the appealing party regardless of the outcome of the appeal. However, we will consider any good faith, reasonable requ for us to pay all or any part of those fees if you are the appealing party.

(l) *Rules of Interpretation*: This Arbitration Provision shall survive the repayment of all amounts owed under this Agreement, any legal proceeding, or a use of a self-help remedy by us to collect a debt owed by you to us, and any bankruptcy by you, to the extent consistent with applicable bankruptcy law. any portion of this Arbitration Provision (other than the Class Action Waiver referred to in paragraph (f)) is deemed invalid or unenforceable, it shall n invalidate this Agreement or the remaining portions of this Arbitration Provision. In the event of a conflict or inconsistency between this Arbitrati Provision, on the one hand, and the applicable arbitration rules or the other provisions of this Agreement, on the other hand, this Arbitration Provision sha govern. **This Arbitration Provision supersedes any other arbitration provision between the parties or that may otherwise be applicable.**

NOTICE OF BORROWER'S RESPONSIBILITY

PURSUANT TO SECTION 1788.21 OF THE CALIFORNIA CIVIL CODE, YOU ARE REQUIRED TO NOTIFY LENDER OF ANY CHANGE IN YOUR NAME, ADDRESS OR EMPLOYMENT WITHIN A REASONABLE TIME AFTER SUCH CHANGE OCCURS.

FOR INFORMATION CONTACT THE DEPARTMENT OF CORPORATIONS, STATE OF CALIFORNIA

DO NOT SIGN THIS AGREEMENT UNLESS YOU HAVE READ IT, INCLUDING THE ARBITRATION PROVISION, OR IF IT HAS ANY BLANKS. YOU WILL RECEIVE A COPY OF THIS AGREEMENT.

Borrower

LENDER

Co-Borrower

by: Its Authorized Representative

IMPORTANT NOTICE REGARDING CUSTOMER PRIVACY

We collect non-public personal information about you from the following sources:

- Information we receive from you on applications or other forms;
- Information about your transactions with us, our affiliates, or others;
- Information we receive from a consumer reporting agency.

We do not disclose any nonpublic personal information about our customers or former customers to anyone except to our affiliates and nonaffiliated third parties working on our behalf as provided by law.

We restrict access to nonpublic personal information about you to those employees who need to know that information and to our affiliates and nonaffiliated third parties working on our behalf to provide products and services to you, to administer your account, or to collect any money or collateral due us. We maintain physical, electronic and procedural safeguards that comply with federal regulations to guard this nonpublic personal information.

EXHIBIT 2

KEMNITZER, BARRON & KRIEG, LLP
ATTORNEYS AT LAW
www.kbklegal.com

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OFFICE LOCATIONS:
SAN FRANCISCO
SACRAMENTO
FRESNO
LOS ANGELES
SAN DIEGO

April 13, 2012

Ms. Delicia Reynolds
National Association of Consumer Advocates
1730 Rhode Island Avenue NW, Ste 710
Washington, DC 20036

Dear Ms. Reynolds,

You asked me to report on some of the cases our firm has litigated, which may assist the Consumer Financial Protection Bureau in studying the problem of forced arbitration in the context of consumer protection.

Background

I have practiced consumer litigation for more than twenty-five (25) years. In addition to serving on the Board of Directors of NACA for six (6) years (and as co-chair along with Paul Bland in 2004), I currently serve on the Board of Directors of the National Consumer Law Center[1]. However, I submit this letter to present case examples from my private practice.

Summary of Discussion

This letter focuses on three things. First I describe a forgery case, which we won at trial, but involved rights we would not have been able to vindicate in arbitration. Second, I discuss a category of cases in which we have obtained nearly $1.5 billion in debt relief and more than $25 million in restitution for consumers. Cases such as these cannot be economically litigated on an individual basis; and the class action ban in arbitration would effectively nullify applicable law. Third, I note the status of the *Sanchez v Valencia* case, in which the trial and appellate courts invalidated the arbitration clause in the California standard form automotive conditional sale contract on grounds of unconscionability. The California Supreme Court has just granted review of the *Sanchez* decision, throwing uncertainty into the status of cases concerning automotive lending in California. This uncertainty encourages predatory lending practices.

The problem of forced arbitration in the consumer context is not abstract or academic. It has concrete negative effects on the actual lives of Americans in economic distress. Consumer protection laws are only as strong as their enforcement; forced arbitration weakens legislation's salutary effect.

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1 My professional biography can be found at http://www.kbklegal.com/who-we-are/attorney-bios/nancy-barron

Gutierrez v Autowest
A Case of 756 Forgeries

In *Gutierrrez v Autowest*, 114 Cal.App.4th 77, (2004), the California Court of Appeal held that consumers could not be required to pay unconscionable costs to bring a claim in arbitration. The underlying lawsuit alleged that a California car dealership targeted low-income consumers with television ads falsely promising "zero money down" leases. When Ryan Gutierrez responded to such an ad for a Dodge Durango, he was unaware that the lease would be packed with add-ons at undisclosed prices. In order to effect this "bait & switch," the dealer forged the documents by tearing off the top copy Ryan Gutierrez had signed and then ran the remaining copies through the computer *a second time* to fill in blanks with figures the lender required for funding. The Gutierrezes knew they were not alone, but they would need verified discovery to prove it. They filed a class action based on the Consumers Legal Remedies Act and California's Unfair Competition Law. It was then that the defendant moved to compel arbitration. The plaintiffs proved arbitration of these claims would cost in excess of $10,0000, which they could not afford, and thereby lose the ability to vindicate their rights. The trial court denied the arbitration motion on grounds of unconscionability; the appellate court affirmed the ruling on unconscionable costs and remanded on the issue of severability. On remand, the court refused to sever the offending clause and again denied the arbitration motion.

Back in court after two years, plaintiffs conducted discovery that the "efficiencies" of arbitration would have denied them. It came to light that more than 750 contracts had been similarly forged. A former manager testified this was standard practice during the class period. The court certified the class. The lender settled. We won at trial against the dealership, obtaining the maximum civil penalty. Had this case been sent to arbitration, the full extent of the misconduct would never have come to light.

Post-Repossession Notice Cases
More than $1.5 Billion in Unlawful Debt Expunged

We handle certain cases as class actions to challenge wrongful assessment of deficiencies after repossession. As a provisional remedy without judicial oversight, repossession is rife with abuse. These are labor-intensive cases that cannot be litigated effectively on an individual basis. Particularly where deficiency portfolios have been sold to downstream debt collectors, the expense and intricacy of identifying the appropriate defendant lenders alone makes it impossible to litigate these cases without specialized industry expertise and court-supervised discovery.

These cases balance the power of the lender's provisional rights and remedies against the due process rights of consumers who need to keep their cars in order to keep their jobs, and for the necessities of American life. "The sale of automobiles is particularly important because of the very size, for the great majority of families, of the economic decision involved in the purchase of an automobile. Such a purchase is second in importance to a family only to the purchase of a home." *Final Report of the Assembly Interim Committee on Finance and Insurance,* at p. 17, 1

Appendix to the Journal of the Assembly (1961 Reg. Sess.). The litigation enforces the mandatory notice and anti-deficiency provisions of the Rees-Levering Act, Civil Code §2981, *et seq.,* which give statutory protection for consumers buying vehicles on credit. A summary of the outcomes in a selection of these cases (some with co-counsel) is enclosed. In sum, lenders have waived nearly $1.5 billion and refunded about $25 million in restitution to California consumers.

These are significant figures, so I would like to briefly explain the legal framework. Repossession is a statutory provisional remedy. The lien holder does not have to go to arbitration, does not have to go to court, and does not even have to give notice before towing the car away. It only has to give notice before re-selling the car and charging a deficiency. This Notice of Intent to Sell is commonly known as an "NOI." The extrajudicial practice is open to abuse, except for due process protections for the borrower.

Effective in 1962, the Rees-Levering Act (also known as the Automobile Sales Finance Act) Civil Code 2981, *et seq.* "was designed to provide a more comprehensive protection for the unsophisticated motor vehicle consumer." *Hernandez v Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 69-70. Its intent is to provide broad consumer protection. *Cerra v Blackstone* (1985) 172 Cal.App.3d 604, 607-609. The Rees- Levering Act, Civil Code §2983.2(a) details information creditors must provide to buyers in the post-repossession Notice of Intent to Sell. The NOI gives the borrower one last chance to pay and reinstate before the car is sold. The law entitles consumers to precise information as to the amount to be paid, the place and manner of payment, and the deadline. *Juarez v Arcadia Financial, Ltd.* (2007) 152 Cal.App. 889. If the NOI does not comply with the law, the California Supreme Court holds that the lender is absolutely barred from collecting a deficiency after disposition of the vehicle. Civil Code §§2983.2, 2983.8; *Bank of America v Lallana* (1998) 19 Cal.4th 203, 315. "[T]he rule and requirement are simple. If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment." *Ibid.*

The problem is that few borrowers who lose their car to repossession have any idea that these important rights exist. Debt collectors avoid arbitration in their own actions; lenders bring their own debt collection actions in courts to obtain deficiency judgments. It is unclear whether any arbitration provider even handles such debt collection matters. *See, "Repairing a Broken System: Protection Consumers in Debt Collection Litigation and Arbitration,"* (F.T.C. 2010) pp. 39-40, and fn. 118 [regarding NAF demise and AAA moratorium on debt collection arbitrations]. It is only when borrowers fight back that lenders seek to enforce the arbitration clause.

The benefits of NOI litigation in California have been profound. Beyond the restitutionary recovery, thousands of consumers have had their credit cleared of this unlawfully assessed debt, and numerous lenders have corrected their Notices, so that California consumers are properly advised of their rights.

AT&T Mobility v Concepcion and *Sanchez v Valencia* Uncertainty in the Courts

New motor vehicles, and used cars sold by dealers, are sold pursuant to a standard form Retail Installment Sale Contract[2] (enclosed). On the very bottom of the unsigned backside of the 2008 version of this prolix printed form (and in some versions earlier), the vendor (Reynolds & Reynolds[3]) began to include an arbitration clause with a class action ban. An appellate court recently held that the clause is both procedurally and substantively unconscionable, and thus unenforceable in California, notwithstanding *AT&T Mobility v Concepcion* (2011) 131 S.Ct. 1740. *Sanchez v Valencia Holding Co.* (2011) 201 Cal.App.4th 74. The California Supreme Court has accepted review. *See, Sanchez v Valencia Holding Co.* (March 21, 2012) 2012 WL 1159303.

The uncertain state of the law has caused inconsistent outcomes in current cases. Where the form changed during a class period, thousands of putative class members have no arbitration clauses in their contracts and thousands of *otherwise identically-situated* consumers have arbitration clauses and thus no recourse to a remedy. Meanwhile, all affected borrowers are caught in the credit purgatory of unfairly damaged credit while these NOI cases are in limbo. Some courts stay the action. Other courts grant the arbitration motion, even where many class contracts pre-date 2008. Some courts determine typicality, not on common predatory practices, but simply on the existence of an arbitration clause. Some lenders want to settle cases by revising the class definition to exclude persons with arbitration clauses. Other lenders contend their database does not include search criteria to distinguish between borrowers with or without the arbitration clause. If arbitration were just another forum for civil justice, this mess would not exist. The fact is that forced binding arbitration fails to provide civil justice in the consumer context. Even when the California Supreme Court issues its ruling *Sanchez* sometime next year, the justice system will continue to wrestle with the arbitration debate.

Uncertainty in the law invites predatory practices. We see increasingly egregious abuses in automotive lending: title loans involving 186% interest, banks exercising dubious set-off claims by draining checking accounts without notice, wrongful repossession, and other frauds. When an easily-inserted arbitration clause becomes a "get-out-of-jail-free card," there is no deterrence to deceptive or even criminal conduct.

There are many reasons that arbitration should not be applied in the consumer context. I hope these examples and this analysis are helpful to understand the clear and concrete problem for automotive lending. I am aware that car dealers themselves are not within the purview of the CFPB's authority. However, the conditional sales contracts, which are the subject of this discussion, are required by and assigned to lenders at the point of sale. An agency ruling

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2 Please see the original California form included in the mailed hard copy of this report. The electronic copy is not a true representation of the original, which is approximately 30" long and has colored quadruplicate copies.

3 The use of Reynolds & Reynolds Law Forms is ubiquitous. Buyers report that they are required to sign a Retail Installment Sale Contract form even for a cash transaction, because the dealer computer only prints one form.

that such consumer contracts may not contain a forced arbitration clause is the only way to ensure that consumers can vindicate their rights and prevent a wide array of lender abuse.

Sincerely,

Nancy Barron

Nancy Barron

NB:am
Enclosures

Sample of NOI Class Action Recovery

	Case Name	Court	Case #	Final Approval	Class Size	Deficiency Claimed by Financial Institution	Average Deficiency Waived (Injunctive Relief)	Refund to which Class Members are entitled (Restitution)	Class Members Entitled to Refund through Restitution	Average Restitutionary Recovery
1	Aguilar v. Citizens Automobile Finance, Inc.	N.D. CAL	C 10-05345JS	Pending	2,167	$46,786,977.00	$21,590.67	$1,500,000		
2	Asabi v. Santander Consumer USA Inc. dba Drive Financial Services	Alameda	RG09443628	1/13/2011	12,631	$93,692,092.92	$7,417.63	$1,070,581	1,885	$567.95
3	Baker v. GEMB Lending Inc.	N.D. Cal	C10-05261 (SBA)	Pending	2,304	$44,705,357.00	$19,403.37	$410,047		
4	Bruno v. Capital One	Los Angeles	BC397149	6/16/2011	23,285	$189,000,000.00	$8,116.81	$2,154,000		
5	Bryan v. Franklin Financial Corporation, Franklin Capital Corporation	Los Angeles	BC340574	6/22/2009	750	$2,999,325.39	$3,999.10	$426,140	92	$4,631.65
6	Campbell v. Alta Vista Credit Union	San Bernardino	CIVDS 1009450	3/5/2012	260	$2,397,463.00	$9,221.01	$34,784.64		
7	Castillo v. Quality Financial, Inc., dba Quality Acceptance	Los Angeles	KC061825	Pending	2,328	$9,045,894.80	$3,885.69	$58,439		
8	Dadian (Paris) v. Westlake Services, Inc.	Los Angeles	BC 322765	8/13/2010	5,460	$15,165,344.06	$2,777.54	$1,382,102	992	$1,393.25
9	Dixon v. AFG	Alameda	RG10537949	2/29/2012	4,471	$26,881,883.99	$6,012.50	$121,885		
10	Friedrichs v. BMW Financial Services	N.D. Cal	C 08-04486 PJH	1/20/2010	2,680	$30,195,154.01	$11,266.85	$535,000	175	$3,057.14
11	Honda Auto Finance Cases (Dawson)	San Diego	JCCP 4596	8/13/2010	24,389	$140,000,000.00	$5,740.29	$7,250,000	9,456	$766.71
12	Liedorff v. CenterOne Financial	N.D. Cal	C 08-05455 PJH	9/1/2010	644	$7,081,348.48	$10,995.88	$352,000	117	$3,008.55
13	Lobel Financial Auto Cases	Sacramento	JCCP 4563	12/29/2010	9,159	$43,808,147.00	$4,783.07	$407,563	320	$1,273.63
14	McCoy v. Alliant Credit Union	Alameda	RG09444283	7/30/2010	640	$7,370,853.36	$11,516.96	$121,786	521	$233.75
15	Meyer v. First City Credit Union	Los Angeles	BC386098	4/5/2010	390	$3,711,742.59	$9,517.29	$87,721	33	$2,658.21
16	Meza v. ACC Consumer Finance LLC	Alameda	RG09458893	8/6/2010	1,623	$14,988,490.27	$9,235.05	$75,329	61	$1,234.90
17	Morrison v. Credit Acceptance Corp.	N.D. Cal	C 10-00549 PHJ	1/12/2011	892	$5,096,065.00	$5,713.08	$34,114	31	$1,100.45
18	O'Neal v. Ford Motor Credit co.	San Diego	37-2007-00077225-CL-CL-CS	1/27/2010	15,877	$110,810,774.38	$6,979.33	$4,317,771	1,065	$4,054.24
19	Orizabal v. LBS Financial Credit Union	Los Angeles	BC321978	12/9/2005	735	$7,385,000.00	$10,047.62	$144,000	54	$2,666.67
20	Pryer v. Daimler Chrysler	Riverside	RIC 470466	9/3/2010	12,248	$120,576,786.34	$9,844.61	$1,757,542	958	$1,834.59
21	Richardson v. WFB	San Francisco	CGC-08-481662	7/1/2011	18,536	$237,441,000.00	$12,809.72	$2,397,804	719	$3,334.00
22	Salazar v. AutoMax	Sacramento	06AS01213	6/3/2008	125	$1,125,380.70	$9,003.05	$114,858	109	$1,053.75
23	Santos v. Meriwest Credit Union	Alameda	RG09480463	1/28/2011	270	$3,625,000.00	$13,425.93	$120,000	68	$1,764.71
24	Stephens v. Bay Federal Credit Union	San Francisco	CGC-08-478197	1/11/2010	711	$5,159,514.61	$7,256.70	$41,150	32	$1,285.93
25	Sutherland v. Santander Consumer USA Inc.	Alameda	RG10507124	Pending	15,873	$111,139,512.40	$7,001.80	$391,347		
26	Tolentino v. Bank of Stockton	Santa Cruz	CV 160904	11/30/2009	387	$3,443,414.56	$8,897.71	$297,135	107	$2,776.96
27	Walker v. Westlake Financial	Los Angeles	BC436725	Pending	16,070	$65,275,583.00	$4,061.95	$775,583		
28	Willoughby v. DT Credit Corporation	Los Angeles	BC326262	6/30/2008	13,342	$77,878,974.33	$5,837.13	$180,033	515	$349.58
	SUMMARY				**188,247**	**$1,426,787,079.19**	**$7,579.34**	**$26,558,715**	**17,310**	**$1,534.30**

Ptg. 10/11

RETAIL INSTALLMENT SALE CONTRACT – SIMPLE FINANCE CHARGE

Dealer Number _____ Contract Number _____ R.O.S. Number _____ Stock Number _____

Buyer Name and Address (Including County and Zip Code)	Co-Buyer Name and Address (Including County and Zip Code)	Creditor-Seller (Name and Address)

You, the Buyer (and Co-Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Creditor - Seller (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge in U.S. funds according to the payment schedule below. We will figure your finance charge on a daily basis. The Truth-In-Lending Disclosures below are part of this contract.

New Used	Year	Make and Model	Odometer	Vehicle Identification Number	Primary Use For Which Purchased
					☐ personal, family or household ☐ business or commercial

FEDERAL TRUTH-IN-LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your down payment of
_____ %	$ _____ (e)	$ _____	$ _____ (e)	$ _____ is $ _____ (e)

(e) means an estimate

YOUR PAYMENT SCHEDULE WILL BE:

Number of Payments:	Amount of Payments:	When Payments Are Due:
One Payment of		
One Payment of		
Payments		Monthly, Beginning
Payments		Monthly, Beginning
One Final Payment		

Late Charge. If payment is not received in full within 10 days after it is due, you will pay a late charge of 5% of the part of the payment that is late.
Prepayment. If you pay off all your debt early, you may be charged a minimum finance charge.
Security Interest. You are giving a security interest in the vehicle being purchased.
Additional Information: See this contract for more information including information about nonpayment, default, any required repayment in full before the scheduled date, minimum finance charges, and security interest.

ITEMIZATION OF THE AMOUNT FINANCED (Seller may keep part of the amounts paid to others.)

1. **Total Cash Price**
   - A. Cash Price of Motor Vehicle and Accessories $ _____ (A)
     - 1. Cash Price Vehicle $ _____
     - 2. Cash Price Accessories $ _____
     - 3. Other (Nontaxable)
       - Describe _____ $ _____
       - Describe _____ $ _____
   - B. Document Preparation Fee (not a governmental fee) $ _____ (B)
   - C. Smog Fee Paid to Seller $ _____ (C)
   - D. (Optional) Theft Deterrent Device (to whom paid) _____ $ _____ (D)
   - E. (Optional) Theft Deterrent Device (to whom paid) _____ $ _____ (E)
   - F. (Optional) Theft Deterrent Device (to whom paid) _____ $ _____ (F)
   - G. (Optional) Surface Protection Product (to whom paid) _____ $ _____ (G)
   - H. (Optional) Surface Protection Product (to whom paid) _____ $ _____ (H)
   - I. Sales Tax (on taxable items in A through H) $ _____ (I)
   - J. Optional DMV Electronic Filing Fee $ _____ (J)
   - K. (Optional) Service Contract (to whom paid) _____ $ _____ (K)
   - L. (Optional) Service Contract (to whom paid) _____ $ _____ (L)
   - M. (Optional) Service Contract (to whom paid) _____ $ _____ (M)
   - N. (Optional) Service Contract (to whom paid) _____ $ _____ (N)
   - O. (Optional) Service Contract (to whom paid) _____ $ _____ (O)
   - P. Prior Credit or Lease Balance paid by Seller to _____ $ _____ (P)
     (see downpayment and trade-in calculation)
   - Q. (Optional) Gap Contract (to whom paid) _____ $ _____ (Q)
   - R. (Optional) Used Vehicle Contract Cancellation Option Agreement $ _____ (R)
   - S. Other (to whom paid) _____ $ _____ (S)
     For _____

   Total Cash Price (A through S) $ _____ (1)
2. **Amounts Paid to Public Officials**
   - A. License Fees $ _____ (A)
   - B. Registration/Transfer/Titling Fees $ _____ (B)
   - C. California Tire Fees $ _____ (C)
   - D. Other _____ $ _____ (D)

   Total Official Fees (A through D) $ _____ (2)
3. **Amount Paid to Insurance Companies**
   (Total premiums from Statement of Insurance column (a)) $ _____ (3)

STATEMENT OF INSURANCE

NOTICE. No person is required as a condition of financing the purchase of a motor vehicle to purchase or negotiate any insurance through a particular insurance company, agent or broker. You are not required to buy any other insurance to obtain credit. Your decision to buy or not buy other insurance will not be a factor in the credit approval process.

Vehicle Insurance

	Term	Premium
$ _____ Ded. Comp., Fire & Theft	____ Mos.	$ _____
$ _____ Ded. Collision	____ Mos.	$ _____
Bodily Injury $ _____ Limits	____ Mos.	$ _____
Property Damage $ _____ Limits	____ Mos.	$ _____
Medical _____	____ Mos.	$ _____
_____	____ Mos.	$ _____

Total Vehicle Insurance Premiums $ _____ (a)

UNLESS A CHARGE IS INCLUDED IN THIS AGREEMENT FOR PUBLIC LIABILITY OR PROPERTY DAMAGE INSURANCE, PAYMENT FOR SUCH COVERAGE IS NOT PROVIDED BY THIS AGREEMENT.

You may buy the physical damage insurance this contract requires (see back) from anyone you choose who is acceptable to us. You are not required to buy any other insurance to obtain credit.

Buyer X _____
Co-Buyer X _____
Seller X _____

If any insurance is checked below, policies or certificates from the named insurance companies will describe the terms and conditions.

Application for Optional Credit Insurance

☐ Credit Life: ☐ Buyer ☐ Co-Buyer ☐ Both
☐ Credit Disability (Buyer Only)

	Term	Exp.	Premium
Credit Life	____ Mos.	____	$ _____
Credit Disability	____ Mos.	____	$ _____

Total Credit Insurance Premiums $ _____ (b)

Insurance Company Name _____

Home Office Address _____

Credit life insurance and credit disability insurance are not required to obtain credit. Your decision to buy or not buy credit life and credit disability insurance will not be a factor in the credit approval process. They will not be provided unless you sign and agree to pay the extra cost. Credit life insurance is based on your original payment schedule. This insurance may not pay all you owe on this contract if you make late payments. Credit disability insurance does not cover any increase in your payment or in the number of payments. Coverage for credit life insurance and credit disability insurance ends on the original due date for the last payment unless a different term for the insurance is shown above.

You are applying for the credit insurance marked above. Your signature below means that you agree that: (1) You are not eligible for insurance if you have reached your 65th birthday. (2) You are eligible for disability insurance only if you are working for wages or profit 30 hours a week or more on the Effective Date. (3) Only the Primary Buyer is eligible for disability insurance. DISABILITY INSURANCE MAY NOT COVER CONDITIONS FOR WHICH YOU HAVE SEEN A DOCTOR OR CHIROPRACTOR IN THE LAST 6 MONTHS (Refer to "Total Disabilities Not Covered" in your policy for details).
You want to buy the credit insurance.

_____ X _____ ____
Date Buyer Signature Age

_____ X _____ ____
Date Co-Buyer Signature Age

OPTIONAL GAP CONTRACT A gap contract (debt cancella

Total Official Fees (A through D) $ _____ (2)

3. **Amount Paid to Insurance Companies**
(Total premiums from Statement of Insurance column a + b) $ _____ (3)
4. ☐ **Smog Certification or** ☐ **Exemption Fee Paid to State** $ _____ (4)
5. **Subtotal** (1 through 4) $ _____ (5)
6. **Total Downpayment**
A. Agreed Trade-In Value Yr _____ Make _____ $ _____ (A)
Model _____ Odom _____
VIN _____
B. Less Prior Credit or Lease Balance $ _____ (B)
C. Net Trade-In (A less B) (indicate if a negative number) $ _____ (C)
D. Deferred Downpayment $ _____ (D)
E. Manufacturer's Rebate $ _____ (E)
F. Other _____ $ _____ (F)
G. Cash $ _____ (G)
Total Downpayment (C through G) $ _____ (6)
(If negative, enter zero on line 6 and enter the amount less than zero as a positive number on line 1P above)
7. **Amount Financed** (5 less 6) $ _____ (7)

SELLER ASSISTED LOAN
BUYER MAY BE REQUIRED TO PLEDGE SECURITY FOR THE LOAN, AND WILL BE OBLIGATED FOR THE INSTALLMENT PAYMENTS ON BOTH THIS RETAIL INSTALLMENT SALE CONTRACT AND THE LOAN.

Proceeds of Loan From: _____
Amount $ _____ Finance Charge $ _____
Total $ _____ Payable in _____
installments of $ _____ $ _____
from this Loan is shown in item 6D.

AUTO BROKER FEE DISCLOSURE
If this contract reflects the retail sale of a new motor vehicle, the sale is not subject to a fee received by an autobroker from us unless the following box is checked:

☐ **Name of autobroker receiving fee, if applicable:**

_____

SELLER'S RIGHT TO CANCEL If Buyer and Co-Buyer sign here, the provisions of the Seller's Right to Cancel section on the back giving the Seller the right to cancel if Seller is unable to assign this contract to a financial institution will apply.

X _____ X _____
Buyer Co-Buyer

_____ X _____ _____
Date Co-Buyer Signature Age

OPTIONAL GAP CONTRACT A gap contract (debt cancellation contract) is not required to obtain credit and will not be provided unless you sign below and agree to pay the extra charge. If you choose to buy a gap contract, the charge is shown in item 1Q of the Itemization of Amount Financed. See your gap contract for details on the terms and conditions it provides. It is a part of this contract.

Term _____ Mos. _____
Name of Gap Contract

I want to buy a gap contract.

Buyer Signs X _____

OPTIONAL SERVICE CONTRACT(S) You want to purchase the service contract(s) written with the following company(ies) for the term(s) shown below for the charge(s) shown in item 1K,1L, 1M, 1N, and/or 1O.

1K Company _____
Term _____ Mos. or _____ Miles
1L Company _____
Term _____ Mos. or _____ Miles
1M Company _____
Term _____ Mos. or _____ Miles
1N Company _____
Term _____ Mos. or _____ Miles
1O Company _____
Term _____ Mos. or _____ Miles
Buyer X _____

HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to the contract must be in writing and both you and we must sign it. No oral changes are binding.

Buyer Signs X _____
Co-Buyer Signs X _____

OPTION: ☐ You pay no finance charge if the Amount Financed, item 7, is paid in full on or before _____, Year _____. SELLER'S INITIALS _____

THE MINIMUM PUBLIC LIABILITY INSURANCE LIMITS PROVIDED IN LAW MUST BE MET BY EVERY PERSON WHO PURCHASES A VEHICLE. IF YOU ARE UNSURE WHETHER OR NOT YOUR CURRENT INSURANCE POLICY WILL COVER YOUR NEWLY ACQUIRED VEHICLE IN THE EVENT OF AN ACCIDENT, YOU SHOULD CONTACT YOUR INSURANCE AGENT.
WARNING:
YOUR PRESENT POLICY MAY NOT COVER COLLISION DAMAGE OR MAY NOT PROVIDE FOR FULL REPLACEMENT COSTS FOR THE VEHICLE BEING PURCHASED. IF YOU DO NOT HAVE FULL COVERAGE, SUPPLEMENTAL COVERAGE FOR COLLISION DAMAGE MAY BE AVAILABLE TO YOU THROUGH YOUR INSURANCE AGENT OR THROUGH THE SELLING DEALER. HOWEVER, UNLESS OTHERWISE SPECIFIED, THE COVERAGE YOU OBTAIN THROUGH THE DEALER PROTECTS ONLY THE DEALER, USUALLY UP TO THE AMOUNT OF THE UNPAID BALANCE REMAINING AFTER THE VEHICLE HAS BEEN REPOSSESSED AND SOLD.
FOR ADVICE ON FULL COVERAGE THAT WILL PROTECT YOU IN THE EVENT OF LOSS OR DAMAGE TO YOUR VEHICLE, YOU SHOULD CONTACT YOUR INSURANCE AGENT.
THE BUYER SHALL SIGN TO ACKNOWLEDGE THAT HE/SHE UNDERSTANDS THESE PUBLIC LIABILITY TERMS AND CONDITIONS.

S/S X _____ X _____

Payoff Agreement: Seller relied on information from you and/or the lienholder or lessor of your trade-in vehicle to arrive at the payoff amount shown in item 6B of the Itemization of Amount Financed as the "Prior Credit or Lease Balance." Seller agrees to pay the payoff amount shown in 6B to the lienholder or lessor of the trade-in vehicle, or its designee. If the actual payoff amount is more than the amount shown in 6B, you must pay the Seller the excess on demand. If the actual payoff amount is less than the amount shown in 6B, Seller will refund the difference to you. Except as stated in the "NOTICE" on the back of this contract, any assignee of this contract will not be obligated to pay the Prior Credit or Lease Balance shown in 6B or any refund due from the Seller.

Buyer Signature X _____ **Co-Buyer Signature X** _____

Notice to buyer: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a completely filled in copy of this agreement. (3) You can prepay the full amount due under this agreement at any time. (4) If you default in the performance of your obligations under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.

If you have a complaint concerning this sale, you should try to resolve it with the seller.
Complaints concerning unfair or deceptive practices or methods by the seller may be referred to the city attorney, the district attorney, or an investigator for the Department of Motor Vehicles, or any combination thereof.
After this contract is signed, the seller may not change the financing or payment terms unless you agree in writing to the change. You do not have to agree to any change, and it is an unfair or deceptive practice for the seller to make a unilateral change.

Buyer Signature X _____ **Co-Buyer Signature X** _____

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge.

THERE IS NO COOLING-OFF PERIOD UNLESS YOU OBTAIN A CONTRACT CANCELLATION OPTION
California law does not provide for a "cooling-off" or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud. However, California law does require a seller to offer a 2-day contract cancellation option on used vehicles with a purchase price of less than $40,000, subject to certain statutory conditions. This contract cancellation option requirement does not apply to the sale of a recreational vehicle, a motorcycle, or an off-highway motor vehicle subject to identification under California law. See the vehicle contract cancellation option agreement for details.

YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETELY FILLED-IN COPY WHEN YOU SIGNED IT.

Buyer Signature X _____ Date _____ Co-Buyer Signature X _____ Date _____

Co-Buyers and Other Owners — A co-buyer is a person who is responsible for paying the entire debt. An other owner is a person whose name is on the title to the vehicle but does not have to pay the debt. The other owner agrees to the security interest in the vehicle given to us in this contract.

Other Owner Signature X _____ Address _____

GUARANTY: To induce us to sell the vehicle to Buyer, each person who signs as a Guarantor individually guarantees the payment of this contract. If Buyer fails to pay any money owing on this contract, each Guarantor must pay it when asked. Each Guarantor will be liable for the total amount owing even if other persons also sign as Guarantor, and even if Buyer has a complete defense to Guarantor's demand for reimbursement. Each Guarantor agrees to be liable even if we do one or more of the following: (1) give the Buyer more time to pay one or more payments; (2) give a full or partial release to any other Guarantor; (3) release any security; (4) accept less from the Buyer than the total amount owing; or (5) otherwise reach a settlement relating to this contract or extend the contract. Each Guarantor acknowledges receipt of a completed copy of this contract and guaranty at the time of signing.

Guarantor waives notice of acceptance of this Guaranty, notice of the Buyer's non-payment, non-performance, and default; and notices of the amount owing at any time, and of any demands upon the Buyer.

Guarantor X _____ Date _____ Guarantor X _____ Date _____
Address _____ Address _____

Seller Signs _____ Date _____ By X _____ Title _____

LAW® **FORM NO. 553-CA-ARB** (REV. 1/10) U.S. PATENT NO. D460,782

ORIGINAL LIENHOLDER

OTHER IMPORTANT AGREEMENTS

1. FINANCE CHARGE AND PAYMENTS

a. **How we will figure Finance Charge.** We will figure the Finance Charge on a daily basis at the Annual Percentage Rate on the unpaid part of the Amount Financed. Creditor - Seller may receive part of the Finance Charge.

b. **How we will apply payments.** We may apply each payment to the earned and unpaid part of the Finance Charge, to the unpaid part of the Amount Financed and to other amounts you owe under this contract in any order we choose.

c. **How late payments or early payments change what you must pay.** We based the Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it is due. Your Finance Charge, Total of Payments, and Total Sale Price will be more if you pay late and less if you pay early. Changes may take the form of a larger or smaller final payment or, at our option, more or fewer payments of the same amount as your scheduled payment with a smaller final payment. We will send you a notice telling you about these changes before the final scheduled payment is due.

d. **You may prepay.** You may prepay all or part of the unpaid part of the Amount Financed at any time. If you do so, you must pay the earned and unpaid part of the Finance Charge and all other amounts due up to the date of your payment. As of the date of your payment, if the minimum finance charge is greater than the earned Finance Charge, you may be charged the difference; the minimum finance charge is as follows: (1) $25 if the original Amount Financed does not exceed $1,000, (2) $50 if the original Amount Financed is more than $1,000 but not more than $2,000, or (3) $75 if the original Amount Financed is more than $2,000.

2. YOUR OTHER PROMISES TO US

a. **If the vehicle is damaged, destroyed, or missing.** You agree to pay us all you owe under this contract even if the vehicle is damaged, destroyed, or missing.

> **GAP LIABILITY NOTICE**
> In the event of theft or damage to your vehicle that results in a total loss, there may be a gap between the amount you owe under this contract and the proceeds of your insurance settlement and deductible. THIS CONTRACT PROVIDES THAT YOU ARE LIABLE FOR THE GAP AMOUNT. An optional gap contract (debt cancellation contract) for coverage of the gap amount may be offered for an additional charge.

b. **Using the vehicle.** You agree not to remove the vehicle from the U.S. or Canada, or to sell, rent, lease, or transfer any interest in the vehicle or this contract without our written permission. You agree not to expose the vehicle to misuse, seizure, confiscation, or involuntary transfer. If we pay any repair bills, storage bills, taxes, fines, or charges on the vehicle, you agree to repay the amount when we ask for it.

c. **Security Interest.**
You give us a security interest in:
- The vehicle and all parts or goods installed on it;
- All money or goods received (proceeds) for the vehicle;
- All insurance, maintenance, service, or other contracts we finance for you; and
- All proceeds from insurance, maintenance, service, or other contracts we finance for you. This includes any refunds of premiums or charges from the contracts.

This secures payment of all you owe on this contract. It also secures your other agreements in this contract as the law allows. You will make sure the title shows our security interest (lien) in the vehicle.

d. **Insurance you must have on the vehicle.**
You agree to have physical damage insurance covering loss of or damage to the vehicle for the term of this contract. The insurance must cover our interest in the vehicle. If you do not have this insurance, we may, if we choose, buy physical damage insurance. If we decide to buy physical damage insurance, we may either buy insurance that covers your interest and our interest in the vehicle, or buy insurance that covers only our interest. If we buy either type of insurance, we will tell you which type and the charge you must pay. The charge will be the premium for the insurance and a finance charge equal to the Annual Percentage Rate shown on the front of this contract or, at our option, the highest rate the law permits. If the vehicle is lost or damaged, you agree that we may use any insurance settlement to reduce what you owe or repair the vehicle.

e. **What happens to returned insurance, maintenance, service, or other contract charges.** If we get a refund of insurance, maintenance, service, or other contract charges, you agree that we may subtract the refund from what you owe.

3. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES

a. **You may owe late charges.** You will pay a late charge on each late payment as shown on the front. Acceptance of a late payment or late charge does not excuse your late payment or mean that you may keep making late payments. If you pay late, we may also take the steps described below.

b. **You may have to pay all you owe at once.** If you break

f. **We will sell the vehicle if you do not get it back.** If you do not redeem, we will sell the vehicle. We will send you a written notice of sale before selling the vehicle.
We will apply the money from the sale, less allowed expenses, to the amount you owe. Allowed expenses are expenses we pay as a direct result of taking the vehicle, holding it, preparing it for sale, and selling it. Attorney fees and court costs the law permits are also allowed expenses. If any money is left (surplus), we will pay it to you unless the law requires us to pay it to someone else. If money from the sale is not enough to pay the amount you owe, you must pay the rest to us. If you do not pay this amount when we ask, we may charge you interest at the Annual Percentage Rate shown on the face of this contract, not to exceed the highest rate permitted by law, until you pay.

g. **What we may do about optional insurance, maintenance, service, or other contracts.** This contract may contain charges for optional insurance, maintenance, service, or other contracts. If we demand that you pay all you owe at once or we repossess the vehicle, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe or repair the vehicle. If the vehicle is a total loss because it is confiscated, damaged, or stolen, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe.

4. WARRANTIES SELLER DISCLAIMS

If you do not get a written warranty, and the Seller does not enter into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.
This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide. If the Seller has sold you a certified used vehicle, the warranty of merchantability is not disclaimed.

5. **Used Car Buyers Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.**
Spanish Translation: Guía para compradores de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta.

6. Applicable Law
Federal law and California law apply to this contract. If any part of this contract is not valid, all other parts stay valid. We may delay or refrain from enforcing any of our rights under this contract without losing them. For example, we may extend the time for making some payments without extending the time for making others.

7. **Warranties of Buyer.** You promise you have given true and correct information in your application for credit, and you have no knowledge that will make that information untrue in the future. We have relied on the truth and accuracy of that information in entering into this contract. Upon request, you will provide us with documents and other information necessary to verify any item contained in your credit application.

You waive the provisions of Calif. Vehicle Code Section 1808.21 and authorize the California Department of Motor Vehicles to furnish your residence address to us.

CREDIT DISABILITY INSURANCE NOTICE
CLAIM PROCEDURE

If you become disabled, you must tell us right away. (You are advised to send this information to the same address to which you are normally required to send your payments, unless a different address or telephone number is given to you in writing by us as the location where we would like to be notified.) We will tell you where to get claim forms. You must send in the completed form to the insurance company as soon as possible and tell us as soon as you do.

If your disability insurance covers all of your missed payment(s), WE CANNOT TRY TO COLLECT WHAT YOU OWE OR FORECLOSE UPON OR REPOSSESS ANY COLLATERAL UNTIL THREE CALENDAR MONTHS AFTER your first missed payment is due or until the insurance company pays or rejects your claim, whichever comes first. We can, however, try to collect, foreclose, or repossess if you have any money due and owing us or are otherwise in default when your disability claim is made or if a senior mortgage or lien holder is foreclosing.

If the insurance company pays the claim within the three calendar months, we must accept the money as though you paid on time. If the insurance company rejects the claim within the three calendar months or accepts the claim within the three calendar months on a partial disability and pays less than for a total disability, you will have 35 days from the date that the rejection or the acceptance of the partial disability claim is sent to pay past due payments, or the difference

a. **You may owe late charges.** You will pay a late charge on each late payment as shown on the front. Acceptance of a late payment or late charge does not excuse your late payment or mean that you may keep making late payments. If you pay late, we may also take the steps described below.

b. **You may have to pay all you owe at once.** If you break your promises (default), we may demand that you pay all you owe on this contract at once, subject to any right the law gives you to reinstate this contract.
Default means:
- You do not pay any payment on time;
- You give false, incomplete, or misleading information on a credit application;
- You start a proceeding in bankruptcy or one is started against you or your property;
- The vehicle is lost, damaged or destroyed; or
- You break any agreements in this contract.

The amount you will owe will be the unpaid part of the Amount Financed plus the earned and unpaid part of the Finance Charge, any late charges, and any amounts due because you defaulted.

c. **You may have to pay collection costs.** You will pay our reasonable costs to collect what you owe, including attorney fees, court costs, collection agency fees, and fees paid for other reasonable collection efforts. You agree to pay a charge not to exceed $15 if any check you give to us is dishonored.

d. **We may take the vehicle from you.** If you default, we may take (repossess) the vehicle from you if we do so peacefully and the law allows it. If your vehicle has an electronic tracking device, you agree that we may use the device to find the vehicle. If we take the vehicle, any accessories, equipment, and replacement parts will stay with the vehicle. If any personal items are in the vehicle, we may store them for you at your expense. If you do not ask for these items back, we may dispose of them as the law allows.

e. **How you can get the vehicle back if we take it.** If we repossess the vehicle, you may pay to get it back (redeem). You may redeem the vehicle by paying all you owe, or you may have the right to reinstate this contract and redeem the vehicle by paying past due payments and any late charges, providing proof of insurance, and/or taking other action to cure the default. We will provide you all notices required by law to tell you when and how much to pay and/or what action you must take to redeem the vehicle.

months, we must credit the money as though you paid on time. If the insurance company rejects the claim within the three calendar months or accepts the claim within the three calendar months on a partial disability and pays less than for a total disability, you will have 35 days from the date that the rejection or the acceptance of the partial disability claim is sent to pay past due payments, or the difference between the past due payments and what the insurance company pays for the partial disability, plus late charges. You can contact us, and we will tell you how much you owe. After that time, we can take action to collect or foreclose or repossess any collateral you may have given. If the insurance company accepts your claim but requires that you send in additional forms to remain eligible for continued payments, you should send in these completed additional forms no later than required. If you do not send in these forms on time, the insurance company may stop paying, and we will then be able to take action to collect or foreclose or repossess any collateral you may have given.

Seller's Right to Cancel

a. Seller agrees to deliver the vehicle to you on the date this contract is signed by Seller and you. You understand that it may take a few days for Seller to verify your credit and assign the contract. You agree that if Seller is unable to assign the contract to any one of the financial institutions with whom Seller regularly does business under an assignment acceptable to Seller, Seller may cancel the contract.

b. Seller shall give you written notice (or in any other manner in which actual notice is given to you) within 10 days of the date this contract is signed if Seller elects to cancel. Upon receipt of such notice, you must immediately return the vehicle to Seller in the same condition as when sold, reasonable wear and tear excepted. Seller must give back to you all consideration received by Seller, including any trade-in vehicle.

c. If you do not immediately return the vehicle, you shall be liable for all expenses incurred by Seller in taking the vehicle from you, including reasonable attorney's fees.

d. While the vehicle is in your possession, all terms of the contract, including those relating to use of the vehicle and insurance for the vehicle, shall be in full force and you shall assume all risk of loss or damage to the vehicle. You must pay all reasonable costs for repair of any damage to the vehicle until the vehicle is returned to Seller.

ARBITRATION CLAUSE
PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The preceding NOTICE applies only if the "personal, family or household" box in the "Primary Use for Which Purchased" section of this contract is checked. In all other cases, Buyer will not assert against any subsequent holder or assignee of this contract any claims or defenses the Buyer (debtor) may have against the Seller, or against the manufacturer of the vehicle or equipment obtained under this contract.

Seller assigns its interest in this contract to _____ (Assignee) at (address) _____
under the terms of Seller's agreement(s) with Assignee.

☐ Assigned with recourse ☐ Assigned without recourse ☐ Assigned with limited recourse

Seller _____ By _____ Title _____

EXHIBIT 3

Copies of additional stories, consumer contracts and case examples sent to NACA for submission to the CFPB

THE LAW FIRM OF
PHILIPPS & PHILIPPS, LTD.

David J. Philipps
Mary E. Philipps

Bonnie C. Dragotto

March 13, 2012

Delicia Reynolds Hand
Legislative Director
National Associates of Consumer Advocates
1730 Rhode Island Avenue, NW, Suite 710
Washington, DC 20036

RE: CFPB Arbitration Study

Dear Delicia:

We are writing to you in response to your e-mail to the NACA-Class listserv concerning the Consumer Financial Protection Bureau's ("CFPB") arbitration study. We have two current cases in which debt buyers are seeking to enforce arbitration clauses, to our clients' detriment.

In *Sorge v. Cavalry Portfolio Services, LLC, et al.*, S.D. Ill. No. 3:11-cv-00297-DRH-SCW, the consumer was sued by the creditor in state court in 2008, and a judgment was entered against her in March, 2009. Rather than institute collection proceedings on the judgment, the creditor apparently sold the debt to Cavalry SPV I, LLC, which assigned its related corporation, Cavalry Portfolio Services, to collect the debt – which it did by filing a second state court lawsuit against the consumer – which lawsuit contained numerous false statement and thus, violated the FDCPA. The consumer's legal aid lawyer got second lawsuit dismissed on the basis of res judicata, and we then brought an FDCPA lawsuit on the consumer's behalf in Federal Court against the debt buyer and its two debt collectors.

The Defendants and its debt collectors sought to compel arbitration, based on the arbitration agreement in the underlying contract (*see* attached Exhibit A), and the trial court granted their motion. Thus, a consumer who had a terrific claim for actual damages, as a result of being wrongfully sued, has been shunted off into the arbitration process – with a former big firm, corporation defense attorney as the arbitrator. Moreover, the arbitrator selected is from Chicago, while the consumer is in Collinsville, Illinois and case was pending in the Southern District of Illinois. Chicago and downstate Illinois are really two different worlds, and having an arbitrator from so far away -- as opposed to a local federal judge and jury -- is not in consumer's interest.

9760 South Roberts Road, Suite One, Palos Hills, Illinois 60465
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www.philippsconsumerlaw.com

In *Mangioni v. Midland Credit Management, Inc., et al.*, the consumer brought a class action claim against a debt buyer for its attempts to collect a debt which had been discharged in bankruptcy. The debt is now owned by Midland Funding, and its chain of title contains at least two glaring gaps, but, nonetheless, Midland produced a "sample", undated, unsigned generic Cardmember Agreement from the initial creditor (*see*, attached Exhibit B) and claims the right to arbitrate based thereon. Defendants' motion to compel arbitration is pending.

This arbitration agreement is particularly problematic because it contains a clause stating that, "Unless inconsistent with applicable law, each party shall bear the expense of their respective attorneys', experts', and witness fees, regardless of which party prevails in the arbitration.", which is inconsistent with the fee-shifting provisions of the FDCPA. Moreover, if this arbitration agreement were to be enforced, it would also foreclose the *Mangioni* case from being handled as a class action.

Please do not hesitate to contact us it you have any questions concerning the above two matters.

Very truly yours,

David J. Philipps

DJP/mep

Encl.

ARBITRATION AGREEMENT

THIS ARBITRATION AGREEMENT PROVIDES THAT ALL DISPUTES BETWEEN BORROWER AND CERTAIN OTHER PERSONS ON THE ONE HAND AND LENDER AND CERTAIN OTHER PERSONS AND ENTITIES ON THE OTHER HAND, EXCEPT THOSE SPECIFIED BELOW, WILL BE RESOLVED BY MANDATORY, BINDING ARBITRATION. YOU THUS GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT OR DEFEND YOUR RIGHTS (EXCEPT FOR MATTERS THAT ARE EXCLUDED FROM ARBITRATION AS SPECIFIED BELOW). YOUR RIGHTS WILL BE DETERMINED BY A NEUTRAL ARBITRATOR AND NOT A JUDGE OR JURY. YOU ARE ENTITLED TO A FAIR HEARING, BUT THE ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT.

BORROWER(S)	LENDER
TINA SORGE JOHN SORGE 1210 STATE ST COLLINSVILLE IL 62234	CITIFINANCIAL SERVICES, INC. CITIFINANCIAL COLLINSVILLE, IL 62234
Date of Note 06/19/2008	Account Number 384370

In consideration of Lender making the extension of credit described in the instrument evidencing your loan ("Note") and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by both parties, You and We agree that either You or We have an absolute right to demand that any Claim be submitted to an arbitrator in accordance with this Arbitration Agreement. If either You or We file a lawsuit, counterclaim, or other action in court, the other party has the absolute right to demand arbitration following the filing of such action.

Definitions for Arbitration Agreement. As used in this Arbitration Agreement ("Agreement"), the following definitions will apply: "You" or "Your" means any or all of Borrower(s) listed above and Non-Obligor(s) who execute the Note, and their heirs, survivors, assigns, and representatives. "We" or "Us" or "Our" means the Lender under the Note listed above, its past, present or future respective parents, subsidiaries, affiliates, predecessors, assignees, successors, and their respective employees, agents, directors, and officers (whether acting in their corporate or individual capacity). "Credit Transaction" means any one or more past, present, or future extensions, applications, or inquiries of credit or forbearance of payment such as a loan, retail credit agreement, or otherwise from any of Us to You. "Claim" means any case, controversy, dispute, tort, disagreement, lawsuit, or claim now or hereafter existing between You and Us. A Claim includes, without limitation, anything related to:

- The Note, this Agreement, or the enforceability, or the arbitrability of any Claim pursuant to this Agreement, including but not limited to the scope of this Agreement and any defenses to enforcement of the Note or this Agreement;
- Any Credit Transaction;
- Any past, present, or future insurance, service, or other product that is offered or purchased in connection with a Credit Transaction;
- Any documents or instruments that contain information about any Credit Transaction, insurance, service, or product;
- Any act or omission by any of Us;
- Fraud or misrepresentation, including claims for failing to disclose material facts;
- Any federal or state statute or regulation, or any alleged violation thereof, including without limitation insurance, usury, and lending laws;
- Any party's execution of this Agreement and/or willingness to be bound by its terms and provisions; or
- Any dispute about closing, servicing, collecting, or enforcing a Credit Transaction.

"Rules" means the then applicable rules and procedures that govern consumer disputes for the chosen "Administrator" (as defined below).

Agreement to Arbitrate Claims. Upon written request by either party that is submitted according to the Rules for arbitration, any Claim, except those specified below in this Agreement, shall be resolved by binding arbitration in accordance with (i) the Federal Arbitration Act, (ii) the then applicable Rules of the chosen "Administrator" and (iii) this Agreement, unless We and You both agree in writing to forgo arbitration. The terms of this Agreement shall control over any inconsistency between the Rules of the Administrator and this Agreement. The party initiating the arbitration must choose one of the two following arbitration firms ("Administrator") and follow the Rules for initiating and pursuing an arbitration:

American Arbitration Association 335 Madison Avenue, Floor 10 New York, NY 10017-4605 www.adr.org	National Arbitration Forum P.O. Box 50191 Minneapolis, MN 55405 www.arbitration-forum.com

You may obtain a copy of the Rules and a form of demand for arbitration for each Administrator by contacting the Administrator or by accessing the Administrator's internet site. We or You may bring an action, including a summary or expedited proceeding, to compel arbitration of any Claim, and/or to stay the litigation of any Claim pending arbitration, in any court having jurisdiction. Such action may be brought at any time, even if a Claim is part of a lawsuit, up until the entry of a final judgment. You and We also agree to submit to final, binding arbitration not only all Claims, but also any claim or dispute You or We have against (i) all persons and/or entities involved with any Credit Transaction or any other matter relating to this Disclosure Statement, Note and Security Agreement, (ii) all persons and/or entities who signed or executed any document relating to any Credit Transaction or Claim, and (iii) all persons and/or entities who may be jointly or severally liable to either You or any of Us regarding any Claim.

Judgment. Judgment upon any arbitration award may be entered in any court having jurisdiction. If timely requested by either party, the arbitrator shall provide a brief written statement of the reasons for any award.

Claims Excluded from Arbitration. Neither You nor We may require the other to arbitrate the following types of matters:

- Any action to the extent necessary to obtain a judicial order for the purpose of (a) effecting a foreclosure or transferring title being foreclosed, or permitting exercise of extra-judicial or self-help repossession under applicable law, with respect to an interest in property, or (b) establishing, perfecting or clearing title, with respect to an interest in property.
- Any Claim where all parties collectively (including multiple named parties) seek monetary relief in the aggregate of $15,000.00 or less in total relief, including but not limited to compensatory, statutory and punitive damages, restitution, rescission, disgorgement, costs and fees (including attorneys' fees); or any Claim brought in and subject to the jurisdiction of a small claims court, so long as such matter remains in such court and advances only an individual, non-class Claim. Any Claims asserted on behalf of a putative class of persons, will, for purposes of this exclusion, be deemed to exceed $15,000.00. In the event that any party fails to specify the amount being sought for any relief, or any form or component of relief, the amount being sought shall, for purposes of this exclusion, be deemed to exceed $15,000.00, unless the matter remains in and subject to the jurisdiction of the small claims court.

Participating in a lawsuit or seeking enforcement of this section by a court shall not waive the right to arbitrate any other Claim.

Additional Terms.

Administration of Arbitration. Arbitration shall be administered by the chosen Administrator, but if said Administrator is unable or unwilling to administer the arbitration, then an alternate Administrator shall be chosen by the party initiating the arbitration and that Administrator shall administer any arbitration required under this Agreement pursuant to its Rules. The arbitrator shall make his or her decision in accordance with the applicable law, and shall be empowered to award any damages or other relief provided for under the applicable law.

Place of Arbitration. The arbitration shall be conducted in the county of Your residence, unless all parties agree to another location.

Appeal. Either You or We may appeal the arbitrator's award in accordance with the then applicable Optional Appeals Procedures of JAMS or in accordance with procedures otherwise agreed to by You and Us, and the award may be subject to judicial review on the grounds stated in 9 U.S.C. § 10.

No Class Actions/No Joinder of Parties. You agree that any arbitration proceeding will only consider Your Claims. Claims by or on behalf of other borrowers will not be arbitrated in any proceeding that is considering Your or Our Claims. Because You have agreed to arbitrate all Claims, You may not serve as a class representative or participate as a class member in a putative class action against any party entitled to compel arbitration under this Agreement.

Depositions. After a demand for arbitration is made, You and We may conduct a limited number of depositions by mutual agreement. Any disagreement concerning the taking of depositions will be resolved by the arbitrator.

Borrower's Initials: TS JS

1

EXHIBIT A

EXHIBIT A

Costs. Unless the Rules of the Administrator require allocation more beneficial to You, the cost of any arbitration proceeding shall be divided as follows:

- The party making demand upon the Administrator for arbitration shall pay to the Administrator the filing fee required by the Rules when the demand is made, except that We will pay the amount of the filing fee in excess of the amount of the fee that would be required for You to file a lawsuit in Your jurisdiction. In addition, We will pay to the Administrator all other administrative costs of the arbitration proceeding. However, the arbitrator may award Us, in accordance with Rules, the excess amount of any such filing fee and any other arbitration administrative costs We incur if the arbitrator determines that the Claim was made in bad faith or lacks any justification on Your part. Despite our agreement to pay costs and fees described above, you have the option to pay Your share of filing fees and administrative costs consistent with the applicable Rules.
- Each party shall pay his/her own attorney, expert, and witness fees and expenses, unless otherwise required by law or by other terms of the Note.

Governing Law. This Agreement is governed by federal law and by the laws of the state where the closing of the Credit Transaction took place, but only to the extent that such state laws are consistent or compatible with federal law.
Interpretation. Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of this Agreement under which arbitration is sought, shall be submitted to and ruled on by the arbitrator, unless the relevant law requires that a court of competent jurisdiction make such determinations. The arbitrator has the authority to determine jurisdiction and arbitrability prior to conducting a full hearing on the merits.
Severability. If the arbitrator or any court determines that one or more terms of this Agreement or the Rules are unenforceable, or would make this Agreement unenforceable, only such terms(s) shall be deemed unenforceable and shall be deemed stricken from this Agreement, but such determination shall not impair or affect the enforceability of the other terms of this Agreement or the Rules.
Survival. This Agreement applies even if the Note has been paid in full, charged off by us, or discharged in bankruptcy.

Special Acknowledgments. You understand and acknowledge by signing Your name to this Agreement that (i) a court and/or jury will not hear or decide any Claim governed by this Agreement, (ii) the funding for Your Credit Transaction will come in whole or in part from sources outside this state, which will involve commerce within the meaning of the United States Arbitration Act, 9 U.S.C. §1 et seq., as amended, (iii) discovery in an arbitration proceeding can be much more limited than in a court proceeding, and (iv) rights to appeal an arbitration award are very limited.

READ THE ABOVE ARBITRATION AGREEMENT CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO OBTAIN REDRESS THROUGH COURT ACTION. BY SIGNING BELOW, YOU AGREE TO THE TERMS CONTAINED IN THIS AGREEMENT AND ACKNOWLEDGE THAT THIS DOCUMENT DID NOT CONTAIN ANY BLANK SPACES WHEN YOU SIGNED IT.

The Arbitration Agreement is executed as of the "Date of Note" written above.

TINA SORGE — Borrower

JOHN SORGE — Borrower

Non-Obligor

By _____
(Lender Name and Title)

EXHIBIT A

Cardmember Agreement

Arbitration notice: This Agreement provides that all disputes arising from or related to your Account may be resolved by arbitration. See "Arbitration" below.

This Agreement governs your Credit Card account ("Account") with Direct Merchants Credit Card Bank, N.A.

SECTION 1 - GENERAL

1.1 Parties

In this Agreement the words "you" and "your" refer to any Liable Party (as defined in section 5.1, below). The words "we," "us," and "our" refer to Direct Merchants Credit Card Bank, National Association.

1.2 Agreement to Terms

Your use of the Account, any Credit Card or other access device issued in connection with your Account, or your failure to close the Account within 5 days after receiving this Agreement, constitutes your agreement to all of the terms and conditions set forth herein.

1.3 Definitions

In addition to other terms defined in this Agreement, the following definitions apply:

a) Agreement means this Cardmember Agreement and the separate Key Terms Addendum we have provided to you, as they may be amended from time to time. If there is any discrepancy between your Cardmember Agreement and the Key Terms Addendum, the Addendum shall control;
b) APR means corresponding Annual Percentage Rate;
c) Authorized User means any person designated by a Liable Party in accordance with section 5.2, below;
d) Billing Cycle or Cycle means each period of approximately one month ending on a billing date;
e) Card or Credit Card means the credit card(s) issued to obtain credit under your Account;
f) Statement means the monthly statement we send to you that lists the transactions, FINANCE CHARGES, Fees and other charges or credits posting to your Account during a Billing Cycle;
g) Unauthorized Use means a transaction made on your Account by a person, other than you, who, under applicable law, does not have actual, implied or apparent authority to conduct that transaction and from which you receive no benefit.

SECTION 2 - USE OF YOUR ACCOUNT

2.1 Types of Transactions

You may use your Account to purchase goods and services at participating merchants and to obtain cash advances and other benefits as described in this Agreement. You agree that all uses of your Account shall be for personal, family or household purposes. You may not use your Account for any business, commercial or unlawful purpose. We reserve the right to block or reverse any use of your Account which we in good faith believe to be for the purpose of Internet gaming or gambling, or otherwise in violation of this Agreement. In no event will we be liable if you utilize your Account or your Card to engage in any illegal transaction.

2.2 Credit Limit

The amount of your credit limit is disclosed when your Card is issued and on each Statement. We may change your assigned maximum credit limit at any time. The portion of your total credit limit that may be used for Cash Transactions ("Cash Transaction Credit Limit") is disclosed on your Statement. We may change your Cash Transaction Credit Limit at any time. You agree not to allow your total unpaid balance, including FINANCE CHARGES and other charges, to exceed your maximum credit limit. We may authorize transactions that, when added to your existing balance, would cause your Account to exceed your credit limit. If we do, you agree to pay us that excess amount, plus applicable FINANCE CHARGES and Over Limit Fees. If we permit you to exceed your assigned credit limit, this shall not in any manner be construed to increase your assigned maximum Credit Limit or Cash Transaction Credit Limit.

2.3 Cash Transactions

A "Cash Transaction" includes the use of your Account for any of the following: (1) Automated Teller Machine (ATM) transactions; (2) Cash Advance, Convenience Check transactions or on-line Bill Payment; (3) money orders, cashiers checks, travelers checks, wire transfers, foreign currency or other in-bank transactions; (4) lottery tickets, casino chips, or racetrack wagers; (5) tax payments; (6) purchase of any voucher or similar document that is redeemable for cash; and, (7) court costs, bail bonds and fines.

2.4 Credit Authorizations

You may be asked to provide identification in connection with certain transactions that require our prior authorization. We may refuse to authorize any transaction on your Account at our sole discretion including, without limitation, if we reasonably suspect that such authorization may result in fraudulent or suspicious activity on the Account. We are not liable for any refusal or failure to authorize a transaction.

2.5 Closing Your Account

You can close your Account by calling or writing to us at the telephone number or address shown on your Card or Statement. We can close your Account, refuse to allow further transactions, or revoke your Card at any time in our sole discretion including, without limitation, if your Account becomes delinquent or inactive in accordance with our internal criteria. If we do, we will provide any notice required by applicable law.

If your Account is closed for any reason, you agree to pay your full outstanding balance immediately upon our request. Whether or not we require immediate payment, all outstanding balances remain subject to this Agreement in all respects until paid in full.

If we do not require immediate payment of your closed Account, in consideration of allowing you to repay your balance over time, you agree that we may change any terms of your Account in accordance with Section 7.1 below and under our ordinary pricing criteria.

We reserve the right not to accept, process or complete any transaction after the Account is closed and not to honor any Balance Transfer or Convenience Check written on your Account that is received after your Account is closed. Any such transaction that does occur, however, will be subject to the terms of this Agreement.

SECTION 3 - FINANCE CHARGES

3.1 Interest Rates

The Key Terms Addendum lists the Daily Periodic Rates, APRs and Margins applicable to your Account for Purchases and Cash Transactions. These variable rates are calculated as of the last day of each Billing Cycle by adding the stated Margin to the highest prime rate published in The Wall Street Journal during the previous three full calendar months preceding the month in which the billing period ends ("Prime Rate") and will apply to that entire Billing Cycle. We divide each APR by 365 to get the corresponding Daily Periodic Rate. An increase in the Prime Rate may result in an increase in your APR. If your APR increases, it may increase the minimum payment due on your Account. Regardless of the Prime Rate, your APRs will not be less than the Minimum, nor more than the Maximum shown in the Key Terms Addendum. Promotional, discount, limited-time or other special interest rates ("Special Offer") may be offered to you from time to time. Terms of any such Special Offer will be disclosed if and when it is made available.

3.2 Penalty Rates

Your APRs will automatically be adjusted to the Penalty Rates disclosed in the Key Terms Addendum if you miss a payment twice in any rolling six-month period. To "miss a payment" means that the required minimum payment was not credited to your Account before the first day of the Billing Cycle that began after the payment due date shown on your Statement. Once imposed, all new and outstanding balances will be subject to the applicable Penalty Rates. Penalty Rates will not be less than their respective minimum Purchase Rate and minimum Cash Rate disclosed within. Balances will be returned to their respective non-Penalty Rates when your Account is current five out of six months in a rolling six-month period, and is current in the last month.

3.3 Calculation of Finance Charge

For each day in the Billing Cycle, we take your beginning balance and add any new transactions and other debits and subtract any payments or other credits. This equals that day's Daily Balance. We multiply the Daily Balance by the applicable Daily Periodic Rate to get your finance charge for that day. We add these daily FINANCE CHARGES to your Daily Balance to get the beginning balance for the next day. We add together the daily FINANCE CHARGES calculated during each Billing Cycle to determine the Total Finance Charge for that Billing Cycle. We add together each daily balance for the Billing Cycle and divide by the number of days in that Billing Cycle to determine your Average Daily Balance.
Where appropriate, we perform this calculation separately for each type of transaction that appears on the Statement such as Purchases, Cash Transactions, Balance Transfers or Promotional Balances.
The daily balance is considered to be zero for any day on which your Account has a credit balance.

3.4 Grace Period

We do not charge any finance charge on your new purchases if you pay your entire new balance by its due date or if your previous balance was zero or a credit balance. The payment due date will be at least 20 days from the statement date if no finance charge was billed to the Account in the current billing period; otherwise the payment due date will be 25 days from the statement date. There is no grace period for Cash Transactions.

SECTION 4 - OTHER FEES AND CHARGES

4.1 Annual Fee

The amount of your Annual Fee, if any, is set forth in the Key Terms Addendum. Any Annual Fee will be billed on your first Statement and thereafter billed each year in the month in which your Account was opened. The Annual Fee is not refundable, in whole or part, if your Account is closed.

4.2 Cash Transaction Fee

A fee is assessed for each Cash Transaction made under your Account. The amount of this fee is set forth on the Key Terms Addendum. The Cash Transaction fee is a FINANCE CHARGE posted at the time the advance is posted. This will increase the Annual Percentage Rate shown on the Statement on which the Cash Transaction is posted to your Account.

4.3 Foreign Currency Exchange Fee

For each purchase made in a foreign currency, we add an additional Foreign Currency Exchange Fee to the amount of the purchase after it is converted into U.S. dollars as explained in Section 7.9, below. The amount of this fee is set forth on the Key Terms Addendum. This fee is a FINANCE CHARGE and will increase the nominal APR shown on the statement on which the foreign currency purchase is first posted to your Account.

4.4 Other Fees

We will impose: (a) a Late Fee each time we do not receive at least the minimum payment by the payment due date shown on your Statement; (b) an Over Limit Fee if, at any time in a Billing Cycle, you exceed your credit limit; (c) a Returned Payment Fee each time a payment you make to us by any payment method is returned unsatisfied by the paying institution; and (d) a Returned Convenience Check Fee each time you use a Convenience Check that we are unable to honor because it would exceed your credit limit when added to your existing balance on the date it is presented for payment, or your Account is otherwise blocked or frozen. The amount of each of these Fees is set forth on the Key Terms Addendum.

4.5 Research and Copy Charges

We charge $5 for each copy of any sales draft, Statement, check, or other record of your Account you request, other than those produced in response to a billing error you reasonably assert pursuant to applicable law.

4.6 Administrative Charges

We will charge you a fee if you elect to take advantage of any optional administrative services we offer, such as payment services or express delivery services. If an administrative service is offered to you, any related fee will be disclosed. You agree to pay the disclosed fee when you take advantage of the optional service.

EXHIBIT
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SECTION 5 - LIABILITY

5.1 Liable Parties

Each person: a) who has applied for and is granted use of the Account; b) whose name appears on a Credit Card, Card application, acceptance form or Statement; or, c) who has otherwise agreed to be liable on the Account shall be a "Liable Party." An Authorized User shall not be considered to be a Liable Party for the purposes of this paragraph. Each Liable Party is individually and jointly responsible for repaying all amounts advanced under this Account and all related FINANCE CHARGES, Fees and other charges (except for charges resulting from Unauthorized Use, as defined in Section 1.3 (g), above).

5.2 Authorized Users

A Liable Party may designate one or more Authorized Users on the Account in any of the following ways: 1) by notifying us of the name and Social Security Number of the Authorized User(s); or, 2) in any other manner that, under applicable law, would give a person the actual, implied or apparent authority to use your Account. An Authorized User's authority will continue until a Liable Party notifies us that such authority shall be terminated and any Card(s) or other access device(s) in possession of the Authorized User(s) is retrieved.

5.3 Other Users of the Account

Any person who uses the Account and is not a Liable Party is liable for any such use, including all related FINANCE CHARGES, Fees and other charges. Liability of any such user including, without limitation, any Authorized User does not relieve any Liable Party from responsibility for such user's unpaid transactions, including all related FINANCE CHARGES, Fees and other charges.

5.4 Liability for Unauthorized Use

Retain your copies of all charge slips until you receive your Statement, at which time you should verify that the charges are true and the amounts are correct. You may be liable for the unauthorized use of your Credit Card, up to a maximum of $50.00. You will not be liable for Unauthorized Use of this Account that occurs after you notify us of the loss, theft or possible Unauthorized Use. You must notify us immediately upon learning of the loss, theft or possible Unauthorized Use of the Account, Card or other access device by calling or writing to us at the telephone number or address shown on your Card or Statement. You waive your right to claim Unauthorized Use with respect to any transaction about which you notify us more than twelve months after that transaction first appeared on your Statement.

Unauthorized Use does not include use by any person to whom you have given the Credit Card, Account number and/or related Personal Identification Number ("PIN"), or the authority to use your Card, Account or PIN, even if that person exceeds any restrictions you have placed on such use. In addition, you may be responsible for another person's use of your Account if you allow that person to obtain possession of your Card, Account number or PIN.

SECTION 6 - PAYMENT

6.1 Promise to Pay

You promise to pay to us, or our successors and/or assignees, the amount of all: (a) credit we extend under the Account; (b) FINANCE CHARGES, Late Fees, and other Fees and charges provided in this Agreement; and (c) collection costs and attorneys' Fees, not prohibited by applicable law, which we incur in enforcing any of our rights under this Agreement.

6.2 Minimum Payment

The amount of your minimum monthly payment is set forth on each Statement. The manner in which the amount of your minimum monthly payment is calculated is shown in the Key Terms Addendum.

6.3 Payment

We will impose the Late Fee shown in the Key Terms Addendum if we do not receive at least the minimum payment reflected in your Statement by the payment due date shown on your Statement. You may pay more than the minimum payment shown and you may at any time pay the entire amount due for the current Billing Cycle (called "new balance"). In order to verify that your payment(s) have been honored by your financial institution, we reserve the right in our discretion to delay restoring the available credit on your Account for a reasonable period of time after we receive your payment. If any payment is not honored by your financial institution, we reserve the right to restrict access to your available credit for a reasonable period of time.

All payments must be made payable to Direct Merchants Credit Card Bank, N.A. in U.S. Dollars. Payments by mail must be made by check drawn on a U.S. financial institution or by money order reasonably acceptable to us. We may, upon notice to you, require that payments be made in the form of a certified or cashier's check, money order or similar payment instrument. In order to receive same-day credit, all payments must be received by us at the address, and by the time, shown on your Statement.

Any check, money order or other instrument tendered as an accord and satisfaction, or which includes a condition, restrictive endorsement or any statement to the effect that our acceptance of such instrument shall constitute satisfaction in full of a disputed or undisputed debt (collectively, a "Condition"), must be sent to: Cardmember Service Center, P.O. Box 44006, Baltimore, MD 21236-6006 and you must note conspicuously on the face of the payment instrument that it is tendered for this purpose. We reserve the right to refuse to accept any payment that is subject to any Condition. If the payment does not comply with the foregoing and we process it, we will not be bound by any Condition.

6.4 Application of Payments

Subject to applicable law, we may choose the order in which to apply payments to the Account balance. For example, we generally apply payments to balances subject to lower interest rates before applying them to other balances. Requests for exceptions or special instructions will not be honored.

SECTION 7 - OTHER PROVISIONS

7.1 Amendments to this Agreement

Subject to applicable law, we may amend or delete any term of this Agreement or add new terms at any time, without limitation. Any change in terms will govern your Account as of the stated effective date and will, as permitted by law and at our option, apply both to transactions made on or after the effective date and to any outstanding balances.

7.2 Default and Termination of Credit Privileges

You will be in default under this Agreement if: (a) you fail to make at least the minimum payment by the date specified on your Statement, or you submit a payment that is not honored by your financial institution; (b) you violate any other provision of this Agreement; (c) you become the subject of bankruptcy or insolvency proceedings; (d) you fail to supply us with any information we reasonably request; (e) you provide us misleading, false, incomplete or incorrect information; (f) we possess or receive information by which we reasonably conclude that you are unwilling or unable to perform under the terms of this Agreement or any other agreement you have with us; (g) we receive information from third parties, including credit reporting agencies, which, in our judgment indicates an inability or unwillingness to repay or a delinquency or charge-off with other creditors; (h) you move out of the United States; or (i) you attempt to satisfy or setoff any amount outstanding on the Account by a "Bond for Discharge of Debt", "Bill of Exchange", "Due Bill", "Redemption Certificate" or any other instrument or document which we reasonably believe to be part of a debt elimination scheme or to be a purported payment device which has no valid legal basis. After default, your Account will continue to accrue FINANCE CHARGES at the interest rate(s) calculated in accordance with the terms then in effect on your Account. Upon default, we have the right to terminate or suspend your credit privileges under this Agreement and to require you to pay your entire Account balance immediately including all accrued, unpaid charges.

7.3 Transactions with Merchants

7.3.1 Return Policy: You are bound by any "no returns", "no refunds", "all sales final", or other return policy that is disclosed by a merchant at which you use your Account.

7.3.2 Reservations: If you cancel any travel or lodging reservations made with your Account, you must follow the merchant's cancellation policy and obtain the cancellation number that such merchant is required to provide. You may be liable for the canceled transaction unless you provide us with that cancellation number and otherwise fully comply with the merchant's cancellation policies.

7.3.3 Recurring Transactions: You must notify the appropriate merchant if you wish to cancel or change any recurring or repeated transactions you have authorized on your Account.

7.4 Card Renewal

Cards are issued with an expiration date and are not valid for any purpose after that date. We have the right not to renew your Card at our sole discretion.

7.5 Check Presentment Policy

We may, in our sole discretion, present or re-present your check in any manner permitted by applicable law including, without limitation, electronically.

7.6 Lost or Stolen Credit Card(s) and/or Checks

You agree to notify us immediately if your Card(s) or any Balance Transfer or Convenience Checks are lost or stolen. You may notify us by calling the number, or writing to the address shown on your Statement.

7.7 General Inquiries

If you wish to contact us regarding any matter that is not otherwise specifically addressed in this Agreement, please call us or write to us at the phone number or address shown on your statement. We are not responsible for general inquiries communicated in any other manner.

7.8 Updated Information

You agree to give us prompt notice of any change in your name, mailing address or telephone number(s). In addition, at our request, you agree to promptly give us current, accurate financial and other information about yourself which we reasonably believe is necessary for proper administration of your Account. All such information must be sent to the address shown on your statement, or by such other means as we reasonably require or permit.

7.9 Foreign Transactions

If you make a purchase in any currency other than U.S. Dollars, Mastercard® International will convert the amount into U.S. dollars in accordance with its operating regulations or foreign currency conversion procedures then in effect. MasterCard currently uses a conversion rate in effect one day prior to its transaction processing date. Such rate is either a wholesale market rate or the government mandated rate.

The foreign currency conversion rate in effect on the applicable processing date for a transaction may differ from the rate in effect on the sale or posting date on your billing statement for that transaction. If the procedure is discontinued, you agree that it may be replaced, without notice, with any reasonably comparable procedure.

7.10 Applicable Law

Your Credit Card is issued under this Agreement by Direct Merchants Credit Card Bank, National Association, located in the State of Arizona. This Agreement and your Account will be governed by federal law, and the applicable laws of the State of Arizona (not including its 'choice of law' provisions), whether or not you live in Arizona, and whether or not your Account is used outside of Arizona. You agree that this Agreement is subject to, and governed by, Section 44-1205(C) of the Arizona Revised Statutes, as amended, and/or any Arizona statute that may replace or supplement that section.

7.11 Assignment of Account

We may sell, assign or transfer your Account or any portion thereof without notice to you. You may not sell, assign or transfer your Account. We may refer the Account to a collection agency or attorney, who shall be entitled to enforce this Agreement according to its terms.

7.12 Obtaining and Providing Credit Bureau Information

You agree that we may periodically review your credit standing by obtaining relevant information from one or more credit reporting agencies. We may, but are not required to, report the activity on, and performance of, your Account to one or more credit reporting agencies in accordance with applicable law.

7.13 Monitoring

You agree that we may listen to or record telephone calls between you and us in order to create and maintain records of our conversations as well as to monitor and improve the quality of our service.

7.14 Arbitration

Under certain circumstances (described below) you or we may elect to have a dispute heard by a neutral arbitrator rather than by a judge or jury. In such circumstances YOU GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend your rights under this Agreement. Decisions made by an arbitrator are enforceable and are subject to very limited review by a court.

You agree that any claim, dispute or controversy (whether in contract, regulatory, tort, or otherwise, whether pre-existing, present or future and including constitutional, statutory, common law, intentional tort and equitable claims) arising from or relating to this Account or application for your Account, or advertisements, promotions, or oral or written statements related to the Account, goods or services financed under the Account or the terms of financing, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties) or, except as specified below, the validity, enforceability or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or us or said third parties, by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure of the National Arbitration Forum (or other appropriate organization as provided for below) in effect at the time the Claim is filed. A party who has asserted a Claim in a lawsuit in

court may elect arbitration with respect to any Claim(s) subsequently asserted in that lawsuit by any other party or parties. The Code of Procedure, rules and forms of the National Arbitration Forum may be obtained by calling the National Arbitration Forum at (800) 474-2371, through their web site at www.arb-forum.com, or by making your request to P.O. Box 50191, Minneapolis, Minnesota 55405. All Claims shall be filed at any National Arbitration Forum office, or as otherwise specified in the Code of Procedure. If, for any reason, the National Arbitration Forum is unable or unwilling or ceases to serve as arbitration administrator, (or upon the the reasonable objection of any party subject to arbitration of the Claim) an equivalent national arbitration organization utilizing similar arbitration rules shall be substituted by the party asserting a Claim. Claims shall be filed as provided under the Code of Procedure of the National Arbitration Forum or the substitute arbitration organization. No Claim may be arbitrated on a class action or multiple-party basis without written consent of all parties. Further, an arbitrator can only decide our or your Claim and may not consolidate or join the claims of other persons who may have similar claims. The validity and enforceability of the foregoing two sentences shall be determined by a court having jurisdiction. In the event the foregoing class action waiver is finally determined to be invalid or unenforceable, any class action or similar multiple-party arising from this Agreement shall be heard in a court of competent jurisdiction. Any participatory arbitration hearing that you attend will take place in the federal judicial district of your residence. Upon your written request to we will advance the first $500.00 of the arbitration filing and hearing fees for any Claim which you may file against us. The arbitrator will decide whether we or you will ultimately be responsible for paying any fees in connection with the arbitration. Unless inconsistent with applicable law, each party shall bear the expense of their respective attorneys', experts', and witness fees, regardless of which party prevails in the arbitration. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16 as amended. The arbitrator shall apply applicable substantive law consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized at law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. This Arbitration Provision shall survive repayment of your loan or extension of credit and termination of your Account. If any portion of this Arbitration Provision is deemed invalid or unenforceable under the FAA, it shall not invalidate the remaining portions of this Arbitration Provision.

7.15 Enforceability

If any provision of this Agreement is determined to be void or unenforceable under any applicable law, rule, or regulation, all other provisions of this Agreement will remain valid and enforceable. Our failure to exercise any of our rights under this Agreement will not be deemed to waive our rights to exercise such rights in the future.

7.16 Limited Damages

In the event that either you or we obtain a judgment, verdict, arbitration award or any other legally binding decision against the other, neither of us shall in no event be liable to the other for indirect, incidental, consequential, punitive or any other type or form of damages other than direct monetary compensatory damages and damages mandated by applicable law.

7.17 Notice

You agree that we may send any agreement, notice or other document or information ("Notice") concerning your Account to the most recent address you have provided us that is shown in our Account records. Any Notice sent to such address shall be considered valid for all purposes. Notice to any Liable Party is considered to be Notice to all Liable Parties. Any required or permitted notice that you send us must be sent to the appropriate address as specified in this Agreement.

7.18 Headings

Section headings contained in this Agreement are not a part hereof and shall not be deemed to expand or limit its terms.

7.19 No Waiver

We may elect not to exercise any right(s) we have under your Cardmember Agreement (as amended) without waiving our ability to exercise such right(s) in the future.

SECTION 8 - YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

NOTIFY US IN CASE OF ERRORS OR QUESTIONS ABOUT YOUR BILL

If you think your bill is wrong, or if you need more information about a transaction on your bill, you can call or write us on a separate sheet at the phone number or address shown on your statement as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and Account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are unsure of.

If you have authorized us to pay your Credit Card bill automatically from your savings or checking Account, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us three business days before the automatic payment is scheduled to occur.

YOUR RIGHTS AND OUR RESPONSIBILITIES AFTER WE RECEIVE YOUR WRITTEN NOTICE

We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including FINANCE CHARGES, and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charge related to any questioned amount. If we didn't make a mistake, you may have to pay FINANCE CHARGES, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten days telling us that you still refuse to pay, we must tell anyone to whom we furnished credit information about you that you have a question about your bill. And we must tell you the name of anyone to whom we gave this information. We must tell anyone we report to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first $50 of the questioned amount, even if your bill was correct.

SPECIAL RULE FOR CREDIT CARD PURCHASES

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

(a) You must have made the purchase in your home state or, if not within your home state, within 100 miles of your current mailing address; and

(b) The purchase price must have been more than $50.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

CARDMEMBER AGREEMENT KEY TERMS ADDENDUM

The following key terms apply to your Account. Please read the entire Cardmember Agreement together with this Addendum for a complete explanation of all terms and conditions applicable to your Account. If there is any discrepancy between your Cardmember Agreement and this Addendum, this Addendum shall control. Capitalized terms used in this Addendum and not otherwise defined are defined in your Cardmember Agreement. We recommend that you keep your Cardmember Agreement and this Addendum in a safe place so that you may refer to it in the future.

1. Interest Rates:

Balance Transfers:
At our discretion, you may be offered Balance Transfer opportunities. Balance Transfers are at the Cash Rate (including the Cash Penalty Rate) in effect on your Account.

FOR PURCHASES:
- Daily Periodic Rate: 0.05545%
- Annual Percentage Rate: 20.24%
- Margin: 13.49%

Minimum Rate
- Daily Periodic Rate: 0.05477%
- Annual Percentage Rate: 19.99%

Maximum Rate
- Daily Periodic Rate: 0.08216%
- Annual Percentage Rate: 29.99%

Penalty Rate
- Daily Periodic Rate: 0.07189%
- Annual Percentage Rate: 26.24%
- Margin: 19.49%

FOR CASH TRANSACTIONS:
- Daily Periodic Rate: 0.07189%
- Annual Percentage Rate: 26.24%
- Margin: 19.49%

Minimum Rate
- Daily Periodic Rate: 0.07121%
- Annual Percentage Rate: 25.99%

Maximum Rate
- Daily Periodic Rate: 0.08216%
- Annual Percentage Rate: 29.99%

Penalty Rate
- Daily Periodic Rate: 0.08216%
- Annual Percentage Rate: 29.99%
- Margin: 23.49%

SEE SECTION 3 OF YOUR CARDMEMBER AGREEMENT FOR VARIABLE RATE INFORMATION.

2. Finance Charge:
Your account is subject to a minimum monthly FINANCE CHARGE of $2.00 if any FINANCE CHARGES accrue in that month.

3. Cash Transaction Fee:
For each ATM transaction, non-promotional Balance Transfer or Convenience Check transaction, when the transaction is for $100 or less: $5.
All other Cash Transactions: The greater of 4% of the amount of Cash Transaction or $15.

4. Balance Transfer Fee:
The fee for each Balance Transfer is 3% of the amount of the transaction. This fee is a FINANCE CHARGE and will increase the APR appearing on the monthly statement in which the Balance Transfer is posted to your Account.

5. Annual Fee: $0

6. Late Fee: $39

7. Over Limit Fee: $39

8. Return Payment Fee: $35

9. Returned Convenience Check Fee: $15

10. Foreign Currency Fee: 2.00%

11. Minimum Payment Due:
Your Minimum Payment each month is equal to any past due amounts appearing on your Statement plus the greater of: (a) the sum of i) your billed interest, ii) 1% of the "new balance" shown on your monthly statement, and iii) any overlimit fee charged that month; (b) 2.00% of the "new balance" shown on your monthly statement; or (c) $15. If your new balance is less than $15, you must pay that balance in full.

This Account is issued by Direct Merchants Credit Card Bank, N.A.

SAUL H. CATALAN and MIA MORRIS, Plaintiffs-Appellants, v. GMAC MORTGAGE CORP., Defendant-Appellee.

No. 09-2182

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

629 F.3d 676; 2011 U.S. App. LEXIS 574

February 12, 2010, Argued
January 10, 2011, Decided

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 05 C 6920--George W. Lindberg, Judge.
Catalan v. RBC Mortg. Co., 2009 U.S. Dist. LEXIS 84339 (N.D. Ill., Sept. 16, 2009)

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For GMAC MORTGAGE CORPORATION, Defendant - Appellee: Thomas J. Cunningham, Attorney, Simon A. Fleischmann, Attorney, LOCKE LORD BISSELL & LIDDELL LLP, Chicago, IL.

JUDGES: Before EASTERBROOK, Chief Judge, HAMILTON, Circuit Judge, and SPRINGMANN, District Judge. *

* Hon. Theresa L. Springmann of the Northern District of Indiana, sitting by designation.

OPINION BY: HAMILTON

OPINION

[*680] HAMILTON, Circuit Judge. Plaintiffs Saul H. Catalan and Mia Morris sued defendants RBC Mortgage Company and GMAC Mortgage Company under the federal Real Estate Settlement Procedures Act ("RESPA"), *12 U.S.C. § 2601, et seq.*, and under Illinois law for gross negligence, breach of contract, and willful and wanton negligence. The district court dismissed the plaintiffs' gross negligence claim as merely duplicating the willful and wanton negligence claim. The court granted summary judgment to GMAC Mortgage on the plaintiffs' RESPA, breach of contract, and remaining negligence claims. The plaintiffs [**2] appeal those decisions. We reverse the grant of summary judgment for GMAC Mortgage on the plaintiffs' RESPA and breach of contract claims, and we affirm summary judgment on their negligence claims. [1]

1 Plaintiffs' claims against RBC proceeded to trial. The jury found in favor of the plaintiffs on their RESPA and negligence claims, awarding them $1,100 and $10,000 for those claims, respectively. The jury found for RBC on the plaintiffs' breach of contract claim. The plaintiffs' claims against RBC are not part of this appeal, and RBC is no longer a party.

I. *The Real Estate Settlement Practices Act*

Before digging into the details of plaintiffs' maddening troubles with their mortgage, we provide a sketch of the relevant RESPA requirements. RESPA is a consumer protection statute that regulates the real estate

settlement process, including servicing of loans and assignment of those loans. See *12 U.S.C. § 2601* (Congressional findings). The statute imposes a number of duties on lenders and loan servicers. Most relevant here are the requirements that borrowers be given notice by both transferor and transferee when their loan is transferred to a new lender or servicer, *12 U.S.C. §§ 2605(b)* and *(c)*, [**3] and that loan servicers respond promptly to borrowers' written requests for information, *§ 2605(e)*.

The details of the requirement for responding to written requests will become relevant here. First, it takes a "qualified written request" to trigger the loan servicer's duties under RESPA to acknowledge and respond. The statute defines a qualified written request as written correspondence (other than notices on a payment coupon or similar documents) from the borrower or her agent that requests information or states reasons for the borrower's belief that the account is in error. *12 U.S.C. § 2605(e)(1)(B)*. To qualify, the written request must also include the name and account of the borrower or must enable the servicer to identify them. *Id*.

Within 60 days after receiving a qualified written request, the servicer must take one of three actions: either (1) make appropriate corrections to the borrower's account and notify the borrower in writing of the corrections; (2) investigate the borrower's account and provide the borrower with a written clarification as to why the servicer believes the borrower's account to be correct; or (3) investigate the borrower's account and either provide the [**4] requested information or provide an explanation as to why the requested information is unavailable. See *12 U.S.C. §§ 2605(e)(2)(A)*, *(B)*, and *(C)*. No matter which action the servicer takes, the servicer must provide a name and telephone number of a representative of the servicer who can assist the borrower. See *id*. During the 60-day period after a servicer receives a qualified written request relating [*681] to a dispute regarding the borrower's payments, "a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency." *12 U.S.C. § 2605(e)(3)*.

RESPA provides for a private right of action for violations of its requirements. *12 U.S.C. § 2605(f)*. The provision for a private right of action includes a "safe harbor" provision, which provides in relevant part that a transferee service provider like GMAC Mortgage shall not be liable for a violation of *section 2605* if, "within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of [**5] written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid." *12 U.S.C. § 2605(f)(4)*.

II. *The Facts*

Because the plaintiffs appeal the district court's grant of summary judgment, we review the trial court's decision *de novo*, viewing all evidence in the light most favorable to and drawing all reasonable inferences for the plaintiffs, as the non-moving parties. See *Fed. R. Civ. P. 56(c)*; *Hukic v. Aurora Loan Services, 588 F.3d 420, 432 (7th Cir. 2009)*; *Burnett v. LFW Inc., 472 F.3d 471, 477 (7th Cir. 2006)*. We trace the plaintiffs' problems with their original mortgage servicer, then with the transfer of the mortgage to GMAC Mortgage, as relevant to plaintiffs' claims that GMAC Mortgage violated RESPA by failing to provide notice of the transfer and by failing to respond to their qualified written requests, and by failing to correct erroneous information it had given to credit-reporting services.

Plaintiffs' Problems with RBC Mortgage: In June 2003, [**6] the plaintiffs bought a home in Matteson, Illinois. They obtained a Federal Housing Administration loan by executing a mortgage and note in favor of RBC. At the outset, theirs was a 30-year fixed loan at 5.5% annual interest with a monthly payment of $1,598 that included principal, interest, and escrow.

Although the plaintiffs' first payment was not due until August 1, 2003, RBC incorrectly entered the plaintiffs' mortgage into its computer accounting system to show a first payment due date of July 1, 2003. Because of this error, when the plaintiffs made their first payment they were already behind--at least according to RBC's system. By the time the plaintiffs made their second payment, RBC had determined that their loan was in default, and it increased their monthly payment amount to $1,787. The plaintiffs, at first unaware of the increase, and then, without receiving an explanation of the increase, continued to send their mortgage payments for

the original amount. RBC returned those checks uncashed.

RBC filed for foreclosure on the plaintiffs' home on February 26, 2004. In May and June, the plaintiffs provided checks to RBC in an attempt to make up for the uncashed payments. However, [**7] the plaintiffs' May 2004 payment was still due even after this reconciliation of their account. RBC did not provide the plaintiffs with an account statement or otherwise inform them of that delinquency. Then, when the plaintiffs sent their August 2004 payment to RBC, RBC did not apply that payment to the loan.

GMAC Mortgage Steps In: In September 2004, RBC assigned the plaintiffs' loan to GMAC Mortgage. When GMAC Mortgage assumed the plaintiffs' mortgage, it [*682] did not send the plaintiffs a letter notifying them of the transfer. Plaintiffs, not knowing that GMAC Mortgage was their new mortgage holder, sent their September payment to RBC. RBC did not cash it but forwarded it to GMAC Mortgage.

At some point in this period, GMAC Mortgage sent the plaintiffs an account statement dated September 15, 2004, which they received. That account statement was based on information that GMAC Mortgage had received from RBC. It showed that the plaintiffs' account was past due in the amount of $7,990 and that GMAC Mortgage had already assessed late fees totaling $255. On September 23, 2004, GMAC Mortgage sent the plaintiffs a letter demanding proof of their homeowners' insurance coverage. Then, on September [**8] 27th, GMAC Mortgage returned the plaintiffs' September payment, which they had sent to RBC. The letter returning the payment informed the plaintiffs that the payment represented only one of five payments that were then due (from May to September), and provided the plaintiffs with a phone number.

On October 6, 2004, the plaintiffs wrote to the United States Department of Housing and Urban Development ("HUD") detailing what they understandably described as their "nightmare" with RBC. They explained:

> Despite admissions by RBC that they made errors, they feel no obligation to correct the grievance [sic] wrongs by supplying information necessary to bring closure to this situation, and they have cashed checks as if there was never any question raised or breach of obligation on their part. This is the same company that as of a few weeks ago was in hot pursuit of our home by means of foreclosure and had for months refused to accept our payments. The last message we received from RBC stated that there were updates on our account yet they have continually refused to operate in a professional manner by providing a written explanation that would offer us clarity and accountability on their part.

The [**9] letter provided a detailed outline of the plaintiffs' account history with RBC, including the fact that their first payment had been due in August 2003. It also recounted that RBC did not cash their August or September 2004 payments, and that on October 4th they received a letter from GMAC Mortgage returning their September 2004 payment and informing them that the payment was not enough to cover the past due balance because five payments were then due. The plaintiffs wrote: "GMAC claims that they took over our mortgage in May 04. No information to that effect had ever previously been provided by RBC or GMAC." Finally, their letter asked several questions about RBC's and GMAC Mortgage's servicing practices, among them:

> o Why did [RBC] cash checks in July for an account that they did not hold and according to GMAC had purportedly been sold in May?
>
> o What happened to the funds that were taken in July?
>
> o Why were previous checks not forwarded to the new company?
>
> o Why would GMAC just now initiate contact?
>
> o Why would GMAC purchase a "nonperforming" mortgage?

The plaintiffs sent their letter to HUD, which forwarded it to GMAC Mortgage, which received it on October 14, 2004.

In the meantime, on [**10] October 7th and again on October 15th, the plaintiffs wrote to GMAC Mortgage

directly, requesting information concerning the transfer of their loan, including the date of the transfer, the amount transferred, confirmation of their monthly payment amount, and the payment address. The October 15th letter [*683] further sought "any information available about this account."

On October 13th, in response to the plaintiffs' October 7th letter, GMAC Mortgage advised the plaintiffs that their account had been transferred on September 1, 2004 and that a monthly payment of $1,661 had been due on May 1st. The response also listed plaintiffs' then-current principal balance. Then, under separate cover, when GMAC Mortgage did not receive the plaintiffs' October 2004 payment, the company demanded $9,588 for payments on the plaintiffs' account since May 2004, plus $255 in late fees. In that letter dated October 15, 2004, GMAC Mortgage informed the plaintiffs that they were in default and stated that they could cure by paying the total amount due within 30 days. Days later on October 20th, GMAC sent an odd letter informing plaintiffs that their monthly payment was $1,598, their "next payment due date" was [**11] May 1, 2004, and that there was an escrow shortage in their account of $7,022.

On October 21, 2004, GMAC Mortgage responded to the letter that it had received from HUD in a letter to HUD captioned "Re: Saul Catalan and Mia Morris . . . Payment Dispute." GMAC Mortgage informed HUD that there was no indication that the plaintiffs' funds were missing or misapplied based on the records that GMAC Mortgage had received from RBC. GMAC Mortgage also told HUD that those records reflected that the plaintiffs' first payment had been due in July 2003.

GMAC Mortgage sent a letter to the plaintiffs on October 25, 2004 to advise them that their mortgage had "reached an advanced stage of delinquency" and to offer alternatives, such as a repayment plan, loan modification, or deed in lieu of foreclosure, to avoid a completed foreclosure.

On November 15, 2004, the plaintiffs sent a letter to GMAC Mortgage, describing their history with RBC and enclosing a check for $11,186 to cover seven payments of $1,598. In that letter they informed GMAC Mortgage that "RBC received payments from us that were not applied promptly, other payments that were never applied and they never provided a clear explanation for their [**12] refusal to accept our payments, an action which resulted in our home being wrongfully placed in foreclosure." They also set forth their "expectations" for how their account would be handled, advising GMAC Mortgage that they expected that "any request from us for information will be provided," "any changes to our account or information that requires correspondence will be forwarded to us in writing," and "all payments will be processed in a timely manner." Finally, they advised GMAC Mortgage that "if you have any questions regarding this account I would appreciate them being asked in writing from the standpoint that documentation is clarity. It is an unsafe approach to take the word of RBC as fact because as a company they have proven to me that fact for them is evasive." [2] On November 24, 2004, GMAC Mortgage commenced foreclosure proceedings. By December 2004, GMAC Mortgage was reporting the plaintiffs' loan as delinquent to the credit bureaus.

2 GMAC Mortgage suggests that the plaintiffs' insistence on communication in writing equates to a failure to cooperate or to communicate with GMAC Mortgage. Given the history of the debacle, plaintiffs' insistence seems at least reasonably prudent [**13] and should not be faulted. As will be seen, the plaintiffs' insistence likely saved their claims under RESPA.

On December 2, 2004, the plaintiffs sent GMAC Mortgage another letter to request that GMAC Mortgage apply the $11,186 payment to their account, explaining that "it becomes a major disruption to have [*684] large sums of money unaccounted for." They wrote again on December 9th, again asking GMAC Mortgage to process the $11,186 check and requesting "quick resolution of whatever issues remain since the transfer of this account to your company by processing and updating this and all future payments received immediately." The plaintiffs sent their December mortgage payment on the same date under separate cover. On December 13th, GMAC Mortgage returned the $11,186 check, explaining that the funds did not represent the full amount required to bring the plaintiffs' account current and advising the plaintiffs that their account had been sent to an attorney to begin foreclosure proceedings. It then responded to the plaintiffs' December 2nd and 9th letters on December 23rd and 30th. In each of those letters, it stated, "thank you for your inquiry on your account. We are currently processing your [**14] request and will respond in writing within 20 days." The record does not contain

these promised follow-up responses.

The plaintiffs then wrote GMAC Mortgage's outside foreclosure counsel a letter dated December 17th stating that they disputed GMAC Mortgage's attempt to collect on their account and that they had sent everything necessary to bring their account current. They also requested an explanation for why, according to the letter they had received from foreclosure counsel, the balance of their account had been increased by $19,200 between September and November 2004. That same day (and 23 days after it had filed for foreclosure), GMAC Mortgage dismissed the foreclosure proceedings. Then, inexplicably, on December 22nd, GMAC Mortgage sent another letter to the plaintiffs advising them that their account had been transferred to GMAC Mortgage's attorney for foreclosure proceedings and returning their December 2004 payment!

On January 25, 2005, HUD again intervened, requesting that, upon receipt of ten mortgage payments from the plaintiffs (for the months of May 2004 to February 2005), GMAC Mortgage reinstate the plaintiffs' loan as current and waive any and all extra charges and attorney [**15] fees. The plaintiffs sent a check for $15,980 to GMAC Mortgage on February 3, 2005. That amount represented ten mortgage payments and included no account fees or costs, and thus amounted to what the plaintiffs would have otherwise paid in regular mortgage payments over ten months. Once it had received the plaintiffs' check, GMAC Mortgage brought their account current without charging them penalties or additional interest.

In April 2005, HUD contacted GMAC Mortgage on the plaintiffs' behalf to request that GMAC Mortgage stop reporting them as delinquent to the credit bureaus. On May 4, 2005, GMAC Mortgage complied, and in August 2005 it sent the plaintiffs a letter claiming that its records indicated that it had not reported any derogatory credit information on the plaintiffs' account from September 2004 through July 2005.

The District Court Proceedings: GMAC Mortgage moved for summary judgment on all of the plaintiffs' claims. Without reaching the merits of the plaintiffs' RESPA claims, the court found that GMAC Mortgage qualified for RESPA's safe harbor provision and was therefore not liable for any violations under that statute. The court dismissed the plaintiffs' gross negligence [**16] claim, finding that it duplicated the plaintiffs' willful-and-wanton negligence claim. The court granted summary judgment for GMAC Mortgage on the plaintiffs' willful-and-wanton negligence claim after finding that GMAC Mortgage promptly corrected the errors relating to the plaintiffs' account when it received notice [*685] of the plaintiffs' payment dispute, so that its conduct could not be deemed willful or wanton. The court found that the plaintiffs could not recover for breach of contract because the plaintiffs had purposely withheld their October 2004 mortgage payment and were themselves in breach.

III. *Plaintiffs' RESPA Claims*

Plaintiffs contend that GMAC Mortgage violated RESPA in a number of ways, including failing to give notice of the transfer of their mortgage, failing to respond promptly to qualified written requests for information, and failing to correct wrong information provided to credit-reporting agencies. The district court did not reach the merits of those claims because it found that GMAC Mortgage was entitled to the protection of the RESPA safe harbor provision in *12 U.S.C. § 2605(f)(4)*. We address first the safe harbor provision and then the substantive claims.

A. *RESPA's* [**17] *"Safe Harbor"*

Although RESPA provides a private right of action for violations of its requirements, it also includes a nonliability or "safe harbor" provision, which provides:

> A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

12 U.S.C. § 2605(f)(4).

GMAC Mortgage is not entitled to the protection of the safe harbor in *section 2605(f)(4)*. Although the parties have debated other requirements in the safe harbor provision, GMAC Mortgage did not argue, and nothing in the record shows, that GMAC Mortgage "notif[ied] the person concerned of the error," as required to invoke the protection. [**18] On this basis alone, GMAC Mortgage was not eligible for protection in the RESPA safe harbor. The district court's finding otherwise was error.

In the district court, GMAC Mortgage argued that it was protected by the safe harbor because, when all was said and done, the plaintiffs did not pay any money in excess of what they otherwise would have paid, and GMAC Mortgage corrected all errors in the plaintiffs' account within 60 days after receiving the plaintiffs' December 17, 2004 letter, and before the plaintiffs filed suit. Under this view of the statute, the defendant must have corrected the error only before plaintiffs filed suit, even if the defendant did not discover and correct the error before receiving written notice of it from the borrower. Plaintiffs contend that the safe harbor provision requires the defendant to have corrected the error both before suit was filed and before the defendant received written notice of the error from the borrower. Because GMAC Mortgage's failure to provide notice keeps it out of the safe harbor in this case, we express no view on the district court's reasoning on this point.

B. *The "Qualified Written Request" Issue*

The plaintiffs argue that the letters [**19] they sent on October 6, November 15, December 2, December 9 and December [*686] 17 were qualified written requests. They contend that GMAC Mortgage violated RESPA by reporting their account as delinquent to the credit bureaus within the 60-day window after each of those qualified written requests was received, and that GMAC Mortgage also failed to investigate properly or to take corrective action in response to the October 6, November 15, December 2 and December 9 qualified written requests.

RESPA defines a qualified written request as follows:

> For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that--
>
> (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
>
> (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1)(B).

GMAC Mortgage argues that the letters in question were not qualified written requests because the letters "do not identify [**20] an error in plaintiffs' account or provide any statement of the reasons plaintiffs believe their account was in error." GMAC Mortgage Br. 16. [3] Relying on several district court decisions, GMAC Mortgage contends that letters that "merely dispute a debt or request information are not 'qualified written requests,' and do not trigger the obligations under *section 2605*." *Id., citing Moore v. Federal Deposit Ins. Corp., 2009 U.S. Dist. LEXIS 110979, 2009 WL 4405538, at *4 (N.D. Ill. Nov. 30, 2009)* (plaintiffs' letters requesting information regarding reinstatement of a defaulted mortgage loan and the amounts of delinquent mortgage payments due did not relate to "servicing" and thus were not qualified written requests), *Champlaie v. BAC Home Loans Servicing, LP, 706 F. Supp. 2d 1029, 2009 WL 3429622, at *7 (E.D. Cal. 2009)* (plaintiffs' claim that lender failed to respond in violation of RESPA was dismissed because plaintiff did not allege that his written request for rescission of the loan related to the servicing of his loan and thus his communication was not a qualified written request), *Keen v. American Home Mortgage Servicing, 664 F. Supp. 2d 1086, 1097 (E.D. Cal. 2009)* (plaintiff's demand to cancel trustee's sale of home and [**21] for rescission disputed the validity of the loan but did not dispute the servicing of the loan and was not a qualified written request), *Pettie v. Saxon Mortgage Services, 2009 U.S. Dist. LEXIS 41496, 2009 WL 1325947, at *2 (W.D. Wash. May 12, 2009)* (plaintiffs' "inquiry letter" disputing amount owed and requesting 26 sets of documents did not offer reasons for their dispute and thus was not a qualified written request under *section 2605(e)(1)(B)*); *MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885, 900-01 (N.D. Ill. 2000)* (letter seeking information about the validity of a loan and mortgage documents but making no inquiry as to the

account balance or credit for periodic payments did not relate to "servicing" and was thus not a qualified written request). By GMAC Mortgage's argument, a lender would have no obligation to respond to a borrower who expressed her belief that her account was in error but was unable to provide specific reasons for that belief, an untenable result under the language of the statute.

> 3 Although GMAC Mortgage conducted an investigation and corrected the plaintiffs' account in response to their December 17th letter, it disputes whether that letter was a qualified written request under the technical [**22] requirements of the statute. GMAC Mortgage Br. 17.

[*687] RESPA does not require any magic language before a servicer must construe a written communication from a borrower as a qualified written request and respond accordingly. The language of the provision is broad and clear. To be a qualified written request, a written correspondence must reasonably identify the borrower and account and must "include a statement of the reasons for the belief of the borrower, *to the extent applicable*, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." *12 U.S.C. § 2605(e)(1)(B)* (emphasis added). Any reasonably stated written request for account information can be a qualified written request. To the extent that a borrower is able to provide reasons for a belief that the account is in error, the borrower should provide them, but any request for information made with sufficient detail is enough under RESPA to be a qualified written request and thus to trigger the servicer's obligations to respond. See *12 U.S.C. §§ 2605(e)(1)(A), (e)(2),* and *(e)(3)*; see also *Garcia v. Wachovia Mortgage Corp., 676 F. Supp. 2d 895, 909 (C.D. Cal. 2009)* [**23] (when construed in light most favorable to borrower, letter was a qualified written request even though it did not contain a statement of reasons for borrower's belief of error; letter provided sufficient detail regarding "other information" being sought); *Rawlings v. Dovenmuehle Mortgage, Inc., 64 F. Supp. 2d 1156, 1162 (M.D. Ala. 1999)* (plaintiffs' claims survived summary judgment where court found that descriptions of payments made to a prior servicer sufficiently stated plaintiffs' reasons for their belief that their account was in error and were qualified written requests). We turn to the disputed letters.

1. *Letter of October 6, 2004*

The plaintiffs' October 6th letter included content that was clearly sufficient to be a qualified written request. The three-page letter described in great detail the difficulties the plaintiffs encountered at the hands of RBC. The letter recounted that their first payment was due in August 2003, but that RBC failed to process the plaintiffs' August payment in a timely manner, and that a discrepancy arose between the plaintiffs and RBC as to whether the plaintiffs had made their payments or not. The letter described how RBC raised the plaintiffs' monthly [**24] payment amount without informing them of the change, and that each of the plaintiffs' attempts to communicate with RBC was rebuffed until RBC at last acknowledged its error and dismissed its foreclosure action against the plaintiffs in July 2004. The letter then reported that RBC did not cash the plaintiffs' August and September 2004 payments, but that GMAC Mortgage returned the plaintiffs' September 2004 payment uncashed, even though that payment had been sent to RBC, and that GMAC Mortgage informed the plaintiffs that their September 2004 payment was insufficient to cover the amount they then owed on their mortgage account, which, according to GMAC Mortgage, was five months overdue. The plaintiffs, naturally, wrote this description of the history of their loan's servicing from their perspective, and without access to the (incorrect) information that GMAC Mortgage had acquired from RBC. But the letter was certainly a thorough statement of "the reasons for the belief of the borrower, to the extent applicable, that the account is in error" under *section 2605(e)(1)(B)*.

The letter then continued, requesting very specific information. Plaintiffs asked that RBC explain why it had cashed [**25] the checks they had sent in July if, as they had been told by GMAC Mortgage, RBC had sold their account to GMAC Mortgage in May. The letter also sought an accounting of the funds plaintiffs had paid in July and sought information related to the transfer--specifically, [*688] why RBC had not forwarded their checks to GMAC Mortgage, why GMAC Mortgage had delayed initiating contact with them after purchasing their account, and why GMAC Mortgage would purchase a "nonperforming" mortgage. Some of this information might have been "unavailable or [unable] to be obtained by the servicer" under *section 2605(e)(2)(C)*, but whether the information the plaintiffs sought was unavailable or whether their questions were unanNo. swerable does not negate the fact that they had "provide[d] sufficient detail to the servicer regarding

other information sought by the borrower" under *section 2605(e)(1)(B)*. Their October 6th letter was a qualified written request, and GMAC Mortgage was obligated to respond.

Of course, the plaintiffs did not send their October 6, 2004 letter directly to GMAC Mortgage. They sent it to HUD, which forwarded it to GMAC Mortgage. The statute requires that qualified written requests be received [**26] "from the borrower (or an agent of the borrower)." *12 U.S.C. § 2605(e)(1)(A)*. We do not have difficulty interpreting that requirement, under the circumstances of this case, to include HUD's intercession on the plaintiffs' behalf. RESPA is a consumer protection statute, and on summary judgment we must view the facts in the plaintiffs' favor. Here, the record amply demonstrates that the plaintiffs had exhausted every reasonable avenue in their communications with RBC, yet in the fall of 2004, they were back in the same nightmare with a different company. Again they were being accused of not paying their mortgage, and again they were being threatened with foreclosure. Their confusion and desperation at this point were palpable, and they reasonably sought help from HUD. Besides, when it received the plaintiffs' letter, GMAC Mortgage tacitly acknowledged that the letter was a request for information and raised a dispute with their account. After all, in its response to HUD, GMAC Mortgage provided a detailed accounting of the history and transfer of the plaintiffs' mortgage and captioned its letter as a response to the plaintiffs' "payment dispute." After the months the plaintiffs had spent [**27] writing to and getting nowhere with RBC, and due to the fact that GMAC Mortgage received the plaintiffs' October 6th letter and treated it as a payment dispute and as a request for information, the fact that GMAC Mortgage received the letter from HUD and not directly from the plaintiffs does not prevent the plaintiffs' October 6th letter from being a qualified written request under RESPA.

2. *Letter of November 15, 2004*

In the plaintiffs' November 15th letter, they explained their understanding that, based on information they had received from GMAC Mortgage, there were seven payments due on their mortgage of $1,598 each, for a total of $11,186. A check for that amount was enclosed with the letter. The plaintiffs also set forth their expectations for how GMAC Mortgage would handle their account going forward, including that GMAC Mortgage would provide any information they request, that any requested information and any changes to their account would be in writing, and that their mortgage payments would be applied in a timely manner. However, the plaintiffs did not raise any disputes or errors in their account, and their "expectations" were not requests for information. We cannot construe [**28] the plaintiffs' November 15th letter as a qualified written request under RESPA.

3. *Letter of December 2, 2004*

In the plaintiffs' letter of December 2nd, they explained that they sent a check to GMAC Mortgage for $11,186 on November 26, 2004, which GMAC Mortgage had not yet cashed. Their letter requested [*689] that GMAC Mortgage cash their check and apply the funds to their account because "it becomes a major disruption to have large sums of money unaccounted for." Although this letter certainly pertained to the servicing of their account, the plaintiffs were not requesting information and were not stating a belief that their account was in error. The plaintiffs were requesting that GMAC Mortgage process their payment more quickly, but in and of itself, that request does not seem to be based on any belief that an underlying error was causing the delay. The plaintiffs' December 2nd letter was not a qualified written request under RESPA.

4. *Letter of December 9, 2004*

The plaintiffs' letter of December 9th was similar to their letter of December 2nd. They recounted how GMAC Mortgage returned their August and September 2004 mortgage payments and how they sent a check for $11,186 in response to GMAC [**29] Mortgage's statement that $9,843 was necessary to bring the plaintiffs' account current. They stated that GMAC Mortgage's "refusal to process this check when only having an association with the account for two months raises questions in our minds about your motivation for acquiring our account," and that:

> the chaotic state that existed when you acquired the account was a direct result of the extreme mismanagement of our account by RBC. However your actions also give me pause to wonder if your interest is more in acquiring our home than servicing the account. Additionally, it is extremely questionable as to why your company would assume an account that

> appeared to be in as severe disarray as the one received from RBC.

The plaintiffs then asked for "quick resolution of whatever issues remain since the transfer of this account to your company by processing this and all future payments immediately." Although the plaintiffs were understandably frustrated that GMAC Mortgage had not yet cashed their $11,186 check and applied that amount to their account, we do not interpret the plaintiffs' December 2nd letter as a statement of their belief that GMAC Mortgage's servicing of their account was [**30] in error. Again, their letter expressed their desire that GMAC Mortgage process their payment more quickly, which is not a statement of error or a request for information. They also hinted at "issues" remaining since GMAC Mortgage acquired their account from RBC, but we cannot reasonably construe the plaintiffs' use of the word "issues" as a statement of error, or as a request for information. The plaintiffs' December 9th letter was not a qualified written request.

5. *Letter of December 17, 2004*

The plaintiff's December 17th letter was unequivocally a qualified written request under RESPA. The first sentence of the letter said: "I am disputing your attempt to collect on the above referenced account." The plaintiffs stated that they had sent GMAC Mortgage the full amount required to bring the account current, but by then GMAC Mortgage had returned their $11,186 check and had advised them that it was seeking foreclosure against them. Against this backdrop, the plaintiffs' statement that GMAC Mortgage had "refused to process checks to alleviate any unnecessary actions or undue harm" was a statement of their belief that their account was in error. [4] They also very clearly requested [*690] specific [**31] information regarding their account--namely, an explanation of how their account balance increased from $229,098 to $248,298 over a two-month time span. The December 17th was also a qualified written request.

> 4 The context explains why this December 17th letter was a qualified written request and the plaintiffs' December 2nd and 9th letters were not, even though all three expressed the plaintiffs' belief that GMAC Mortgage had failed to process their payments in a timely manner.

Having found that the plaintiffs' October 6th and December 17th letters were qualified written requests under RESPA, we leave it to the district court to resolve on remand whether GMAC Mortgage satisfied its obligations to investigate and respond under *12 U.S.C. §§ 2605(e)(1)(A)* and *2605(e)(2)* and to refrain from reporting the plaintiffs as delinquent to the credit reporting bureaus under *12 U.S.C. § 2605(e)(3)*. On remand, the district court will also need to consider the plaintiffs' claims that GMAC Mortgage violated RESPA by not sending them an appropriate notice that their loan had been transferred and by charging them late fees within 60 days of the transfer. See *12 U.S.C. § 2605(c)* (requiring transferee servicer [**32] to notify the borrower of the transfer within 15 days of the effective date of transfer, with certain exceptions); *12 U.S.C. § 2605(d)* (prohibiting transferee servicer from imposing a late fee if borrower's payment is received by the transferor servicer before the payment due date). Summary judgment for GMAC Mortgage on the plaintiffs' RESPA claims is reversed, and we remand to the district court for further proceedings.

IV. *Common Law Claims*

A. *Breach of Contract*

The plaintiffs also claimed that GMAC Mortgage breached the mortgage-and-note contract when it refused to accept the payments they sent on September 27, 2004 and November 15, 2004. [5] The district court dismissed the plaintiffs' breach of contract claim on summary judgment. The court found that the plaintiffs had purposely withheld their October 2004 payment and that this withholding was itself a breach. We agree with plaintiffs that this was an error.

> 5 On reply, the plaintiffs abandoned their argument that regulations of the Department of Housing and Urban Development were incorporated into their mortgage contract, and that those regulations provided an independent basis for their breach of contract claims. Pl. Reply 6, n. 6.

GMAC [**33] Mortgage does not dispute that it refused the plaintiffs' September 27th and November 15th payments and did not immediately apply those payments to the plaintiffs' debt. It argues instead that its failure to do so did not amount to a breach of the contract. Nothing in the contract required GMAC Mortgage to apply the payments according to any sort of schedule, it argues, and

it attempts to reframe the plaintiffs' breach of contract claim as nothing more than a "gripe" that the payments "were not applied as plaintiffs would have liked," pointing out that in time, all of the plaintiffs' payments were applied properly. GMAC Mortgage Br. 25.

To swallow GMAC Mortgage's argument, we would have to accept, as a matter of law, that a lender is free to refuse a tendered payment and then to hold the borrower responsible for having failed to make the payment. We would have to accept, as a matter of law, that it does not matter if a holder of a promissory note without a specified time period for its own performance performs its obligations under the contract in a *reasonable* time, so long as the party performs its obligations . . . eventually. We do not accept that argument. It is a basic tenet of [**34] contract law, recognized in Illinois, that where no time for performance is specified, the law implies a reasonable time. See *In re Marriage of Tabassum and Younis, 377 Ill. App. 3d 761, 881 N.E.2d* [*691] *396, 408, 317 Ill. Dec. 228 (Ill. App. 2007)*; *Rose v. Mavrakis, 343 Ill. App. 3d 1086, 799 N.E.2d 469, 475, 278 Ill. Dec. 751 (Ill. App. 2003)*; *Meyer v. Marilyn Miglin, Inc., 273 Ill. App. 3d 882, 652 N.E.2d 1233, 1239, 210 Ill. Dec. 257 (Ill. App. 1995)*. Whether or not GMAC Mortgage's delay in applying the plaintiffs' payments was reasonable--especially when GMAC Mortgage was claiming that plaintiffs were in breach by failing to make those same payments-- is an issue of material fact that precludes summary judgment for GMAC Mortgage on the claim.

GMAC Mortgage also argues that its breach should be excused because the plaintiffs breached the contract first when they failed to remit their October 2004 payment. [6] True, another general tenet of contract law is that plaintiffs cannot succeed on a breach of contract claim unless they demonstrate their own performance of the contract's requirements. See *Hukic v. Aurora Loan Services, 588 F.3d 420, 433 (7th Cir. 2009)*; *Solai & Cameron, Inc. v. Plainfield Community Consolidated School Dist. No. 202, 374 Ill. App. 3d 825, 871 N.E.2d 944, 953, 313 Ill. Dec. 217 (Ill. App. 2007)* (" 'under general contract principles, [**35] a material breach of a contract provision by one party may be grounds for releasing the other party from his contractual obligations' "), quoting *Mohanty v. St. John Heart Clinic, S.C., 225 Ill. 2d 52, 866 N.E.2d 85, 95, 310 Ill. Dec. 274 (Ill. 2006)*; *Borys v. Rudd, 207 Ill. App. 3d 610, 566 N.E.2d 310, 315, 152 Ill. Dec. 623 (Ill. App. 1990)* (only material breach of a contract provision will justify non-performance by the other party). The plaintiffs were certainly obligated to make timely payments under the note-and-mortgage contract. But the servicers had their own obligations under the contract, one of which was to provide timely and accurate information about where and to whom those payments should be sent in the event of a transfer. Such notice was also required under RESPA. See *12 U.S.C. §§ 2605(b)* and *(c)*. On these facts, which party breached first is not a question with a clear answer. A reasonable jury could find that the plaintiffs' failure to submit their October 2004 payment in a timely manner was justified by earlier wrongs by RBC Mortgage and GMAC Mortgage.

> 6 GMAC Mortgage also contends that the plaintiffs had tendered some earlier payments to RBC that were returned for insufficient funds. GMAC Mortgage Br. 28, citing GMAC Mortgage Ex. 89, ¶ 3. [**36] It is unclear whether those checks bounced because the plaintiffs had insufficient funds to cover the checks or, as counsel for plaintiffs asserted at oral argument, whether the checks were not processed for some other reason related to RBC's servicing of the plaintiffs' account. We cannot resolve this issue on summary judgment, even if GMAC Mortgage had explained how the plaintiffs' alleged failure to remit payments to RBC would excuse GMAC Mortgage's subsequent breach.

In September 2004, GMAC Mortgage assumed the plaintiffs' mortgage from RBC, but the plaintiffs were not informed of the transfer. Not knowing that GMAC Mortgage was their new mortgage holder, the plaintiffs sent their September payment to RBC. That payment was later returned to the plaintiffs uncashed, not by RBC but by GMAC Mortgage, along with a letter informing them that they owed not one payment but five, relying on inaccurate information from RBC. When, on October 15th, GMAC Mortgage told the plaintiffs that they could bring their account current by paying $9,588, the plaintiffs paid $11,186--a check that GMAC Mortgage again returned, uncashed. (Why GMAC Mortgage did not accept the plaintiffs' September and November [**37] checks as partial payment of the total amount it believed the plaintiffs owed is not explained by the parties and remains a mystery.) A reasonable jury could conclude that the plaintiffs were doing their [*692] best to hold up their end of the bargain--after all, they were not

squandering their uncashed mortgage payments, and in November they were able to send GMAC Mortgage more than it asked for. A jury could also find that plaintiffs' attempts were thwarted, first by RBC's and then by GMAC Mortage's mismanagement of their account. Given the plaintiffs' understandable confusion and frustration with the servicing of their loan in the fall of 2004 and GMAC Mortgage's mixed messages regarding how they might fix the problems, a reasonable jury could conclude that the plaintiffs' failure to submit their October 2004 payment to GMAC Mortgage was excused.

GMAC Mortgage cites our decision in *Hukic*, arguing that *any* misstep by a borrower in performance of the contract absolves a lender from liability for a later breach of the contract. We do not read *Hukic* so broadly. Hukic paid his property taxes and insurance directly, as his mortgage contract permitted him to do so long as he also submitted proof [**38] of payment to his mortgage company (or companies--Hukic's mortgage was also transferred from one servicer to another several times). *Hukic, 588 F.3d at 425*. This he failed to do despite his servicers' repeated requests for the required proof. Because they were unaware that Hukic had already paid those items, the mortgage servicers also paid them, which put Hukic's mortgage account in arrears. Hukic brought suit against the servicers for breach of contract. We upheld summary judgment for the mortgage servicers, finding that Hukic had breached the contract by not informing the companies that he had paid the property taxes and homeowner's insurance, as he was contractually obligated to do. *Id. at 433*. Hukic's failure to comply with his contractual obligations was material and absolved the servicers from liability because it directly caused the servicers' actions that were the basis of his own breach of contract claims. There was no issue in *Hukic* concerning whether or not Hukic's breach was excusable.

Here, even assuming that the plaintiffs delayed in making their October payment as GMAC Mortgage contends, that delay did nothing to exacerbate the already serious problems with GMAC Mortgage's [**39] servicing of the plaintiffs' mortgage account. Their delay in submitting their October 2004 payment, viewed in light of RBC's and GMAC Mortgage's repeated failures to provide them with information regarding their account or to conduct an investigation into the errors in transferring their account, is not comparable to Hukic's stonewalling. A reasonable trier of fact could find that the plaintiffs' failure to remit their October 2004 payment in a timely manner, although a breach of the contract, was excused due to the lenders' earlier breaches and errors and the resulting confusion surrounding their account. Summary judgment for GMAC Mortgage on the plaintiffs' breach of contract claim is reversed.

B. *Negligence*

Finding that GMAC Mortgage promptly corrected the errors in the plaintiffs' account, the district court held that GMAC Mortgage could not be found to have acted willfully or wantonly for its own financial gain, and the court dismissed the plaintiffs' consolidated negligence claims on summary judgment. The plaintiffs appeal. They describe their negligence claims as "willful and wanton negligence or negligence based on willful or wanton misconduct." They argue that, however described, [**40] the issue of willfulness or wantonness is one for a jury and that the trial court erred in dismissing their negligence claims.

Plaintiffs are foreclosed from recovering on their negligence claims under [*693] the economic loss doctrine, which bars tort recovery for purely economic losses based on failure to perform contractual obligations. See *Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443, 448-49, 61 Ill. Dec. 746 (Ill. 1982)*. In *Moorman*, the Illinois Supreme Court found that contract law protects the contracting parties' expectation interests and "provides the proper standard when a qualitative defect is involved," so a contracting party may not "recover for solely economic loss under the tort theories of strict liability, negligence and innocent misrepresentation." *Id. at 448, 453*. Illinois recognizes three general exceptions to the doctrine, which its Supreme Court recently set forth as follows: "(1) where the plaintiff sustained damage, *i.e.*, personal injury or property damage, resulting from a sudden or dangerous occurrence; (2) where the plaintiff's damages are proximately caused by a defendant's intentional, false representation, *i.e.*, fraud; and (3) where the plaintiff's damages are proximately [**41] caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions." *First Midwest Bank, N.A. v. Stewart Title Guaranty Co., 218 Ill. 2d 326, 843 N.E.2d 327, 333-34, 300 Ill. Dec. 69 (Ill. 2006)* (internal citations omitted). These exceptions have in common the existence of an extra-contractual duty between the parties, giving rise to a cause of action in tort separate from one based

on the contract itself.

The plaintiffs do not argue that their negligence claim falls into one of the three recognized exceptions, but they attempt to fashion a duty from the note-and-mortgage contract, from common law, and from GMAC Mortgage's obligations under RESPA. See Pl. Reply Br. 8-15. However, each duty that the plaintiffs identify has its root in the note-and-mortgage contract itself. No matter GMAC Mortgage's failings, the contract itself cannot give rise to an extra-contractual duty without some showing of a fiduciary relationship between the parties. See *Judd v. First Federal Sav.& Loan Ass'n of Indianapolis, 710 F.2d 1237, 1241-42 (7th Cir. 1983)* (holding under Indiana law that mortgage contract did not create a trust requiring the mortgagee [**42] to account to the mortgagors as beneficiaries, nor did it transform a traditional debtor-creditor relationship into a fiduciary relationship); *Ploog v. HomeSide Lending. Inc., 209 F. Supp. 2d 863, 874-75 (N.D. Ill. 2002)* (denying lender's motion to dismiss borrower's negligence claim because lender's duty to manage escrow funds properly could give rise to fiduciary relationship between lender and borrower); *Choi v. Chase Manhattan Mortgage Co., 63 F. Supp. 2d 874, 885 (N.D. Ill. 1999)* (same). The plaintiffs have made no such showing, and the trial court's dismissal of their negligence claims is affirmed.

V. *Damages*

We are not quite done yet. GMAC Mortgage argues in the alternative that even if plaintiffs' claims survive summary judgment on the issues already addressed, their RESPA and breach of contract claims cannot survive because they do not have competent evidence of damages. The district court did not address the question of damages. In doing so now, we conclude that the plaintiffs have raised disputed issues of material fact that bar summary judgment on this basis.

Plaintiffs must come forward with evidence sufficient to support an award of actual damages to pursue their RESPA and [**43] breach of contract claims. RESPA allows for damages in an amount equal to the sum of:

> (A) any actual damages to the borrower as a result of the failure; and
>
> [*694] (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.

12 U.S.C. § 2605(f)(1). The plaintiffs do not contend that GMAC Mortgage engaged in a "pattern or practice" of noncompliance, and so to prevail under RESPA they must prove actual damages. Damages are also an essential element of their surviving breach of contract claim. See *Akinyemi v. JP Morgan Chase Bank, N.A., 391 Ill. App. 3d 334, 908 N.E.2d 163, 169, 330 Ill. Dec. 311 (Ill. App. 2009)* (dismissal of breach of contract claim upheld where plaintiff pled only that he "suffered damages in an amount to be proven at trial"). The plaintiffs contend that, as a result of GMAC Mortgage's conduct, they were denied home-equity lines of credit and a small business loan, and that they suffered emotional distress. [7] Keeping in mind the standard applicable for summary judgment, we review the relevant evidence in the light reasonably most favorable to plaintiffs as the non-moving parties.

> 7 The plaintiffs offer [**44] no response to GMAC Mortgage's argument that their damages claims relating to loans made by plaintiff Morris's mother should be dismissed. Accordingly, that damages theory is not available on remand.

A. *Denials of Credit Applications*

While the issues with plaintiffs' mortgage were still ongoing, they applied for four home equity lines of credit, three with LaSalle Bank and one with Quicken Loans. Plaintiff Morris also applied for a business loan with First American Bank. Each of these applications was denied. In response to the plaintiffs' contentions that they were denied loans and credit lines as a result of GMAC Mortgage's actions, GMAC Mortgage counters that no admissible facts support the plaintiffs' claim that they were denied credit as a result of GMAC Mortgage's report of negative information to the credit bureaus.

A representative of LaSalle Bank testified that the bank's decisions to deny the plaintiffs' applications of December 1, 2004, March 7, 2005, and October 14, 2005 would have been no different regardless of the issues between RBC, GMAC Mortgage, and the plaintiffs. The plaintiffs presented contrary evidence. Morris testified that a LaSalle Bank loan officer told her [**45] that the plaintiffs' home-equity loan applications would not be approved until their foreclosure was removed.

GMAC Mortgage argues that the plaintiffs' evidence about what the LaSalle Bank loan officer said is not sufficient to avoid summary judgment because it is "classic" hearsay. We disagree. Hearsay, of course, is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Fed. R. Evid. 801(c)*. The loan officer's statement to Morris was not hearsay. It was not an assertion of a factual matter but a statement describing the bank's collective intentions: we won't approve a loan until you get the foreclosure issue resolved. There is also an exception to the exclusion of hearsay for "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." *Fed. R. Evid. 803(3)*; see *Citizens Financial Group, Inc. v. Citizens National Bank, 383 F.3d 110, 133 (3d Cir. 2004)* (bank tellers' statements regarding their personal experiences with certain customers were not hearsay because [**46] the tellers described the actions they took with regard to those customers and why); *United States v. Heath, 970 F.2d 1397, 1404 (5th Cir. 1992)* (statement by vice president and loan officer [*695] of bank that he was concerned a loan was a sham was not hearsay; his statement was offered not to show that the loan was a sham but to reveal whether the loan had aroused the witness's suspicions and whether the witness had notified any other bank officer about it); *United States v. Visa U.S.A., Inc., 2007 U.S. Dist. LEXIS 42131, 2007 WL 1741885, at *9 (S.D.N.Y. June 15, 2007)* (statements of bank employees regarding the banks' reasons for dealing with one supplier rather than another were not hearsay). Also, because the loan officer was speaking during the employment relationship concerning matters within the scope of her employment, her statement may be imputed to the bank. Thus, the LaSalle loan officer's statements to plaintiff Morris about the need to resolve the mortgage problem were expressions of the intentions of the bank made by its representative. The statements fall outside the definition of hearsay, and even if they amounted to hearsay, the *Rule 803(3)* hearsay exception would apply. The testimony from Morris about [**47] the bank representative's statements is admissible. The evidence presented by the parties presents a disputed issue of material fact that bars summary judgment on this issue.

The plaintiffs also applied for a fourth home equity loan with Quicken Loans in October 2005. The denial letter informed them that their application was rejected because of their poor credit scores. GMAC Mortgage argues that the denial of this loan cannot be attributed to its conduct because a different lender pulled the plaintiffs' credit report on the same day that Quicken did, and the report relied on by the other lender showed only positive information being reported by GMAC Mortgage on that date. However, without additional evidence to connect the dots, there is no way to conclude beyond reasonable dispute that Quicken did not rely on the negative and erroneous credit information that GMAC Mortgage had reported to the credit bureaus only five months earlier. GMAC Mortgage's unbolstered assumption is speculative and insufficient to support summary judgment.

The plaintiffs support their claim that Morris was denied a business loan through First American Bank due to GMAC Mortgage's actions with an email sent by [**48] a representative of the bank to a First American loan officer expressing concern regarding Morris's "mortgage situation." [8] GMAC Mortgage argues that the representative who sent that email later testified that Morris's application was denied for reasons having nothing to do with GMAC Mortgage. GMAC Mortgage's argument goes to weight, not admissibility, and does not resolve this dispute of material fact. Taken in the light most favorable to the plaintiffs, a reasonable jury could conclude that GMAC Mortgage's actions resulted in plaintiff Morris's business loan application being denied. [9]

8 The plaintiffs also argue that a "former" [**49] First American loan officer told Morris that her business loan was denied due to the foreclosure. Although the plaintiffs disclosed this former First American loan officer to GMAC Mortgage as a potential witness, neither Morris's deposition testimony nor any other evidence in the record supports the plaintiffs' assertion of this statement. Even assuming that the loan officer made this statement to plaintiff Morris, there is no indication that she made the statement during the time she was an agent of the bank, so the statement has not been shown to be admissible.

9 In the long run, of course, simply being denied a loan that would have to be repaid would not be sufficient by itself to prove damages; the plaintiffs would need to show further damages resulting from the loan denial. As the case comes to us, however, those issues are not before us. We focus only on the threshold step of whether the loans

were denied as a result of GMAC Mortgage's actions.

[*696] B. *Emotional Distress Damages*

Regarding the plaintiffs' claim of emotional distress, Plaintiff Morris's medical records indicate that she was under increased stress during this time period because of her "house situation." Also, both of the [**50] plaintiffs testified regarding their emotional distress. Plaintiff Morris explained:

> It is hard to feel like people aren't listening to you, that they're ignoring you. It makes me nervous. It makes me shaky. It depresses me. It concerns me. It embarrasses me.
>
> I can't sleep. I don't like people ringing my doorbell. Any and every way that you should feel in your own home, I don't feel, and only now are we really starting to do things in our house because I was concerned that it wasn't going to be my house. . . . It makes me sad because I've taken time away from my husband and from my child and from myself because I have been consumed with this and dealing with this, and I'm angry about it.
>
> I understand to an extent that [GMAC Mortgage] inherited an issue that was preexisting, but it seemed like [GMAC Mortgage] jumped on the bandwagon and didn't listen, ignored what was said to you.
>
> I get headaches thinking about it and dealing with it. I'm just tired of it.

And, plaintiff Catalan testified:

> If I see my wife upset, I can't let her know that I'm upset. So the whole time that we were going through this process, I had to deal with my wife every day crying and being upset, not being able to take [**51] care of my son the way she was supposed to. And I had to take care of my son . . . try to console my wife, and at the same time, I couldn't let anybody know how I felt about it.
>
> . . . .
>
> Every day I just felt useless. I couldn't do anything to help her. I couldn't resolve the situation. I couldn't fix her problem.
>
> . . . .
>
> It was killing me every day.

GMAC Mortgage concedes that emotional distress damages are available as actual damages under RESPA, at least as a matter of law, but argues that the plaintiffs's evidence is not sufficient to support a damages award because it did not show "extreme" emotional distress and was "self-serving and conclusory." GMAC Mortgage Br. 35, 36. We disagree. Although not extensive, the plaintiffs' testimony is not conclusory. They described their emotional turmoil in reasonable detail and explained what they believe to be the source of that turmoil. Although also "self-serving," most testimony by a party is, *see, e.g., Payne v. Pauley, 337 F.3d 767, 772 (7th Cir. 2003)* (reversing summary judgment), so that characterization does not assist GMAC Mortgage. So long as the statements were made with personal knowledge, which they certainly were, plaintiffs' testimony on [**52] this point is admissible. GMAC Mortgage will be free to argue on remand that any such distress was minor and that other stressors in the plaintiffs' lives were the true causes of their distress, but the plaintiffs' testimony is sufficient to preclude summary judgment for GMAC Mortgage on the question of whether the plaintiffs suffered emotional harm as a result of GMAC Mortgage's actions--and inaction. [10]

> 10 Before leaving the issue of damages, recall that plaintiffs already won a judgment for $11,100 against RBC Mortgage. To the extent that plaintiffs are seeking damages against GMAC Mortgage for any of the same injuries, on remand the district court will need to ensure that plaintiffs do not recover twice for the same injury.

[*697] *Conclusion*

The district court's grant of summary judgment for GMAC Mortgage on the plaintiffs' RESPA claims and breach of contract claim is REVERSED and REMANDED for further proceedings. The court's grant of summary judgment to GMAC Mortgage on the plaintiffs'

negligence claims is AFFIRMED.

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Attorney for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

JON PERZ, an individual, Plaintiff(s), v. MOSSY TOYOTA, a business entity form unknown, and DOES 1-30 inclusive, Defendant(s).	Case No. 37-2007-00066485-CU-BC-CTL NOTICE OF MOTION AND MOTION TO STRIKE ANSWER OF MOSSY TOYOTA , POINTS AND AUTHORITIES, DEC. OF MICHAEL E. LINDSEY, NOTICE OF LODGEMENT, PROPOSED ORDER DATE: August 12, 2011 TIME: 10:30 am PLACE: 330 W. Broadway DEPT.: 73 JUDGE: Hon. Steven R. Denton

TO EACH PARTY AND TO THE ATTORNEY OF RECORD FOR EACH PARTY IN THIS ACTION:

YOU ARE HEREBY NOTIFIED THAT at 10:30 am on August 12, 2011, or as soon thereafter as the matter may be heard, in Department 73 of this Court, located at 330 W. Broadway , San Diego, California, Plaintiff JON PERZ will move this Court for an order striking the answer of Defendant MOSSY TOYOTA, and enter a default. This motion will be made on the ground that Defendant MOSSY TOYOTA's refusal to comply with the Order of the Court is without substantial justification. Plaintiff has made reasonable and good faith efforts to resolve the matter informally, to no avail.

This motion will be decided on the date set forth. After 4:00 p.m. on the day

preceding the hearing date, parties may obtain the ruling on the San Diego Superior Court website, www.sdcourt.ca.gov.

This motion will be based on this Notice, the Memorandum of Points and Authorities filed with the Court, the Declaration of Michael E. Lindsey filed with the Court, the exhibits lodged with the Court, the complete files and records in this action and upon such other documentary or oral evidence which may be presented at the hearing of this motion.

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POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE ANSWER OF MOSSY TOYOTA TO DEFENDANT MOSSY TOYOTA

I. INTRODUCTION

On April 8, 2011, the Court denied plaintiff's Motion to Appoint Arbitrator, based upon Mossy Toyota's prior written agreement to utilize Judicial Arbitration and Mediation Services, and ordered that arbitration commence through "as soon as practicable", through AAA. On April 8, 2011, plaintiff sought to comply with the Order of the Court and contacted Mossy. **Mossy has refused in writing to comply with the Court's April 8, 2011, order**. **Exhibit 8** hereto.

Since this case was compelled to arbitration on August 7, 2007, Mossy has deliberately obstructed and prevented any fair hearing on this matter. It agreed to arbitration before Hon. Robert May of Judicial Arbitration and Mediation Services, actually represented that it was "initiating the arbitration proceeding with JAMS", **Exhibit 1**, then reneged, initiated nothing, and refused to return calls or respond to correspondence for almost a year. It then agreed to arbitration before Richard W. Page and/or Maureen Summers. **Exhibit 3**. Again it reneged and refused to return calls or correspondence for months.

Now, by correspondence dated May 5, 2011, Mossy refuses to arbitrate and states that it complied with its obligations and "this matter is now concluded". **Exhibit 8** hereto. Mossy is flouting the April 8, 2011, Order of the Court. Plaintiff is deprived not just of the right to a jury trial, but also the right to be heard even in the forced arbitration forum of Mossy's unilateral choosing.

The following is a brief chronology of Mossy's various written agreements and subsequent repudiations of those agreements.

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MOSSY STIPULATIONS

1. Mossy's stipulation to use Judicial Arbitration and Mediation Services.

September 25, 2007, Mossy stipulated to submit to Judicial Arbitration and Mediation Services and sent correspondence stating "We are in the process of initiating the arbitration proceeding with JAMS", and "we are agreeable to using the Hon. Robert May (Ret.) to serve as the arbitrator." That proved to be false, and Mossy reneged on the agreement. Despite repeated request, Mossy has been unable produce evidence that it initiated arbitration proceedings with JAMS. **Exhibit 1** hereto. Judge May was, and still is affiliated with JAMS.

Months passed during which Mossy refused to return calls or respond to correspondence. On May 8, 2008, at the Order to Show Cause re Dismissal, Mossy complained of a result that was not to his liking from JAMS, and that his client had to "stroke a check" for the arbitration costs in that case.

2. Mossy's stipulation to use Richard W. Page or Maureen Summers.

Following the OSC on May 8, 2008, Plaintiff submitted to Mossy a list of 9 potential arbitrators, two of whom are with AAA. **Exhibit 2** hereto, correspondence to Mossy dated July 10, 2008. On August 4, 2008, Mossy selected two arbitrators from plaintiff's list. One was with AAA, Richard W. Page. One was not, Maureen Summers. **Exhibit 3** hereto, Correspondence from Mossy. "We are agreeable to use Richard Page, Esq. and Maureen Summers, Esq. from your list to serve as arbitrator".

Mossy's agreement again proved illusory. Mossy subsequently asserted that the commercial rules applied to the subject 2002 Ford Escort, requiring plaintiff to pay the full AAA commercial fees. Mossy asserted its position in writing, even though Mossy's own contract states the contract is a "Consumer Contract" and states that the subject vehicle was purchased for "personal, family, or household" use. **Exhibit 4** hereto, Mossy Position Paper dated October 21, 2008. As a result, Mr. Page withdrew.

Following the Court's April 8, 2011, Order, plaintiff contacted Mr. Page who said he was agreeable to act as arbitrator under the AAA Consumer Rules. *(Lindsey Dec.)*

Mossy reneged once again on its agreement to use Mr. Page. Mossy's counsel refused to confirm as requested with Mr. Page. Mossy now refuses to use Mr. Page or Ms. Summers. Curiously, Mossy never refused Mr. Page previously, but cited his withdrawal, and claimed it was impossible to utilize his services because of the withdrawal it engineered by its assertion that the Commercial Rules applied to this consumer contract[1].

FOLLOWING THE APRIL 8, 2011 HEARING, PLAINTIFF SOUGHT TO IMPLEMENT THE ORDER OF THE COURT

3. Plaintiff contacts Mossy to start the arbitration process as ordered.

On April 8, 2011, the Court ordered that "...arbitration must commence through AAA as soon as practicable". On April 8, 2011, plaintiff sent correspondence requesting the required filing fee, in accordance with the terms of the contract. **Exhibit 5-1** hereto, correspondence from plaintiff dated April 8, 2011.

Mossy refused to respond. Also on April 8, 2011, the hearing date, plaintiff contacted Richard W. Page again. Mr. Page is an arbitrator with American Arbitration Association[2]. Mossy stipulated to Mr. Page previously, and significantly *never withdrew*

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[1]Mossy will no doubt raise plaintiff's withdrawal from the initial arbitration. However, that is irrelevant to Mossy's current refusal to comply with the Order of the Court, and the reasons for plaintiff's withdrawal from arbitration before the biased arbitration process in February of 2010, are well documented and part of the Court's file. The withdrawal was well founded, both on statutorily, and on established case law. Neither Mossy nor the AAA said that the evidence was untrue, or even unfair. The evidence remains uncontroverted and uncontradicted.

[2]Mr. Page is an arbitrator with American Arbitration Association. From his website; Director, American Arbitration Association ("AAA"); Panelist, AAA Large Complex Case Program ("LCCP"); Member, AAA Commercial Arbitration Panel since 1982; Member, AAA Mediation Panel since 1985; San Diego Superior Court arbitration, mediation and pro tem panel. http://www.pagefirm.com/resume.html.

that stipulation. Mossy instead defended itself from its agreement on the pretext that Mr. Page withdrew following Mossy's assertion of the Commercial Rules and demanding that plaintiff pay 1000s in arbitration fees in this consumer case. **Exhibit 4**, Mossy position paper dated October 21, 20080.

However, on April 12, 2011, Mr. Page *agreed again* to serve as arbitrator and asked that counsel for Mossy call him.

4. Mossy refused to respond, so Plaintiff made a second attempt to contact Mossy's counsel.

On April 12, 2011, plaintiff sent a second request, asking that Mossy re-confirm with Richard W. Page. **Exhibit 5-2**, Correspondence to Mossy dated April 12, 2011, asking him to confirm arbitration with Mr. Page and pay the AAA filing fee. (The Contract states that Mossy will "advance your filing ... or hearing fee up to a maximum of $1500".) See also **Exhibit 3, ¶ 2**, August 4, 2008, Correspondence from Mossy, confirming it would pay "Mr. Perz's first $1,500.00.

Mossy again refused to respond to the correspondence. A week later, on April 19, 2011, plaintiff contacted Mr. Page by email and asked if Mossy's counsel, Mr. Ritchie had called him. See **Exhibit 5-3**, Email Correspondence to Mr. Page dated April 19, 2011, asking if Mossy had confirmed the arbitration, and his response "I have heard nothing".

5. Mossy refused to respond, so Plaintiff made a third attempt to contact Mossy's counsel.

After almost two weeks without any response from Mossy, plaintiff sent a third letter to counsel. **Exhibit 5-4** Correspondence to Mossy dated April 20, 2011.

On April 20, 2011, plaintiff noted counsel's failure to respond to any correspondence, and the failure to call AAA arbitrator Richard W. Page to confirm arbitration pursuant to AAA Consumer Rules.

6. Mossy responds for the first time and refuses to advance fees.

By correspondence dated April 21, 2011, Mossy refused to advance the fees.

Exhibit 6 Correspondence from Mossy dated April 21, 2011, refusing to advance filing fees as required by the contract.

Mossy's letter consisted mostly of misrepresentations and distortions. Mossy omitted plaintiff's prior submission of *9 prospective arbitrators* in order to move the arbitration forward. See plaintiff's July 23, 2008, correspondence in which he listed 9 acceptable arbitrators. **Exhibit 2** hereto. Mossy failed to note that plaintiff's request that the Court appoint JAMS, was based on Mossy's *stipulation* to JAMS. See correspondence dated September 25, 2007, above, **Exhibit 1** hereto, stating Mossy was "in the process of initiating the arbitration proceeding with JAMS". Asking the Court to enforce the written agreement of a party is proper procedure.

Two of plaintiff's 9 proposed arbitrators, Richard W. Page and Judith Finch-Campbell, *are AAA arbitrators.* Mossy omitted its August 4, 2008, response stating "We are agreeable to use Richard Page, Esq. and Maureen Summers,[3] Esq. from your list to serve as arbitrator". **Exhibit 3** hereto. Plaintiff also notified Mossy that Ms. Summers was still an agreeable arbitrator.

7. To comply with the Order of the Court plaintiff sent Mossy the American Arbitration Association application form.

Despite the correspondence of counsel for Mossy, plaintiff persisted in attempting to comply with the April 18, 2011, Order of the Court, and responded promptly. **Exhibit 7** Correspondence from plaintiff dated the same day as Mossy's, April 21, 2011, with a AAA application form enclosed. Plaintiff enclosed a AAA consumer arbitration form, requiring the payment of fee, and the signature of each party.

Two weeks passed with no communication from defendant.

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[3]Ms. Summers is a mediator and arbitrator well established in San Diego. Thus Mossy had at least twice agreed to use non AAA arbitrators, i.e., Ms. Summers and Judge Robert May.

8. After weeks of silence, Mossy responded with a flat refusal to arbitrate.

After refusing plaintiff's requests, Mossy flatly refused to arbitrate. **Exhibit 8** Correspondence from Mossy, dated May 5, 2011, stating it had "fulfilled its contractual obligations and Judge Denton's order" and that "this matter is now concluded". Mossy now refuses to arbitrate at all, in violation of the Court's April 8, 2011, ruling.

MOSSY HAS BROKEN EVERY AGREEMENT IT HAS MADE

In order to avoid a hearing in any forum, Mossy has repeatedly violated the orders of the Court, and reneged on its agreement, written and otherwise. There is not a single agreement that Mossy has kept. Not the agreement to submit to the Hon. Robert May, Judicial Arbitration and Mediation Services. **Exhibit 1.** Not the agreement to submit to Richard W. Page, of the American Arbitration Association. Not the agreement to submit to Maureen Summers. **Exhibit 3.** Each agreement was confirmed in writing. Each was agreement was broken.

Nor can Mossy claim that plaintiff has been unwilling to arbitrate. Plaintiff sent correspondence suggesting 9 different arbitrators, two of whom are AAA arbitrators. **Exhibit 2.** Mossy actually approved *two* from that list, including Maureen Summers, who is not affiliated with AAA. **Exhibit 3**. Mossy itself has suggested a third, also not with AAA, i.e., Judge May. **Exhibit 1.**

II.
FACTUAL SUMMARY OF CASE

Mossy sold plaintiff a water damaged and wrecked used car without disclosure. Specifically to make this sale, Mossy expressly promised to repair the vehicle for engine vibration. After the sale, Mossy breached the express warranty by failing to make the repair. Before filing suit plaintiff attempted to have this matter resolved himself, without counsel. He asked in person. They literally laughed at him. He sent a letter asking for repurchase. He was rebuffed at every turn. Plaintiff filed suit in this court on May 9,

2007. The Court granted defendant's motion to compel arbitration on August 9, 2007. Following the Court's Ruling, Mossy deliberately stalled for approximately 12 months from the filing date, awaiting the outcome of a Fee Motion to JAMS. JAMS refused to award Mr. Ritchie's combined request of $62,932.01 in arbitration fees and attorney fees and costs against that consumer.

After Judge Pate issued the decision, Mossy reneged on its agreement to submit to JAMS, as it has reneged on every agreement to date.

III.
THE COURT HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED

The Court has the power to enforce its orders, and where one party so clearly refuses to comply with an order, it has the power and the discretion to strike the answer and default that party.

> A number of statutes provide authority for the trial court to terminate a case. For example, Code of Civil Procedure section 575.2 permits dismissal of a case for the violation of fast track rules where noncompliance is the fault of the party and not counsel. [citations omitted.] Former Code of Civil Procedure section 2023 permits trial courts to impose terminating sanctions and strike pleadings as a discovery sanction. (See fn. 4.) Additionally, the statutes recognize that the courts have the inherent authority to dismiss an action. (Code Civ. Proc., §§ 581, subd. (m), 583.150) [citations omitted.] FN7
>
> FN7. Code of Civil Procedure section 583.150 reads: "This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent authority of the court."
>
> Code of Civil Procedure section 581, subdivision (m) reads: "The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant." Trial courts should only exercise this authority in extreme situations, such as when the conduct was clear and deliberate, where no lesser alternatives would remedy the situation [citations omitted.], the fault lies with the client and not the attorney [citations omitted.], and when the court issues a directive that the party fails to obey. (E.g., former Code Civ. Proc., § 2023.)

Del Junco v. Hufnagel 150 Cal.App.4th 789, 799, 60 Cal.Rptr.3d 22, 28 - 29 (Cal.App. 2 Dist.,2007)

Here there can be no dispute. Mossy is in violation of the April 8, 2011, Order of the Court and is engaged in active obstruction. The April 8, 2011, Order of the Court clearly states that "...arbitration must commence through AAA as soon as practicable". Mossy has flatly refused, claiming it has "fulfilled its contractual obligations and Judge Denton's order" and that "this matter is now concluded". **Exhibit 8** hereto. Furthermore,

Government Code § 68608 (b) provides as follows:

> (b) Judges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. Judges are encouraged to impose sanctions to achieve the purposes of this article. (Emphasis added)

Mossy has been in repeated violation of this Court's orders. From September of 2007, until May of 2008, Mossy obstructed by the simple expedience of not responding to phone calls or correspondence. Subsequently it reneged on its stipulations to initiate arbitration with JAMS, to arbitrate before Hon. Robert May, to go before Richard W. Page, or arbitration with Maureen Summers. Judge Robert May was Mossy's own suggestion.

Mossy is in deliberate violation of the Court's April 8, 2011, order.

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IV.
CONCLUSION

Plaintiff has been denied justice since February of 2007. When he went back to Mossy Toyota and asked them to buyback the car, they actually laughed at him. Mossy has dangled plaintiff and mocked the Court long enough.

Defendant by its refusal to comply with the the orders of this court, is mocking the court and the civil justice system. If Mossy Toyota will not cooperate in the legal process, it should be excused from participating in it any further. The court should strike the ANSWER filed by the Defendant, enter a default of Mossy Toyota, and set a hearing to determine the damages of plaintiff.

Respectfully Submitted.

July 20, 2011

Michael E. Lindsey
Attorney for Plaintiff

DECLARATION OF MICHAEL E. LINDSEY IN SUPPORT OF PLAINTIFF MOTION FOR SANCTIONS, INCLUDING TERMINATION SANCTIONS IN THE FORM OF STRIKING THE ANSWER BASED UPON THE DEFENDANT MOSSY TOYOTA 'S CONTEMPT OF COURT

I, MICHAEL E. LINDSEY, declare:

1. I am an attorney duly licensed to practice law before all the courts of the State of California and am attorney of record for Plaintiff, JON PERZ. I am personally familiar with this file and can testify based upon personal knowledge of the facts stated within.

2. I hereby incorporate by reference the facts stated in the foregoing to which this declaration is attached. I have personal knowledge of each of those facts, because I am the attorney who was responsible for the preparation and review of each of the documents referenced therein, I was the person who engaged in the telephonic and written communications described therein, and I attended the Court appearances referenced therein.

3. On April 8, 2011, the Court issued the Order requiring that arbitration commence "as soon as practicable", through AAA.

4. I have attached hereto true and correct copies of the following;

Exhibit 1 hereto. Correspondence from Mossy dated September 25, 2007, stating "We are in the process of initiating the arbitration proceeding with JAMS", and "we are agreeable to using the Hon. Robert May (Ret.) to serve as the arbitrator."

Exhibit 2 hereto, correspondence to Mossy dated July 10, 2008, listing 9 potential arbitrators, two of whom are with AAA.

Exhibit 3 hereto, Correspondence from Mossy dated August 4, 2008, Mossy selected two arbitrators from plaintiff's list. One selected by Mossy was with AAA, Richard W. Page. One was not, Maureen Summers. "We are agreeable to use Richard Page, Esq. and Maureen Summers, Esq. from your list to serve as arbitrator".

Exhibit 4 hereto, Mossy Position Paper dated October 21, 2008. Mossy asserted that the commercial rules applied to the subject 2002 Ford Escort, requiring plaintiff to pay the full AAA commercial fees. Mossy's own contract states the contract is a "Consumer Contract" and states that the subject vehicle was purchased for "personal, family, or household" use. As a result, Mr. Page withdrew.

Exhibit 5-1 hereto, correspondence from plaintiff dated April 8, 2011. On April 8, 2011, the Court ordered that "...arbitration must commence through AAA as soon as practicable". On April 8, 2011, plaintiff sent correspondence requesting the required filing fee, in accordance with the terms of the contract.

Exhibit 5-2, Correspondence to Mossy dated April 12, 2011, asking him to confirm arbitration with Mr. Page and pay the AAA filing fee. (The Contract states that Mossy will "advance your filing ... or hearing fee up to a maximum of $1500".) This was plaintiff's second request.

Exhibit 5-3, Email Correspondence to Mr. Page dated April 19, 2011, asking if Mossy had called him to confirm the arbitration, and his response "I have heard nothing".

Exhibit 5-4 Correspondence to Mossy dated April 20, 2011, requesting that Mossy "notify Mr. Richard Page that Mossy will honor [its] agreement to have him serve as arbitrator". Richard W. Page is an arbitrator with the American Arbitration Association. Mossy did not repudiate its August 4, 2008, agreement (Exhibit 3) to submit to Mr. Page as arbitrator, until after the April 8, 2011, Order of the Court.

Exhibit 6 Correspondence from Mossy dated April 21, 2011, refusing to advance filing fees as required by the contract.

Exhibit 7 Correspondence from plaintiff dated the same day as Mossy's, April 21, 2011, with a AAA application form enclosed. Plaintiff enclosed a AAA consumer arbitration form, requiring the signature of each party.

Two weeks passed with no communication from defendant.

Exhibit 8 Correspondence from Mossy, dated May 5, 2011, refusing arbitration, stating it had "fulfilled its contractual obligations and Judge Denton's order" and that "this matter is now concluded". Mossy refuses to arbitrate at all, in violation of the Court's April 8, 2011, ruling.

5. MOSSY TOYOTA , has unjustifiably failed and refused to comply with the Order of the Court by letter dated May 5, 2011. **Exhibit 8**.

6. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

July 20, 2011

Michael E. Lindsey
Attorney for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

JON PERZ, an individual, Plaintiff(s), v. MOSSY TOYOTA, a business entity form unknown, and DOES 1-30 inclusive, Defendant(s).	Case No.37-2007-00066485-CU-BC-CTL PROPOSED ORDER OF THE COURT DATE: August 12, 2011 TIME: 10:30 am PLACE: 330 W. Broadway DEPT.: 73 JUDGE: Hon. Steven R. Denton

TO THE CLERK OF THE COURT, DEFENDANT, AND ITS ATTORNEY OF RECORD:

This matter was heard before the Court on _____, at ____:____ A.M./P.M., in Department 73 of the Superior Court of the County of San Diego, with Plaintiff and Defendant appearing through counsel.

Having reviewed Plaintiff' Motion to MOTION TO STRIKE ANSWER OF MOSSY TOYOTA, and finding good cause therefore, it is ordered that;

1. The answer of defendant Mossy Toyota filed on June 19, 2007, is stricken.

2. A hearing will be set on _____, 2011, regarding plaintiff's damages.

///

3. Service of this order by United States mail is permissible.

Dated: _____

By: _____
Judge of the Superior Court

Michael E. Lindsey
Attorney at Law
State Bar No. 99044
4455 Morena Blvd., Ste. 207
San Diego, California 92117-4325
(858) 270-7000

Attorney for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

JON PERZ, an individual, Plaintiff(s), v. MOSSY TOYOTA, a business entity form unknown, and DOES 1-30 inclusive, Defendant(s).	Case No. 37-2007-00066485-CU-BC-CTL NOTICE OF LODGMENT OF EXHIBITS RE PLAINTIFF'S MOTION TO STRIKE ANSWER OF MOSSY TOYOTA AND REQUEST FOR MONETARY SANCTIONS DATE: August 12, 2011 TIME: 10:30 am PLACE: 330 W. Broadway DEPT.: 73 JUDGE: Hon. Steven R. Denton

Plaintiff JON PERZ hereby lodges the following exhibits in support of Plaintiff's MOTION TO STRIKE ANSWER OF MOSSY TOYOTA :

Exhibit 1 hereto. Correspondence from Mossy dated September 25, 2007, stating "We are in the process of initiating the arbitration proceeding with JAMS", and "we are agreeable to using the Hon. Robert May (Ret.) to serve as the arbitrator."

Exhibit 2 hereto, correspondence to Mossy dated July 10, 2008, listing 9 potential arbitrators, two of whom are with AAA.

Exhibit 3 hereto, Correspondence from Mossy dated August 4, 2008, Mossy selected two

arbitrators from plaintiff's list. One selected by Mossy was with AAA, Richard W. Page. One was not, Maureen Summers. "We are agreeable to use Richard Page, Esq. and Maureen Summers, Esq. from your list to serve as arbitrator".

Exhibit 4 hereto, Mossy Position Paper dated October 21, 2008. Mossy asserted that the commercial rules applied to the subject 2002 Ford Escort, requiring plaintiff to pay the full AAA commercial fees. Mossy's own contract states the contract is a "Consumer Contract" and states that the subject vehicle was purchased for "personal, family, or household" use. As a result, Mr. Page withdrew.

Exhibit 5-1 hereto, correspondence from plaintiff dated April 8, 2011. On April 8, 2011, the Court ordered that "...arbitration must commence through AAA as soon as practicable". On April 8, 2011, plaintiff sent correspondence requesting the required filing fee, in accordance with the terms of the contract.

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Exhibit 5-3, Email Correspondence to Mr. Page dated April 19, 2011, asking if Mossy had called him to confirm the arbitration, and his response "I have heard nothing".

Exhibit 5-4 Correspondence to Mossy dated April 20, 2011, requesting that Mossy "notify Mr. Richard Page that Mossy will honor [its] agreement to have him serve as arbitrator". Richard W. Page is an arbitrator with the American Arbitration Association. Mossy did not repudiate its August 4, 2008, agreement (Exhibit 3) to submit to Mr. Page as arbitrator, until after the April 8, 2011, Order of the Court.

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Exhibit 7 Correspondence from plaintiff dated the same day as Mossy's, April 21, 2011, with a AAA application form enclosed. Plaintiff enclosed a AAA consumer arbitration form, requiring the signature of each party.

Exhibit 8 Correspondence from Mossy, dated May 5, 2011, refusing arbitration, stating it had "fulfilled its contractual obligations and Judge Denton's order" and that "this matter is now concluded". Mossy refuses to arbitrate at all, in violation of the Court's April 8, 2011, ruling.

July 20, 2011

Michael E. Lindsey
Attorney for Plaintiff

EXHIBIT 1

Callahan McCune & Willis

PETER M. CALLAHAN
LARRY N. WILLIS
ROBERT W. THOMPSON
O. BRANDT CAUDILL, JR.
SCOTT S. BLACKSTONE
NANCY L. DEPASQUALE-ERKER
RICHARD J. RITCHIE
NANCY E. POWER
COLRENA K. JOHNSON
NORMA S. MARSHALL
LEE A. SHERMAN
JAMES M. HANSEN
EON I. KERN
KELLIE S. CHRISTIANSON
THOMAS M. RUTHERFORD, JR.
CHRISTOPHER J. ZOPATTI
DENISE M. CALKINS
EVETTE L. SMITH
JOAN E. TRIMBLE
KATHLEEN M. HARTMAN
JOHN W. FOX
JENNIFER L. CALLAHAN
DEAN D. JACOBSEN
LETITIA OBREGON
CHARLES S. RUSSELL
KATHLEEN P. ALPARCE
MICHAEL SAN FILIPPO
ANGELA M. ROSSI
TRISHA L. COZAD
DOUGLAS A. WRIGHT
ALISON I. ROTH
BRYAN M. THOMAS
AMID J. BAHADORI
VIRGINIA S. AL-SARAFI
SVETLEN SHOPF
NICOLE M. SAVALA
LINDA D.
LAURA J. ANSON
CHRIS A. SEPERI
CHRISTOPHER R. KELLEY
SHELDON COHEN
KATHERINE H. PARK
RONALD D. DIGESTI
ANNA C. GHIRIGER
RICHARD BERBERIAN
CHLOE N. NGUYEN
SARAH A. HODGSON
OF COUNSEL
GARRETT S. GREGOR
ADMINISTRATOR
JERRI DORAN
SCOTT M. McCUNE
(1948-1989)

September 25, 2007

SENT VIA FACSIMILE AND MAIL

Michael E. Lindsey, Esq.
Attorney at Law
4455 Morena Blvd., Ste. 207
San Diego, CA 92117-4325

Re: Jon Perz v. Mossy Toyota

Dear Mr. Lindsey:

We are in the process of initiating the arbitration proceeding with JAMS. In the event that you are willing to forego the JAMS selection process, we are agreeable to using the Hon. Robert May (Ret.) to serve as the arbitrator. If you have any questions or concerns regarding the above, please feel free to contact our office.

Sincerely,

CALLAHAN, McCUNE & WILLIS, APLC

Richard J. Ritchie, Esq.

RJR/

G:\TRA\070002\CORRESPONDENCE\092507.003.doc

EXHIBIT 2

LAW OFFICE OF

MICHAEL E. LINDSEY

4455 MORENA BLVD., STE.207, SAN DIEGO, CALIFORNIA, 92117-4325
TEL: (858) 270-7000 FAX: (858) 270-7710

July 23, 2008

Richard J. Ritchie
Callahan, McCune, & Willis
1230 Columbia, Ste. 930
San Diego, CA, 92101

Re: ARBITRATORS
Perz v. Mossy Toyota, Case No. 37-2007-00066485-CU-BC-CTL

Dear Mr. Ritchie:

Plaintiff proposes the following arbitrators;

1. Jd. William C. Pate
2. Judith M. Finch-Campbell
3. Richard W. Page
4. Jd. J. Richard Haden
5. Peter Searle
6. Maureen Summers
7. Howard A. Wiener
8. Jd. Raymond Zvetina
9. Jd. Wm. Howatt

If you have any questions, please give me a call. Thank you very much.

Yours very truly,

Michael E. Lindsey
Attorney at Law

EXHIBIT 3

Callahan McCune Willis

PETER M. CALLAHAN
LARRY N. WILLIS
ROBERT W. THOMPSON
O. BRANDT CAUDILL, JR.
SCOTT S. BLACKSTONE
NANCY J. DEPASQUALE-ERKER
RICHARD J. RITCHIE
NANCY E. POWER
COLRENA K. JOHNSON
NORMA S. MARSHALL
LEE A. SHERMAN
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ANNA C. GEHRIGER
RICHARD BERBERIAN
CHLOE N. NGUYEN

SARAH A. HODGSON
AARON R. STIEGLER
MARK A. VEZZOLA

OF COUNSEL
GARRETT S. GREGOR

ADMINISTRATOR
JERRI DORAN

SCOTT M. McCUNE
(1948-1989)

August 4, 2008

Michael E. Lindsey, Esq.
Attorney at Law
4455 Morena Blvd., Ste. 207
San Diego, CA 92117-4325
(Via Facsimile and U.S. Mail)

Re: Jon Perz v. Mossy Toyota

Dear Mr. Lindsey:

This responds to yours of July 23, 2008, with respect to the binding arbitration.

1) We are agreeable to use Richard Page, Esq. and Maureen Summers, Esq. from your list to serve as arbitrator, with no preference as to which we attempt to contact first. Please let me know your preference, if any, and we can attempt to contact that individual to see if they are willing to serve.

2) Per Judge Denton's interpretation of the binding arbitration clause, Mossy is agreeable an arbitration fee sharing agreement whereby it pays the first three thousand dollars ($3,000.00) of the fee, representing a $1,500.00 share and Mr. Perz' first $1,500.00, with costs beyond that sum to be borne equally by the parties;

3) We would like to commence discovery simply utilizing the Code of Civil Procedure rules and would suggest that the arbitrator also serve as the discovery referee in the event of any unanticipated discovery problems.

Mr. Michael Lindsey
Perz v. Mossy
August 4, 2008

We are hopeful that this resolves all issues and that we can initiate discovery as soon as possible. Please let me know your thoughts.

Sincerely,

CALLAHAN, McCUNE & WILLIS, APLC

Richard J. Ritchie, Esq.

RJR/

G:\TRA\070002\CORRESPONDENCE\C0804008.003.doc

EXHIBIT 4

A PROFESSIONAL LAW CORPORATION ORANGE COUNTY · LOS ANGELES · SAN DIEGO · SAN FRANCISCO · FRESNO · SHANGHAI

Callahan McCune Willis

PETER M. CALLAHAN
LARRY N. WILLIS
ROBERT W. THOMPSON
O. BRANDT CAUDILL, JR.
SCOTT S. BLACKSTONE
NANCY J. DEPASQUALE-ERKER
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SARAH A. HODGSON
AARON R. STIEGLER
MARK A. VEZZOLA

OF COUNSEL
GARRETT S. GREGOR

ADMINISTRATOR
JERRI DORAN

SCOTT M. McCUNE
(1948-1989)

October 21, 2008

Richard Page, Esq.
Attorney at Law
525 B Street, #1440
San Diego, CA 92101
(Via Facsimile and Electronic Mail)

Re: Jon Perz v. Mossy Toyota

Dear Mr. Page:

This sets forth the position of Mossy Toyota with respect to your request regarding whether we believe the AAA Consumer or Commercial Rules apply. We believe that the Commercial Rules apply to the dispute, based on the following pertinent portions of the AAA Commercial Rules, Rule R-1:

"(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator. "

The arbitration clause in the contract (provided to you earlier today by Mr. Lindsey) does provide for the arbitration to occur through either the National Arbitration Forum or AAA, but does not specify which AAA rule set is to be used. The above passage also suggests that the use of the Commercial Rules is mandatory (use of the word "shall") where the parties have provided for the use of AAA in their arbitration clause in a domestic dispute.

Since we have agreed to use your services privately and not through AAA, we also suggest that the cost allocation and attorney fee/cost award provisions represent the agreement between the parties to allocate costs in the matter.

Mr. Richard Page, Esq.
Perz v. Mossy Toyota
October 21, 2008

Since it appears Mr. Lindsey previously forward the other documents you requested, which we appreciate, we are prepared for a scheduling conference pending your guidance regarding same. My direct line is 619-858-2604 if you have any questions.

Sincerely,

CALLAHAN, McCUNE & WILLIS, APLC

Richard J. Ritchie, Esq.

RJR/

Cc: Michael Lindsey, Esq. (Via Facsimile and Electronic Mail)

EXHIBIT 5

LAW OFFICE OF

MICHAEL E. LINDSEY

4455 MORENA BLVD., STE.207, SAN DIEGO, CALIFORNIA, 92117-4325
TEL: (858) 270-7000 FAX: (858) 270-7710

If there is a problem with transmission or if all pages are not received, please call (858) 270-7000 for retransmission.

TO: RICHARD J. RITCHIE

FAX #: 1 (619) 232-2206

COMPANY: Callahan, Thompson, Sherman & Caudill LLP
Telephone #: 1 (619) 858-2604

FROM: Michael E. Lindsey DATE: April 8, 2011

RE: FILING FEE
Perz v. Mossy Toyota, Case No. 37-2007-00066485-CU-BC-CTL

Number of pages including this cover page:
1

Comments:

Please forward the requisite filing fee for the arbitration to my office at your earliest convenience, in accordance with the Purchase Contract, unless you intend to forward it to the ADR provider yourself. If the latter, please copy me on the correspondence. Thank you very much.

Exhibit 5-1

LAW OFFICE OF

MICHAEL E. LINDSEY

4455 MORENA BLVD., STE.207, SAN DIEGO, CALIFORNIA, 92117-4325
TEL: (858) 270-7000 FAX: (858) 270-7710

If there is a problem with transmission or if all pages are not received, please call (858) 270-7000 for retransmission.

TO: RICHARD J. RITCHIE

FAX #: 1 (619) 232-2206

COMPANY: Callahan, Thompson, Sherman & Caudill LLP
Telephone #: 1 (619) 858-2604

FROM: Michael E. Lindsey DATE: April 12, 2011

RE: ARBITRATION FEE
Perz v. Mossy Toyota, Case No. 37-2007-00066485-CU-BC-CTL

Number of pages including this cover page:
1

Comments:

This is my second request to promptly pay the arbitration fee in this matter. You failed to respond to the first request. I spoke to Mr. Page and now that you have withdrawn your fraudulent claim that this 2002 Ford Escort is subject to the commercial rules, he has agreed to act as arbitrator. Please notify him of your agreement immediately, and forward the check immediately. Thank you very much.

Exhibit 5-2

Michael Lindsey

From: Richard Page <rwpage@pagefirm.com>
Sent: Tuesday, April 19, 2011 3:56 PM
To: 'Michael Lindsey'
Subject: RE: Perz v. Mossy

I have heard nothing.

From: Michael Lindsey [mailto:mlindsey@nethere.com]
Sent: Tuesday, April 19, 2011 3:33 PM
To: rwpage@pagefirm.com
Subject: Perz v. Mossy

Richard,

I sent Mr. Ritchie a fax last week, telling him that you were willing to act as arbitrator once more, and asked him to call you and confirm. Have you heard from him? Thanx.

Mike Lindsey
858/270-7000

Exhibit 5-3

LAW OFFICE OF

MICHAEL E. LINDSEY

4455 MORENA BLVD., STE.207, SAN DIEGO, CALIFORNIA, 92117-4325
TEL: (858) 270-7000 FAX: (858) 270-7710

If there is a problem with transmission or if all pages are not received, please call (858) 270-7000 for retransmission.

TO: RICHARD J. RITCHIE

FAX #: 1 (619) 232-2206

COMPANY: Callahan, Thompson, Sherman & Caudill LLP
Telephone #: 1 (619) 858-2604

FROM: Michael E. Lindsey DATE: April 20, 2011

RE: FILING FEE
Perz v. Mossy Toyota, Case No. 37-2007-00066485-CU-BC-CTL

Number of pages including this cover page:
1

Comments:

You have not responded to my two prior requests following the April 8, 2011, hearing. Per the subject contract and my prior correspondence please advance the filing fee necessary to commence the arbitration. I understand that you have not contacted the agreed arbitrator as requested. Per my April 12 correspondence, please notify Mr. Richard Page that Mossy will honor your agreement to have him serve as arbitrator, and forward the check for the filing fee to me immediately. Thank you very much.

Exhibit 5-4

EXHIBIT 6

CTSC law
CALLAHAN THOMPSON SHERMAN & CAUDILL LLP

Richard J. Ritchie | Partner
1230 Columbia St., Ste. 930, San Diego, CA 92101
Tel: (619) 232-5700 | Fax: (619) 232-2206
E-mail: rritchie@ctsclaw.com · Website: www.ctsclaw.com

April 21, 2011

Michael E. Lindsey, Esq.
Attorney at Law
4455 Morena Blvd., Ste. 207
San Diego, CA 92117-4325

Re: Jon Perz v. Mossy Toyota

Dear Mr. Lindsey:

This will acknowledge receipt of your faxed correspondence of April 8, 12 and 20, 2011. I wish to remind you of some relevant facts from the history of this litigation. This case was ordered to arbitration over your objections over three years ago. In November, 2008, Mr. Page declined to serve as arbitrator. Subsequently, and by agreement of the parties, the matter was submitted to AAA under the AAA Consumer Rules via a filing made by you, with fees advanced by Mossy.

Since that time, you have refused to arbitrate this case before the agreed upon arbitral forum, AAA, including your decision to withdraw the claim on February 15, 2010, after AAA rejected your efforts to disqualify Ms. Jobi Halper, Esq. and itself as the arbitration provider. During the last three years you have ignored the Court's order to arbitrate this case and have filed multiple motions and ex-parte applications to return the case to the Court's trial calendar and, most recently, to appoint an arbitrator other than AAA, all of which have been denied.

With respect to AAA, you have openly declared your hostility to AAA, calling AAA "biased" and "corrupt" (Plaintiff's Notice of Motion, and Motion to Set For Trial, or in the Alternative, Appoint an Unbiased Arbitrator, 4:15.), and have sought to disqualify two different AAA arbitrators, Toni-Diane Donnet, Esq. (granted shortly before the hearing was set) and Jobi Halper, Esq. (denied) to avoid arbitrating this case before AAA. When that failed, you simply withdrew from arbitration with AAA altogether.

As you were informed at the hearing on your last failed motion, on April 8, 2011, the Court no longer has jurisdiction over this case now that it has been ordered to arbitration. Further, our client has no contractual or legal obligation to initiate arbitration proceedings before AAA, or any other arbitrator for that matter as it has fully complied with its obligations in that regard. Additionally, our client has fulfilled its contractual obligation to pay the arbitration fees by

forwarding the fees for the AAA arbitration you withdrew from, and therefore has no further obligation to initiate a claim against itself or pay any further arbitration fees as you suggest.

Sincerely,

CALLAHAN, THOMPSON, SHERMAN & CAUDILL LLP

Richard J. Ritchie

RJR/MSF:jcr

G:\TRA\070004\CORRESPONDENCE\C042011.003.Lindsey.docx

EXHIBIT 7

LAW OFFICE OF

MICHAEL E. LINDSEY

4455 MORENA BLVD., STE.207, SAN DIEGO, CALIFORNIA, 92117-4325
TEL: (858) 270-7000 FAX: (858) 270-7710

April 21, 2011

Richard J. Ritchie
Callahan, Thompson, Sherman & Caudill LLP
1230 Columbia, Ste. 930
San Diego, CA, 92101

Re: Perz v. Mossy Toyota, Case No. 37-2007-00066485-CU-BC-CTL

Dear Mr. Ritchie:

Your letter omits the fact that you have at least twice approved other arbitrators, only to renege on your agreement later. First, your letter claiming to be "in the process of initiating the arbitration proceeding with JAMS", per your letter dated September 25, 2007. Second, your subsequent agreement to submit to Richard Page or Maureen Summers. Please see your correspondence dated August 4, 2008. I have requested the documents which evidence your initiation of the JAMS arbitration, but you refuse to produce them. Please forward those documents to me at your earliest convenience. Moreover, your 2007 letter seems to contradict your current statement that you have no obligation to initiate any arbitration at all.

Mr. Page of course withdrew solely because you asserted that the commercial rules of arbitration applied. Now that you have withdrawn that claim, he has again agreed to serve as arbitrator, and I request that you honor one of your agreements. (See your September 25, 2007, letter "we are agreeable to using the Hon. Robert May (Ret.) to serve as the arbitrator.") Plaintiff is not trying to evade arbitration. Nor is plaintiff in violation of the Court's order. Having the case heard in a fair forum is plaintiff's right. Plaintiff is only asking you and Mossy to keep your word, and to honor the contract.

Your claim that plaintiff is trying to avoid arbitration is clearly untrue. See my July 10, 2008, correspondence suggesting the following arbitrators;

1. Jd. William C. Pate
2. Judith M. Finch-Campbell
3. Richard W. Page
4. Jd. J. Richard Haden
5. Peter Searle

6. Maureen Summers
7. Howard A. Wiener
8. Jd. Raymond Zvetina
9. Jd. Wm. Howatt

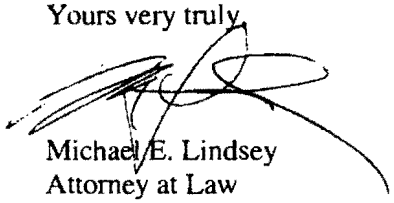
From that list you responded "We are agreeable to use Richard Page, Esq. and Maureen Summers, Esq. from your list to serve as arbitrator." -August 14, 2008 correspondence. Mr. Page has agreed to act as arbitrator again, per my recent correspondence. Please notify him of your agreement so that we can get started.

You and Mossy have evaded a fair arbitration by repeatedly breaking your word and ironically, the contract. That has been Mossy's intent since the May 8, 2008, OSC re Dismissal when you complained in Judge Denton's chambers that your client had to "stroke a check" for the arbitration costs in another case. In fact, it is Mossy that has evaded every effort to have the case heard. It has been a long sorry record of stall and delay. You refused to return my calls or respond to my correspondence for a year in 2007 and into 2008. Instead you reneged on your agreements and demand a biased forum that ignores its own rules and routinely violates California law. Under AAA rules, it apparently is acceptable for one arbitrator to solicit real estate business from the parties while an arbitration is pending, and to fail to disclose that another decided forty consecutive consumer cases in favor of a single debt collector. The record on both points is uncontested.

In addition to honoring your agreements to arbitration before Mr. Page or Ms. Summers, or Judicial Arbitration and Mediation Services, plaintiff asks Mossy to honor the contract. The arbitration clause in Mossy's contract states that the dealer will "advance... fees ... up to a maximum of $1,500". Please advance the filing fee per the contract, as Mossy is nowhere near the maximum stated. I have also included the AAA arbitration filing application. Please complete it and return it to me with the filing fee of $375.00.

Contrary to your letter, the Court did not say it was without jurisdiction. Nor do I see how you could make that claim, as you did not attend the hearing. That is because you do not wish to run the risk the Court might ask you about your letters and the unusual positions you have taken, such as the commercial rules claim. Please send the check and return the completed application as soon as possible. If you have any questions, please give me a call. Thank you very much.

Yours very truly,



Michael E. Lindsey
Attorney at Law

AMERICAN ARBITRATION ASSOCIATION
SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES

(FOR USE ONLY IN CALIFORNIA)

Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA's Case Filing Services at 1-877-495-4185, if you have any questions regarding the waiver of administrative fees.

How to file a claim; consumers should:

- Fill out this form and retain one copy for your records.
- Mail a copy of this form and your check or money order made payable to the AAA, to: AAA's Case Filing Services, 1101 Laurel Oak Road Suite 100, Voorhees, NJ 08043. Please consult Section C-8 of the *Supplementary Procedures for Consumer-Related Disputes* for the appropriate fee.
- Send a copy of this form to the business.

How to file a claim; businesses should:

- Fill out this form and retain one copy for your records.
- Mail a copy of this form and your check or money order made payable to the AAA, to: AAA's Case Filing Services, 1101 Laurel Oak Road Suite 100, Voorhees, NJ 08043. Please consult Section C-8 of the *Supplementary Procedures for Consumer-Related Disputes* for the appropriate fee.
- Send a copy of this form to the consumer by registered mail, return receipt requested.

1 How is this claim being filed? Check only one.

[ ] By request of the consumer (A copy of the arbitration agreement **must** be attached. A copy of this form **must** also be sent to the business)

[ ] By request of the business (A copy of the arbitration agreement **must** be attached. A copy of this form **must** also be sent to the consumer by registered mail return receipt requested)

-or-

[ ] By mutual agreement ("submission") of the parties (both parties **must** sign this form)

2 Briefly explain the dispute.

3 Do you believe there is any money owed to you? [ ] Yes [ ] No If yes, how much? _____

4 Are you seeking any other relief? [ ] Yes [ ] No
If yes, what is it?

5 Preferred hearing locale (if an in-person hearing is held) _____

6 Amount enclosed: _____

7 Fill in the following information:

Consumer

Name of Consumer _____

Address _____

City/State/Zip _____

Telephone _____

Fax _____

Email Address _____

Signature of Consumer _____

Representative _____

Firm _____

Address _____

City/State/Zip _____

Telephone _____

Fax _____

Email Address _____

Business

Name of Business _____

Address _____

City/State/Zip _____

Telephone _____

Fax _____

Email Address _____

Signature of Business _____

Representative _____

Firm _____

Address _____

City/State/Zip _____

Telephone _____

Fax _____

Email Address _____

EXHIBIT 8

CTSC law
CALLAHAN THOMPSON SHERMAN & CAUDILL LLP

Richard J. Ritchie | Partner
1230 Columbia St., Ste. 930, San Diego, CA 92101
Tel: (619) 232-5700 | Fax: (619) 232-2206
E-mail: rritchie@ctsclaw.com · Website: www.ctsclaw.com

May 5, 2011

Michael E. Lindsey, Esq.
Attorney at Law
4455 Morena Blvd., Ste. 207
San Diego, CA 92117-4325

Re: Jon Perz v. Mossy Toyota

Dear Mr. Lindsey:

In response to your most recent correspondence of April 21, 2011, Mossy Toyota fulfilled its contractual obligations and Judge Denton's order regarding arbitration by: (1) participating in an arbitration proceeding with AAA in early 2009; and (2) paying the filing fee for said arbitration. Unfortunately, you withdrew from the arbitration, which terminated the arbitration proceeding. Accordingly, this matter is now concluded.

Sincerely,

CALLAHAN, THOMPSON, SHERMAN & CAUDILL LLP

Richard J. Ritchie

RJR/MSF:jcr

G:\TRA\070002\CORRESPONDENCE\C050211 003 Lindsey.docx

PROOF OF SERVICE BY MAIL
(Sections 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 4455 Morena Blvd., Ste. 207, San Diego, California 92117-4325.

On the date shown below, I served the foregoing document described as:

NOTICE OF MOTION AND MOTION TO STRIKE ANSWER OF MOSSY TOYOTA, POINTS AND AUTHORITIES, DEC. OF MICHAEL E. LINDSEY, NOTICE OF LODGEMENT, PROPOSED ORDER
Perz v. Mossy Toyota, Case No. 37-2007-00066485-CU-BC-CTL

to the interested parties in this action by mail at San Diego, California addressed as follows:

Richard J. Ritchie
Callahan, Thompson, Sherman & Caudill LLP
1230 Columbia, Ste. 930
San Diego, CA, 92101

[] **(BY MAIL)** The envelope was mailed with postage thereon fully prepaid. As follows: I am "readily familiar" with this office's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] **(BY PERSONAL SERVICE)** I caused to be delivered such envelope by hand to the addressee.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] **(FEDERAL]** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 21, 2011, at San Diego, California.

Michael E. Lindsey

TIMELINE

Jon Perz v. Mossy Toyota

1. **February 16, 2007**, Date of purchase. Mossy sold plaintiff a water damaged and wrecked used car without disclosure. Plaintiff noticed a vibration during the test drive. To make the sale, Mossy promised to repair the vehicle for the engine vibration. [Subsequent document production shows that Mossy knew about the vibration and determined that it was irreparable during its presale vehicle inspection.] The representation was a CLRA violation. After the sale, Mossy breached its express 90 day/3,000 mile 100% warranty by failing to make the repair. Before filing suit plaintiff attempted to have this matter resolved himself, without counsel. He asked in person. They laughed at him. He sent a letter asking for repurchase. He was rebuffed.

2. **February 17-28, 2007**, Perz takes the vehicle to Mossy for repair of the vibration problem per their promise. He is told it's a condition of the vehicle and cannot be repaired. He also has electrical problems with the vehicle and discovers large areas of rust, water marks, and sediment in and on the vehicle.

3. **March 30, 2007**, Perz checks Carfax and learns of a prior undisclosed collision. Perz makes a formal request for repurchase to Mossy. There is no response.

4. **April 3, 2007**, Perz has the vehicle inspected by a professional who documents the extensive rust, water damage, electrical problems, and collision damage.

5. The complaint was filed **May 9, 2007**.

6. **July 16, 2007**, counsel for Mossy prepares and faxes a stipulation to submit to JAMS. Counsel for plaintiff makes one change to clarify that Mossy will pay the arbitration fees and costs per Code of Civil Procedure § 1284.3. Mossy rejects and per phone call of its counsel, Michael C. Rogers, flatly refuses to pay the fees and costs of arbitration. Per Mr. Rogers, Mossy is going to "make a stand".

7. The court granted Mossy's Motion to Compel Arbitration on **August 9, 2007**. Neither plaintiff nor defendant submitted evidence on the question of arbitration costs. However, the Court went outside the pleadings and premised its assertion that the arbitration clause was not "substantively unconscionable" on its own investigation. Specifically the Court held the American Arbitration Association and National Arbitration Forum rules "accessed via their respective websites limit the fees payable by a consumer in actions not exceeding $75,000 to $250 and $375, respectively"

8. Prior to the Court's ruling both counsel agreed to stipulate to Judicial Arbitration and Mediation Services (JAMS). Mossy sent a proposed stipulation to JAMS prepared by counsel for Mossy, dated July 16, 2007. However, Mossy demanded a previously undiscussed requirement that plaintiff pay for the arbitration.

9. **September 25, 2007**, counsel for Mossy represents that he is "in the process of initiating the arbitration proceeding with JAMS", by letter dated September 25, 2007, from Richard J. Ritchie, counsel for Mossy. However, the letter was false and no process was ever initiated with JAMS. From September of 2007, until May of 2008, counsel for Mossy, Richard J. Ritchie, did not respond to phone calls or correspondence, and reneged on promise to initiate arbitration with JAMS.

10. Following the Court's Ruling, Mossy deliberately stalled for approximately 12 months from the filing date, awaiting the outcome of a Fee Motion to JAMS.

JAMS refused to award Mr. Ritchie's combined request of $62,932.01 in arbitration fees and attorney fees and costs against a consumer. After Judge Pate (JAMS) issued the decision, Mossy reneged on its agreement to submit to JAMS.

11. Because Mossy stalled on arbitration with JAMS, the Court set a OSC re Dismissal on **May 8, 2008**. There counsel for defendant complained to the Court (in chambers) that his client "had to stroke a check for $12,000.00 [for arbitration fees and costs] in that case". In actuality the arbitration fees demanded by counsel for Mossy in the JAMS matter were $16,476.38. The attorney fees and costs counsel for defendant demanded in the JAMS matter were $46,455.63. Consistent with JAMS rules, and CCP § 1284.3, Jd. Pate denied counsel for defendant's motion. Counsel for Mossy did not disclose to the Court at the hearing that he had *also* demanded $46,455.63 in attorney fees be assessed against Mr. Robledo, the consumer. Unlike AAA and NAF, JAMS, follows its rules and California law. Per Judge Pate's ruling, Code of Civil Procedure § 1284.3 specifically precludes the $56,983.31 that AAA grants.

    a. **May 7, 2008**, the day before the OSC re Dismissal, counsel for Mossy stated that he was backing out of the agreement to use JAMS. Per notes of the telephone conversation, "re hearing tomorrow. RJR now is backing out of agreement to use JAMS, said his last arb cost 12k and demands that Perz pay all his costs of arb. up front."

12. **July 3, 2008**, plaintiff brings a motion to the Court asking that Mossy be deemed to have waived its right to arbitration, for delay. The motion is denied.

13. **August 4, 2008,** in response to a letter suggesting various arbitrators, counsel for Mossy states that he would be amenable to Richard Page or Maureen Summers. The parties agree to Richard Page. However, Mossy still demands that plaintiff pay for arbitration.

14. **August 28, 2008**, counsel for Mossy did nothing to move the arbitration forward, i.e., Mossy failed to pay the arbitration fees and failed to initiate the arbitration process as promised.

15. **September 3, 2008**, there was no response from Mossy and Perz sent another letter. "On 8/28/08 I faxed you noting that I have received discovery from your office. I requested confirmation that you have paid the arbitration fees and initiated the arbitration process thru AAA designating Mr. Page as the arbitrator. I requested that you forward the associated documents to my office. To date I have received nothing. Please confirm whether or not you have done the above. If I do not hear from you I will assume that you continue to refuse to arbitrate."

16. **September 8, 2008**, there was still no response and another letter was sent to counsel for Mossy.

17. **September 10, 2008**, Mossy finally contacts Mr. Page as agreed to initiate the arbitration which it compelled more than a year earlier. However, in a new twist, Mossy then claimed that the *Commercial Rules* of arbitration applied. The contract states "personal, family, or household use" states that it is a "consumer contract". Per the AAA Commercial Rules, the filing fee for this case would be $950.00, and defendant demanded that plaintiff pay it. In the face of the demands of Mossy, Mr. Page then withdrew as arbitrator and refused to hear the case. Thereafter Mossy and its counsel refused to submit the claim to AAA, and refused to pay the fee. Meanwhile, Mossy propounded discovery and simultaneously refused to participate in arbitration.

18. **September 21, 2008**, Mr. Page agrees to act as arbitrator, however, now Mossy claims the subject Ford Escort, is a commercial vehicle and subject to the Commercial Rules of arbitration, *and the commercial fees* for such business to business arbitrations. Mossy maintains this position despite the fact that the Purchase Contract the dealer prepared sates the vehicle was sold for "personal, household, and family use", and leaves the "commercial" box unchecked.

19. **October 21, 2008**, Mossy submits its Position Paper to Mr. Page. It states in pertinent part; "We believe that the Commercial Rules apply to the dispute,...", and ", we also suggest that the cost allocation and attorney fee/cost award provisions [of the Commercial Rules] represent the agreement between the parties to allocate costs in the matter."

    a. Perz responded the same day with correspondence noting that 1) Plaintiff's central claim is for misrepresentation under the Consumer Legal Remedies Act, 2) "The purchase contract refers to "personal, family, or household" in regard to the subject vehicle, 3) the contract "states that it is a "CONSUMER CREDIT CONTRACT", and 4) the Answer of Mossy Toyota claims an offset for the "consumer's use" of the subject vehicle. Answer 6:16, 22d Affirmative Defense.

20. **November 14, 2008**, Mr. Page withdraws as arbitrator because of Mossy's assertion the subject 2002 Ford Escort was a commercial vehicle subject to the Commercial Rules requiring Mr. Perz to pay 50% of the fees. That was in direct conflict with the Order granting Mossy's Motion to Compel Arbitration, which limits the fees payable by a consumer … to $250 and $375, respectively". Also, not coincidentally, the Commercial Rules would remove Mr. Perz from the protection of Code of Civil Procedure § 1284.3, although the AAA Consumer Rules cited by the Court provide no protection in actual practice by the AAA. Mr. Page also expressed a reluctance to have to negotiate his fees "directly with the parties".

21. **December 1, 2008**, counsel for Perz again requests Mossy forward the filing fee for AAA arbitration, in accordance with its own contract.

22. **February 17, 2009**, counsel for Perz again asks Mossy to forward the fees requested by AAA.

23. **February 24, 2009**, 565 days after the Court granted Mossy Toyota's Petition to Compel Arbitration, Mossy confirms it has paid the fees to AAA.

24. **April 2, 2009**, the American Arbitration Association sends a list of potential arbitrators, but fails to make full disclosure of their backgrounds and current affiliations. The parties agree on Toni Donnet. She does not disclose that she currently represents car dealers and maintains a website offering legal advise to car dealers. During the pendency, she send solicitations to counsel for her real estate business.

25. **June 4, 2009**, the arbitrator issues dates for arbitration.

26. **September 20, 2009**, plaintiff requests the disqualification of Donnet.

27. **November 2009**, AAA offers arbitrators and the parties agree to Jo Beth Halper. However, the AAA does not disclose her history.

28. This case was set for arbitration on **February 8, 2010**, before Jo Beth Halper. The AAA did not disclose that she has rendered 100% of her decisions in favor of businesses. 38 arbitrations by Ms. Halper were on behalf of a single debt collection company. All 38 of her decisions were in favor of that company. Out of 40 consumer arbitrations she has done, no consumer has *ever* won an arbitration before this arbitrator.

a. Plaintiff requested a hearing on whether the subject arbitration clause complies with the AAA Consumer Due Process Protocol. The AAA's own rules prohibit the use of such clauses. The request for a hearing is denied.

b. In denying plaintiff's request for a hearing the arbitrator Ms. Halper fabricated what she believes plaintiff will testify to, then dismissed the imagined testimony to rule against him. Her January 14, 2010 email correspondence states;

"I understand that Mr. Perz would likely testify that he was not offered review of the form on both sides, was not required to sign the form on both sides, and would likely testify that the sales person had an arm on the contract to implicitly discourage that the form be reviewed on both sides. I also understand that Mr. Perz was given a copy where he could see that the document was 2-sided after he received it, and apparently did not review it to raise an objection to the arbitration. I also understand that (sic) did not ask to have the sales person move his or her arm before signing, did not ask to see the the other side, if any, of the document, and that he was not forced to sign under *duress*. (Emphasis added.)

[Actually, if that was his testimony then the AAA Consumer Due Process Protocol would prohibit it from hearing the case.]

c. None of that testimony exists anywhere but in the mind of the arbitrator. The neutral arbitrator requirement, is essential to ensuring the integrity of the arbitration process. *Armendariz v. Foundation Health Psychcare Services, Inc.* 24 Cal.4th 83, 103 (Cal. 2000). It is completely improper for the trier of fact to assume in advance what Mr. Perz will say or did say, and dismiss it out of hand. Jurors are routinely instructed to *wait* until the evidence is presented to make up their minds.

d. Moreover, "duress", as stated by Ms. Halper, is not the standard for consumer transactions in California. Deception and its materiality are determined from the viewpoint of the reasonable consumer. *Falk v. Gen. Motors Corp.*, 496 F.Supp.2d 1088, 1094-95 (N.D.Cal.2007).

29. **January 27, 2010**, plaintiff requested disqualification of Ms. Halper based upon her arbitration history and her statement regarding imagined testimony of Jon Perz.

30. **February 1, 2010**, Counsel for plaintiff, by letter requested answers to certain questions regarding the arbitrator, Ms. Halper, i.e.,

1. The total amount of fees received by Ms. Halper in regard to the arbitrations she conducted between Jan 1, 2005 and Dec 31, 2009.

2. If Ms. Halper ruled in favor of any consumer during that time, please identify the case, the name of the consumer, and the result.

3. Please provide the total amount of attorney fees and costs Ms. Halper assessed against consumers between Jan 1, 2005 and Dec 31, 2009.

a. Please state the legal basis for the assessment of attorney fees and costs against consumers in your arbitration process.

b. Please state how many consumers have had attorney fees and costs assessed against them in AAA's arbitration process.

Plaintiff sent the correspondence to the regular case administrators, James Lee and Lynn Cortinas. Upon AAA's receipt, they were promptly discharged and replaced by Jesse Molina, a Supervisor.

31. **February 4, 2010**, Molina responded "Please be advised that I will handle the further administration of your case.", "your case is very important to the Association", and "Additionally, the Association will not be providing responses to Mr. Lindsey's letter dated February 1, 2010."

32. **February 15, 2010**, after refusing plaintiff's request for a hearing on whether the AAA's own Consumer Due Process Protocol permits it to hear a forced arbitration case under the terms of the subject arbitration clause plaintiff withdraws from AAA arbitration by letter. However, the AAA refuses to acknowledge the withdrawal. The former case administrators are no longer available, and Jesse Molina, Supervisor, takes over. He states his goal is to see the arbitration concluded immediately and attempts to force it through.

33. **May 14, 2010**, plaintiff brings a motion asking the Court to disqualify Ms. Halper and select an arbitrator or set for trial. The Court denies the motion, and offers no alternative but to go through arbitration with AAA and Ms. Halper. Plaintiff makes the motion on the basis of non disclosure and bias of the arbitrator. Plaintiff also demonstrates that the AAA fails to comply with the reporting requirements of CCP § 1281.96. The motion is denied.

34. **June 17, 2010**, after an exchange of emails in which plaintiff pointed out to Mr. Molina the standards in California for arbitrator disclosure, and pointedly highlights the issues, Molina belatedly acknowledges plaintiff's withdrawal of February 15, and states that the case is closed.

35. **August 9, 2010**, plaintiff again sends a letter offering to stipulate to JAMS, and enclosing current list of arbitrators and the current consumer rules. Mossy does not reply.

36. **October 1, 2010**, Mossy brings a Motion to Dismiss for Lack of Prosecution. The motion is denied, but the Court from the bench addresses some of the means by which defendant may manouevre the case into a position where it could be dismissed. The Court also indicates a preference that one of the parties dismiss and take an appeal.

FILED

MAR 9 2007

CAL07-06223

Circuit Court for Prince George's County

CLERK OF THE CIRCUIT COURT
PRINCE GEORGE'S COUNTY, MD.

City or County

CIVIL–NON-DOMESTIC CASE INFORMATION REPORT

Directions:

Plaintiff: *This Information Report must be completed and attached to the complaint filed with the Clerk of Court unless your case is exempted from the requirement by the Chief Judge of the Court of Appeals pursuant to Rule 2-111(a).* ***A copy must be included for each defendant to be served.***

Defendant: *You must file an Information Report as required by Rule 2-323(h).*

THIS INFORMATION REPORT CANNOT BE ACCEPTED AS AN ANSWER OR RESPONSE.

FORM FILED BY: ☑ PLAINTIFF ☐ DEFENDANT CASE NUMBER: _____ (Clerk to insert)

CASE NAME: Gregory Washington (Plaintiff) v Specialty Motors, Inc., d/b/a Auto Source (Defendant)

JURY DEMAND: ☑ Yes ☐ No Anticipated length of trial: _____ hours or 3 days

RELATED CASE PENDING? ☐ Yes ☑ No If yes, Case #(s), if known: _____

Special Requirements? ☐ Interpreter/communication impairment Which language _____

(Attach Form 1-332 if Accommodation or Interpreter Needed) Which dialect _____

☐ ADA accommodation: _____

NATURE OF ACTION (CHECK ONE BOX)

TORTS
- ☐ Motor Tort
- ☐ Premises Liability
- ☐ Assault & Battery
- ☐ Product Liability
- ☐ Professional Malpractice
- ☐ Wrongful Death
- ☐ Business & Commercial
- ☐ Libel & Slander
- ☐ False Arrest/Imprisonment
- ☐ Nuisance
- ☐ Toxic Torts
- ☑ Fraud
- ☐ Malicious Prosecution
- ☐ Lead Paint
- ☐ Asbestos
- ☐ Other

LABOR
- ☐ Workers' Comp.
- ☐ Wrongful Discharge
- ☐ EEO
- ☐ Other

CONTRACTS
- ☐ Insurance
- ☐ Confessed Judgment
- ☐ Other

REAL PROPERTY
- ☐ Judicial Sale
- ☐ Condemnation
- ☐ Landlord Tenant
- ☐ Other

OTHER
- ☐ Civil Rights
- ☐ Environmental
- ☐ ADA
- ☐ Other

DAMAGES/RELIEF

A. TORTS

Actual Damages
- ☐ Under $7,500
- ☑ $7,500 - $50,000
- ☐ $50,000 - $100,000
- ☐ Over $100,000
- ☐ Medical Bills $ _____
- ☐ Property Damages $ _____
- ☐ Wage Loss $ _____

B. CONTRACTS
- ☐ Under $10,000
- ☐ $10,000 - $20,000
- ☐ Over $20,000

C. NONMONETARY
- ☐ Declaratory Judgment
- ☐ Injunction
- ☐ Other

ALTERNATIVE DISPUTE RESOLUTION INFORMATION

Is this case appropriate for referral to an ADR process under Md. Rule 17-101? (Check all that apply)

A. Mediation ☐ Yes ☑ No
B. Arbitration ☐ Yes ☑ No
C. Settlement Conference ☐ Yes ☑ No
D. Neutral Evaluation ☐ Yes ☑ No

TRACK REQUEST

With the exception of Baltimore County and Baltimore City, please fill in the estimated ***LENGTH OF TRIAL. THIS CASE WILL THEN BE TRACKED ACCORDINGLY.***

- ☐ ½ day of trial or less
- ☐ 1 day of trial time
- ☐ 2 days of trial time
- ☑ 3 days of trial time
- ☐ More than 3 days of trial time

PLEASE SEE PAGE TWO OF THIS FORM FOR INSTRUCTIONS PERTAINING TO THE BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM AND ADDITIONAL INSTRUCTIONS IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY.

Date 3/7/2007 *Signature* _____

BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

For all jurisdictions, *if Business and Technology track designation under Md. Rule 16-205 is requested, attach a duplicate copy of complaint and check one of the tracks below.*

☐ **Expedited**	☐ **Standard**
Trial within 7 months of Defendant's response	Trial - 18 months of Defendant's response

☐ EMERGENCY RELIEF REQUESTED _____ _____

Signature *Date*

IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY PLEASE FILL OUT THE APPROPRIATE BOX BELOW.

CIRCUIT COURT FOR BALTIMORE CITY (check only one)

☐ Expedited	Trial 60 to 120 days from notice. Non-jury matters.
☐ Standard-Short	Trial seven months from Defendant's response. Includes torts with actual damages up to $7,500; contract claims up to $20,000; condemnations; injunctions and declaratory judgments.
☐ Standard-Medium	Trial 12 months from Defendant's response. Includes torts with actual damages over $7,500 and under $50,000, and contract claims over $20,000.
☐ Standard-Complex	Trial 18 months from Defendant's response. Includes complex cases requiring prolonged discovery with actual damages in excess of $50,000.
☐ Lead Paint	Fill in: Birthdate of youngest plaintiff _____.
☐ Asbestos	Events and deadlines set by individual judge.
☐ Protracted Cases	Complex cases designated by the Administrative Judge.

CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

To assist the Court in determining the appropriate Track for this case, check one of the boxes below. This information is <u>not</u> an admission and may not be used for any purpose other than Track Assignment.

☐ Liability is conceded.
☐ Liability is not conceded, but is not seriously in dispute.
☑ Liability is seriously in dispute.

CIRCUIT COURT FOR BALTIMORE COUNTY

☐ Expedited (Trial Date-90 days)	Attachment Before Judgment, Declaratory Judgment (Simple), Administrative Appeals, District Court Appeals and Jury Trial Prayers, Guardianship, Injunction, Mandamus.
☐ Standard (Trial Date-240 days)	Condemnation, Confessed Judgments (Vacated), Contract, Employment Related Cases, Fraud and Misrepresentation, Intentional Tort, Motor Tort, Other Personal Injury, Workers' Compensation Cases.
☐ Extended Standard (Trial Date-345 days)	Asbestos, Lender Liability, Professional Malpractice, Serious Motor Tort or Personal Injury Cases (medical expenses and wage loss of $100,000, expert and out-of-state witnesses (parties), and trial of five or more days), State Insolvency.
☐ Complex (Trial Date-450 days)	Class Actions, Designated Toxic Tort, Major Construction Contracts, Major Product Liabilities, Other Complex Cases.

GREGORY WASHINGTON 85 Sycamore Drive Northeast, Maryland 21901,	*	IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY,
Plaintiff,	*	MARYLAND
v.	*	
SPECIALTY MOTORS, INC. d/b/a AUTO SOURCE 4740 St. Barnabus Road Temple Hills, Maryland 20748	*	
Serve on: Richard M Sussman, Esq. Resident Agent for Specialty Motors, Inc. 600 Jefferson Plaza, Suite 308 Rockville, Maryland 20852,	*	CASE NO. CAL07-06223
Defendant.	*	

* * * * * * * * *

FILED

MAR 9 2007

CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGES COUNTY, MD.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Gregory Washingon ("Mr. Washingon"), through his attorneys, files this Complaint against the Defendant Specialty Motors, Inc. d/b/a Auto Source ("Auto Source") and for cause states:

INTRODUCTION

1. This case is about a car dealership that defrauded a veteran out of a $13,000.00 down-payment, which constituted his savings, and then stole the vehicle they sold to him without cause, and sold it to somebody else. The dealership never repaid or offered to repay Mr. Washington for his down-payment, and never returned or offered to return Mr. Washington's vehicle. They simply took both his money and his car, leaving him without his savings, without transportation to necessary family and medical

appointments, aggravating a medical condition and causing Mr. Washington to lose visitation rights with his children.

2. The outrageous, intentional and malicious actions of the dealership, Auto Source, caused Mr. Washington significant economic and non-economic injuries and damages. Auto Source's actions constituted violations of the common law, including fraud, conversion, and negligence, and violations of statutory law, including the Maryland Consumer Debt Collection Act ("MCDCA"), and the Maryland Consumer Protection Act ("CPA").

3. Through this lawsuit, Mr. Washington seeks economic and non-economic compensatory damages, punitive damages, statutory damages, and attorney's fees, to make him whole for his losses.

PARTIES

4. Defendant Auto Supreme is a Maryland corporation with its principal place of business in Maryland, which carries on a regular business in Prince George's County, Maryland.

5. Plaintiff, Mr. Washington, is a natural person residing in Cecil County, Maryland.

JURISDICTION AND VENUE

6. This court has jurisdiction as the Defendant is a Maryland corporation with its principal place of business in Maryland, and as the acts giving rise to causes of action in this Complaint occurred in Maryland.

7. Venue is proper in this Court as the principal place of business of the Defendant, Auto Supreme, is in Prince George's County, Maryland.

FACTS

8. In August, 2006, Mr. Washington visited Auto Source to shop for, and perhaps purchase, a vehicle.

9. When he went to the dealership, Mr. Washington was approached by a salesman for Auto Source.

10. Mr. Washington viewed some of the cars at the dealership, and agreed to purchase a 2001 Mercedes Benz S500 ("the Vehicle").

11. Mr. Washington signed a Buyer's Order and agreed to pay a $13,000.00 down-payment on the vehicle.

12. After Mr. Washington agreed to purchase the vehicle and signed a Buyer's Order, he met with another employee of Auto Source, a person identified to him as the finance manager, Edward N. Walker ("Mr. Walker").

13. Mr. Walker had Mr. Washington sign a number of documents regarding financing, including a financing contract.

14. Mr. Washington gave Mr. Walker a $13,000.00 certified check to cover the down-payment, but Mr. Walker said that Auto Source could accept cash only for the down-payment, and could not accept a check of any sort.

15. Mr. Washington went back to the bank to ask for $13,000.00 in cash, but the bank representative he spoke to told him that the bank did not have that amount of cash on hand to give to him.

16. Mr. Washington told Mr. Walker that he was not able to get the $13,000.00 in cash, so Mr. Walker accompanied Mr. Washington to the bank, and told Mr. Washington

to have the check made out to Mr. Walker, personally, so that he could make the deal go through. Mr. Washington made a check payable to Mr. Walker in the amount of $13,000.00.

17. Mr. Walker and Mr. Washington returned to Auto Source, and Mr. Washington insured the Vehicle and drove it home.

18. About a month and a half after purchasing the Vehicle, the left side hydraulic system on the Vehicle failed. Mr. Washington called Auto Source, and was told that since he lived so far away from Auto Source, if he took the Vehicle to a nearby shop and paid for the repairs, Auto Source would reimburse him.

19. Mr. Washington took the Vehicle to a nearby auto repair shop to have the necessary work done to fix the vehicle.

20. While the Vehicle was at the shop, Auto Source repossessed it.

21. Auto Source told Mr. Washington that the reason the Vehicle was repossessed was because Mr. Washington missed a payment.

22. Auto Source told Mr. Washington that he was supposed to be making payments to the dealership, though they had previously told Mr. Washington that he would be getting payment instructions in the mail to make his payments to a financing company. Mr. Washington never received any payment instructions in the mail.

23. Mr. Washington never received any notices or other correspondence regarding Auto Source's repossession of the Vehicle, subsequent sale of the Vehicle, or any other such information.

24. Mr. Washington has tried on several occasions to resolve this issue.

25. Mr. Washington was told by Auto Source that Mr. Walker no longer works at the dealership, that Mr. Walker kept Mr. Washington's down-payment, and that Auto Source is not responsible for the down-payment or for the actions of Mr. Wwalker. Auto Source has refused to return Mr. Washington's down-payment.

26. Auto Source told Mr. Washington that they would honor the $13,000.00 down-payment on another vehicle, but they have never honored this promise.

27. Due to Auto Source's taking of the Vehicle, Mr. Washington lost visitation rights with his son, causing him extreme emotional distress and mental anguish.

28. In addition, Auto Source's taking of the Vehicle aggravated Mr. Washington's post traumatic stress disorder as a result of the added stress he has suffered in losing his savings of $13,000.00, and as the result of doctors' appointments he has missed because he has been without a vehicle.

29. Mr. Washington has suffered physical manifestations of the emotional distress and mental anguish he has suffered as the result of Auto Source's actions.

30. Mr. Washington has suffered other economic and non-economic damages as the result of Auto Source's actions.

31. Auto Source's actions toward Mr. Washington were perpetrated with actual malice.

COUNT ONE
FRAUD

32. Mr. Washington re-alleges and incorporates the preceding paragraphs as if fully set forth below.

33. Mr. Washington was told by Auto Source, through its employee, Mr. Walker, within the scope of Mr. Walker's employment, that the $13,000.00 cashier's check Mr. Washington made out to Mr. Walker would be used toward Mr. Washington's purchase of the Vehicle as a down-payment.

34. Auto Source represented to Mr. Washington that his financing contract would be assigned to Drive Financial Services.

35. Auto Source's representations to Mr. Washington were false.

36. Auto Source's representations to Mr. Washington were material.

37. Auto Source made the false representations to Mr. Washington for the purpose of defrauding Mr. Washington.

38. Mr. Washington justifiably relied on Auto Source's representations.

39. Mr. Washington suffered damages as a direct result of his reliance on Auto Source's representations, including but not limited to loss of his $13,000.00 down-payment, loss of possession of the Vehicle, and other incidental and consequential economic and non-economic damages.

40. Auto Source's fraudulent acts were perpetrated with actual malice.

WHEREFORE, Mr. Washington respectfully requests:

a. Compensatory, incidental and consequential damages in excess of $25,000.00 in an amount to be determined by a jury;

b. Punitive damages in an amount to be determined by a jury;

c. Pre- and post- judgment interest, and costs;

d. Attorney's fees; and,

e. Such other and further relief as the nature of this case may require.

COUNT TWO
CONVERSION

41. Mr. Washington re-alleges and incorporates the preceding paragraphs as if fully set forth below.

42. Mr. Washington was in rightful possession of the Vehicle and personal items inside that vehicle when the Vehicle and the items inside were taken from an auto repair shop where he took the Vehicle for repairs by Auto Source.

43. Auto Source intended to take possession of the Vehicle and the items inside the Vehicle from Mr. Washington, and did so.

44. Auto Source had no justification or permission to take the Vehicle or the items inside the vehicle from Mr. Washington, as it had no legal right to possession of the vehicle or the items inside, and Mr. Washington did not grant Auto Source permission to take possession of or seize the Vehicle or the items inside.

45. Auto Source exercised dominion over the Vehicle and the personal items inside the vehicle when it took possession of the Vehicle and the items inside without Mr. Washington's permission.

46. Mr. Washington, at the time Auto Source took his vehicle and the items inside it, was entitled to immediate possession of the Vehicle and the items inside it.

47. Auto Source caused harm to Mr. Washington and the Vehicle and the items inside the vehicle when it converted the Vehicle and the items inside it without permission or justification, exercised dominion over the Vehicle and the items inside it, and continues

to exercise dominion over the vehicle and the items inside it while preventing Mr. Washington from possession of the Vehicle and the items inside it.

48. The acts of Auto Source in converting the Vehicle and the items inside it were perpetrated with actual malice, as demonstrated by the facts discussed above surrounding Auto Source's acts including but not limited to the fact that the Vehicle and the items inside it were taken without justification, and were never returned to Mr. Washington.

WHEREFORE, Mr. Washington respectfully requests:

a. Compensatory, incidental and consequential damages in excess of $25,000.00;

b. Punitive damages;

c. Pre- and post- judgment interest, and costs;

d. Attorney's fees; and,

e. Such other and further relief as the nature of this case may require.

COUNT THREE
VIOLATION OF ARTICLE NINE OF THE COMMERCIAL LAW ARTICLE

49. Mr. Washington re-alleges and incorporates the preceding paragraphs as if fully set forth below.

50. Auto Source, in connection with the sale and financing of the Vehicle to Mr. Washington, is a secured party under Md. Comm. L. §9-102(a)(73).

51. The Vehicle is a consumer good under Md. Comm. L. §9-102(a)(23).

52. Article 9 of the Maryland Commercial Law Article sets forth, *inter alia*, obligations a secured party must fulfill in connection with repossessing and disposing of collateral securing a loan. These requirements include but are not limited to sending a

reasonable authenticated notice of disposition of collateral, and paying any surplus received from the disposition of collateral to the debtor.

53. Auto Source did not comply with its obligations under Article 9 in connection with its taking of, and disposition of, the Vehicle with regard to Mr. Washington.

54. Under Md. Comm. L. §9-625, "a person is liable for damages in the amount of any loss caused by a failure to comply with this title. **Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing**." [emphasis added]

55. Here, the actions of Auto Source in taking the Vehicle in a manner not compliant with Article 9 caused Mr. Washington losses and damages including but not limited to the losses he has suffered obtaining alternative transportation, the losses he has suffered as a result of not having the vehicle to which he is entitled, the losses he has suffered as the result of not being able to obtain alternative financing, the losses he suffered as a result of spending money fixing a car that was then taken by Auto Source from the repair shop, and the losses he has suffered as the result of being deprived of any surplus resulting from Auto Source's disposition of the collateral.

WHEREFORE, Mr. Washington respectfully requests:

a. Compensatory, incidental and consequential damages for the losses caused to Mr. Washington by Auto Source when it did not comply with Article 9, in excess of $25,000.00, in an amount to be determined by a jury;

b. Statutory damages under Md. Comm. L. §9-625(c)(2), in the amount of the credit service charge ($19,469.05), plus 10 percent of the principal

amount of the obligation ($2,782.84), plus 10 percent of the cash price ($3,860.70), for a total of $26,112.59 in statutory damages under Md. Comm. L. §9-625(c)(2);

c. Pre- and post- judgment interest, and costs;

d. Attorney's fees; and,

e. Such other and further relief as the nature of this case may require.

COUNT FOUR
VIOLATION OF THE MARYLAND CONSUMER DEBT COLLECTION ACT

56. Mr. Washington re-alleges and incorporates the preceding paragraphs as if fully set forth below.

57. The transaction in which Mr. Washington purchased a vehicle from Payless as described above was a "consumer transaction" within the meaning of the MCDCA, Md. Comm. L. §14-201(c), as Mr. Washington purchased a vehicle on credit for personal, family, and household purposes.

58. Auto Source is a "collector" within the meaning of the MCDCA, Md. Comm. L. §14-201(b), as it was attempting to collect an alleged debt arising out of a consumer transaction when it took the Vehicle.

59. The MCDCA prohibits a collector from "[c]laim[ing], attempt[ing], or threaten[ing] to enforce a right with knowledge that the right does not exist." Md. Comm. L. §14-202(8).

60. Auto Source violated the MCDCA when it took Mr. Washington's vehicle and had no right to take Mr. Washington's vehicle, and knew that it had no right to take Mr. Washington's vehicle.

61. Mr. Washington has suffered significant damages as a result of the violations of the MCDCA by Auto Source, including, but not limited to damages from loss of use of his vehicle, damages resulting from having to use rental cars and public transportation when he should have had possession of his vehicle, and other incidental and consequential damages arising from his loss of the vehicle. In addition, the wrongful seizure of his car and the results of that wrongful seizure have caused Mr. Washington significant emotional distress and mental anguish, which are damages he also seeks to recover under this Count.

WHEREFORE, Mr. Washington respectfully requests:

a. Compensatory, incidental and consequential damages of $75,000.00;

b. Pre- and post- judgment interest, and costs;

c. Attorney's fees; and,

d. Such other and further relief as the nature of this case may require.

COUNT FIVE
VIOLATION OF THE MARYLAND CONSUMER PROTECTION ACT

62. Mr. Washington re-alleges and incorporates the preceding paragraphs as if fully set forth below.

63. Auto Source is a "merchant" within the meaning of the CPA, as it directly offered and made available to Mr. Washington consumer goods and consumer credit.

64. Auto Source engaged in numerous violations of the CPA causing damage to Mr. Washington based on the facts discussed above.

65. When Auto Source committed fraud against Mr. Washington, it violated the CPA.

66. When Auto Source took a $13,000.00 down-payment from Mr. Washington and then told Mr. Washington that the $13,000.00 had not been applied to his purchase of the Vehicle, Auto Source violated the CPA.

67. When Auto Source told Mr. Washington that it would honor his $13,000.00 down-payment on another vehicle and failed to do so, Auto Source violated the CPA.

68. When Auto Source, through Mr. Walker, demanded a $13,000.00 down-payment in a cashier's check made out to Mr. Walker, Auto Source violated the CPA.

69. When Auto Source told Mr. Washington that it was not responsible for the acts of Mr. Walker and that the down-payment issue was Mr. Washington's problem, Auto Source violated the CPA.

70. When Auto Source violated Article 9 of the Commercial Law Article as described above, it violated the CPA.

71. When Auto Source failed to send Mr. Washington any notices or accountings concerning their seizure of the Vehicle, Auto Source violated the CPA.

72. When Auto Source represented that it had the right to take Mr. Washington's car, and took Mr. Washington's car without justification, it violated the CPA.

73. When Auto Source violated the MCDCA as described above, it violated the CPA.

74. When Auto Source negligently supervised Mr. Washington as described below, it violated the CPA.

75. Mr. Washington has suffered significant economic and non-economic damages as a result of Auto Source' violations of the CPA including, but not limited to, damages from loss of use of his vehicle, damages resulting from having to use rental cars and

public transportation when he should have had possession of his vehicle, loss of his $13,000.00 down payment, loss of the money he spent on repairing the Vehicle, and other incidental and consequential damages arising from his loss of the vehicle.

WHEREFORE, Mr. Washington respectfully requests:

a. Compensatory, incidental and consequential damages exceeding $25,000.00, in an amount to be determined by a jury;

b. Attorney's fees;

c. Pre- and post- judgment interest, and costs; and,

d. Such other and further relief as the nature of this case may require.

COUNT SIX
RESPONDEAT SUPERIOR

76. Mr. Washington re-alleges and incorporates the preceding paragraphs as if fully set forth below.

77. Mr. Walker, at all times relevant to this action, was employed by, and the agent of, Auto Source.

78. Mr. Walker intentionally committed the acts he is described as committing above, causing damages to Mr. Washington.

79. Mr. Walker committed the acts described above, causing damages to Mr. Washington, within the scope of his employment and agency with Auto Source, when he was performing services for which he had been engaged and when acting in furtherance of Auto Source's interests.

80. Auto Source ratified and adopted the acts of Mr. Walker with full knowledge of all material facts.

WHEREFORE, Mr. Washington respectfully requests:

a. Compensatory, incidental and consequential damages exceeding $25,000.00, in an amount to be determined by a jury;

b. Punitive damages in an amount to be determined by a jury;

c. Attorney's fees;

d. Pre- and post- judgment interest, and costs; and,

e. Such other and further relief as the nature of this case may require.

COUNT SEVEN
NEGLIGENT HIRING/RETENTION

81. Mr. Washington re-alleges and incorporates the preceding paragraphs as if fully set forth below.

82. An employment relationship existed between Auto Source and Mr. Walker at all times relevant to this action.

83. The acts of Mr. Walker described above proximately caused Mr. Washington the losses and injuries, both economic and non-economic, described above.

84. Auto Source knew or should have known by the exercise of diligence and reasonable care that Mr. Walker was capable of inflicting harm of some type, and was not fit or competent for the duties of a car salesman or finance manager.

85. Auto Source failed to use proper care in selecting, supervising, and retaining Mr. Walker.

86. Auto Source's breach of duty proximately caused Mr. Washington's injuries and losses described above.

WHEREFORE, Mr. Washington respectfully requests:

a. Compensatory, incidental and consequential damages exceeding $25,000.00, in an amount to be determined by a jury;

b. Attorney's fees;

c. Pre- and post- judgment interest, and costs; and,

d. Such other and further relief as the nature of this case may require.

Respectfully submitted,

PETER A. HOLLAND
BENJAMIN H. CARNEY
The Holland Law Firm, P.C.
Clock Tower Place
1410 Forest Drive, Suite 21
Annapolis, MD 21403
410-280-6133
ATTORNEYS FOR MR. WASHINGTON

DEMAND FOR JURY TRIAL

Mr. Washington demands a jury trial on all issues in this action.

PETER A. HOLLAND
BENJAMIN H. CARNEY
The Holland Law Firm, P.C.
Clock Tower Place
1410 Forest Drive, Suite 21
Annapolis, MD 21403
410-280-6133
ATTORNEYS FOR MR. WASHINGTON

MEMORANDUM

To: NACA
From: Nance F. Becker, Chavez & Gertler LLP
Re: Preservation of Consumer Class Actions

Chavez & Gertler LLP is a small law firm near San Francisco, CA that specializes in representing consumers and employees in class action litigation. This memo offers a few examples of our firm's recent cases that illustrate the importance of the class action procedure in consumer disputes, and the reasons why it is imperative to enact legislation to prevent financial institutions and others from using boilerplate arbitration clauses to preempt such litigation in the future.

***California Rees-Levering Act Cases*: Protecting Consumers From Unlawful Debt Collection Practices**

Plaintiffs litigating claims for violations of California's Rees-Levering Automobile Sales Finance Act (Cal. Civil Code §2981 et seq.) have had dramatically different experiences depending on whether their contracts do or do not contain an arbitration clause.

In exchange for granting lenders the right to repossess personal motor vehicles when consumers become delinquent on certain types of loans, the Rees-Levering Act requires the lender to send a detailed written notice ("Statutory Notice") specifying exactly how much the borrower must pay and what s/he must do in order to repurchase the vehicle or reinstate the loan. There is a strict penalty for noncompliance: the Act provides that the borrower is not liable for the difference between the amount owed under an installment sale contract and the amount realized from the sale of the vehicle – the "deficiency balance" – unless the Statutory Notice contains *all* of the detailed disclosures required by the statute.

Needless to say, the vast majority of consumers are unaware of these technical requirements and, knowing that they are behind on their car payments and lacking money to pay an attorney, they are unlikely to seek legal advice. Such individuals may be burdened for years by demands from auto lenders and collection agencies to pay deficiency balances which are not lawfully owed. The persistence of the "debts" on the consumer's credit report also hinders their ability to obtain financing for another car, a home, or other important purchases when their financial situation improves. Yet because the amounts of money at stake in these cases is very small, averaging $5,000 - $10,000 or less, even a consumer who suspects their Statutory Notice is defective is unlikely to be able to retain an attorney to represent him or her in an individual action.

These cases are, in short, ideally suited for class action litigation, and plaintiff's counsel have brought over three dozen cases alleging violations of the notice provisions of the Rees-Levering Act, obtaining relief from these unlawful debt collection practices for well over 100,000 consumers, over the last 3 years. One example is *Asabi v. Santander Consumer USA, Inc.* (Superior Court of California, County of Alameda, Case No.

RG09443628). Plaintiff sued on behalf of over 12,600 individuals whose cars were repossessed and sold, who received Statutory Notices that were incomplete and confusing, and from whom the lender nevertheless demanded some $93 million in deficiency balances that were not legally owed. After a year of litigation, the parties reached a settlement pursuant to which the defendant agreed to waive its claims to all of the remaining deficiency balances, to return most of the deficiency payments previously made, and to direct the credit reporting agencies to delete all reference to the debts – a fairly typical settlement in these cases.

Our ability to continue to do this work is, however, in jeopardy. There have historically been two versions of the form installment sale contracts that motor vehicle purchasers are required to sign, one of which includes an arbitration clause and one that does not. The arbitration clause precludes the consumer from bringing a class action and provides that the class action ban is not severable from the other arbitration provisions. In the wake of the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion* and its progeny, lenders have become much more aggressive about asserting the arbitration clause as a defense to Rees-Levering Act actions.

The impact of this change in the law is well-illustrated by our experiences in two recent cases, one brought in the California Superior Court for the City and County of Los Angeles on behalf of plaintiffs Arturo Arguelles-Romero and his wife Evangelina Amezcua (*Arguelles-Romero v. Americredit Financial Services, Inc.*, L.A. Superior Court No. BC410509) and the other on behalf of plaintiffs Michael and Michelle Sutherland (*Sutherland v. Santander Consumer USA, Inc.*, Alameda Superior Court No. RG10-507124). Plaintiffs in both cases were sent Statutory Notices that, plaintiffs contended, failed to include all of the disclosures required by the Rees-Levering Act. Both plaintiffs had also signed form contracts that contained an arbitration clause.

In *Arguelles-Romero*, the trial court granted the lender's motion to compel arbitration, and although plaintiffs appealed and succeeded in having the issue remanded (*see Arguelles-Romero v. Superior Court*, 184 Cal.App.4th 825 (2010)), in light of the Supreme Court's decision in *Concepcion* we were compelled to dismiss the class claims and enter into an individual settlement on behalf of the named plaintiffs only. The estimated 35,000 other individuals who were members of the proposed class received no benefit from the settlement.

In *Sutherland*, the trial court denied defendant's motion to compel arbitration, and defendant appealed. Plaintiffs discovered, however, that many of the contracts at issue did not contain an arbitration clause, and we were able to amend the complaint to assert the same claims on behalf of a non-arbitration sub-class represented by another class member, Kiesha Thomas. When the trial court ruled that the claims of the non-arbitration sub-class could go forward, plaintiffs successfully negotiated a comprehensive settlement that benefitted all of the consumers injured by the lender's common practices. The settlement, which has received preliminary approval from the court, relieves almost 16,000 consumers from over $111 million in wrongfully-demanded debt.

The California Supreme Court has accepted review of at least one case in which the enforceability of the arbitration clause in the standard-form retail installment sale contract at issue in those cases – a form that is used by auto dealers throughout California – is at issue (*Sanchez v. Valencia Holding Co.*, 201 Cal.App.4th 74 (2011), *rev. granted*) and has been asked to review another (*Buzenes v. Nuvell Financial Services LLC*, Cal. Ct. Appeal No. B221970, *rev. pending*).

Labrador v. Seattle Mortgage Co.: **Protecting Seniors From Unlawful Charges For Reverse Mortgages**
(Northern District of California, San Francisco Division, Case No.CV-08-2270 SC)

Mary Labrador was a widow in her mid-80s when a mortgage broker came to call. The broker arrived at her home and convinced Mrs. Labrador to refinance her home with a home equity conversion (reverse) mortgage that she did not need. Among the thousands of dollars in transaction fees she was required to pay was a $7,200 "origination fee." That fee was passed through from the lender (Seattle Mortgage Company, or SMC) to the loan broker.

Mrs. Labrador filed suit against SMC to recover her origination fee, alleging that SMC's imposition of the fee violated one of the applicable HUD regulations (24 C.F.R. §206.31(a)) enacted to protect the vulnerable population of senior citizens targeted for reverse mortgage transactions. The case presented an issue of first impression as to whether the payment of certain types of "correspondent fees" by a lender to a mortgage broker creates a "financial interest" between those parties under federal law, and thus prohibits the lender from charging the borrower an origination fee. Plaintiff sued in the Northern District of California on behalf of all senior citizens throughout the United States who had been charged similar fees by SMC. The case settled, with some 11,700 class members in 12 states being entitled to receive an equitable share of a significant Settlement Fund.

Brandow v. Heart Check America et al.: **Seeking Redress For Defendants' Breach Of Prepaid Contract To Provide Long Term Medical Screening Services**
(Superior Court of California, Los Angeles County, Case No. BC470410)

The *Brandow* case was a class action on behalf of all California consumers who signed a long-term contract for medical imaging services with Heart Check America (HCA) and affiliated companies. The defendants were a privately-held group of medical imaging centers who offered "preventive imaging" services alleged to promote the early detection and diagnosis of disease. Through an extensive advertising campaign, defendants encouraged consumers to sign multi-year contracts to receive body scans, lung and heart scans, bone density scans, and other screening services, the costs of which are not covered by insurance. By agreeing to and pre-paying for a long-term (up to 10 year) contract, defendants promised, the per-scan cost of such services would be significantly reduced.

HCA's contracts cost thousands of dollars, and they arranged financing through Chase Bank USA and other national banks such as GE Money Bank. Eligible consumers were enrolled in a "ChaseHealthAdvance" account and similar plans pursuant to which the lender paid HCA all required enrollment and service fees up front, and the consumer repaid the advance, at a high interest rate, to the lender over time.

In or around May 2011, HCA abruptly shut its offices and ceased providing any medical services. Nevertheless, the banks continued to demand payment under the finance contracts.

Mr. and Mrs. Brandow and others brought suit against Chase on behalf of themselves and all other California consumers who had entered into long-term contracts with HCA, contending among other things that the bank was subject to all claims and defenses – including breach of contract – the consumers had against HCA. The suit sought restitution of all amounts paid for services that were not and will never be provided, and a determination that consumers need not make any further payments on their contracts. This complex litigation was later consolidated with similar actions filed in Nevada, Illinois, and Colorado, and the parties have entered into a multi-million dollar nationwide class settlement that is awaiting court approval.

The settlement benefits only those consumers whose financing was provided by Chase. Plaintiffs were unable to seek or obtain similar relief for those consumers whose contracts were financed by GE Money Bank because GE Money Bank's finance contract contains an arbitration clause.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN D. AHO, individually, and on behalf of all others similarly situated, Plaintiff, vs. AMERICREDIT FINANCIAL SERVICES, INC. dba ACF FINANCIAL SERVICES, INC., Defendant.	CASE NO. 10cv1373 DMS (BLM) **ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **[Docket No. 117]**

This matter comes before the Court on Plaintiff's motion for partial summary judgment. Defendant filed an opposition to the motion, and Plaintiff filed a reply. The motion came on for hearing on January 20, 2012. John Hanson and Michael Lindsey appeared and argued on behalf of Plaintiff, and Anna McLean and Shannon Peterson appeared and argued on behalf of Defendant. Having carefully considered the pleadings and arguments of counsel, the Court now grants the motion.

I.

BACKGROUND

On December 14, 2003, Plaintiff Steven Aho entered into a Retail Installment Sale Contract ("RISC") with Rancho Chrysler Jeep Dodge for the financing and purchase of a 2002 Dodge Dakota

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truck. Pursuant to the RISC, Plaintiff was to make monthly payments on the loan beginning in January 2004.

Plaintiff's truck was repossessed on August 13, 2005, after he failed to make the monthly payments required by the RISC. On August 15, 2005, Defendant AmeriCredit Financial Services, Inc. sent Plaintiff a "Notice of Our Plan to Sell Property" ("NOI"). (Decl. of Stephen Aho in Supp. of Mot. ("Aho Decl."), Ex. 2.) The NOI informed Plaintiff that the truck would be sold, and the proceeds from the sale would be used to pay the outstanding balance. It also informed Plaintiff that he would be responsible for any balance remaining if the sale proceeds did not cover the entire outstanding amount.

On September 15, 2005, Plaintiff's truck was sold at a private sale. On September 27, 2005, Defendant sent Plaintiff a "Deficiency Calculation," which listed a deficiency in the amount of $9,212.48. Over the next three years, Defendant attempted to collect this deficiency from Plaintiff, and reported the deficiency to various credit reporting agencies. Plaintiff did not make any payments toward the deficiency until June 14, 2010, at which time he made a $25 payment.

About two weeks after making that payment, Plaintiff filed the present case. He alleges three claims: (1) for violation of California Civil Code §§ 1788, *et seq.* ("the California Fair Debt Collection Practices Act" or "the Rosenthal Act"), (2) for violation of California Business and Professions Code §§ 17200, *et seq.*, and (3) for declaratory relief. Plaintiff's theories are that Defendant's collection and credit reporting activities violated the Rosenthal Act, and Defendant's NOI failed to comply with California Civil Code §§ 2981, *et seq.* ("the Automobile Sales Finance Act" or "Rees-Levering Act").

II.

DISCUSSION

Plaintiff argues he is entitled to summary judgment on his claims for violation of California Business and Professions Code § 17200 and for declaratory relief. Both of these claims depend on a showing that Defendant violated the Automobile Sales Finance Act ("ASFA"). Plaintiff asserts he has met that showing with respect to the NOI at issue in this case. Defendant disagrees.

A. Summary Judgment

Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has

the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party must identify the pleadings, depositions, affidavits, or other evidence that it "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

The burden then shifts to the opposing party to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at 324. The opposing party's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, to avoid summary judgment, the opposing party cannot rest solely on conclusory allegations. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing there is a genuine issue for trial. *Id. See also Butler v. San Diego District Attorney's Office*, 370 F.3d 956, 958 (9th Cir. 2004) (stating if defendant produces enough evidence to require plaintiff to go beyond pleadings, plaintiff must counter by producing evidence of his own). More than a "metaphysical doubt" is required to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

B. The ASFA

Plaintiff's 17200 claim and declaratory relief claim depend on the ASFA, or the Act.

> Under the Act, defaulting buyers whose cars have been repossessed by a creditor must be given the opportunity to redeem their vehicles by paying the full balance due under the contract. The Act also requires the defaulting buyers be given the opportunity, in many circumstances, to reinstate their contracts by curing the default and meeting certain other conditions set by the creditor.

Juarez v. Arcadia Financial, Ltd., 152 Cal. App. 4th 889, 894 (2007). The ASFA:

> requires that creditors provide a defaulting buyer with a notice of intention (NOI) to dispose of the repossessed vehicle. To ensure that a defaulting buyer is made aware of his or her right to redeem or reinstate prior to the creditor disposing of the vehicle, the Act requires that creditors include in the NOI information about the buyer's right to redeem or reinstate. The act further requires that the NOI set forth "all the conditions precedent" to reinstatement.

Id.

In *Juarez*, the court interpreted the phrase "all the conditions precedent" to require:

> that creditors provide sufficient information to defaulting buyers to enable them to determine precisely what they must do in order to reinstate their contracts, including stating the amounts due, to whom they are due, the addresses and/or contact information for those parties, and any other specific actions the buyer must take.

Id. at 899. The court went on to state, "[t]he creditor must provide the buyer with all of the relevant information it possesses and/or information it has the ability to discern, concerning precisely what the buyer must do to reinstate his or her contract." *Id.* at 909.

In this case, Defendant sent Plaintiff an NOI pursuant to the ASFA. (*See* Aho Decl., Ex. 2.) The terms of the NOI are not in dispute. What is in dispute is whether the NOI includes "all the conditions precedent" to reinstatement, as required by the ASFA.

The NOI lists the following specific amounts that must be paid prior to reinstatement: (1) past due amount, (2) late charges and (3) repossession costs. (*Id.*) It also states the buyer must pay "any storage charges, additional payments, and late charges which become due after the date of this notice." (*Id.*) Plaintiff takes issue with the latter statement, asserting that it violates the ASFA because it does not include specific information about amounts due and to whom the amounts are payable. Plaintiff also contends the NOI fails to include "all the conditions precedent" to reinstatement, including installment and late fees, storage charges, key charges, transportation fees and insurance information. Defendant responds that the fees and charges identified by Plaintiff either are not conditions precedent to reinstatement or Defendant did not know, nor should it have reasonably known, the specific amounts of those fees and charges. Defendant also argues there is a triable issue as to Plaintiff's standing, therefore Plaintiff is not entitled to summary judgment.

As mentioned above, Plaintiff's first argument in support of its motion is that the language, "Plus any storage charges, additional payments, and late charges which become due after the date of this notice," is a *per se* violation of the ASFA. In support of this argument, Plaintiff relies on *Juarez*, which states the NOI must "provide a level of specificity as to the conditions precedent to reinstatement sufficient to inform the buyer-without need for further inquiry-as to exactly what the buyer must do to cure the default." 152 Cal. App. 4th at 904. However, Plaintiff misreads *Juarez*. Although the *Juarez* court stated that all conditions precedent must be included in the NOI with sufficient particularity, it did

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not state that the kind of vague language Plaintiff relies on here results in a *per se* violation of the ASFA. Accordingly, this argument does not warrant summary judgment in Plaintiff's favor.

Next, Plaintiff points to specific fees and charges that it asserts are conditions precedent to reinstatement, including (1) repossession agent storage fees, (2) auction house storage fees, (3) transportation fees, (4) key fees, (5) personal property fees, (6) reconditioning fees, (7) monthly payments or late fees, (8) law enforcement fees and (9) insurance-related fees. Plaintiff argues Defendant knew, or should have known, about these fees and charges, therefore they should have been included in the NOI. Because these fees and charges were not included in the NOI, Plaintiff argues the NOI violates ASFA.

The Court has reviewed the evidence in support of Plaintiff's argument that these specific fees and charges are conditions precedent to reinstatement, and that Defendant knew, or should have known, about them. For the majority of these fees and charges, the evidence reflects that either they were not conditions precedent to reinstatement, Defendant did not know, or it was not reasonable for Defendant to have known, the specifics of those fees and charges, or there is a genuine issue of material fact on one or both of those elements. However, there are two specific charges that are both conditions precedent to reinstatement and that Defendant knew or should have known about.

The first of those charges are the monthly payments and late fees. The NOI reflects that these charges are conditions precedent to reinstatement. (Aho Decl., Ex. 2.) Indeed, it states specifically that "additional payments, and late charges which become due after the date of this notice" are included in the amount required to reinstate. (*Id.*) The evidence also reflects that Defendant knew, or reasonably should have known, these amounts. (Decl. of Michael Lindsey in Supp. of Mot., Ex. 14 at Ex. A at 34-35.)

In response to this evidence, Defendant argues these amount were included in the sales contracts, and therefore available to the consumer. Defendant also argues it routinely waived these charges. However, neither of these arguments defeats Plaintiff's showing that these amounts were conditions precedent to reinstatement or that Defendant knew these amounts. Defendant fails to cite any authority that relieves it of its obligation to disclose information if that information is available to the consumer. Indeed,

> [c]onsidering that [Americredit] has in its possession the relevant information the defaulting buyer needs in order to reinstate a contact, requiring the buyer to obtain this information by contacting [Americredit] and/or *by gleaning it from other sources* places a significantly greater burden on the buyer than any burden that would be placed on [Americredit] from requiring that it disclose this information to defaulting buyers in writing at the beginning of the process.

Juarez, 152 Cal. App. 4th at 905 (emphasis added). Accordingly, that the information may be available to the consumer does not relieve Defendant of its obligation to include that information in the NOI. Defendant's argument of waiver fares no better. On the contrary, the concept of waiver only reinforces that these amounts are both conditions precedent and that Defendant knew or should have known about them. In sum, the monthly payments and late fees were conditions precedent to reinstatement that Defendant knew, or reasonably should have known, and thus they should have been included in the NOI. The second amount that should have been included in the NOI is the law enforcement fee. *See Mora v. Harley-Davidson Credit Corp.*, No. 1:08-CV-01453-OWW-GSA, 2010 WL 4321602 (E.D. Cal. Oct. 25, 2010) (holding law enforcement fee should have been included in NOI). Defendant argues the law enforcement fee is a prerequisite to physical recovery of the vehicle, but it is not a condition precedent to reinstatement of the contract, therefore it need not be included in the NOI. However, this argument ignores the consumer's primary purpose for reinstatement, which is to regain possession of the vehicle. To accomplish that purpose, the consumer must pay the law enforcement fee. Thus, although Defendant may not require payment of the law enforcement fee to reinstate the contract, payment of the fee is necessary to fulfill the purpose of reinstatement for the consumer, namely regaining possession of the vehicle.

Plaintiff has demonstrated the absence of a genuine issue of material fact that payment of additional monthly installments, late fees and the law enforcement fee is a condition precedent to reinstatement of the contract. He has also demonstrated the absence of genuine issue of material fact that Defendant knew, or should have known, the specifics of those fees and charges. Defendant's failure to include this information in the NOI is a violation of the ASFA.

C. Standing

The only remaining issue is whether Plaintiff has made a sufficient showing of standing such that he is entitled to summary judgment. Defendant does not appear to challenge Plaintiff's standing

on the declaratory relief claim. Therefore, Plaintiff is entitled to summary judgment on that claim. However, Defendant does challenge Plaintiff's standing on the UCL claim.

"For purposes of a UCL cause of action, a plaintiff ... must prove the elements for standing to bring a UCL cause of action, including causation of loss of money or property as a result of unfair competition under the UCL." *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1350 (2009) (citing Cal. Bus. & Prof. Code § 17204). Defendant raised the issue of Plaintiff's standing in its first motion for summary judgment. In the order on that motion, the Court found Defendant had failed to demonstrate the absence of a genuine issue of material fact on the elements of injury and causation, and therefore denied the motion as to Plaintiff's standing. Defendant argues it is now Plaintiff's burden to demonstrate there are no triable issues on these elements, and Plaintiff has not met that burden.

However, Plaintiff has come forward with evidence to support a finding of injury in the form of his $25 payment toward his deficiency as well as his negative credit report. Defendant does not show there are triable issues of fact on these injuries. Rather, Defendant's focus is on the element of causation.

Previously, the Court found the evidence was susceptible to competing inferences about causation: One inference was that Plaintiff's injury was caused by Defendant's conduct. The other inference was that Plaintiff made the payment to manufacture standing for this case. That argument holds true on the $25 payment, but it carries less weight with respect to the negative credit report. Indeed, it is unreasonable to suggest that Plaintiff would have manufactured that kind of injury for standing purposes. With this injury, there is no dispute Defendant reported the deficiency to the credit rating agencies. Defendant argues Plaintiff had other delinquent accounts that negatively impacted his credit report, but that argument does not defeat a showing of causation sufficient to satisfy the statutory standing requirement. As stated by the California Supreme Court, "a 'plaintiff is not required to allege that [the challenged] misrepresentations were the sole or even the decisive cause of the injury-producing conduct.'" *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 (2011) (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009)). Rather, the plaintiff need only show that the Defendant's conduct "'was an immediate cause of the injury-producing conduct.'" *Id.* (quoting *In re Tobacco II*, 46 Cal. 4th

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at 326). Plaintiff has made that showing here, and thus he has satisfied the statutory standing requirements for his UCL claim.

Having demonstrated that he has standing under the UCL, and having shown that the NOI violates the ASFA, Plaintiff is entitled to summary judgment on his declaratory relief and UCL claims.

III.

CONCLUSION

For these reasons, Plaintiff's motion for partial summary judgment on his declaratory relief and 17200 claims is granted.

IT IS SO ORDERED.

DATED: January 31, 2012

HON. DANA M. SABRAW
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN D. AHO, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

AMERICREDIT FINANCIAL SERVICES, INC. dba ACF FINANCIAL SERVICES, INC.,

Defendant.

CASE NO. 10cv1373 DMS (BLM)

***SECOND AMENDED* ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL AND (2) DENYING AS MOOT DEFENDANT'S MOTION TO EXCLUDE PUTATIVE CLASS MEMBERS WITH ARBITRATION CLAUSES**

[Docket Nos. 40 and 41]

This matter has been fully briefed and comes before the Court on Plaintiff's motion for class certification and appointment of class counsel. John Hanson and Michael Lindsey appeared and argued on behalf of Plaintiff, and Peter Hecker, Anna McLean and Shannon Peterson appeared and argued on behalf of Defendant Americredit Financial Services, Inc. After the Court issued its order on the motion, Defendant filed a motion for reconsideration on Plaintiff's request for statutory damages under the Rosenthal Act, and the parties submitted supplemental briefing on the numerosity requirement. Having carefully considered all of the pleadings and arguments of counsel, the Court now amends its previous order as follows:

I.

BACKGROUND

On December 14, 2003, Plaintiff Steven Aho entered into a Retail Installment Sales Contract ("RISC") with Rancho Chrysler Jeep Dodge for the financing and purchase of a 2002 Dodge Dakota truck. (Decl. of Stephen D. Aho in Supp. of Mot. for Class Cert. ("Aho Decl."), Ex. 1.) Pursuant to the RISC, Plaintiff was to make monthly payments on the loan beginning in January 2004. (*Id.*)

Plaintiff's truck was repossessed on August 13, 2005, after he failed to make the monthly payments required by the RISC. On August 15, 2005, Defendant AmeriCredit Financial Services, Inc. sent Plaintiff a "Notice of Our Plan to Sell Property" ("NOI"). (Aho Decl., Ex. 2.) The NOI informed Plaintiff that the truck would be sold, and the proceeds from the sale would be used to pay the outstanding balance. (*Id.*) It also informed Plaintiff that he would be responsible for any balance remaining if the sale proceeds did not cover the entire outstanding amount. *(Id.)*

On September 15, 2005, Plaintiff's truck was sold at a private sale. (Aho Decl., Ex. 3.) On September 27, 2005, Defendant sent Plaintiff a "Deficiency Calculation," which listed a deficiency in the amount of $9,212.48. (*Id.*) Over the next three years, Defendant attempted to collect this deficiency from Plaintiff, and reported the deficiency to various credit reporting agencies. Plaintiff did not make any payments toward the deficiency until June 14, 2010, at which time he made a $25 payment.

Thereafter, Plaintiff filed the present action. He alleges three claims: (1) for violation of "the California Fair Debt Collection Practices Act" or "the Rosenthal Act" (Cal. Civ. Code §§ 1788, *et seq.*); (2) for violation of California's Unfair Competition Law ("UCL"; Bus. & Prof. Code §§ 17200, *et seq.*); and (3) for declaratory relief. Plaintiff's theories are that Defendant's collection activities violated the Rosenthal Act, and Defendant's NOI failed to comply with California's Rees-Levering Automobile Sales Finance Act ("ASFA"; Cal. Civ. Code §§ 2981, *et seq.*)

Specifically, Plaintiff claims the NOI failed to comply with Section 2983.2(a)(2) of the ASFA, because the NOI did not inform him of "all the conditions precedent" to reinstating his RISC.[1] Citing

[1] Cal. Civ. Code § 2983.2(a)(2) provides, in pertinent part, that a purchaser shall not be liable for a deficiency following repossession unless the NOI "[s]tates ... that there is a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice and all the conditions precedent thereto ...." Cal. Civ. Code § 2983.2(a)(2).

Juarez v. Arcadia Financial, Ltd., 152 Cal. App. 4th 889, 912 (2007), a case that interpreted the statute's "conditions precedent" language, Plaintiff asserts the NOI must "inform the consumer of any amounts the consumer will have to pay to reinstate a contract [and] inform the consumer if, when and by how much those amounts may increase as a result of late fees and other charges." The subject NOI, according to Plaintiff, informs him of only a "partial dollar amount" to reinstate, followed by other vague language: "Plus any storage charges, additional payments, and late charges that come due after the date of this notice." The NOI did not inform Plaintiff of the specific amounts and dates of the "plus payments" that came due between the date of the NOI and the expiration of the reinstatement period. Nor did it tell him how much, or to whom, he would have to pay storage charges, late charges, and government fees.

Because the NOI fails to set forth the conditions precedent to reinstatement as required by Section 2983.2(a)(2) of the ASFA, Plaintiff claims Defendant failed to create a valid debt and is barred from collecting a deficiency. Plaintiff further claims that as a result of the disclosure violation he is entitled to remedies provided by statute, including statutory damages and restitution, citing *Lewis* v. *Robinson Ford Sales, Inc.*, 156 Cal. App. 4th 359, 365 n.4 (2007) ("'conditional sale contract shall not be enforceable'" where disclosure requirements of ASFA are violated). *See also* Cal. Civ. Code § 2983 (providing restitution for statutory violation). Finally, Plaintiff claims that because the same (defective) standard-form NOI was used with all class members, the statutory violation is readily determinable by common proof on a classwide basis.

II.

DISCUSSION

Plaintiff moves to certify a class consisting of:

> All persons who were sent an NOI by AmeriCredit to an address in California at any time from March 18, 2005 through May 15, 2009, following the repossession or voluntary surrender of a motor vehicle, who were assessed a deficiency balance following the disposition of the vehicle, and against whom AmeriCredit has asserted, collected, or attempted to collect any portion of the deficiency balance. The class excludes persons whose obligations have been discharged in bankruptcy, persons against whom AmeriCredit has obtained final judgments in replevin actions, and persons who received NOIs that denied them the right to reinstate.

(Mem. of P. & A. in Supp. of Mot. for Class Cert. at 4.) Plaintiff asserts the proposed class satisfies the requirements of Federal Rules of Civil Procedure 23(a), 23(b)(2) and 23(b)(3). Defendant questions whether Plaintiff's claims are typical of the claims of absent class members and whether Plaintiff and his counsel are adequate representatives for the class. Defendant also contests that Plaintiff has met the requirements of Rules 23(b)(2) and 23(b)(3).

A. Legal Standard

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, ___U.S.___, 131 S.Ct. 2541**,** 2550 (2011) (citing *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)). To qualify for the exception to individual litigation, the party seeking class certification must provide facts sufficient to satisfy the requirements of Federal Rules of Civil Procedure 23(a) and (b). *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977).

Federal Rule of Civil Procedure 23(a) sets out four requirements for class certification – numerosity, commonality, typicality, and adequacy of representation.[2] A showing that these requirements are met, however, does not warrant class certification. Plaintiff also must show that one of the requirements of Rule 23(b) is met. Here, Plaintiff asserts that the requirements of both Rule 23(b)(2) and (b)(3) are met.

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Because the relief requested in a (b)(2) class is prophylactic, enures to the benefit of each class member, and is based on accused conduct that applies uniformly to the class, notice to absent class members and an opportunity to opt out of the class is not required. *See Dukes*, 131 S.Ct. at 2558 (noting relief sought

[2] Fed. R. Civ. P. 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

in a (b)(2) class "perforce affect[s] the entire class at once" and thus, the class is "mandatory" with no opportunity to opt out).

In contrast, Rule 23(b)(3) applies to situations "in which class-action treatment is not as clearly called for," as in a (b)(2) class. *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). Rule 23(b)(3) "allows class certification in a much wider set of circumstances but with greater procedural protections," (*id.*), including that: (a) "questions of fact or law common to class members predominate over questions affecting only individual members," (b) class treatment is determined to be superior to other methods of adjudicating the controversy, and (c) class members receive "'the best notice that is practicable under the circumstances'" and are allowed to "withdraw from the class at their option." *Id.* (citing Fed. R. Civ. P. 23(c)(2)(B)).[3]

The district court must conduct a rigorous analysis to determine whether the prerequisites of Rule 23 have been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). It is a well-recognized precept that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action."' *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). However, "[a]lthough some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits at the class certification stage." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475,480 (9th Cir. 1983) (citation omitted); *see also Nelson v. United States Steel Corp.*, 709 F.2d 675, 679-80 (11th Cir. 1983) (plaintiff's burden "entails more than the simple assertion of [commonality and typicality] but less than a prima facie showing of liability") (citation omitted). Rather, the court's review of the merits should be limited to those aspects relevant to making the certification decision on an informed basis.

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[3] Rule 23(b)(3) requires the court to find: "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

See Fed. R. Civ. P. 23 advisory committee notes. If a court is not fully satisfied that the requirements of Rules 23(a) and (b) have been met, certification should be refused. *Falcon,* 457 U.S. at 161.

B. Rule 23(a)

Rule 23(a), and its prerequisites for class certification – numerosity, commonality, typicality, and adequacy of representation – are addressed in turn.

1. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Staton v. Boeing Co.,* 327 F.3d 938, 953 (9th Cir. 2003). The plaintiff need not state the exact number of potential class members; nor is a specific minimum number required. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on the facts and circumstances of each case. *ld.*

Here, Plaintiff states, and Defendant does not dispute, that there are more than 93,035 potential class members. In a companion motion, Defendant moved to exclude putative class members who agreed to arbitrate their claims against Defendant. Approximately 60% of the potential class members would be affected, according to Defendant. Assuming Defendant's 60% estimate is accurate, the class would still consist of approximately 37,000 members, which would satisfy the numerosity requirement. Accordingly, Plaintiff has satisfied the first requirement of Rule 23(a).

2. Commonality

The second element of Rule 23(a) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement is met through the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution[.]" *Dukes,* 131 S.Ct. at 2551. As summarized by the Supreme Court:

> What matters to class certification ... is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

ld. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 132 (2009)).

In this case, there are discrete factual and legal issues common to the proposed class that, when answered, are dispositive of the entire litigation. Factually, Plaintiff states Defendant sent a defective standard-form NOI to all class members, and Defendant has uniformly asserted deficiency balances against class members. (*See* Pl.'s Supp. Br. in Supp. of Mot. for Class Cert. at 5.) Legally, Plaintiff states each class member's claim is the same, namely, that the NOI fails to comply with ASFA disclosure requirements, and thus, Defendant has failed to create a valid debt and is barred from collecting any deficiency. These issues meet the standard of commonality, as their resolution will generate common answers apt to drive resolution of the litigation.

3. Typicality

The next requirement of Rule 23(a) is typicality, which focuses on the relationship of facts and issues between the class and its representatives. "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted).

Here, Plaintiff asserts the facts underlying his claim are typical of the facts underlying the claims of all members of the proposed class. Specifically, Plaintiff defaulted on a car loan and had his car repossessed. AmeriCredit then sent a defective standard-form NOI to Plaintiff (and all class members) explaining how he could redeem his vehicle or reinstate his loan. The NOI also informed Plaintiff that if he did not reinstate or redeem, the vehicle would be sold and Plaintiff would be liable for any deficiency. Plaintiff did not reinstate or redeem, his vehicle was sold, and AmeriCredit asserted the deficiency against Plaintiff.

Defendant argues Plaintiff's claim is not typical of the claims of members of the proposed class because Plaintiff cannot show the NOI or Defendant's collection efforts caused Plaintiff any harm. (Opp'n to Mot. for Class Cert. at 16-17.) Specifically, Defendant asserts Plaintiff cannot show Defendant's conduct caused Plaintiff to make the $25 deficiency payment or resulted in Plaintiff's loss

of employment. This argument, however, does not address whether Plaintiff's claim is typical of the claims of absent class members. Rather, the argument attacks the merits of Plaintiff's individual claim. Moreover, Defendant's argument does not address the other common injury alleged in this case, *i.e.*, that class members are subjected to an invalid debt caused by AmeriCredit's defective NOI and assertion of a deficiency.

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Defendant also argues Plaintiff's claims are not typical of those members of the proposed class whose RISCs contain arbitration clauses. On this issue, the Court agrees with Defendant. In an effort to cure this problem, Plaintiff proposes that the Court redefine the proposed class to exclude individuals whose RISCs include an arbitration clause. With this adjustment to the class definition, Plaintiff has met the typicality requirement.[4]

4. Adequacy of Representation

The final requirement of Rule 23(a) is adequacy. Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is grounded in constitutional due process concerns; "absent class members must be afforded adequate representation before entry of judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citing *Hansberry* v. *Lee*, 311 U.S. 32,42-43 (1940)). In reviewing this issue, courts must resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill* v. *lnflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). The named plaintiffs and their counsel must have sufficient "zeal and competence" to protect the interests of the rest of the class. *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975).

Plaintiff has demonstrated the absence of any conflict between himself and his counsel and the members of the proposed class. He has also demonstrated that he and his counsel will vigorously prosecute the case on behalf of the class. Nevertheless, Defendant argues Plaintiff is not an adequate

[4] The Court therefore denies as moot Defendant's companion motion to exclude putative class members with arbitration clauses.

class representative because he lacks standing, his claim is time-barred and his credibility is lacking. For the reasons set out in the Court's order on Defendant's motion for summary judgment, the Court rejects Defendant's first two arguments. Defendant's latter argument is relevant to the adequacy analysis, but is not determinative. *See Harris* v. *Vector Marketing Corp.*, 753 F.Supp.2d 996, 1015 (N.D. Cal. 2010) (stating credibility is relevant to adequacy but does not automatically render proposed representative inadequate). Although Defendant has pointed out some inconsistencies in Plaintiff's testimony, those inconsistencies are not "'so sharp as to jeopardize the interests of absent class members[,]"' thereby rendering Plaintiff an inadequate class representative. *Id.* (quoting *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 177 (S.D.N.Y. 2008)). Defendant's arguments about Plaintiff's counsel are similarly unpersuasive. Accordingly, Plaintiff has satisfied Rule 23(a)(4).

C. Rule 23(b)

Having satisfied the requirements of Rule 23(a), the next issue is whether Plaintiff has shown that at least one of the requirements of Rule 23(b) is met. *Amchem*, 521 U.S. at 614-15. Plaintiff asserts he has met the prerequisites of certification for both a (b)(2) and (b)(3) class. Each proposed class is addressed in turn.

1. Rule 23(b)(2)

Under Rule 23(b)(2), class certification may be appropriate where a defendant acted or refused to act in a manner applicable to the class generally, rendering injunctive and declaratory relief appropriate to the class as a whole. Until recently, the Ninth Circuit permitted certification of claims for damages, including restitution, under Rule 23(b)(2) if the injunctive or declaratory relief sought predominated over any monetary relief sought. The parties focused on the predominance test in their briefs, but shortly after argument in this case the Supreme Court rejected that test and held that "individualized monetary claims belong in Rule 23(b)(3)." *Dukes*, 131 S.Ct. at 2558. The Supreme Court reasoned:

> The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' (Citation omitted.) In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it

> does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Dukes, 131 S.Ct. at 2557.

Notably, however, the Supreme Court indicated – but did not decide – that claims for monetary relief may be certified under Rule 23(b)(2) if such relief is "incidental" to the injunctive or declaratory relief sought. *Id.* at 2560 ("We need not decide whether there are any forms of 'incidental' monetary

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relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause.")

Here, Plaintiff for himself, and on behalf of the class, is seeking statutory damages under the Rosenthal Act and restitution of all amounts paid toward the deficiencies. However, neither form of relief is incidental to the declaratory and injunctive relief sought.

Title 15 U.S.C. § 1692k, a provision of the Fair Debt Collection Practices Act ("FDCPA"), applies to Plaintiff's claim under the Rosenthal Act by virtue of California Civil Code § 1788.17.[5] *See Gonzalez v. Arrow Financial Services, LLC*, ___ F.3d ___, No. 10-55379, 2011 WL 4430844, at *6 (9th Cir. Sept. 23, 2011) (stating this statute "unambiguously supercedes any provision of the Rosenthal Act inconsistent with the referenced provisions of the FDCPA"); *Sullivan v. American Express Publishing Corp.*, No. SACV 09-142-JST (Anx), 2011 WL 2600702, at *7 (C.D. Cal. June 30, 2011) (stating statutory damages for class action under Rosenthal Act are capped at $500,000 pursuant to 15 U.S.C. § 1692k). This statute provides that for class action claims, the plaintiffs may recover, in addition to actual damages:

> (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector[.]

15 U.S.C. §1692k(a)(2)(B). In determining whether and how much, if any, to award under this section in a class action, the statute sets out the following factors: "the frequency and persistence of

[5] This statute provides: "Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code." Cal. Civ. Code § 1788.17.

noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional." 15 U.S.C. § 1692k(b)(2). Under the plain language of the statute, statutory damages are subject to the court's discretion considering the factors listed above. *Irwin v. Mascott*, 112 F.Supp.2d 937, 946 (N.D. Cal. 2000). Plaintiff has failed to demonstrate that any award of statutory damages would flow directly from liability to the class as a whole without the need for resolution of substantial factual issues or individualized determinations. *See Dukes*, 131 S.Ct. at 2560 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (damages may be incidental if they "'flow directly from liability to the class as a *whole* on the claims forming the basis of the injunctive or declaratory relief'" and do not "'introduce new substantial legal or factual issues, nor entail complex individualized determinations.'") Under these circumstances, Plaintiff's request for damages under the referenced statutory scheme is not incidental to the declaratory and injunctive relief sought, and is therefore inappropriate for certification under Rule 23(b)(2).

In addition, the restitutionary relief sought by the class is not incidental to the injunctive and declaratory relief, as each class member who paid a deficiency paid a different sum, and thus would be entitled to an "individualized award." *Dukes*, 131 S.Ct. at 2557. While such relief would follow automatically if liability is proven by the class and individualized proof would be required only as to the *amount* of the individual award, certification is nevertheless appropriately sought under Rule 23(b)(3) and not under Rule 23(b)(2). Given that the restitution sought here approximates $ 4 million and will vary from class member to class member, and some individual relief may involve significant sums, these absent class members ought to be provided notice and an opportunity to withdraw from the class to pursue these and other potential damages and claims against Defendant on an individual basis if they so desire.

Plaintiff has proposed in the alternative that the Court create a subclass consisting of all those who made a payment toward a deficiency, thereby carving out the restitutionary relief sought from the injunctive and declaratory relief. (Pl.'s Supp. Br. in Supp. of Mot. for Class Cert. at 4 n.l.) Plaintiff also requests in the alternative that his request for statutory damages under the Rosenthal Act be certified under Rule 23(b)(3). Those requests are addressed below under Rule 23(b)(3).

With the carve out of statutory and restitutionary damages, the class is appropriately certified under Rule 23(b)(2). Plaintiff seeks declaratory and injunctive relief on behalf of the class under the "unlawful" prong of California's UCL. Cal. Bus. & Prof. Code §§ 17200, *et seq.* Plaintiff employs the ASFA, and Defendant's violation of its disclosure requirements, as a predicate for the unlawful act requirement under the UCL. If the NOI fails ASFA's disclosure requirements, Plaintiff argues the deficiency balances ought to be declared invalid and any collection activities enjoined. Plaintiff's legal theory, which finds support in California case law, is that a violation of ASFA's mandatory disclosure requirements renders sellers strictly liable. *See Lewis*, 156 Cal. App. 4th at 370 (mandatory disclosures required by the ASFA are analogous to a strict liability provision, and individualized proof of reliance by or financial harm to the customer is not required). The core factual issues under this theory are whether Defendant's form NOI used during the class period satisfies the disclosure requirements of the ASFA, and whether Defendant asserted a deficiency against class members. These issues can be determined by examining the face of the NOIs. Similarly, whether Defendant initiated collection efforts against class members can be readily determined from the discovery.[6] Excluding Plaintiff's request for restitution and statutory damages, the declaratory and injunctive relief sought stems from Defendant's conduct against the class generally and the relief, if granted, would be appropriate to the class as a whole.

2. Rule 23(b)(3)

With certification of the class specified above, the Court next considers whether Plaintiff has met the requirements of Rule 23(b)(3) for the subclass consisting of all those who made a payment toward a deficiency and seek restitution, as well as Plaintiff's request for statutory damages under the Rosenthal Act. Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (internal quotations omitted). Rule 23(b)(3), as discussed, calls for two separate inquiries: (1) do issues common to the class "predominate" over issues unique to individual class members, and (2) is the proposed class action "superior" to the other methods available for adjudicating the controversy. Fed. R. Civ. P.

[6] Plaintiff asserts Defendant "automatically" reported every class member to credit bureaus. (Pl.'s Supp. Br. in Supp. of Mot. for Class Cert. at 5.) Plaintiff also claims Defendant uniformly attempted collection from class members through demand letters and telephone calls. (*See* Decl. of Michael Lindsey in Supp. of Mot. for Class Cert. ("Lindsey Decl."), Ex. 9 (Dep. of Craig Paterson, at 9-21)).

23(b)(3). In adding these requirements to the qualifications for class certification, "the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3)(advisory committee notes)).

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a. Predominance

A "central concern of the Rule 23(b)(3) predominance test is whether 'adjudication of common issues will help achieve judicial economy.'" *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001)). Thus, courts must determine whether common issues constitute such a significant aspect of the action that "there is a clear justification for handling the dispute on a representative rather than on an individual basis." 7A Charles Alan Wright, *et al., Federal Practice and Procedure* § 1778 (3d ed. 2005). To satisfy the predominance inquiry, it is not enough simply to establish that a common question of law or fact exists, as it is under Rule 23(a)(2)'s commonality requirement. The predominance inquiry under Rule 23(b) is more rigorous, *Amchem*, 521 U.S. at 624, as it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623.

i. Statutory Damages Under the Rosenthal Act

Absent certification of statutory damages under the Rosenthal Act pursuant to Rule 23(b)(2), Plaintiff requests that the Court certify class treatment of these damages under Rule 23(b)(3). To warrant class certification under this Rule, Plaintiff must demonstrate that the request for statutory damages satisfies the predominance requirement. Plaintiff asserts this requirement is met because Defendant engaged in "a uniform practice for collections." (Opp'n to Mot. for Reconsideration at 5.) Defendant contends Plaintiff has failed to produce any evidence to support this assertion, but the record does contain some evidence that Defendant's collection efforts were uniform. (*See* Lindsey Decl., Ex. 9 (Depo. of Craig Paterson, at 9:4-17)) (explaining Defendant's procedure to "actively call the account to try to collect the deficiency balance" 45 days after sale of the repossessed vehicle and to "start a letter

process, as well," in which there was a scheduled sequence for sending "certain letters ... at a certain time ...."). Plaintiff, however, provides no evidence as to the number, timing and content of the telephone calls, or the number and timing of the letters, let alone that a standard collection practice was used as to all class members. The general description of collection activities provided by Mr. Paterson is insufficient. For example, Plaintiff has not come forward with sufficient common evidence addressing the relevant statutory factors, such as the frequency and persistence of Defendants' noncompliant debt collection activities, the specific nature of such noncompliance, and whether the noncompliance was

intentional, among other factors. *See* 15 U.S.C. § 1692k(a)(2)(B). For these reasons, the Court finds Plaintiff has not established that common evidence predominates with respect to the statutory damages claim.

Defendant also argues it did not engage in any class-wide collection efforts in the year before this case was filed, thereby defeating a finding of predominance on this separate ground as well. In support of this argument, Defendant relies on Mr. Paterson's testimony wherein he states that Defendant stopped sending collection letters and making collection calls to its California customers in May 2009. (Lindsey Decl., Ex. 9 at 13-14.) Defendant concedes "there were isolated instances where this policy was not followed," (Decl. of Craig Paterson in Opp'n to Mot. for Class Cert. ¶ 3), but it argues those isolated instances are insufficient to warrant class certification on the Rosenthal Act claim.

Notably, Plaintiff does not dispute that Defendant did not engage in class-wide collection efforts within the year preceding the filing of this case, and he fails to provide any evidence of such conduct. Instead, he relies on the continuing violations and tolling doctrines to sweep Defendant's more remote conduct into this case.

The continuing violations doctrine "permits recovery 'for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period[.]'" *Komarova v. National Credit Acceptance, Inc.*, 175 Cal. App. 4th 324, 343 (2009) (quoting *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 812 (2001)). The key to the continuing violations doctrine "'is whether the conduct complained of constitutes a continuing pattern and course of conduct as opposed to unrelated discrete acts.'" *Id.* (quoting *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, 281

F.Supp.2d 1156, 1161 (N.D. Cal. 2003)). Here, Defendant ceased its uniform collection efforts against its California customers, including Mr. Aho, in May 2009. Plaintiff asserts Defendant's collection activity continued through the filing of the present case on June 29, 2010, and in support of that assertion he cites Defendant's phone logs with Plaintiff, which run through June 24, 2010. (*See* Decl. of Michael Lindsey in Opp'n to Mot. to Exclude Pre Juarez Notices, Ex. 1.) The activity on that log, however, does not constitute a continuation of Defendant's collection practices. Rather, the log reflects Defendant did not initiate any collection attempts against Plaintiff between May 2009 and May 13, 2010. On May 13, 2010, the log reflects that a female called Defendant about settling Plaintiff's account. Over

the next month, the parties continued to discuss Plaintiff's account, but those discussions were not part of a "continuing pattern and course of conduct." On the contrary, those discussions appear to have been discrete acts directed solely at Plaintiff, and prompted by *Plaintiff's* conduct, not Defendant. Under these circumstances, the continuing violation doctrine does not assist Plaintiff in meeting the predominance requirement.

Plaintiff's reliance on tolling is, likewise, unavailing.[7] The parties do not dispute that the statute of limitations for an individual action may be tolled by the filing of an earlier class action. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In this case, Plaintiff relies on *Smith v. Americredit*[8] to toll the statute of limitations on his Rosenthal Act claim.[9] Initially, Plaintiff argued he was entitled to *American Pipe* tolling because the

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[7] The parties first raised and briefed these arguments on Defendant's motion for summary judgment. The parties reasserted and refined their arguments on Defendant's motion for reconsideration.

[8] *Smith* was filed on May 18, 2009, in this Court. The complaint in that case alleges claims for violations of the Rosenthal Act and the UCL, and a claim for declaratory relief. On December 11, 2009, this Court granted Defendant's motion to compel arbitration and dismissed the case without prejudice. Plaintiff's appeal of that decision is currently pending before the Ninth Circuit.

[9] In the briefing on Defendant's summary judgment motion, Plaintiff also relied on another case for tolling his statute of limitations: *Arguelles-Romero v. Americredit*, which was filed in Los Angeles Superior Court. In that case, as in *Smith*, the court granted the defendant's motion to compel arbitration. *Arguelles* has since been dismissed, and in the briefing on the motion for reconsideration, Plaintiff no longer relies on that case. Plaintiff's arguments about *Arguelles*, however, would apply equally to *Smith* since both courts reached the same conclusion, namely that the claims were subject to arbitration.

present case had not been certified for class treatment. However, in light of the Court's grant of class certification following the present motion, the *American Pipe* rule does not apply.

Nevertheless, Plaintiff argues he is entitled to tolling pursuant to *Catholic Social Services, Inc. v. Immigration and Naturalization Service*, 232 F.3d 1139 (9th Cir. 2000) (*en banc*).[10] In that case, the Ninth Circuit extended the tolling doctrine of *American Pipe* and *Crown, Cork & Seal* to a subsequent class action based on its finding that the plaintiffs were "not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Id.* at 1149.

Defendant here does not assert that Plaintiff is "attempting to relitigate an earlier denial of class certification." *Id.* However, Defendant does argue that Plaintiff is attempting "to correct a procedural deficiency in an earlier would-be class." *Id.* Specifically, Defendant contends Plaintiff is attempting to correct this Court's order compelling arbitration of Smith's claims.

Plaintiff argues the order compelling arbitration was not a "procedural deficiency," as that term is used in *Catholic Social Services*. Plaintiff asserts the court used that term to refer only to issues related to class certification. *Hunsaker v. Hurwitz*, 14 Fed. Appx. 826 (9th Cir. 2001), however, refutes that assertion. In that case, the earlier-filed class action was dismissed as to certain defendants for failure to serve. The court found that failure constituted a "procedural deficiency" under *Catholic Social Services*, and thus the plaintiffs were not entitled to tolling under *American Pipe*. *Id.* at 829-30.

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[10] Plaintiff also suggests that tolling is appropriate because this Court has not yet issued a decision on class certification in *Smith*. The Ninth Circuit has yet to decide whether *American Pipe* tolling applies "where plaintiffs seek application of class tolling to a subsequently filed class action, where *no decision* as to certification has yet been made in the earlier filed class action." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F.Supp.2d 1072, 1102 (N.D. Cal. 2007). However, the *DRAM* court refused to allow tolling under those circumstances, citing "concerns for the potential multiplicity of actions that could result from allowing subsequent classes of plaintiffs to unfairly 'piggyback' on prior class actions, and the court's own view that the policy reasons behind the class tolling doctrine are better served by declining to apply class tolling under the facts of this case[.]" *Id.* at 1103. The court was also concerned "that if it were to conclude otherwise, and class tolling were held to apply, then plaintiffs would essentially be permitted to file class action after class action, until the state court class actions finally decide either the merits of the earlier cases, or the class certification issue." *Id.* This Court is persuaded by the reasoning in *DRAM*, and therefore adopts the *DRAM* court's holding that tolling does not apply when the court in the earlier filed action has not issued a decision on class certification.

No court has addressed whether an order compelling arbitration constitutes a "procedural deficiency" under *Catholic Social Services*.[11] Enforcing an arbitration clause, however, is not a ruling on the merits. Rather, it is a procedural mechanism for determining the proper forum to resolve the underlying dispute. As construed, enforcement of the arbitration clause in *Smith* is a "procedural deficiency" that Plaintiff is attempting to correct through the current case. Accordingly, Plaintiff is not entitled to tolling of the statute of limitations under *Catholic Social Services*. Absent tolling, Plaintiff has not shown that the predominance requirement is met. Specifically, Plaintiff has not shown the existence of any issues common to the class on the Rosenthal Act claim during the one year preceding the filing of the Complaint. On the contrary, the evidence reflects Defendant ceased its collection activities in that time frame, *i.e.*, more than one year before the case was filed. The only evidence of collection activity within the relevant time frame relates to Plaintiff Aho, and that evidence raises only individual issues, not common issues. Having failed to meet the predominance requirement, Plaintiff is not entitled to class certification under Rule 23(b)(3) on the issue of statutory damages under the Rosenthal Act.[12]

ii. Restitution Subclass[13]

On the restitution subclass, Plaintiff argues the primary issue is whether Defendant AmeriCredit failed to include statutorily-required information in the NOIs that it sent to Plaintiff and class members. Plaintiff asserts this issue is common to the class and can be determined by evaluating the form NOIs

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[11] At least two courts have held that "enforcement of an arbitration clause is the equivalent of denying class certification for purposes of statute of limitations analysis." *Newport v. Dell, Inc.*, No. CV-08-0096-TUC-CKJ(JCG), 2008 WL 4347311, at *6 (D. Ariz. Aug. 21, 2008). *See also Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2007 WL 841776, at *7 (N.D. Cal. March 20, 2007) (stating class action was denied by court's ruling that class representatives' claims were precluded by arbitration clause). However, neither court provided any reasoning for that conclusion.

[12] Absent a showing of predominance, the Court declines to address whether certification of this claim satisfies the superiority requirement.

[13] In the previous order on class certification, the Court declined to certify this subclass because Plaintiff failed to provide any evidence to satisfy the numerosity requirement. The Court invited supplemental briefing from the parties, which is now before the Court. The evidence submitted with that briefing demonstrates that the numerosity requirement is met with respect to this subclass. (*See* Supp. Decl. of John Hanson, and Notice of Recent Authority, Re: Numerosity and Proposed Restitution Subclass, Ex. 1 at 3) (the number of potential subclass members "eligible for restitution is 1,791 persons.") Accordingly, the Court proceeds with its consideration of whether this subclass should be certified under Rule 23(b)(3).

and uniform collection procedures. Although the Court finds there is insufficient evidence of uniform collection activities and procedures, the Court agrees that the availability of restitution can be determined by common proof, namely by reference to the NOI to determine whether it complies with the ASFA, and hence whether Defendant violated the Rosenthal Act by threatening to take action that cannot legally be taken, *i.e.*, attempting to collect or collecting an invalid debt. *See* Cal. Civ. Code § 1788.17 (incorporating provisions of federal Fair Debt Collection Practices Act ("FDCPA")); 15 U.S.C. § 1692e(5) (prohibiting the "threat to take any action that cannot legally be taken or that is not intended to be taken.") Notwithstanding these common issues, Defendant argues there are other issues that will be subject to individual proof and that will predominate over common issues, specifically, issues of injury and causation. The Court disagrees.

Defendant attempts to analogize this case to *Cohen* v. *DIRECTV, Inc.*, 178 Cal. App. 4th 966 (2010), where the court affirmed the trial court's denial of class certification on the ground that individual issues of reliance would predominate over common issues. But *Cohen* is distinguishable. There, the plaintiff asserted "a species of fraud in the inducement, alleging that subscribers to DlRECTV's HD services purchased those services in reliance on the company's false advertising." 178 Cal. App. 4th at 969. That claim required a showing of "actual reliance." *Id.* at 980. The claim at issue here, that Defendant has engaged in unlawful conduct under the UCL, does not require reliance. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011) (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009)); *Lewis*, 156 Cal. App. 4th at 370-71. Therefore, Defendant's reliance-based argument does not defeat a finding of predominance of common issues.

Defendant next argues that all class members must satisfy Article III standing and thus, individual issues of injury and causation will predominate. *See Webb v. Carter's Inc.*, 272 F.R.D. 489 (C.D. Cal. 2011) (holding absent class members must satisfy Article III standing requirements). However, in *Stearns*, the Ninth Circuit stated that its law "keys on the representative party, not all of the class members, and has done so for years." 655 F.3d at 1021. Therefore, this Court's inquiry into causation and injury is limited to the representative party, Plaintiff Aho, who meets the standing requirements of Article III. (*See* Docket No. 60 (Order Granting in Part and Denying in Part

Defendant's Motion for Summary Judgment) at 3-6.)[14] Accordingly, this argument does not defeat a finding of predominance in this case.

The only other possible obstacle to a finding that common issues predominate is the individual nature of the restitutionary relief sought, as class members presumably paid different sums toward their deficiency balances. Damages calculations alone, however, "cannot defeat certification." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). If liability is proven, proof of restitution due each class member can be proved with relative ease through Defendant's own records.

For these reasons, the Court concludes that Plaintiff's request for restitution under the UCL presents common questions of fact and law that predominate over individual issues and that restitutionary damages calculations – while involving individualized proof – do not defeat class certification and are appropriately certified under Rule 23(b)(3). Accordingly, the Court considers the next prong of Rule 23(b)(3), whether this subclass meets the superiority requirement.

b. Superiority

Rule 23(b)(3) provides a list of factors relevant to the superiority inquiry:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). This inquiry "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair," such that the proposed class is superior to

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[14] In any event, the proposed class here meets the standing requirements of Article III. The essence of Plaintiff's claim is that Defendant failed to create a valid and enforceable debt. Being subjected to an invalid debt satisfies Article III standing requirements. *See White v. Trans Union, LLC*, 462 F.Supp.2d 1079, 1084 (C.D. Cal. 2006) (perpetuation of erroneous credit report is sufficient injury for standing purposes). Further, the Rule 23(b)(3) subclass has suffered an additional injury in the form of payment toward an allegedly invalid debt. These injuries – being subjected to a disputed debt and payment toward a disputed debt – are traceable to Defendant's conduct, and redressable by a ruling in this case, which is all that Article III requires. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

other methods for adjudicating the controversy. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010).

Here, Plaintiff asserts that no other class members have shown an interest in individually controlling separate actions against Defendant. Plaintiff also asserts it is unlikely there will be any difficulties in managing this case as a class action. Defendant does not dispute these arguments, but argues instead that the amount of the individual deficiency balances is sufficient incentive for class members to litigate their claims on an individual basis. Based on the common legal and factual issues, however, the Court finds that it would be more efficient to litigate this case on a class-wide basis rather than have each member of the class litigate their claim individually (and that those class members who desire to pursue restitution and other claims individually may opt out and do so). Accordingly, the Court finds the superiority requirement has been met.

III.

CONCLUSION

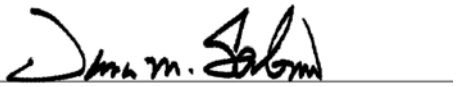
For the reasons set out above, the Court finds Plaintiff has satisfied the requirements for certification of the following class under Rule 23(b)(2):

> All persons who were sent an NOI by AmeriCredit to an address in California at any time from March 18, 2005 through May 15, 2009, following the repossession or voluntary surrender of a motor vehicle, who were assessed a deficiency balance following the disposition of the vehicle, and against whom AmeriCredit has asserted, collected, or attempted to collect any portion of the deficiency balance. The class excludes persons whose obligations have been discharged in bankruptcy, persons against whom AmeriCredit has obtained final judgments in replevin actions, persons whose contracts include arbitration clauses that prohibit class membership, and persons who received NOIs that denied them the right to reinstate.

This class is entitled to pursue all forms of requested relief, with the exception of statutory damages under the Rosenthal Act and restitution of any amounts paid toward a deficiency balance. The Court also certifies under Rule 23(b)(3) a subclass consisting of all those who made a payment toward a deficiency and are therefore entitled to restitution. The attorneys of record for the named class Plaintiff are designated as counsel for this class and subclass.

IT IS SO ORDERED.

DATED: November 8, 2011



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Attorneys for Plaintiff Steve Aho

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

'10 CV 1373 MMA POR

STEPHEN D. AHO, an individual, individually and on behalf of a class of similarly situated persons,

Plaintiff,

v.

AMERICREDIT FINANCIAL SERVICES, INC., d.b.a. ACF FINANCIAL SERVICES, INC., a business entity form unknown,

Defendant(s).

Case No.

CLASS ACTION

COMPLAINT

Violation of Cal. Bus. & Prof. Code §§17200, *et seq.*, and Cal. Civ. Code §§1788, *et seq.*, Cal. Civ. Code §§2981, *et seq.*, and Declaratory Relief

(Jury Trial Requested)

Plaintiff, Steve Aho, on behalf of himself and all others similarly situated, all to the best of his knowledge, information, and belief formed after an investigation reasonable under the circumstances, which facts are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery, except for information identified herein based on personal knowledge, hereby alleges as follows

against the above-named company, AmeriCredit Financial Services, Inc., and its California d.b.a. name ACF Financial Services, Inc. ("Defendant" or "AmeriCredit"):

NATURE OF ACTION

1. Defendant, AmeriCredit, has violated the requirements of California's Business and Professions Code §§17200, *et seq.* (the "UCL") and the Automobile Sales Finance Act, Cal.Civ.Code §§2981, *et seq.* (the "ASFA"), among other laws, by failing to provide required notices and rights to reinstatement and redemption for California consumers regarding vehicles AmeriCredit repossessed. This action is brought on behalf of a class of California consumers seeking, among other things, a determination that the "Notices of Our Plan to Sell Property" AmeriCredit sent to Plaintiff and the Class members following the repossession of their consumer vehicles failed to comply with the ASFA, and that as a consequence AmeriCredit lost the right to assert a deficiency claim. Plaintiff seeks restitution to Class members based on the amount of money each class member paid on AmeriCredit's invalid deficiency claims during the relevant period, as well as an injunction prohibiting AmeriCredit from attempting to collect on the invalid deficiency claims. Plaintiff also seeks relief for the injuries sustained by AmeriCredit's illegal collection efforts regarding the invalid deficiency amounts pursuant to California's Rosenthal Fair Debt Collection Practices Act, Cal.Civ.Code §§1788, *et seq.*, and seeks declaratory relief.

JURISDICTION AND VENUE

2. Jurisdiction and venue in this Court are based upon §1332 of Title 28 of the United States Judicial Code, 28 U.S.C. §§ 1332, as amended by The Class Action Fairness Act of 2005 ("CAFA"), Pub. Law 109-2 (Feb.18, 2005). The Class involves more than 100 persons. 28 U.S.C. §1332(d)(5)(A). The aggregate amount in controversy, exclusive of interest and costs, exceeds $5,000,000. 28 U.S.C. §1332(d)(2). Plaintiff is a resident of California, and the Defendant is incorporated under the laws of Delaware and has its corporate headquarters and principal place of business in Fort Worth, Texas. Therefore, minimal diversity of opposing parties is

present as required under CAFA. 28 U.S.C.§1332(d)(2)(A).

3. In connection with the acts and course of conduct alleged in this Complaint, the Defendant both directly and indirectly used the means and instrumentalities of interstate commerce, including the United States mails and interstate telephone communications, to engage in the conduct at issue herein.

4. Venue is proper in this District under §§ 1391(a)-(c) of Title 28 of the United States Code, because a substantial part of the acts and conduct charged herein occurred in this District and because Defendant does business in this District. Mr. Aho purchased his vehicle in this District, the vehicle was repossessed in this District, Defendant took assignment of the RISC in this District, Mr. Aho resided in this District, the illegal reinstatement notice, attempted debt collections, and other communications were sent to Mr. Aho in this District. Numerous Class members likewise received the illegal notices and collection communications in this District. Defendants received substantial compensation and profits from the assignment of Mr. Aho's and other Class members' automobile finance contracts from this District as well as profits from the subsequent repossession and deficiencies in and from this District.

PARTIES

5. At all times mentioned, Plaintiff, Steve Aho ("Plaintiff" or "Mr. Aho"), a natural person, was a resident of California.

6. AmeriCredit Financial Services, Inc., doing business in California as ACF Financial Services, Inc. ("AmeriCredit"), is a business entity that is licensed to transact business in California and is engaged in the business of purchasing and servicing Retail Installment Sales Contracts ("RISCs") for motor vehicles that it acquires from dealers statewide in California, including in this District.

7. Plaintiff is informed and believes, and on that basis alleges, that AmeriCredit is the alter ego of its owner or owners, and that there is insufficient separation of identity between the owner and the corporate entity, such that injustice would result to Plaintiff in this matter if the corporate veil were to remain intact. Plaintiff

is unaware of the identity of the owner or owners of AmeriCredit at this time and will amend this complaint to allege their true identities when ascertained, up to and including the time of trial.

8. Plaintiff is informed and believes, and on that basis alleges, that at all time mentioned herein each defendant, whether actually or fictitiously named was the principal, agent or employee of each other defendant, and in acting as such principal, or within the course and scope of such employment or agency, took some part in the acts and omissions hereinafter set forth by reason of which each defendant is liable to Plaintiff for the relief prayed for herein. At all times relevant herein, each defendant ratified the unlawful conduct of the other defendants, their agents and employees, by failing to repudiate the misconduct and by accepting the benefits of the transaction with knowledge of the wrongdoing. Plaintiff further alleges that each defendant fully controlled the actions and directed the enterprise of the other defendants at all times with respect to all matters pertaining to the vehicle that is the subject of the action.

FACTS

9. Plaintiff purchased a 2002 Dodge Dakota, VIN: 1B7GL42N22S598833, (the "Vehicle") for personal, household or family use from a car dealership in San Diego, California. The purchase was made pursuant to a RISC that the dealership assigned to AmeriCredit shortly after Plaintiff signed the RISC.

10. Defendant repossessed the Vehicle after Plaintiff defaulted on the RISC.

11. Pursuant to the requirements of California Civil Code § 2983.2, AmeriCredit sent Mr. Aho a notice of its intent to dispose of the repossessed vehicle ("NOI"), entitled "Notice of Our Plan to Sell Property". The NOI did not comply with the notice requirements of the Automobile Sales Finance Act (the "ASFA"), California Civil Code § 2981, *et seq.*

12. Plaintiff was entitled to reinstate the contract. However, the conditions precedent for reinstatement were not fully and properly set forth on the NOI. In particular, and in violation of Civil Code § 2983.2(a)(2), AmeriCredit failed to inform Mr.

Aho of all amounts that Mr. Aho must pay to AmeriCredit to cure the default, including additional monthly payments coming due after the date of the NOI but before the end of the notice period, any late fees or other fees and the amount of those fees, payments to third parties, as well as fees regarding the report of repossession to government officials and the name and location of where those government fees were to be paid.

13. Mr. Aho was unable to reinstate and AmeriCredit sold Mr. Aho's Vehicle at a repossession sale.

14. Thereafter, AmeriCredit claimed that Plaintiff owed it the deficiency balance.

15. Plaintiff has been injured in his business and property by the unlawful, unfair, and deceptive business practices of AmeriCredit.

16. Plaintiff has suffered injury in fact and damage to his property or money because AmeriCredit has attempted to enforce its invalid deficiency through credit bureau reports and collection letters, and because Mr. Aho made payments to AmeriCredit on its invalid deficiency claim based on its false assertion that it was entitled to collect a deficiency.

17. Because AmeriCredit failed to provide members of the proposed class with all of the information and disclosures to which they are entitled under Civil Code § 2983.2, those consumers are not liable, under the explicit terms of §§ 2983.2 and 2983.8, for any deficiency following the disposition of their repossessed motor vehicles.

18. Nevertheless, without any legal right to do so, AmeriCredit and the other defendants engaged in collection activity with respect to class members and have collected deficiency balances from proposed class members in direct violation of the law. AmeriCredit's collection activity includes dunning notices, calls and letters from collection agencies, transmission of derogatory information to credit reporting agencies, collection lawsuits and invalid judgments.

19. Any applicable statutes of limitation has been equitably tolled by defendants' affirmative acts of fraudulent concealment, suppression, and denial of the

true facts regarding the existence of the practices at issue herein. Such acts of fraudulent concealment included covering up and refusing to publicly disclose the fact that no deficiency amounts were due and owing, and presenting documents that represented the legal entitlement to such amounts. Through such acts of fraudulent concealment, defendants were able to actively conceal from the public for years the truth about their practices, thereby tolling the running of any applicable statutes of limitation until public disclosure of the true facts. Defendants still refuse to this day to take full responsibility for their actions, despite being aware that such conduct has taken place. In addition, any statute of limitations has been tolled by the pendency of other class actions regarding defendant's practices alleged herein.

CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action on behalf of a class of similarly situated California consumers pursuant to Rule 23 of the Federal Rules of Civil Procedure to challenge and remedy AmeriCredit's wrongful business practices. Plaintiff seeks relief for the following class of persons (the "Class"):

> All California residents to whom AmeriCredit sent NOIs during the period beginning March 18, 2005, to the date of Class certification whose vehicles were repossessed by or voluntarily surrendered to AmeriCredit or its agents, and against whom AmeriCredit has asserted a deficiency claim. The Class excludes the Court and its staff, all employees of AmeriCredit and its affiliates, and all persons whose conditional sale contract obligations have been discharged in bankruptcy.

21. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class is so numerous that the individual joinder of all its members in one action is impracticable. While the exact number and the identities of Class members are not known at this time, they can be ascertained through appropriate investigation and discovery through the records of AmeriCredit.

22. Questions of law and fact of common and general interest to the class exist as to all class members and predominate over any questions affecting only individual members of the class.

23. The common questions include, among others, the following:

(a) whether AmeriCredit sent NOIs to proposed class members that informed them of all the conditions precedent to reinstatement or whether AmeriCredit imposed other conditions precedent to reinstatement in addition to those disclosed on its NOIs;

(b) whether AmeriCredit's NOIs complied with the ASFA;

(c) whether AmeriCredit complied with the other requirements of the ASFA;

(d) whether AmeriCredit has engaged in other unlawful, unfair or deceptive business practices in its efforts to collect its deficiency claims from the proposed class members;

(e) whether AmeriCredit or its agents have collected or attempted to collect deficiency claims from proposed class members when it had no legal right to do so;

(f) whether AmeriCredit or its agents obtained deficiency judgments against proposed class members when it failed to send proper NOIs to such persons and whether AmeriCredit collected or attempted to collect on such judgments when it had no legal right to obtain such judgments or to collect on them;

(g) the amount of revenues and profits AmeriCredit received or saved and/or the amount of monies or other obligations imposed on or lost by Class members as a result of such wrongdoing;

(h) whether AmeriCredit's actions violate the Rosenthal Fair Debt Collection Practices Act and the federal Fair Debt Collection Practices Act as applied through the Rosenthal Fair Debt Collection Practices Act;

(i) whether the Class members are threatened with irreparable harm and/or

are entitled to injunctive and other equitable relief, and, if so, what is the nature of such relief; and

(j) whether Plaintiff and the Class members are entitled to statutory, actual or exemplary damages, rescission, and/or equitable monetary relief from AmeriCredit and, if so, what is the nature and appropriate measure of such relief.

24. Plaintiff's claims are typical of the claims of the class because Plaintiff and all Class members were injured by the same wrongful conduct and scheme of the Defendant alleged herein.

25. Plaintiff will fairly and adequately represent the interests of the Class. Plaintiff's interests are not antagonistic to the interests of the proposed class. Plaintiff is represented by attorneys who are competent and experienced in consumer class action litigation.

26. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because the harm suffered by each individual member is relatively slight compared to the expense and burden of prosecuting such an individual case.

27. If individual class members were required to bring separate actions, courts throughout California would be confronted by a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single court. Defendant has acted on grounds generally applicable to the entire Class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the Class as a whole. Notice of the pendency of and any resolution of this action can be provided to the Class members by individual mailed notice or the best notice practicable under

the circumstances.

28. In addition, because few attorneys in California are experienced or knowledgeable about repossessions, the ASFA, or ASFA's requirements regarding repossession, it is extremely unlikely that consumers harmed by AmeriCredit's defective NOIs and other illegal, unfair or deceptive practices would ever recover anything unless this case proceeds as a class action.

COUNT I

Class Claim for Violation of California Civil Code §§ 1788, *et seq.*

(Against AmeriCredit)

29. Plaintiff and the Class Members hereby incorporate the preceding paragraphs as if fully alleged herein and further allege as follows.

30. AmeriCredit is a "debt collector," as defined by the California Rosenthal Fair Debt Collections Practices Act, Civ. Code §1788.2(c).

31. The assigned RISCs for Mr. Aho's and the Class members' vehicles are debts, as defined by Civ. Code §1788.2 (d).

32. The purported debts with AmeriCredit were incurred by Plaintiff and Class members for personal, family, or household purposes.

33. AmeriCredit, to Plaintiff and the Class members, (1) misrepresented the character, amount or legal status of the deficiency-related debt, (2) threatened to take action that cannot legally be taken, and (3) made false, deceptive, or misleading representations to collect a debt.

34. AmeriCredit violated the California Rosenthal Fair Debt Collections Practices Act in the following ways:

(a) Violations of §1788.17, 15 U.S.C. §§1692e, and 1692e(2)(A) by falsely representing the character, amount, or legal status of any debt;

(b) Violations of §1788.17 through failing to comply with 15 U.S.C. § 1692e(5) and threatening to take any action that cannot legally be taken;

(c) Violations of §1788.17 through failing to comply with 15 U.S.C. § 1692e(8)

by communicating to any person credit information which is known or should be known to false; and

(d) Violations of §1788.17 through failing to comply with 15 U.S.C. § 1692e(10) by the use of any false representation or deceptive means to collect or attempt to collect any debt.

35. As a result of violations of the federal Fair Debt Collection Practices Act and Rosenthal Debt Collect Practices Act by AmeriCredit, Plaintiff and the Class members are entitled to actual damages under California Civil Code §1788.30(a), statutory damages for knowing or willful violations under California Civil Code §1788.30(b), and reasonable attorney's fees and costs under California Civil Code §1788.30(c).

COUNT II

Class Claim for Violation of Cal. Bus. & Prof. Code §17200, *et seq.* and Cal.Civ.Code §2981, *et seq.*

(Against AmeriCredit)

36. Plaintiff and the Class members hereby incorporate the preceding paragraphs as if fully alleged herein and further allege as follows.

37. Plaintiffs allege violations of the ASFA as a predicate to this Unfair Competition Law (UCL) cause of action. Defendant's acts and practices as detailed above constitute acts of unfair competition. Defendant has engaged in an unlawful, unfair or fraudulent business act and/or practice within the meaning of California Business & Professions Code §17200. Plaintiff has been injured in fact by the unlawful, unfair and deceptive business practices of defendant.

38. Defendant has engaged in "unlawful" business acts and practices by violating the ASFA., Cal.Civ.Code § 2983.2(a)(2), and the Rosenthal Act, Cal.Civ.Code §1788.17.

39. Plaintiff is informed and believes, and on that basis alleges, that AmeriCredit failed to comply with other requirements of the ASFA in addition to Civil

Code § 2983.2(a)(2) and have engaged in other business practices that violate California's Unfair Competition Law ("UCL"), California Business & Professions Code § 17200 *et seq.*, among other laws. Plaintiff will amend this complaint to describe AmeriCredit's other practices that violate the ASFA and/or the UCL at the end of the discovery period in this case.

40. By engaging in the above-described conduct, AmeriCredit has engaged in an "unfair" business acts or practices that offend public policy and are substantially injurious to consumers. AmeriCredit's acts and practices have no utility that outweighs the substantial harm to consumers.

41. By engaging in the above-described conduct, Defendant has engaged in a "fraudulent" business act or practice that are likely to deceive the courts, the public, and affected consumers as to their legal rights and obligations, and by using such deception, preclude consumers from exercising legal rights to which they are entitled, such as the right to redeem their vehicles or reinstate their RISCs after repossession.

42. Defendant need only to have violated one of the three provisions set forth above to be strictly liable under this Count.

43. The above-described unlawful, unfair or fraudulent business acts and practices engaged in by Defendant continues to this day and present a threat to Plaintiff and the Class in that Defendant has failed to publicly acknowledge the wrongfulness of their actions, publicly issue individual and comprehensive corrective notices, cease related collection efforts, and provide full equitable monetary relief to all persons with a vested interest therein.

44. As a direct result of the above-mentioned acts, AmeriCredit received and continues to hold ill-gotten gains in the form of money obtained by collecting on invalid deficiency claims; and by collecting on deficiency judgments illegally obtained, together with profits and interest derived from that money.

45. Pursuant to the UCL, Plaintiff seeks an order enjoining AmeriCredit from engaging in the acts and practices described in this complaint, and ordering that

AmeriCredit disgorge all ill-gotten gains and provide appropriate restitution to all affected consumers. In addition, pursuant to C.C.P. § 1021.5, Cal.Civ.Code §2983.4, and §1788.30(c), Plaintiff seeks recovery of his attorneys' fees, costs and expenses incurred in the filing and prosecution of this action, together with such other relief the Court deems appropriate.

46. Pursuant to California Business & Professions Code §17203, Plaintiff, individually and on behalf of the Class, seeks an order of this Court requiring Defendant to immediately cease such acts of unfair competition and enjoining Defendant from continuing to conduct business via the unlawful, fraudulent or unfair business acts and practices complained of herein and from failing to fully disclose the true nature of their misrepresentations, and ordering Defendant to engage in a corrective informational campaign. As a direct result of the above-mentioned acts, AmeriCredit received and continues to hold ill-gotten gains in the form of money obtained by collecting on invalid deficiency claims; and by collecting on deficiency judgments illegally obtained, together with profits and interest derived from that money. Plaintiff, therefore, additionally requests an order from the Court requiring Defendants to provide complete equitable monetary relief, including that they disgorge and return or pay over Defendant's ill-gotten gains and such other monies as the trier of fact may deem necessary to deter such conduct or prevent the use or enjoyment of all monies wrongfully obtained either directly or indirectly, and/or pay restitution, including cancellation of any obligations or the return of any monies paid to Defendant that would not otherwise have been paid had the true facts been disclosed by Defendant or if it had complied with their legal obligations and previous representations, plus any interest earned by Defendant on such sums. Such an order is necessary so as to require Defendant to surrender all money obtained either directly or indirectly through such acts of unfair competition, including all monies earned as a result of such acts and practices, so that Defendant are prevented from benefitting or profiting from practices that constitute unfair competition or the use or employment by Defendant of any monies resulting from illegal

collections and/or to ensure the return of any monies as may be necessary to restore to any person in interest who lost money or property as a result of such acts or practices any money or property which may have been acquired by means of such acts of unfair competition. Plaintiff also requests the Court order that an asset freeze or constructive trust be imposed over all monies that rightfully belong to members of the Class.

COUNT III

Class Claim For Declaratory Relief

(Against AmeriCredit)

47. Plaintiff and the Class members hereby incorporate the preceding paragraphs as if fully alleged herein and further allege as follows.

48. There currently exists between Plaintiff and the Class members, on the one hand, and Defendant, on the other hand, a substantial controversy regarding the respective rights and obligations of the parties as detailed above by virtue of their contractual and/or legal relationship of sufficient immediacy and reality such that there is a specific need for the Court to declare the parties' rights and obligations.

49. A declaratory judgment is necessary in that Plaintiff and Class members contend (and Defendant disputes) that the deficiency amounts are legally invalid and unenforceable.

50. Therefore, pursuant to 28 U.S.C. §2201, Plaintiff and Class members request the Court grant declaratory relief and declare the respective rights and liabilities of the parties, including, but not limited to, a finding that (1) the NOI AmeriCredit sent to Plaintiff following the repossession of the Vehicle failed to comply with the ASFA and that as a consequence AmeriCredit lost the right to assert a deficiency claim, and (2) the other NOIs that AmeriCredit sent to the members of the Class contained the same defects as the NOI AmeriCredit sent to Plaintiff and that, as a consequence, AmeriCredit lost the right to assert deficiency claims against any of the Class members.

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PRAYER

WHEREFORE, Plaintiff, Steve Aho, prays for:

1. An order certifying the Class and appointing Plaintiff and his counsel as Class Representative and Class Counsel.

2. A determination that the NOI AmeriCredit sent to Plaintiff following the repossession of the Vehicle failed to comply with the ASFA and that as a consequence AmeriCredit lost the right to assert a deficiency claim.

3. A determination that the other NOIs that AmeriCredit sent to the members of the Class contained the same defects as the NOI AmeriCredit sent to Plaintiff and that, as a consequence, AmeriCredit lost the right to assert deficiency claims against any of the class members.

4. Restitution, with interest or the disgorgement of profits thereon, to class members based on the amount of money each class member paid on AmeriCredit's invalid deficiency claims during the relevant period.

5. An order requiring all actual, statutory, direct, consequential, incidental and exemplary damages and penalties as applicable for each Count;

6. The distribution of any unclaimed funds pursuant to a *cy pres* fund or fluid recovery remedy.

7. An injunction prohibiting AmeriCredit from attempting to collect on the invalid deficiency claims and requiring them to recall accounts from collection agencies and law firms and to repurchase accounts they have sold.

8. An injunction requiring AmeriCredit and the other AmeriCredit to seek and obtain orders vacating all judgments entered in favor of AmeriCredit or the other AmeriCredit against class members on the deficiency claims and further requiring AmeriCredit to dismiss all pending lawsuits for the collection of deficiency claims from class members.

9. An order awarding attorney's fees and costs to Plaintiff's counsel.

10. Declaratory relief declaring the rights and obligations of the parties.

11. Such other and further relief as this Court may deem necessary, proper and/or appropriate.

JURY DEMAND

Plaintiff demands a trial by jury on all causes of action so triable.

June 25, 2010

LAW OFFICES OF MICHAEL E. LINDSEY

THE HANSON LAW FIRM

By: _____
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Attorneys for Plaintiff, Steve Aho

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JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

STEPHEN D. AHO, an individual, individually and on behalf of a class of similarly situated persons

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Law Office of Michael E. Lindsey, 4455 Morena Blvd., Ste. 207, San Diego, CA, 92117-4325 858/270-7000

DEFENDANTS

AMERICREDIT FINANCIAL SERVICES, INC., d.b.a. ACF FINANCIAL SERVICES, INC.

2010 JUN 29 PM 3:42

County of Residence of First Listed Defendant Fort Worth, TX
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

BY DEPUTY

Attorneys (If Known)

'10 CV 1373 MMA POR

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☒ 4
Citizen of Another State	☐ 2	☒ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☒ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
California 17200, Civil Code § 1788, 2981 28:1331

Brief description of cause:
Unfair Competition Law, defective Notices under Automobile Sales Finance Act, FDCPA

VII. REQUESTED IN COMPLAINT:

☑ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☑ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 6/28/10

SIGNATURE OF ATTORNEY OF RECORD Mchael E. Lindsey

FOR OFFICE USE ONLY

RECEIPT # 15102 AMOUNT $350- APPLYING IFP JUDGE MAG. JUDGE

TRS 06-29-10

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS015102
Cashier ID: mbain
Transaction Date: 06/29/2010
Payer Name: MICHAEL LINDSEY

CIVIL FILING FEE
For: AHO V AMERICREDIT
Case/Party: D-CAS-3-10-CV-001373-001
Amount: $350.00

CHECK
Check/Money Order Num: 1857
Amt Tendered: $350.00

Total Due: $350.00
Total Tendered: $350.00
Change Amt: $0.00

There will be a fee of $45.00
charged for any returned check.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEVE AHO, an individual, individually and on behalf of a class of similarly situated persons, Plaintiff, v. AMERICREDIT FINANCIAL SERVICES, INC., d.b.a. ACF FINANCIAL SERVICES, INC., a business entity form unknown, Defendants.	Case No. 10cv1373 DMS (BLM) PLAINTIFF'S OPPOSITION TO AMERICREDIT'S MOTION TO EXCLUDE PUTATIVE CLASS MEMBERS WITH ARBITRATION CLAUSES DATE: May 13, 2011 TIME: 1:30 pm PLACE: 940 Front Street, San Diego JUDGE: Hon. Dana M. Sabraw

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

ARGUMENT

A. Americredit's Motion Is Premature

AmeriCredit's interest is not in arbitration, but solely in its class action ban. The clause at issue is a class action ban, made to look like an arbitration clause. The last sentence of the clause discloses the intent. It states;

> "If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the *remainder* of this arbitration clause shall be unenforceable." (Emphasis added.)

This "poison pill provision" proves the arbitration portion of the clause is mere window dressing. Moreover, AmeriCredit's Moving Papers repeatedly reference the clause in terms of "class action waivers". Indeed, when deposing Mr. Aho on March 9, 2010, counsel for defendant at p. 195:23 posed a question to him premised solely upon the class action ban;

> Q Are you aware that about 60 percent of the people in the class that you are seeking to represent have agreed not to bring a class-action against AmeriCredit?

AmeriCredit has no interest in compelling arbitration. Its interest lies only in compelling a class action ban. However, AmeriCredit has failed to identify a single consumer subject to the class action ban, much less any consumer who "agreed" it. AmeriCredit can make its case only by producing signed contracts. In short, it must produce evidence. In the absence of any evidence the Court must deny AmeriCredit's motion.

Further, AmeriCredit's motion to strike/exclude pursuant to Rule (23)(d)(1)(D) is premature and procedurally defective[1]. Rule (23)(d)(1)(D) states;

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[1]AmeriCredit does not reveal the basis for its motion and actually reference Rule 23(d)(1)(D) until the end of the Moving Papers, in the *conclusion*.

> "the court may issue orders that require that the pleadings be amended to eliminate allegations about representation of absent persons..."

Rule 23(d)(1)(D) is procedurally inseparable from Rule 23, subdivision (c)(1)(a), which provides that at an early practicable time the court should determine whether to certify the class. Typically, if a court decides that the class should not be certified, then it issues an order pursuant to subdivision (d)(1)(D) requiring the plaintiff to amend the pleadings to reflect that decision. Wright, Miller & Kane, *Federal Practice & Procedure Civil*, § 1795 (3d. ed.). "A rule 23(d)(1)(D) order to strike class allegations is appropriate only after the court rules that class treatment is improper-such as after the court denies class certification." *Faktor v. Lifestyle Lift*, 2009 WL 1565954 (N.D.Ohio 2009) quoting from 5-23 Moore's *Federal Practice-Civil* § 23.145.

AmeriCredit's arbitration claim is an affirmative defense against members of the putative class who allegedly signed contracts that contained an arbitration clause. See AmeriCredit's Answer, [Doc. No. 25] Twentieth Affirmative Defense. If AmeriCredit wants to preclude them from obtaining relief in this case and force them to arbitrate their claims individually, it must prove this affirmative defense. It must establish its claim by evidence, i.e., signed contracts. It cannot do so by the mere assertion of its employee, and the production of unsigned "exemplar" contracts that the class members would supposedly have signed, if only there was evidence of it.

At the very least AmeriCredit must produce the actual contracts for those putative class members it seeks to exclude. The proper way to do that is by summary judgment, not a "motion to exclude". This motion is merely an attempt to circumvent the evidentiary requirements of the Federal Rules of Civil Procedure.

So drastic a remedy as the enforcement of a naked class action ban, must be established by hard evidence, not mere argument. Moreover, the declaration

of Grant Helmer, executed as it were in Cancun Quintana Roo, Mexico, where the Court can assume no AmeriCredit records are stored, making the bare assertion that "approximately 40% of the portfolio loans" do not have arbitration clauses is not evidence at all. The statement is without foundation. There is no evidence of how that number was reached. No search of files. No review of records. No statement of personal knowledge from the declarant. See Objections to Evidence. Mr. Helmer's bare statement is patently inadequate to establish an affirmative defense. It is patently inadequate to deprive 1000s of California consumers whose vehicles have been repossessed, and cannot afford to vacation in Cancun, of substantive rights under California law. An arbitration defense is an affirmative defense and the burden of proof is on AmeriCredit to establish it. See Fed.R.Civ.P. 8(c). An affirmative defense places the burden of proof on the party pleading it. See *F.T.C. v. National Business Consultants, Inc.* 376 F.3d 317, 322 (C.A.5 (La.),2004).

To date, AmeriCredit has failed to prove that *any* class member has an arbitration provision in their contract. All it has done is submit the single page declaration Grant Helmer with exemplars of hypothetical form contracts, allegedly with customer information redacted. [Exhibits A through H, Doc. No. 41-3 to 41-10][2] . See Objections to Evidence. One cannot prove an affirmative defense with hypothetical evidence. In short, defendant has failed (*and* refused) to identify a single individual subject to its alleged arbitration clause. Neither plaintiff, nor the Court know which, if any, class members have arbitration clauses, or what those specific clauses provide. Plaintiff has been denied discovery entirely on the subject and the Court has no evidentiary basis to grant summary judgment

[2]AmeriCredit has substantially altered the exemplars. None of the original contracts had the banner AmeriCredit added to the top of each stating "*LAW* 553-CA-ARB". The front of the contracts, containing approximately 3,500 words has the word "arbitration" only once. The word is so effectively hidden that defendant probably does not know where it is located.

against these absent class members, or exclude them from the class.

Plaintiff in *Bankston v. AmeriCredit* spent months trying to get this discovery from AmeriCredit, but it refused to comply with plaintiff's discovery requests. **Exhibit 1** hereto, joint letter to Magistrate Judge Spero explaining the dispute. AmeriCredit refused to identify the class members who have contracts with arbitration clauses. It refused to produce their contracts. It objects on grounds of undue burden, overbreadth, relevance and "premature." *Id.* AmeriCredit refused to even *look* at the contracts to determine who it claims will be subject to its class action ban. **Exhibit 2** hereto, AmeriCredit responses to Special Interrogatories Set One, *Arguelles-Romero v. AmeriCredit.*

> "AmeriCredit objects to this request as unduly burdensome. To obtain the requested information, AmeriCredit would be required to manually search and individually inspect tens of thousands of documents related to the approximately 93,035 California contracts..."

That was AmeriCredit's response to a direct Special Interrogatory on July 7, 2009, and two years later it is still too great a burden. AmeriCredit has failed to meet its evidentiary burden to prove the Affirmative Defense.

The Court should deny this motion. If it wants to consider AmeriCredit's motion as a motion for summary judgment on this affirmative defense, it should defer its ruling until AmeriCredit meets its burden and plaintiff has had a fair and adequate opportunity to conduct discovery and present the class's evidence. Moreover, if the Court is inclined to grant the motion, plaintiff requests leave to amend the complaint to add a cause of action for violation of the Consumer Legal Remedies Act.

B. Americredit Cannot Prove Its Affirmative Defense By Relying On Decisions in Other Cases

In urging the Court to strike allegations from plaintiff's Complaint, AmeriCredit relies on rulings from a superior court in *Arguelles-Romero v.*

AmeriCredit and this district court in *Smith v. AmeriCredit*. However, AmeriCredit has not presented this Court with any evidence from those cases, or from its own files.[3]

Mr. Aho was not a party to *Arguelles-Romero* or *Smith*. The classes were never certified. In *Arguelles-Romero*, the Court of Appeal granted that plaintiff was entitled to conduct discovery into the application of the arbitration clause by AmeriCredit, and its policies and procedures. *Arguelles-Romero v. Superior Court* 109 Cal.Rptr.3d 289 (2010). *Smith* of course is briefed and on appeal.

AmeriCredit complains that Mr. Aho's lawsuit "is a classic 'end run' around the arbitration orders in *Arguelles-Romero* and *Smith*, and patently improper" [Doc. No. 41-1, p. 2, line1], but it does not explain why Mr. Aho's action is improper and it cites no authority. The only end run at play is by AmeriCredit, around the rules of evidence.

Because AmeriCredit has failed to explain its legal basis, we can only surmise it is relying on the doctrines of res judicata or collateral estoppel.[4] Both are also affirmative defenses for which AmeriCredit has presented no evidence. Neither apply in this case. There are strict requirements for both doctrines:

> The doctrine of res judicata applies when there exists between two separate cases (1) an identity of claims; (2) identity or privity between parties in both cases; and (3) a final judgment on the merits in the first case. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir.2002); *Western Radio Servs. Co., Inc. v. Glickman*, 123 F.3d 1189 (9th Cir.1997). All three of these essential elements must be shown for res judicata to apply. 50 C.J.S. Judgments § 703 (2007).
>
> *U.S. v. Bhatia* 2007 WL 2554402, 3 (N.D.Cal.2007).
>
> Collateral estoppel, or "issue preclusion," refers to the common-law doctrine that "when an issue of ultimate fact has once been determined by

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[3]The party seeking to compel arbitration bears the burden of proving that an arbitration agreement exists. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 972 (1997). Only then does the burden shift to Mr. Aho to prove a defense to the enforcement of the arbitration agreement. *Id.*

[4]If AmeriCredit reveals a different theory in its reply brief, Mr. Aho would request leave to file a surreply to address any new arguments.

> a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."
> *Ashe, 397 U.S.* at 443 (emphasis added); see also *United States v. Arnett*, 327 F.3d 845, 848 (9th Cir.2003)

Id. at 6. There is no identity or privity between Mr. Aho and the plaintiffs in *Arguelles-Romero* or *Smith* and there is no final judgment in either case. Hence, no res judicata or collateral estoppel.

C. Americredit's Class Action Ban Is Against Public Policy in California Making the Arbitration Provisions Unenforceable

The class action ban AmeriCredit seeks to enforce is clearly contrary to public policy in California. California Civil Code § 2983.7, a provision of the Rees Levering Automobile Sales Finance Act (ASFA), states in pertinent part;

> No conditional sale contract shall contain any provision by which:
> (a) The buyer agrees not to assert against the seller a claim or defense arising out of the sale or agrees not to assert against an assignee such a claim or defense.
>
> (c) The buyer *waives any right of action* against the seller or holder of the contract or other person acting on his behalf, for any illegal act committed in the collection of payments under the contract or in the repossession of the motor vehicle.
>
> (e) The buyer *relieves the seller from liability for any legal remedies* which the buyer may have against the seller under the contract or any separate instrument executed in connection therewith. (Emphasis added.)

The ASFA expressly prohibits the class action ban that AmeriCredit seeks to impose. AmeriCredit may argue that the the ASFA cannot prohibit an arbitration clause, and while plaintiff does not concede the point, it is beside the point. The ASFA *can and does* prohibit a class action ban. The class action ban must by law fail, because AmeriCredit cannot force the waiver of "any right of action". Because the class action ban fails, the entire clause fails, ***by its own terms***. The "poison pill provision" of the last sentence of arbitration clause dictates that result. It states;

> "If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the *remainder* of this arbitration clause ***shall*** be unenforceable." (Emphasis added.)

Statutes should be interpreted to promote rather than defeat the legislative purpose and policy. *Cerra v. Blackstone* 172 Cal.App.3d 604, 608 (Cal.App. 6 Dist.,1985), see also *Juarez v. Arcadia Financial, Ltd.* 152 Cal.App.4th 889, 904 (Cal.App. 4 Dist.,2007).

Here the public policy behind the ASFA is fully enunciated.

> The legislative purpose in enacting the Rees-Levering Act was to provide more comprehensive protection for the unsophisticated motor vehicle consumer. (Final Report of the Assembly Interim Committee on Finance and Insurance, 15 Assembly Interim Committee Reports No. 24 (1961) quoted in The Rees-Levering Motor Vehicle Sales and Finance Act, 10 UCLA Law Review (1962) 125, 127.)

Part of the protection of the unsophisticated motor vehicle consumer is the express prohibition on the contractual waiver of any right of action he or she may have "against the seller or holder", including the right to participate in a class action. While AmeriCredit may argue that the putative class members are free to seek arbitration on an individual basis, that is incorrect and illusory. That construction merely ensures that no one will ever get redress for the invalid deficiencies and improper credit reporting. Properly analyzed, the class action ban must be struck down as contrary to law, and therefore void as against public policy.

The arbitration clause, is nothing more than a stalking horse for the class action ban. It vanishes by its own terms because the last sentence of the clause states;

> "If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the *remainder* [i.e., the arbitration portion] of this arbitration clause shall be unenforceable." (Emphasis added.)

By its own terms the clause is exculpatory.

Claims for injunctive relief are not subject to arbitration. Mr. Aho asserts

on behalf of the class, claims for Declaratory Relief. See Complaint. [Doc. No. 1, p. 13;10-27]. Moreover, plaintiff specifically requests injunctive relief from the deficiency claims of AmeriCredit. *Id.* 14:19-26. Those claims are by law not subject to arbitration.[5] The California Supreme Court has held that;

> "requests for injunctive relief designed to benefit the public presented a narrow exception to the rule that the FAA requires state courts to honor arbitration agreements."

and,

> "the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators."
> *Cruz v. PacifiCare Health Systems, Inc.* 30 Cal.4th 303, 312 (Cal.,2003).

AmeriCredit's arbitration clause/class action ban has "poison pill" provision in the last sentence. Because plaintiff's claims for injunctive relief cannot be ordered to arbitration, the arbitration clause is automatically unenforceable by its own terms. The California Supreme Court observed that nothing "in the legislative history of the FAA suggest that Congress contemplated 'public injunction' arbitration within the universe of arbitration agreements it was attempting to enforce. *Id.* at 314. AmeriCredit does not permit the severing of the claims for injunctive relief from any individual claims. By dint of its own contract, and by its express terms, the arbitration clause "shall be unenforceable" and AmeriCredit's Motion to Exclude fails.

D. Uncontroverted Evidence Proves AmeriCredit's Arbitration Clauses Are Unconscionable

The only evidence submitted by AmeriCredit in connection with this motion are Grant Helmer's declarations and the altered contracts with the added language "*LAW* 553-CA-ARB" across to top of each contract. See Objections to

[5]The Court may recall in a conference call with the Court that Plaintiff in *Smith* offered to arbitrate all claims on a class wide basis and AmeriCredit's counsel refused.

Evidence. Mr. Helmer declares from Cancun that those altered contracts are "representative examples of all contracts in use by AmeriCredit from October 2005 to the present that contain arbitration clauses…." [Doc. No. 41-2, ¶ 2]. "Representative examples" are inadequate to deprive anyone of their rights.

AmeriCredit argues these unidentified contracts from unidentified dealerships involving unidentified consumers are not contracts of adhesion. "A contract is procedurally unconscionable if it is a contract of adhesion, i.e., a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1148. Specifically the contracts that AmeriCredit claims *here* are not adhesion contracts have *already been adjudicated* as such.

> In this case, the trial court found that procedural unconscionability had been established as the contract was a form contract of adhesion, presented to plaintiffs on a take-it-or-leave-it basis. *Arguelles-Romero v. Superior Court* 184 Cal.App.4th 825, 843 (Cal.App. 2 Dist.,2010)

If res judicata or collateral estoppel have any application here, they would apply to AmeriCredit and its contracts. AmeriCredit's claim that these preprinted Reynolds and Reynolds form contracts, "Law Form No. 553-CA-ARB" are not an adhesion contracts is without merit.

This contract is the same Reynolds and Reynolds Law Form No. 553-CA-ARB Retail Installment Sales Contract considered by the *Fisher v. DCH Temecula*, 187 Cal.App.4th 601 (2010), court, and the court in *Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77. ***Every court that has ever examined the California standard form Retail Installment Sales Contract has determined it to be an adhesion contract.***

> The [contract] was presented to plaintiffs for signature on a "take it or leave it" basis. Plaintiffs were given no opportunity to negotiate any of the preprinted terms in the [contract]. The arbitration clause was <u>particularly inconspicuous, printed in eight-point typeface on the opposite side of the signature page of the [contract</u>]. Gutierrez was never informed that the

> [contract] contained an arbitration clause, much less offered an opportunity to negotiate its inclusion within the [contract] or to agree upon its specific terms. He was not required to initial the arbitration clause. He either had to accept the arbitration clause and the other preprinted terms, or reject the [contract] entirely. Under these circumstances, the arbitration clause was procedurally unconscionable. *Gutierrez*, 114 Cal.App.4th at 89; internal citations omitted. (Emphasis added.)

AmeriCredit has cited no case to the contrary. In fact, this Court found this same form contract to be an adhesion contract in *Smith v. AmeriCredit*, Order of the Court 9:14, [Doc. No. 32]. "As discussed above, the Arbitration Clause is a contract of adhesion."

Nonetheless, AmeriCredit argues that under *Crippen v. Central Valley RV Outlet, Inc.*, 124 Cal.App.4th 1159, 1166 (2004) "the general rule in California is that procedural unconscionability cannot be inferred from the form agreement or the nature of the relationship between the automobile dealer and the customer." AmeriCredit's Motion to Exclude, [Doc. No. 41-1, p. 4:9-11]. That is not the holding of *Crippen*. The holding was that buyer failed to show that parties' arbitration agreement was procedurally unconscionable.

Crippen was a defective product case that was brought by a consumer whose purchase contract for a motor home contained an arbitration provision. When the consumer sued the dealer, the dealer moved to compel arbitration. In opposing that motion, the customer presented no extrinsic evidence other than the contract. The trial court found that the arbitration agreement was both procedurally and substantively unconscionable, hence unenforceable, and it denied the dealer's motion. The dealer appealed. The Court of Appeal reversed because, on the record in that case it could find no evidence of procedural unconscionability. *Crippen*, supra at 1162.

The *Crippen* Court was careful to point out that its decision was based on the facts of that case, and that it was not announcing a rule of law. In particular, it noted at the beginning of the opinion that "in some situations, procedural unconscionability can be established simply by examining the written agreement

and the nature of the relationship between the parties without the use of extrinsic evidence." *Id.* at 1162. Then it carefully noted that, unlike any of the contracts submitted by AmeriCredit, the arbitration provision in *Crippen* was on a separate page that was executed separately by parties. *Id.* Further, it noted that, unlike here, the arbitration clause was not in small type or hidden in a prolix form. *Id* at 1165. In short, it was very different contract from any contract at issue here.

The *Crippen* Court contrasted that arbitration provision with one that had been deemed unconscionable in *Harper v. Ultimo*, 113 Cal.App.4th 1402 (2003). The preprinted contract in *Harper* contained an arbitration provision that required the parties to arbitrate under the rules of the Better Business Bureau. Just like here, those rules, however, were not attached to the agreement. After defendant caused extensive damage to plaintiffs' property, plaintiffs learned that the BBB rules limited their remedies to completion of the work, a refund, or damages of no more than $2,500. The Court in *Harper* found procedural unconscionability from the document itself. It explained:

> Procedural unconscionability focuses on the factors of surprise and oppression (*Stirlen v. Supercuts, Inc.*, supra, 51 Cal.App.4th at p. 1532, 60 Cal.Rptr.2d 138, quoting *A & M Produce Co. v. FMC Corp*. (1982) 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114), with surprise being a function of the disappointed reasonable expectations of the weaker party. (See *Armendariz*, supra, 24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669.)
>
> Here is the surprise: The customer must inevitably receive a nasty shock when he or she discovers that no relief is available even if out and out fraud has been perpetrated, or even if he or she merely wants to be fully compensated for damaged property.
>
> Here is the oppression: The inability to receive full relief is artfully hidden by merely referencing the Better Business Bureau arbitration rules, and not attaching those rules to the contract for the customer to review. The customer is forced to go to another source to find out the full import of what he or she is about to sign-and must go to that effort prior to signing. *Id.* at 1406, partially quoted in *Crippen* at 1167.

That is exactly the case here. By looking at Mr. Helmer's exemplars of the AmeriCredit contracts, the Court can see for itself that AmeriCredit's arbitration provision is literally at the very end of a prolix (extended to great, unnecessary, or

tedious length; long and wordy) form contract, and *not* on a separate page. There are approximately 3,500 words on the front, and approximately 4,000 words on the back. It is in fine print, in grey ink on yellow paper. It not easy to read. It is on the backside of the contract, not the front. There are a minimum of ten (10) places to sign or initial on the front. There are zero initials or signatures required on the back. It is no accident that the arbitration clause is not signed separately from the rest of the contract. It is a deliberate subterfuge. The customer signs nothing on the back of the contract where the arbitration clause is printed. That is no accident.

Procedural unconscionability is clear in this case, just as it was in *Harper*. Both surprise and oppression are present. The surprise comes when the customer finds that to get back the money he/she has paid on AmeriCredit's invalid deficiency claim, he/she must pay the American Arbitration Association $3,350 for the filing fee, $8,200 for the arbitration, plus the room charge of $200 per day in San Diego, and $3,250 more for each successive day. Additionally, Mr. Aho would have to pay the arbitrator's fee of $300 to $600 per hour. AmeriCredit's obligation to reimburse the customer for these fees is limited to only $1,500, and that is an "advance". See Dec. of Michael E. Lindsey ¶¶ 10-13.

The oppression is analogous to the oppression in *Harper*. AmeriCredit's arbitration provision hides from the customers the exorbitant cost of arbitration by not disclosing that information in the contract. Just like *Harper*, the AAA rules are not stated in the contract, but are incorporated by reference. Moreover, the rules to which the consumer is subjected are subject to change without notice or agreement of the parties. This is a clear violation of the Merger clause on the *front* of the contract, which requires a signature. It states;

///

///

> HOW THIS CONTRACT CAN BE CHANGED
> This contract *contains the entire agreement* between you and us relating to this contract. Any change to this contract must be in writing and both you and we must sign it. No oral changes are binding. (Emphasis added.)
>
> Buyer signs X_____
> Co-Buyer signs X_____

That statement is clearly false and misleading. It is procedurally and substantively unconscionable. It is unquestionably deceptive, because material terms of the contract can be changed at anytime, without any notice, and without any agreement, by an entity which is not even a party to the contract, the AAA or the NAF. AmeriCredit's arbitration provision is worse than *Crippen* because it lulls the customer into believing that AmeriCredit will pay for the arbitration by promising to advance up to $1,500 for arbitration fees. This $1,500 advance leads consumers to think that AmeriCredit will pay for the arbitration. They do not suspect that AmeriCredit's $1,500 will cover only a small fraction of the AAA's charges. Nor are they informed that there is no possibility they will ever recover those fees.

Even if the consumer wins the arbitration, he or she still must pay AAA's fees above $1,500 and thus will lose by winning. Even the notion of an "advance" is illusory. In this context, an "advance" is defined in *Webster* as "to supply or furnish in expectation of repayment". The provision is notable for *not* stating that AmeriCredit will *pay* the costs of the arbitration it demands.

Crippen is completely inapposite. This case is a repeat of *Harper*, not *Crippen*, and the arbitration clauses are unconscionable under the same analysis.

E. AmeriCredit's Cases Do Not Support Its Argument.

AmeriCredit cites four cases in support of its assertion that "putative class members who signed valid contractual arbitration agreements and class action waivers are subject to exclusion." Document 48, page 3, lines 5-6. Those cases do not support its motion.

Mowdy v. Beneto Bulk Transport Kenan Advantage Group, Inc., No. C06-5682 MHP, 2008 WL 901546 (N.D.Cal. March 31, 2008) was a wage and hour case brought under the Fair Labor Standards Act and the California Labor Code. The pending motion was for approval of Hoffman-LaRoche notice and conditional certification of an opt-in class of approximately 1,000 current or former truck drivers. The defendant contended that some of the drivers were exempt from the protections of the FLSA because they had signed arbitration agreements when they joined the company. *Id* at ¶3. Judge Patel refused to exclude those drivers from the class at that point in the litigation. The Court explained:

> In the present case, defendants have not sufficiently developed the record as to the nature of the arbitration agreements at issue, and it is unclear what number of individuals have signed either a current or former version of the agreement or whether the agreements are valid. The court will reserve its determination as to the validity of the arbitration agreements until after notice has been mailed and those receiving it have had an opportunity to express an interest to join the suit. If validity of those agreements is in issue the court will resolve the dispute and then, at the second stage of the certification process, any individuals who are shown to have signed valid arbitration agreements that properly pertain to the type of claim at issue may be excluded from the collective suit. Id. at *6. Judge Patel refused to do what AmeriCredit asks this Court to do.

Next, AmeriCredit cites *Aljabi v. Pardee Construction Corp.*, an unpublished decision of the California Court of Appeal that can be found at 2002 WL 254407. The opinion is unpublished and under the California Rules of Court cannot be cited to a state court. California Rules of Court, Rules 8.1105, 8.1110 and 8.1115. Inasmuch as this is a diversity case brought under California law, in which the Court applies California law, the Court should disregard *Aljabi*. See *In re Antablian*, 140 B.R. 534, 537 (Bkrtcy.C.D.Cal.,1992).

In any event, *Aljabi* is inapposite. The case was brought by the owners of a single family residence in a development that was only a few hundred feet beneath the flight path leading to a new cargo airport in San Diego County. The developer's sales literature did not disclose how close the houses were to the flight path. Plaintiffs and 147 other homeowners had contracts without arbitration

clauses, but 249 other buyers had contracts with arbitration clauses. The superior court eliminated the arbitration clause buyers from the class because it was unclear how plaintiffs could "lessen the problems inherent in class actions where some plaintiffs were bound by an arbitration clause and others were not." *Id* at *5. The class was much smaller, the class members were all owners of property in one development, and each of them had spent hundreds of thousands of dollars buying the property. *Nor was there any claim for injunctive relief.*

That is completely unlike this case. Here the putative class members are poor. Many do not speak English. They have limited educations. Mr. Aho did not finish highschool. They are consumers are spread all over California, they are unsophisticated car buyers in the subprime market, and the arbitration clause in AmeriCredit's contracts is unconscionable and thus unenforceable. Moreover, there is an express Legislative intent to protect these persons.

> The legislative purpose in enacting the Rees-Levering Act was to provide more comprehensive protection for the unsophisticated motor vehicle consumer. (Final Report of the Assembly Interim Committee on Finance and Insurance, 15 Assembly Interim Committee Reports No. 24 (1961) quoted in The Rees-Levering Motor Vehicle Sales and Finance Act, 10 UCLA Law Review (1962) 125, 127.) *Cerra v. Blackstone* 172 Cal.App.3d 604, 608 (Cal.App. 6 Dist.,1985).

Olvera v. El Pollo Loco, 173 Cal.App.4th 447 (2009) also had no claims for injunctive relief. It was an appeal by a restaurant owner whose motion to compel arbitration of a worker's complaint had been denied. The Court of Appeal affirmed the denial of the motion to compel arbitration. At footnote 5, the Court said that the named plaintiffs who had not signed arbitration agreements "could not vindicate the statutory rights of employees who were bound by the arbitration agreement, if the agreement were enforceable. *Id* at 457, italics added. AmeriCredit omits from its quotation from the case the critical phrase "if the agreement were enforceable."

Mr. Aho contends that the arbitration provision in AmeriCredit's form

contracts is unenforceable because he requests injunctive relief, and because the ASFA prohibits the inclusion in the contract of a waiver of any right of action by a purchaser. By its own terms the last sentence of the clause states that it "shall be unenforceable" because the claims for injunctive relief cannot be severed, and because the waiver of class action rights is against California law. Mr. Aho is perfectly competent to vindicate the interests of all class members.

The last case that AmeriCredit relies on for its argument is *Endres v. Wells Fargo Bank*, 2008 WL 344204 (N.D.Cal., Feb. 6, 2008). Endres was a credit card disclosure class action in which Judge Hamilton denied class certification because plaintiffs did not show that their claims were typical or that common issues predominated. It was a very fact specific decision. It was a very different situation. The only reference to arbitration clauses appears at *10 where the Court said "nationwide class treatment is inappropriate where class members are subject to contractual arbitration agreements and/or class action waivers that may be enforceable as to residents of states other than California." Again, the case is different from the present circumstances. Unlike *Endres*, this case is not a nationwide class action, subject to the laws of 50 states and the District of Columbia. The class members are all from California. All the class members are uniformly entitled to the protection of California's Rees-Levering Act and the UCL. All are uniformly subject to the protection and provisions of California law. *Endres* provides no support for AmeriCredit's motion.

F. The Ninth Circuit's Decision In *Pokorny v. Quixtar* Lays To Rest AmeriCredit's Claim That Its Arbitration Clauses Are Enforceable.

The Ninth Circuit affirmed Judge Conti's denial of a motion to compel arbitration in *Pokorny v. Quixtar*, 601 F.3d 987 (2010). Plaintiffs were Independent Business Owners (IBOs) who had signed up to be distributors of Quixtar products, the successor to Amway. The IBOs signed agreements that

contained mandatory dispute resolution provisions. Junior IBOs sued Quixtar and some senior IBOs claiming that they had "operate[d] a two-tiered pyramid scheme that has scammed junior IBOs like themselves out of millions of dollars." Defendants moved to compel arbitration and compulsory mediation, but the district court denied their motion because it found the alternative dispute resolution provisions unconscionable. The Ninth Circuit affirmed.

It explained that "although both procedural and substantive unconscionability must be present for the contract to be declared unenforceable, they need not be present to the same degree." *Pokorny*, supra at 996, and significantly relying upon *Harper v. Ultimo*, 113 Cal.App.4th 1402, 1406 (Ct. App.2003). *Pokorny* reaffirmed prior Ninth Circuit decisions holding that "a contract is procedurally unconscionable under California law if it is 'a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" *Id* at 5988-89, quoting *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003).

AmeriCredit's contracts are standardized forms drafted by the party of superior bargaining strength. AmeriCredit cannot deny that it and its auto dealer network have superior bargaining position to the customers. While this case has been pending AmeriCredit was purchased by General Motors for 3.5 billion dollars. By contrast, the class consists of consumers who are "subprime borrowers," i.e. people who have poor credit scores and history. They in many instances lack education. In a word, they are poor. That is why their vehicles were repossessed. Realistically, their options are to accept the form contract or shop somewhere else. The Ninth Circuit succinctly summed it up in *Pokorny*, "[t]his oppressive behavior is the quintessential characteristic of a procedurally unconscionable agreement. *Id* at 996.

In *Pokorny*, defendant Quixtar had failed to attach a copy of the Rules of

Conduct to the contract that contained the arbitration agreement. That is exactly the case here, as discussed, *supra*. The Ninth Circuit found this to constitute procedural unconscionabilty.

> "Plaintiffs were not even given a fair opportunity to review the full nature and extent of the …binding arbitration processes to which they would be bound before they signed the [contracts with the arbitration provisions]. These problems multiply the degree of procedural unconscionability…." *Id* citing *Harper v. Ultimo*, supra at 1406-1407.

AmeriCredit's contracts do not attach the rules of either the American Arbitration Association or the now-defunct National Arbitration Forum, or their fee schedules. AmeriCredit's customers do not have a fair opportunity to know what they are agreeing to. The aforementioned Merger Clause on the front of the contract affirmatively misrepresents the contents of the contract by promising that all the terms and conditions *are* stated, when of course they are not. The arbitration clause stateRees Levering

> You may get a copy of the rules of these organizations by contacting the arbitration organization or visting its website.

Having found substantial evidence to support the finding of procedural unconscionability, the Ninth Circuit explained that "'[s]ubstantive unconscionability addresses the fairness of the term in dispute.'" *Id* at 997, quoting *Szetela v. Discover Bank*, 118 Cal.Rptr.2d 862, 867 (2002). "The focus of the inquiry is whether the term is one-sided and will have an overly harsh effect on the disadvantaged party." *Id* citing *Harper*, supra. "Agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability." *Id*, citations and quotations omitted.

AmeriCredit's arbitration provisions do not provide even a modicum of bilaterality. The arbitration provision is sharply tilted in favor of AmeriCredit and against consumers.

1. The agreement provides that "[i]f a dispute is arbitrated, you will give up your right to participate as a class representative or class member on any

class claim you may have against us including any right to class arbitration or any consolidation of individual arbitrations." "You expressly waive any right you may have to arbitrate a class action." See Helmer dec., Exh A. This waiver of class action rights applies by its terms to the customers only, not to AmeriCredit. But even if it expressly applied to AmeriCredit, that would not make it bilateral because lenders do not bring class actions against their borrowers. It is like saying that a law prohibiting people from sleeping under bridges applies to everyone. In practice it applies only to poor people because rich people do not sleep under bridges.

2. The arbitration clause provides that the parties "retain any rights to self-help remedies, such as repossession." This is a one-sided provision that favors AmeriCredit. No car buyer has any right or reason to repossess anything from AmeriCredit. The retention of the right to repossess benefits only AmeriCredit.

3. The arbitration clause provides that AmeriCredit can file suit in small claims court or elsewhere without waiving its right to demand arbitration later. This allows AmeriCredit to use the court system to collect its deficiency claims. If a consumer ever has the audacity to sue over the illegal deficiency claim, AmeriCredit can invoke the arbitration provision to insulate it from class action liability as it does here.

4. AmeriCredit's arbitration agreement provides that the arbitrator's decision is final "except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes injunctive relief against that party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitration panel." Exhibit A to Helmer's dec. This is not bilateral. No customer of AmeriCredit is likely to

have a liability that exceeds $100,000. That would apply only to Mercedes owners, and other high end vehicles, not the consumers in the "subprime market" AmeriCredit targets. AmeriCredit has no reason to seek injunctive relief so the customers' right to appeal an award of injunctive relief against them is meaningless. All AmeriCredit needs is the right to repossess the vehicle (which it reserves) and to sue to recover the deficiency (which it also reserves). AmeriCredit is the only party that might have injunctive relief ordered against it, and it has reserved the right to appeal such a decision.

Another reason for finding substantive unconscionability in *Pokorny* was that the Rules of Conduct unfairly exposed the IBOs to a greater financial risk in arbitrating claims than they would face if they were to litigate those same claims in court. *Id* at 1004. AmeriCredit's arbitration provision requires the customer to pay all of the costs of arbitration above the $1,500 that AmeriCredit will reimburse and expressly prohibits the arbitrator from awarding more. Thus the consumer would be out of pocket at least $5,800 for a one-day arbitration before the AAA, even if he won. That unfairly exposes the customer to a much greater financial risk than litigation in state or federal court.

CONCLUSION

For the foregoing reasons, Mr. Aho respectfully requests this Court deny AmeriCredit's Motion to Exclude Putative Class Members with Arbitration Clauses.

April 15, 2011

/s/Michael E. Lindsey
Michael E. Lindsey
Attorney for Plaintiff

PROOF OF SERVICE
(Sections 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 4455 Morena Blvd., Ste. 207, San Diego, California 92117-4325.

On the date shown below, I served the foregoing document described as:

PLAINTIFF'S OPPOSITION TO AMERICREDIT'S MOTION TO EXCLUDE PUTATIVE CLASS MEMBERS WITH ARBITRATION CLAUSES Aho v. AmeriCredit , Case No. 10cv1373 DMS (BLM)

to the interested parties in this action by mail at San Diego, California addressed as follows:

Peter S. Hecker
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA, 94111-4109

[X] (**BY EFILE)** The above document was served on the interested party named above by electronic means via Efile.

[] (**BY MAIL)** The envelope was mailed with postage thereon fully prepaid. As follows: I am "readily familiar" with this office's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (**BY PERSONAL SERVICE**) I caused to be delivered such envelope by hand to the addressee.

[X] (**FEDERAL**] I declare that I am a member of the bar of this court.

Executed on April 15, 2011, at San Diego, California.

/s/Michael E. Lindsey
Michael E. Lindsey

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN D. AHO, an individual, individually and on behalf of a class of similarly situated persons,

Plaintiff,

v.

AMERICREDIT FINANCIAL SERVICES, INC., d.b.a. ACF FINANCIAL SERVICES, INC., a business entity form unknown,

Defendant.

Case No. 10 CV 1373 DMS BLM

FINAL PRETRIAL CONFERENCE ORDER

Trial Date: April 30, 2012
Judge: Hon. Dana M. Sabraw
Courtroom: 10

[Complaint Filed: June 29, 2010]

Following pretrial proceedings pursuant to Fed.R.Civ.P. 16 and Civil Local Rule 16.1.f.6 IT IS SO ORDERED:

I.

As set forth in the Complaint and Answer on file, [Doc. Nos. 1, 25], this is a class action for restitutionary, injunctive, and declaratory relief by Plaintiff and Class Representative Steven D. Aho ("plaintiff" or "Aho") and the following certified Federal Rule of Civil Procedure ("Rule") 23(b)(2) Class ("Class") and Rule 23(b)(3) Subclass ("Subclass").

The Class:

> All persons who were sent an NOI by AmeriCredit to an address in California at any time from March 18, 2005 through May 15, 2009, following the repossession or voluntary surrender of a motor vehicle, who were assessed a deficiency balance following the disposition of the vehicle, and against whom AmeriCredit has asserted, collected, or attempted to collect any portion of the deficiency balance. The class excludes persons whose obligations have been discharged in bankruptcy, persons against whom AmeriCredit has obtained final judgments in replevin actions, persons whose contracts include arbitration clauses that prohibit class membership, and persons who received NOIs that denied them the right to reinstate.

The Subclass is defined as those Class Members who have paid any amount to AmeriCredit after repossession. [Doc. No. 98.]

The Complaint alleged that Defendant AmeriCredit Financial Services, Inc. (hereafter, "AmeriCredit") violated California Business & Professions Code §17200, *et seq.* (the "UCL") by violating the Rees-Levering Automobile Sales Financing Act, Civil Code §2982(a) ("ASFA"). Plaintiff contends he has pled an ASFA cause of action in the Complaint independent of the UCL claim. AmeriCredit contends that plaintiff has not pled an ASFA claim, but instead has pled the following three cause of action for (1) violation of the Rosenthal Act; (2) violation of the UCL predicated on an ASFA violation, and (3) declaratory relief.

The Court certified the Class and Subclass, including Mr. Aho, and granted partial summary judgment on Counts II and III of the Complaint, holding "Plaintiff's motion for partial summary judgment on his declaratory relief and 17200 claims is granted." [Doc. 154 at 8:7-8.] The Court stated "Defendant's failure to include [additional monthly installments, late fees and the law enforcement fee] in the NOI is a violation of the ASFA." [Doc. No. 154, 6:21-25.]

AmeriCredit contends it will demonstrate at trial that, given equitable and other

considerations, restitution and injunctive relief are inappropriate and that prejudgment interest cannot be recovered as a matter of law. Plaintiff contends the entitlement to restitution, including interest, has been decided by the Court, and/or waived by AmeriCredit, that the equities are in favor of restitution, and that injunctive relief is necessary and appropriate.

This is also an individual action by Plaintiff, Mr. Aho, for damages regarding AmeriCredit's alleged violation of the California Rosenthal Fair Debt Collections Practices Act in the following ways:

(a) Violations of §1788.17, 15 U.S.C. §§1692e, and 1692e(2)(A) by falsely representing the character, amount, or legal status of any debt;

(b) Violations of §1788.17 through failing to comply with 15 U.S.C. § 1692e(5) and threatening to take any action that cannot legally be taken;

(c) Violations of §1788.17 through failing to comply with 15 U.S.C. § 1692e(8) by communicating to any person credit information which is known or should be known to false; and

(d) Violations of §1788.17 through failing to comply with 15 U.S.C. § 1692e(10) by the use of any false representation or deceptive means to collect or attempt to collect any debt.

As a result of the alleged violations of the Rosenthal Act, Plaintiff seeks actual damages under California Civil Code §1788.30(a), and statutory damages for knowing or willful violations under California Civil Code §1788.30(b), which, AmeriCredit contends, cannot be greater than $1,000 as a matter of law. AmeriCredit also contends that it has not violated the Rosenthal Act, that plaintiff has not suffered any actual damages, and that statutory damages of up to $1,000 are also inappropriate because it has not engaged in any knowing or willful misconduct.

II.

Jurisdiction and venue in this Court are based upon §1332 of Title 28 of the United States Judicial Code, 28 U.S.C. §§ 1332, as amended by The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2 (2005). The Class involves more than 100 persons. 28 U.S.C. §1332(d)(5)(B). The aggregate amount in controversy, exclusive of interest and costs, exceeds $5,000,000. 28 U.S.C. §1332(d)(2). Plaintiff is a resident of California, and the AmeriCredit is incorporated under the laws of Delaware and has its corporate headquarters and principal place of business in Fort Worth, Texas. Therefore, minimal diversity of opposing parties is present as

required under CAFA. 28 U.S.C.§1332(d)(2)(A). Plaintiff contends that Article III standing and UCL class representative standing have already been determined by the Court. F.R.C.P. 56 (d). AmeriCredit does not dispute this but contends that plaintiff lacks standing and this Court therefore lacks subject matter jurisdiction, and AmeriCredit reserves its rights on appeal.

Venue is proper in this District under §§ 1391(b)-(c) of Title 28 of the United States Code, because a substantial part of the acts and conduct charged herein occurred in this District, AmeriCredit does business in this District, and Mr. Aho resides in this District. Mr. Aho purchased his vehicle in this District and the vehicle was repossessed in this District. The reinstatement notice was sent to Mr. Aho in this district.

III.

The following facts are admitted and require no proof,

1. The jurisdictional and venue facts listed above, except that for purposes of appeal, AmeriCredit does not admit that plaintiff has standing or that this Court has subject matter jurisdiction.

2. The Class Members (excluding Subclass Members) are identified by name and last-known address (street, city, state and ZIP code) in Bates-stamped document AC AHO 14665.

3. The Subclass Members are identified by name and last known address (street, city, state and ZIP code) in Bates-stamped documents AC AHO 171497.

4. AmeriCredit received total payments of $3,880,473.31 from the Subclass Members towards their asserted deficiencies of $14,341,529.58, as of January 2, 2012.

5. The dates, amounts, and payors of Subclass Member payments are listed in Bates-stamped document AC AHO 14468-69.

6. The Class and Subclass Member Retail Installment Sale Contracts ("RISCs") are listed in Bates-stamped documents AC AHO 14-21, 3893-7521, 35504-68983, 148328-152127.

7. The Class and Subclass Member Notices of Intent to Dispose of Vehicles ("NOIs") are Bates-stamped AC AHO 35-37, 7522-14389, 68984-144618.

8. Plaintiff's RISC is Bates-stamped document Aho 14-21.

9. Plaintiff's NOI is Bates-stamped document AC AHO 35-37.

10. Plaintiff's Deficiency Calculation, dated September 27, 2005 is Bates-stamped Aho 53 and AC AHO 30.

11. The payment histories and data for Subclass Members are Bates-stamped AC AHO 152305-171495.

12. Plaintiff's NOI is materially the same as all Class Member and Subclass member NOIs, with the exception of the date issued and the specific dollar amounts listed.

13. Plaintiff's payment history is Bates-stamped AC AHO 38-40, 214-215, and Aho 35-36.

14. Emails sent by AmeriCredit in May 2009 on California accounts are Bates-stamped AC AHO 247-255.

15. AmeriCredit's list and amounts of payments coming due in the 20-day reinstatement period for Subclass Members are Bates-stamped AC AHO 171496.

16. Declaration of Stephen D. Aho in Support of Motion for Class Certification, filed 8/16/2010 (Doc. 11-14).

IV.

The reservations as to the facts recited in paragraph III above are as follows: Plaintiff reserves objections under FRE 401-403 as to the documents identified above in Nos. 13-16.

With respect to all facts and documents identified above, AmeriCredit reserves all objections under FRE 401-403

V.

Plaintiff asserts that the following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

- The Court granted the Class and Subclass, including Mr. Aho, partial summary judgment on Counts II and III of the Complaint for violation of the UCL and ASFA, holding "Plaintiff's motion for partial summary judgment on his declaratory relief and 17200 claims is granted." [Doc. 154 at 8:7-8.] AmeriCredit contends this is not an issue for trial and reserves its rights on appeal.

- The Court held "Defendant's failure to include [additional monthly installments, late fees and the law enforcement fee] in the NOI is a violation of the ASFA." [Doc. No. 154, 6:21-25.] AmeriCredit contends this is not an issue for trial and reserves its rights on appeal.
- The Court held that the violations of the ASFA in the NOI means no deficiency debt was owed by the Class or Subclass. AmeriCredit contends that the Court did not so hold, and that this is not an issue for trial and reserves all its rights.
- The Class is properly certified pursuant to Fed.R.Civ.P. 23(a) and 23(b)(2). AmeriCredit contends this is not an issue for trial and reserves its rights on appeal.
- The SubClass is properly certified pursuant to Fed.R.Civ.P. 23(a) and 23(b)(3). AmeriCredit contends this is not an issue for trial and reserves its rights on appeal.
- AmeriCredit reported to credit reporting agencies Equifax, Experian, and TransUnion that Mr. Aho owed it post-repossession deficiency amounts. AmeriCredit contends that the Court has already concluded that credit reporting activities are preempted for purposes of the Rosenthal Act claim. AmeriCredit further contends that previous credit reporting activities are also irrelevant to the UCL claim because it has contacted all the major credit bureaus and requested that they delete the negative trade lines relating to the Class Members' AmeriCredit accounts. Thus, AmeriCredit contends that such facts are not relevant at trial.

VI.

The following issues of fact, and no others, remain to be litigated upon the trial:

1. Plaintiff contends trial is necessary to determine the amount of restitution to be ordered for the Subclass. AmeriCredit contends this is a legal issue for the Court and not a factual one for a jury and that, given the equities, no restitution is appropriate, or at most restitution should be measured as up to the amounts of the payments coming due for Subclass Members who had payments coming due during the 20-day reinstatement period. AmeriCredit describes the equitable factors at issue in Section IX below regarding issues of law. Plaintiff contends the Court already rejected this argument at Summary Judgment, granting the Class and Subclass summary

judgment irrespective of payments coming due within 20-days. Plaintiff further contends the 20 day payment argument is irrelevant, as numerous other violations also invalidate the debt. Plaintiff further contends AmeriCredit waived any equitable or other defenses regarding Subclass entitlement to restitution at summary judgment, that the alleged facts supporting any equitable defense are irrelevant and contrary to statutory purposes, and that such defenses, if allowed, would require fact-finding. [Doc. Nos. 117, 132, 154, 168.]

2. Plaintiff asserts that the Court must determine the amount of pre- and post-judgment interest to be ordered for the Subclass. AmeriCredit contends this is a legal issue for the Court and not a factual one for a jury and that, as a matter of law, the Subclass is not entitled to any interest. Plaintiff contends AmeriCredit waived any equitable or other defenses regarding Subclass entitlement to interest at summary judgment, that the alleged facts supporting any equitable defense are irrelevant and contrary to statutory purposes, and that such defenses, if allowed, would require fact-finding. [Doc. Nos. 117, 132, 154, 168.]

3. Whether injunctive relief should be ordered and, if so, in what form. AmeriCredit contends this is a legal issue for the Court and not a factual one for a jury, and that no injunctive relief is warranted:

- Plaintiff contends AmeriCredit should be permanently enjoined from all collection activities on Class Members' accounts, from accepting or requesting further Class Member payments, immediately withdraw and retrieve all collection agent accounts for Class Member accounts. AmeriCredit contends this is a legal issue, and that such an injunction is inappropriate because AmeriCredit has stopped accepting any payments from Class Members and it is AmeriCredit's policy to reject and return any payments made by Class Members since February 14, 2012.
- Plaintiff contends AmeriCredit should be ordered to submit corrected tax forms for Class Members regarding deficiency amount settlements and agree to pay for all additional taxes assessed against the Class Members for such amounts. AmeriCredit contend this is a legal issue, and that such an

injunction is inappropriate because AmeriCredit is already in the process of submitting updated 1099(c) forms reflecting a $0 balance to Class Members and to the Internal Revenue Service for Class Members for whom AmeriCredit had previously submitted such forms. Further, AmeriCredit cannot be enjoined to pay additional taxes assessed against Class Members because such "injunctive" relief is inappropriate and is really a claim for damages not allowed under the UCL. Nor has a subclass been certified on this issue. Nor could it, given the individual inquiries involved. Nor is any such claim ripe.

- Plaintiff contends AmeriCredit be enjoined to extinguish all outstanding deficiency balances. AmeriCredit contends this is a legal issue, and that such an injunction is inappropriate because AmeriCredit has stopped all collection activities and has closed the accounts for all Class Members, so their balances are zero.
- Plaintiff contends AmeriCredit be enjoined to correct class members' credit reports. AmeriCredit contends this is a legal issue, and that such an injunction is inappropriate because AmeriCredit has already contacted all the major credit bureaus and requested that they delete the negative trade lines relating to the Class Members' AmeriCredit accounts.
- Plaintiff contends AmeriCredit be enjoined to send all Class Members appropriate and corrective notice of the Court judgment. AmeriCredit contends that such an injunction is inappropriate and this is a legal issue to be determined, if appropriate, following trial and not as part of any injunctive relief.
- Plaintiff contends AmeriCredit be enjoined to hire a private investigation firm to locate Class Members whose addresses are no longer current, for purposes of corrective notice and refunds, and/or whether the Court should appoint a receiver to insure full remedies are effectuated. AmeriCredit

contends that such an injunction is inappropriate and this is a legal issue to be determined, if appropriate, following trial and not as part of any injunctive relief.

4. With regard to all of AmeriCredit's points in (3) above, plaintiff contends AmeriCredit should be enjoined and that this involves disputed questions of fact. Plaintiff has requested discovery on the post-MSJ changes made after close of discovery. Plaintiff contends injunctive relief is necessary and appropriate provided the conduct of this case by AmeriCredit, AmeriCredit's years of collections based on knowingly invalid NOIs, AmeriCredit's years of refusal to correct knowingly invalid NOIs pre-litigation, AmeriCredit's continued assertion of the validity of non-class member deficiencies on the same NOIs, AmeriCredit's continued refusal to send corrective notices, and AmeriCredit's continued refusal to return money paid on debts not owed.

5. Plaintiff contends AmeriCredit violated the Rosenthal Act regarding Mr. Aho. AmeriCredit contends that it did not and that the facts will show that it did not engage in debt collection with respect to Mr. Aho, that in any event it did not engage in unfair debt collection, that it did not misrepresent the character, amount, or legal status of any debt, that it did not threaten to take legal action that cannot be legally taken, that it did not communicate any credit information it knew or should have known to be false, and that it did not use any false or deceptive means to collect any debt.

6. Plaintiff contends AmeriCredit's violation of the Rosenthal Act was willful or knowing. AmeriCredit contends that it did not violate the Rosenthal Act and that any such violation was not willful or knowing.

7. Plaintiff contends he suffered actual damages as a result of debt collection in violation of the Rosenthal Act and that he should also recover statutory damages. AmeriCredit contends Plaintiff did not pay any money or suffer any other actual damage as a result of any unfair debt collection practice. AmeriCredit also contends that it did not engage in any willful or knowing conduct that would warrant statutory damages, and that any such statutory damages would be capped, as a matter of law, at $1,000. AmeriCredit further contends that none of the

factors used to determine whether to award statutory damages under the FDCPA—the frequency and persistence of noncompliance, the nature of such noncompliance, and the extent to which such noncompliance was intentional— are satisfied and thus statutory damages are not warranted. *See* 15 U.S.C. 1692k(b)(1).

8. Plaintiff contends the following is an issue for trial: Whether Plaintiff has UCL class representative and Article III standing on grounds alternative to those determined on Summary Judgment. [Doc. Nos. 117, 132, 138, 154.] AmeriCredit contends the Court has already determined standing and this is not an issue at trial, though AmeriCredit reserves its rights on appeal.

9. Plaintiff contends the following is an issue for trial: Whether AmeriCredit's alleged failure to list the amount and/or schedule for storage fees is a separate and additional ground to hold Plaintiff's, Class, and Subclass member's NOIs in violation of the UCL and ASFA. AmeriCredit contends this is not an issue for trial as the Court has already determined liability.

10. Plaintiff contends the following are issues for trial: Whether AmeriCredit's alleged failure to list repo agent transport fees, key fees, personal property fees, auto auction reconditioning fees, and the types and limits of required insurance are separate and additional grounds to hold Plaintiff's, Class, and Subclass member's NOIs in violation of the UCL and ASFA. AmeriCredit contends these are not issues for trial as the Court has already determined liability.

11. The following alleged facts and/or legal conclusions:

- Whether the Class Members defaulted on their RISCs, and as a result owed a valid debt; (Plaintiff contends that the debts were no longer, as a matter of law and law of this case, owed after the post-repossession sale by AmeriCredit due to the defects in the NOIs);
- Whether AmeriCredit voluntarily contacted Class Members to provide all information they required to reinstate and proactively worked with Class Members to reinstate whenever possible (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);

- Whether AmeriCredit had no incentive to, and did not, intentionally mislead Class Members so as to prevent reinstatement (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether AmeriCredit's policy required only amounts listed on the NOI for a customer to reinstate, beginning in July 2007 (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether AmeriCredit regularly waived certain charges so as to allow reinstatement (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);;
- Whether in June 2009, AmeriCredit implemented a new NOI found to be compliant with the ASFA (Plaintiff contends these facts are untrue and irrelevant);
- Whether AmeriCredit acted in good faith at all times to try to comply with California law, which has been unclear as to the specific requirements as to what charges must be listed on the NOI (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether the Class Members had the benefit of the use of their vehicles while in default on their payment obligations under their RISCs, thus obtaining "free" or discounted use of the vehicles for months, justifying equitable offset (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether AmeriCredit, intentionally or otherwise, failed to correct its form NOIs until litigation was brought in May 2009, despite knowing they were non-compliant with the ASFA (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether the conduct of this case by AmeriCredit militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);

- Whether AmeriCredit's years of collections based on knowingly invalid NOIs militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's years of refusal to correct knowingly invalid NOIs pre-litigation militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's continued assertion of the validity of non-class member deficiencies on the same NOIs militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's continued refusal to send corrective notices militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's continued refusal to return money paid on debts not owed militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether the difficulties in locating Class members and otherwise administering relief requires a receiver and private investigation fees (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case.);
- Whether all changes in policy regarding deficiencies were either occasioned by litigation, Plaintiff's obtaining the declaratory relief requested, and/or Summary Judgment in the Class members' favor (AmeriCredit contends

that these facts are untrue and/or irrelevant to the issues that are to be tried in this case).

12. Plaintiff contends the following: Whether the conduct of this case by AmeriCredit, AmeriCredit's years of collections based on knowingly invalid NOIs, AmeriCredit's years of refusal to correct knowingly invalid NOIs pre-litigation, AmeriCredit's continued assertion of the validity of non-class member deficiencies on the same NOIs, AmeriCredit's failure and continued refusal to send corrective notices, AmeriCredit's continued refusal to return money paid on debts not owed, as well as further facts based on requested discovery regarding the post-MSJ and discovery cutoff changes in policy, practice and procedure alleged by AmeriCredit.

VII.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between plaintiff ("Pl.") and defendant ("Def.") with respect thereto, are as follows:

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
1.	Pl.	Purchase Documents Bates No. 1-13	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
2.	Pl./Def. (Ex. F)	Purchase Contract Bates No. 14-21			
3.	Pl./Def. (Ex. G)	Notice of Intent to Dispose of Vehicle AC AHO 35-37			
4.	Pl./Def. (Ex. H)	Deficiency Calculation AC AHO 30, Bates No. 53			
5.	Pl.	Aho credit report Bates No. 25-26	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
6.	Pl.	Western Union Receipt, 5/25/08, Bates, No. 31	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
7.	Pl.	AmeriCredit Billing Statement Bates No. 32-33	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
8.	Pl./Def. (Ex. D)	Payment history Bates No. 35-36			
9.	Pl./Def. (Ex. M)	Correspondence from Aho Bates No. 37			

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
10.	Pl./Def. (Ex. I)	Correspondence from AmeriCredit, 5/14/10, Bates No. 38			
11	Pl.	Correspondence from Jason Gonzales, 4/28/10 Bates No. 39	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
12.	Pl.	Bank of America Receipt Bates No. 40	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
13.	Pl./Def. (Ex. J)	Western Union Receipt Bates No. 41			
14.	Pl.	Employment Application Serco 5/5/10, Bates No. 42-48	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
15.	Pl.	Correspondence from OSI Collections Bates No. 50	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
16.	Pl.	Correspondence from Plaza Recovery Associates Bates No. 51-52	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
17.	Pl.	Correspondence from AmeriCredit 5/20/10, Bates No. 54	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Offer to Compromise (FRE 408)		
18.	Pl.	Payment history Bates No. 55-56	Duplicative (of Pl. Ex. 8)		
19.	Pl.	Certificate of Completion, 5/29/03 Bates No. 57-60	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
20.	Pl.	US Navy Certification Bates No. 61-67	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
21.	Pl.	Experian Credit report Bates No. 68	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
22.	Pl.	TransUnion Credit report Bates No. 71	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
23.	Pl.	Department of Defense correspondence Bates No. 75-76	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
24.	Pl.	AC BANKS 03634-36 (Exh. 32 Heinrich) Form NOI	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
25.	Pl.	AC BANKS 03637-39 (Exh. 33 Heinrich) Form NOI	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
26.	Pl.	AC BANKS 03640-42 (Exh. 34 Heinrich) Form NOI	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
27.	Pl./Def. (Ex. A)	AC BANKS 01911 (Exh. 57 Dishman) "California Reinstatement Handling"			
28.	Pl /Def. (Ex. A)	AC BANKS 01912 CA Reinstatement Handling Example			
29.	Pl.	*Juarez* Opinion (AC AHO)	Irrelevant (FRE 401): Prejudice/Confusion/Waste of Time (FRE 403); Legal Conclusion; Hearsay (FRE 802)		
30.	Pl.	AC BANKS 00028 (Exh. 58 Paterson) Form Collection letter	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
31.	Pl.	AC BANKS 00029 (Exh. 58 Paterson) Form Collection letter	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
32.	Pl.	AC BANKS 00030 (Exh. 58 Paterson) Form Collection letter	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
33.	Pl.	AC BANKS 00031 (Exh. 58 Paterson) Form Collection letter	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
34.	Pl.	AC BANKS 01331-37 (Exh. 49 Dishman) Independent Contractor Service Agreement	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
35.	Pl.	AC BANKS 01310-21 (Exh. 50 Dishman) Independent Contractor Service Agreement	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
36.	Pl.	AC BANKS 03690-3710 (Exh. 54 Dishman) Repossession Policy Nov. 19, 2003)	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
37.	Pl.	AC BANKS 03698	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
38.	Pl.	AC BANKS 03686-7	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
39.	Pl.	Machado Hewitt corresp.	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
40.	Pl.	Machado NOI	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
41.	Pl.	Machado RISC	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
42.	Pl.	Machado credit denial docs	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
43.	Pl.	Machado Mail Receipts	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
44.	Pl.	Machado Letts to AC	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
45.	Pl.	Machado Letts to Equifax, Experian, TransUnion	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
46.	Pl.	Machado Credit Reports	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
47.	Pl.	AC lett to Machado	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
48.	Pl.	Todd Mott RISC	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
49.	Pl.	Todd Mott NOI	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
50.	Pl.	Todd Mott corresp.	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
51.	Pl.	Todd Mott credit report	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
52.	Pl.	Annual Report GM Financial, Jan. 2012	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
53.	Pl.	WRIGHT NOI 10cv0922 Exhibit B to [Doc. No. 14, page 25-28]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
54.	Pl.	AC AHO 00508 (Contract Addendum)	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
55.	Pl.	AUTO AUCTION SPREADSHEET / invoices	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
56.	Pl.	REPO AGENT SPREADSHEET / invoices	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
57.	Pl.	CLASS MEMBER RISCS (B)(2),(AC AHO 14707-68983; AC AHO 0148328-0152127); (B)(3) (AC AHO 3893-7521, AC AHO 144668-148327)	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403)		
58.	Pl.	CLASS MEMBER NOIs (B)(2)(AC AHO 68984-00144618); (B)(3) (AC AHO 7522-14389)	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403)		
59.	Pl.	CLASS LIST (B)(2) (AC AHO 14665-14665)	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403);		
60.	Pl.	CLASS LIST (B)(3) (AC AHO 14392-434; AC AHO 14468)	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403);		
61.	Pl.	CLASS LIST OF TOTAL PAYMENTS (AC AHO 14392-434; AC AHO 14468.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403);		
62.	Pl.	Class Member Payments History (AC AHO 14469-70)	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403);		
63.	Pl.	Class Interest Calc. spreadsheet 1	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Improper Purported Expert Opinion When No Expert Designated; Lack of Foundation; Hearsay (FRE 802)		
64.	Pl.	AC 01892 Terminology Doc.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
65.	Pl.	SEALED DOCS RE CLASS CERT	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
66.	Pl.	SEALED DOCS RE PL'S MSJ	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Cumulative		
67.	Pl.	Craig Baker NOI	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
68.	Pl.	Craig Baker RISC	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
69.	Pl.	AmeriCredit Phone Logs, AC AHO 43-63	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
70.	Pl.	AC Lett to Baker re defic.	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
71.	Pl.	AC Lett to Baker re defic.	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
72.	Pl.	Example Interest Calculation	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Improper Purported Expert Opinion When No Expert Designated; Lack of Foundation; Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
73.	Pl.	Class Interest Calculation spreadsheet 2	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802); Improper Purported Expert Opinion When No Expert Designated; Lack of Foundation; Failure to Provide Exhibit to Defendant per S.D. Local Rule 16.1(f)(4)(d)		
74.	Pl.	Declaration of Andrew J. Ogilvie in support of Motion for Class Certification, Bankston v. AmeriCredit, see Exhibit 14 to [Doc. No. 117-4]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
75.	Pl.	Deposition of Michelle Skrasek, October 11, 2011, see [Doc. No. 117-8]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
76.	Pl.	Deposition of Kathleen Reynolds, October 11, 2011, see [Doc. No. 117-5]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
77.	Pl.	Deposition of Craig Paterson, October 12, 2011, see Exhibit 10 to [Doc. No. 117-4]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
78.	Pl.	Deposition of Maria Thompson-Davies, October 12, 2011, see [Doc. No. 117-3]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
79.	Pl.	Deposition excerpts of Maria Thompson-Davies, August 4, 2010, Exhibit 4 to [Doc. No. 117-4]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
80.	Pl.	Deposition of Stephen Wade, October 11, 2011, see [Doc. No. 117-9]	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
81.	Pl.	Deposition of Tisha Weems, October 12, 2011, see	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Hearsay (FRE 802)		
82.	Pl.	Records of payments spreadsheet created by plaintiff, filed under seal at Exhibit 8 to [Doc. No. 138-1]	Irrelevant (FRE 401); Authenticity (FRE 901); Prejudice/Confusion/Waste of Time (FRE 403); Lack of Foundation; Hearsay (FRE 802)		
A	Def./Pl. (Exs. 27 & 28)	AmeriCredit's California Reinstatement Handling policy, AC AHO 01841-01842	1-6		
B	Def.	Emails sent by AmeriCredit re ceasing collections on California accounts, AC AHO 00247-00255	1-6		
C	Def.	Declaration of Stephen D. Aho in Support of Motion for Class Certification, filed 8/16/2010 (Doc. 11-14)	1-6		
D	Def./Pl. (Ex. 8)	Plaintiff's Payment History, AC AHO 38-40, 214-215; Aho 35-36	1-6		
E	Def.	Deposition Transcript of Stephen D. Aho, dated March 10, 2011	1-6		
F	Def./Pl. (Ex. 2)	Plaintiff's Retail Installment Sales Contract, Aho 14-21	1-6		

EX.	OFFERED BY	DESCRIPTION	OBJECTIONS	DATE OFFER	DATE ADMIT
G	Def./Pl. (Ex. 3)	Plaintiff's NOI, AC AHO 35-37	1-6		
H	Def./Pl. (Ex. 4)	Plaintiff's Deficiency calculation, Aho 53; AC AHO 30	1-6		
I	Def./Pl. (Ex. 10)	AmeriCredit letter enclosing plaintiff's payment history, Aho 38	1-6		
J	Def./Pl. (Ex. 13)	Plaintiff's $25 payment receipt, dated June 14, 2010, Aho 41	1-6		
K	Def.	Excel document listing AmeriCredit's list and amounts of payments coming due in 20-day reinstatement period for subclass, AC AHO 171496	1-6, 7: L.R. 16.1		
L	Def.	Payment histories and data for subclass, AC AHO 152305-171495	1-6, 7: L.R. 16.1		
M	Def./Pl. (Ex. 9)	Plaintiff's letter rejecting settlement, Aho 37	1-6, 7: FRE 408		

GROUNDS FOR PLAINTIFF'S OBJECTIONS

1. Irrelevant
2. Hearsay
3. Best Evidence
4. Inadmissible Opinion
5. Insufficient Foundation (Relevancy, Personal Knowledge, Authenticity, Identity)
6. Unduly time Consuming, Prejudicial, Confusing or Misleading
7. Other (specify)

VIII.

The following are a list of witnesses to be called by plaintiff ("Pl.") and defendant ("Def."). Plaintiff and defendant have listed all witnesses as percipient witnesses. No expert witnesses were designated or are permitted.

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
1.	Gary R. Pitsinger, 14450 El Evado Rd., Apt. 167, Victorville, CA 92392	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))"

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
2.	Jason Gonzalez, 9350 Waxie Way # 400 San Diego CA 92123 858/715-6281	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602)
3.	Arnold Santiago, 412 E. San Bernardino Rd, Covina, CA 91723, 418 S. Lake St., Burbank, CA 91502 (818) 845-5078	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
4.	Steve Innis, 7525 Mission Gorge Rd, Ste. G, San Diego, CA 92120; 1714 Production Circle, Riverside CA 92509, 12798 Nutwood, Garden Grove, CA 92840	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
5.	Nally William Terrance, 916 Bailey Ct., San Marcos CA 92069	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
6.	Patrick K. Willis, 6362 Blacktop Rd. #I, Rio Linda, CA 95673	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
7.	Gary M. Rogers, 11330 Sorrento Valley Road, San Diego, CA 92121 (858) 546-8100	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
8.	Larry Reeves and Stephanie Christine Powell, 12550 Vigilante Road, Lakeside, CA (619) 938-8188	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
9.	Alice Whitten, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
10.	Selena Chung, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
11.	D'Amberly Brown, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
12.	Allison Magee, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
13.	Joe Bystry, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
14.	Bryan Russell, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
15.	Maria L. Thompson-Davies, AmeriCredit	Pl./Def.	
16.	Dan Heinrich, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
17.	Craig Paterson, AmeriCredit	Pl./Def.	
18.	Scott Dishman, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
19.	Tisha Weems, AmeriCredit	Pl./Def.	
20.	Kathleen Reynolds, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
21.	Jo Hanen, AmeriCredit	Pl./Def.	

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
22.	Michelle Skrasek, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
23.	Stephen Wade, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
24.	John Moody, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
25.	Marci Mancuso, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Attorney-Client Privilege Work Product (FRE 502);Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
26.	Anna Yates, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
27.	Kristen Hewitt, 2250 Douglas Blvd Ste 100 Roseville CA 95661, 916-774-8910	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
28.	Steven D. Aho, 444 N. El Camino Real, #149 Encinitas CA 92024 760/943-0391	Pl./Def.	
29.	Devon Bailey 444 N. El Camino Real, #149 Encinitas CA 92024 760/943-0391	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602)
30.	Marcello Bradford 717 Oregon Street Fairfield CA 94533 707/816-1237	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
31.	Greg Adamson 964 Calle Carrillo San Dimas CA 91773 626/209-3538	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
32.	Daniel & Natalie Ramirez 4424 Gardena Avenue Long Beach CA 90807 562/426-1526 Percipient	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
33.	Rob Obbink 1849 Hideaway Place, #201 Corona CA 92879 951/295-5480	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
34.	Jessica McDougald 1411 Lombard Street, #2510 Oxnard CA 93030 805/901-0463	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
35.	Dean Clary Post Office Box 315 Rialto CA 92377 909/815-1197	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
36.	Victor Mares 6012 Stafford Avenue, Apt. C Los Angeles CA 90255 323/587-7338	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
37.	Darrin Erb 69644 Brookview Way Cathedral City CA 92234 760/902-1374	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
38.	Michael F. Machado, 672 Third Ave. Sacramento, CA 95818	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
39.	Todd Mott 6235 Comstock Avenue, #4 Whittier CA 90601 562/325-5821	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
40.	Craig Baker, 22415 Panoche Rd., Apple Valley, CA 92308 (760) 590-0009	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
41.	Rene Rubalcaba, 404 East Birch Street Brea CA 92821 714/624-7233	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose in initial Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
42.	John Olson, 3575 Fillmore St. #306, San Francisco, CA 94123 (916) 719-3209	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Improper opinion testimony when no experts designated (FRE 701-705); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
43.	Anthony Edwards, 5334 E. Wallace Ave., Scottsdale AZ 85254	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
44.	Leslie Green, 526 E. Olive Ave. #248, Fresno, CA 93727	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
45.	Lawrence Green, 526 E. Olive Ave. #248, Fresno, CA 93727	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
46.	Kevin Coleman, 2065 Sanford St., Oxnard, CA 93033 (805) 390-6835	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
47.	Donna Williams	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
48.	Erin Busic	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
49.	Elizabeth Rayner, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
50.	Tiheisha Paige AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
51.	AmeriCredit employee USER No. KGR1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
52.	AmeriCredit employee USER No. ENE1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
53.	AmeriCredit employee USER No. BLO1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
54.	AmeriCredit employee USER No. ERAYNEl	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
55.	AmeriCredit employee USER No. TPAIGEl	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
56.	AmeriCredit employee USER No. CRA1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
57.	AmeriCredit employee USER No. RCA1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
58.	AmeriCredit employee USER No. JPI2	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
59.	AmeriCredit employee USER No. AVE1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
60.	AmeriCredit employee USER No. TDO1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
61.	AmeriCredit employee USER No. CGU1	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
62.	AmeriCredit employee Nelson@ AmeriCredit.com	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

No.	NAME/ADDRESS	CALLED BY	OBJECTIONS
63.	Connie Coffey, AmeriCredit	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Witness located beyond reach of subpoena power; Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))
64.	Juan Cardenas and Florencia Herrera de Cardenas 1155 Brunswick Street Daly City, CA 94104 (415) 334-6307	Pl.	Irrelevant (FRE 401); Prejudice/Confusion/Waste of Time (FRE 403); Lacks Personal Knowledge (FRE 602); Failure to Disclose (FRCP 26(a)(1) and 37(c)(1))

IX.

The following issues of law, and no others, remain to be litigated upon the trial:

1. Whether restitution, if any, is recoverable by the Subclass, and if so, in what amount.

2. Whether interest is recoverable under the UCL as a matter of law, and if so, in what amount.

3. Whether interest is due Plaintiff regarding the Rosenthal claim, and if so, in what amount.

4. Whether injunctive relief should be ordered on behalf of the Class and Subclass, and, if so, in what form.

5. Whether equitable or other defenses to the entitlement of the Subclass to restitution and/or injunctive relief, including AmeriCredit's affirmative defenses of equitable offset, unclear hands, good faith and comparative fault, limit plaintiff and Class Members from recovering restitution.

6. Whether AmeriCredit can assert equitable defenses to restitution and injunctive relief under the UCL, and if so prohibit the Class and Subclass from recovering restitution and/or injunctive relief, based in part on the following:

- Whether the Class Members defaulted on their RISCs, and as a result owed a valid debt (Plaintiff contends that the debts were no longer, as a matter of law and law of this case, owed after the post-repossession sale by AmeriCredit due to the defects in the NOIs);
- Whether AmeriCredit voluntarily contacted Class Members to provide all information they required to reinstate and proactively worked with Class Members to reinstate whenever possible (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether AmeriCredit had no incentive to, and did not, intentionally mislead Class Members so as to prevent reinstatement (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether AmeriCredit's policy required only amounts listed on the NOI for a customer to reinstate, beginning in July 2007 (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether AmeriCredit regularly waived certain charges so as to allow reinstatement (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);;
- Whether in June 2009, AmeriCredit implemented a new NOI found to be compliant with the ASFA (Plaintiff contends these facts are untrue and irrelevant);
- Whether AmeriCredit acted in good faith at all times to try to comply with California law, which has been unclear as to the specific requirements as to what charges must be listed on the NOI (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);
- Whether the Class Members had the benefit of the use of their vehicles while in default on their payment obligations under their RISCs, thus obtaining "free" or discounted use of the vehicles for months, justifying

equitable offset (Plaintiff contends these facts are untrue and irrelevant to the purposes of the ASFA);

- Whether Subclass Members are entitled to any restitution, or at most up to the amounts of the payments coming due for those Subclass Members who had payments coming due during the 20-day reinstatement period. Plaintiff contends this issue was decided in the Class Members' favor at summary judgment;
- Whether AmeriCredit, intentionally or otherwise, failed to correct its form NOIs until litigation was brought in May 2009, despite knowing they were non-compliant with the ASFA (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether the conduct of this case by AmeriCredit militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's years of collections based on knowingly invalid NOIs militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's years of refusal to correct knowingly invalid NOIs pre-litigation militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's continued assertion of the validity of non-class member deficiencies on the same NOIs militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether AmeriCredit's continued refusal to send corrective notices militates in favor of injunctive and/or equitable relief (AmeriCredit

contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);

- Whether AmeriCredit's continued refusal to return money paid on debts not owed militates in favor of injunctive and/or equitable relief (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether the difficulties in locating Class members and otherwise administering relief requires a receiver and private investigation fees (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case);
- Whether all changes in policy regarding deficiencies were either occasioned by litigation, Plaintiff's obtaining the declaratory relief requested, and/or Summary Judgment in the Class members' favor (AmeriCredit contends that these facts are untrue and/or irrelevant to the issues that are to be tried in this case).

7. Whether plaintiff has pled a cause of action for violation of AFSA in his Complaint. Plaintiff contends he has pled such a cause of action, while AmeriCredit contends he has not, but has instead pled a violation of ASFA only as a predicate to the UCL cause of action.

8. Whether AmeriCredit is a "debt collector" for purposes of the Rosenthal Act. Plaintiff contends that AmeriCredit is a "debt collector" and AmeriCredit contends it is not a debt collector under the Fair Debt Collection Practices Act, which it contends applies. Plaintiff contends that this issue was decided in Plaintiff's favor at summary judgment.

9. Whether AmeriCredit waived defenses at summary judgment. AmeriCredit contends there was no such waiver.

10. Whether Plaintiff may amend the Complaint in conformity to proof or otherwise. AmeriCredit contends that plaintiff may not amend the Complaint.

11. Whether the Court held that no deficiency debt was owed. Plaintiff contends this issue was decided at summary judgment and that declaratory relief was ordered to this effect.

Plaintiff also contends any argument to the contrary was waived at summary judgment. AmeriCredit contends that the Court made no such holding, and nothing was waived.

X.

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order must supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

XI.

The parties agree the Court may decide the UCL claims and defenses and that the Rosenthal Act claims and defenses are for the jury.

XII.

Plaintiff requests the trial of this case not be bifurcated to avoid unnecessary duplication, *inter alia*. As set forth in its separate Motion to Bifurcate (Doc. 161), to be heard on March 16, 2012, AmeriCredit contends that the individual Rosenthal jury claim should be bifurcated from the non-jury UCL and declaratory relief class claims, with the class claims to be tried first by bench trial.

XIII.

Plaintiff's estimate for trial is 7 days. AmeriCredit estimates 4 days for bench trial of the UCL/declaratory relief class claims; and 2 days for jury trial (including 1 day for jury selection and instruction) for the individual Rosenthal claim.

IT IS SO ORDERED.

Dated: March 19, 2012

HON. DANA M. SABRAW
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN D. AHO, individually, and on behalf of all others similarly situated, Plaintiff, vs. AMERICREDIT FINANCIAL SERVICES, INC. dba ACF FINANCIAL SERVICES, INC., Defendant.	CASE NO. 10cv1373 DMS (BLM) **ORDER REQUESTING SUPPLEMENTAL BRIEFING**

Defendant's motion to exclude putative class members with arbitration clauses is currently pending before the Court. After reviewing the parties' briefs and evidence in conjunction with Plaintiff's pending renewed motion for class certification, the Court requests supplemental briefing from the parties on whether the issue of the arbitration clauses is more appropriately addressed through the typicality requirement of Rule 23(a)(3) rather than the motion to exclude. Although the issue of the arbitration clauses is squarely presented in the current motion, Defendant has failed to provide evidence sufficient to warrant exclusion of each individual whose contract included such a clause. Furthermore, given the estimated number of individuals who are potentially subject to an arbitration clause, it would be unduly burdensome for the parties and the Court to litigate that issue on an individual basis. It appears to the Court that the issue could be fully addressed through the typicality requirement, and thus

/ / /

the Court requests supplemental briefing on that issue. The supplemental briefs shall not exceed five (5) pages, and shall be filed on or before **July 15, 2011**.

IT IS SO ORDERED.

DATED: July 7, 2011

HON. DANA M. SABRAW
United States District Judge

DEPT 757 6168538912037
PO BOX 4115
CONCORD CA 94524

March 21, 2012

ADDRESS SERVICE REQUESTED

#BWNFTZF #BCC6168538912037#

L81425- 140
DANIELLE FINELLI
787 N FAIR OAKS AVE APT 7
SUNNYVALE CA 94085-3128

CALIFORNIA CHECK CASHING, CA/C#579
7001 POST ROAD, SUITE 200
DUBLIN, OH 43016
(614) 798-5900

CALIFORNIA CHECK CASHING, CA/C#579
7001 Post Road, Suite 200
Dublin, OH 43016-8755

DETACH UPPER PORTION AND RETURN WITH PAYMENT

Re: Customer Loan Number: 01858
Current Amount Owed: $181.91

Dear DANIELLE FINELLI,

This letter is in regards to your outstanding obligation with California Check Cashing Stores,LLC.

According to our records you have defaulted on the above referenced debt and as a result we have declared your loan in default. We have the right, according to your contract, to demand the entire amount owed due and immediately payable. However, we are giving you this opportunity to cure your outstanding balance. This letter serves as a demand for your outstanding balance due in the amount of $181.91.

It is necessary that you pay this amount owed in full within 15 days to avoid further action on your account. Should you fail to pay or make satisfactory arrangements to resolve this issue, California Check Cashing Stores,LLC retains the right as defined under the terms of your contract to:

Forward your account to a 3rd party collection agency for further action;
Take immediate possession of the vehicle used as security on this loan in compliance with State law;
File suit against you for unpaid sums owed; and/or
Exercise any other legal or equitable remedy available.

We regret this action has become necessary. Please take this opportunity to contact us at (866) 354-0567 ext. 2011 to resolve this matter to avoid additional expense to your account.

Federal law requires that you be informed that this communication is from a debt collector any information obtained will be used for that purpose.

CALIFORNIA Check Cashing STORES

CALIFORNIA CHECK CASHING STORES, LLC
STATEMENT OF LOAN · FEDERAL DISCLOSURES · PROMISSORY NOTE AND SECURITY AGREEMENT

Borrower Name and Address	Lender Name and Address
DANIELLE G FINELLI 935 POMEROY AVE #02 SANTA CLARA, CA 95051	California Check Cashing Stores, LLC 2325 EL CAMINO REAL SANTA CLARA, CA 95051
CO-Borrower Name & Address	License No.: 6054011
	Loan No.: 01858
Date of Loan: 07/23/2011	Maturity Date: 09/23/2013

In this Promissory Note and Security Agreement ("Agreement"), Borrower and Co-Borrower are referred to as "you" and "your" and Lender is referred to as "we," "us" and "our." On the date shown opposite your signature(s) below, we have loaned you money and you have granted to us as a security interest in your motor vehicle described below ("Vehicle") as collateral to secure repayment. Unless the following box is checked, this loan is made primarily for personal, family or household purposes.

☐ Business or Commercial Purposes.

Vehicle Description:	Year: 2009	Make: TOYO	Model: CAMRY
Odometer: 41000		Vin #: 4T1BE46K69U370980	Color: SILVER
Transmission:		License No.: 6PXF789	Body Style: 4D

Federal Truth in Lending Act Disclosures

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
60.00%	$2114.66	$2615.00	$4729.66

Your payment schedule will be:

No of Payments	Regular Payments of	One Final Payment of	Payments Are Due
26	$181.91	$181.94	Monthly Beginning 08/23/2011

Security: You are giving a security interest in your Vehicle.

Late Charge: If any payment is not made within 10 days after it is due, you will be charged $10. If any payment is not made within 15 days after it is due, you will be charged $15. You will only be charged one Late Charge fee per occurrence.

Prepayment: If you pay off early, you will not have to pay a penalty and you will not be entitled to a refund of part of the finance charge.

See your contract documents for any additional information about nonpayment, default, any requirement repayment in full before the scheduled date, and prepayment refunds.

"e" means estimate

*** The Lender may retain a portion of these amounts**

Itemization of Amount Financed	
A. Amount Given to you Directly	$2600.00
B. DMV Lien Fee	$15.00
C. DMV Registration Fees	$0.00
D. Prepaid Finance Charge (Admin. Fee)	$0.00
E. Total Loan Amount	$2615.00
F. Amount Financed (E minus D)	$2615.00

Important Notice to Borrower(s)

THIS IS A HIGH-COST LOAN. YOU MAY BE ABLE TO OBTAIN A LOAN FROM SOMEONE ELSE AT A LOWER RATE OF FINANCE CHARGE. THINK CAREFULLY BEFORE YOU DECIDE TO TAKE THIS LOAN.

Borrower: X Danielle F Nelli

Co-Borrower: X

For value received, you promise to pay to our order via Electronic Funds Transfer the Total Loan Amount ("Principal") shown above and finance charge on the unpaid Principal at the simple interest rate of 60.00% per year, in equal Monthly installments of Principal and interest as shown in the payment schedule above, until you have paid us all that you owe us. If more than one of you signs this Agreement, each of you will be individually and jointly liable to us for repayment. **You understand all payments are to be made by Electronic Funds Transfer.**

DEFINITIONS

Simple Interest Loan & Your Payments. This is a simple interest loan. Finance charge will accrue on the unpaid Principal balance on a daily basis. Payments we receive will be applied first to accrued and unpaid finance charge, then to unpaid Principal, then to other amounts you may owe us. If you pay late, more finance charge will accrue. If you pay early, less finance charge will accrue. If you make more than one payment before it is due, you will still owe the payments due as scheduled (advance payments are applied to the Principal balance). The Finance Charge, Total of Payments and Payment Schedule disclosed in the Federal Truth in Lending Disclosures may differ from the actual amount you pay if your payments are not received by us on their exact due dates. Your first payment and your final payment may be different than the amount disclosed under the Payment Schedule if you make your payments after the date they are due. **You understand all payments are to be made by Electronic Funds Transfer.**

Prepayment. You may prepay all interest in the certificate of ownership to any one of you without penalty. If there is more than one of you, you agree that we may

Late Fee. You agree to

Transmission: | License No.: 6PXF789 | Body Style: 4D

Federal Truth in Lending Act Disclosures

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	AMOUNT FINANCED The amount of credit provided to you or on your behalf.	TOTAL OF PAYMENTS The amount you will have paid after you have made all payments as scheduled.
60.00%	**$2114.66**	$2615.00	$4729.66

Your payment schedule will be:

No of Payments	Regular Payments of	One Final Payment of	Payments Are Due
26	$181.91	$181.94	Monthly Beginning 08/23/2011

Security: You are giving a security interest in your Vehicle.
Late Charge: If any payment is not made within 10 days after it is due, you will be charged $10. If any payment is not made within 15 days after it is due, you will be charged $15. You will only be charged one Late Charge fee per occurrence.
Prepayment: If you pay off early, you will not have to pay a penalty and you will not be entitled to a refund of part of the finance charge.
See your contract documents for any additional information about nonpayment, default, any requirement repayment in full before the scheduled date, and prepayment refunds. "e" means estimate

*** The Lender may retain a portion of these amounts**

Itemization of Amount Financed	
A. Amount Given to you Directly	$2500.00
B. DMV Lien Fee	$15.00
C. DMV Registration Fees	$0.00
D. Prepaid Finance Charge (Admin. Fee)	$0.00
E. Total Loan Amount	$2515.00
F. Amount Financed (E minus D)	$2515.00

Important Notice to Borrower(s)

THIS IS A HIGH-COST LOAN. YOU MAY BE ABLE TO OBTAIN A LOAN FROM SOMEONE ELSE AT A LOWER RATE OF FINANCE CHARGE. THINK CAREFULLY BEFORE YOU DECIDE TO TAKE THIS LOAN.

Borrower: X Danielle Fiorelli

Co-Borrower: X

For value received, you promise to pay to our order via Electronic Funds Transfer the Total Loan Amount ("Principal") shown above and finance charge on the unpaid Principal at the simple interest rate of 60.00% per year, in equal Monthly installments of Principal and interest as shown in the payment schedule above, until you have paid us all that you owe us. If more than one of you signs this Agreement, each of you will be individually and jointly liable to us for repayment. **You understand all payments are to be made by Electronic Funds Transfer.**

DEFINITIONS

Simple Interest Loan & Your Payments. This is a simple interest loan. Finance charge will accrue on the unpaid Principal balance on a daily basis. Payments we receive will be applied first to accrued and unpaid finance charge, then to unpaid Principal, then to other amounts you may owe us. If you pay late, more finance charge will accrue. If you pay early, less finance charge will accrue. If you make more than one payment before it is due, you will still owe the payments due as scheduled (advance payments are applied to the Principal balance). The Finance Charge, Total of Payments and Payment Schedule disclosed in the Federal Truth in Lending Disclosures may differ from the actual amount you pay if your payments are not received by us on their exact due dates. Your first payment and your final payment may be different than the amount disclosed under the Payment Schedule if you make your payments after the date they are due. **You understand all payments are to be made by Electronic Funds Transfer.**
Prepayment. You may pay us all that you owe us at any time without penalty. If there is more than one of you, you agree that we may release our lien interest in the certificate of ownership to any one of you.
Late Fee. You agree to pay a late fee (late charge) for late payment as disclosed above.
Security Interest. You grant us a security interest in (1) the Vehicle and all parts or accessories (including without limitation radio, tape player, CD player, DVD player, navigation system, transmitter, and telephone) attached to the Vehicle, (2) all money or goods received for the Vehicle (proceeds), and (3) all proceeds or refunded insurance premiums or charges for optional products or services financed in the loan, which secure all sums due or to become due under this loan as well as any modifications, extensions, renewals, amendments or refinancing of this loan. You will do all acts necessary to ensure our lien interest appears on the certificate of ownership to the Vehicle.
Use of Vehicle. You agree to keep the Vehicle free of all liens and encumbrances, including tax liens, except the lien in our favor, and to not use the Vehicle or permit the Vehicle to be used illegally, improperly or for hire, or to expose the Vehicle to misuse, seizure, confiscation, forfeiture or other involuntary transfer, even if the Vehicle is not the subject of judicial or administrative proceedings. You agree not to make or allow any material change to be made to the Vehicle. You agree to allow us to inspect the Vehicle at any reasonable time. You agree not to remove the Vehicle, or allow the Vehicle to be removed, from California for a period in excess of 30 days without our express permission. You agree not to remove the vehicle from the U.S. or Canada. You agree not to sell, rent, lease or transfer any interest in the Vehicle. You agree to keep the Vehicle in good working condition and make all necessary repairs. Although we are not obligated to do so, if we pay any liens, fees, maintenance or taxes in connection with the Vehicle, or advance any other amount to protect our interest in the Vehicle, you will reimburse us, at our option, within 5 days of our demand upon you to do so, or we may add the amount of any such liens, fees, maintenance or taxes or other charges we pay to the Principal balance. Such amounts will accrue finance charge at the rate set forth above. Unless you have paid us such amounts prior to maturity, they will be due at the maturity of this Agreement.

Insurance. You agree to keep the Vehicle insured in our favor with a policy and insurance provider satisfactory to us, with comprehensive fire, theft and collision coverage, insuring the Vehicle in an amount sufficient to cover the value of the Vehicle, and providing for a deductible of not more than $500. You may obtain the insurance from any insurer or broker you choose that is acceptable to us. You agree to obtain and deliver to us a loss payable endorsement on such insurance. You agree that we may (1) contact your insurance agent to verify coverage or to have us added as a loss payee, (2) make any claim under your insurance policy for physical damage or loss to the Vehicle, (3) cancel the insurance if you default in your obligations under this Agreement and we take possession of the Vehicle, and/or (4) receive any payment for loss or damage, or return premium, and apply amounts we receive, at our option, to replacement of the Vehicle or to what you owe under this Agreement, including indebtedness not yet due. If you fail to maintain such insurance, we may, at our option, obtain such insurance to protect our interest in the Vehicle. The insurance we purchase may not cover your interests. You understand that the insurance premiums may be higher if we must purchase such insurance than if you had purchased the insurance yourself. Whether the Vehicle is insured, you must pay us all that you owe us if the Vehicle is lost, stolen, damaged or destroyed.

Default. If you fail to pay us what you owe when it is due or when we demand you pay, you will be in default of this Agreement. You will also be in default of this Agreement if: (1) you gave us false information in connection with this loan; (2) you fail to keep your promises or fulfill your obligations under this agreement; (3) you die and there is no surviving Co-Borrower; (4) you become insolvent or file a petition in bankruptcy, or a petition in bankruptcy is filed against you; or (5) the Vehicle is stolen, damaged, destroyed, impounded, seized, confiscated or forfeited.

Remedies. If you are in default, we may (1) declare all that you owe us to be immediately due and payable; (2) file suit against you for all unpaid sums you owe under this Agreement; (3) take immediate possession of the Vehicle where we may find it, provided we do so peacefully; and (4) exercise any other legal or equitable remedy. If the Vehicle is equipped with a tracking device, you agree that we may locate the Vehicle by use of that device. If we take possession of the Vehicle, any accessories, equipment or replacement parts will stay with the Vehicle. If any of your personal items are in the Vehicle when we take possession, they will be stored for you at your expense. California law provides for the period of time these items must be held. If you do not ask for these items back within that time, we may dispose of them as permitted by law. Our remedies under (1) and (2) above are subject to any right you may have to reinstate the Agreement or redeem the Vehicle by paying what you owe in full as provided in the California Finance Lenders Law and the California Uniform Commercial Code. Upon taking possession of the Vehicle, subject to any right you may have to reinstate or redeem, we will sell the Vehicle at a public or private sale. We will give you notice of the sale as required by law. We will add the costs of retaking, holding, preparing for sale, and disposing of the Vehicle to what you owe, as permitted by law. The proceeds of the sale will be applied first to these costs, and the remainder will be applied to unpaid sums you owe under this Agreement. If we must pursue collection, or hire an attorney to collect what you owe, you will reimburse us our reasonable collection costs and attorneys' fees when we demand. If there is any money left over (surplus), we will pay it to you unless we must pay someone else who has a subordinate lien or encumbrance on the Vehicle, as permitted by law. If a balance remains due us, you promise to pay it when we make demand. After we accelerate the unpaid Principal balance, you will pay interest on what you still owe us at the rate of Finance Charge shown in this Agreement, until you pay us all that you owe, or until judgment is entered in our favor. Our remedies are cumulative, and our taking any action will not be deemed a waiver of or prohibition against us taking any other action.

Extensions. We may agree from time to time to extend payments or amounts you owe us. If we do so, such extension does not mean we must or will extend any other payment, and does not affect your liability for what you owe.

Power of Attorney. Until you have paid us all that you owe us, you hereby appoint us, and any one of our designated officers or employees, as your attorney-in-fact, with full power of substitution, to sign in your name any and all applications for certificate of ownership to secure our lien in the Vehicle, and any affidavits or the certificate of ownership to transfer and convey the title or our interest in the Vehicle.

Other Terms. • If we agree to an extension of the due date for payment, agree to extend payment(s) you owe us, accept money in amounts less than is due, or waive a right we have, our doing so will not be a waiver of any other right or later right to enforce the terms of this Agreement. • If any provision of this Agreement is held invalid, the remaining provisions will continue to be valid and enforceable. • You waive the right to presentment, protest, notice of dishonor and notice of protest. • If the DMV Filing Fee is more than the amount shown above, you will pay the difference to us upon demand. If it is less, we will refund the difference to you. • **You must notify us of any change of your name, address or employment within 30 days.**

Confidentiality. We will abide by our Privacy Policy. We may report your payment experience with us to credit reporting agencies and others who may lawfully receive that information. By signing this Agreement, you waive the confidentiality under the provisions of California Vehicle Code Section 1808.21 and authorize us to obtain from the California Department of Motor Vehicles your current residence address, until we are paid in full.

Cell Phones. By providing us your wireless (cell) telephone number in your application, you expressly consent to receiving telephone calls from us concerning your loan, including calls to collect what you owe. Live calls may be made by one of our employees. Calls may also be made by a prerecorded, autodialed voice or text message. Your consent covers *all* types of calls. We do not charge you for such calls. Your wireless carrier will charge you for our incoming calls and text messages according to your plan.

Governing Law. This loan is governed by California Law. This loan is not subject to California's usury limit, Cal. Const. art. XV, Section 1. If the Total Loan Amount is a bona fide principal amount of more than $2,500, this loan is not subject to the rate limitations in the California Finance Lenders Law. This loan is made pursuant to the California Finance Lenders Law, Division 9 (commencing with Section 22000) of the Financial Code.

FOR INFORMATION, CONTACT THE DEPARTMENT OF CORPORATIONS, STATE OF CALIFORNIA.

Broker: A broker has not performed any act in connection with the making of this loan unless the following box is checked:
☐ Broker has participated.

You acknowledge that you have read and received a signed copy of this Agreement.

Borrower Signature: X Danielle Dinelli Date: 07/23/2011

THUMBPRINT

Date: 07/23/2011

that we may locate the Vehicle by use of that device. If we take possession of the Vehicle, any accessories, equipment or replacement parts will stay with the Vehicle. If any of your personal items are in the Vehicle when we take possession, they will be stored for you at your expense. California law provides for the period of time these items must be held. If you do not ask for these items back within that time, we may dispose of them as permitted by law. Our remedies under (1) and (2) above are subject to any right you may have to reinstate the Agreement or redeem the Vehicle by paying what you owe in full as provided in the California Finance Lenders Law and the California Uniform Commercial Code. Upon taking possession of the Vehicle, subject to any right you may have to reinstate or redeem, we will sell the Vehicle at a public or private sale. We will give you notice of the sale as required by law. We will add the costs of retaking, holding, preparing for sale, and disposing of the Vehicle to what you owe, as permitted by law. The proceeds of the sale will be applied first to these costs, and the remainder will be applied to unpaid sums you owe under this Agreement. If we must pursue collection, or hire an attorney to collect what you owe, you will reimburse us our reasonable collection costs and attorneys' fees when we demand. If there is any money left over (surplus), we will pay it to you unless we must pay someone else who has a subordinate lien or encumbrance on the Vehicle, as permitted by law. If a balance remains due us, you promise to pay it when we make demand. After we accelerate the unpaid Principal balance, you will pay interest on what you still owe us at the rate of Finance Charge shown in this Agreement, until you pay us all that you owe, or until judgment is entered in our favor. Our remedies are cumulative, and our taking any action will not be deemed a waiver of or prohibition against us taking any other action.

Extensions. We may agree from time to time to extend payments or amounts you owe us. If we do so, such extension does not mean we must or will extend any other payment, and does not affect your liability for what you owe.

Power of Attorney. Until you have paid us all that you owe us, you hereby appoint us, and any one of our designated officers or employees, as your attorney-in-fact, with full power of substitution, to sign in your name any and all applications for certificate of ownership to secure our lien in the Vehicle, and any affidavits or the certificate of ownership to transfer and convey the title or our interest in the Vehicle.

Other Terms. · If we agree to an extension of the due date for payment, agree to extend payment(s) you owe us, accept money in amounts less than is due, or waive a right we have, our doing so will not be a waiver of any other right or later right to enforce the terms of this Agreement. · If any provision of this Agreement is held invalid, the remaining provisions will continue to be valid and enforceable. · You waive the right to presentment, protest, notice of dishonor and notice of protest. · If the DMV Filing Fee is more than the amount shown above, you will pay the difference to us upon demand. If it is less, we will refund the difference to you. · **You must notify us of any change of your name, address or employment within 30 days.**

Confidentiality. We will abide by our Privacy Policy. We may report your payment experience with us to credit reporting agencies and others who may lawfully receive that information. By signing this Agreement, you waive the confidentiality under the provisions of California Vehicle Code Section 1808.21 and authorize us to obtain from the California Department of Motor Vehicles your current residence address, until we are paid in full.

Cell Phones. By providing us your wireless (cell) telephone number in your application, you expressly consent to receiving telephone calls from us concerning your loan, including calls to collect what you owe. Live calls may be made by one of our employees. Calls may also be made by a prerecorded, autodialed voice or text message. Your consent covers *all* types of calls. We do not charge you for such calls. Your wireless carrier will charge you for our incoming calls and text messages according to your plan.

Governing Law. This loan is governed by California Law. This loan is not subject to California's usury limit, Cal. Const. art. XV, Section 1. If the Total Loan Amount is a bona fide principal amount of more than $2,500, this loan is not subject to the rate limitations in the California Finance Lenders Law. This loan is made pursuant to the California Finance Lenders Law, Division 9 (commencing with Section 22000) of the Financial Code.

FOR INFORMATION, CONTACT THE DEPARTMENT OF CORPORATIONS, STATE OF CALIFORNIA.

Broker: A broker has not performed any act in connection with the making of this loan unless the following box is checked:
☐ Broker has participated.

You acknowledge that you have read and received a signed copy of this Agreement.

Borrower Signature: X Danielle Brudi Date: 07/23/2011

THUMBPRINT

Co-Borrower's Signature: X_____ Date: 07/23/2011

Lender: California Check Cashing Stores, LLC By: X Dranak

Unless you are borrowing money for business or commercial purposes, the following notice applies if the loan is being used in whole or in part to purchase the Vehicle:

NOTICE – ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF THE GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

ARBITRATION AGREEMENT

READ THIS ARBITRATION AGREEMENT CAREFULLY IT WILL HAVE A SUBSTANTIAL IMPACT ON YOUR LEGAL RIGHTS

If you have a question or problem regarding your consumer loan or our services, please contact us right away. Frequently a telephone call or visit to one of our offices will resolve your concerns quickly and amicably.

However, if you and we are not able to resolve our disagreements informally, you agree in consideration of the consumer loan and other services that we provide to you that any Claim (as this and certain other terms are defined on the reverse side hereof) will be resolved pursuant to the following terms and conditions (collectively, the "Arbitration Agreement"):

Resolution of Claims: Any Claim shall be resolved by binding arbitration administered by the American Arbitration Association (the "AAA") pursuant to all of the terms and conditions of this Arbitration Agreement and the AAA's Commercial 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. Alternatively, you and we may agree to select a local arbitrator who is an attorney, retired judge, or arbitrator registered and in good standing with an arbitration association in the federal judicial district in which you reside, and arbitrate pursuant to such arbitrator's rule. Any arbitrator under this Arbitration Agreement must be a lawyer with more than ten (10) years of experience or a retired judge. As a condition to serving, the arbitrator or arbitration service must agree in writing in advance of the arbitration to apply and enforce all of the terms and conditions of this Arbitration Agreement.

Federal Arbitration Act and Appeals: This Arbitration Agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. The arbitrator shall apply applicable substantive law and statutes of limitations, shall honor claims of privilege recognized at law and shall provide a written explanation of the basis for the award. In conducting the arbitration proceeding, the arbitrator shall not be required to apply the Federal or any state rules of civil procedure or rules of evidence. Pre-arbitration discovery shall be available, consistent with the rules of the arbitration administrators. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator's decision will be final and binding, except for any right of appeal provided by the FAA and except that, if the amount in controversy exceeds $50,000, any party may appeal the award (or denial of award) to a three-arbitrator panel administered by the same arbitration administrator, which shall reconsider de novo any aspect of the initial award requested by either party. The decision of the panel shall be by majority vote. The costs of such an appeal will be borne by the appealing party regardless of the outcome of the appeal.

Small Claims Adjudication: You and we shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction. Any complaint, counter-claim, third party complaint, or any other dispute which cannot be adjudicated within the jurisdiction of a small claims tribunal shall be resolved by binding arbitration. Either you or we shall have the right to remove a case to arbitration after it has been filed in the small claims tribunal.

Agreement Not To Bring or Participate in Class Actions: To the extent permitted by law, by signing below you agree that you will not bring, join or participate in any class action as to any Claim, dispute or controversy you may have against Us or otherwise involving Us. You agree to the entry of injunctive relief to stop such lawsuit, arbitration or action of any kind, or to remove you as a participant in any such lawsuit, arbitration or action of any kind. This agreement is not a waiver of any of your rights and remedies to pursue a Claim individually and not as a class action. This agreement not to bring, join or participate in any class action is an independent agreement and shall survive the closing and the repayment of the consumer loan you are receiving.

Survival, Severability, Primacy: This Arbitration Agreement shall survive your voluntary payment of the Consumer Loan Service Agreement(s), (as defined on the following page), our sale or transfer of the Consumer Loan Service Agreement(s) and your bankruptcy. If any portion of this Arbitration Agreement is deemed invalid or unenforceable under any law or statute consistent with the FAA, that invalidity shall not extend to the remaining portions of this Arbitration Agreement, which shall be enforceable regardless of such invalidity. In the event of a conflict or inconsistency between the rules of the arbitration administrator and this Arbitration Agreement, this Arbitration Agreement shall govern.

OPT-OUT Process: You may choose to opt out of this Arbitration Provision but only by following the process set forth below. If you do not wish to be subject to this Arbitration Provision, then you must notify us in writing within sixty (60) calendar days of the date of this Agreement at the following address: CCCS -- Consumer Loans, Attn: Legal Dept., PO Box 20813, Oakland CA 94620. Your written notice must include your name, address, social security number, the date of this Agreement, and a statement that you wish to opt out of the Arbitration Provision. If this Agreement is your first transaction with us since 05/24/2011 and you provide us the appropriate opt-out notice, then your decision to opt out will also apply to all your previous transactions with us. If you choose not to opt out on your first transaction with us after 09/21/2011, then this Arbitration Provision will apply to all your previous transactions with us. Your decision to opt out on subsequent transactions with us will only apply to that particular transaction and no previous transactions.

Important Additional Disclosures: **While you understand that you may individually bring a claim against us either through arbitration or in a small claims tribunal subject to the terms and conditions of this Arbitration Agreement, you acknowledge and agree that by entering into this Arbitration Agreement:**

a) **YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;**
b) **YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY CLAIM OR DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES.**
c) **YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS *PARENS PATRIAE*, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT OR ARBITRATION FILED AGAINST US AND/OR RELATED THIRD PARTIES.**

By Received Time Mar. 28. 2012 7:39AM No. 4105 **we agree to be legally bound by this Arbitration Agreement.**

Federal Arbitration Act and Appeals: This Arbitration Agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. The arbitrator shall apply applicable substantive law and statutes of limitations, shall honor claims of privilege recognized at law and shall provide a written explanation of the basis for the award. In conducting the arbitration proceeding, the arbitrator shall not be required to apply the Federal or any state rules of civil procedure or rules of evidence. Pre-arbitration discovery shall be available, consistent with the rules of the arbitration administrators. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator's decision will be final and binding, except for any right of appeal provided by the FAA and except that, if the amount in controversy exceeds $50,000, any party may appeal the award (or denial of award) to a three-arbitrator panel administered by the same arbitration administrator, which shall reconsider de novo any aspect of the initial award requested by either party. The decision of the panel shall be by majority vote. The costs of such an appeal will be borne by the appealing party regardless of the outcome of the appeal.

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Important Additional Disclosures: While you understand that you may individually bring a claim against us either through arbitration or in a small claims tribunal subject to the terms and conditions of this Arbitration Agreement, you acknowledge and agree that by entering into this Arbitration Agreement:

a) **YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;**
b) **YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY CLAIM OR DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES.**
c) **YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS *PARENS PATRIAE*, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT OR ARBITRATION FILED AGAINST US AND/OR RELATED THIRD PARTIES.**

By your signature and our signature below, you and we agree to be legally bound by this Arbitration Agreement.

PLEASE SEE NEXT PAGE FOR ADDITIONAL IMPORTANT TERMS

DANIELLE G FINELLI — Customer's Printed
Danielle G Finelli — Name Customer's Signature
07/23/2011 — Date

California Check Cashing Stores, LLC
By: Diana — Employee's Printed Name
Employee's Signature
07/23/2011 — Date

Definitions

"You" or **"your"** mean the Customer who signs and enters into any Agreement(s) (defined below) with us, and his or her heirs, executors, administrators, beneficiaries, representatives and assigns.

"We", "our" or **"us"** mean California Check Cashing Stores, LLC all of the members, parents, wholly or partially owned subsidiaries, affiliates, predecessors, successors, and assigns of such entities, and all of the agents, employees, directors, attorneys, officers, shareholders, and representatives of the foregoing entities.

"Consumer Loan Service Agreement(s)" mean any Consumer Loan Service Agreement, Statement of Loan, Disclosures, Promissory Notes and/or Security Agreement, any other transaction(s) or agreement(s) entered into between you and us at the time you sign this Arbitration Agreement and any other transaction(s) or agreement(s) entered into between you and us.

"Claim" means any claim, dispute, controversy or other unresolved disagreement between you and us arising in any way from or relating in any way to any Consumer Loan Service Agreement(s) or this Arbitration Agreement, including the validity, enforceability or scope of this Arbitration Agreement or the meaning of this Arbitration Agreement and whether a disagreement is a "Claim" subject to binding arbitration as provided for in this Arbitration Agreement. "Claim" includes claims of every kind and nature, including but not limited to initial claims, counterclaims, cross-claims and third-party claims and claims based upon broken promises or contract, tort (injury caused by negligence or intentional conduct), fraud, constitution, statute, regulation, common law and equity. The term "Claim" is to be given the broadest possible meaning and includes, by way of example and without limitation, any claim, dispute or controversy that arises under or relates to the Truth in Lending Act and Regulation Z; the Equal Credit Opportunity Act and Regulation B; the Fair Credit Reporting Act; the Fair Debt Collection Practices Act; the provisions of the California Civil Code relating to Check Cashers beginning at Section 1789.30; state insurance, usury and lending laws, fraud, unfair business practices; misrepresentation statutes and laws, including laws relating to omissions to disclose material facts including without limitation Section 17200 et seq. of the California Business and Professions Code; Part 313 of the FTC Regulations and other federal and state laws relating to privacy of financial information; other federal or state consumer protection statutes or regulations; any party's execution of this Arbitration Agreement and/or willingness to be bound by the terms of this Arbitration Agreement; or any dispute about soliciting, originating, making, closing, servicing, collecting or enforcing any Consumer Loan Service Agreement(s).

Hearing Location and Arbitration Costs: Any arbitration hearing that you attend will take place in the federal judicial district of your residence. If we demand arbitration, we will be responsible for all of the filing, administrative and/or hearing fees in connection with any Claim we bring and seek to arbitrate. If you demand arbitration, at your written request, we will advance that portion of the filing, administrative and/or hearing fees (not including attorney, expert or witness fees). At the end of the arbitration, and consistent with applicable law, the arbitrator will decide who will ultimately be responsible for paying the filing, administrative and/or hearing fees in connection with the arbitration. Unless inconsistent with applicable law, each party shall bear the expense of that party's attorneys, experts and witnesses, regardless of which party prevails in the arbitration.

Self Help Remedies: Neither this Arbitration Agreement, nor the exercise of any of the rights you and we have under this Arbitration Agreement, shall stop you or us from exercising any lawful rights either you or we have to exercise self help remedies, including without limitation set off rights.

Open Control Panel

Call Now!
1-800-99PAYDAY

Contact

Customer Service

California Check Cashing Stores, LLC.

P.O. Box 20813
Oakland
CA
USA
94620

1-800-99PAYDAY

Send an e-mail to this Contact:

Enter your name:

E-mail address:

Message subject:

Enter your message:

Submit

Payroll Advances should be used for short-term financial needs only, not as a long-term financial solution.
Customers with credit difficulties should seek credit counseling.

Agreements for Resolving Disputes: You agree to the Agreements for Resolving Disputes in this Agreement. Except as otherwise provided in the Agreements for Resolving Disputes, this Agreement will be governed by the laws of the State of Nevada. If any part of this Agreement is found to be unenforceable, that part will be deemed severed from the Agreement, and the remaining provisions will be enforced to the fullest extent allowed by law.

Agreements for Resolving Disputes

PRE-DISPUTE RESOLUTION PROCEDURE

In the event that you or we have a claim that arises from or relates to any check cashing, credit, loan or other services you request or we provide ("Services"), before commencing, joining or participating in any judicial or arbitration proceeding, as either an individual litigant or member of a class ("Proceeding"), the complaining party shall give the other party or any "related party": (1) at least 15 days' written notice of the claim ("Claim Notice"), explaining in reasonable detail the nature of the claim and any supporting facts; and (2) a reasonable good faith opportunity to resolve the claim without the necessity of a Proceeding. Our "related parties" are any parent company and affiliated entities (including Ad Astra Recovery Services, Inc.); and our and their employees, directors, officers, shareholders, governors, managers and members. Any Claim Notice to us shall be sent in care of Tiger Financial Management, LLC, Attn: Legal Department, 3527 North Ridge Road, Wichita, Kansas 67205 (or such other address as we shall subsequently provide to you) or to you at your address appearing in our records or, if you are represented by an attorney, to your attorney at his or her office address. Nothing in this paragraph is intended to affect or modify in any fashion any separate Arbitration Provision between you and us.

ARBITRATION PROVISION

VERY IMPORTANT. READ THIS ARBITRATION PROVISION CAREFULLY. IT SETS FORTH WHEN AND HOW CLAIMS (AS DEFINED IN SECTION 2 BELOW) WHICH YOU OR WE HAVE AGAINST ONE ANOTHER WILL BE ARBITRATED INSTEAD OF LITIGATED IN COURT. IF YOU DON'T REJECT THIS ARBITRATION PROVISION IN ACCORDANCE WITH SECTION 1 BELOW, UNLESS PROHIBITED BY APPLICABLE LAW, IT WILL HAVE A SUBSTANTIAL IMPACT ON THE WAY IN WHICH YOU OR WE RESOLVE ANY CLAIM WHICH YOU OR WE HAVE AGAINST EACH OTHER NOW OR IN THE FUTURE.

Unless prohibited by applicable law and unless you reject the Arbitration Provision in accordance with Section 1 below, you and we agree that either party may elect to require arbitration of any Claim under the following terms and conditions:

1. RIGHT TO REJECT ARBITRATION. If you do not want this Arbitration Provision to apply, you may reject it within 30 days after the date of your application ("Application") for check cashing, credit, loan or other services from us ("Services") [by delivering to us at any of our offices or] by mailing to us in care of Tiger Financial Management, LLC, Attn: Legal Department, 3527 North Ridge Road, Wichita, Kansas 67205, a written rejection notice which provides your name, address, the date of the Application, the address of the store where you submitted the Application and states that you are rejecting the related Arbitration Provision. If you want proof of the date of such a notice, you should send the notice by "certified mail, return receipt requested." If you use such a method, we will reimburse you for the postage upon your request. Nobody else can reject arbitration for you; this is the only way you can reject arbitration. Your rejection of arbitration will not affect your right to Services or the terms of Services. If you reject this Arbitration Provision, it shall have the effect of rejecting any prior arbitration provision or agreement between you and us that you did not have the right to reject; it will not affect any prior arbitration provision or agreement which you had a right to reject that you did not exercise.

2. DEFINITION OF "CLAIM". The term "Claim" means any claim, dispute or controversy between you and us (including "related parties" identified below) that arises from or relates in any way to Services you request or we provide, now, in the past or in the future; the Application (or any prior or future application); any agreement relating to Services ("Services Agreement"); any of our marketing, advertising, solicitations and conduct relating to your request for Services; our collection of any amounts you owe; our disclosure of or failure to protect any information about you; or the validity, enforceability or scope of this Arbitration Provision. "Claim" is to be given the broadest possible meaning and includes claims of every kind and nature, including but not limited to, initial claims, counterclaims, cross-claims and third-party claims, and claims based on any constitution, statute, regulation, ordinance, common law rule (including rules relating to contracts, negligence, fraud or other intentional wrongs) and equity. It includes disputes that seek relief of any type, including damages and/or injunctive, declaratory or other equitable relief. Notwithstanding the foregoing, "Claim" does not include any individual action brought by you in small claims court or your state's equivalent court, unless such action is transferred, removed, or appealed to a different court, or any assertion that Section 5(C), (D) and/or (E) below is invalid or unenforceable; any such actions and assertions of this kind will be resolved by a court and not an arbitrator. "Claim" also does not include any "self-help remedy" (that is, any steps taken to enforce rights without a determination by a court or arbitrator, for example, repossession and/or re-titling of a motor vehicle) or any individual action by you or us to prevent the other party from using any self-help remedy, so long as such self-help remedy or individual judicial action does not involve a request for monetary relief of any kind. Even if all parties have elected to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claim asserted in that lawsuit, and nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision. This Arbitration Provision will apply to all Claims, even if the facts and circumstances giving rise to the Claims existed before the effective date of this Arbitration Provision. Our "related parties" are any parent company and affiliated entities (including Ad Astra Recovery Services, Inc.); our and their employees, directors, officers, shareholders, governors, managers and members; and any third parties who are parties in a legal proceeding involving you and us.

3. STARTING AN ARBITRATION. Before starting an arbitration (or a judicial proceeding), you or we must comply with any other agreement between you and us providing a right to notice of a claim and/or a right to attempt to resolve the claim without litigation or arbitration. To start an arbitration, you or we must give written notice of an election to arbitrate. This notice may be given after a lawsuit has been filed and may be given in papers or motions in the lawsuit. If such a notice is given, unless prohibited by applicable law, the Claim shall be resolved by arbitration under this Arbitration Provision and the applicable rules of the arbitration administrator then in effect. You must select the administrator when you give us notice that you want to arbitrate a claim or within 20 days after we give you such a notice. If you don't make a selection, we will. The administrator must be either the National Arbitration Forum, P.O. Box 50191, Minneapolis, MN 55405, www.arb-forum.com, (800) 474-2371; or the American Arbitration Association, 1633 Broadway, 10th Floor, New York NY 10019, www.adr.org, (800) 778-7879. The arbitrator will be selected under the administrator's rules, except that the arbitrator must be a lawyer with at least ten years of experience or a retired judge unless the parties agree otherwise.

4. LOCATION AND COSTS. The arbitrator may decide that an in-person hearing is unnecessary and that he or she can resolve the Claim based on the papers submitted by the parties and/or through a telephone hearing. However, any arbitration hearing that you attend will take place in a location that is reasonably convenient for you. We will consider any good faith request you make for us to pay the administrator's or arbitrator's filing, administrative, hearing and/or other fees if you cannot obtain a waiver of such fees from the administrator and we will not seek or accept reimbursement of any such fees. We will also pay any fees or expenses we are required by law to pay or that we must pay in order for this Arbitration Provision to be enforced. Each party must normally pay for its own attorneys, experts and witnesses. However, we will pay all such reasonable fees and costs you incur if you are the prevailing party and/or where required by applicable law and/or the administrator's rules. The arbitrator shall not limit the attorneys' fees and costs to which you are entitled because your Claim is for a small amount. Also, to the extent permitted by applicable law and provided in any Services Agreement, you will pay any reasonable attorneys' fees, collection costs and arbitration fees and costs we incur if we prevail in an arbitration in which we seek to recover any amount owed by you to us under the Services Agreement.

5. NO CLASS ACTIONS OR SIMILAR PROCEEDINGS; SPECIAL FEATURES OF ARBITRATION. IF YOU OR WE ELECT TO ARBITRATE A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO: (A) HAVE A COURT OR A JURY DECIDE THE CLAIM; (B) OBTAIN INFORMATION PRIOR TO THE HEARING TO THE SAME EXTENT THAT YOU OR WE COULD IN COURT; (C) PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION, EITHER AS A CLASS REPRESENTATIVE, CLASS MEMBER OR CLASS OPPONENT; (D) ACT AS A PRIVATE ATTORNEY GENERAL IN COURT OR IN ARBITRATION; OR (E) JOIN OR CONSOLIDATE CLAIM(S) INVOLVING YOU WITH CLAIMS INVOLVING ANY OTHER PERSON. THE RIGHT TO APPEAL IS MORE LIMITED IN ARBITRATION THAN IN COURT. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

6. GETTING INFORMATION. In addition to the parties' rights under the administrator's rules to obtain information prior to the hearing, either party may ask the arbitrator for more information from the other party. The arbitrator will decide the issue in his or her sole discretion, after allowing the other party the opportunity to object.

7. EFFECT OF ARBITRATION AWARD. Any court with jurisdiction may enter judgment upon the arbitrator's award. The arbitrator's award will be final and binding, except for: (1) any appeal right under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (the "FAA"); and (2) Claims involving more than $50,000. For Claims involving more than $50,000, any party may appeal the award to a three-arbitrator panel appointed by the administrator, which will reconsider *de novo* any aspect of the initial award that is appealed. The panel's decision will be final and binding, except for any appeal right under the FAA. Unless applicable law provides otherwise, the appealing party will pay the appeal's costs, regardless of its outcome. However, we will consider any good faith request for us to bear the cost and will pay any amount that we must pay under applicable law or the administrator's rules and any amount that we must pay in order for this Arbitration Provision to be enforced.

8. GOVERNING LAW. This Arbitration Provision is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA, and not Federal or state rules of civil procedure or evidence or any state laws that pertain specifically to arbitration, provided that the law of Kansas, where we are headquartered, shall be applicable to the extent that any state law is relevant in determining the enforceability of this Arbitration Provision under Section 2 of the FAA. The arbitrator shall follow applicable substantive law to the extent consistent with the FAA, applicable statutes of limitation and applicable privilege rules, and shall be authorized to award all remedies available in an individual lawsuit under applicable substantive law, including, without limitation, compensatory, statutory and punitive damages (which shall be governed by the constitutional standards applicable in judicial proceedings), declaratory, injunctive and other equitable relief, and attorneys' fees and costs. In addition, if you prevail in an individual (non-class) arbitration against us in which you are seeking monetary relief from us, we agree that the arbitrator shall award as the minimum amount of your damages (excluding arbitration fees and attorneys' fees and costs, if any) an amount that is $100 greater than the jurisdictional limit of the small claims court (or your state's equivalent court) in the county in which you reside. For example, if such a court can decide claims up to $5,000, then if you prevail in an individual arbitration, you will receive a minimum of $5,100 even if the amount you would otherwise be entitled to receive is less than that amount. Upon the timely request of either party, the arbitrator shall write a brief explanation of the basis of his or her award. The arbitrator will follow rules of procedure and evidence consistent with the FAA, this Arbitration Provision and the administrator's rules.

9. SURVIVAL, SEVERABILITY, PRIMACY. This Arbitration Provision shall survive the full payment of any amounts due under any Services Agreement; any proper rescission or cancellation of any Services Agreements; any exercise of a self-help remedy; our sale or transfer of any Services Agreement or our rights under any Services Agreement; any legal proceeding by us to collect a debt owed by you; and your (or our) bankruptcy. If any part of this Arbitration Provision cannot be enforced, the rest of this Arbitration Provision will continue to apply; provided, however, that if Section 5(C), (D) and/or (E) is declared invalid in a proceeding between you and us, without

in any way impairing the right to appeal such decision, this entire Arbitration Provision (other than this sentence) shall be null and void in such proceeding. In the event of any conflict or inconsistency between this Arbitration Provision and the administrator's rules or the rest of any Services Agreement, this Arbitration Provision will govern. If you and we are a party to any other arbitration or dispute resolution agreement in connection with prior Services, this Arbitration Provision will supersede such prior arbitration agreement.

10. BREACH OF ARBITRATION AGREEMENT. If either party fails to submit to arbitration following a proper demand to do so and a court later orders arbitration, to the extent permitted by law that party shall bear all costs and expenses including reasonable attorneys' fees, incurred by the other party in seeking to compel arbitration.

JURY TRIAL WAIVER

YOU AND WE ACKNOWLEDGE THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL RIGHT, BUT THAT IT MAY BE WAIVED UNDER CERTAIN CIRCUMSTANCES. TO THE EXTENT PERMITTED BY LAW, YOU AND WE, AFTER HAVING HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL, KNOWINGLY AND VOLUNTARILY, AND FOR THE MUTUAL BENEFIT OF ALL PARTIES, WAIVE ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION ARISING OUT OF OR RELATED TO THIS AGREEMENT. THIS JURY TRIAL WAIVER SHALL NOT AFFECT OR BE INTERPRETED AS MODIFYING IN ANY FASHION ANY SEPARATE ARBITRATION PROVISION BETWEEN YOU AND US, WHICH CONTAINS ITS OWN SEPARATE JURY TRIAL WAIVER.

Important Notices

BY SIGNING THIS AGREEMENT OR APPLYING FOR A LOAN:

- **YOU WILL NOT BE ENTITLED TO HAVE A TRIAL BY JURY TO RESOLVE ANY CLAIM AGAINST US.**
- **YOU WILL NOT BE ENTITLED TO HAVE A COURT, OTHER THAN A SMALL CLAIMS COURT OR JUSTICE COURT, RESOLVE ANY CLAIM AGAINST US.**
- **YOU WILL NOT BE ABLE TO BRING, JOIN OR PARTICIPATE IN ANY CLASS ACTION LAWSUIT AGAINST US.**

By signing below, you acknowledge and affirm that: (1) you have received and read a copy of this Agreement, (2) you agree to the above terms and to the Agreements for Resolving Disputes, (3) there are no blanks spaces appearing on this Agreement and (4) you represent that the "Amount Financed" as shown above, together with any other outstanding loans you have with us, does not exceed twenty-five percent of your expected monthly gross income.

	6/15/2008	By	6/15/2008
Customer Signature(s)	Date	Rapid Cash Representative	Date

Electronic Check Deposit. The check that you have given to us for payment of your obligation under this Agreement may be presented to your bank as an Electronic Funds Transfers ("EFT") through the Automated Clearing House (ACH) network. We may initiate a debit entry to your checking account in order to receive payment. We may do so where the check is lost, misplaced or destroyed or it is more practical to conduct an EFT rather then deposit your check. In other circumstances, we may process your payment and deposit your check. In cases where we utilize an EFT for payment, funds may be withdrawn from your account quickly sometimes the same date as your loan is due and you will not receive your check back from your financial institution. By signing this Agreement, you authorize us to electronically deposit and collect on your check in the amount of the Total of Payments shown in this Agreement. Your authorization to EFT your account will remain in full force and effect until you terminate it by giving us written notice at the address listed on this Agreement and until we have had a reasonable opportunity to act on your notice.

Nonpayment and Default. You will be in default if the Total of Payments is not paid in full by the due date. If you default on your obligations, in addition to the amounts you owe us, we may charge you interest for 90 days from the date of your default at the rate equal to the prime rate of the largest bank in the State of Nevada (as ascertained by the Nevada Commissioner of Financial Institutions), plus ten percent. If your payment either by check or EFT is not paid upon presentment because of NSF or Account Closed you will be charged a return check charge of $25.00. If you default on this loan you have the opportunity within 30 days of the default to enter into a repayment plan with a term of at least 90 days. We will offer the repayment plan to you before we commence any civil action or process of alternative dispute resolution.

Authorizations to Collect Debt Upon Default. You authorize us to withdraw from your bank account the amount you owe us according to this or any former Agreement. We may make this withdrawal by re-presenting your check electronically, and/or by using one or more, in varied amounts paper or EFT debits not to exceed the amount owed to us. Your EFT debit authorization extends to the bank account listed on your original check or any other bank account maintained by you wherever located. If you provide us with a Visa or MasterCard check, debit or credit card (collectively the "Card") you also authorized us, denoted by your signature on this Agreement to charge, submit and collect all amounts due to us. We may submit these charges to your Card one or more times until the total amount owed to us is paid in full. Your authorization to ACH and to charge your Card will remain in full force and effect until you terminate it by giving us written notice at the address listed on this Agreement and until we have had a reasonable opportunity to act on your notice. We may not require repayment of loans by preauthorized electronic transfers. You voluntarily authorize the above collection of the Total of Payments by electronic means from your bank account and Card. You may withdraw such voluntary consent by writing to us at our business address set forth above.

Offset. You agree that by law and this Agreement we or our agents may offset (deduct) any sums owed to us from any checks presented to us now or in the future for cashing. The amount owed to us includes any legitimate reason including, but not limited to, returned checks, return check charges, defaulted loans or additional collection costs that you have incurred with us or one of our affiliates.

Credit Reporting. You agree that we may make inquiries concerning your credit history and standing, and we may report information concerning your performance under this Agreement to credit reporting agencies.

Telephone Calls – Monitoring: You agree that if you are past due or in default, you will accept calls from us regarding the collection of your Account. You understand these calls could be automatically dialed and a recorded message may be played. You agree such calls will not be unsolicited calls for purposes of state and federal law. You also agree that, from time to time, we may monitor telephone conversations between you and us to assure the quality of our customer service.

Agreements for Resolving Disputes: You agree to the Agreements for Resolving Disputes in this Agreement. Except as otherwise provided in the Agreements for Resolving Disputes, this Agreement will be governed by the laws of the State of Nevada. If any part of this Agreement is found to be unenforceable, that part will be deemed severed from the Agreement, and the remaining provisions will be enforced to the fullest extent allowed by law.

Agreements for Resolving Disputes

Mediation Agreement

You and We Agree to Mediate Claims. You and we agree that before either of us starts a lawsuit, arbitration proceeding or any other legal proceeding, we will submit any and all "Claims" that we have against you, and you will submit any and all Claims that you have against us, to neutral, individual (and not class) mediation.

What is Mediation? Mediation is an informal procedure used to resolve disputes. In a mediation, a professionally trained, impartial mediator meets with the parties to a dispute. A mediator does not decide who is right or wrong. Instead, a mediator assists the parties in finding a solution that works best for them. If the parties agree, they may settle their differences and avoid further proceedings.

Meaning of "Claims." "Claims" means any and all claims, disputes or controversies that arise under common law, federal or state statute or regulation, or otherwise, and that we or our servicers or agents have against you or that you have against us, our servicers, agents, directors, officers and employees. "Claims" also includes any and all claims that arise out of (i) the validity, scope and/or applicability of this Mediation Agreement or the Arbitration Agreement appearing below, (ii) your application for a Loan, (iii) the Agreement, (iv) any prior agreement between you and us, including any prior loans we have made to you or (v) our collection of any Loan. "Claims" also includes all claims asserted as a representative, private attorney general, member of a class or in any other representative capacity, and all counterclaims, cross-claims and third party claims.

Rules of Mediation. You and we agree to mediate in good faith to resolve any Claims on an individual (and not class) basis. The mediation will be governed by the Better Business Bureau Rules of Mediation in effect at the time the Claim is filed. You can obtain a copy of the Rules of Mediation and forms at any Better Business Bureau Office or online at www.bbb.org. The mediation will take place at a location near your residence. The mediator will not conduct class mediation, and will not allow you to act as a representative, private attorney general or in any other representative capacity.

Costs of Mediation. We will pay all mediation fees, including filing fees and the mediator's fees.

Other Mediation Terms. This Mediation Agreement is an independent agreement, will survive the closing and repayment of the Loan for which you are applying, and will be binding upon you and your heirs and assigns. If a court of competent jurisdiction finds that one or more provisions of this Mediation Agreement is unenforceable, such provision or provisions will be deemed to be severed, and the remaining provisions of this Mediation Agreement will be enforced to the fullest extent allowed by law.

Arbitration Agreement

You and We Agree to Arbitrate. If you and we are not able to resolve a Claim in mediation, then you and we agree that such Claim will be resolved by neutral, binding individual (and not class) arbitration. You and we may not initiate arbitration proceedings without first complying with the Mediation Agreement.

What is Arbitration? Arbitration is a procedure used to resolve disputes. It is different than mediation. In arbitration, a professionally trained, neutral, third party arbitrator holds a hearing. The hearing is less formal than a trial in court. Each party has the opportunity to tell his or her side of the dispute. The arbitrator will review each party's case and make a decision. The decision is binding on the parties. By agreeing to arbitration, YOU GIVE UP YOUR RIGHT TO GO TO COURT.

Meaning of "Claims." The word "Claims" has the same meaning as in the Mediation Agreement.

Rules of Arbitration. Except as provided in this Arbitration Agreement, the arbitration will be governed by the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed. Rules and forms of the NAF may be obtained and all claims must be filed at any NAF office, on the World Wide Web at www.arb-forum.com, or at National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota 55405-0191. You may also elect to have the arbitration heard by and under the consumer rules of the American Arbitration Association or the Better Business Bureau. Any arbitration hearing, if one is held, will take place at a location near your residence. The arbitration will be conducted by a single arbitrator. The arbitrator will not conduct class arbitration, and will not allow you to act as a representative, private attorney general or in any other representative capacity. The arbitration award will be in writing. The arbitrator may award the prevailing party its attorneys' fees and arbitration expenses. Judgment upon the award may be entered by any party in any court having jurisdiction. All statutes of limitations that are applicable to a Claim will apply to any arbitration between you and us.

Costs of Arbitration. We will pay our share of any arbitration fees. ***If you are unable to pay your share of the costs of arbitration, your arbitration fees may be waived by the NAF or other arbitration service provider you have selected.*** If your properly submitted request to waive the arbitration fees is denied, or if the arbitration service you have selected does not have a waiver procedure, then we will, at your request, advance your share of the arbitration fees. If the arbitrator renders a decision in your favor, then you will not have to reimburse us for your share of the arbitration fees. If the arbitrator renders a decision in our favor, then you agree to reimburse us for the arbitration fees we have advanced on your behalf. However, you will not have to reimburse us for any more than the amount that could have been assessed as court costs if the Claim had been resolved by a state court with proper jurisdiction.

Governing Law. This Arbitration Agreement is made pursuant to a transaction involving interstate commerce. It will be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as amended ("FAA"). If for any reason a court of competent jurisdiction finds that the FAA does not apply, then this Arbitration Agreement will be governed by the Nevada Uniform Arbitration Act, as amended.

Other Arbitration Terms. This Arbitration Agreement is an independent agreement, will survive the closing and repayment of the Loan for which you are applying, and will be binding upon you and your heirs and assigns. If a court of competent jurisdiction finds that one or more provisions of this Arbitration Agreement is unenforceable, such provision or provisions will be deemed to be severed, and the remaining provisions of the Arbitration Agreement will be enforced to the fullest extent allowed by law.

Exceptions to Mediation and Arbitration

In the following situations, neither you nor we will need to submit Claims to mediation or arbitration before taking other actions.

Limited and Small Claims. You and we each have the right to bring a Claim in a small claims or the proper Las Vegas Justice Court, as long as the Claim is within the jurisdictional limits of that court. Neither you nor we will need to submit Claims to mediation or arbitration before doing so. However, neither you nor we may bring any Claims as a representative, private attorney general, member of a class or in any other representative capacity. All Claims that cannot be brought in small claims court or Las Vegas Justice Court (and all appeals from a judgment by a small claims court or limited actions / jurisdiction court) must be resolved consistent with the Mediation Agreement and the Arbitration Agreement appearing above.

Important Notices

BY SIGNING THIS AGREEMENT OR APPLYING FOR A LOAN:

- **YOU WILL NOT BE ENTITLED TO HAVE A TRIAL BY JURY TO RESOLVE ANY CLAIM AGAINST US.**
- **YOU WILL NOT BE ENTITLED TO HAVE A COURT, OTHER THAN A SMALL CLAIMS COURT OR JUSTICE COURT, RESOLVE ANY CLAIM AGAINST US.**

- **YOU WILL NOT BE ABLE TO BRING, JOIN OR PARTICIPATE IN ANY CLASS ACTION LAWSUIT AGAINST US.**

By signing below, you acknowledge and affirm that: (1) you have received and read a copy of this Agreement, (2) you agree to the above terms and to the Agreements for Resolving Disputes, (3) there are no blanks spaces appearing on this Agreement and (4) you represent that the "Amount Financed" as shown above, together with any other outstanding loans you have with us, does not exceed twenty-five percent of your expected monthly gross income.

[redacted] [redacted]

Customer Signature(s) Date

By [redacted]

Rapid Cash Representative Date

Notice of Your Financial Privacy Rights

We respect the privacy of our customers and are committed to treating customer information responsibly. This Privacy Notice is for Speedy Cash®, Galt Ventures, Inc., and all their parent and affiliate companies doing business as Speedy Cash®, Rapid Cash and AAA Title Loans. This Notice describes the type of information we collect, how we might disclose that information and the steps we take to protect your information.

A. NON-DISCLOSURE POLICY AND SECURITY.
We do not disclose any nonpublic personal information about our customers or former customers to anyone, except as permitted by law. We restrict access to nonpublic personal information about you to those employees who need to know that information to provide products or services to you. We maintain physical, electronic, and procedural safeguards that comply with federal standards to guard your nonpublic personal information.

B. CATEGORIES OF INFORMATION WE COLLECT.
We collect nonpublic personal information from the following sources:
Information we receive from you on applications or other forms, such as social security number, banking and credit history and income;
Information about your transactions within the Speedy /Rapid Cash /AAA Title Loan group of companies, or others;
Information we receive from consumer credit reporting agency; and
Information we receive from other nonaffiliated third parties, such as your bank.

C. CATEGORIES OF INFORMATION WE DISCLOSE.
We may disclose all the information we collect, as described above, to our companies and to nonaffiliated third parties in accordance within applicable law.

D. CATEGORIES OF AFFILIATES and THIRD PARTIES TO WHOM WE DISCLOSE.
Affiliates: The Speedy /Rapid Cash /AAA group of companies;
Third Parties: Entities who process or administer a financial transaction requested or authorized by you; Consumer Credit Reporting Agencies to which we permitted under law and banks, credit card companies and other financial service providers with whom you have a contractual relationship and federal, state and local governmental departments that require us to disclose the information or where disclosure concerns fraud, theft or criminal activity; other third parties that are permitted. under 16 CFR 313.15.

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ARBITRATION PROVISION

VERY IMPORTANT. READ THIS ARBITRATION PROVISION CAREFULLY. IT SETS FORTH WHEN AND HOW CLAIMS (AS DEFINED IN SECTION 2 BELOW) WHICH YOU OR WE HAVE AGAINST ONE ANOTHER WILL BE ARBITRATED INSTEAD OF LITIGATED IN COURT. IF YOU DON'T REJECT THIS ARBITRATION PROVISION IN ACCORDANCE WITH SECTION 1 BELOW, UNLESS PROHIBITED BY APPLICABLE LAW, IT WILL HAVE A SUBSTANTIAL IMPACT ON THE WAY IN WHICH YOU OR WE RESOLVE ANY CLAIM WHICH YOU OR WE HAVE AGAINST EACH OTHER NOW OR IN THE FUTURE.

Unless prohibited by applicable law and unless you reject the Arbitration Provision in accordance with Section 1 below, you and we agree that either party may elect to require arbitration of any Claim under the following terms and conditions:

1. **RIGHT TO REJECT ARBITRATION.** If you do not want this Arbitration Provision to apply, you may reject it within 30 days after the date of your application ("Application") for check cashing, credit, loan or other services from us ("Services") [by delivering to us at any of our offices or] by mailing to us in care of Tiger Financial Management, LLC, Attn: Legal Department, 3527 North Ridge Road, Wichita, Kansas 67205, a written rejection notice which provides your name, address, the date of the Application, the address of the store where you submitted the Application and states that you are rejecting the related Arbitration Provision. If you want proof of the date of such a notice, you should send the notice by "certified mail, return receipt requested." If you use such a method, we will reimburse you for the postage upon your request. Nobody else can reject arbitration for you; this is the only way you can reject arbitration. Your rejection of arbitration will not affect your right to Services or the terms of Services. If you reject this Arbitration Provision, it shall have the effect of rejecting any prior arbitration provision or agreement between you and us that you did not have the right to reject; it will not affect any prior arbitration provision or agreement which you had a right to reject that you did not exercise.

2. **DEFINITION OF "CLAIM".** The term "Claim" means any claim, dispute or controversy between you and us (including "related parties" identified below) that arises from or relates in any way to Services you request or we provide, now, in the past or in the future; the Application (or any prior or future application); any agreement relating to Services ("Services Agreement"); any of our marketing, advertising, solicitations and conduct relating to your request for Services; our collection of any amounts you owe; our disclosure of or failure to protect any information about you; or the validity, enforceability or scope of this Arbitration Provision. "Claim" is to be given the broadest possible meaning and includes claims of every kind and nature, including but not limited to, initial claims, counterclaims, cross-claims and third-party claims, and claims based on any constitution, statute, regulation, ordinance, common law rule (including rules relating to contracts, negligence, fraud or other intentional wrongs) and equity. It includes disputes that seek relief of any type, including damages and/or injunctive, declaratory or other equitable relief. Notwithstanding the foregoing, "Claim" does not include any individual action brought by you in small claims court or your state's equivalent court, unless such action is transferred, removed, or appealed to a different court, or any assertion that Section 5(C), (D) and/or (E) below is invalid or unenforceable; any such actions and assertions of this kind will be resolved by a court and not an arbitrator. "Claim" also does not include any "self-help remedy" (that is, any steps taken to enforce rights without a determination by a court or arbitrator, for example, repossession and/or re-titling of a motor vehicle) or any individual action by you or us to prevent the other party from using any self-help remedy, so long as such self-help remedy or individual judicial action does not involve a request for monetary relief of any kind. Even if all parties have elected to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claim asserted in that lawsuit, and nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision. This Arbitration Provision will apply to all Claims, even if the facts and circumstances giving rise to the Claims existed before the effective date of this Arbitration Provision. Our "related parties" are any parent company and affiliated entities (including Ad Astra Recovery Services, Inc.); our and their employees, directors, officers, shareholders, governors, managers and members; and any third parties who are parties in a legal proceeding involving you and us.

3. **STARTING AN ARBITRATION.** Before starting an arbitration (or a judicial proceeding), you or we must comply with any other agreement between you and us providing a right to notice of a claim and/or a right to attempt to resolve the claim without litigation or arbitration. To start an arbitration, you or we must give written notice of an election to arbitrate. This notice may be given after a lawsuit has been filed and may be given in papers or motions in the lawsuit. If such a notice is given, unless prohibited by applicable law, the Claim shall be resolved by arbitration under this Arbitration Provision and the applicable rules of the arbitration administrator then in effect. You must select the administrator when you give us notice that you want to arbitrate a claim or within 20 days after we give you such a notice. If you don't make a selection, we will. The administrator must be either the National Arbitration Forum, P.O. Box 50191, Minneapolis, MN 55405, www.arb-forum.com, (800) 474-2371; or the American Arbitration Association, 1633 Broadway, 10th Floor, New York NY 10019, www.adr.org, (800) 778-7879. The arbitrator will be selected under the administrator's rules, except that the arbitrator must be a lawyer with at least ten years of experience or a retired judge unless the parties agree otherwise.

4. **LOCATION AND COSTS.** The arbitrator may decide that an in-person hearing is unnecessary and that he or she can resolve the Claim based on the papers submitted by the parties and/or through a telephone hearing. However, any arbitration hearing that you attend will take place in a location that is reasonably convenient for you. We will consider any good faith request you make for us to pay the administrator's or arbitrator's filing, administrative, hearing and/or other fees if you cannot obtain a waiver of such fees from the administrator and we will not seek or accept reimbursement of any such fees. We will also pay any fees or expenses we are required by law to pay or that we must pay in order for this Arbitration Provision to be enforced. Each party must normally pay for its own attorneys, experts and witnesses. However, we will pay all such reasonable fees and costs you incur if you are the prevailing party and/or where required by applicable law and/or the administrator's rules. The arbitrator shall not limit the attorneys' fees and costs to which you are entitled because your Claim is for a small amount. Also, to the extent permitted by applicable law and provided in any Services

Agreement, you will pay any reasonable attorneys' fees, collection costs and arbitration fees and costs we incur if we prevail in an arbitration in which we seek to recover any amount owed by you to us under the Services Agreement.

5. NO CLASS ACTIONS OR SIMILAR PROCEEDINGS; SPECIAL FEATURES OF ARBITRATION. IF YOU OR WE ELECT TO ARBITRATE A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO: (A) HAVE A COURT OR A JURY DECIDE THE CLAIM; (B) OBTAIN INFORMATION PRIOR TO THE HEARING TO THE SAME EXTENT THAT YOU OR WE COULD IN COURT; (C) PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION, EITHER AS A CLASS REPRESENTATIVE, CLASS MEMBER OR CLASS OPPONENT; (D) ACT AS A PRIVATE ATTORNEY GENERAL IN COURT OR IN ARBITRATION; OR (E) JOIN OR CONSOLIDATE CLAIM(S) INVOLVING YOU WITH CLAIMS INVOLVING ANY OTHER PERSON. THE RIGHT TO APPEAL IS MORE LIMITED IN ARBITRATION THAN IN COURT. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

6. GETTING INFORMATION. In addition to the parties' rights under the administrator's rules to obtain information prior to the hearing, either party may ask the arbitrator for more information from the other party. The arbitrator will decide the issue in his or her sole discretion, after allowing the other party the opportunity to object.

7. EFFECT OF ARBITRATION AWARD. Any court with jurisdiction may enter judgment upon the arbitrator's award. The arbitrator's award will be final and binding, except for: (1) any appeal right under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (the "FAA"); and (2) Claims involving more than $50,000. For Claims involving more than $50,000, any party may appeal the award to a three-arbitrator panel appointed by the administrator, which will reconsider *de novo* any aspect of the initial award that is appealed. The panel's decision will be final and binding, except for any appeal right under the FAA. Unless applicable law provides otherwise, the appealing party will pay the appeal's costs, regardless of its outcome. However, we will consider any good faith request for us to bear the cost and will pay any amount that we must pay under applicable law or the administrator's rules and any amount that we must pay in order for this Arbitration Provision to be enforced.

8. GOVERNING LAW. This Arbitration Provision is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA, and not Federal or state rules of civil procedure or evidence or any state laws that pertain specifically to arbitration, provided that the law of Kansas, where we are headquartered, shall be applicable to the extent that any state law is relevant in determining the enforceability of this Arbitration Provision under Section 2 of the FAA. The arbitrator shall follow applicable substantive law to the extent consistent with the FAA, applicable statutes of limitation and applicable privilege rules, and shall be authorized to award all remedies available in an individual lawsuit under applicable substantive law, including, without limitation, compensatory, statutory and punitive damages (which shall be governed by the constitutional standards applicable in judicial proceedings), declaratory, injunctive and other equitable relief, and attorneys' fees and costs. In addition, if you prevail in an individual (non-class) arbitration against us in which you are seeking monetary relief from us, we agree that the arbitrator shall award as the minimum amount of your damages (excluding arbitration fees and attorneys' fees and costs, if any) an amount that is $100 greater than the jurisdictional limit of the small claims court (or your state's equivalent court) in the county in which you reside. For example, if such a court can decide claims up to $5,000, then if you prevail in an individual arbitration, you will receive a minimum of $5,100 even if the amount you would otherwise be entitled to receive is less than that amount. Upon the timely request of either party, the arbitrator shall write a brief explanation of the basis of his or her award. The arbitrator will follow rules of procedure and evidence consistent with the FAA, this Arbitration Provision and the administrator's rules.

9. SURVIVAL, SEVERABILITY, PRIMACY. This Arbitration Provision shall survive the full payment of any amounts due under any Services Agreement; any proper rescission or cancellation of any Services Agreements; any exercise of a self-help remedy; our sale or transfer of any Services Agreement or our rights under any Services Agreement; any legal proceeding by us to collect a debt owed by you; and your (or our) bankruptcy. If any part of this Arbitration Provision cannot be enforced, the rest of this Arbitration Provision will continue to apply; provided, however, that if Section 5(C), (D) and/or (E) is declared invalid in a proceeding between you and us, without in any way impairing the right to appeal such decision, this entire Arbitration Provision (other than this sentence) shall be null and void in such proceeding. In the event of any conflict or inconsistency between this Arbitration Provision and the administrator's rules or the rest of any Services Agreement, this Arbitration Provision will govern. If you and we are a party to any other arbitration or dispute resolution agreement in connection with prior Services, this Arbitration Provision will supersede such prior arbitration agreement.

10. BREACH OF ARBITRATION AGREEMENT. If either party fails to submit to arbitration following a proper demand to do so and a court later orders arbitration, to the extent permitted by law that party shall bear all costs and expenses including reasonable attorneys' fees, incurred by the other party in seeking to compel arbitration.

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ATTACHMENT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

BRETT AND LINDA DAVIS,	)	
	)	
Plaintiffs,	)	
	)	**Case No.: 3:10-CV-322-H**
v.	)	
	)	
GLOBAL CLIENT SOLUTIONS LLC, GHS SOLUTIONS, LLC, AND ROCKY MOUNTAIN BANK & TRUST, AND JOHN AND JANE DOES A-K	)	**SUPPORTING MOTION TO COMPEL ARBITRATION**
	)	
	)	***Electronically filed***
Defendants.	)	

DECLARATION OF BRENT HAMPTON

Pursuant to 28 U.S.C. § 1746, I, Brent Hampton, declare as follows:

1. I, Brent Hampton, am the General Counsel of Global Client Solutions, LLC ("GLOBAL"). As part of my responsibilities, I have direct personal knowledge of GLOBAL's business operations and procedures. I also have personal knowledge of the facts stated herein or through a review of records over which I have care, custody, and control. This Declaration is made in support of GLOBAL's motion to compel arbitration in the above-styled matter.

2. GLOBAL is a limited liability company organized and existing under the laws of the State of Oklahoma.

3. GLOBAL, is an agent of Rocky Mountain Bank and Trust ("RMBT"), a Colorado bank, and provides account management and processing for consumer accounts maintained in Colorado at RMBT.

4. In April 2009, Plaintiffs completed a Special Purpose Account Application (the, "Application") to open a bank account at RMBT, and were provided with a copy of the Account Agreement and Disclosure Statement (the, "Account Agreement") at the time they completed the Application. (*See* Exhibit 1 attached hereto.) Once opened, GLOBAL would administer the Account.

5. RMBT and GLOBAL accepted Plaintiff's Application and mailed them as a course of business practice a Welcome Letter and second copy of the Account Agreement. (*See* Exhibit 2 attached hereto.)

6. Each month after establishing and using their account, GLOBAL mailed to Plaintiffs at the address they provided, from April 2009 through March 2010, by first class mail and proper postage, a paper statement detailing all account activity Plaintiffs authorized in connection with their bank account during each particular calendar month. (*See* Exhibit 3 attached hereto.)

7. As the Account Agreement here reflects, RMBT is facilitating an Automated Clearing House ("ACH") function for account holders, which banks commonly perform. ACH transactions are payment instructions to either debit or credit a deposit account. An ACH transaction is essentially an electronic funds transfer between

originating and receiving financial institutions. ACH payments can either be credits, originated by the accountholder sending funds (payer), or debits, originated by the accountholder receiving funds (payee). ACH payments are used in a variety of payment environments. Originally, consumers primarily used the ACH for paycheck direct deposit. Now, they increasingly use the ACH for bill payments (often referred to as direct payments), corporate payments (business-to-business), and government payments (*e.g.*, tax refunds).

8. Financial institutions may contract with third-party service providers – such as GLOBAL – to conduct their ACH activities, and independent third parties not ordinarily affiliated with a financial institution now generate significant ACH payment activity. GLOBAL was the processor for all the activity that related to the account Plaintiffs in this case established at RMBT.

9. GLOBAL, expressly, does not conduct any negotiations for RMBT account holders with any of the account holder's creditors, and did not do so for Plaintiffs in this case.

10. The foregoing facts are known by me to be true, of my own personal knowledge. I am competent to testify to such acts, and would so testify if I appeared in court as a witness at the trial of this claim.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury and of the laws of the United States that the foregoing is true and correct.

Brent Hampton

Dated: July 30, 2010

EXHIBIT 1

SPECIAL PURPOSE ACCOUNT APPLICATION

I hereby apply for and agree to establish a special purpose account (the "Account") with Rocky Mountain Bank & Trust of Colorado Springs, Colorado ("Bank") for the purpose of accumulating funds to repay my debts in connection with a debt management program (the "Program") sponsored by the organization identified below (the "Sponsor"). I understand that the Account's features, terms, conditions and rules are further described in an Account Agreement and Disclosure Statement that accompanies this Application (the "Agreement"). I acknowledge that I have received a copy of the Agreement; that I have read and understand it; that the Agreement is fully incorporated into this Application by reference; and that I am bound by all of its terms and conditions. I also understand that his Application is subject to Bank's customer identification program, as required the USA Patriot Act and other applicable laws; and accordingly, I hereby represent that the following information is true and complete to the best of my knowledge and belief, and that I will provide a copy of a government issued photo-ID (e.g., a drivers license) for Bank's use in connection with this application.

ACCOUNT OWNERSHIP, CONTROL AND USE

I understand that the Account, when established in accordance with this Application, will be my sole and exclusive property; that only I may authorize deposits to and disbursements from the Account; and that I may withdraw funds from and/or close the Account at any time as provided for in the Agreement. I hereby authorize Bank, through its agent Global Client Solution, LLC ("Global"), to administer the Account on my behalf by (a) periodically transferring and depositing funds to the Account pursuant to the authorization provided below and (b) periodically disbursing funds from the Account pursuant to instructions that I may give from time to time. In this regard, I hereby authorize payment from the Account of the fees and charges provided for in this Application and the Agreement.

PERMISSION TO SHARE DATA

I hereby grant permission for Bank, Global and the Sponsor to share information regarding the Program and the Account with each other to facilitate the transactions I may initiate that involve the Account, and with any other party that is essential to the administration of the Account on my behalf. I understand that the Agreement provides additional information relating to privacy.

Applicant Last Name	First Name	M.I.	Social Security #	Date of Birth (mo/day/yr)
DAVIS	BRETT	B	[redacted]	[redacted]
Authorized Contact Last Name (optional)	**First Name**	**M.I.**	**Social Security #**	**Date of Birth (mo/day/yr)**
DAVIS	LINDA	M	[redacted]	[redacted]
Address	**City**	**State**	**Zip**	
[redacted]	[redacted]	KY	[redacted]	
Home Phone	**E-mail address**		**Mother's Maiden Name (for future ID purposes)**	
[redacted]	[redacted]		[redacted]	
Sponsor			**Account Number with Sponsor**	
NEIL HANTMAN (GHS Solutions)			?	

AUTHORIZATION TO DEBIT BANK ACCOUNT

Financial Institution Information

Bank Name			
[redacted]			
Address	**City**	**State**	**Zip**
[redacted]	[redacted]	[redacted]	[redacted]
Routing Number (1)	**Account Number (2)**		
[redacted]	[redacted]		

Customer Information

Name (as it appears on check)			
BRETT DAVIS			
Address (as it appears on check)	**City**	**State**	**Zip**
[redacted]	[redacted]	[redacted]	[redacted]
Amount of Debit	**Date of Debit**		
$ [redacted]	On or after the 4th day of each month until further notice		

I hereby authorize Bank, through its agent Global, to initiate debit entries to my ☒ checking / ☐ savings account at the financial institution named above (my "Primary Bank Account"), in the amount(s) and on or after the dates(s) set forth above, and to debit the same to my Primary Bank Account for the purpose of transferring funds to my Account at Bank. I represent that my Primary Bank Account exists; that I own it; and that I will maintain sufficient funds in it to permit the debits to clear on the applicable dates. I understand that I will incur a charge as set forth in the Schedule of Fees and Charges if any attempted debit is not immediately honored when presented. In addition, I understand that I may subsequently designate another account for this purpose by contacting Global customer service; that I may also change the corresponding amounts and dates from time to time in this manner; and that the representations I made above about My Primary Bank Account will apply to any other account that I designate.

This authorization shall remain in full force and effect until I give a written termination notice to Global that affords it a reasonable period of time to act on it. Any such notice, and any other written notice that is provided for in this Application or the Agreement, shall be sent to Global customer service at the address set forth in the Agreement. In addition, I understand that Global may terminate this authorization on behalf of Bank by providing me with a written notice at least ten (10) days prior to the actual termination.

1) Routing Number is the 9-digit number that appears in bottom left-hand corner of your check.
2) Account Number is to the right of the Routing Number and after the check number on your check.

Applicant Signature	Date
Brett Davis	4-7-09

SCHEDULE OF FEES AND CHARGES

Program Fees (refer to your Sponsor Agreement)

Account Setup (refer to the enclosed account agreement)

Monthly Service Charge (refer to the enclosed account agreement)

Transaction and Other Fees (refer to the enclosed account agreement)

See the Agreement for the Global payment and correspondence addresses, the address of the Global website and the toll-free Global customer service number.

☐ Monthly statements will be mailed unless this box is checked, in which case they will be sent via e-mail.

FOR OFFICE USE ONLY

[redacted]

ACCOUNT NUMBER

[redacted]

PASSCODE

EXHIBIT 2

Global Client Solutions LLC
4500 South 129th East Ave, Ste 177
Tulsa, Oklahoma 74134

Global Client Solutions Banking Services

Rocky Mountain Bank & Trust

Account #: [redacted]

RETURN SERVICE REQUESTED

March 31, 2009

[redacted]

Brett Davis
[redacted]

Client of GHS Solutions

Internet Password: [redacted]
IVR Password: [redacted]

Welcome to Global Client Solutions

Please read the following carefully and in its entirety as it contains important information regarding your account.

We would like to welcome you to Global Client Solutions, LLC ("GCS"). We are the **processor** for all activity related to your account at Rocky Mountain Bank and Trust ("RMBT"). Your account setup and your new account number is displayed above. You will need this number for future access to your account activity and balance information. The final step in activating your account is to complete and sign your account paperwork which can be done online at https://globalclientsolutions.com/Secure/LoginPage.aspx. Account access instructions are provided below and the website will walk you through the signature process. As an alternative to signing your paperwork on-line, we have provided an account application with this letter which can be returned to our offices, Global Client Solutions, LLC, 4500 South 129th East Ave, Ste 177 Tulsa, Oklahoma 74134 or faxed to 866-357-1402. Please note that if you mail or fax your application you must include a legible copy of a government issued photo ID. Your ID must have the same address as the one we have on file, otherwise please include a copy of a recent utility bill that displays your name and the address we have on file in addition to your ID.

Your account can be accessed online at www.globalclientsolutions.com or through our Customer Support line at (800)-398-7191. Passwords for both services are included at the top of this letter. Please note that your 4-digit Passcode must be used to access account information via telephone and is also used for verification purposes should you need to contact a customer support representative. Internet access requires that you enter your 16-digit account number as your Username, and the "Internet Password" indicated above as your Password. You can change your password once you have logged into the website, or continue to use the one provided. Please take a moment to log in and review your personal information and forward changes to customersupport@globalclientsolutions.com.

In addition to online and telephone access, we will mail you a paper statement listing all account activity during each calendar month. The statement will be mailed out by the 15th of the month following the month being reported. Please take advantage of these various access methods to monitor your account on a regular basis. We strive for excellence in helping you manage your account, but ultimately this is your account and should be treated like any other asset you own.

Our Role as Third Party Processor

Our duties as the **processor** for your account include the drafting of funds from your primary bank account into your account at RMBT as provided for in your application, as well as making payments to your creditors when we are instructed to do so. Please note, however, that we do not maintain records of your individual debts and therefore any questions regarding negotiations of debts and the status of your debt management program should be **directed to GHS Solutions**. Additionally, any questions regarding changes to your draft or deposit schedule should also be **directed to GHS Solutions** because changes to those schedules could directly impact future creditor payments or negotiations.

Included with this letter is your Account Agreement and Disclosure Statement. Any fees applicable to the maintenance of your account with RMBT are listed and should be reviewed. Instructions for contacting us, as well as instructions on how to deposit additional funds into your account are also included in that document. Please feel free to give us a call or send an email if you have any questions about your account. Our office hours are 9:00 am to 6:00 pm CST, Monday through Friday, excluding bank holidays.

Sincerely,

Global Client Solutions
Customer Support Team

ACCOUNT AGREEMENT AND DISCLOSURE STATEMENT

This Account Agreement and Disclosure Agreement (this "Agreement") is between Rocky Mountain Bank & Trust, 755 Cheyenne Meadows, Colorado Springs, CO 80906 (the "Bank"), and you. This document contains the terms, conditions, and disclosures that apply to your special purpose account with us (your "Account"). We hope that you will find it helpful in answering any questions you might have about your Account. By signing an Application for your Account and using it, you agree that this Agreement shall apply; and you agree to abide by all of the terms, conditions, and rules set forth in this Agreement. If you have questions that are not addressed here, or otherwise need to contact us about your Account, please call, e-mail, or write our customer service provider, Global Client Solutions LLC ("GCS"), at the number or address shown at the end of this Agreement. Please review this document carefully and keep it with your other records.

Definitions: In this Agreement, the words, "I," "me," "mine," "my," "you," and "your" mean you and any other party who uses the Account. The words "we," "us," "our," shall mean the Bank or any agent of the Bank, including, without limitation, GCS.

Purpose, Nature and Use of the Account: Your Account is a special purpose bank account that you can use in connection with the debt management program you have undertaken. In general, you will be making periodic deposits to your Account from your primary bank account, and you will be periodically disbursing funds from your Account to repay your debts. Your Account is an FDIC-insured sub-account within a master custodial account maintained at the Bank. You are the only one that has the right to authorize transactions involving your Account; and you may withdraw funds from your Account and/or close it at any time in the manner provided for below. Your Account may not be used for illegal transactions or to purchase illegal goods or services.

Passcode and Password: We will provide you with a four-digit number (your "Passcode") that you will use to access your Account via the telephone. Additionally, we will provide you a random character sequence (your "Password") that you will use to access your account via the Internet. You are responsible for the protection and use of your Passcode or Password. Do not disclose your Passcode or Password to anyone who does not have your permission to access your Account.

Telephonic / Electronic Communications: You authorize us to accept and act upon any agreement or instruction received from you, or authorized by you, concerning your Account where you communicate that agreement or instruction to us by telephone, facsimile, e-mail or other electronic means using a telephone keypad or computer. Use of your Passcode, Password, or any other form of agreed upon designation, in any transaction constitutes acceptance by you and us that it is your electronic signature, as that term is used in the federal Electronic Signature in Global and National Commerce law and applicable state laws.

Authorizing Transactions: You have authorized us to make certain transactions on your behalf in the account application you signed when you applied for your Account (your "Account Application"). From time to time, you may change those instructions and/or give us other instructions to initiate deposits to or disbursements from your Account by using your Password to log into the GCS website or by contacting GCS customer service. We will then follow those instructions provided you have given us a reasonable period of time to act on them. The address of the GCS website and the telephone number for GCS customer service is shown at the end of this Agreement.

Fees and Charges: You promise to pay us the fees and charges shown in the Schedule of Fees and Charges below and in your Account Application; and you agree that we may deduct these charges directly from your Account. The monthly service charge for the first month in which your Account is opened will not be prorated and will be deemed earned on the first day your account is opened. Thereafter, the monthly service charge will be deemed earned in full on the first day of each calendar month. Other fees will be deemed earned at the time of the transaction or the event that gives rise to the fee. We reserve the right to increase the fees and charges relating to your Account for any increase in our associated costs and expenses.

Termination of Agreement: You may terminate this Agreement and close your Account at any time by sending a written notice to GCS customer service at the address shown at the end of this Agreement. We may terminate this Agreement and cancel your Account at any time without notice for inactivity, if your Account is improperly maintained or used, or if you otherwise violate any provision of this Agreement. The effective date for the termination of this Agreement will be ten days after we receive your termination notice or immediately if we terminate it. If either you or we terminate this Agreement, we will promptly send you our check for the collected balance in your Account.

Default and Collection of Accounts: If your Account is suspended, canceled or terminated for any reason and your Account has a negative balance, you agree to pay us the negative balance upon demand. Should you fail to remit all amounts due, you shall remain responsible for the deficit and you understand that we, or anyone on our behalf, shall have the right to collect all such amounts. If we are forced to take collection action, you agree to pay all court costs and collection fees, including reasonable attorney's fees, to the extent permitted by applicable law.

Monthly Statements: We will mail you a monthly statement showing your Account balance unless you have elected to receive your statement online. Additionally, you may obtain balance and transaction information by using your Password to log into the GCS website or by calling GCS customer service. You agree to inspect your statement and promptly notify us of any erroneous, improper or unauthorized transactions.

Interest: No interest will be paid to you on or with respect to your Account.

Consumer Liability: If you believe someone has transferred or may transfer money from your Account without your permission, contact GCS customer service immediately at the number or address shown at the end of this Agreement. Telephoning is the best way to keep your possible losses down. If you fail to notify us promptly, you could lose all of the money in your Account.

FDIC Insurance: The funds in your Account will be FDIC insured up to a maximum of $100,000.00.

Failure to Complete Transactions: We will not be liable for failing to complete a transaction if, through no fault of ours, you do not have enough money in your Account to complete the transaction; or if circumstances beyond our control prevent the completion of the transaction.

Error Resolution Procedures: In case of errors or questions about transactions involving your Account, call or write GCS customer service at the number or address shown at the end of this Agreement as soon as you can. We must hear from you no later than sixty days after the transaction in question has been reflected on your monthly statement. When you contact us, please provide the following information:

1. Your name and Account Number.
2. Date and amount of transaction.
3. Type of transaction and description of the suspected error. Please explain as clearly as possible why you believe there is an error or why you need additional information.
4. Dollar amount of the suspected error.

If you provide this information orally, we may require that you also send it to us in writing within ten business days. We will tell you the results of our investigation within ten business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to forty-five days to investigate your complaint or question. If we decide there is no error, we will send you a written explanation within three business days. You may ask for and receive copies of the documents that we used in our investigation.

Creditor Disputes: You agree to settle all disputes about payments made to your creditors from your Account. We are simply providing your Account to help facilitate your plan to repay your debts. We are not a party to your debt management plan, and you acknowledge that we have no involvement in or responsibilities of any nature with respect to your plan or the results that you may or may not achieve from its execution.

Arbitration and Application of Law: In the event of a dispute or claim relating in any way to this Agreement or our services, you agree that such dispute shall be resolved by binding arbitration utilizing a qualified independent arbitrator of our choosing. Further, you agree that any arbitration shall take place in Colorado Springs, Colorado and that the laws of the State of Colorado shall apply. The decision of an arbitrator will be final and subject to enforcement in a court of competent jurisdiction.

Limitation of Liability: Under no circumstances shall we be liable for any special, incidental, consequential, exemplary or punitive damages.

Change in Terms: We may, at any time, and subject to applicable law, add, delete, or modify the terms, conditions, rights and responsibilities regarding your Account. You will be notified of any changes. However, if the change is made for security purposes, we can implement such change without prior notice. We reserve the right to add, delete, change, modify, or replace, from time to time, and without prior notice, any of our service providers, as we deem necessary in our sole discretion.

Governing Law: The laws of the State of Colorado govern this Agreement without giving effect to the choice of law provisions thereof. If any part of this Agreement is declared void or unenforceable, such provisions shall be deemed severed from this Agreement. The remainder of this Agreement shall remain in full force and effect, and shall be modified to any extent necessary to give such force and effect to the remaining provisions. No delay or forbearance in the strict observance or performance of any provision of this Agreement, nor any failure to exercise a right or remedy hereunder, shall be construed as a waiver of such performance, right, or remedy, as the case may be.

USA Patriot Act Compliance: In order to assist in combating terrorism and preventing the banking system from being used for money laundering purposes, you authorize us to take those steps that are reasonable and practical to identify you and any information about you, including, without limitation, securing a credit report on you and otherwise verifying your identity as we are required to do so by the USA Patriot Act.

PRIVACY POLICY

We are committed to providing the highest level of security and privacy regarding the collection and use of your personal information. Personal information may be collected from your account Application, any updated information you may provide us from time to time and the banking transactions processed through your Account. A description of our Privacy Policy is provided below. If you have additional questions regarding the privacy of your personal information, please contact GCS customer service at the address shown at the end of this Agreement.

Collection / Use of Personal Information: Our collection of your personal information is designed to protect access to your Accounts and to assist us in providing you with the products and services you want and need. All personal information collected and stored by us, or on our behalf, is used for specific business purposes to protect and administer your Account and transactions, to comply with state and federal banking regulations, and to help us better understand your financial needs in order to design or improve our products and services.

Only approved personnel will have access to your personal information. Furthermore, auditing mechanisms have been put into place to further protect your information by identifying the personnel who may have accessed and in any way modified - for example, updated or added to - your personal information.

Maintenance of Accurate Information: It is in the best interest of both you and us to maintain accurate records concerning your personal information. For this reason, we allow you to update your personal information online, at any time, by using your Password to log into the GCS website or by contacting GCS customer service.

Limited Access to Personal Information: We limit access to your personal information to only those personnel with a business reason for knowing such information. We also educate all personnel about the importance of confidentiality and customer privacy. In addition, individual user names and passwords are used by approved personnel to access your personal information, providing audit trails to further safeguard the privacy of your personal information.

Third-Party Disclosure Restrictions: We follow strict privacy procedures in regard to protecting your personal information. In addition, we require all third parties with a business need to access this information to adhere to similar and equally stringent privacy policies. Personal information may be supplied to a third party in order to process a transaction you have authorized or if the disclosure is required or allowed by law (i.e. exchange of information with reputable reporting agencies, subpoena, or the investigation of fraudulent activity, etc.).

Disclosure of Privacy Policies: We are committed to ensuring the privacy of your personal information. For more information regarding our Privacy Policy, please contact GCS customer service.

SCHEDULE OF FEES AND CHARGES

One-time account setup	0.00
Monthly service charge	0.00
Transaction and other fees:	
Incoming wire transfer	10.00
Dishonored/returned deposit item	25.00
Premium disbursement services:	
Wire transfer	15.00
2nd day check delivery	10.00
Standard next day check delivery	20.00
Stop payment order	17.50

CUSTOMER SERVICE INFORMATION

Website Address:

www.globalclientsolutions.com

Correspondence Address:

4500 South 129th East Ave, Ste 177
Tulsa, Oklahoma 74134
Telephone - (800) 398-7191
Fax - (866) 355-8228

Payment Address:

PO Box 61029
Colorado Springs, CO 80960-1029

Express Mail Payment Address:

755 Cheyenne Meadows Rd
Colorado Springs, CO 80906
(719) 579-7628

Wire Transfer Instructions:

Rocky Mountain Bank & Trust
101 East Main, Florence, Colorado 81226
Telephone - (719) 784-6316
ABA# - 107000929
For credit to - Global Client Solutions, Custodian
Account # - 034584
For further credit to: Your name plus your 16-digit acct. number.

MoneyGram Instructions:

Agent locator - www.moneygram.com

Sending Instructions
Pay to - Global Client Solutions, Custodian
Receive Code - 4912
Account # - "DR" + last 8 digits of your 16-digit acct. # (Example: DR12345678)

EXHIBIT 3

Global Client Solutions LLC
4500 S. 129th East Ave, Ste 175
Tulsa, Oklahoma 74134

RETURN SERVICE REQUESTED

Global Client Solutions LLC

Account #: [redacted]

June 04, 2010

Brett Davis
[redacted]

LOUISVILLE, KY 40258

Client of GHS Solutions

ACCOUNT ACTIVITY STATEMENT

DATE	DESCRIPTION	TYPE	AMOUNT	BALANCE
04/08/2009	Debit - 04/06/09	Deposit	543.33	543.33
04/16/2009	Setup Fee - 04/16/09	Customer Fee	-534.33	9.00
04/16/2009	Monthly Fee - 04/16/09	Customer Fee	-9.00	0.00
05/08/2009	Debit - 05/06/09	Deposit	543.33	543.33
05/18/2009	Setup Fee - 05/18/09	Customer Fee	-534.33	9.00
05/18/2009	Monthly Fee - 05/18/09	Customer Fee	-9.00	0.00
06/10/2009	Debit - 06/06/09	Deposit	543.33	543.33
06/16/2009	Setup Fee - 06/16/09	Customer Fee	-534.33	9.00
06/16/2009	Monthly Fee - 06/16/09	Customer Fee	-9.00	0.00
07/08/2009	Debit - 07/06/09	Deposit	499.00	499.00
07/16/2009	Retainer Fee - 07/16/09	Customer Fee	-200.37	298.63
07/16/2009	Monthly Fee - 07/16/09	Customer Fee	-9.00	289.63
08/10/2009	Debit - 08/06/09	Deposit	499.00	788.63
08/17/2009	Retainer Fee - 08/17/09	Customer Fee	-200.37	588.26
08/17/2009	Monthly Fee - 08/17/09	Customer Fee	-9.00	579.26
09/10/2009	Debit - 09/06/09	Deposit	499.00	1,078.26
09/16/2009	Retainer Fee - 09/16/09	Customer Fee	-200.37	877.89
09/16/2009	Monthly Fee - 09/16/09	Customer Fee	-9.00	868.89
10/08/2009	Debit - 10/06/09	Deposit	499.00	1,367.89
10/16/2009	Monthly Fee - 10/16/09	Customer Fee	-9.00	1,358.89
10/16/2009	Retainer Fee - 10/16/09	Customer Fee	-200.37	1,158.52
11/10/2009	Debit - 11/06/09	Deposit	274.00	1,432.52
11/16/2009	Monthly Fee - 11/16/09	Customer Fee	-9.00	1,423.52
11/16/2009	Retainer Fee - New - 11/16/09	Customer Fee	-200.37	1,223.15
11/17/2009	Monthly Fee - 11/17/09	Customer Fee	-9.00	1,214.15
12/09/2009	Debit - 12/06/09	Deposit	274.00	1,488.15
12/16/2009	Monthly Fee - 12/16/09	Customer Fee	-9.00	1,479.15
12/16/2009	Retainer Fee - 12/16/09	Customer Fee	-200.37	1,278.78

Account Inquiries (800) 398-7191

Correspondence Address-
4500 S. 129th East Ave, Ste 175
Tulsa, Oklahoma 74134

Payment Address-
PO Box 61029
Colorado Springs, Co 80960-1029

Please note that the above account balance may not be the actual balance of your account due to pending transactions not yet processed.

Global Client Solutions LLC
4500 S. 129th East Ave, Ste 175
Tulsa, Oklahoma 74134

RETURN SERVICE REQUESTED

Global Client Solutions LLC

Account #: [redacted]

June 04, 2010

Brett Davis
[redacted]

LOUISVILLE, KY 40258

Client of GHS Solutions

ACCOUNT ACTIVITY STATEMENT

DATE	DESCRIPTION	TYPE	AMOUNT	BALANCE
01/08/2010	Debit - 01/06/10	Deposit	274.00	1,552.78
01/19/2010	Monthly Fee - 01/18/10	Customer Fee	-9.00	1,543.78
01/19/2010	Retainer Fee - 01/18/10	Customer Fee	-200.37	1,343.41
02/10/2010	Debit - 02/08/10	Deposit	274.00	1,617.41
02/16/2010	Monthly Fee - 02/16/10	Customer Fee	-9.00	1,608.41
02/16/2010	Retainer Fee - 02/16/10	Customer Fee	-200.37	1,408.04
03/10/2010	Debit - 03/06/10	Deposit	274.00	1,682.04
03/16/2010	Monthly Fee - 03/16/10	Customer Fee	-9.00	1,673.04
03/16/2010	Retainer Fee - 03/16/10	Customer Fee	-200.37	1,472.67
03/30/2010	Brett & Linda Davis	Payment	-1,472.67	0.00

Account Inquiries (800) 398-7191

Correspondence Address-
4500 S. 129th East Ave, Ste 175
Tulsa, Oklahoma 74134

Payment Address-
PO Box 61029
Colorado Springs, Co 80960-1029

Please note that the above account balance may not be the actual balance of your account due to pending transactions not yet processed.

Global Client Solutions LLC
4500 S. 129th East Ave, Ste 175
Tulsa, Oklahoma 74134

RETURN SERVICE REQUESTED

Global Client Solutions LLC

Account #: [redacted]

June 04, 2010

Brett Davis
[redacted]

LOUISVILLE, KY 40258

Client of GHS Solutions

ACCOUNT ACTIVITY STATEMENT

DATE	DESCRIPTION	TYPE	AMOUNT	BALANCE

Account Inquiries (800) 398-7191

Correspondence Address-
4500 S. 129th East Ave, Ste 175
Tulsa, Oklahoma 74134

Payment Address-
PO Box 61029
Colorado Springs, Co 80960-1029

Please note that the above account balance may not be the actual balance of your account due to pending transactions not yet processed.

ATTACHMENT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

BRETT AND LINDA DAVIS,	)	
	)	
Plaintiffs,	)	
	)	**Case No.: 3:10-CV-322-H**
v.	)	
	)	
GLOBAL CLIENT SOLUTIONS LLC, GHS SOLUTIONS, LLC, AND ROCKY MOUNTAIN BANK & TRUST, AND JOHN AND JANE DOES A-K	)	**SUPPORTING MOTION TO COMPEL ARBITRATION**
	)	
	)	*Electronically filed*
Defendants.	)	

DECLARATION OF DOUGLAS L. MCCLURE

Pursuant to 28 U.S.C. § 1746, I, Douglas L. McClure declare as follows:

1. I am the Chairman and CEO of Defendant Rocky Mountain Bank & Trust ("RMBT"). I have personal knowledge of the facts stated herein, or through a review of records over which I have care, custody, and control. This affidavit is made in support of RMBT's memorandum of law supporting its motion to compel arbitration in the above-styled matter.

2. RMBT is a chartered Colorado state bank and is FDIC insured, with its offices located in Colorado.

3. The following documents are relevant to the motion to compel arbitration and are records RMBT made or received at or near the time by, or from information transmitted by, a person with knowledge pertaining to Plaintiff. These documents are duplicate copies of RMBT's original documents, which were made or received at or near the time of the matters set forth by, or from information transmitted by, a person with

knowledge of those matters, are kept in the course of RMBT's regularly conducted activity, and are made or received as part of RMBT's regularly conducted activity as a regular practice and record of that business activity. These documents include the following, which are attached hereto and incorporated herein by reference:

4. Exhibit 1 Plaintiffs' Special Purpose Account Application.

5. Exhibit 2 Plaintiffs' Account Documents including Welcome Letter, and Account Agreement and Disclosure Statement, which contains the arbitration provision.

6. As the Account Agreement attached hereto as Exhibit 2 reflects, RMBT is facilitating an Automated Clearing House ("ACH") function for account holders of this type of account, a function which banks commonly perform. ACH transactions are payment instructions to either debit or credit a deposit account.

7. RMBT contracts with third-party service providers – such as Global Client Solutions, LLC ("GLOBAL"), an agent of RMBT – to conduct it's ACH activities, and independent third parties not ordinarily affiliated with a financial institution now generate significant ACH payment activity. GLOBAL was the processor for all the activity that related to the account Plaintiffs in this case established at RMBT.

8. The foregoing facts are known by me to be true, of my own personal knowledge. I am competent to testify to such acts, and would so testify if I appeared in court as a witness at the trial of this claim.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury and of the laws of the United States that the foregoing is true and correct.

Douglas L. McClure

Dated: July 29, 2010

EXHIBIT 1

SPECIAL PURPOSE ACCOUNT APPLICATION

I hereby apply for and agree to establish a special purpose account (the "Account") with Rocky Mountain Bank & Trust of Colorado Springs, Colorado ("Bank") for the purpose of accumulating funds to repay my debts in connection with a debt management program (the "Program") sponsored by the organization identified below (the "Sponsor"). I understand that the Account's features, terms, conditions and rules are further described in an Account Agreement and Disclosure Statement that accompanies this Application (the "Agreement"). I acknowledge that I have received a copy of the Agreement; that I have read and understand it; that the Agreement is fully incorporated into this Application by reference; and that I am bound by all of its terms and conditions. I also understand that this Application is subject to Bank's customer identification program, as required the USA Patriot Act and other applicable laws; and accordingly, I hereby represent that the following information is true and complete to the best of my knowledge and belief, and that I will provide a copy of a government issued photo-ID (e.g., a drivers license) for Bank's use in connection with this application.

ACCOUNT OWNERSHIP, CONTROL AND USE

I understand that the Account, when established in accordance with this Application, will be my sole and exclusive property; that only I may authorize deposits to and disbursements from the Account; and that I may withdraw funds from and/or close the Account at any time as provided for in the Agreement. I hereby authorize Bank, through its agent Global Client Solution, LLC ("Global"), to administer the Account on my behalf by (a) periodically transferring and depositing funds to the Account pursuant to the authorization provided below and (b) periodically disbursing funds from the Account pursuant to instructions that I may give from time to time. In this regard, I hereby authorize payment from the Account of the fees and charges provided for in this Application and the Agreement.

PERMISSION TO SHARE DATA

I hereby grant permission for Bank, Global and the Sponsor to share information regarding the Program and the Account with each other to facilitate the transactions I may initiate that involve the Account, and with any other party that is essential to the administration of the Account on my behalf. I understand that the Agreement provides additional information relating to privacy.

Applicant Last Name	First Name	M.I.	Social Security #	Date of Birth (mo/day/yr)
DAVIS	BRETT	B	[redacted]	[redacted]

Authorized Contact Last Name (optional)	First Name	M.I.	Social Security #	Date of Birth (mo/day/yr)
DAVIS	LINDA	M	[redacted]	[redacted]

Address	City	State	Zip
[redacted]	[redacted]	KY	[redacted]

Home Phone	E-mail address	Mother's Maiden Name (for future ID purposes)
[redacted]	[redacted]	[redacted]

Sponsor	Account Number with Sponsor
NEIL HARTMAN / GHS Solutions	?

AUTHORIZATION TO DEBIT BANK ACCOUNT

Financial Institution Information

Bank Name			
[redacted]			
Address	**City**	**State**	**Zip**
[redacted]	[redacted]	[redacted]	[redacted]
Routing Number (1)	**Account Number (2)**		
[redacted]	[redacted]		

Customer Information

Name (as it appears on check)			
BRETT DAVIS			
Address (as it appears on check)	**City**	**State**	**Zip**
[redacted]	[redacted]	KY	[redacted]
Amount of Debit	**Date of Debit**		
[redacted]	On or after the 1st day of each month until further notice		

I hereby authorize Bank, through its agent Global, to initiate debit entries to my ☒ checking / ☐ savings account at the financial institution named above (my "Primary Bank Account"), in the amount(s) and on or after the date(s) set forth above, and to debit the same to my Primary Bank Account for the purpose of transferring funds to my Account at Bank. I represent that my Primary Bank Account exists; that I own it; and that I will maintain sufficient funds in it to permit the debits to clear on the applicable dates. I understand that I will incur a charge as set forth in the Schedule of Fees and Charges if any attempted debit is not immediately honored when presented. In addition, I understand that I may subsequently designate another account for this purpose by contacting Global customer service; that I may also change the corresponding amounts and dates from time to time in this manner; and that the representations I made above about My Primary Bank Account will apply to any other account that I designate.

This authorization shall remain in full force and effect until I give a written termination notice to Global that affords it a reasonable period of time to act on it. Any such notice, and any other written notice that is provided for in this Application or the Agreement, shall be sent to Global customer service at the address set forth in the Agreement. In addition, I understand that Global may terminate the authorization on behalf of Bank by providing me with a written notice at least ten (10) days prior to the actual termination.

1) Routing Number is the 9-digit number that appears in bottom left-hand corner of your check.
2) Account Number is to the right of the Routing Number and after the check number on your check.

Applicant Signature	Date
Brett Davis	4-7-09

SCHEDULE OF FEES AND CHARGES

Program Fees (refer to your Sponsor Agreement)

Account Setup (refer to the enclosed account agreement)

Monthly Service Charge (refer to the enclosed account agreement)

Transaction and Other Fees (refer to the enclosed account agreement)

See the Agreement for the Global payment and correspondence addresses, the address of the Global website and the toll-free Global customer service number.

☐ Monthly statements will be mailed unless this box is checked, in which case they will be sent via e-mail.

FOR OFFICE USE ONLY

ACCOUNT NUMBER

PASSCODE

EXHIBIT 2

Global Client Solutions Banking Services

Global Client Solutions LLC
4500 South 129th East Ave, Ste 177
Tulsa, Oklahoma 74134

Rocky Mountain Bank & Trust

Account #: [redacted]

RETURN SERVICE REQUESTED

March 31, 2009

[redacted]

Brett Davis
[redacted]

Client of GHS Solutions

Internet Password: [redacted]
IVR Password: [redacted]

Welcome to Global Client Solutions

Please read the following carefully and in its entirety as it contains important information regarding your account.

We would like to welcome you to Global Client Solutions, LLC ("GCS"). We are the **processor** for all activity related to your account at Rocky Mountain Bank and Trust ("RMBT"). Your account setup and your new account number is displayed above. You will need this number for future access to your account activity and balance information. The final step in activating your account is to complete and sign your account paperwork which can be done online at https://globalclientsolutions.com/Secure/LoginPage.aspx. Account access instructions are provided below and the website will walk you through the signature process. As an alternative to signing your paperwork on-line, we have provided an account application with this letter which can be returned to our offices, Global Client Solutions, LLC, 4500 South 129th East Ave, Ste 177 Tulsa, Oklahoma 74134 or faxed to 866-357-1402. Please note that if you mail or fax your application you must include a legible copy of a government issued photo ID. Your ID must have the same address as the one we have on file, otherwise please include a copy of a recent utility bill that displays your name and the address we have on file in addition to your ID.

Your account can be accessed online at www.globalclientsolutions.com or through our Customer Support line at (800)-398-7191. Passwords for both services are included at the top of this letter. Please note that your 4-digit Passcode must be used to access account information via telephone and is also used for verification purposes should you need to contact a customer support representative. Internet access requires that you enter your 16-digit account number as your Username, and the "Internet Password" indicated above as your Password. You can change your password once you have logged into the website, or continue to use the one provided. Please take a moment to log in and review your personal information and forward changes to customersupport@globalclientsolutions.com.

In addition to online and telephone access, we will mail you a paper statement listing all account activity during each calendar month. The statement will be mailed out by the 15th of the month following the month being reported. Please take advantage of these various access methods to monitor your account on a regular basis. We strive for excellence in helping you manage your account, but ultimately this is your account and should be treated like any other asset you own.

Our Role as Third Party Processor

Our duties as the **processor** for your account include the drafting of funds from your primary bank account into your account at RMBT as provided for in your application, as well as making payments to your creditors when we are instructed to do so. Please note, however, that we do not maintain records of your individual debts and therefore any questions regarding negotiations of debts and the status of your debt management program should be **directed to GHS Solutions.** Additionally, any questions regarding changes to your draft or deposit schedule should also be **directed to GHS Solutions** because changes to those schedules could directly impact future creditor payments or negotiations.

Included with this letter is your Account Agreement and Disclosure Statement. Any fees applicable to the maintenance of your account with RMBT are listed and should be reviewed. Instructions for contacting us, as well as instructions on how to deposit additional funds into your account are also included in that document. Please feel free to give us a call or send an email if you have any questions about your account. Our office hours are 9:00 am to 6:00 pm CST, Monday through Friday, excluding bank holidays.

Sincerely,

Global Client Solutions
Customer Support Team

CFBWel1-0331A300605-JWE3-3 665

ACCOUNT AGREEMENT AND DISCLOSURE STATEMENT

This Account Agreement and Disclosure Agreement (this "Agreement") is between Rocky Mountain Bank & Trust, 755 Cheyenne Meadows, Colorado Springs, CO 80906 (the "Bank"), and you. This document contains the terms, conditions, and disclosures that apply to your special purpose account with us (your "Account"). We hope that you will find it helpful in answering any questions you might have about your Account. By signing an Application for your Account and using it, you agree that this Agreement shall apply; and you agree to abide by all of the terms, conditions, and rules set forth in this Agreement. If you have questions that are not addressed here, or otherwise need to contact us about your Account, please call, e-mail, or write our customer service provider, Global Client Solutions LLC ("GCS"), at the number or address shown at the end of this Agreement. Please review this document carefully and keep it with your other records.

Definitions: In this Agreement, the words, "I," "me," "mine," "my," "you," and "your" mean you and any other party who uses the Account. The words "we," "us," "our," shall mean the Bank or any agent of the Bank, including, without limitation, GCS.

Purpose, Nature and Use of the Account: Your Account is a special purpose bank account that you can use in connection with the debt management program you have undertaken. In general, you will be making periodic deposits to your Account from your primary bank account, and you will be periodically disbursing funds from your Account to repay your debts. Your Account is an FDIC-insured sub-account within a master custodial account maintained at the Bank. You are the only one that has the right to authorize transactions involving your Account; and you may withdraw funds from your Account and/or close it at any time in the manner provided for below. Your Account may not be used for illegal transactions or to purchase illegal goods or services.

Passcode and Password: We will provide you with a four-digit number (your "Passcode") that you will use to access your Account via the telephone. Additionally, we will provide you a random character sequence (your "Password") that you will use to access your account via the Internet. You are responsible for the protection and use of your Passcode or Password. Do not disclose your Passcode or Password to anyone who does not have your permission to access your Account.

Telephonic / Electronic Communications: You authorize us to accept and act upon any agreement or instruction received from you, or authorized by you, concerning your Account where you communicate that agreement or instruction to us by telephone, facsimile, e-mail or other electronic means using a telephone keypad or computer. Use of your Passcode, Password, or any other form of agreed upon designation, in any transaction constitutes acceptance by you and us that it is your electronic signature, as that term is used in the federal Electronic Signature in Global and National Commerce law and applicable state laws.

Authorizing Transactions: You have authorized us to make certain transactions on your behalf in the account application you signed when you applied for your Account (your "Account Application"). From time to time, you may change those instructions and/or give us other instructions to initiate deposits to or disbursements from your Account by using your Password to log into the GCS website or by contacting GCS customer service. We will then follow those instructions provided you have given us a reasonable period of time to act on them. The address of the GCS website and the telephone number for GCS customer service is shown at the end of this Agreement.

Fees and Charges: You promise to pay us the fees and charges shown in the Schedule of Fees and Charges below and in your Account Application; and you agree that we may deduct these charges directly from your Account. The monthly service charge for the first month in which your Account is opened will not be prorated and will be deemed earned on the first day your account is opened. Thereafter, the monthly service charge will be deemed earned in full on the first day of each calendar month. Other fees will be deemed earned at the time of the transaction or the event that gives rise to the fee. We reserve the right to increase the fees and charges relating to your Account for any increase in our associated costs and expenses.

Termination of Agreement: You may terminate this Agreement and close your Account at any time by sending a written notice to GCS customer service at the address shown at the end of this Agreement. We may terminate this Agreement and cancel your Account at any time without notice for inactivity, if your Account is improperly maintained or used, or if you otherwise violate any provision of this Agreement. The effective date for the termination of this Agreement will be ten days after we receive your termination notice or immediately if we terminate it. If either you or we terminate this Agreement, we will promptly send you our check for the collected balance in your Account.

Default and Collection of Accounts: If your Account is suspended, canceled or terminated for any reason and your Account has a negative balance, you agree to pay us the negative balance upon demand. Should you fail to remit all amounts due, you shall remain responsible for the deficit and you understand that we, or anyone on our behalf, shall have the right to collect all such amounts. If we are forced to take collection action, you agree to pay all court costs and collection fees, including reasonable attorney's fees, to the extent permitted by applicable law.

Monthly Statements: We will mail you a monthly statement showing your Account balance unless you have elected to receive your statement online. Additionally, you may obtain balance and transaction information by using your Password to log into the GCS website or by calling GCS customer service. You agree to inspect your statement and promptly notify us of any erroneous, improper or unauthorized transactions.

Interest: No interest will be paid to you on or with respect to your Account.

Consumer Liability: If you believe someone has transferred or may transfer money from your Account without your permission, contact GCS customer service immediately at the number or address shown at the end of this Agreement. Telephoning is the best way to keep your possible losses down. If you fail to notify us promptly, you could lose all of the money in your Account.

FDIC Insurance: The funds in your Account will be FDIC insured up to a maximum of $100,000.00.

Failure to Complete Transactions: We will not be liable for failing to complete a transaction if, through no fault of ours, you do not have enough money in your Account to complete the transaction; or if circumstances beyond our control prevent the completion of the transaction.

Error Resolution Procedures: In case of errors or questions about transactions involving your Account, call or write GCS customer service at the number or address shown at the end of this Agreement as soon as you can. We must hear from you no later than sixty days after the transaction in question has been reflected on your monthly statement. When you contact us, please provide the following information:

1. Your name and Account Number.
2. Date and amount of transaction.
3. Type of transaction and description of the suspected error. Please explain as clearly as possible why you believe there is an error or why you need additional information.
4. Dollar amount of the suspected error.

If you provide this information orally, we may require that you also send it to us in writing within ten business days. We will tell you the results of our investigation within ten business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to forty-five days to investigate your complaint or question. If we decide there is no error, we will send you a written explanation within three business days. You may ask for and receive copies of the documents that we used in our investigation.

Creditor Disputes: You agree to settle all disputes about payments made to your creditors from your Account. We are simply providing your Account to help facilitate your plan to repay your debts. We are not a party to your debt management plan, and you acknowledge that we have no involvement in or responsibilities of any nature with respect to your plan or the results that you may or may not achieve from its execution.

Arbitration and Application of Law: In the event of a dispute or claim relating in any way to this Agreement or our services, you agree that such dispute shall be resolved by binding arbitration utilizing a qualified independent arbitrator of our choosing. Further, you agree that any arbitration shall take place in Colorado Springs, Colorado and that the laws of the State of Colorado shall apply. The decision of an arbitrator will be final and subject to enforcement in a court of competent jurisdiction.

Limitation of Liability: Under no circumstances shall we be liable for any special, incidental, consequential, exemplary or punitive damages.

Change in Terms: We may, at any time, and subject to applicable law, add, delete, or modify the terms, conditions, rights and responsibilities regarding your Account. You will be notified of any changes. However, if the change is made for security purposes, we can implement such change without prior notice. We reserve the right to add, delete, change, modify, or replace, from time to time, and without prior notice, any of our service providers, as we deem necessary in our sole discretion.

Governing Law: The laws of the State of Colorado govern this Agreement without giving effect to the choice of law provisions thereof. If any part of this Agreement is declared void or unenforceable, such provisions shall be deemed severed from this Agreement. The remainder of this Agreement shall remain in full force and effect, and shall be modified to any extent necessary to give such force and effect to the remaining provisions. No delay or forbearance in the strict observance or performance of any provision of this Agreement, nor any failure to exercise a right or remedy hereunder, shall be construed as a waiver of such performance, right, or remedy, as the case may be.

USA Patriot Act Compliance: In order to assist in combating terrorism and preventing the banking system from being used for money laundering purposes, you authorize us to take those steps that are reasonable and practical to identify you and any information about you, including, without limitation, securing a credit report on you and otherwise verifying your identity as we are required to do so by the USA Patriot Act.

PRIVACY POLICY

We are committed to providing the highest level of security and privacy regarding the collection and use of your personal information. Personal information may be collected from your account Application, any updated information you may provide us from time to time and the banking transactions processed through your Account. A description of our Privacy Policy is provided below. If you have additional questions regarding the privacy of your personal information, please contact GCS customer service at the address shown at the end of this Agreement.

Collection / Use of Personal Information: Our collection of your personal information is designed to protect access to your Accounts and to assist us in providing you with the products and services you want and need. All personal information collected and stored by us, or on our behalf, is used for specific business purposes to protect and administer your Account and transactions, to comply with state and federal banking regulations, and to help us better understand your financial needs in order to design or improve our products and services.

Only approved personnel will have access to your personal information. Furthermore, auditing mechanisms have been put into place to further protect your information by identifying the personnel who may have accessed and in any way modified - for example, updated or added to - your personal information.

Maintenance of Accurate Information: It is in the best interest of both you and us to maintain accurate records concerning your personal information. For this reason, we allow you to update your personal information online, at any time, by using your Password to log into the GCS website or by contacting GCS customer service.

Limited Access to Personal Information: We limit access to your personal information to only those personnel with a business reason for knowing such information. We also educate all personnel about the importance of confidentiality and customer privacy. In addition, individual user names and passwords are used by approved personnel to access your personal information, providing audit trails to further safeguard the privacy of your personal information.

Third-Party Disclosure Restrictions: We follow strict privacy procedures in regard to protecting your personal information. In addition, we require all third parties with a business need to access this information to adhere to similar and equally stringent privacy policies. Personal information may be supplied to a third party in order to process a transaction you have authorized or if the disclosure is required or allowed by law (i.e. exchange of information with reputable reporting agencies, subpoena, or the investigation of fraudulent activity, etc.).

Disclosure of Privacy Policies: We are committed to ensuring the privacy of your personal information. For more information regarding our Privacy Policy, please contact GCS customer service.

SCHEDULE OF FEES AND CHARGES

One-time account setup	0.00
Monthly service charge	0.00
Transaction and other fees:	
Incoming wire transfer	10.00
Dishonored/returned deposit item	25.00
Premium disbursement services:	
Wire transfer	15.00
2nd day check delivery	10.00
Standard next day check delivery	20.00
Stop payment order	17.50

CUSTOMER SERVICE INFORMATION

Website Address:

www.globalclientsolutions.com

Correspondence Address:

4500 South 129th East Ave, Ste 177
Tulsa, Oklahoma 74134
Telephone - (800) 398-7191
Fax - (866) 355-8228

Payment Address:

PO Box 61029
Colorado Springs, CO 80960-1029

Express Mail Payment Address:

755 Cheyenne Meadows Rd
Colorado Springs, CO 80906
(719) 579-7628

Wire Transfer Instructions:

Rocky Mountain Bank & Trust
101 East Main, Florence, Colorado 81226
Telephone - (719) 784-6316
ABA# - 107000929
For credit to - Global Client Solutions, Custodian
Account # - 034584
For further credit to: Your name plus your 16-digit acct. number.

MoneyGram Instructions:

Agent locator - www.moneygram.com

Sending Instructions
Pay to - Global Client Solutions, Custodian
Receive Code - 4912
Account # - "DR" + last 8 digits of your 16-digit acct. # (Example: DR12345678)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

BRETT AND LINDA DAVIS,	)	
	)	
Plaintiffs,	)	
	)	**Case No.: 3:10-CV-322-H**
v.	)	
	)	
GLOBAL CLIENT SOLUTIONS LLC, GHS SOLUTIONS, LLC, AND ROCKY MOUNTAIN BANK & TRUST, AND JOHN AND JANE DOES A-K	)	
	)	***Electronically filed***
Defendants.	)	

MOTION TO COMPEL ARBITRATION
WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to LR 7.1 of this Court, Defendants Rocky Mountain Bank & Trust ("RMBT") and Global Client Solutions, LLC ("GLOBAL") serve this motion and memorandum of law in support of their motion to compel arbitration.

As discussed more fully in the accompanying memorandum of law, there are three grounds for compelling this matter to arbitration, dismissing the class claims and staying the action. First, the claims asserted here involve a contract in interstate commerce, which contains an arbitration provision. The claims, therefore, are subject to the Federal Arbitration Act (the "FAA"). Second, the agreement and arbitration provision is silent with respect to class treatment, so, such treatment is foreclosed, under the controlling legal authority. Finally, the FAA expressly requires a stay of this action during any arbitration.

MEMORANDUM OF LAW

I. PREFACE

On behalf of a putative class, Plaintiffs accuse RMBT and GLOBAL of fraud and deception purportedly arising from "aiding and abetting in and conspiring to violate" Kentucky's Debt Adjusting and Consumer Protection Acts, Chapters 380 and 367, respectively.[1] One of the other defendants is alleged to offer "debt settlement programs to Kentucky debtors" and the remaining defendants are John and Jane Does who supposedly "exercised close control" over the "conduct alleged."[2] Central to Plaintiffs' assertions is the contention that the "agreements drafted by *Defendants* are illegal."[3](e.s.) Conspicuously, the alleged agreement between Plaintiffs and RMBT and GLOBAL is not attached to the Complaint. The reason Plaintiffs purposefully omit the agreement upon which their claims rest is simple, the agreement requires arbitration.

II. PERTINENT FACTS

A. THE PARTIES.

Brett and Linda Davis allege they are married and live in Kentucky.[4] They admit that RMBT is a financial institution (a bank) "under the laws of Colorado."[5] They also

[1] [D.E. 1, ¶¶ 1 & 2.].
[2] [D.E. 1, ¶¶ 5 & 7.].
[3] [D.E. 1, ¶ 15.]. Plaintiffs frequently use the improper device of referring to all defendants collectively and expansively irrespective of the actual conduct in which such defendant allegedly engaged as a means of avoiding the pleading specificity requirements of Fed.R.Civ.P. 9(b). RMBT and GLOBAL leave such additional challenges to the sufficiency of Plaintiffs' Complaint for their contemporaneously filed motion under Fed.R.Civ.P. 12(b)(6).
[4] [D.E. 1, ¶ 3.].
[5] [D.E. 1, ¶ 6.].

allege that GLOBAL is an Oklahoma limited liability company, with its principal offices in Tulsa, Oklahoma.[6]

B. THE DEBT SETTLEMENT PROGRAM.

Plaintiffs allege they "participated" in a debt settlement program with one of the co-defendants, a company named GHS Solutions.[7]

Plaintiffs admit in the Complaint that they gave "authority" to GLOBAL and RMBT to "maintain and manage" a bank account Plaintiffs established at RMBT and to "transfer specified monthly program payments" to such bank account in connection with the debt settlement program.[8]

C. THE RMBT ACCOUNT AGREEMENT.

In April 2009, Plaintiffs completed a Special Purpose Account Application (the "Application") to open a bank account at RMBT, and were provided with a copy of the Account Agreement and Disclosure Statement (the "Account Agreement") at the time they completed the Application.[9] Once opened, GLOBAL would administer the Account.[10] The Application Plaintiffs signed provides, in pertinent part, that:

> I hereby apply for and establish a special purpose account (the "account") with Rocky Mountain Bank & Trust of Colorado Springs, Colorado ("Bank") for the purpose of accumulating funds to repay my debts in connection with a debt management program (the "Program") by the organization identified below (the "Sponsor"). I understand that the Accounts features, terms, conditions and rules are further described in an Account Agreement and Disclosure Statement that accompanies this Application (the "Agreement"). I acknowledge that I have received a copy of the Agreement; that I have read and understand it; that the

[6] [D.E. 1, ¶ 4.].
[7] [D.E. 1, ¶¶ 13 & 18.].
[8] [D.E. 1, ¶ 14 c.].
[9] *See* McClure Dec. at ¶¶ 4 & 5; Ex. 1 & 2; Hampton Dec. at ¶ 4; Ex. 1 & 2.
[10] *See* McClure Dec. at ¶¶ 4 & 5; Hampton Dec. at ¶ 4.

> Agreement is fully incorporated into this Application by reference; and that I am bound by all of its terms and conditions.

The Agreement alleged in the Complaint governs the relationship between Plaintiffs and GLOBAL and RMBT, and provides, in part, that:

> **Arbitration and Application of Law:** In the event of a dispute of claim relating in any way to this Agreement or our services, you agree that such dispute shall be resolved by binding arbitration utilizing a qualified independent arbitrator of our choosing. Further, you agree that any arbitration shall take place in Colorado Springs, Colorado and that the laws of the State of Colorado shall apply. The decision of an arbitrator will be final and subject to enforcement in a court of competent jurisdiction.
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> *** * ***
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> **Governing Law:** The laws of the State of Colorado govern this Agreement without giving effect to the choice of law provisions thereof. If any part of this Agreement is declared void or unenforceable, such provisions shall be deemed severed from this Agreement. The remainder of this Agreement shall remain in full force and effect, and shall be modified to any extent necessary to give such force and effect to the remaining provisions. No delay or forbearance in the strict observance or performance of any provision of this Agreement, nor any failure to exercise a right or remedy hereunder, shall be construed as a waiver of such performance, right, or remedy, as the case may be. [11]

RMBT and GLOBAL accepted Plaintiffs' Application and mailed them, as a course of business practice, a Welcome Letter and second copy of the Account Agreement.[12] Each month after establishing and using their account, from April 2009 through March 2010, GLOBAL mailed to Plaintiffs at the address they provided, by first class mail and proper postage, a paper statement. The paper statement detailed all of the account activity which Plaintiffs had authorized during each particular calendar month.[13]

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[11] *See* McClure Dec. at ¶¶ 4 & 5; Ex. 1 & 2; Hampton Dec. at ¶ 4; Ex. 1 & 2.
[12] *See* Hampton Dec. at ¶ 5; Ex. 2.
[13] *See* Hampton Dec. at ¶ 6; Ex. 3.

As set forth in the Account Agreement, RMBT is facilitating an Automated Clearing House ("ACH") function for account holders, which banks commonly perform. ACH transactions are payment instructions to either debit or credit a deposit account. An ACH transaction is essentially an electronic funds transfer between originating and receiving financial institutions. ACH payments can either be credits, originated by the accountholder sending funds (payer), or debits, originated by the accountholder receiving funds (payee). ACH payments are used in a variety of payment environments. Originally, consumers primarily used the ACH for paycheck direct deposit. Now, they increasingly use the ACH for bill payments (often referred to as direct payments), corporate payments (business-to-business), and government payments (*e.g.*, tax refunds).[14] Plaintiffs' account statements reflect the ACH transactions they authorized.

Financial institutions such as RMBT may contract with third-party service providers – such as GLOBAL – to conduct their ACH activities. Indeed, independent third parties not ordinarily affiliated with a financial institution now generate significant ACH payment activity. GLOBAL was the processor for all the activity that related to the account Plaintiffs in this case established at RMBT.[15] Plaintiffs' account statements reflect ACH transfers they authorized and directed GLOBAL to effect.

GLOBAL, expressly, does not conduct any negotiations for any RMBT account holder's creditors, and did not do so for Plaintiffs in this case.[16] Obviously, as it acted solely as the bank with which Plaintiffs' account was placed, neither did RMBT.

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[14] *See* Hampton Dec. at ¶ 7; Ex. 2; McClure Dec. ¶ 6.
[15] *See* Hampton Dec. at ¶ 8; Ex. 2; McClure Dec. ¶ 7.
[16] *See* Hampton Dec. at ¶ 9; Ex. 2.

III. ARGUMENT

After applying for and receiving a bank account at RMBT from which Plaintiffs – alone – could direct payments, they now, with revisionist lenses, are pursuing an "aiding and abetting" theory of action here, and in several other states around the country, in order to accuse a bank and its processing agent of committing a "crime."[17] The fact is, however, and as the Account Agreement reflects, GLOBAL was simply facilitating, at the account holder's request, an ACH transfer, that is, ACH payment instructions received from Plaintiffs to either debit or credit a deposit account.[18] All RMBT, the bank here, did was to contract with a third-party service provider – GLOBAL, an agent of RMBT – to conduct RMBT's ACH activities for Plaintiffs, the account holder. So all GLOBAL did was to act as processor for all the activity that related to account the Plaintiffs controlled, and in this case, established at RMBT.[19]

The nature of the Account, and the parties' performance under it, are a matter for contractual arbitration, not for federal court litigation brought by opportunistic lawyers who are pursuing a dubious aiding and abetting legal theory against a bank and its agent solely to leverage the litigation either for an exorbitant settlement or for statutory attorneys' fees. Under Plaintiffs' legal theory, there is literally no bank anywhere in Kentucky or the world for that matter that is not a debt adjuster under Kentucky's Debt Adjusting statute. Plaintiffs underlying theory sweeps in every type of account from which an account holder pays a creditor.

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[17] [D.E. 1, ¶ 45.].
[18] *See* Hampton Dec. at ¶ 6; Ex. 3.
[19] *See* Hampton Dec. at ¶ 7.

For example, one definition of debt adjusting is doing the following: "[r]eceiv[ing] from the debtor and disburs[ing] to the debtor's creditors any money or other thing of value."[20] Under Plaintiffs' construction of the Debt Adjusting statute, even a purchase of gasoline on credit at the local filling station or a purchase of groceries on a debit card, that is, any transaction processed by a bank, or its third-party processing agent, falls within Kentucky's Debt Adjusting statute and is a deceptive practice under the State's Consumer Protection Act—because Plaintiffs contend it involves receiving and disbursing money to a debtor's creditors. The determination of what either RMBT or GLOBAL did under the Account Agreement to which Plaintiffs agreed, however, is a matter to be decided in arbitration, as discussed next.

A. THE FEDERAL ARBITRATION ACT CONTROLS HERE, AND REQUIRES ARBITRATION OF ALL CLAIMS.

The Federal Arbitration Act, 9 U.S.C. § 2 provides in pertinent part that:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[21]

The FAA promotes a "liberal federal policy favoring arbitration agreements," and "questions of arbitrability must be addressed with a healthy regard for the federal policy

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[20] K.R.S. § 380.010(2)(b).

[21] 9 U.S.C. § 2. The term "involving commerce" covers more than just persons or activities within the flow of interstate commerce; it should be broadly construed to the full limit of Congress' Commerce Clause power, so that it applies to any contract affecting interstate commerce regardless of whether the parties intended the contract to affect interstate or international commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274 (1995); 9 U.S.C. § 1.

favoring arbitration."[22] In essence, the FAA provides authority for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement (9 U.S.C. § 4), and for stays of proceedings when an issue in the proceeding is referable to arbitration (9 U.S.C. § 3).[23] The Sixth Circuit Court of Appeal has consistently applied these principles and routinely enforces arbitration provisions.[24]

Here, the arbitration provision in the Account Agreement Plaintiffs signed states:

> **Arbitration and Application of Law**: In the event of a dispute or claim relating in any way to this Agreement or our services, you agree that such dispute shall be resolved by binding arbitration utilizing a qualified independent arbitrator of our choosing. Further, you agree that any arbitration shall take place in Colorado Springs, Colorado and that the laws of the State of Colorado shall apply. The decision of an arbitrator will be final and subject to enforcement in a court of competent jurisdiction.[25]

If Plaintiffs contest their Account Agreement and its arbitration provision, they bear the burden of showing that the arbitration agreement is invalid or does not encompass the claims at issue.[26] Under Section 2 of the FAA Plaintiffs can only contest arbitrability on two grounds: one, a challenge of the contract as a whole and, two, a challenge to the

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[22] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). *See also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 220, and n. 6 (1985); *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 510, n. 4 (1974).

[23] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). As clearly established by the U.S. Supreme Court, even statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the Act. *Gilmer*, 500 U.S. 20.

[24] *See, e.g., Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 625 (6th Cir. 2003).

[25] *See* McClure Dec. at ¶¶ 4 & 5; Ex. 1 & 2; Hampton Dec. at ¶ 4; Ex. 1 & 2.

[26] *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); Once evidence of an agreement is presented, the burden shifts to the party seeking to avoid the agreement. *Valley Constr. Co. v. Perry Host Management, Co.*, 796 S.W. 2d 365, 368 (Ky. App. 1990); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854 (Ky.2004).

validity of the agreement to arbitrate.[27] Here the parties assented to – and performed under - the Account Agreement containing an arbitration provision, meaning the contract is valid as is the agreement to arbitrate. Consequently, the instant case must be compelled to Arbitration pursuant to the provision in the parties' Account Agreement, for the reasons discussed next.

1. The Account Agreement is a valid contract, containing an arbitration provision.

To determine if an agreement is enforceable, Kentucky courts look to general principles of contract law.[28] A party seeking to enforce an arbitration agreement has the burden of establishing its existence.[29] Under Kentucky law a contract is formed on mutual assent; the parties' assent to a contract is determined by the objective manifestations of contractual assent, and it is the words of the contract and the manifestations of assent which govern, not the secret intentions of the parties.[30]

On March March 31, 2009, Global mailed Plaintiffs a Welcome Letter and Account Agreement, which includes the arbitration provision.[31] On April 7, 2009, Plaintiffs completed, signed and returned an Application to open a bank account at RMBT, and were in possession of a copy of the Account Agreement at the time they signed the Application.[32] Furthermore, each month after establishing and using their account, GLOBAL mailed to Plaintiffs at the address they provided, from April 2009

[27] *Rent-A-Center, West, Inc. v. Jackson*, 2010 WL 2471058, 130 S.Ct. 2772, 2778 (2010) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)); *accord Bratt Enterprises, Inc. v. Noble International, Ltd.*, 338 F.3d 609, 612 (6th Cir.2003).

[28] *Long v. Regency Rehab & Nursing Center*, 2009 WL 1247113 * 4 (W.D. Ky., Louisville May 5, 2009).

[29] *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky.2004).

[30] *Barber Cabinet Co., Inc. v. Sparks*, 2009 WL 4406079 * 3 (Ky. Ct. App. 2009).

[31] *See* Hampton Dec. at ¶ 4, 5 & 6; Ex. 1, 2, & 3.

[32] *See* McClure Dec. at ¶¶ 4 & 5; Ex. 1 & 2; Hampton Dec. at ¶ 4; Ex. 1 & 2.

through March 2010, by first class mail and proper postage, a paper statement detailing all account activity Plaintiffs authorized in connection with their bank account during each particular calendar month.[33] The Account Application, Welcome Letter and Account Agreement reflect the parties' objective manifestations of contractual assent.[34] Indeed, "Kentucky law recognizes that parties may be bound by the terms of an unsigned contract when their actions demonstrate assent to the agreement."[35] Under Kentucky law an agreement to arbitrate is enforceable even if it is neither signed nor dated by one of the parties.[36]

As the foregoing demonstrates, the parties made a contract and performed under the Account Agreement. The parties' Agreement includes a provision calling for arbitration.[37]

2. The arbitration provision is valid and enforceable, and the claims here fall within its scope.

Plaintiffs allege RMBT and GLOBAL committed fraud and deception "by aiding and abetting in and conspiring to violate" Kentucky's Debt Adjusting and Consumer Protection Acts, Chapters 380 and 367, respectively.[38] Central to Plaintiffs assertions is the contention that the "agreements drafted by Defendants are illegal."[39] The Account Agreement here is (i) written, (ii) determined the relationship of the parties, (iii) involved

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[33] *See* Hampton Dec. at ¶ 6; Ex. 3.
[34] *See* McClure Dec. at ¶¶ 4 & 5; Ex. 1 & 2; Hampton Dec. at ¶ 4; Ex. 1 & 2.
[35] *Long*, 2009 WL 1247113 at * 4 (quoting *E.L. Burns Co., Inc. v. David Eng'g & Const., Inc.*, 2008 WL 2388414 at *2 (Ky. App. 2008) (internal citations omitted)).
[36] *Long*, 2009 WL 1247113 at * 4.
[37] 9 U.S.C. § 1, *et seq*.
[38] [D.E. 1, ¶¶ 1 & 2.].
[39] [D.E. 1, ¶ 15.].

interstate commerce, and (iv) contained an arbitration agreement.[40] Plaintiffs' claims are clearly within the scope of the arbitration provision contained in the Account Agreement. That provision is broad, and explicitly covers all claims or disputes "relating in any way to [the] Agreement or to [GLOBAL's or RMBT's] services . . . ."[41]

Moreover, the fact that this case involves statutory claims does not impact the enforcement of the arbitration agreement. The law is well settled that statutory claims, for example the Consumer Protection Act claim brought by Plaintiffs here, have no special exemption from arbitration.[42] "Even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its function."[43]

As the language from the arbitration provision quoted above demonstrates, the claims raised here fall within the scope of the arbitration provision. Since any doubts concerning the scope of arbitrable issues is resolved in favor of arbitration the provision here is enforceable.[44]

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[40] 9 U.S.C. § 2; *Beverly Enterprises, Inc. v. Ping*, 2010 WL 2867914 * 2 (Ky. App. Jul 23, 2010).

[41] *See* McClure Dec. at ¶¶ 4 & 5; Ex. 2; Hampton Dec. at ¶ 4; Ex. 1 & 2.

[42] *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky.App.2001) (Kentucky's Consumer Protection Act did not create an overriding exception to state arbitration act, which allows contracts to compel arbitration).

[43] *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (citations omitted) (holding that parties may arbitrate federal TILA claims). *See also Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000) (TILA claims are arbitrable).

[44] *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Randolph*, 531 U.S. at 89; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24; *see also International Union v. Wald Manufacturing Co.*, 260 F. Supp. 824, 825 (E.D. Ky. 1966) ("In determining whether or not the Agreement covers the particular question or questions raised as being subject to arbitration, all doubt should be resolved in favor of coverage."); *Buck Run Baptist*

B. THE ACCOUNT AGREEMENT IS SILENT WITH RESPECT TO CLASS ARBITRATION, WHICH FORECLOSES A CLASS ARBITRATION OF THE CLAIMS ASSERTED HERE.

The arbitration provision in the Agreement is silent regarding class action arbitration and its procedures, and, while arbitration is obligatory, there can be no class action arbitration here. For example, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,*[45] the Supreme Court reaffirmed that cases, such as this one, styled as class actions are equally subject to mandatory arbitration. But where, like here, the arbitration agreement makes clear that neither Plaintiffs nor RMBT and Global agreed to the conduct of the arbitration as a class action, the Supreme Court held that where there was no specific agreement to authorize a class action arbitration, the parties, while required to arbitrate, could not be compelled to arbitrate their suit as a class action. The Supreme Court made clear "that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." Likewise, in *Lockman v. J.K. Harris & Co.*, LLC,[46] this Court held:

> No Kentucky court has considered the procedural question of whether a party to an arbitration agreement is entitled to pursue a class action absent a provision allowing it. However, all federal courts and some state courts have held that the Federal Arbitration Act, 9 U.S.C. § 1-307 (2007), requires enforcement of agreements precisely as written. The Sixth Circuit has held that a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation. *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir.1991). If a district court in this circuit is precluded from consolidating arbitration proceedings, it is certainly precluded from compelling to arbitration a class action, which

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Church, Inc. v. Cumberland Surety Ins. Co., Inc., 983 S.W.2d 501, 504 (Ky. 1998); *Fayette County Farm Bureau Federation v. Martin*, 758 S.W.2d 713, 714 (Ky. App. 1988).

[45] 130 S.Ct. 1758, 1775, (2010).

[46] 2007 WL 734951 at * 4 (W.D. Ky. Mar. 6, 2007).

> would require the consolidation of claims of both known and unknown parties. The Seventh Circuit came to the same conclusion, finding no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration. *Champ v. Siegal Trading Co.*, 55 F.3d 269, 276 (7th Cir.1995). The court held that by assenting to an arbitration agreement, parties give up certain "procedural niceties" available in court, such as the ability to pursue a class action. *Id.* **Therefore, in these circumstances, silence regarding any procedures for or even the availability of class arbitration is best construed as a prohibition of it.** *See* Joshua S. Lipshutz, The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits, 57 Stan. L.Rev.. 1677, 1697-98 (2005).[47]

In the instant case, as in *Stolt-Nielsen S.A.* and *Lockman*, the Agreement and the arbitration provision is silent with respect to the right to pursue a class action.[48] On the legal authority cited including this Court's own prior rulings, this Court must compel the arbitration of Plaintiffs' individual claims but is without the power to compel arbitration on behalf of a putative class, which would impermissibly permit consolidation of claims of known and unknown parties.[49] By assenting to the arbitration provision in the Agreement, Plaintiffs relinquished certain "procedural niceties" available in court, such as the ability to pursue a class action.[50] Therefore, as held in *Lockman*, and echoed in

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[47] *Id.* (emphasis added).

[48] *See* McClure Dec. at ¶¶ 4 & 5; Ex. 2; Hampton Dec. at ¶ 4; Ex. 1 & 2.

[49] *Lockman*, 2007 WL 734951 at * 4; *see also Eaves-Leanos v. Assurant, Inc.*, 2008 WL 1805431 ** 2-3 (W.D. Ky. Apr. 21, 2008). Furthermore, as is argued in RMBT's and GLOBAL' motion to dismiss, and supporting memorandum, because Plaintiffs can never state a plausible class claim, the class action must be dismissed. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

[50] The contractual nature of arbitration means that parties may specify with whom they choose to arbitrate their disputes. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement" (emphasis added)); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) ("[A]n arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"); *accord, First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943

Stolt-Nielsen S.A., under these circumstances, silence regarding any procedures for or even the availability of class arbitration is best construed as a prohibition of it. Thus, Plaintiffs' class allegations should be dismissed.

C. IF NOT DISMISSED, A STAY OF THE ACTION IS REQUIRED.

Section 3 of the FAA expressly provides that, where a valid arbitration agreement requires a dispute to be submitted to binding arbitration, the district court shall stay the action "until such arbitration has been had in accordance with the terms of the agreement."[51]

IV. CONCLUSION

Based on the foregoing, the valid agreement in interstate commerce between the parties, which contains an enforceable arbitration provision, must be compelled to arbitration under the FAA. Since the agreement is silent on class treatment, there can be no class action and since arbitration must be compelled, a stay of the action is required under the FAA.

("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration").

[51] 9 U.S.C. § 3; *Rent-A-Center, West, Inc. v. Jackson*, 2010 WL 2471058, 130 S.Ct. 2772, 2776 (2010); *see also Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 624 (6th Cir.2003) (noting that the FAA "provides for a stay of proceedings when an issue is referable to arbitration and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement."); *Collins v. Burlington N. R. Co.*, 867 F.2d 542, 545 (9th Cir. 1989) (remanding case where district court failed to consider whether a stay was appropriate as a result of binding arbitration agreement).

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by ECF notice or U.S. mail to the persons indicated on this 2nd day of August, 2010:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINGINHO POWELL, Plaintiff, v. The PAYDAY LOAN STORE OF ILLINOIS, INC., Defendant.	))))))))))	1:09-cv-4146 Jury Demanded

COMPLAINT

CLASS ACTION

1. Plaintiff Dominginho Powell brings this action to secure redress for violation of the Equal Opportunity Credit Act 15 U.S.C. §1691 ("ECOA"), the Truth in Lending Act, 15 U.S.C. §1602 et seq., the Telephone Consumer Protection Act, 47 U.S.C. § 227 and the Illinois Consumer Fraud Act, 815 ILCS 505/2 et seq. ("ICFA").

INTRODUCTION

2. The defendant lender regularly and systematically makes loans to Illinois consumers at interest rates at 300% and above that call for two payments: one small payment due approximately a month after closing, and another balloon payment for the balance of the loan due the month after that. This scheme is designed to make the first payment affordable and the second payment unaffordable.

3. PLS takes payments by cash or certified funds, only, so customers typically make payments in-person. When customers come in to make their first payment, PLS' standard and systematic practice is to tell them that they must sign new loan documents, using the balloon

payment it knew in the beginning the borrower could not afford, and the threat of repossession of their car as leverage if the borrower protests. Customers like plaintiff typically do sign new loan papers, but only do so because they were either induced to believe that this is the way loans are "supposed to work" or because they believe they have no other reasonable choice, or both. PLS tricked plaintiff with this scheme nine times between June 2008 and March 2009.

4. PLS never sends such customers any adverse action notice pursuant to the ECOA; a violation of 15 U.S.C. § 1691.

5. Furthermore, PLS' standard practice is to treat each "loan" separately, even though it knows when it makes the first loan that it will force a refinance before the maturity of the original loan and collect much more in finance charges than displayed in the truth in lending disclosures. This TILA paperwork makes it look like the consumer is in the same position as the previous month: similar payment structure and amount, identical APR and almost identical disclosed finance charge.

6. Because it was always PLS' plan to issue multiple loans to the borrowers, principals of equity require looking at each borrower's string of loans as one large loan, rather than as a series of little loans. Thus, the finance charge disclosed in each loan after the first is understated; a violation of the TILA, 15 U.S.C. § 1638(a). The finance charge for the "second" loan should have been added to the sum disclosed in the first so that the borrower had a chance to understand his position. Alternatively, the finance charge in the first TILA disclosure should have disclosed the true anticipated finance charge. Alternatively, defendant should not have been engaged in this kind of predatory lending.

7. The practice of signing a consumer to one loan with the intent to bring them into another loan is called "loan flipping." PLS regularly baits money-troubled consumers into

entering into loan agreements that it knows the consumers cannot satisfy, with the purpose and intent to induce the customers into entering into new "agreements" on a monthly basis. The purpose and effect of this scheme is to have each monthly "agreement" look just like the previous: a similar first and second payment, an APR that is disclosed as the same percentage rate and a finance charge that is disclosed as almost identical to that of the first loan. After nine nearly identical loans and $5,000 in interest, plaintiff's principal has gone down only a few dollars.

JURISDICTION AND VENUE

8. This Court has federal question subject matter jurisdiction over the ECOA and TILA claims and supplemental jurisdiction over the state law and TCPA claims under 28 U.S.C. §1367.

9. Venue is proper because a substantial portion of the events complained of occurred in this District.

PARTIES

10. Dominginho Powell ("Powell") is an individual who resides in this district.

11. The Payday Loan Store of Illinois, Inc. is an Illinois corporation that does business in this district. Its registered agent is Burke Law Agents, Inc. 330 N. Wabash Ave, 22nd Floor, Chicago, Illinois 60611.

FACTS

12. June 20, 2008 Loan. On or about June 30, 2008, plaintiff entered PLS' location at 628 W. 14th Street, Chicago Heights, Illinois in order to obtain a loan. Plaintiff had been having financial difficulties, and needed a loan to make ends meet.

13. The "best" loan PLS offered plaintiff was an automobile title loan for $2,265 at 300% interest. Plaintiff reluctantly entered into the loan transaction. Plaintiff used his 1972 Oldsmobile as collateral.

14. The loan called for two installments; one payment of $558.49 on July 30, 2008, and a balloon payment of $2842.10 on August 30, 2008. The finance charge was listed as $1,135.60.

15. PLS knew that plaintiff would not be able to make the balloon payment at the time of the loan. It entered into the transaction, anyway.

16. July 30, 2008 Loan. When plaintiff went in to make the first payment on or about July 30, 2008, PLS told him that he was required to refinance the loan. Plaintiff reluctantly did so. Plaintiff does not have the documentation from that loan. Upon information and belief, the terms of the second loan were less favorable than the terms of the first.

17. August 31, 2008 Loan. Plaintiff went to PLS on August 31, 2008, to make the August 30, 2008 payment. On that date, PLS took a payment for the old loan, and told plaintiff that, as a part of the deal, he had to sign new papers refinancing the remaining balance of approximately $2,263.49, which was not yet due.

18. Plaintiff only signed the papers because (a) PLS told him that signing new loan papers on or around the due date of the first payment was their standard procedure, because (b) PLS told him that he was required to do so, and because (c) plaintiff could not, at that time, pay the balance of the loan.

19. The August 31, 2008 loan called for two payments: one for $558.12 due on September 30, 2008, and a balloon payment of $2,840.21 due on October 31, 2008. The finance charge for this loan was listed as $1,134.85.

20. October 3, 2008 Loan. Plaintiff went to the same PLS location to make a payment on or about October 3, 2008.

21. On that date, PLS took a payment of $615 for the August 31, 2008 loan, and told plaintiff that he would have to again sign new papers refinancing the remaining balance of approximately $2,263, or face repossession of the car.

22. The October 3, 2008 loan was for $2,262 at 300% interest. It was to be paid in two installments: one for $557.85 due on November 2, 2008, and one for $2,838.87, due on December 3, 2008. The finance charge for this loan was listed as $1,134.31.

23. PLS knew that plaintiff could not pay the balance of the previous loan, and knew that plaintiff would not be able to pay the loan it was requiring. Plaintiff had no choice, though, and signed the loan papers.

24. November 3, 2008 Loan. On November 3, 2008, plaintiff went to PLS to make a payment on the previous loan, and made a payment of $557.00.

25. PLS told plaintiff at that time that, as part of standard procedure, he had to sign new papers and refinance the balance of his loan. Plaintiff signed new papers financing the remaining $2,258.87 at 300%.

26. The truth in lending documents called for two payments: one for $556 due on December 3, 2008, and a balloon payment for $2,258.87 due on January 3, 2009. The finance charge for this loan was listed as $1,134.53.

27. December 3, 2008 Loan. On December 3, 2008, plaintiff went to PLS to make a payment on the previous loan, and made a payment.

28. PLS told plaintiff at that time that, as part of standard procedure, he had to sign new papers and refinance the balance of his loan.

29. Plaintiff signed new papers financing the remaining $2,258.85 at 300% interest. This loan had two payments: one for $556.97 due on January 2, 2009, and a balloon payment for $2,834.39 due on February 2, 2009. The finance charge for this loan was listed as $1,134.52.

30. January 6, 2009 Loan. On January 6, 2009, plaintiff went to PLS to make a payment on the previous loan, and made a payment.

31. PLS told plaintiff at that time that, as part of the deal, he had to sign new papers and refinance the balance of his loan. Plaintiff protested, but signed new papers financing the remaining $2,258.87 at 300%. Plaintiff only did this because PLS told him this was required, and because plaintiff could not, at that time, afford to pay the balance of the loan.

32. This loan called for two payment installments: one for $556.04 due on February 2, 2009, and a balloon payment for $2,255.09 due on March 8, 2009. The finance charge for this loan was listed as $1,130.63.

33. February 7, 2009 Loan. On February 7, 2009, plaintiff went to PLS to make a payment on the previous loan, and made a cash payment of $575.

34. PLS told plaintiff at that time that, as part of the deal, he had to sign new papers and refinance the balance of his loan.

35. Plaintiff protested, but signed new papers financing the remaining $2,254.20 at 300%. Plaintiff only did this because PLS told him this was required, and could not, at that time, pay the balance of the loan.

36. This loan had two payments: one for $555.83 due on March 9, 2009, and a balloon payment for $2828.55 due on April 9, 2009. The finance charge for this loan was listed as $1,130.19.

37. March 9, 2009 Loan. On March 9, 2009, plaintiff went to PLS to make a payment on the previous loan. Plaintiff made a cash payment on that date.

38. PLS told plaintiff at that time that, as part of the deal, he had to sign new papers and refinance the balance of his loan.

39. Plaintiff protested, but signed new papers financing the remaining $2,235.03 at 300%. Plaintiff only did this because PLS told him this was required, and could not, at that time, pay the balance of the loan.

40. This loan had two payments: one for $551.10 due on April 8, 2009, and a balloon payment for $2804.50 May 9, 2009. The finance charge for this loan was listed as $1,120.58.

41. April 8, 2009. On April 8, 2009, plaintiff went to PLS to make a payment on the previous loan, and made a cash payment of $551.10.

42. PLS told plaintiff at that time that, as part of the deal, he had to sign new papers and refinance the balance of his loan. This loan had a higher interest rate, and payments every two weeks.

43. Plaintiff protested, and told PLS that this was not fair. He realized that he had already paid nearly $5,000 for a loan that was supposed to cost $1,135.59.

44. The finance charge for each loan was understated. Plaintiff has currently paid over $5,000 and still owes approximately $2,235 – an amount very similar to the amount he borrowed in the first place.

45. PLS never sent plaintiff any letters explaining why he was required to enter into any new loan agreement.

46. Upon information and belief, PLS acted on applications for more than one hundred and fifty loan applications during 2007, and more than one hundred and fifty loan applications during 2008.

47. PLS called plaintiff numerous times on his cellular telephone to collect the April 8, 2009, that plaintiff never signed. Upon information and belief, PLS used an "automatic telephone dialing system" as the term is defined in 47 U.S.C. §227(b), to call plaintiff. In April 2009, plaintiff instructed PLS to stop calling him. PLS called plaintiff on his cell phone, this request.

Count I – ECOA – Class Claim

48. Plaintiff incorporates all previous paragraphs.

49. When a creditor unilaterally changes credit terms to the detriment of the borrower like PLS did here, the ECOA, 15 U.S.C. §1691(d) requires the creditor to send the borrower a written "adverse action" notice. The statute reads:

> Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—
>
> (A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or
>
> (B) giving written notification of adverse action which discloses
>
> > (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and
> >
> > (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

50. Plaintiff and the class members were indirect applicants for credit under §1691a(b). Plaintiff and the class were improperly induced to re-apply for credit that they already had before the maturity of the loans.

51. The ECOA, 15 U.S.C. §1691(d)(6) defines "adverse action" as:

For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

52. The implementing regulations 12 C.F.R. § 202.2(c) define "adverse action" as:

(c) Adverse action--(1) The term means:

(i) A refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered;

(ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts; or

(iii) A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

(2) The term does not include:

(i) A change in the terms of an account expressly agreed to by an applicant.

(ii) Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account;

(iii) A refusal or failure to authorize an account transaction at point of sale or loan, except when the refusal is a termination or an unfavorable

> **change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts, or when the refusal is a denial of an application for an increase in the amount of credit available under the account;**
>
> **(iv) A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or**
>
> **(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.**

53. PLS' requirement that its customers sign new loan documents was an adverse action: the finance charge when viewed as a whole went up, even though the APR and principal remained fairly constant. The APR and principal remaining constant was part and parcel to the scheme to trick the borrowers that there had been no adverse action at all, and that their deal remained unchanged.

54. Although the borrowers signed the "new" loan documents, they did not "expressly agree" to the changes; they were tricked into believing that they had no choice in the matter. Further, even if they realized what was happening, they had no control over whether to sign the document because, pursuant to PLS' plan, they could not afford the second payment.

55. Plaintiff brings this claim on behalf of a class. The class is defined as:

> All Illinois residents who (a) entered into a consumer credit arrangement with defendant, (b) where the loan called for two payments, one payment of between 10% and 20% and a balloon of the remainder of the disclosed "total of payments" (c) where the loan was "refinanced" within five days of the due date of the first payment, (c) where no notice of adverse action was sent by PLS explaining the specific reasons why the loan terms were changed, (d) where the date of any such new loan is on or after the date one year before the filing of this action.

56. Upon information and belief, there are more than 50 members of the proposed class; sufficient to satisfy the numerosity requirement.

57. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting any individual member of the Class, including plaintiff. Such questions common to the Class include, but are not limited to:

a. Whether defendant had a pattern and practice of inducing borrowers into signing new loan papers on or around the due date of the first payment;

b. Whether defendant sent such borrowers a sufficient adverse action notice; and

c. Calculation of actual and punitive damages.

58. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has no interests that might conflict with the interests of the class. Plaintiff is interested in pursuing her claims against defendant vigorously, and has retained counsel competent and experienced in class and complex litigation.

59. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy.

60. Payday Loan Store of Illinois, Inc. has acted on grounds generally applicable to the class, thereby making relief appropriate with respect to the class as a whole. Prosecution of separate actions by individual members of the class would create the risk of inconsistent or

varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct.

61. The identity of the class is likely readily identifiable from defendant's records.

62. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable.

WHEREFORE, plaintiff requests that this Court enter judgment against PLS and in favor of plaintiff and the class for:

a. Actual and punitive damages;

b. Attorneys' fees and costs of suit; and

c. Any other relief the court deems proper.

Count II – Truth in Lending – Class Claim

63. Plaintiff incorporates all previous paragraphs.

64. The Truth in Lending Act, 15 U.S.C. § 1638(a) requires lenders to accurately state the finance charge for credit transactions. That section states:

> **Required disclosures by creditor. For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:**
> ***
> **(2)(A) The "amount financed", using that term, which shall be the amount of credit of which the consumer has actual use. This amount shall be computed as follows, but the computations need not be disclosed and shall not be disclosed with the disclosures conspicuously segregated in accordance with subsection (b)(1) of this section:**
>
> > **(i) take the principal amount of the loan or the cash price less downpayment and trade-in;**
> >
> > **(ii) add any charges which are not part of the finance charge or of the principal amount of the loan and which are financed by the consumer, including the cost of any items excluded from the finance charge pursuant to section 1605 of this title; and**

> **(iii) subtract any charges which are part of the finance charge but which will be paid by the consumer before or at the time of the consummation of the transaction, or have been withheld from the proceeds of the credit.**

65. PLS knew when it entered into the transaction with plaintiff and with the other borrowers that it would induce them into signing new loan documents upon payment of the first payment

66. PLS thus misstated the finance charge for every transaction it entered into with plaintiff and the class because it failed to take into account the sum of the finance charges from the subsequent loans it planned to obtain through "loan flipping."

67. Plaintiff brings this claim on behalf of a class. The class is defined as:

> All Illinois residents who (a) entered into a consumer credit arrangement with defendant, (b) where the loan called for two payments, one payment of between 10% and 20% and a balloon of the remainder of the disclosed "total of payments" (c) where the loan was "refinanced" within five days of the due date of the first payment, (c) where the "finance charge" of any loan other than the initial loan did not disclose the sum of the finance charges from previous loans as part of the "new" finance charge, (d) where the date of any such new loan is on or after the date one year before the filing of this action.

68. Plaintiff does not seek recovery for himself or the class for misstatements on the initial loans. Plaintiff seeks recovery for subsequent loans, only, that he and the class were tricked into signing.

69. Upon information and belief, there are more than 50 members of the proposed class; sufficient to satisfy the numerosity requirement.

70. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting any individual member of the Class, including plaintiff. Such questions common to the Class include, but are not limited to:

a. Whether defendant had a pattern and practice of understating the finance charge;

b. Calculation of actual and statutory damages.

71. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has no interests that might conflict with the interests of the class. Plaintiff is interested in pursuing her claims against defendant vigorously, and has retained counsel competent and experienced in class and complex litigation.

72. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy.

73. Payday Loan Store of Illinois, Inc. has acted on grounds generally applicable to the class, thereby making relief appropriate with respect to the class as a whole. Prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct.

74. The identity of the class is likely readily identifiable from defendant's records.

75. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable.

76. Plaintiff has been damaged as a result of the violation(s).

WHEREFORE, plaintiff requests that this Court enter judgment against PLS and in favor of plaintiff and the class for:

a. Statutory and actual damages;

b. Attorney's fees and costs of suit;

c. Any other relief the court deems proper.

Count III – Illinois Consumer Fraud Act – Class Claim

77. Plaintiff incorporates all previous paragraphs.

78. The Illinois Consumer Fraud Act, 815 ILCS 505/2 et seq. broadly prohibits deceptive and unfair conduct.

79. The conduct alleged herein was deceptive and unfair within the meaning of the ICFA.

80. For example, it is deceptive within the meaning of the ICFA to trick consumers into signing new loan documents by telling them that this is the "way loans work."

81. It is deceptive within the meaning of the ICFA to induce borrowers into signing new loan agreements without disclosing the true finance charge.

82. It is unfair within the meaning of the ICFA to engage in "loan flipping" such that a borrower owes the same principal amount for a loan they have paid $5,000 for after approximately one year.

83. It is unfair within the meaning of the ICFA to issue loans that PLS knew or had reason to know, the borrowers could not afford.

84. Violations of the TILA and ECOA are also violations of the ICFA.

85. Plaintiff brings this claim on behalf of two classes. The classes are overlapping and identical to those in Counts I and II.

WHEREFORE, plaintiff requests that this Court enter judgment against PLS and in favor of plaintiff and the class for:

a. Actual and punitive damages;

b. Attorney's fees and costs of suit;

c. Any other relief the court deems proper.

Count IV – Telephone Consumer Protection Act

86. Plaintiff incorporates paragraphs 1 through 47.

87. PLS called plaintiff on his cellular telephone many times.

88. Upon information and belief, based upon the frequency of the calls and a pause at the beginning of the call, PLS used an "automatic telephone dialing system" within the meaning of 47 U.S.C. §227(b) to make those calls.

89. Plaintiff asked PLS to stop calling in April 2009, but PLS persisted.

WHEREFORE, plaintiff requests that this Court enter judgment against PLS and in favor of plaintiff and the class for:

a. Statutory damages of $500 per call; $1,500 per call if the violation is found to be willful;

b. Any other relief the court deems proper.

Respectfully submitted,

/s/Alexander H. Burke

Alexander H. Burke
BURKE LAW OFFICES, LLC
155 N. Michigan Ave., Suite 9020
Chicago, IL 60601
(312) 729-5288
(312) 729-5289 (fax)
ABurke@BurkeLawLLC.com

JURY DEMAND

Plaintiff demands trial by jury.

/s/Alexander H. Burke

Alexander H. Burke
BURKE LAW OFFICES, LLC
155 N. Michigan Ave., Suite 9020
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(312) 729-5288
(312) 729-5289 (fax)
ABurke@BurkeLawLLC.com

DOCUMENT PRESERVATION DEMAND

Plaintiff hereby demands that the defendant take affirmative steps to preserve all recordings, data, documents and all other tangible things that relate to plaintiff or the putative class members, the events described herein, any third party called in association with any account or file associated with plaintiff or the putative class members, and any account or number relating to any of them. These materials are very likely relevant to the litigation of this claim. This demand shall not narrow the scope of any independent document preservation duties of the defendant.

/s/Alexander H. Burke

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINGIHNO POWELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09 C 4146
	)	
PAYDAY LOAN STORES OF ILLINOIS, INC.,	)	Judge Gottschall
	)	
Defendant.	)	

AFFIDAVIT OF JEFF BENDY

STATE OF ILLINOIS)
) ss.:
COUNTY OF COOK)

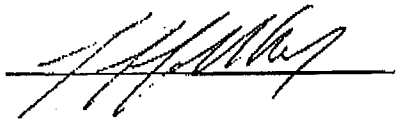
I, Jeff Bendy, being first duly sworn upon my oath, and under penalties of perjury, depose and state as follows:

1. I am an adult of sound mind and can testify to the matters set forth in this affidavit at trial or hearing, based upon personal knowledge.

2. I am Director of Operations – Illinois South, and authorized to provide this affidavit on behalf of The Payday Loan Store of Illinois, Inc. ("PLS").

3. I have reviewed the copies of the Installment Loan and Security Agreements, which are attached as Exhibits A to I to this affidavit. They are true and accurate copies. These records are a part of Dominginho Powell's loan file; they are kept in the course of PLS's ordinary and regular business activity, and it is in the ordinary and regular course of PLS's business to keep and maintain such records.

Further Affiant Sayeth Not.



Subscribed and sworn to
Before me this 2nd th day of
September, 2009.

Notary Public

OFFICIAL SEAL
MICHELLE PRICE
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:05/17/10

EXHIBIT A

INSTALLMENT LOAN AND SECURITY AGREEMENT

Loan # PD065 -37157-675500097

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1120.57	$ 2235.03	$ 3355.60

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	551.10	Payment on Wednesday, 04/08/2009
1	2804.50	Final payment on Saturday, 05/09/2009

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 0.00
2) Amount Paid On Previous Loan with us: $ 2235.03 (only if amount financed is $200 or more)
3) Official Fees $

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3U67K2M1481660000	X7114671601	910160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, or, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature _____ Date 03/09/2009 Company Representative _____

03/09/2009

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all o. .rt of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and working order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor); or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permited by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of repossession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for Important Information.

READ AND SIGN ONE

Covered Borrower Identification Statement

Federal law provides important protections to active duty members of the Armed Forces and their dependents. To ensure that these protections are provided to eligible applicants, we require you to sign one of the following statements as applicable:

I AM a regular or reserve member of the Army, Navy, Marine Corps, Air Force, or Coast Guard, serving on active duty under a call or order that does not specify a period of 30 days or fewer.

Applicant's Signature _____ Date _____

I AM a dependent of a member of the Armed Forces on active duty as described above because I am the member's spouse, the member's child under the age of eighteen years old, or I am an individual for whom the member provided more than one-half of my financial support for 180 days immediately preceding today's date.

Applicant's Signature _____ Date _____

– OR –

I AM NOT a regular or reserve member of the Army, Navy, Marine Corps, Air Force, or Coast Guard, serving on active duty under a call or order that does not specify a period of 30 days or fewer (or a dependent of such member).

Applicant's Signature _____ Date 3.9.09

Warning: It is important to fill out this form accurately. Knowingly making a false statement on a credit application is a crime.

How Did You Hear about PLS?

- ☐ Billboard
- ☒ I am a PLS Customer
- ☐ Doorhanger
- ☐ Flyer
- ☐ Friend
- ☐ Internet/PLS Website
- ☐ Mail
- ☐ Mailing
- ☐ Another Local Business _____ (name, if known)
- ☐ Radio
- ☐ Sign
- ☐ Store Signage
- ☐ TV
- ☐ Yellow Pages
- ☐ Customer Referral _____ Account# _____
- ☐ Newspaper (Publication) _____
- ☐ Other _____

EXHIBIT B

INSTALL[illegible] LOAN AND SECURITY AGREEMENT

Loan #.PD065 -37157-67550008T

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1130.18	$ 2254.20	$ 3384.38

CHICAGO HEIGHTS 2
628 W. 14TH STREET
PAID
MAR 09 2009

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	555.83	Payment on Monday, 03/09/2009
1	2828.55	Final payment on Thursday, 04/09/2009

CASH REN DEP (check #) 575
AMOUNT PAID
REFUND AMOUNT

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 0.00
2) Amount Paid On Previous Loan with us: $ 2254.20
3) Official Fees $ (only if amount financed is $200 or more)

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3J67K2M1481660000	X7114671601	9I0160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth In Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature _____ Date 02/07/2009 Company Representative _____

02/07/2009

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and working order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor); or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permitted by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of repossession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

READ AND SIGN ONE

Covered Borrower Identification Statement

Federal law provides important protections to active duty members of the Armed Forces and their dependents. To ensure that these protections are provided to eligible applicants, we require you to sign one of the following statements as applicable:

I AM a regular or reserve member of the Army, Navy, Marine Corps, Air Force, or Coast Guard, serving on active duty under a call or order that does not specify a period of 30 days or fewer.

Applicant's Signature _____ Date _____

I AM a dependent of a member of the Armed Forces on active duty as described above, because I am the member's spouse, the member's child under the age of eighteen years old, or I am an individual for whom the member provided more than one-half of my financial support for 180 days immediately preceding today's date.

Applicant's Signature _____ Date _____

– OR –

I AM NOT a regular or reserve member of the Army, Navy, Marine Corps, Air Force, or Coast Guard, serving on active duty under a call or order that does not specify a period of 30 days or fewer (or a dependent of such member).

Applicant's Signature [signature] Date 2-7-09

Warning: It is important to fill out this form accurately. Knowingly making a false statement on a credit application is a crime.

MARKETING

How Did You Hear about PLS?

- ☐ Billboard
- ☑ I am a PLS Customer
- ☐ Doorhanger
- ☐ Flyer
- ☐ Friend
- ☐ Internet/PLS Website
- ☐ Mail
- ☐ Mailing
- ☐ Another Local Business _____ (name, if known)
- ☐ Radio
- ☐ Sign
- ☐ Store Signage
- ☐ TV
- ☐ Yellow Pages
- ☐ Customer Referral _____ Account# _____
- ☐ Newspaper (Publication) _____
- ☐ Other _____

EXHIBIT C

INSTAL... T LOAN AND SECURITY AGR...

Loan # PD065 -37157-67550007T

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 985-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Sodal Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1130.62	$ 2255.09	$ 3385.71

CHICAGO HEIGHTS 2
628 W. 14TH STREET
PAID
FEB 07 2009

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	556.04	Payment on Thursday, 02/05/2009
1	2829.67	Final payment on Sunday, 03/08/2009

CASH REN DEP Title
(check #) 5944.00
AMOUNT PAID
REFUND AMOUNT

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 0.00 (only if amount financed is $200 or more)
2) Amount Paid On Previous Loan with us: $ 2255.09
3) Official Fees $

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	M14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3J67K2M1481660000	X7114671601	9I0160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature _____ Date 01/06/2009 Company Representative _____

Date 01/06/2009

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and woring order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor); or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permited by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of repossession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

READ AND SIGN ONE

Covered Borrower Identification Statement

Federal law provides important protections to active duty members of the Armed Forces and their dependents. To ensure that these protections are provided to eligible applicants, we require you to sign one of the following statements as applicable:

I AM a regular or reserve member of the Army, Navy, Marine Corps, Air Force, or Coast Guard, serving on active duty under a call or order that does not specify a period of 30 days or fewer.

Applicant's Signature _____ Date _____

I AM a dependent of a member of the Armed Forces on active duty as described above, because I am the member's spouse, the member's child under the age of eighteen years old, or I am an individual for whom the member provided more than one-half of my financial support for 180 days immediately preceding today's date.

Applicant's Signature _____ Date _____

– OR –

I AM NOT a regular or reserve member of the Army, Navy, Marine Corps, Air Force, or Coast Guard, serving on active duty under a call or order that does not specify a period of 30 days or fewer (or a dependent of such member).

Applicant's Signature D Powell Date 1/6/09

Warning: It is important to fill out this form accurately. Knowingly making a false statement on a credit application is a crime.

How Did You Hear about PLS?

- ☐ Billboard
- ☐ I am a PLS Customer
- ☐ Doorhanger
- ☐ Flyer
- ☐ Friend
- ☐ Internet/PLS Website
- ☐ Mail
- ☐ Mailing
- ☐ Another Local Business _____ (name, if known)
- ☐ Radio
- ☐ Sign
- ☐ Store Signage
- ☐ TV
- ☐ Yellow Pages
- ☐ Customer Referral _____ Account# _____
- ☐ Newspaper (Publication) _____
- ☐ Other _____

EXHIBIT D

INSTALL T LOAN AND SECURITY AGREEMENT

Loan # PD065 -37157-67550006T

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1132.51	$ 2258.85	$ 3391.36

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	556.97	Payment on Friday, 01/02/2009
1	2834.39	Final payment on Monday, 02/02/2009

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 2258.85 2) Amount Paid On Previous Loan with us: $ 0.00
3) Official Fees $ 0.00 (only if amount financied is $200 or more)

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3J67K2M1481660000	x7114671601	910160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.
Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.
Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.
Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.
NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.
By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature D Powell Date 12/03/2008 Company Representative Monique Davis

Date 12/03/2008

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and woring order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor); or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permited by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of repossession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

EXHIBIT E

Loan # PD065 -37157-67550005T

INSTALLMENT LOAN AND SECURITY AGREEMENT

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1132.52	$ 2258.87	$ 3391.39

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	556.98	Payment on Wednesday, 12/03/2008
1	2834.41	Final payment on Saturday, 01/03/2009

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 2258.87 2) Amount Paid On Previous Loan with us: $ 0.00
3) Official Fees $ 0.00 (only if amount financied is $200 or more)

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3J67K2M1481660000	X7114671601	9I0160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agree to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature _____ Date 11/03/2008 Company Representative _____

Signature _____ Date 11/03/2008

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and woring order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor)' or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permitted by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of repossession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

EXHIBIT F

Loan # PD065 -37157-67550004T

INSTALL[illegible]T LOAN AND SECURITY AGREEMENT

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1134.30	$ 2262.42	$ 3396.72

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	557.85	Payment on Sunday, 11/02/2008
1	2838.87	Final payment on Wednesday, 12/03/2008

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 2262.42 2) Amount Paid On Previous Loan with us: $ 0.00
3) Official Fees $ 0.00 (only if amount financed is $200 or more)

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3J67K2M1481660000	X7114671601	9I0160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature D Powell Date 10/03/2008 Company Representative Monique Davis

Signature Date 10/03/2008

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and woring order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor)' or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permited by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of reposession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). if you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

EXHIBIT G

Loan # PD065 -37157-67550003T

INSTALL[illegible]T LOAN AND SECURITY AGREEMENT

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1134.84	$ 2263.49	$ 3398.33

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	558.12	Payment on Tuesday, 09/30/2008
1	2840.21	Final payment on Friday, 10/31/2008

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 2263.49 2) Amount Paid On Previous Loan with us: $ 0.00
3) Official Fees $ 0.00 (only if amount financied is $200 or more)

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3J67K2M1481660000	X7114671601	9I0160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above:

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature D Powell Date 08/31/2008 Company Representative

Signature Date 08/31/2008

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and woring order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor)' or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permited by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of reposession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

EXHIBIT H

Loan # P0065 -37157-67550002T

INSTALL[illegible]T LOAN AND SECURITY AGREEMENT

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1134.84	$ 2263.49	$ 3398.33

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	558.12	Payment on Friday, 08/29/2008
1	2840.21	Final payment on Monday, 09/29/2008

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 2263.49 2) Amount Paid On Previous Loan with us: $ 0.00
3) Official Fees $ 0.00 (only if amount financied is $200 or more)

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017070307

Vehicle Identification Number.	Title Certificate Number	License Validation Number
3J67K2M1481660000	X7114671601	9I0160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature D Powell Date 07/30/2008 Company Representative Latoya Dixon

Signature Date 07/30/2008

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and woring order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor)' or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permited by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of repossession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). if you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

EXHIBIT I

Loan # PD065 -37157-67550001T

INSTALL[illegible]T LOAN AND SECURITY AGREEMENT

LENDER: Pay Day Loan Store
Address: 628 W. 14TH ST.
CHICAGO HEIGHTS, IL
(708) 983-0000

BORROWER:
Name: DOMINGINHO POWELL
Address: 4052 CHARLSTON RD
MATTESON, IL 60443
Social Security No.: xxx-xx-3697

FEDERAL TRUTH-IN-LENDING DISCOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The Amount you will have paid after you have made all payments as scheduled.
300.00 %	$ 1135.59	$ 2265.00	$ 3400.59

Your payment schedule will be:

Number of Payment(s)	Amount of Payment(s)	When Payments are due
1	558.49	Payment on Wednesday, 07/30/2008
1	2842.10	Final payment on Saturday, 08/30/2008

Security: You are giving us a security interest in the below-described Motor Vehicle, or, if your amount financed is less than $200, in the title certificate for such Motor Vehicle.
Prepayment: If you pay off early, you will not have to pay a penalty. See the contract terms below for additional information about nonpayment, default, prepayment penalties.

Itemization of the Amount Financed:
1) Amount Given Directly To you: $ 2265.00 2) Amount Paid On Previous Loan with us: $ 0.00
3) Official Fees $ 0.00 (only if amount financed is $200 or more)

Description of Pleged Motor Vehicle:

Year	Color	Make	Model	License Number
1972	BLACK	OLDSMOBILE	CUTLASS	W14017078307

Vehicle Identification Number	Title Certificate Number	License Validation Number
3J67K2M1481660000	X7114671601	9I0160930

This Installment Loan and Security Agreement (the "Agreement") states the terms of your loan and security agreement with us. By signing, you agree to all the terms in this Agreement. In this Agreement, the words "you" and "your" mean each of the borrowers shown above. The words "we", "us", and "our" mean the lender shown above. "Motor Vehicle" means the motor vehicle described above.

Your Promise to Pay: To repay the loan we have made to you, you promise to pay us in immediately available U.S. currency, the Amount Financed shown in the Federal Truth in Lending Disclosure Statement ("Disclosure Statement") plus interest on the unpaid Amount Financed. We will begin charging interest on the date of this Agreement shown above. We will calculate the interest on a daily basis using the Annual Percentage Rate by multiplying the daily rate times the unpaid balance of the Amount Financed each day. We figure the daily rate by dividing the Annual Perventage Rate by 365 (or 366 in any leap year). You agree to repay the loan according to the payment schedule shown in the Disclosure Statement. If you have not repaid the loan after the final payment due date, you agree to pay, as provided by applicable law, interest at the Annual Percentage Rate shown in the Disclosure Statement. Any payments you make will be applied first to any accrued interest, then to the principal, then to any other charges you owe us. You promise to pay us at the adress shown above or at any other address we tell you in writing. Unless you have repaid all obligations under this Agreement in full, surrendered the Motor Vehicle, been sent notice of our intention not to renew this Agreement, or have defaulted under this Agreement, we will automatically extend from month to month the due date of the Amount Financed until terminated.

Security Agreement: To protect us if you default under this Agreement, or any change, extension or renewal of this Agreement, you give us a security interest in the Motor Vehicle, of, if your Amount Financed is less than $200, in the title certificate for such Motor Vehicle. You also give us a security interest in any accession to and proceeds of the Motor Vehicle and any substitutions of the Motor Vehicle and all proceeds of the Motor Vehicle, including any insurance proceeds or refunds of insurance premiums related to the Motor Vehicle. You agree to file or sign any documentation required to perfect our security interest in the Motor Vehicle. You agree to provide us the title certificate for the motor vehicle and you agree that we may retain possession of it as security for your performance of your obligations under this Agreement.

Your Other Promises: You agree to notify us in writing if you change your address. You represent that the Motor Vehicle is not stolen and has no liens against it. You agree not to seek, or assist any other person in seeking, a duplicate title for the motor Vehicle until this Agreement is paid in full. You agree not to attempt to sell, or transfer title to the motor vehicle until this agreement is paid in full.

NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

By signing, you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agreed to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Signature D. Powell Date 06/30/2008 Company Representative Latoya Dixon

Signature Date 06/30/2008

ADDITIONAL TERMS OF YOUR LOAN

Prepayment: You have the right to prepay all or part of the Amount Financed at any time. There is no additional charge for prepayment. If you do prepay in full before the final payment due date, you will owe less interest than the Finance Charge shown in the Disclosure Statement.

Care and Location of Motor Vehicle: You will keep the Motor Vehicle in good repair and woring order. You agree not to use the Motor Vehicle for any unlawful purpose. If this loan has an amount financed of more than $500, you also agree to keep the Motor Vehicle insured against fire, theft, and collision; you may buy this insurance from anyone you want, but you will have the insurance company name us in the policy as a secured party. You will not remove the Motor Vehicle from Illinois without our permission. You will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement.

Credit Reporting Agencies: We may report your performance under this Agreement to credit reporting agencies. For Example, we may disclose any default by you under this Agreement to credit reporting agencies.

Changes, Waivers, and Delay in Enforcement: This Agreement cannot be changed unless we agree to the changes in writing. You agree that we may give up ("waiver") or delay enforcement of our rights under this Agreement without losing them. If we release any of you from this Agreement, the rest of you will not be released. We do not have to use our legal remedies against the rest of you. You give up your rights that require us to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayments (protest); (3) notify you that amounts due have not been paid (notice of dishonor)' or (4) give you any other notice except as required by this Agreement or required by other law.

More than One Signer: Whether you sign this Agreement as an individual or as one of a group, you are each fully responsible for all the obligations owed to us.

Default: You will be in default if you fail to make payment of any amount owing under this Agreement, or you provide false or misleading information in connections with your loan or your application for credit, or someone tries to take the Motor Vehicle from you through legal proceedings, or you fail to perform any other promise or agreement you made to us in this Agreement.

Our Rights: If you are in default, we have the right to exercise any remedies which are permitted by law. For example, to the extent permited by law, we may repossess and sell the Motor Vehicle. We do not have to give you notice before we repossess. If, at the time of reposession, you have paid an amount equal to thirty percent or more of the total of payments shown in the Disclosure Statement, you may, within twenty-one days of the repossession, reinstate this Agreement, and recover the Motor Vehicle from us by paying all amounts due and payable, curing any other default under this Agreement, and paying our reasonable costs and expenses in connection with the repossession.

Collection Costs: To the extent not prohibited by law, you agree to pay all of our costs and attorney fees in collecting this Agreement including any appeals.

Agreement Binding: You agree that this Agreement is binding on your heirs and your legal representatives. This Agreement is the final and complete expression of the agreement between you and us.

Severability: If any part of this Agreement is found to be unenforceable all other provision will remain in full force and effect.

Governing Law: This Agreement and any actions arising out of this Agreement are governed by the laws of Illinois.

Arbitration

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com) or the American Arbitration Association (1-800-778-7879, www.arb.com). If you do not select an arbitration organization, you agree that we may select one. If a judgement has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) make a decision, we or you may apply to any court having jurisdiction to enter a judgement based on teh decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et. seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right to appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permited in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

NOTICE: See other page of this form for important information.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DOMINGINHO POWELL	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 09 C 4146**
	)	
THE PAYDAY LOAN STORE OF ILLINOIS, INC.,	)	**Judge Gottschall**
	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION OF PLAINTIFF'S CLAIMS AND STAY PROCEEDINGS

Defendant, The Payday Loan Store of Illinois ("PLS"), incorrectly sued as Payday Loan Stores of Illinois, Inc., by its attorneys, respectfully submits this memorandum in support of its Motion to Compel Arbitration of Plaintiff's Claims and Stay Proceedings.

I. INTRODUCTION.

Plaintiff, Dominginho Powell, has filed a four-count complaint against PLS, alleging violations of the Equal Credit Opportunity Act ("ECOA"), the Truth in Lending Act ("TILA"), the Telephone Consumer Protection Act ("TCPA"), and the Illinois Consumer Fraud Act ("ICFA"). Plaintiff's claims stem from nine loan transactions that Plaintiff entered into with PLS. See Compl. at ¶¶ 12, 16, 17, 20, 24, 27, 30, 33, 37. In conjunction with each of the loan transactions about which he complains, Plaintiff executed an Installment Loan and Security Agreement ("Agreement"). See Exhibits A - I attached to Affidavit of Jeff Bendy (attached as Exhibit 1). Each Agreement contains an arbitration provision that clearly and unambiguously states that any claim, dispute or controversy shall be resolved, upon election of either party, by binding arbitration. See id. PLS elects arbitration pursuant to these Agreements. The arbitration provision requires Plaintiff to arbitrate his claims on an individual bases (rather than a class-wide basis). See Exhibits A - I to

Exhibit 1. Therefore, Plaintiff should be compelled to arbitrate his claims against PLS, and this litigation should be stayed pending the completion of arbitration.

II. THE ARBITRATION PROVISION.

The arbitration provision in each Agreement provides:

ARBITRATION

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com), the American Arbitration Association (1-800-778-7879, www.adr.org), or JAMS/Endispute (1-800-352-5267, www.jamsadr.com). If you do not select an arbitration organization, you agree that we may select one.

If a judgment has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before a judgment is entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees.

After the arbitrator(s) makes a decision, we or you may apply to any court having jurisdiction to enter a judgment based on the decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et seq., as amended.

If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right of appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permitted in any arbitration.

> If any part of this provision or the application of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid and enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.
>
> READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

See Exhibits A - I to Exhibit 1 (emphasis in original).

III. THE ARBITRATION PROVISION IS VALID AND ENFORCEABLE.

A. The Federal Arbitration Act.

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq., "create[s] a body of federal substantive law of arbitrability," which is applicable to arbitration agreements in contracts that involve interstate commerce. Perry v. Thomas, 482 U.S. 483, 489 (1987). "[T]his body of substantive law is enforceable in both state and federal courts." Id. (citing Southland v. Keating, 465 U.S. 1, 11-12 (1984)).

Pursuant to Section 2 of the FAA, an arbitration provision in a written contract evidencing a transaction involving commerce "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. As the United States Supreme Court has repeatedly explained, Section 2 of the FAA " 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner." Preston v. Ferrer, __ U.S. __, 128 S. Ct. 978, 983 (2008) (quoting Southland v. Keating, 465 U.S. 1, 10 (1984)). Indeed, the purpose of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 US. 20, 24 (1991).

Section 3 of the FAA, in turn, unequivocally provides that where there is an enforceable agreement to arbitrate, the Court must stay judicial proceedings and compel arbitration:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis in original); accord C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228, 1232 (7th Cir. 1977). Under these circumstances, the FAA requires the court to stay the action and send the parties to arbitration.

"Arbitration agreements [are] enforceable to the same extent as other contracts, so courts must enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Zurich Am. Ins. Co. v. Watts Indust., Inc., 466 F.3d 577, 580 (7th Cir. 2006) (brackets in original) (internal quotation marks omitted). The question whether a party is bound to arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties. See Id.

B. The FAA Applies In This Case.

The arbitration provision of the Agreements falls squarely within the purview of the FAA. First, the FAA applies to contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2. The case law makes clear that the " 'involving commerce' language must be construed very broadly"; it is equal in scope to Congress's power to regulate under the commerce clause. Snyder v. Smith, 736 F.2d 409, 418 (7th Cir. 1984), cert. denied, 469 U.S. 1037 (1984), overruled on other ground by Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998)).

Here, the arbitration provision of each Agreement signed by Plaintiff explicitly states that "[t]his arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1, et seq., as amended." See Exhibits A - I to Exhibit 1. Where parties to an arbitration agreement stipulate that their transaction involves interstate commerce within the meaning of the FAA, courts will and must enforce that stipulation. See In re Knepp, 229 B.R. 821, 834 (N.D. Ala. 1999); Staples v. Money Tree, Inc., 936 F. Supp. 856, 858 (M.D. Ala. 1996).

C. Plaintiff Agreed To Arbitration And Executed A Written Agreement To Arbitrate.

Plaintiff admits that he entered into the loan transactions covered by the attached Agreements (which bear Plaintiff's signature), and Plaintiff admits signing "loan papers" in each loan transaction. See Compl. at ¶¶ 12, 14, 16-18, 20-21, 24-25, 27, 29, 30-31, 33, 35, 37, 39; see also Exhibits A - I to Exhibit 1. Each Agreement expressly and conspicuously provides:

> NOTICE: See additional terms on the second page of this form for important information. This Agreement contains an arbitration provision. THE ARBITRATION PROVISION LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

See Exhibits A - I to Exhibit 1 (emphasis in original). The Agreements further provide (just above Plaintiff's signature):

> By signing you state that you have received a completed copy of this form. By signing you also state that you have read, understand, and agree to all the terms of this Agreement, including the terms on the second page of this form. You agree that the terms on the second page of this form are part of this Agreement.

Id. Plaintiff expressly acknowledged that he read, understood, and agreed to the terms of the arbitration provision, before signing the Agreements, and he executed the same. See Id.

D. Plaintiff's Claims Are Plainly Within The Scope Of The Arbitration Provision.

Plaintiff's statutory claims against PLS are plainly covered by the arbitration provision, which provides:

> Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration… .

See Exhibits A - I to Exhibit 1. This broad and expansive language -- "arising from or relating to the loan made to you" -- covers alls disputes having their genesis or origin in the loan transactions between Plaintiff and PLS. The case law makes abundantly clear that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." Gilmer v. Interstate/Johnson Lane Corp., 500 US. 20, 26 (1991); see also Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 556-59 (7th Cir. 2003) (enforcing arbitration of TILA claim). Even if there were a doubt as to whether Plaintiff's claims fall within the scope of the Arbitration provision (and there should be none), any such doubt would have to be resolved in favor of arbitration. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

E. Plaintiff's Claims Must Be Arbitrated On An Individual Basis.

The Agreement requires Plaintiff to arbitrate his claims on an individual (non-class) basis. Under the arbitration provision, the Plaintiff "**do[es] not have the right to have any claim arbitrated as a class action**… ." See Exhibits A - I to Exhibit 1 (emphasis in original). In addition, the Agreement clearly tells borrowers that the arbitration provision "LIMITS CERTAIN RIGHTS, INCLUDING … [their] RIGHT TO PURSUE A CLAIM AS A CLASS ACTION." See Id.

The Seventh Circuit has consistently enforced individual arbitration provisions (class-action waivers) such as the one here. In Livingston, the Court reversed the district court's orders denying

the motion to compel arbitration and certifying a class action. In so doing, the Seventh Circuit stated that the "Arbitration Agreement at issue here explicitly precludes the [plaintiffs] from bringing class claims or pursuing 'class action arbitration,' so we are therefore 'obligated to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class-basis.'" 339 F.3d at 559 (citing Champ v. Siegel Trading Co., 55 F.3d 269, 277 (7th Cir. 1995)); see also Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d 903, 904 (7th Cir. 2004), (affirming order compelling arbitration where arbitration agreement did not permit class actions without the consent of the parties); James v. McDonald's Corp., 417 F.3d 672, 681 (7th Cir. 2005) (affirming order compelling arbitration where arbitration agreement provided that all claims "shall be resolved individually, without resort to any form of class action"). These decisions reflect the fundamental principle that arbitration is a matter of contract, and arbitration agreements should be enforced as written. The arbitration provision here requires individual, rather than class-wide, arbitration, and it should be enforced according to its terms.

IV. CONCLUSION.

For the foregoing reasons, PLS requests that this Court grant PLS's motion, and enter an order requiring Plaintiff to pursue through individual arbitration any claim in his complaint. PLS further requests that this Court stay the proceedings pending arbitration and grant such further relief as the Court deems appropriate.

Dated: September 3, 2009

Respectfully submitted,

THE PAYDAY LOAN STORE OF ILLINOIS, INC.,
Defendant

By: s/Jonathan N. Ledsky
One of Its Attorneys

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Jonathan N. Ledsky
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CERTIFICATE OF SERVICE

Jonathan N. Ledsky, an attorney, hereby certifies that a true and correct copy of the foregoing, **Defendant's Memorandum in Support of Motion to Compel Arbitration of Plaintiff's Claims and Stay Proceedings**, was electronically filed via CM/ECF e-Filing and was served upon:

Alexander Holmes Burke
ABurke@BurkeLawLLC.com

this 3rd day of September, 2009, on or before the hour of 5:00 p.m.

s/ Jonathan N. Ledsky

Slip Copy, 2010 WL 3893894 (N.D.Ill.)
(Cite as: 2010 WL 3893894 (N.D.Ill.))

C

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
Dominginho **POWELL**, Plaintiff,
v.
The **PAYDAY LOAN STORE** OF ILLINOIS, INC., Defendant.

No. 09 C 4146.
Sept. 28, 2010.

Alexander Holmes Burke, Burke Law Offices, LLC, Chicago, IL, for Plaintiff.

Craig Allen Varga, Jonathan N. Ledsky, Scott J. Helfand, Varga Berger Ledsky Hayes & Casey, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

JOAN B. GOTTSCHALL, District Judge.

***1** Plaintiff Dominginho Powell ("Powell" or "plaintiff") filed a four-count class action complaint against The Payday Loan Store of Illinois FN1 ("Payday"), alleging violations of the Equal Credit Opportunity Act ("ECOA"), the Truth in Lending Act ("TILA"), the Telephone Consumer Protection Act ("TCPA"), and the Illinois Consumer Fraud Act ("ICFA"). Plaintiff accuses Payday of improperly inducing borrowers into repeatedly refinancing (*i.e.*, "flipping") high interest rate loans that are secured by the borrowers' automobiles. Payday has moved to compel arbitration.

FN1. Defendant states that it is mistakenly referred to as "Payday Loan Store of Illinois, Inc." in plaintiff's complaint. Def's Mem. at 1.

In conjunction with each of plaintiff's loans with Payday, he executed an Installment Loan and Security Agreement ("Agreement"). Def.'s Mem. at Ex. 1. Each Agreement contains an arbitration provision and also requires plaintiff to arbitrate his claims on an individual, rather than a class-wide, basis. The arbitration provision reads:

ARBITRATION

Any claim, dispute or controversy arising from or relating to (a) the loan made to you, (b) the actions of you, us, or third parties, or (c) the validity of this arbitration provision ("Claim") shall, upon the election by either you or us, be resolved by binding arbitration in accordance with this arbitration provision and the Code of Procedure of the applicable arbitration organization in effect when the Claim is filed. You may select the arbitration organization from the following: either the National Arbitration Forum (1-800-474-2371, www.arb-forum.com), or the American Arbitration Association (1-800-778-7879, www.adr.org). If you do not select an arbitration organization, you agree that we may select one. If a judgment has been entered in a suit involving you and us, then neither we nor you can demand arbitration. This means that either we or you may sue the other party in court or initiate other remedies; however, if either we or you demand arbitration before a judgment in entered, then we and you will arbitrate the Claim. Any arbitration hearing that you attend will take place in the federal judicial district where you reside or where you obtain the loan, at your election. The arbitrator(s) (the people who decide the Claim) will apply relevant law; however, the arbitrator(s) will not apply federal or state rules of civil procedure or evidence. The decision of the arbitrator(s) will be evidenced by written, reasoned findings of fact (a determination of what happened) and conclusion of law (legal consequences of the facts). If you ask us to, we will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000; the arbitrator(s) will decide whether we or you will ultimately pay those fees. After the arbitrator(s) makes a de-

cision, we or you may apply to any court having jurisdiction to enter a judgment based on teh [sic] decision of the arbitrator(s). This arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et seq., as amended. **If we or you choose arbitration, we and you no longer have the right to go to court or to have a jury trial, except for any right of appeal provided by the Federal Arbitration Act. If arbitration is chosen, you do not have the right to have any claim arbitrated as a class action under the rules of the arbitration organization or under any other rules of civil procedure. No joinder or consolidation of parties, except for joinder of parties to the same loan agreement, will be permitted in any arbitration.** If any part of this provision to any particular Claim or subject matter is held to be invalid or unenforceable, the remainder of this arbitration provision and the application of this provision to any other Claims will remain valid [and] enforceable. In the event of a conflict between the arbitration organization's code and this provision, this provision controls.

***2** READ THIS PROVISION CAREFULLY. IT LIMITS CERTAIN RIGHTS, INCLUDING YOUR RIGHT TO PURSUE A CLAIM IN COURT AND YOUR RIGHT TO A JURY TRIAL AND YOUR RIGHT TO PURSUE A CLAIM AS A CLASS ACTION.

Def.'s Mem. at Ex. 1. Due to a consent decree prohibiting the National Arbitration Forum from accepting any consumer arbitrations, the AAA is the only available arbitral forum for plaintiff.

I. Analysis

The Federal Arbitration Act establishes a federal policy favoring arbitration of disputes that requires courts to "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). When parties have made an agreement to arbitrate a dispute, the party opposing arbitration bears the burden of proving that the claims at issue should not be subjected to arbitration. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 91-92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). Because all of plaintiff's arguments center on the costs of arbitration, the court turns to that issue first.

A. AAA Fees

There are two types of fees assessed by the AAA-administrative fees and arbitrator fees. Further, the AAA assesses arbitration costs based on the size of the claim, as measured by the AAA. In order to determine what fees would apply, the court must determine whether plaintiff's claims would fall under the AAA's "Consumer Arbitration Costs" or the more expensive "Commercial Arbitration Costs." The AAA applies Consumer Arbitration Costs to claims that do not exceed $75,000; for claims in excess of $75,000, the Commercial Arbitration Costs apply.

1. Administrative Fees

According to the AAA Consumer Arbitration Costs, "Administrative fees are based on the size of the claim and counterclaim in a dispute. They are based only on the actual damages and not on any additional damages, such as attorneys' fees or punitive damages." Def.'s Reply at Ex. 1. Thus, the Consumer Arbitration Costs will apply if plaintiff's actual damages are less than $75,000.

Plaintiff's actual damages include $5,009, which is the amount plaintiff paid to Payday. Beyond that, plaintiff claims he is entitled to statutory damages for certain claims. In an abundance of caution, Payday has included statutory damages in its calculation of "actual damages." Because plaintiff cannot reach the $75,000 cut-off even if statutory damages are included, the court will follow Payday's lead and assume for purposes of this analysis that the AAA would include statutory damages to figure out the value of the claim. Plaintiff asks for the following statutory damages: (1) $8,000 for eight TILA violations which includes statutory damages of $1000 per violation; and (2) $15,000 for ten TCPA violations.[FN2] Because plaintiff's ac-

tual damages (even assuming statutory damages are included) are $28,009, his demand for arbitration would be subject to the Consumer Arbitration Costs. Under the Consumer Arbitration Costs, a plaintiff does not pay any Administrative Fees.

> FN2. In his response, plaintiff lists statutory damages of $8,000 for TILA and $15,000 for ICFA. He also notes that, in addition to these statutory damages, he is seeking "actual damages" but does not provide a dollar amount for the actual damages associated with his claims. Because plaintiff bears the burden of proving that the cost of arbitration is prohibitively expensive, and he failed to provide the court with any breakdown of his actual damages associated with his claims, the court has not included any dollar amounts, beyond the $5,009, for actual damages.

2. Arbitrator Fees

***3** With respect to arbitrator fees, the Consumer Arbitration Costs states that "If the consumer's claim or counterclaim is greater than $10,000, but does not exceed $75,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $375." Def.'s Rep. at Ex. 1. Plaintiff alleges that because this section of the Consumer Arbitration Costs does not contain the same qualifier as that discussed above (*i.e.*, that the value of the claim is limited to actual damages), the value of his claims for purposes of determining an arbitrator's fees must include punitive damages, which would mean that the more expensive Commercial Arbitration Costs would apply. Payday argues that the AAA includes only actual damages in its calculation of arbitrator's fees.

The court acknowledges that the language in the Consumer Arbitration Costs document concerning arbitrator's fees does not specifically explain that such fees are based only on the actual damages in a claim. Any ambiguity, however, is resolved by the affidavit of Gerald Strathmann, Assistant Vice President for the American Arbitration Association. Pl's Mot. To Supp. Rec. at Ex. Strathmann. In his affidavit, Strathmann explains that he oversees all consumer case administration at all AAA offices. *Id.*. Strathmann makes clear that,

> Pursuant to AAA's *Consumer Rules*, under the Rule C-8 "Administrative Fees and Arbitrator Fees," if the consumer's actual damages claim or counterclaim, exclusive of punitive damages and attorney's fees, is greater than $10,000 but does not exceed $75,000, a consumer is responsible for one-half of the arbitrator's fee, up to a maximum of $375 as his or her portion of the arbitrator's fee. The consumer will pay nothing further for arbitrator fees. The consumer does not pay any administrative fee to the AAA.

Id. Thus, because plaintiff's actual damages fall between $10,000 and $75,000, the AAA's Consumer Arbitration Costs apply, both with respect to the AAA's administrative fees and the arbitrator's fees. As a result, in order for plaintiff to file a demand for arbitration in this matter, his AAA costs would be capped at $375. Def.'s Rep. at Ex. 1 (arbitrator fee is either $125 (half of the cost of a "Desk Arbitration or Telephone Hearing") or $375 (half of the cost of an "In Person Hearing")).

B. Unconscionability

1. Arbitration Clause

Plaintiff first argues that the arbitration clause in the Agreement should be stricken because the costs associated with filing a demand for arbitration with the AAA are prohibitively expensive. The United States Supreme Court has recognized that "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating [his] federal statutory rights in the arbitral forum." *Green Tree*, 531 U.S. at 90. Plaintiff's argument is based on his assertion, rejected above, that the AAA would impose its Commercial Arbitration Rules to his claims. Because this is not the case, plaintiff's claim that it would cost him $16,145 to pursue an arbitration at the AAA is not accurate. Further, in

light of the court's conclusion that the AAA Consumer Arbitration Costs apply, plaintiff's reliance on *Kinkel v. Cingular Wireless LLC,* 223 Ill.2d 1, 306 Ill.Dec. 157, 857 N.E.2d 250, 263 (Ill.2006), misses the mark. In *Kinkel,* the court determined that an arbitration clause was prohibitively expensive where the cost of arbitration would have been $125 plus attorneys' fees and the underlying claim involved actual damages of only $150. 306 Ill.Dec. 157, 857 N.E.2d at 268. In *Kinkel,* unlike this case, the plaintiff would have been forced to pay more for the arbitration itself than his claim was worth. Here, plaintiff will incur a $375 fee and claims he is owed approximately $100,000 in damages. *Kinkel* is clearly distinguishable. Because $375 is similar to the $350 filing fee he paid in filing the instant case in this court, the court does not conclude that the costs of arbitration are prohibitively expensive, especially in light of the fact that Payday will advance plaintiff $1000 toward any arbitration fees. *See* Def.'s Mem. at Ex. 1 ("[W]e will advance all or part of the filing and hearing fees that you will have to pay for the arbitration not to exceed $1,000[.]").

***4** Plaintiff also argues that the arbitration clause is procedurally unconscionable because of the circumstances under which plaintiff entered into the contract. He argues that he was fraudulently induced into signing the Agreements subsequent to his first loan transaction with Payday, and that the Agreements are the product of duress. These challenges, because they are directed to the contract as a whole, and are not limited to the arbitration clause itself, must be resolved by the arbitrator. *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 449, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (claim of fraud in the inducement of the entire contract must be resolved by the arbitrator, not the court); *see also James v. McDonald's Corp.,* 417 F.3d 672, 680 (7th Cir.2005) ("[A] court may consider a claim that a contract party was fraudulently induced to include an arbitration provision in the agreement but not claims that the entire contract was the product of fraud.").

2. Class Action Waiver

Plaintiff argues that the class action waiver in the Agreement is substantively unconscionable because: (1) it is one-sided in that it applies to claims by borrowers only; (2) it was designed to permit Payday "to continue to abuse consumers with impunity by effectively blocking all challenges by rendering them prohibitively expensive"; and (3) concealing such from the consumer at the time of contracting .[FN3] Pl.'s Resp. at 15.

> FN3. Without elaboration, plaintiff mentions in a single sentence that the class action waiver was "conceal[ed] ... from the consumer at the time of contracting." Pl.'s Resp. at 15. The court does not agree that the class action waiver was "conceal[ed]" or unfairly hidden in a "maze of fine print where it was unlikely to be noticed, much less read." *Kinkel,* 306 Ill.Dec. 157, 857 N.E.2d at 265. In the two-page document, the class action waiver is mentioned on the first page just above the signature line, and again in the description of the arbitration provision. The arbitration provision (which included the class action waiver) is set apart; it is twice the width of the other paragraphs and is set off with a bold heading **"Arbitration."** It clearly states, in bold, that if arbitration is chosen, neither party has the right to have any claim arbitrated as a class action. Thus, the court does not conclude that the class action waiver was "conceal [ed]."

As the Supreme Court of Illinois made clear in *Kinkel,*[FN4] class action waivers are not *per se* unconscionable. 857 N.E.2d at 278 ("It is not unconscionable or even unethical for a business to attempt to limit its exposure to class arbitration or litigation, but to prefer to resolve the claims of customers or clients individually."). *Kinkel* explained that substantive unconscionability "concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. Indicative of

substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." 306 Ill.Dec. 157, 857 N.E.2d at 267 (quoting *Maxwell v. Fidelity Financial Servs., Inc.*, 184 Ariz. 82, 907 P.2d 51, 58 (Ariz.1995)). In *Kinkel*, a plaintiff sued a cell phone provider arguing that a $150 early cancellation fee was an improper penalty under the law. *Id.* at 254. Pursuant to the standard service agreement, the plaintiff agreed to mandatory arbitration and a class action waiver. *Id.* The *Kinkel* court stressed that any challenge to a class action waiver must be analyzed on case-by-case basis, recognizing that such analysis is highly fact-specific. *Id.* at 275. Ultimately, the court found that the class action waiver was unconscionable where the cost of arbitration was $125 and the actual damages were $150. *Id.* at 274. In addition, the court relied on the fact that it would not be "obvious to the typical consumer" that he had a claim for an improper penalty, without the aid of an attorney. *Id.* at 267-68. Because a claimant would likely need an attorney and would be forced to pay $125 to file the arbitration, the claimant, even if he were to prevail on his claim and receive $150 in damages, would not be made whole. *Id.* at 268. Finally, the court also relied on the fact that the cost of arbitration was not disclosed in the contract. *Id.* at 275.

> FN4. The court notes that the plaintiff cited to many non-Illinois cases in his briefing. Because *Kinkel* is on point, the court relies on that case instead of looking to other states' courts.

***5** *Kinkel* also looked to patterns emerging from other states and concluded that "[A] class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner." *Id.* at 271-274 (noting that many courts invalidate a class action waiver where some or all of the following factors are present: the contract limits the types of damages available to the plaintiff in arbitration, the contract restricts the plaintiff to a forum where the costs are prohibitively expensive, disputes between the parties predictably involve small amounts of damages, the site of arbitration would necessarily involve great expense to the plaintiff, the exclusion of a class action would make it unlikely that the plaintiff would secure competent counsel, the waiver lacked mutuality because the defendant would not be likely to bring a class action against its customers, and a confidentiality agreement was part of the contract).

The court turns, therefore, to the facts of this case and considers the factors listed in *Kinkel*. The first, and perhaps most important, task is a comparison of the potential damages to arbitration costs. Here, there is great disparity between the amount of plaintiff's damages and the costs of arbitration; plaintiff assesses his individual damages at approximately $100,000 and he need only pay $375 to file his demand for arbitration. This is not a scenario where individual plaintiffs would seek small or de minimus damages, thus necessitating a class action to allow those claims to be pooled together. Indeed, plaintiff seeks significant damages. This factor strongly supports a finding that the class action waiver should be enforced.

The question of whether or not plaintiff's claims are the type that a non-lawyer would be able to understand is a closer call. Plaintiff alleges that,

> The defendant lender regularly and systematically makes loans to Illinois consumers at interest rates at 300% and above that call for two payments: one small payment due approximately a month after closing, and another balloon payment for the balance of the loan due the month after that. This scheme is designed to make the first payment affordable and the second payment unaffordable.

> [Payday] takes payments by cash or certified funds, only, so customers typically make payments in person. When customers come in to make their first payment, [Payday's] standard and systematic practice is to tell them that they must sign new loan documents, using the balloon payment it knew in the beginning the borrower could not afford, and the threat of repossession of their car as leverage if the borrower protests. Customers like plaintiff typically do sign new loan papers, but only do so because they were either induced to believe that this is the way loans are "supposed to work" or because they believe they have no other reasonable choice, or both. [Payday] tricked plaintiff with this scheme nine times between June 2008 and March 2009.
>
> ***6** ...
>
> The practice of signing a consumer to one loan with the intent to bring them into another loan is called "loan flipping."

Compl. at ¶¶ 2-3, 7. Plaintiff alleges that Payday set up a scheme whereby its customers would be "tricked" into thinking they were paying off the original loan, when in fact each time they came in to make a payment they actually were entering into a new loan agreement with Payday. Clearly, if his allegations are correct, plaintiff was tricked by Payday into entering into eight additional loans over the course of a year and a half. However, plaintiff alleges that, without the assistance of counsel, he realized in April 2009 that something was amiss when he noticed that he had already paid $5,000 for a loan that was supposed to cost $1,135.59. The nature of the alleged scheme suggests that many months may pass before a customer even realizes that something is wrong. In light of the fact that a significant amount of time could elapse before a plaintiff might realize that he was being tricked, and in light of the fact that a lawyer would be necessary to assist the plaintiff in pursuing his claims, this factor weighs in favor of unconscionability.

The remaining factors examined by the *Kinkel* court strongly support a finding that the waiver should be enforced. Ultimately, these factors, combined with the fact that it is not prohibitively expensive for plaintiff to arbitrate his claims, lead the court to uphold the class action waiver. The Agreement at issue does not limit the type of damages plaintiff may receive in arbitration. Arbitration would not be cost-prohibitive given the spread between plaintiff's potential damages and the relatively small cost of arbitration present in this case. FN5 This is not a case where plaintiff's damages are so small that neither he nor a lawyer would be interested in pursuing an individual action. Plaintiff's potential damages are in excess of $100,000 and he already has secured a lawyer to represent him. Finally, the Agreement does not contain a confidentiality agreement. While true that the class action waiver is not mutual because Payday is unlikely to sue its customers in a class action, the overwhelming balance of factors here supports the court's conclusion that the class action waiver should be upheld.

> FN5. Because arbitration is not cost-prohibitive, the court does not view the fact that the relatively small fee associated with arbitration was not disclosed in the Agreement as weighing in favor of unconscionability. The failure of the defendant to disclose the cost of the arbitration was significant in *Kinkel* because the amount of plaintiff's damages and the cost of arbitration were so similar. That is not the case here.

C. Motion to Stay

The Federal Arbitration Act mandates that the court issue a stay when an issue in the case is subject to arbitration. 9 U.S.C. § 3. Because plaintiff's claims are subject to arbitration, the court must stay the present case, pending the outcome of the arbitration proceedings. Payday's motion to stay is granted.

II. Conclusion

Payday's motion to compel arbitration of

plaintiff's claims [13-1] and motion to stay the proceedings [13-2] is granted.

N.D.Ill.,2010.
Powell v. Payday Loan Store of Illinois, Inc.
Slip Copy, 2010 WL 3893894 (N.D.Ill.)

END OF DOCUMENT

AMERICAN ARBITRATION ASSOCIATION

Order and Second Scheduling Order Case # _14 513 E 01761 11 ____

Peruzzi Mitsubishi and Robert Tattersall
And
Chase Automotive Finance
And
Silvano Ghali

RECITATION

Pursuant to the Consumer-Related Arbitration Rules of the American Arbitration Association (AAA), a second telephone conference was held on April 26, 2012 before Arbitrator, Jerry Schuchman. Participating in the second telephone conference were Jennifer Coatsworth, Esq. on behalf of Peruzzi Mitsubishi and Robert Tattersall; William C. Bensley, Esq. on behalf of Silvano Ghali; and Ronald M. Metcho, Esq. and Andrew Schwartz, Esq. on behalf of Chase Automotive Finance. As sole arbitrator I have issued the following order:

ORDER

Upon consideration of Respondent, Silvano Ghali's Preliminary Objections and Petition to Dismiss the arbitration of this matter, Claimant, Chase Auto Finance's, Response thereto, Claimant, Peruzzi Mitsubishi's and Robert Tattersall's Response thereto, and after telephonic hearing on April 26, 2012, it is hereby ORDERED that Respondent's Preliminary Objections are DENIED. The current matter shall move forward in accordance with the Second Scheduling Order as follows:

SECOND SCHEDULING ORDER

1. An inspection of the vehicle shall take place on or before May 31, 2012. The parties are allowed to record the inspection via videography or photography. This does not preclude any party from arguing against the admissibility of such videography or photography at the hearing.

2. Face to face hearings are scheduled for June 27 and 28, 2012 at 9:30 A.M. in Philadelphia, PA.

3. On or before June 8, 2012, each party shall serve and file a prehearing brief on all significant disputed issues, setting forth briefly the party's position and the supporting arguments and authorities. Briefs shall include an assessment of damages or lack thereof and references to supporting documentary evidence or lack thereof.

4. Briefs shall be not more than ten pages in length, twelve point type, double spaced, on letter size image.

5. Any and all documents to be filed with or submitted to the Arbitrator shall be given to the AAA case administrator for transmittal to the arbitrator. COPIES OF SAID DOCUMENTS SHALL ALSO BE SENT SIMULTANEOUSLY TO THE OPPOSING PARTY.

There shall be no direct oral or written communication between the parties and the arbitrator.

6. All deadlines stated herein will be strictly enforced. After such deadline, the parties may not file such motions except with the permission of the Arbitrator, good cause having been shown.

7. Additional provisions regarding the submission of exhibits and disclosure of witnesses shall be set forth during the second telephonic conference.

8. This order shall continue in effect unless and until amended by subsequent order of the arbitrator.

Dated: April 26, 2012

Arbitrator's Signature

KARIN J. BLACK, et al, Plaintiff, v. JP MORGAN CHASE & CO., et al, Defendants.

Civil Action No. 10 - 848

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2011 U.S. Dist. LEXIS 99428

August 25, 2011, Decided
August 25, 2011, Filed

SUBSEQUENT HISTORY: Adopted by, Motion granted by, Motion denied by, As moot, Stay granted by *Black v. JP Morgan Chase & Co., 2011 U.S. Dist. LEXIS 103799 (W.D. Pa., Sept. 14, 2011)*

PRIOR HISTORY: *Black v. Jp Morgan Chase & Co., 2011 U.S. Dist. LEXIS 103727 (W.D. Pa., Aug. 10, 2011)*

COUNSEL: [*1] For KARIN J. BLACK, individually and on behalf of the Classes, Plaintiff: Matthew L. Kurzweg, Pittsburgh, PA.

For JP MORGAN CHASE & CO, Defendant: Arthur H. Stroyd, Jr., Matthew T. Logue, Del Sole Cavanaugh Stroyd LLC, Pittsburgh, PA; Peter E. Greene, PRO HAC VICE, Peter S. Julian, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY.

For BANK OF AMERICA CORPORATION, Defendant: Mark S. Melodia, Reed Smith LLP, Princeton, NJ; Thomas L. Allen, Reed Smith, Pittsburgh, PA.

For DISCOVER FINANCIAL SERVICES, Defendant: Alan S. Kaplinsky, PRO HAC VICE, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA; Burt M. Rublin, PRO HAC VICE, Carl G. Roberts, Ballard Spahr LLP, Philadelphia, PA.

For EXPERIAN INFORMATION SOLUTIONS, INC., Defendant: Mark D. Shepard, LEAD ATTORNEY, Babst, Calland, Clements & Zomnir, Pittsburgh, PA; David H. Suggs, New York, NY; Jack E. Pace, Robert A. Milne, White & Case LLP, New York, NY.

For TRANSUNION, LLC, Defendant: Dennis A. Watson, LEAD ATTORNEY, Grogan Graffam, P.C., Pittsburgh, PA; James K. Gardner, Neal, Gerber & Eisenberg LLP, Chicago, IL.

For EQUIFAX CREDIT INFORMATION SERVICES, INC., Defendant: George E. Yokitis, DeForest Koscelnik Yokitis Skinner **[*2]** & Berardinelli, Pittsburgh, PA; Gregory B. Mauldin, PRO HAC VICE, Peter Kontio, PRO HAC VICE, Teresa T. Bonder, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA.

For FICO, LLC, Defendant: Michael G. Connelly, LEAD ATTORNEY, Spilman, Thomas & Battle, Pittsburgh, PA; Michelle S. Grant, PRO HAC VICE, Dorsey & Whitney LLP, Minneapolis, MN.

For VANTAGESCORE SOLUTIONS, LLC, Defendant: Wendelynne J. Newton, LEAD ATTORNEY, Bradley J. Kitlowski, Gretchen L. Jankowski, Buchanan Ingersoll & Rooney, Pittsburgh, PA.

JUDGES: LISA PUPO LENIHAN, Chief U.S. Magistrate Judge. Judge David Stewart Cercone.

OPINION BY: LISA PUPO LENIHAN

OPINION

REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Motion of Defendant Discover Financial Services to Compel Arbiration (ECF No. 28) be granted and the Motion to Dismiss the Complaint (ECF No. 28) be denied as moot. It is further recommended that this case be stayed only as to Defendant Discover Financial Services while Plaintiff submits her claim to arbitration.

II. REPORT

A. Background and Procedural History

Plaintiff, Karin Black, has filed a purported class action complaint, alleging that the Defendants violated the Sherman Act, *15 U.S.C. §1*. Generally, Black alleges **[*3]** that the Defendants--consumer lenders, credit reporting agencies, and credit scoring companies--conspired to restrain the availability of consumer loans and inflate or fix the price of that credit at artificially high levels, by sharing pricing data in the form of credit history information. Plaintiff also alleges a national boycott of consumers who are unable or unwilling to pay monopolistic prices. (Compl. ¶ 67.) She seeks an order declaring that this action be maintained as a class action and declaring Plaintiff as representative of the Classes and her counsel as counsel for the Classes; an order enjoining the Defendants' anti-competitive conduct; and an award of damages for herself and the Classes. [1]

1 Black invokes this Court's subject matter jurisdiction pursuant to *15 U.S.C. §§ 15* and *26*, and *28 U.S.C. §§1331* and *1337*. Venue lays in this district under *15 U.S.C. §§15, 22*, and *26*, and *28 U.S.C. § 1391*.

In response to the Complaint, Defendant Discover Financial Services ("DFS"), one of three lender defendants in this case, has filed a motion to compel arbitration of Plaintiff's individual claims or, in the alternative, to dismiss the Complaint (ECF No. 28), which is the subject of **[*4]** this Report and Recommendation. In support of its alternative argument seeking dismissal of the Complaint pursuant to *Rule 12(b)(6)*, DFS joins in the memorandum of law filed by the other two lender defendants, JP Morgan Chase & Co. and Bank of America Corporation. [2] Plaintiff filed a memorandum of law opposing the motion to compel arbitration and reply brief. On February 10, 2011, the Court heard oral argument on DFS's motion. As the motion has been fully briefed and argued, it is now ripe for disposition.

2 JP Morgan Chase and BOA filed a motion to dismiss the Complaint under *Rule 12(b)(6)* (ECF No. 32) arguing that under *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and its progeny, Plaintiff failed to allege sufficient facts to show that her antitrust claims against them were plausible. On August 10, 2011, the undersigned filed a Report and Recommendation (ECF No. 84) recommending that the motion to dismiss (ECF No. 32) filed by JP Morgan Chase and BOA be granted. Because the Court concludes that this case should proceed to arbitration, the Court does not reach the merits of DFS's motion, in the alternative, to dismiss the Complaint under *Rule 12(b)(6)*.

B. Legal Standard - Motion [*5] to Compel Arbitration

The standard of review on a motion to compel arbitration is the same as the standard of review on a motion for summary judgment. *Quilloin v. Tenet HealthSystem Philadelphia, Inc., 763 F.Supp. 2d 707, 715 (E.D.Pa. 2011)* (quoting *Hopkins v. New Day Fin., 643 F.Supp. 2d 704, 713-14 (E.D.Pa. 2009)* (citing *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 & n. 9 (3d Cir.1980))*; *see also Kirleis v. Dickie, McCamey & Chilcote, 560 F.3d 156, 159 n. 3 (3d Cir.2009)*. "'Accordingly, the Court may consider all affidavits, exhibits and discovery in the record.'" *Quilloin, 763 F.Supp. 2d at 715* (quoting *Hopkins, 643 F.Supp. 2d at 713-14* (citing *Par-Knit Mills, 636 F.2d at 54* & n. 9)). A motion to compel arbitration should be granted only where there is "'no genuine issue of fact concerning the formation of the agreement'" to arbitrate. *Kirleis, 560 F.3d at 159* (quoting *Par-Knit Mills, 636 F.2d at 54*). "In making this determination, the party

opposing arbitration is entitled to 'the benefit of all reasonable doubts and inferences that may arise.'" *Id.*

C. Facts[3]

> 3 The factual allegations relating to the alleged antitrust violations are set forth in detail in Part **[*6]** II.C. of the Court's Report and Recommendation (ECF No. 84) on the motions to dismiss filed by the other defendants, and thus, will not be repeated here.

The facts relating to DFS's motion to compel arbitration are straightforward and are not disputed. [4] Plaintiff's Discover Card is issued by Discover Bank, a federally issued bank chartered and incorporated in the State of Delaware, with its principal place of business in Delaware. (Declaration of Leo Linian ("Linian Decl."), ¶¶ 2-4, ECF No. 28-2.) Discover Bank operates a facility in Delaware that provides a full array of retail and depository banking services to its customers. (Linian Decl., ¶ 3.) DFS Services LLC is the servicing affiliate of Discover Bank and, as such, administers a variety of the business aspects of the Discover Card program, including the servicing and collection of credit card accounts, the issuance of statements, the handling of disputes and settlement with merchants. (Linian Decl., ¶¶ 2, 5.) Both DFS Services LLC and Discover Bank (collectively, "Discover") are subsidiaries of DFS, are incorporated in the State of Delaware, and have their principal places of business in Illinois. (Linian Decl., ¶¶ 2-3.)

> 4 In **[*7]** support of its motion to compel arbitration, DFS has submitted the declaration of Leo Linian, Director of Collection Strategy for DFS Services LLC, as subsidiary of Discover Financial Services. (Linean Decl., ¶2.) Plaintiff has not submitted any affidavit or other competent evidence to contradict Mr.Linean's statements.

Plaintiff has been a Discover credit card member since 1999. (Linian Decl., ¶6.) When Ms. Black's application was approved, her credit card and the Cardmember Agreement were mailed to her at the address she provided in her application, per Discover's standard practice. (Linian Decl., ¶7.) The Cardmember Agreement provides that by using her credit card, Ms. Black agrees to the terms of the Cardmember Agreement. According to Discover's records, Ms. Black did use her card thereafter. (Linian Decl., ¶ 8.)

The Discover Cardmember Agreement provided to Plaintiff in 1999 contained a broad arbitration provision that encompassed "any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account . . .." (Ex. 1 to Linian Decl. at 8, ECF No. 28-3.) This Cardmember Agreement also **[*8]** provided that it would be governed by Delaware law and applicable federal laws. (Ex. 1 to Linian Decl. at 10.)

The arbitration provision of the Cardmember Agreement has been amended several times since Plaintiff first opened her Discover Card account pursuant to the "Change of Terms" provision of the Cardmember Agreement (Linian Decl. ¶9; Ex. 1 to Linian Decl. at 8), and Delaware law, *5 Del. C. §952(a)*. [5] When a change has been made to the terms of the Cardmember Agreement, Discover inserts and mails a Notice of Change to the Cardmember Agreement with the billing statements of all Discover card members who have open accounts and are receiving statements. (Linian Decl., ¶ 9.) The Cardmember Agreement provides Ms. Black with the right to reject any such changes to the terms of the Cardmember Agreement and close her account. (*Id.*) According to Discover's records, Ms. Black did not reject any of the changes that Discover Banks made to the terms of her Cardmember Agreement. (*Id.*)

> 5 The amendments are attached to the Linian Declaration. *See* Linian Decl., ¶10-17.

As amended, the arbitration provision in the 2009 Cardmember Agreement applicable to the current dispute states in relevant part:

> **Arbitration [*9] of Disputes.** *Agreement to arbitrate.* In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement, or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration. IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER

> YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY ("Class Action Waiver").

Ex. 10 to Linian Decl. at 11, ECF No. 28-4. The arbitration clause also delineates who shall conduct the arbitration:

> The arbitration shall be conducted, at the **[*10]** option of whoever files the arbitration claim, by either the American Arbitration Association (AAA) or the National Arbitration Forum (NAF) in accordance with their procedures in effect when the claim is filed. . . . No other arbitration forum will be permitted, except as agreed to pursuant to either the Changes to this Agreement section or a writing signed by both parties.

Id.

In addition, the arbitration clause provides that Discover Bank's "rights and obligations under this arbitration provision shall inure to the benefit of and be binding upon our parent corporations, subsidiaries, affiliates (including, without limitation, DFS Services LLC), predecessors, successors, assigns, as well as the officers, directors and employees of each of these entities, ..." *Id.* at 12. As DFS is the parent corporation of Discover Bank (Linian Decl., ¶2), the arbitration provision is binding upon DFS.

In 2003, Plaintiff was given the option of rejecting the arbitration provision without cancelling her account or affecting any of her other rights or privileges under the remainder of the Cardmember Agreement. (Linian Decl., ¶11; Ex. 4, ECF No. 28-3.) In particular, Discover Bank inserted into, and mailed **[*11]** with, Plaintiff's billing statement a **"NOTICE OF RIGHT TO REJECT ARBITRATION,"** which became effective April 1, 2003. (Linian Decl., ¶11.) The Notice of Right to Reject Arbitration required that notice of rejection be made in writing and provided to Discover Bank by March 25, 2003. (Ex. 4.) According to Discover's records, Plaintiff did not exercise her right to opt out of, or otherwise reject, the arbitration provision. (Linian Decl., ¶11.)

Similarly, in 2004, 2005, 2006, 2007 and 2008, Discover Bank also sent to Plaintiff notices of amendments to the "Arbitration of Disputes" section, included with her billing statements. (Linian Decl., ¶¶ 12-16; Exs. 5-9 attached thereto, ECF No. 28-4.)

D. Analysis

The Federal Arbitration Act ("FAA") "'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate . . . .'" *9 U.S.C. § 1, et seq.*; *John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 136 (3d Cir. 1998)* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983))*. The FAA provides that a written arbitration provision in any contract "evidencing a transaction involving commerce is valid and enforceable, except **[*12]** upon "such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2*. [6] In addition, the FAA favors the enforcement of arbitration agreements, requiring that such agreement be enforced to the same extent as other contracts. *Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178 (3d Cir. 1999)*. The FAA also provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court . . . for an Order directing that such arbitration proceed in the manner provided in the agreement." *9 U.S.C. § 4*.

> 6 The parties do not dispute that the contract in this case involves "commerce" as defined in *9 U.S.C. § 1*.

The FAA clearly reflects a "strong policy in favor of the resolution of disputes through arbitration." *Kirleis, 560 F.3d at 160* (quoting *Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 263 (3d Cir. 2003))*. "[T]his presumption

in favor of arbitration 'does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.'" *Id.* (quoting *Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002))*.

The interpretation **[*13]** and construction of arbitration agreements are determined by reference to federal substantive law. *Harris, 183 F.3d at 179* (citing *Moses H. Cone, 460 U.S. at 25, n.32*). However, pursuant to section two of the FAA, federal courts may apply state law "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)*; *Harris, 183 F.3d at 179* (citing *9 U.S.C. § 2*). Thus, a court may turn to "ordinary state-law principles that govern the formation of contracts" when determining whether the parties agreed to arbitrate. *Kirleis, 560 F.3d at 160* (quoting *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*, and citing *Blair v. Scott Specialty Gases, 283 F.3d 595, 603 (3d Cir. 2002))*. In addition, state law is applicable where a party raises contract defenses to invalidate arbitration agreements, such as fraud, duress, or unconscionability. *Doctor's Assocs., 517 U.S. at 687*; *see also Harris, 183 F.3d at 179* (citing *Doctor's Assocs., 517 U.S. at 687*; *Perry v. Thomas, 482 U.S. 483, 492, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987))*.

1. Validity and Scope of Arbitration Provision

As a threshold matter, the FAA **[*14]** requires the court to make the following determinations before ordering arbitration: (1) whether the parties entered into a valid arbitration agreement; and (2) whether the specific dispute falls within the scope of that agreement. *Olick, 151 F.3d at 136* (explaining that a "district court need only engage in a limited review to ensure that the dispute is arbitrable"). DFS contends that these requirements have been satisfied here. As to the first requirement, DFS submits that Plaintiff's Cardmember Agreement and transactions with Discover Bank clearly involve interstate commerce. In addition, DFS points out that the arbitration clause contains an express provision to this effect and states that it shall be governed by the FAA. Plaintiff does not contest this point.

As to whether a valid and enforceable agreement to arbitrate exists between Plaintiff and itself, DFS contends that Ms. Black received the written Cardmember Agreement when she applied for and opened her credit card account with Discover Bank, and used her card. By doing so, she agreed to the arbitration provision. In addition, DFS submits that Plaintiff was notified in writing of her right to reject the arbitration provision **[*15]** and the procedure for doing so, but she did not elect to reject the arbitration provision. [7]

> 7 DFS, as parent corporation of Discover Bank, is entitled to enforce the arbitration provision based on the provision entitled "Other Beneficiaries of this Provision" contained in the Cardmember Agreement.

In response, Plaintiff argues that although Discover may have made a one-time offer to opt out of arbitration over seven years ago, she does not recall receiving the offer and thus never actually agreed not to opt out. By relying on silence instead of contacting her to discuss the terms, Plaintiff submits that Discover Bank is simply exercising its superior strength in bargaining power to control the terms and avoid any meaningful negotiations regarding those terms. Plaintiff's argument is unavailing for two reasons. First, her contention that she does not recall receiving the Notice of Rejection of Arbitration is unattested, as it is set forth in her memorandum of law and not in an affidavit, and therefore, is legally insufficient. *Fed. R. Civ. P. 56(c)(1)*. Second, even if Plaintiff had provided such statement in an affidavit, merely asserting that she did not recall receiving the Notice does **[*16]** not lead to the conclusion that she never actually agreed to not opt out of the arbitration clause. *See, e.g., Tinder v. Pinkerton Security, 305 F.3d 728, 735-36 (7th Cir. 2002)* (holding that plaintiff's averment in her affidavit that she did not recall seeing or reviewing the arbitration program brochure that was allegedly included with her payroll check did not raise a genuine issue of fact as to whether the brochure was distributed to her, where the record also contained uncontroverted affidavits from defendant indicating that the brochure was definitely sent and presumably received with her paycheck) (citations omitted); *Fisher v. GE Med. Sys., 276 F.Supp. 2d 891, 895 (M.D. Tenn. 2003)* ("That [plaintiff] 'does not recall' receiving a copy of [the arbitration agreement] does not invalidate the agreement.").

As to the second threshold requirement, DFS maintains that Plaintiff's antitrust claims against DFS fall within the scope of the arbitration agreement, given the broad and sweeping language of the arbitration provision

and the strong presumption of arbitrability. In support, DFS argues that its alleged violations of the Sherman Act clearly relate to Plaintiff's Account and "the **[*17]** relationships which resulted from [her] Account," as that claim is premised on her allegation that DFS used its relationships with credit reporting bureaus and credit scoring companies to share her financial information with the other defendants, thereby supposedly fixing the price that she paid for her credit from DFS and the other defendants. (DFS's Mem. of Law at 10, ECF No. 28 (citing Compl. ¶67).) DFS further contends that the privacy provision of the Cardmember Agreement specifically contemplates and expressly permits the sharing of Plaintiff's account information with others. Therefore, DFS maintains that Plaintiff's claims relate directly to her account and Cardmember Agreement, and thus, are subject to the agreement to arbitrate with Discover Bank and its parent corporation, DFS. Plaintiff does not appear to contest that her antitrust claims here fall within the scope of the arbitration provision in her Cardholder Agreement.

The Court finds that Plaintiff's antitrust claims against DFS clearly fall within the scope of the arbitration provision. A "presumption of arbitrability" guides the Court's inquiry as to whether Plaintiff's claims fall within the substantive scope of the **[*18]** arbitration provision in her Cardholder Agreement. *PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990)*(overruled by implication on other grounds by *Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)*, as recognized by *Dean Witter Reynolds, Inc. v. Druz, 2003 U.S. App. LEXIS 15523 (3d Cir. Aug. 4, 2003))* (citing *AT & T Techs. v. Commc'n Workers of Am., 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986))*. In addition, "[a]n order to arbitrate 'should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc., 247 F.3d 44, 55 (3d Cir. 2001)* (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960))*. Courts have determined that language of an arbitration provision providing that "any controversy, claim or dispute arising out of or relating" is of the broadest nature. *TMG Health, Inc. v. UnitedHealth Group, Inc., Civ. A. No. 07-115, 2007 U.S. Dist. LEXIS 31423, 2007 WL 1258133, at *1 (E.D. Pa. Apr. 27, 2007)* (citing *Medtronic AVE, Inc. v. Cordis Corp., 367 F.3d 147, 100 F. App'x 865, 868-69 (3d Cir. 2004))*. In the case at bar, the Court **[*19]** finds that the arbitration provision at issue here is broadly worded so as to encompass the antitrust claims asserted by Plaintiff, as said claims arise out of or relate to matters covered in the Cardholder Agreement.

Accordingly, the Court finds that the undisputed facts show: (1) the parties entered into a valid arbitration agreement, and (2) Plaintiff's antitrust claims against DFS fall within the scope of that agreement. As to whether the arbitration provision is actually enforceable, Plaintiff raises several defenses at law to the enforceability of contracts, which are addressed below.

2. Enforceability of Arbitration Provision

Plaintiff's primary focus in opposing the motion to compel arbitration lies in two defenses at law to the enforceability of contracts--impossibility and unconsionability. For support, Plaintiff cites the *Restatement (Second) of Contracts, §261*, which provides: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate **[*20]** the contrary."

a. Impossibility of Performance

Selection of Forum

First, Plaintiff submits that the arbitration provision is void as being impossible to perform according to its terms, because neither of the forums specifically designated in the arbitration clause no longer accept consumer debt arbitrations. According to Plaintiff, the *New York Times* reported that as of July 20, 2009, the National Arbitration Forum ("NAF") is not accepting consumer arbitration cases in accordance with its settlement agreement with the Minnesota Attorney General. [8] In addition, NAF's website indicates that it is currently not accepting consumer arbitrations. [9] DFS concedes this point.

8 *See* Associated Press, *NY Times*, "Firm Agrees to End Role in Arbitrating Card Debt," July 20, 2009, as reported at http://www.nytimes.com/2009/07/20/busine

ss/20credit.html.

9 *See* http://www.adrforum.com/faq.aspx?faq=884 (last visited 8/24/11).

Plaintiff further submits that the American Arbitration Association ("AAA") similarly has stopped accepting consumer credit card debt arbitrations and adjudications of class action waivers. The AAA recently issued the following notice regarding its previous moratorium on debt collection **[*21]** arbitrations:

> Notice on Consumer Debt Collection Arbitrations
>
> On October 19, 2010, the National Task Force on the Arbitration of Consumer Debt Collection Disputes released the Consumer Debt Collection Due Process Protocol Statement of Principles. That Protocol sets forth a number of important principles that need to be addressed and incorporated into consumer debt collection arbitration programs to help ensure that a fair and adequate arbitration process is made available to the parties. . . .
>
> However, the American Arbitration Association's previously announced moratorium on debt collection arbitrations remains in effect. That moratorium was instituted based on public discourse and an evaluation of the AAA's own experiences. Matters included in this moratorium are: consumer debt collections programs or bulk filings and individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute and the case involves a credit card bill or, the case involves a telecom bill or the case involves a consumer finance matter.
>
> The AAA will continue to administer all demands for arbitration filed by consumers against businesses, and all **[*22]** other types of consumer arbitrations.

See http://www.adr.org/sp.asp?id=36427 (last visited 8/2411) (hereinafter referred to as "AAA Notice").

Black construes the language in the second paragraph of the AAA Notice following "Matters included in this moratorium are:" in the disjunctive, and thus, argues that the terms "telecom bills" and "consumer finance matters" are clearly separate from the prior limitation regarding who is the filing party. Therefore, according to Black, consumer finance matters (which is really what her case involves, not debt collection) are included within the moratorium. Based on the above, Plaintiff argues that neither forum designated in the arbitration provision, AAA nor NAF, will arbitrate disputes involving consumer debts similar to the one at issue here. Consequently, because an agreement to arbitrate before a particular forum is an integral term of an agreement to arbitrate, where the forum selected by the parties declines to hear the matter, the dispute is to be tried in court. Accordingly, plaintiff submits that the motion to compel arbitration should be denied.

The Court disagrees with Plaintiff's construction of the language in the last sentence of the **[*23]** second paragraph in the AAA Notice, as she ignores the use of the conjunctive, "and," as well as the grammatical structure of that sentence. As to the use of the conjunctive, unless the context dictates otherwise, the word "and" is presumed to be used in its ordinary sense. *Reese Brothers, Inc. v. United States, 447 F.3d 229, 235-36 (3d Cir. 2006)* (citations omitted). When the ordinary meaning of the word "and" is applied to the last sentence of paragraph two, the AAA Notice sets forth three situations to which the moratorium applies: (1) "consumer debt collection programs[,]" (2) "bulk filings[,] ***and*** [(3)] "individual case filings in ***which*** the company is the filing party ***and*** the consumer has not agreed to arbitrate at the time of the dispute ***and*** [(a)] the case involves a credit card bill, or [(b)] the case involves a telecom bill, or [(c)] the case involves a consumer finance matter. (Emphasis added.) The grammatical structure of the sentence supports this conclusion. The words, "and the consumer has not agreed to arbitrate at the time of the dispute," and "the case involves a credit card bill or . . . a telecom bill or . . . a consumer finance matter," are actually clauses (i.e., **[*24]** contain a noun and a verb), as opposed to the matters set forth at the beginning--"consumer debt collection programs" and "bulk filings"--which are nouns. Moreover, the use of the relative pronoun, "which" in the preceding clause, "individual case filings in *which* the company is the filing party," indicates that the clauses that follow it are subordinate to it. Indeed, the very definition of a

subordinate clause is that it depends on something else, i.e., an independent clause, for its meaning. Finally, the Court notes that the last subordinate clause which begins "and the *case* involves a credit card bill . . ." actually includes the word "case," which appears to be referring to the "individual *case* filings" language in the independent clause, "Matters included in this moratorium are . . . individual *case* filings in which the company is the filing party and . . .." (Emphasis added.)

In addition, this construction is in line with AAA's concerns, in implementing the moratorium, with ensuring a fair and adequate arbitration process for *consumer debt collection* arbitration programs. The Court's construction of the moratorium is also logical given the AAA's repeated reference to *debt* **[*25]** *collection* arbitrations throughout the Notice, and the fact that debt collections are normally brought by the company/lender against the consumer. None of these concerns are implicated here, where Plaintiff's dispute with DFS does not involve a consumer debt collection arbitration. [10] At least two other district courts have agreed with this Court that AAA is available to arbitrate similar claims. *See, e.g., Clerk v. ACE Cash Express, Inc., No. 09-05117, 2010 U.S. Dist. LEXIS 7978, 2010 WL 364450, at *10 (E.D.Pa. Jan. 29, 2010)*; *Smith v. ComputerTraining.com, Inc., No. 2:10-cv-11490, 772 F. Supp. 2d 850, 2011 U.S. Dist. LEXIS 16516, at *30-31 (S.D. Mich. Feb. 18, 2011)*.

> 10 Nor does applying the ordinary meaning of the word "and" here lead to an absurd or anomalous result, but rather, is entirely consistent with the purpose of the moratorium.

In light of this construction of the AAA Notice, the Court finds that none of the situations subject to the AAA moratorium is present here. The first situation is not implicated because, as Plaintiff concedes, the dispute here involves "a consumer finance matter (price fixing), not a debt collection program." P1.'s Sur-Reply Br. at 1, ECF No. 73. Nor does this case involve a "bulk filing, and thus, **[*26]** the second situation is likewise inapplicable. As to the third situation, all three conditions must be met in order for the matter to fall within the moratorium. The only condition at issue here is the first one--whether DFS is the filing party. Black argues that DFS is the filing party because DFS is the partying requesting arbitration. The Court disagrees. Just because DFS has moved to compel arbitration does not mean that it is the filing party. Rather, the filing party is the party pursuing the underlying claim which, in this case, is Black. *See Ace Cash Express, 2010 U.S. Dist. LEXIS 7978, 2010 WL 364450, at *10*; *Estep v. World Finance Corp. of Ill., 735 F.Supp. 2d 1028, 1033 (C.D.Ill. 2010)*; *Jackson v. The Payday Loan Store of Ill., 2010 U.S. Dist. LEXIS 25266, at *6-7 (N.D. Ill. Mar. 17, 2010)*.

Plaintiff attempts to distinguish these cases on the basis that the district courts in *Estep* and *Jackson* failed to analyze the moratorium in light of AAA's substantive concerns as stated in the Naimark Testimony. However, the moratorium's concerns were specifically directed to consumer debt collection arbitrations brought by lenders, and thus, would have no relevance to the decisions in *Estep* and *Jackson*, or to the **[*27]** instant matter.

Moreover, the third paragraph of the AAA Notice makes clear that the moratorium does not apply to Plaintiff's dispute with DFS. Black does not agree with this conclusion, again asserting that she is not the party demanding arbitration. This argument fails for the reason just stated--Plaintiff, who is pursuing an antitrust claim against DFS, would be the filing party in the arbitration. Thus, the third paragraph of the AAA Notice makes clear that Plaintiff's claim is not subject to the current AAA moratorium on debt collection arbitrations.

Finally, in a last ditch effort to show that arbitration before the AAA is impossible, Plaintiff posits that when the substantive concerns underlying the moratorium are taken into consideration, [11] AAA will not administer the arbitration. According to Black, AAA's substantive concern of bias has nothing to do with which party files in arbitration. Plaintiff's argument might have some merit if her dispute with DFS involved the arbitration of a debt collection matter and she was the one being sued. But, as she herself concedes, her dispute with DFS involves a consumer finance matter (price fixing), and she is the filing party.

> 11 As Black **[*28]** notes, one of the critical issues needing further consideration and improvement before arbitration of debt collection cases will resume is arbitrator neutrality, specifically, that "an appearance of bias might result from arbitrators hearing many cases involving the same business party." Testimony of Richard W. Naimark on behalf of AAA, Before Domestic Policy Subcommittee, Oversight and Government Reform Committee, July 22, 2009 ("Naimark Testimony") at 6, reported at

http://www.adr.org/si.asp?id=5770 (last visited 8/24/2011) (ECF No 73-1). However, a review of Mr. Naimark's testimony reveals that the AAA's overarching concern is with the fairness of *debt collection* arbitrations. In this regard, Naimark testified:

> [I]t is the AAA's position that a series of important fairness and due process concerns must be addressed and resolved before we will proceed with the administration of any future *debt collection arbitrations.* Until such time, the AAA has placed a moratorium on the administration of any *consumer debt collection arbitration programs.*

Id. at 2 (emphasis added). Thus, the critical issues identified by AAA--notice (many consumers do not appear), arbitrator neutrality, pleading and **[*29]** evidentiary standards, and defenses and counterclaims--are particular to the consumer debt collection arbitrations, and were identified based on the large number of cases filed by creditors, and statistical evidence showing that 93.3% of the time defendants (consumers) did not appear, defendants are almost never represented by counsel, and that 80% of cases result in default judgments against the consumer without the requisite proof. *Id.* at 4 (citing *Debt Weight: The Consumer Credit Crisis in new York City and its Impact on the Working Poor*, available at http://www.urbanjustice.org/pdf/publicat ions/CDP Debt Weight.pdf.). None of these concerns is implicated in the case at bar.

In the alternative, Black requests leave of court under *Rule 26(d)(1)* to conduct discovery limited to determining whether the present dispute with Discover falls within AAA's moratorium. As the Court has determined that the moratorium does not apply to Plaintiff's dispute with DFS, and even Plaintiff's own evidence, Naimark's testimony, supports this conclusion, there is no need to conduct discovery to ascertain whether AAA would arbitrate the matter. That issue has clearly been resolved.

Accordingly, because the **[*30]** AAA moratorium does not apply to Plaintiff's dispute with DFS, enforcement of the arbitration provision is not impossible under the terms of the Cardholder Agreement.

Class Action Waiver

Plaintiff's other impossibility argument can be summarized as follows--because the arbitration provision in her Cardholder Agreement contains a class action waiver, and AAA does not accept adjudications of class action waivers, the arbitration provision is void as being impossible to perform according to its terms. In support, Black cites a document located on the AAA's website entitled, "Consumer Debt Collection Due Process Protocol Statement of Principles" ("Principles") prepared by the National Task Force on the Arbitration of Consumer Debt Collection Disputes, dated October 2010, from which she infers that AAA has stopped accepting adjudications of class action waivers,. (*See* Ex. B attached to DFS's Reply Br., ECF No. 70.)

In reply, Discover argues that Black is completely wrong when she claims the AAA does not accept adjudications of class action waivers. DFS submits that the document she cites in support, the Principles, does not contain any such statement. More importantly, DFS posits, it is asking **[*31]** *this Court*, not AAA, to enforce the class action waiver. The arbitration agreement specifically provides that "only a court, and not an arbitrator, shall determine the validity and effect of the Class Action Waiver." (Cardmember Agreement at 11, Ex. 10 to Linian Decl.)

The Court does not find any support for Black's position in the Principles document. Rather, review of the Principles reveals that the members of the Task Force took strong but opposing views on the availability of class actions in arbitration, and therefore the Principles declined to take a position on the issue of class actions. *See* Ex. B at 11-14, ECF No. 70. [12] In any event, Plaintiff's argument is undercut by the court of appeals decision in *Puleo v. Chase Bank USA, N.A., 605 F.3d 172 (3d Cir. 2010)*. In *Puleo*, the court of appeals, sitting *en banc*, held that a plaintiff's challenge to an arbitration agreement's class action waiver "presents a question of arbitrability" that the court, not the arbitrator, should decide. *Id. at 188*. Therefore. even if AAA is no longer accepting adjudications of class action waivers, that does not make the arbitration provision impossible to perform, since the Court, not the arbitrator, **[*32]** determines whether the class action waiver is enforceable.

12 Although neither party brought this to the Court's attention, the court of appeals in *Puleo* noted that the plaintiffs could not have brought that case as a class arbitration before the AAA because in a July 2005 policy, the AAA stated that it "does not accept demands for class arbitration where, as "in that case", 'the underlying agreement prohibits class claims,' unless the parties obtain a court order requiring the parties to submit the class claims to arbitration." *605 F.3d at 176 n. 1*.

b. ***Unconscionability of Class Action Waiver***

DFS submits that the class action waiver in the arbitration provision is valid and enforceable because Plaintiff agreed to the arbitration provision and she did not exercise her right to opt out of the class action waiver. In particular, DFS submits that under Delaware law, the parties' designated choice of law, the class action waiver is enforceable. In response, Plaintiff argues that because Pennsylvania policy interests are implicated here, Pennsylvania law should be applied, and under that law, the class action waiver is unconscionable, and therefore, unenforceable. DFS disagrees that Pennsylvania **[*33]** law should apply here, but submits that even if the Court were to apply Pennsylvania law, Plaintiff has failed to show, as is her burden, that the class action waiver is both procedurally and substantively unconscionable. DFS further submits that pursuant to the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 179 L. Ed. 2d 742 (2011)*, the FAA preempts Pennsylvania law that holds class action waivers in consumer arbitration agreements unconscionable, and thus, unenforceable. For the reasons articulated below, the Court finds the class action waiver is enforceable.

As a preliminary matter, DFS submits that Black does not dispute, nor could she, that if this Court applies the Delaware choice-of-law provision in the Cardmember Agreement, the class action waiver is enforceable. In support, DFS cites *Venezie v. MBNA Am. Bank, No. 05-1458, 2006 U.S. Dist. LEXIS 54014 (W.D.Pa. July 26, 2006)* (Cercone, J.) (upholding Delaware choice-of-law provision in credit card agreement and enforcing class action waiver in a diversity jurisdiction case brought pursuant to TILA); *Lloyd v. MBNA Am. Bank, N.A., 27 F. App'x 82, 85 (3d Cir. 2002)* (finding right to bring class action under TILA **[*34]** was a procedural one and may be waived, and thus, arbitration agreement barring class-wide relief for TILA claims was not unconscionable); *Pick v. Discover Fin. Serv., Inc., C.A. No. 00-935-SLR, 2001 U.S. Dist. LEXIS 15777, 2001 WL 1180278, *5 (D.Del. Sept. 28, 2001)* ("it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions"). In addition, DFS submits that the court of appeals for this circuit has repeatedly enforced class action waivers in arbitration agreements. *See e.g., Gay v. CreditInform, 511 F.3d 369, 391-92 (3d Cir. 2007)* (because plaintiff retained her substantive rights pursuant to the Credit Repair Organizations Act and Pennsylvania Credit Services Act, a provision in the arbitration agreement requiring plaintiff to arbitrate claims on an individual basis did not constitute an unconscionable bargain under Virginia law); *Johnson v. West Suburban Bank, 225 F.3d 366, 371, 373-75 (3d Cir. 2000)* (under federal Truth-in-Lending Act, right to class action was a procedural one and may be waived, and thus, arbitration agreement barring class-wide relief for TILA claims was not unconscionable, reasoning that plaintiffs who signed valid arbitration agreements **[*35]** retained the full range of rights afforded under TILA in individual arbitration proceedings).

A review of Delaware law reveals that the courts of that state have held class action waivers in consumer credit card agreements to be enforceable. *See, e.g., Edelist v. MBNA Am. Bank, 790 A.2d 1249, 1260-61 (Del. Super. Ct. 2001)* (holding that where the surrender of the class action right was clearly articulated in the arbitration agreement, and plaintiff did not dispute the clarity of the language barring class actions in arbitration, the class action waiver was not unconscionable and therefore enforceable); [13] *Pick, 2001 U.S. Dist. LEXIS 15777, 2001 WL 1180278, at *5* ("it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions") (citing *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)* (ADEA claims); *West Suburban Bank, 225 F.3d at 377 (FILA claims))*. Under Delaware law, more than a mere disparity in bargaining power is required to demonstrate that an arbitration provision is unconscionable. *Pick, 2001 U.S. Dist. LEXIS 15777, 2001 WL 1180278, at *5* (citing *Gilmer, 500 U.S. at 33*; *Harris v. Green Tree Fin. Corp., 183 F.3d 173, 182-83 (3d Cir. 1999))*. In setting forth the test for unconscionability, **[*36]** the Delaware Supreme Court opines:

> there must be an absence of meaningful choice and contract terms unreasonably favorable to one of the parties. Superior bargaining power alone without the element of unreasonableness does not permit a finding of unconscionability or unfairness. The traditional test is this: a contract is unconscionable if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other." *Williams v. Walker-Thomas Furniture Co., 121 U.S.App.D.C. 315, 320, 350 F.2d 445, 450, 18 A.L.R.3d 1297, 1301-3 (1965)*. "It is generally held that the unconscionability test involves the question of whether the provision amounts to the taking of an unfair advantage by one party over the other." *J. A. Jones Construction Co. v. City of Dover, Del.Super., 372 A.2d 540, 552 (1977), appeal dismissed, Del.Supr., 377 A.2d 1 (1977)*.

Tulowitzki v. Atlantic Richfield Co., 396 A.2d 956, 960 (Del. 1978).

13 In concluding that the class action waiver was not unconscionable, the *Edelist* court relied on several decisions by Delaware district courts involving unconscionability challenges to class action waivers in TILA cases. **[*37]** *790 A.2d at 1261*. Although Edelist asserted state common law claims and an alleged violation of the Delaware Consumer Fraud Act, the superior court found the result in those TILA cases, i.e., the district court upheld the bar on class actions in arbitration agreements, was equally applicable to plaintiff's putative right under Delaware law to bring a class action. *Id.*

In her written briefs, Black has not provided any argument in opposition to DFS's argument that under Delaware law, the class action waiver is not unconscionable. Indeed, at oral argument, Plaintiff's counsel agreed with DFS that under Delaware law, class action waivers in arbitration provisions are enforceable. (Tr. of Oral Arg. at 80, ECF No. 82.) In light of the Delaware courts' endorsement of the generally accepted view that arbitration clauses are not unconscionable because they preclude class actions, and the absence of any evidence showing DFS had superior bargaining power over Plaintiff that was unreasonable, [14] the Court concludes that Delaware Supreme Court would find that the class action waiver in the arbitration provision agreed to by Plaintiff is enforceable.

14 *See* discussion of this factor *infra* at 29-33 **[*38]** regarding Pennsylvania law on unconscionability.

Perhaps recognizing this, Plaintiff attempts to circumvent the designation of Delaware law in the Cardmember Agreement by arguing that where a class action waiver is unconscionable as against public policy, the policy interests of Pennsylvania override any choice of law clause. Plaintiff's argument parallels, at least partially, a conflict of laws analysis under Pennsylvania law, but is undeveloped. *See* discussion *infra* at 23. The Court notes that neither party has advanced any argument as to which state's choice of laws rules should be applied here. The general rule in diversity of citizenship cases is that the conflicts law of the forum applies. *Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. However, whether this rule applies to federal question case such as this one, where Plaintiff's claims against DFS are brought pursuant to a federal statute, but the issue raised in the motion to compel arbitration involves a state law contract defense, depends on the source of the source of the right or issue being adjudicated. *See* Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, 19 *Fed. Prac. & Proc.* §4520 at 638 (2d ed. **[*39]** 1996) ("Once it is understood that the law to be applied in federal courts is not chosen by reference to the basis of subject-matter jurisdiction, the nature of the inquiry by which it is decided which law to apply in nondiversity cases is the same as that governing the choice in diversity cases. In other words, the choice of applicable law turns upon the source of the right or issue being adjudicated.") (footnote omitted).

The court of appeals decision in *System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131 (3d Cir. 1977)* is instructive here. In that case, the plaintiff brought a federal antitrust claim involving patents in a New Jersey federal court, as well as various common law claims under New Jersey law. *Id. at 1135*. As a threshold matter, the court of appeals addressed a choice of law issue with regard to one of the pendant state law claims.

The court held that although *Klaxon* was a diversity jurisdiction case, the principle of *Klaxon* was equally applicable with regard to pendant jurisdiction claims. *Id. at 1136* (citations omitted). Thus, the court of appeals concluded that since plaintiff's common law product disparagement claim was predicated on state, not **[*40]** federal law, the determination of which state's rules of product disparagement law should have been governed by the choice-of-law rules of the forum state, New Jersey. *Id. at 1136-37* (citation omitted).

Similarly here, this Court's subject matter jurisdiction is predicated on a federal statute--the Sherman Act. Moreover, the FAA governs the interpretation and construction of the arbitration agreement. *Section 2 of the FAA* has been interpreted as endorsing the applicable state law where a party raises contract defenses, such as unconscionability, to invalidate arbitration agreements. *Gay, 511 F.3d at 388* (citing *Harris, 183 F.3d at 179*; *Doctor's Assocs., 517 U.S. at 687*) (other citations omitted). That is precisely what has happened here--Plaintiff has raised an unconscionability defense under Pennsylvania law to the enforcement of the class action waiver in the arbitration provision. Therefore, the Court finds that it is entirely reasonable to apply the choice of law rules of the forum state, Pennsylvania, to determine whether the parties' designation of Delaware law as the governing law should be applied to Plaintiff's unconscionability argument. *See Gay, 511 F.3d at 389* (applying Pennsylvania **[*41]** choice of law rules in a federal question case to determine which state's law governed an arbitration provision based on plaintiff's argument that Pennsylvania law governed the arbitration clause and the contract as a whole, and the court of appeals' observation that had jurisdiction been based on diversity of citizenship, Pennsylvania's choice of law rules would apply under *Klaxon*).

In Pennsylvania, "courts generally honor the intent of the contracting parties and enforce choice of law provisions in contracts executed by them." *Kruzits v. Okuma Mach. Tool, Inc., 40 F.3d 52, 55 (3d Cir. 1994)*. In making this determination, the Pennsylvania courts have adopted the approach taken in the *RESTATEMENT (SECOND) OF CONFLICTS §187*, which provides in relevant part:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by **[*42]** an explicit provision in their agreement directed to that issue, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . ..

Kruzits, 40 F.3d at 55 (citing *Smith v. Commw. Nat'l Bank, 384 Pa. Super. 65, 557 A.2d 775, 777 (Pa. Super. Ct. 1989), appeal denied, 524 Pa. 610, 569 A.2d 1369 (1990)*; *Gay, 511 F.3d at 389*. In the case at bar, Plaintiff's unconsionability defense to the enforceability of the class action waiver cannot be resolved by the terms of the Cardmember Agreement, including the arbitration provision. Thus, *§187(1)* does not apply. Turning to *§187(2)*, it appears that Delaware has a substantial relationship to the parties, as Discover Bank is chartered and incorporated in Delaware, has its principal place of business in Delaware, and operates a full service facility in that state. Moreover, both DFS and DFS Services, LLC are incorporated in Delaware. Thus, the parties' designation of Delaware **[*43]** law will be upheld unless Plaintiff can demonstrate that the application of Delaware law would be contrary to a fundamental policy of Pennsylvania, and Pennsylvania has a materially greater interest than Delaware in the determination of whether

the class action waiver is unconscionable. *Kruzits, 40 F.3d at 56* ("Pennsylvania courts will only ignore a contractual choice of law provision if that provision conflicts with strong public policy interests.")

In arguing against the use of the Delaware choice of law provision in the Cardmember Agreement, Plaintiff does not articulate the fundamental policy of Pennsylvania implicated here, other than making the conclusory statement that class action waivers are unconscionable, an therefore, violate Pennsylvania public policy. [15] Thus, she completely fails to engage in a comparison of the two state's public interests at issue here. Instead, Black simply posits that where a class action waiver is unconscionable as against public policy, the policy interests of Pennsylvania override any choice of law clause. In support of her argument, Plaintiff cites *Lytle v. CitiFinancial Serv., Inc., 2002 PA Super 327, 810 A.2d 643 (Pa. Super. Ct. 2002)*, [16] and *Kaneff v. Delaware Title Loans, Inc., 587 F.3d 616 (3d Cir. 2009)*. **[*44]** Plaintiff fails to explain how either case supports a finding *in this case* that Pennsylvania has a fundamental policy interest that is materially greater than Delaware, or even articulate what that policy interest is. In fact, neither of these cases support the application of Pennsylvania law under *§187(2)(b) of the Restatement (Second) of Conflicts.*

> 15 At oral argument, Plaintiff's counsel described the public policy of Pennsylvania that is implicated here as "we want to protect Pennsylvania residents and allow them to have full remedies against companies that self-create these waivers in their arbitration clause." Tr. of Oral Arg. at 82. No further elaboration was provided as to how this so-called policy has been violated here or conflicts with Delaware law.
>
> 16 The superior court's decision in *Lytle* was subsequently abrogated by *Salley v. Option One Mortgage Corp., 592 Pa. 323, 925 A.2d 115 (Pa. 2007)*, on the issue of whether a financial institution's reservation of access to the courts for itself to the exclusion of the consumer, in an arbitration clause, creates a presumption of unconscionability. The Pennsylvania Supreme Court in *Salley* concluded that while "*Lytle* was well intentioned in its effort **[*45]** to guard against pernicious lending practices, . . . it swept too broadly. Under Pennsylvania law, the burden of establishing unconscionability lies with the party seeking to invalidate a contract, including an arbitration agreement, and there is no presumption of unconscionability associated with an arbitration agreement merely on the basis that the agreement reserves judicial remedies associated with foreclosure." *Id. at 129.*

For example, in *Lytle*, the arbitration clause in the mortgage loan agreement provided that the applicable law was that of the state where the borrowers' real property was located which, in that case, was Pennsylvania. Thus, the superior court was not faced with a choice of law analysis *based on an implicated public policy concern.* Plaintiff's reliance on *Lytle* is even more perplexing given that the superior court did not find the class action waiver to be unconscionable. *810 A.2d at 666.* In so holding, the superior court found instructive the court of appeals decision in *West Suburban Bank, 225 F.3d at 374*, which rejected an identical challenge to the validity of an arbitration clause contained in a consumer loan contract which contained a class action waiver. **[*46]** *Lytle, 810 A.2d at 666.* In the case before it, the *Lytle* court found that the record was devoid of any evidence that would establish that the damages claimed by the plaintiffs were insufficient to allow them to seek legal redress for their injuries in the absence of a class action. *Id.* Without such evidence, the superior court held that plaintiffs' challenge to the class action waiver as violating public policy failed. *Id.*

In *Kaneff*, the court of appeals applied Pennsylvania's choice of law rules to determine whether Pennsylvania law, instead of the Delaware choice-of-law provision in a consumer loan agreement, should be applied to determine whether an arbitration clause, which included a class action waiver, [17] was unconscionable. *587 F.3d at 624.* The court of appeals concluded that Pennsylvania had a materially greater interest than Delaware in the determination of whether the arbitration clause is unconscionable because Pennsylvania's interest in the dispute, particularly its antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue, implicated a fundamental policy, as opposed to Delaware, which has no usury law. *Id.* Ultimately, the *Kaneff* **[*47]** court concluded that the arbitration agreement would not be considered unconscionable under Pennsylvania law. *Id.* By contrast here, the fundamental policy at issue is not the disfavor of usurious interest rates. Because the application of the Restatement test is fact specific, and *Kaneff* differs

factually in this important respect, *Kaneff* does not provide support for Plaintiff's argument that the Pennsylvania policy interest implicated here overrides any choice of law clause.

> 17 Without any discussion, the court of appeals in *Kaneff* found the class action waiver provision was not unconscionable. *587 F.3d at 624*.

In addition to *Lytle* and *Kaneff* Plaintiff relies on a line of cases decided by the court of appeals for this circuit, which she cites for the proposition that the policy interest of the forum can preclude application of arbitration where the class action waiver is found to be unconscionable. *See e.g., Gay, 511 F.3d at 394-95*; *Homa v. Am. Express Co, 558 F.3d 225 (3d Cir. 2009)*, abrogation recognized by *Litman v. Cellco P'ship, No.08-4103, 655 F.3d 225, 2011 U.S. App. LEXIS 17649, at *11 (3d Cir. Aug. 24, 2011)*. [18] In response, DFS questions Plaintiff's reliance on *Gay*, where the court of appeals **[*48]** upheld enforcement of the class action waiver, and on *Homa*, which involved New Jersey law and unlike the agreement here, the arbitration agreement in *Homa* did not give the consumer an opt-out right. The Court finds that Plaintiff's reliance on *Gay* and *Homa* is misplaced as those cases are distinguishable factually from the case at bar, but not for the reasons cited by DFS.

> 18 Plaintiff also cites the court of appeals' en banc decision in *Puleo*, but only to point out that the en banc court clarified that the panel's discussion in *Gay*, indicating that the FAA preempted Pennsylvania law finding that class action waivers were unconscionable, was dicta, as the panel had already determined that Virginia law governed the arbitration provision. *605 F.3d at 176* (citing *Gay, 511 F.3d at 390, 395)*.

In *Gay*, the court of appeals applied Pennsylvania's conflict rules to determine whether the parties' Virginia choice of law provision should be upheld. In weighing the interests of the two states, the court of appeals opined:

> Inasmuch as we see no reason to conclude that Pennsylvania "has a materially greater interest" in the enforceability of the arbitration agreement, or that applying Virginia law to **[*49]** determine whether it should be enforced "would be contrary to a fundamental policy" of Pennsylvania, under Pennsylvania's choice-of-law rules we are satisfied that there is no reason not to honor the parties' choice of Virginia law in considering the unconscionability claim. Though it certainly is true that Pennsylvania has an interest in protecting its consumers, we cannot say that Virginia has a lesser interest in protecting businesses located in it.

511 F.3d at 390. Unlike *Gay*, the fundamental public policy at issue here is the availability of class actions in arbitrations. Thus, the court of appeals decision in *Gay* provides no guidance to this Court on how to evaluate the competing public policy interests of Delaware and Pennsylvania for the purpose of determining which state's law should apply to the issue of whether the class action waiver is unconscionable.

In conducting a choice-of-law analysis in *Homa*, [19] the court of appeals actually considered the competing policy interests of the designated state's law, Utah, and the law of the forum, New Jersey, vis a vis class action waivers in arbitration agreements. The court of appeals concluded that the waiver of class action arbitrations **[*50]** violated fundamental New Jersey public policy as applied to small sum cases. *558 F.3d at 230*. In determining which state, NJ or Utah, had the greater interest, the court of appeals first determined that an actual conflict existed between the laws of those states, as Utah statutory law explicitly provided that class action waivers in open-end consumer credit contracts were valid, while NJ decisional law had declared unconscionable a class action arbitration waiver that would preclude relief under NJ's consumer fraud act. *Id. at 232*. After weighing the public interests at stake--Utah's law indicating a strong policy in favor of the enforcement of class action waivers, as opposed to New Jersey's interest in protecting consumers' ability to effectively pursue their statutory rights under its consumer protection laws--the court of appeals concluded that New Jersey had a materially greater interest than Utah in the enforceability of a class action arbitration waiver that could operate to preclude a New Jersey consumer from relief under its consumer fraud act. *Id. at 232-33*. Clearly, *Homa* is distinguishable because, although the public interests involved were class action waivers in arbitration **[*51]** agreements, the public interests were weighed under New Jersey and Utah law, not Pennsylvania and Delaware law. More importantly,

the continued viability of the conflicts analysis in *Homa* is questionable in light of the court of appeals holding in *Litman* that "*Homa* has been abrogated by *Concepcion* and that *Muhammad* [, New Jersey decisional law that had declared unconscionable a class action arbitration waiver that would preclude relief under NJ's consumer fraud act,] is preempted by the FAA." *655 F.3d 225, 2011 U.S. App. LEXIS 17649, at *11*.

> 19 In *Homa*, the holder of an American Express credit card brought a putative class action in New Jersey District Court claiming that the card issuer and its parent company misrepresented the actual terms of a reward program and failed to reward him the promised amount of cash back, in violation of the New Jersey Consumer Fraud Act. *558 F.3d at 226-27*.

While Plaintiff contends that the policy interests of Pennsylvania override any choice of law clause where the class action waiver is unconscionable and therefore against public policy, [20] she has failed to articulate any argument or facts to support her contention. As the party challenging the application of Delaware **[*52]** choice-of-law, Plaintiff bears the burden to demonstrate that the Delaware choice of law provision should not be upheld. Because she has failed to meet her burden, the Court finds the Delaware choice of law provision should be applied to the issue presented here. "Under *Volt*, when an arbitration agreement contains a choice-of-law provision, that provision must be honored, and a court interpreting the agreement must follow the law of the jurisdiction selected by the parties." *Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 87, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)* (Thomas, J., concurring in judgment) (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478-79, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989))*. As the Supreme Court opined in *Volt*, the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *489 U.S. at 478* (citation omitted). Thus, the Supreme Court held that "where parties agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Id. at 479*. In the case at bar, the Cardholder Agreement, which contains the arbitration **[*53]** provision at issue here, provides that the Agreement shall be governed by Delaware law and applicable federal laws. Plaintiff has failed to proffer any facts or argument calling into question her agreement to the choice-of-law provision in the Cardholder Agreement. Thus, pursuant to *Volt*, the Court is required to follow the law of the jurisdiction selected by the parties, i.e., Delaware, and under that law, the class action waiver is enforceable.

> 20 The Court notes that Plaintiff appears to be putting the proverbial cart before the horse with this argument, as her argument appears to be that because the class action waiver violates public policy, it is unconscionable. However, the determination of whether the class action waiver is unconscionable is not made at this stage, but only after the conflicts of law analysis has been completed.

In the alternative, DFS argues that even if this Court were to find that Pennsylvania law governs the determination as to whether the class action waiver is unconscionable, the class action waiver would still be enforceable. The doctrine of unconscionability in Pennsylvania has been explained by the Pennsylvania Supreme Court as follows:

> [W]e agree with **[*54]** the general formulation which has been applied fairly consistently in the intermediate appellate courts, and which borrows from the statutory version and is largely consonant with the Second Restatement of Contracts. See *Restatement (Second) of Contracts § 208* (1981).
>
> Under that formulation, a contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors the party asserting it. *See Denlinger, Inc. [v. Dendler, 415 Pa. Super. 164, 177, 608 A.2d 1061, 1068 (1992)]* (citing *Witmer v. Exxon Corp., 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981))*. The aspects entailing lack of meaningful choice and unreasonableness have been termed procedural and substantive unconscionability, respectively. See generally *17A Am.Jur.2d Contracts § 278* (2006). The burden of

> proof concerning both elements has been allocated to the party challenging the agreement, and the ultimate determination of unconscionability is for the courts. *See Bishop v. Washington, 331 Pa.Super. 387, 400, 480 A.2d 1088, 1094 (1984)*; *accord 13 Pa.C.S. § 2302*.

Salley, 925 A.2d at 119-20 (footnote omitted). DFS submits **[*55]** that Plaintiff has failed to demonstrate the presence of either type of unconscionability with regard to the class action waiver.

"Procedural unconscionability refers specifically to 'the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language.'" *Zimmer v. CooperNeff Advisors, Inc., 523 F.3d 224, 228 (3d Cir. 2008)* (citing *Harris, 183 F.3d at 181*). As the Pennsylvania Supreme Court has explained, procedural unconscionability means the "absence of meaningful choice on the part of one of the parties." *Witmer v. Exxon Corp., 495 Pa. 540, 434 A.2d 1222, 1228 (Pa. 1981)*. Procedural unconscionability exists generally where the agreement involved is a contract of adhesion, that is, the contract is "prepared by a party with excessive bargaining power and presented to the other party on a 'take-it-or-leave-it' basis." *Hopkins, 643 F.Supp. 2d at 716-17* (citing *Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061, 1068 (Pa. Super. Ct. 1992))*. "The general test is whether the party challenging the agreement had any meaningful choice regarding the acceptance of its provisions." *Id. at 717* (citing *Thibodeau v. Comcast Corp., 2006 PA Super 346, 912 A.2d 874, 886 (Pa. Super. Ct. 2006))*.

Plaintiff's **[*56]** argument in support of procedural unconscionability is that although DFS may have made a one-time offer to opt out of arbitration over seven years ago, she does not recall receiving the offer and thus never actually agreed not to opt out. By relying on silence instead of contacting her to discuss the terms, Plaintiff maintains that DFS is simply exercising its superior strength in bargaining power to control the terms and avoid any meaningful negotiations regarding those terms. In response, DFS submits that Black has failed to show that the arbitration agreement was procedurally unconscionable in that she was afforded the opportunity to opt-out of the arbitration agreement, and her unattested claim that she "does not recall" receiving the opt-out offer is legally insufficient, thus defeating any claim that it was a contract of adhesion. The Court does not find any merit to Plaintiff's argument.

Plaintiff's argument that she was denied any meaningful choice is belied by the uncontested evidence here, which shows that in 2003, Plaintiff was given the explicit right to reject the entire arbitration provision without cancelling her account or affecting any of her other rights or privileges **[*57]** under the remainder of the Cardmember Agreement. (Linian Decl., ¶11 & Ex. 4 attached thereto, ECF No. 28-3). The Notice of Right to Reject Arbitration was included with Plaintiff's monthly billing statement, and indicated that she had the opportunity to reject the Arbitration of Disputes section effective April 1, 2003. (Ex. 4 to Linian Decl.) In order to do so, Plaintiff was required to send a written notice of rejection by March 25, 2003. (*Id.*) Plaintiff allegedly had thirty days to exercise her opt-out right and reject arbitration. [21] According to its records, DFS did not receive any written notice from Plaintiff electing to exercise her right to reject the arbitration provision. (Linian Decl., ¶11.)

> 21 At oral argument, counsel for DFS stated that Plaintiff "had 30 days if she wanted to walk away from arbitration[, and s]he didn't exercise it." Tr. of Oral Arg. at 84-85. Although this statement is not supported by any evidence in the record, it stands unrefuted by Plaintiff.

On this point, the Court finds instructive the district court's decision in *Fluke v. Cashcall, Inc.*, in which the court opined:

> An opt-out provision . . . seriously undermines a consumer's contention that the arbitration **[*58]** agreement is unconscionable. [Plaintiff] was given the option to say "no" to the arbitration provision and he was given a full 60 days to do so. In that way, he had complete control over the terms of the agreement and it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave it basis.

*Fluke v. Cashcall, Inc., Civ. A. No. 08-5776, 2009 U.S. Dist. LEXIS 43231, 2009 WL 1437593, at *8 (E.D.Pa. May 21, 2009)*. The *Fluke* court noted that although the

Pennsylvania courts have not yet addressed whether a class action waiver that contains an opt-out clause is unconscionable and unenforceable, the district court predicted that the Pennsylvania Supreme Court would find that such a provision is not unconscionable because such provisions are not unilaterally imposed but instead give the consumer a meaningful choice as to the terms of the agreement. *2009 U.S. Dist. LEXIS 43231, [WL] at *7-8*.

Similarly, the district court in *Clerk v. ACE Cash Express* rejected plaintiff's argument that she had no meaningful choice in accepting the terms of an arbitration provision due to the unequal bargaining power of the parties and her lack of sophistication. *2010 U.S. Dist. LEXIS 7978, 2010 WL 364450, at *8*. [22] Relying on *Fluke*, the court in *ACE Cash Express* found **[*59]** the opt-out provision in the arbitration agreement, and plaintiff's failure to exercise it, precluded her argument that the arbitration agreement was presented on a take-it-or-leave-it basis. *2010 U.S. Dist. LEXIS 7978, [WL] at *8-9*. Likewise in the case at bar, Plaintiff was given an opt-out right and she failed to execute it. In these circumstances, the Court cannot conclude that Plaintiff lacked a meaningful choice as to the terms of the Cardholder Agreement.

> 22 Several other district courts have declined to find arbitration provisions, with an opt-out clause contained in the arbitration provision, to be procedurally unconscionable. *Clerk v. First Bank of Delaware, 735 F.Supp. 2d 170, 183 (E.D.Pa. 2010)* (collecting cases). The district court in *First Bank of Delaware* declined to follow those cases, however, because the facts in the case before it were distinguishable. There the loan agreement contained terms which gave plaintiff the unilateral right to rescind the loan within one business day of execution of the loan agreement, or to reject the arbitration provision by notice postmarked within seven days. *Id.* The court found the one-day rescission option in a payday loan agreement was meaningless to an individual **[*60]** in plaintiff's position--in dire need of cash assistance and an inability to obtain such assistance elsewhere. Because of the short time frame involved in the opt-out clause, the Court found that the opt-out provision did not protect an otherwise adhesive consumer arbitration agreement from a finding of procedural unconscionability. *Id. at 184*. By contrast here, the record is devoid of any evidence showing that Black needed cash/credit card and she had not other options. Instead, the Court finds that Black's case is more similar to *ACE Cash Express* and *Fluke*, and therefore, elects to apply the reasoning in those cases to the case at bar.

Plaintiff also advances the argument that the arbitration provision is procedurally unconscionable because she does not recall receiving the opt-out notice and thus never actually agreed not to opt out. This argument is equally unavailing. As the Court opined above, Plaintiff's contention that she does not recall receiving the Notice is unattested, and thus, insufficient to show lack of notice. In addition, the district court in *ACE Cash Express* rejected a similar argument in which the plaintiff argued that the arbitration agreement was procedurally **[*61]** unconscionable because she did not recall reading or did not actually read the agreement. *2010 U.S. Dist. LEXIS 7978, 2010 WL 364450, at *9*. The district court found that the "Pennsylvania Supreme Court has explicitly rejected such reasoning, stating that 'failure to read [a contract] is an unavailing excuse or defense and cannot justify avoidance, modification or nullification of [a] contract or any provision thereof.'" *Id.* (quoting *Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (Pa. 1983))*. Black's argument that she *does not recall receiving* the opt-out notice from DFS is somewhat analogous to the plaintiff's argument in *Clerk* that she *did not recall reading* the agreement, and thus, fails for that additional reason. Indeed, a finding of no procedural unconscionability is even more compelling here because the 2003 Notice was sent in a separate document, as opposed to contained within a loan or credit card agreement. Accordingly, the Court finds that Plaintiff has failed to demonstrate that the class action waiver provision is procedurally unconscionable under Pennsylvania law.

DFS further maintains that Plaintiff has failed to show that the class action waiver is substantively unconscionable. **[*62]** Substantive unconscionability requires an inquiry into "whether the arbitration provision 'unreasonably favors the party asserting it.'" *Zimmer, 523 F.3d at 228* (quoting *Salley, 925 A.2d at 119*). The courts have delineated several factors that may indicate that an arbitration provision is substantively unconscionable, including:

> severe restrictions on discovery, *Walker*

> *v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 387-88 (6th Cir.2005)*; high arbitration costs borne by one party, *Spinetti, 324 F.3d at 216-17*; limitations on remedies, *Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 670-71 (6th Cir.2003)*; and curtailed judicial review, *Hooters of America, Inc. v. Phillips, 39 F.Supp.2d 582, 614 (D.S.C.1998)*. Essentially, an arbitration provision is substantively unconscionable if it "create[s] an arbitration procedure that favors one party over another." *Johnson v. West Suburban Bank, 225 F.3d 366, 378 n. 5 (3d Cir.2000)*.

First Bank of Delaware, 735 F.Supp. 2d at 181. In determining the substantive unconscionability of class action waiver provisions, in essence, the "critical issue is whether the particular class action waiver effectively ensures that a defendant will never face **[*63]** liability for wrongdoing." *Cronin v. CitiFinancial Servs., Inc., 352 F. App'x 630, 635 (3d Cir. 2009)*.

In support of her argument that the class action waiver is substantively unconscionable, Black submits that the consumer's ability to pursue relief is effectively foreclosed by the class action waiver, due to price fixing arrangements that only marginally increase the price thereby making the dispute uneconomical to arbitrate on an individual basis. She thus contends that because the arbitration agreement is so one-sided, she should be afforded an opportunity to brief the threshold factual issue of whether the "class action waiver effectively ensures that a defendant will never face liability for wrongdoing," [23] in accordance with *Cronin, 352 F. App'x at 635*. In order to do so, Plaintiff requests leave of court to conduct discovery as to the potential damages that she can individually obtain against DFS, and the relative costs of litigation versus arbitration. In response, DFS disputes Plaintiff's argument that her ability to pursue relief is effectively foreclosed by the class action waiver, arguing in support that Plaintiff ignores provisions in the Sherman Act that allow a prevailing **[*64]** plaintiff to recover treble damages and attorneys' fees, and the provision in the Cardmember Agreement which authorizes Plaintiff to require DFS to pay her arbitration fees and costs (Cardmember Agreement at 11-12, Ex. 10 to Linian Decl.). [24] Thus, DFS contends there is no substantive unconscionability here.

23 As far as Plaintiff's request for the opportunity to brief the "threshold factual issue of whether the "class action waiver effectively ensures that a defendant will never face liability for wrongdoing,'" that opportunity has come and gone. This argument is a legal one and does not require the discovery of "facts" in order to be made.

24 The Cardmember Agreement actually states that at the cardmember's request, "[Discover] will ***advance*** any arbitration filing, administrative and hearing fees which [the cardmember] would be required to pay to pursue a claim or dispute as a result of [its] electing to arbitrate that claim or dispute. . . . The arbitrator will decide who will ultimately be responsible for paying those fees. [The cardmember] will only be responsible for paying or reimbursing our arbitration filing, administrative or hearing fees to the extent [the cardmember] would have **[*65]** been responsible for paying "attorneys' fees and court or other collection costs" had the action proceeded in court. In no event will [the cardmember] be required to pay any fees or costs incurred by us in connection with an arbitration proceeding where such a payment or reimbursement is prohibited by applicable law." (Emphasis added.)

The Court agrees with DFS and finds that the class action waiver does not effectively foreclose Plaintiff's ability to pursue relief. Plaintiff has failed to show that any of the factors indicative of substantive unconscionability are present here. Plaintiff's argument focuses only on two of these factors--damages obtainable and costs of litigation versus arbitration--and, thus, the Court's discussion will be limited to those factors.

In the Complaint, Black seeks monetary damages in the form of disgorgement, restitution, treble damages, penalties and any other monetary relief allowed by law, plus the costs of suit and reasonable attorneys' fees (Compl., Prayer for Relief), all of which are recoverable under the Sherman Act, *15 U.S.C. §15(a)*. The arbitration provision at issue here authorizes the arbitrator to "award all remedies permitted by the substantive **[*66]** laws that would apply if the action were pending in court." Ex. 4 to Linian Decl. at 12. Thus, the full range of remedies under the Sherman Act are potentially recoverable in arbitration. *Cronin, 352 F. App'x at 636* (citing *West Suburban Bank, 225 F.3d at 373*). Moreover, Black's

ability to recover attorneys' fees under the Sherman Act "help to preserve an individual's ability to pursue claims, even in those situations where the class forum has been foreclosed." *Id.* (citing *West Suburban Bank, 352 F. App'x at 636*) (other citation omitted). Additionally, where, as in this case, the claim involves an alleged violation of federal antitrust laws, the ability to recover treble damages increases the value of the claim, thus making it more attractive and one that is likely to be pursued on an individual basis. Thus, these factors do not support a finding that the class action waiver effectively ensures that DFS will never face liability for wrongdoing.

Next Plaintiff argues that she should be allowed discovery as to the potential damages she can recover individually, and as to the relative costs of litigation versus arbitration. The Court finds that discovery is not warranted in this case. **[*67]** The amount of "potential damages" Plaintiff can individually obtain from DFS is simply irrelevant to the substantive unconscionability inquiry. *See AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1753, 179 L. Ed. 2d 742 (2011)* (rejecting dissent's argument that class actions are necessary to bring small-dollar claims that might otherwise slip through the legal system, finding any such requirement would be inconsistent with the FAA); *Litman, 655 F.3d 225, 2011 U.S. App. LEXIS 17649, at *16* (noting that Supreme Court's holding in *Concepcion* applied regardless of whether class arbitration "'is desirable for unrelated reasons'") (citing *Concepcion, 131 S.Ct. at 1753*).

Likewise, the costs of arbitration versus litigation are easily determined without the need for discovery. The arbitration filing, administrative and hearing fees are all a matter of public record. *See* American Arbitration Association website, http://www.adr.org/sp.asp?id=29297. More importantly, under the arbitration provision at issue here, Plaintiff's up-front costs to arbitrate are actually less than the costs of litigation. Under the arbitration provision, upon request, DFS will advance the arbitration filing, administrative and hearing fees. (Ex. 10 **[*68]** attached to Linian Decl. at 11-12.) Ultimately, the arbitrator decides who will be responsible for paying these fees after a decision on the merits. (*Id.* at 12.) However, consumers will only be responsible for paying these fees to the extent they would have been responsible for paying attorneys' fees and court costs had the action proceeded in court. (*Id.*) Thus, this factor actually provides an advantage to proceeding in the arbitral forum.

For all of these reasons, the Court cannot conclude that class action waiver effectively ensures that DFS will never face liability for its alleged wrongdoing. Consequently, the class action waiver is not substantively unconscionable under Pennsylvania law. As Plaintiff has failed to demonstrate that the class action waiver provision is both procedurally and substantively unconscionable under Pennsylvania law, the Court finds that the class action waiver provision is enforceable.

While this motion was pending, the Supreme Court rendered its decision in *AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 179 L. Ed. 2d 742 (2011)*, which appears to foreclose Plaintiff's argument that the class action waivers in arbitration agreements are unconscionable under Pennsylvania **[*69]** law, or that she needs discovery to determine the amount of her potential damages and the costs of arbitration versus litigation. On May 2, 2011, DFS filed a Notice of Subsequent Authority (ECF No. 83), notifying this Court of the Supreme Court's decision in *Concepcion*, and arguing that *Concepcion* is dispositive here with regard to Plaintiff's argument that the class action waiver is unconscionable under Pennsylvania law. Thereafter, on August 16, 2011, DFS filed a second Notice of Subsequent Authority ECF No. 85), notifying the Court of Judge Shapiro's recent decision in *Alfeche v. Cash Am. Int'l, Inc., Civ. A. No. 09-0953, 2011 U.S. Dist. LEXIS 90085, 2011 WL 3565078, *5 (E.D.Pa. Aug. 12, 2011)*. Plaintiff has not filed any response to either notice.

On August 24, 2011, the United States Court of Appeals for the Third Circuit issued its decision in *Litman v. Cellco Partnership, No. 08-4103, 655 F.3d 225, 2011 U.S. App. LEXIS 17649 (3d Cir. Aug. 24, 2011)*, on remand from the Supreme Court, wherein it reconsidered its prior decision in light of the Supreme Court's recent decision in *Concepcion.* The question facing the court of appeals was whether the FAA preempts the New Jersey Supreme Court's ruling in *Muhammad v. County Bank of Rehoboth Beach, Del., 189 N.J. 1, 912 A.2d 88 (N.J. 2006)*, **[*70]** which held that a class action waiver in a consumer contract of adhesion (payday loan agreement) was unconscionable and, therefore, unenforceable because it deprived the plaintiff of the "mechanism of a classwide action, whether in arbitration or in court litigation." *912 A.2d at 101*. [25]

25 In reaching this conclusion, the *Muhammad*

court considered the public interests implicated by the arbitration agreement. *912 A.2d at 99*. As the court of appeals noted in *Litman:*

> [The *Muhammad* court] noted that, "when ... found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages," class waivers are problematic since "'rational' consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel was willing to take the case." *Id. [at 99]* (emphasis original). Thus, the court opined, such class action waivers "functionally exculpate wrongful conduct." *Id. at 100*. As a result, the waivers compromise "[t]he public interest at stake in ... consumers effectively ... pursu[ing] their statutory rights under [New Jersey's] consumer **[*71]** protection laws," and that interest, the court concluded, "overrides ... enforcement of the class-arbitration bar in th[e] agreement[s]." *Id. at 101*.

*655 F.3d 225, 2011 U.S. App. LEXIS 17649, at *5-6 n. 2*. Similarly here, Pennsylvania law favors class action arbitrations and has held class action waivers in arbitration agreements, that effectively foreclose pursuit of small dollar amount claims, are unconscionable and unenforceable. *See, e.g. Thibodeau, 912 A.2d at 881-85* (discussion cases). Thus, given the similarities between New Jersey and Pennsylvania law, the Court finds that the holding in *Concepcion* applies with equal force to the case at bar. *Alfeche, 2011 U.S. Dist. LEXIS 90085, at *17* (concluding that the "Pennsylvania Superior Court's decision in *Thibodeau*, in its analysis of the circumstances under which class action waivers are procedurally and substantively unconscionable, has the effect of requiring the availability of classwide arbitration[,]" which "undermines the FAA's central purpose and is preempted by the FAA.") (citing *Thibodeau, 912 A.2d at 885-86*; *Concepcion, 131 S.Ct. at 1753*).

In *Litman*, plaintiffs brought a putative class action against a telecommunications provider under **[*72]** New Jersey common law and the New Jersey Consumer Fraud Act for allegedly charging fixed-price customers improper service charges on their cell phone service. *655 F.3d 225, 2011 U.S. App. LEXIS 17649, at *3*. The service contract contained an arbitration provision precluding class actions. *Id. at *4*. In its prior opinion, *Litman v. Cellco Partnership, 381 F. App'x 140 (3d Cir.2010)*, the panel held that pursuant to *Homa*, the FAA did not preempt *Muhammad*. Upon reconsideration after the Supreme Court's decision in *Concepcion*, the court of appeals held that "*Homa* has been abrogated by *Concepcion* and that *Muhammad* is preempted by the FAA." *655 F.3d 225, 2011 U.S. App. LEXIS 17649, at 11*. After analyzing *Concepcion*, the court of appeals in *Litman* stated unequivocally, "[w]e understand the holding of *Concepcion* to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'" *Id. at *16* (quoting *Concepcion, 131 S.Ct. at 1753*). The last part of this holding, "irrespective of whether class arbitration "is desirable **[*73]** for unrelated reasons,'" refers to the Supreme Court's consideration and rejection of the argument that class actions "are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Concepcion, 131 S.Ct. at 1753*. This part of the Supreme Court's opinion appears to be directed specifically to those factors indicating the substantive unconscionability of an arbitration provision. As such, Plaintiff's argument in support of substantive unconscionability is undercut by the Supreme Court's ruling in *Concepcion.*

Thus, given the apparent broad sweep of the Supreme Court's holding in *Concepcion*, as acknowledged in *Litman*, the Court finds that to the extent Pennsylvania law holds that class action waivers in arbitration agreements are unconscionable and therefore unenforceable, the FAA preempts Pennsylvania law. Accordingly, the arbitration provision at issue here must be enforced according to its terms, which requires arbitration of individual claims and forecloses class

actions.

For the reasons set forth above, the Court concludes that the arbitration clause is enforceable, and therefore, recommends that Discover Financial Service's motion to compel arbitration **[*74]** of Plaintiff's individual claims be granted. Pursuant to *Section 4 of the FAA*, this Court also recommends that the present action be stayed as to the claims against DFS and the case administratively closed.

E. Discover's Motion to Dismiss

Because this Court has determined that the arbitration clause at issue here is valid and enforceable, this Court lacks jurisdiction to address the merits of DFS's motion to dismiss under *Rule 12(b)(6)*. "Where a dispute is subject to a binding arbitration agreement, a 'district court [is] ... without jurisdiction to address the merits of the complaint.'" *Trenton Metro. Area Local of Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 636 F.3d 45, 56 (3d Cir. 2011)* (quoting *Shaffer v. Mitchell Transport, Inc., 635 F.2d 261, 264 (3d Cir. 1980))* (footnote omitted). Accordingly, the Court recommends that Plaintiff's Motion to Dismiss the Complaint against DFS (ECF No. 28) be denied as moot.

III. CONCLUSION

For the reasons set forth above, it is respectfully recommended that the Motion of Defendant Discover Financial Services to Compel Arbitration of Plaintiff's individual claims (ECF No. 28) be granted and the Motion to Dismiss the Complaint be denied **[*75]** as moot. It is further recommended that this case be stayed, only as to the claims against Defendant Discover Financial Services, while Plaintiff submits her claim to arbitration, and the case be administratively closed.

In accordance with the Magistrate Judges Act, *28 U.S.C. § 636(b)(1)(B)* and *(C)*, and *Rule 72.D.2* of the Local Rules of Court, the parties shall have fourteen (14) days from the date of service of this Report and Recommendation to file written objections thereto. Any party opposing such objections shall have fourteen (14) days from the date on which the objections are served to file its response. A party's failure to file timely objections will constitute a waiver of that party's appellate rights.

Dated: August 25, 2011

BY THE COURT:

/s/ Lisa Pupo Lenihan

LISA PUPO LENIHAN

Chief U.S. Magistrate Judge

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November 3, 2011

VIA FEDERAL EXPRESS OVERNIGHT
Kristen Parsells
Case Filing Coordinator
American Arbitration Association
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043

RE: SILVANO E. GHALI v. CHASE AUTO FINANCE, ET AL.
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
DOCKET NO.: 003505
OUR FILE NO.: 12177.00263

Dear Ms. Parsells:

We are attorneys for Defendant, Chase Auto Finance, in the above-referenced matter. As per our conversation this morning, I enclose a check for $1,375.00 made payable to the American Arbitration Association regarding payment for the arbitration of the above-referenced matter. As you and I discussed, although the parties to this matter received correspondence dated November 2, 2011 stating that the American Arbitration Association would not hear the case as payment had not been received prior to the date of said correspondence, the enclosed payment will be accepted by the American Arbitration Association whereby, pursuant to our agreement, the America Arbitration Association will re-open the current matter.

Please feel free to contact me with any questions or concerns regarding the enclosed payment and the re-opening of the above-referenced matter. We appreciate your time and consideration regarding this matter.

Very truly yours,

Ronald M. Metcho

Ronald M. Metcho

cc: William C. Bensley, Esquire
Jennifer S. Coatsworth, Esquire

American Arbitration Association
Dispute Resolution Services Worldwide

Northeast Case Management Center
950 Warren Avenue, East Providence, RI 02914
telephone: 866-293-4053 facsimile: 401-435-6529
internet: http://www.adr.org/

December 2, 2011

VIA ELECTRONIC MAIL

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Re: 14 513 E 01761 11
Peruzzi Mitsubishi and Robert Tattersall
and
Chase Automotive Finance
and
Silvano Ghali

Dear Parties:

This will acknowledge receipt of a demand for arbitration involving a dispute over the collection of a consumer's debt. While such a case may be covered by the American Arbitration Association's ("AAA") moratorium on consumer debt arbitration as explained on our website: http://www.adr.org/sp.asp?id=36427, we note that this matter was directed to arbitration by court order. Because a court has ordered that this dispute must be resolved by arbitration, the AAA will proceed with administration under the Supplementary Procedures for Consumer-Related Disputes. This is a supplement to the AAA's Commercial Arbitration Rules, both of which may be found on our web site at www.adr.org.

Pursuant to the Consumer Fee Schedule (section C-8), when the consumer's claim is between $10,000 and $75,000, the consumer pays $375 for the arbitrator's compensation. The business pays $950 for the administrative fee plus $375 for the arbitrator's compensation, which we have received. At this time we are assuming that the balance of the arbitrator's compensation will be $375, bringing the **total due from the consumer to $375**. Note that a Case Service Fee of $300.00 will also be due from the business upon the scheduling of an in-person hearing.

Payment of these amounts is a filing requirement under the Consumer Rules. Outstanding payment should be received no later than **December 12, 2011**, and checks should be made payable to the American Arbitration Association. If the parties have not made full payment of these fees by that date, the Association may decline to administer this matter. Also note that should either party not pay their fees in accordance with the Consumer Rules, the opposing party has the option to do so, thereby allowing us to proceed with the administration of this case. That party may then request the arbitrator assess these costs in the award, per the fee schedule.

The attention of Respondent is directed to Section C-2. If Respondent does not answer by **December 12, 2011**, we will assume the claim is denied. If Respondent wishes to file a counterclaim, file two copies of such counterclaim and send an additional copy of the counterclaim to Claimant. Note that the filing of a counterclaim may require the payment of additional administrative fees and/or compensation deposits. Please review the Fee Schedule of the Consumer Rules.

Enclosed is a conflicts form to list those witnesses you expect to present, as well as any persons or entities with an interest in these proceedings. The conflicts form is due within ten (10) days from the date of this letter.

Claimant has requested that the hearing be held in Philadelphia. Please review the Rules and the Protocol regarding the locale of hearings. Unless Respondent files its objections with this office within fifteen (15) days from the date of this letter, any arbitration hearings will be held in Philadelphia.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA. Without consent of the parties, Case Managers only have authority to grant one extension per deadline, provided the request is reasonable and necessary.

The American Arbitration Association appreciates the opportunity to assist you with your dispute resolution needs.

Sincerely yours:

//s//

Barbara C. Cook
Manager of ADR Services
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BC/kr

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Counsel for Claimant
Chase Auto Finance

PERUZZI AUTO GROUP, ET AL	**AAA No. 14 513 E 01761**
v.	
SILVANO GHALI	

CLAIMANT, CHASE AUTO FINANCE'S, RESPONSE IN OPPOSITION TO RESPONDENT, SILVANO GHALI'S, PRELIMINARY OBJECTIONS AND PETITION TO DISMISS ARBITRATION

Claimant, Chase Auto Finance ("Chase"), by and through its counsel, Marshall, Dennehey, Warner, Coleman & Goggin, P.C., provides this Response in opposition to Respondent, Silvano Ghali's ("Ghali"), Preliminary Objections and Petition to Dismiss the Arbitration, stating as follows:

I. FACTUAL AND PROCEDURAL HISTORY:

On June 20, 2008, Respondent, Silvano E. Ghali, filed a Complaint against Peruzzi Mitsubishi ("Peruzzi"), John Tattersall ("Tattersall") (collectively "Peruzzi") and Chase in the Court of Common Pleas of Philadelphia County at docket no. 003505 advancing claims against the three Defendants in regard to the sale of a 2003 Hummer vehicle to him by Peruzzi. (See the June 20, 2008

Complaint which is attached hereto as Exhibit "A"). In his Complaint, Ghali alleged, *inter alia*, that Chase "stepped in the same shoes" as Peruzzi through a Retail Installment Sales Contract entered into with Chase regarding the financing of the Hummer at issue.[1] (See Exhibit "A", ¶¶ 40-51). In sum, Ghali alleged that Chase was liable for purported harm incurred by Ghali in connection with the sale of the allegedly damaged vehicle by Peruzzi, because Chase extended financing for the purchase the vehicle.

On August 15, 2008, in response to Peruzzi's preliminary objections, Ghali filed an Amended Complaint. (See Ghali's Amended Complaint which is attached hereto and marked as Exhibit "B"). As a result of a mandatory arbitration provision in the sales agreement, on September 9, 2008, Peruzzi filed a Motion to Compel Private Arbitration of Ghali's claims.

On September 24, 2008, Chase filed an Answer to Plaintiff's Amended Complaint with New Matter which also contained cross claims against Peruzzi because, to the extent that Chase is liable to Ghali, Peruzzi would be liable to Chase. (See Chase Auto Finance's Answer to Plaintiff's Amended Complaint which is attached hereto and marked as Exhibit "C").

On March 24, 2009, the Court granted the Motion to Compel Private Arbitration and stayed the court proceeding for the purpose of arbitrating the claims in private arbitration with AAA. (See the Court's March 24, 2009 Order Granting the Motion to Compel Private Arbitration, which is attached hereto as Exhibit "D"). After this Order issued, Ghali made no effort to pursue

[1] Shoes which are already (and ably) filled by Peruzzi.

arbitration and this matter languished for two years and several months without rhyme or reason. Apparently, Ghali believes that this delay on his part did not merit a mention in his effort to evade arbitration through his present (and utterly baseless) Preliminary Objections.

On June 30, 2011, more than two years after Ghali elected not to proceed in arbitration as ordered by the Court, the Court issued a Revised Case Management Order which reopened the matter.

Because of Ghali's failure to prosecute his claims in arbitration as ordered by the Court, on July 28, 2011, Peruzzi filed a Motion for Judgment of Non-Pros against Plaintiff. (See Motion for Judgment of Non-Pros, which is attached hereto and marked as Exhibit "E"). Chase joined the Motion for Judgment Non-Pros on July 29, 2011.

On October 4, 2011, the Court issued an Order denying the Motion for Judgment Non-Pros. (See the Order Denying the Motion for Judgment Non-Pros which is attached hereto and marked as Exhibit "F"). The Motion for Non-Pros was denied because the Court believed that it relinquished jurisdiction of this matter when the Court ordered this matter to AAA arbitration and, thus, lacked standing to consider the Motion for Non-Pros.

In August of 2011, while the Motion for Judgment of Non-Pros was pending, Ghali finally recognized that if he was to maintain claims against Peruzzi and Chase, his sole recourse was through arbitration of his claims, as

directed by Court Order. To revive his long stagnate claims, Ghali filed a demand for arbitration with the American Arbitration Association ("AAA").

On October 3, 2012, counsel for Chase sent a letter to Kristin Parsells of AAA requesting that the arbitration be stayed until the parties to this matter received a decision on the pending Motion for Judgment of Non Pros. (See the correspondence sent from counsel for Chase to Kristen Parsells of AAA on October 3, 2011 regarding a request to stay the arbitration pending a decision on the Motion for Judgment Non-Pros which is attached hereto and marked as Exhibit "G"). In the event that the Court granted Non-Pros, there would be no need for arbitration.

Thereafter, an issue arose as to the payments by Peruzzi, Tattersall and Chase. AAA contended that payment was not timely received by the defendants during a time period in which the defendants were communicating with AAA to work out the proportionate shares of the payment of the arbitration.

As a result of this miscommunication, on November 2, 2012, AAA notified the parties that it was declining to administer the case. (See the November 2, 2011 correspondence from Kristen Parsells regarding AAA's notice that it was declining to administer the case which is attached hereto and marked as Exhibit "H")[2]. On the same day, counsel for Chase sent a check for

[2] Note that the correspondence does not state the arbitration was dismissed with prejudice.

the entire fee to AAA for the administration of the arbitration demanded by Ghali.

On November 18, 2012, counsel for Peruzzi sent correspondence to AAA making a claim for arbitration and further requesting that the previous payment that was made by Chase be applied to the arbitration demanded by Peruzzi. (See the November 18, 2011 correspondence containing Peruzzi's claim for arbitration which is attached hereto and marked as Exhibit "I"). The court-ordered arbitration was then accepted by AAA.

On December 1, 2011 Kristen Parsells of AAA sent letters to counsel for Chase confirming the case number for the arbitration. (See the letter from Kristen Parsells of AAA to counsel for Chase dated December 1, 2011, attached hereto and marked as Exhibit "J").

On March 19, 2012, the parties participated in a preliminary hearing with the appointed arbitrator and, shortly thereafter, the arbitrator issued a scheduling order setting the arbitration dates for June 12 and 13, 2012. (See the arbitration scheduling order which is attached hereto and marked as Exhibit "K").

It is Chase's position that the court-ordered arbitration in this matter is proper and that Ghali's Preliminary Objections to the arbitration should be overruled and/or withdrawn by Ghali. Chase will now address each of Ghali's defective arguments that the arbitration should be dismissed.

II. ARGUMENT:

A. Chase is not derivatively liable to Ghali for Peruzzi or Tattersall's alleged conduct in this matter.

Although Ghali's argument in his Preliminary Objections regarding Chase's alleged derivative liability is completely inappropriate in this type of preliminary pleading, Chase must state its position that, as no principal/agency relationship exists between it and Peruzzi, Chase is not derivatively, jointly, severally or fully liable for Peruzzi's alleged misconduct in connection with representations allegedly made by Peruzzi in the course of the sale of the Hummer at issue in this matter. Ghali is attempting to assert an argument that, under the FTC Holder Rule, Chase should be considered a party that is "stepping in the shoes" of Peruzzi for their alleged violative conduct and should, thus, also be liable to Ghali for the purported actions of Peruzzi. Chase acknowledges that, under the FTC Holder Rule, a creditor/assignee steps in the shoes of the assignor and will become "subject to" any claims or defenses the debtor can assert against the seller but does not say that a seller will be liable for the buyer's damages only if the buyer received little or nothing of value under the contract." Beemus v. Interstate Nat'l Dealer Servs., 2003 PA Super 177, 823 A.2d 979, 985; 2003 Pa. Super LEXIS 927, ****16 (Pa. Super. 2003) citing Oxford Finance Companies v. Velez, 807 S.W. 2d 460, 463 (Tex. App. 1991). However, it is Chase's position that, as Peruzzi is actively participating in the current litigation, there are no shoes to be stepped into by Chase, as Peruzzi is able to defend Ghali's claims and absorb

any potential liability that may stem from those claims. Chase does not step in Peruzzi's shoes and is not liable, derivatively or otherwise, for any of Peruzzi's conduct, where Peruzzi is actively defending. Chase did not make any representations to Ghali regarding the vehicle and Chase did not negotiate the terms of financing for the vehicle. Chase did not make any statements to Ghali regarding the mileage on the vehicle or the physical state of the vehicle. The activities complained of by Ghali fall within the custody and control of Peruzzi and not Chase.[3] Chase did not extend any warranties, promises or guarantees to Ghali. Chase was not directly or proximately involved in the underlying transaction at issue and did not deprive Ghali of any rights or obligations in providing financing for said vehicle. As such, it is Chase's position that Ghali's untimely argument in his Preliminary Objections to this arbitration that Chase is derivatively liable for the actions of Peruzzi and its employees is misguided, at best, and patently wrong in every respect. Under the present facts in this matter, Chase will not be required to absorb any liability premised on the alleged conduct of Peruzzi.

[3] Certainly, if Peruzzi did not defend or was rendered insolvent, liability would extend to Chase under the Holder Rule. This is not the case in the present matter and Chase has no exposure for the claims of Ghali under the Holder Rule or otherwise.

B. Chase, on behalf of itself, Peruzzi and Tattersall, made payment to AAA for the applicable fee associated with this arbitration and, thus, did not waive any rights to initiate the arbitration.

Ghali next argues that Chase, Peruzzi and Tattersall waived their right to arbitration by failing to make timely payment regarding the arbitration that was demanded by Ghali in August of 2011. As stated earlier, on November 2, 2012, AAA notified the parties that it was declining to administer the arbitration regarding Ghali's demand for arbitration as payment was not received by Chase, Peruzzi and Tattersall as the parties were awaiting a ruling on the Motion for Judgment Non Pros and there was some confusion between the parties and the administration at AAA as to the amounts that were owed by each party. (Exhibit "H").

On November 2, 2011, counsel for Chase sent a check for the applicable fee to AAA for the administration of the entire arbitration that was demanded by Ghali and, November 18, 2011, counsel for Peruzzi communicated with AAA and made a claim for arbitration in its own right and consistent with the Court Order directing this matter to private arbitration. Counsel for Peruzzi further requested that the payment made by Chase in the dismissed arbitration be applied to the arbitration demanded by Peruzzi. (See Exhibit "I"). The arbitration demanded by Peruzzi and enforced by Court Order, was accepted by AAA. On December 1, 2011, the arbitration was memorialized by Kristen Parsells of AAA in a letter to counsel for Chase confirming the case number for the arbitration. (See Exhibit "J").

Ghali's argument is simply misplaced, as it relates to his arbitration demanded in August of 2011. The present arbitration was precipitated by the demand made by counsel for Peruzzi on November 18, 2011, which applied the payment made by Chase to AAA on November 2, 2011. Again, the arbitration demand by Peruzzi was court-ordered.

In no way did Chase waive its right to arbitrate the issues in this matter. The arbitration was ordered by the Court to take place after the Court granted the Motion to Compel Private Arbitration in March of 2009. It took more than two years and the filing of a Motion for Judgment of Non Pros for Ghali to finally comply with the Court's directive to arbitrate. Chase made the proper payment and the arbitration was accepted by AAA. Further, Ghali consented to the arbitration by participating in the March 19, 2012 preliminary hearing.

It is well-settled that "[a] s a matter of public policy, our courts favor the settlement of disputes by arbitration." GE Lancaster Invs., LLC v. Am. Express Tax & Bus. Servs., 2007 PA Super 65; 920 A.2d 850, 854; 2007 Pa. Super. LEXIS 305, ***7 (Pa. Super. 2007) citing Goral v. Fox Ridge, Inc., 453 Pa. Super. 316, 683 A.2d 931, 933 (Pa. Super. 1996). "Waiver of an arbitration may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." Samuel J. Marranca Gen. Contracting Co., Inc. v. American Cherry Hill Assocs. Ltd. P'ship, 416 Pa. Super. 45, 610 A.2d 499, 501 (Pa. Super. 1992).

A party's acceptance of the regular channels of the judicial process can demonstrate a waiver of arbitration. See Smay v. E.R. Stuebner, Inc., 2004 PA Super 493, 864 A.2d 1266, 1278 (Pa. Super. 2004) "However, a waiver of a right to proceed to arbitration pursuant to the term of a contract providing for arbitration should not be lightly inferred and unless one's conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished the right." Kwalick v. Bosacco, 329 Pa. Super. 235, 478 A.2d 50, 52 (Pa. Super. 1984)(emphasis added).

The Third Circuit has also weighed in on the standard for waiver or an arbitration. "An agreement to arbitrate is waived by any action of a party which is inconsistent with the right of arbitration." Volpe v. Jetro Holdings, 2008 U.S. Dist. LEXIS 93220, *12 (E.D. Pa. 2008) citing Northwestern Nat. Life Ins. Co. v. U.S. Healthcare, Inc., Civ. A. No. 96-4659, 1998 U.S. Dist. LEXIS 6955, 1998 WL 252353, at *14 (E.D. Pa. May 11, 1998) (quotations omitted). "[W]aiver of contractual rights to arbitration is not to be favored or 'lightly inferred.'" Klein v. Boyd, 949 F. Supp. 286, 289 (E.D. Pa. 1996). "Although prejudice remains the ultimate 'touchstone' in determining waiver," the court must consider several other factors when analyzing a waiver claim, including: "(1) the degree to which the party seeking to compel arbitration has contested the merits of his opponent's claims; (2) whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; (3) the extent of its non-

meritorious motion practice; (4) the moving party's assent to the district court's pretrial orders; and (5) the extent of the discovery." Id. citing Paine Webber, Inc. v. Faragalli, 61 F.3d 1063, 1069 & n.4 (3d Cir. 1995)). "Waiver will normally be found only 'where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery.'" Faragalli, 61 F.3d at 1068-69 quoting Gavlik Constr. Co. v. H. F. Campbell Co., 526 F.2d 777, 783 (3d Cir. 1975).

Under both state and federal law in the Commonwealth of Pennsylvania, arbitration of claims is highly favored and waiver will only exist where one party is faced with an undue advantage or suffers some sort of prejudice as a result of the other party's actions or delay. Here, Ghali argues that Chase waived its right to arbitrate the matter by failing to timely make the payment associated with the arbitration demanded in August of 2011. First, the payment was made by Chase on November 2, 2012 and was accepted by AAA as attributable to the arbitration demanded by Peruzzi on November 18, 2012. Second, Ghali has shown absolutely no undue advantage on the part of Chase nor has he shown how an alleged late payment prejudiced his position with regard to his claims and the arbitration. In fact, Ghali has incurred no prejudice whatsoever as a result of the late payment. Mr. Ghali's decision to bring several lawsuits against Peruzzi and to subject himself to a replevin action by choosing not to make payments as agreed for the Hummer (while enjoying the full use of the vehicle) does not reflect any degree of prejudice to

him and does not even approach a legitimate argument of waiver through an alleged late payment of fees to AAA. The payment was made and then accepted by AAA in one month's time. Thus, as Ghali has not been prejudiced by the payment issue and has not been subject to any unfair disadvantage, he cannot claim that Chase waived its right to arbitrate the claims in this matter.

C. The Arbitration that was demanded by Ghali in August of 2011 was not dismissed with prejudice.

Ghali next makes an argument that the arbitration that was demanded by him in August of 2011 was dismissed *with prejudice* by AAA whereby, because Chase and Peruzzi allegedly failed to take action to have AAA lift an order that *never existed and was never entered*, the parties should somehow be precluded from participating in arbitration. This argument is not only advanced in a vacuum, it departs from reality. No arbitration was dismissed with prejudice and no order was issued by AAA.

On November 2, 2012, AAA notified the parties through a letter that it was declining to administer the case because payments were not received in timely fashion. (See Exhibit "H"). Nowhere on this letter does it state that the arbitration was dismissed with prejudice (or otherwise). What the correspondence does say is that, because the required fees were not received, that AAA was declining to administer the case. (See Exhibit "H").

The declination of AAA to administer the case was remedied in two ways – first by Chase's payment of the applicable fee on the same day and, second, by Peruzzi 's demand for arbitration on November 18, 2011, which was

accepted by AAA on December 1, 2012. Ghali's argument in this regard is, again, both unfounded and improper considering that the arbitration was accepted by AAA on December 1, 2012 and Ghali chose to participate in the March 19, 2012 preliminary hearing.

D. AAA's moratorium against administering arbitrations pertaining to debt collection actions does not apply to his matter as the arbitration at issue was Court ordered and the claims at issue do not involve the collection of a debt.

Ghali next argues that a moratorium put in place by AAA in October of 2010 regarding debt collection arbitrations should preclude the parties from proceeding with court-ordered arbitration in the present matter. Ghali's argument fails for two reasons. First, this is not a collection action. Ghali's claims in this matter pertain to misrepresentations with respect to the sale of an automobile arising from purported breaches of a contract, and not to the collection of a debt. Second, AAA's Procedures for Consumer Related Disputes specifically state that the moratorium does not apply to court ordered arbitrations.

As mentioned previously, on March 24, 2009 the Court granted the Motion to Compel Arbitration and ordered the parties to arbitrate claims against the defendants. (See Exhibit "D"). As such, because the arbitration was directed by the Court, it is not subject to AAA's moratorium and, thus, the arbitration should move forward.

E. Chase's filing of a replevin action regarding Ghali's refusal to pay for the use and enjoyment of the Hummer at issue does not constitute a waiver of its right to compel or initiate an arbitration.

Ghali's final argument in his Preliminary Objections to the arbitration is that Chase waived its right to compel or initiate an arbitration by litigating an additional matter against Ghali regarding the possession and non-payment of the Hummer vehicle. The replevin action that was filed by Chase against Ghali in the Court of Common Pleas of Bucks County, Pennsylvania at docket number 02916 pertains to Ghali's continued use, possession and enjoyment of the Hummer at issue without making any payment toward the vehicle pursuant to the agreed-upon finance agreement. The facts and issues in the replevin action are distinct from the facts and issues in this matter, except for the fact that Ghali is allegedly holding the Hummer as a security interest against the Defendants. While the arbitration of the present matter nullifies the patently defective position taken by Plaintiff regarding his decision not to pay for his automobile, the replevin action in no way serves to abrogate the Court's order to arbitrate the present matter.

Moreover, on March 24, 2009 the Court ordered Ghali to seek the arbitration of his claims against Chase, Peruzzi and Tattersall and the Motion for Judgment Non Pros that was filed after Ghali sat for a period of over two years and did nothing except continue to drive the Hummer at issue without making payment to Chase. It is, thus, Chase's position that the replevin action and the current action are separate and distinct and that the filing of the

replevin action or any pleading associated with this matter did not waive the right to arbitration.

III. CONCLUSION:

In sum, it is Claimant, Chase Auto Finance's, position that the Court ordered arbitration in this matter is proper whereby Respondent, Silvano Ghali's, Preliminary Objections and Petition to Dismiss the arbitration should be denied by the Court and the arbitration of the matter should move forward pursuant to AAA Arbitration's rules and procedures.

Respectfully submitted,

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, P.C.

By: _____

RONALD M. METCHO, ESQUIRE
Attorneys for Defendant
Chase Auto Finance

Dated: April 23, 2012

I, Ronald M. Metcho, Esquire, do hereby certify that a true and correct copy of Chase Auto Finance's Response to Silvano Ghali's Preliminary Objections and Petition to Dismiss the arbitration of this matter was served upon all the below listed individuals by electronic mail and U.S. mail on April 23, 2012:

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EXHIBIT "A"

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Attorneys for Plaintiffs

ASSESSMENT OF DAMAGES HEARING:
☒ IS ☐ IS NOT REQUIRED

☐ JURY ☒ NON-JURY ☐ ARBITRATION

SILVANO E. GHALI
1409 Beverly Drive
Quakertown, PA 18951

v.

PERUZZI AUTOMOTIVE GROUP
130 Lincoln Highway
Fairless Hills, PA 19030
and
ROBERT JOHN TATTERS
130 Lincoln Highway
Fairless Hills, PA 19030
and
CHASE AUTO FINANCE
PO Box 901076
TX 1-0056
Fort Worth, TX 76155-2732

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION
JUNE TERM, 2008
NO.
003505

ATTEST
JUN 2 6 2008
S. Garrett

MAR 2 2009

DISCOVERY DEADLINE:

NOTICE TO DEFEND

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find our where you can get legal help.

Philadelphia Bar Association
Lawyer Referral
and Information Service
One Reading Center
Philadelphia, Pennsylvania 19107
(215) 238-6333

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas espuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificación. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede peret dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado immediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagartal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede consequir asistencia legal.

Asociacion de Licenciados
de Filadelfia
Servicio de Referencia e
Informacion Legal
One Reading Center
Filadelfia, Pennsylvania 19107

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SILVANO E. GHALI 1409 Beverly Drive Quakertown, PA 18951 v. PERUZZI AUTOMOTIVE GROUP 130 Lincoln Highway Fairless Hills, PA 19030 and ROBERT JOHN TATTERS 130 Lincoln Highway Fairless Hills, PA 19030 and CHASE AUTO FINANCE PO Box 901076 TX 1-0056 Fort Worth, TX 76155-2732	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL TRIAL DIVISION JUNE TERM, 2008 NO.

COMPLAINT
CIVIL ACTION:
FRAUD: (4010)

PARTIES

1. Plaintiff, Silvano E. Ghali, is an adult individual presently residing at 1409 Beverly Drive, Quakertown, PA 19851.

2. Defendant, Peruzzi Automotive Group ("PAG") is a corporation licensed to do business in the Commonwealth of Pennsylvania, regularly conducting business in the City of Philadelphia and having a principal place of business located at 130 Lincoln Highway, Fairless Hills, Pennsylvania 19030; at all times relevant, acting alone or in concert with others, PAG, formulated, directed, concealed, controlled,

conspired, substantially assisted, enabled and/or participated in the acts and practices set-forth in this Complaint.

3. Defendant, Robert John Tatters, is a supervising agent and/or employee of Defendant PAG and holds a management position at and/or with said Defendant, and at all times relevant, acting alone or in concert with others, formulated, directed, concealed, controlled, conspired, substantially assisted, enabled and/or participated in the acts and practices set forth in this Complaint.

4. Defendant, Chase Auto Finance ("Chase") is a corporation licensed to do business in the Commonwealth of Pennsylvania, that regularly does business in Philadelphia County, and that has headquarters located at 900 Stewart Avenue, Garden City, NY 11530-4855; and at all times relevant, acting alone or in concert with others, formulated, directed, controlled, conspired, substantially assisted, enabled and/or participated in the acts and practices set-forth in this Complaint.

FACTS AND ALLEGATIONS

5. At all times relevant hereto, defendants acted by and through their agents, servants, and employees who acted within the scope of their authority and within the course of their employment.

6. On or around September 1, 2007, Plaintiff, visited the defendants' sales dealership located at 130 Lincoln Highway, Fairless Hills, Pennsylvania 19030.

7. Prior to the execution of any contracts, the Defendants' agents, including but not limited to Defendant Tatters, and/or those identified on the attached documents, made the following representations expressly and/or impliedly about the subject vehicle:

a) the subject vehicle had 33,533 miles on it at the time ownership was transferred to Plaintiff;

b) the odometer reading and disclosure statement reflected the actual mileage;

c) the odometer reading and disclosure statement was reliable and accurate;

d) the subject vehicle had not been damaged or been involved in any accidents;

e) the subject vehicle was in good, safe and operable condition;

f) the subject vehicle was free of defects;

g) defendants would pay off plaintiff's trade vehicle;

h) Plaintiff was being charged lawfully amounts paid to public officials for fees;

i) Defendants were charging a lawful documentary fee;

j) Defendants would transfer lawfully Title and registration;

k) the sale was conducted and the paperwork was completed lawfully;

l) the Defendants lawfully for a Service Contract;

m) Defendants were charging lawfully for all charges and fees.

8. Prior to the execution of any agreements, the Defendants' agents, including Tatters, and/or those identified on the attached sales document, concealed the following facts from the Plaintiffs about subject vehicle:

a) the vehicle was damaged and was in an accident;

b) the vehicle was not free of defects;

c) the vehicle had frame/structural damage;

d) the vehicle was unsafe;

e) the Defendants were charging improperly for and/or overcharging for document fees;

f) the Defendants did not charge lawfully for amounts paid to others;

g) the Defendants did not conduct the sale and/or financing or complete the paperwork lawfully;

h) the defendants did not payoff plaintiff's trade vehicle as promised;

i) the defendants charged plaintiff for paying off plaintiff's trade vehicle;

j) the defendants were not charging lawfully for all charges and fees.

9. By a Buyer's Order (BO) and Retail Installment Sales Contract dated November 10, 2006 (RISC), the Plaintiff and Defendants ostensibly and apparently agreed to the terms for the financed purchase/sale of a 2003 Hummer (VIN: 5GRGN23U43H141958) (Exhibits A and B).[1]

10. The Defendants provided to Plaintiff an Odometer Disclosure Statement dated September 1, 2007 certifying ostensibly under oath that the subject vehicle had traveled 33,533 miles as of the date of transfer of ownership (Exhibit C).

11. PAG signed a Department of Transportation MV-4ST Form, under oath, which stated that PAG transferred ownership of the vehicle to Plaintiff on September 1, 2007 (Exhibit D).

12. The aforementioned MV-4ST form indicated that PAG paid to public officials a total of $63.50 for title, registration and lien fees (Exhibit D).

13. If the vehicle had, and if Plaintiff had known that the vehicle had more than the stated mileage on it, had an unreliable odometer, had required or undergone significant repairs, would require significant repairs, had been in a prior accident, had been damaged, and/or had a damaged structure/frame, or if the Plaintiff had known that the odometer disclosure statement was false, fraudulent, unreliable or unlawful, that any charges or fees were unlawful, false or inaccurate, that any paperwork was completed unlawfully, or the true total cost of the purchase, or that the Defendants would not honor their agreements, then he would have not purchased the vehicle.

14. After taking delivery, plaintiff noticed that the hood did not seem to be aligned properly the vehicle's bumpers' paint chipped and fell off.

15. After taking delivery, plaintiff noticed that the vehicle pulled, shimmied and made strange noises.

16. Plaintiff repeatedly complained to PAG and was told that everything plaintiff described was normal and was a result of inexact manufacturing specifications.

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[1] Under Pennsylvania Law, the RISC controls a financed motor vehicle purchase.

17. The vehicle was involved in one or more serious collisions prior to September 1, 2007, in which it sustained a damaged frame/structure (Exhibit E).

18. The vehicle was sold with a damaged frame/structure (Exhibit E).

19. The vehicle was sold in an unsafe, unmerchantable and unfit condition (Exhibit E).

20. At all times relevant, defendant PAG held itself out to the public as an expert in motor vehicle collision damage inspection, detection and repair (Exhibit F).

21. At all times relevant, defendant PAG provided the following guarantee to the public:

WRITTEN GUARANTEE:

> At the **Peruzzi Collision Center**, we pledge to return the vehicle to it's pre-loss condition with the highest level of craftsmanship, using only the best techniques, products and parts available. We proudly stand behind our work by guaranteeing all sheet metal repairs, welds, plastic repairs and refinishing for the lifetime of the vehicle. All after-market and replacement sheet metal will carry the manufacturer's warranty.

(Exhibit F).

22. Defendants did not give Plaintiff a copy of the written disclosures in a form for Plaintiff to keep before Plaintiff had actually signed the RISC.

23. Defendants represented that they were signing the Title Certificate of the car over to Plaintiff by representing that it would process the Title with the Department of Motor Vehicles, by acting as an agent of the Department of Motor Vehicles to provide his with a temporary tag and a temporary registration, and by using various contract documents that asserted that she was the owner of the car and was giving up a security interest in the car .

24. Although Defendants gave Plaintiff possession of the car on, because Defendants did provide the vehicle as represented and promised, and did not sign Title of the car over to him, it did not give his actual use of that credit that day.

ADDITIONAL ALLEGATIONS

25. Defendants never expressed in any manner any allegation that Plaintiff supplied any false or unverifiable information in connection with the transaction.

26. Defendants never expressed in any manner any allegation that any of Defendants actions were as set forth herein were taken as a result of any false or unverifiable information supplied by the Plaintiff.

27. Defendants never expressed in any manner any allegation that Plaintiff was to blame for any of Defendants' actions.

28 The Plaintiff has no experience in or specialized knowledge related to the automotive industry, and/or related to motor vehicles, motor vehicle sales, motor vehicle repair, and/or consumer finance.

29. At all times relevant, Defendants promised to take good care of the Plaintiff.

30. Defendants stood in a position of trust and confidence.

31. Plaintiff surrendered substantial control over the financing of the subject purchase.

32. By virtue of their position of trust and confidence, their unequal sophistication and expertise, Defendants had the means to take advantage and exercise undue influence over Plaintiff.

33. The purchase of a motor vehicle is one of the largest investments that many, if not most, consumers make.

34. The subject purchase was the Plaintiff's first or second greatest investment.

35. The Defendants stood in a fiduciary relationship with the Plaintiff.

36. The Defendants exploited their fiduciary relationship by deceiving the Plaintiff regarding the party's respective rights and duties under the RISC, and concealing the nature of Defendant's conduct (misconduct).

37. The established business practices discussed in the preceding paragraphs caused Plaintiffs to misunderstand how Defendants were treating the Credit Contract, caused a delay in receiving Title ownership, caused Plaintiff to suffer, by his dealings with Defendants, annoyance, embarrassment, fear, and other general distress damages, and caused Plaintiff to be denied the benefits of the consumer protection statutes specifically designed to protect him.

38. PAG is a member of the Pennsylvania Independent Automobile Dealers Association.

39. PAG is a member of the Pennsylvania Automotive Association.

40. The Defendants are in the business and regularly extend credit to consumers in the manner described above.

41. PAG is a licensed installment seller in the Commonwealth of Pennsylvania.

42. The subject vehicle was purchased by the Plaintiff primarily for personal use.

43. The Defendants induced and entered into the subject purchase-sale agreements with a then present and conscious intention to breach, reject, and/or refuse to honor their obligations under said agreement.

44. The established business practices discussed in the preceding paragraphs were created, implemented, approved, and/or supervised by the Defendants.

45. As a result of the Defendants' unlawful actions, the Plaintiff has been deprived of the use of the vehicle, has incurred expenses for replacement transportation, has suffered damage to his credit rating and credit reputation, and has suffered extreme emotional distress, frustration, humiliation, and/or embarrassment.

46. Plaintiff has been and will continue to be financially damaged due to Defendants' intentional, reckless, wanton, and/or negligent failure to honor their contractual obligations and the damage to their credit rating and reputation.

47. During all times relevant the Defendants deceived the Plaintiff into believing Defendants' actions were lawful, and/or concealed their actions' unlawful nature.

48. At all times relevant, the Plaintiff relied on Defendants' apparent and claimed experience, sophistication and expertise in inspecting, repairing, selling and/or financing motor vehicles.

CHASE AUTO FINANCE

49. Pursuant to the express terms of the RISC, State common law of assignments, and Statutory law, Chase Auto Finance "stepped into the same shoes" as the Dealer Defendants and became derivatively, jointly, severally and fully liable for all of the Dealer Defendants' misconduct.

50. Plaintiff advised defendant Chase Auto Finance of the dealer's misconduct as alleged herein and defendant Suntrust refused to acknowledge its potential derivative liability.

51. Defendant Chase Auto Finance denied that the dealer's misconduct could in any way affect the parties' respective rights and duties under the RISC.

PATTERN AND PRACTICE

52. According to Pa.R.E. 404(b)(2), "[e]vidence of other crimes, wrongs, or acts may be admitted [into evidence] for other purposes, such as proof of **motive**, opportunity, **intent**, **preparation**, **plan knowledge**, identity or **absence of mistake or accident**." Pa.R.E. 404(b)(2) (emphasis added).

Arbitration

53. The contracts at issue were contracts of adhesion presented to Plaintiffs on a take or leave it basis without any meaningful opportunity to negotiate and/or choose the terms and conditions.

54. The subject RISC contains an arbitration clause, which is unconscionable and invalid.

55. The clause is procedurally unconscionable, because it is inconspicuous and was concealed from the Plaintiff by placement on the back of the RISC, the rushed presentation of the documents for

Plaintiff's signature, and the Defendants' failure and/or refusal to provide copies of the RISC to the Plaintiff in a form that he could keep before execution.

56. The Defendants controlled the documents during the signing process, held and obscured the documents face up on the table, and pointed and directed Plaintiff to sign at a particular place.

57. The Defendants rushed the Plaintiff through the signing process and deprived Plaintiff of the opportunity and/or induced plaintiff not to examine fully the fronts and backs of the various documents and all of the terms and conditions.

58. The subject arbitration clause was substantively unconscionable as unreasonably and unfairly one-sided and favorable to the defendants in that it deprived Plaintiff but not Defendants of nearly every important mechanism reasonably necessary to protect a consumer and to prosecute a consumer fraud case.

59. The subject arbitration clause deprived plaintiff but not defendants of the right to be a member of a class and consolidate claims. The clause deprives plaintiff of meaningful discovery as is necessary to establish state-of-mind, pattern and practice, and entitlement to punitive damages.

COUNT I
FRAUD
PLAINTIFF v. ALL DEFENDANTS

60. Plaintiffs incorporate by reference all facts and allegations set forth in this Complaint.

61. Prior to the execution of any contracts, the Defendants' agents, including but not limited to Defendants PAG and Tatters, and/or those identified on the attached documents, made the following representations expressly and/or impliedly about the subject vehicle:

a) the subject vehicle had not been damaged or been involved in any accidents;

b) the subject vehicle was in good, safe and operable condition;

c) the subject vehicle was free of defects;

d) defendants would pay off plaintiff's trade vehicle;

e) Plaintiff was being charged lawfully for taxes;

f) Plaintiff was being charged lawfully amounts paid to public officials for title, registration and lien fees;

g) Defendants were charging a lawful documentary fee;

h) Defendants would transfer lawfully Title and registration;

i) the sale was conducted and the paperwork was completed lawfully;

j) Defendants were charging lawfully for all charges and fees.

62. Prior to the execution of any agreements, the Defendants' agents, including Tatters, and/or those identified on the attached sales document, concealed the following facts from the Plaintiffs about the subject vehicle:

a) the vehicle was damaged and was in an accident;

b) the vehicle was not free of defects;

c) the vehicle had frame/structural damage;

d) the vehicle was unsafe;

f) the Defendants were charging improperly for and/or overcharging for document fees;

f) the Defendants did not charge lawfully for amounts paid to others;

g) the Defendants did not conduct the sale and/or financing or complete the paperwork lawfully;

h) the defendants did not payoff plaintiff's trade vehicle;

i) the defendants charged plaintiff for paying off plaintiff's trade vehicle;

j) Defendants were not charging lawfully for all charges and fees.

63. The misrepresentations and omissions identified in the immediately preceding paragraphs, were known or should have been known to Defendants to be false when made, were material in nature,

and were made with the intent to deceive, defraud and/or induce the Plaintiff, and in fact, induced him to purchase the automobile at the price listed in the purchase agreement.

64. The Defendants knew that the Plaintiff had no special knowledge in the purchase, financing and condition of automobiles and would rely on their representations.

65. The Plaintiff relied on the Defendants' misrepresentations and was induced to sign the RISC and other documents related to which he apparently and ostensibly purchased and financed the aforementioned automobile at the inflated amount listed in the purchase agreement.

66. As a result of the aforementioned conduct, the Plaintiff suffered the damages outlined above and below.

67. The Defendants' actions as hereinbefore described were reckless, outrageous, willful, and wanton, thereby justifying the imposition of exemplary, treble and/or punitive damages.

WHEREFORE, Plaintiff demands judgment against the Defendants in an amount greater than Fifty Thousand Dollars ($50,000), together with attorneys' fees, interest, other costs and punitive damages.

COUNT II
BREACH OF CONTRACT
PLAINTIFF v. ALL DEFENDANTS

68. Plaintiff incorporates by reference all facts and allegations set forth in this Complaint.

69. This and all subsequent causes of action are pleaded in the alternative and/or in addition to Plaintiff's cause of action for fraud.

70. In the alternative, on September 1, 2007, Plaintiff Ghali apparently and/or ostensibly was misled to believe that he had contracted with Defendants for the purchase of the vehicle as well as taxes, registration, tags, service contract, and transfer of title, which agreement was final and included all payment and financing terms.

71. Plaintiff performed or satisfied all of his obligations under the aforementioned finance purchase agreement.

72. The Plaintiff was at no time relevant in default.

73. The Defendants never claimed in writing or otherwise at any time that the Plaintiff was in default.

74. The defendants breached the contracted by failing to deliver the vehicle as promised.

75. The Defendants breached and/or anticipatorily breached all of the agreements thereby relieving Plaintiff of any duty to perform thereunder.

76. As a result of Defendants' breach, the Plaintiff suffered the damages outlined above and in the following additional ways:

a. increased purchase costs;

b. damaged credit rating and reputation;

c. deprived of the use and enjoyment of the vehicles;

d. incurred cost of replacement vehicles;

e. spent time resolving problems created by Defendants' breach;

f. incurred other incidental and consequential damages, including emotional distress; and,

g. incurred increased interest and other expenses for financing the purchase of the vehicle.

77. The Defendants' actions as hereinbefore described were reckless, outrageous, willful, and wanton, thereby justifying the imposition of exemplary, treble and/or punitive damages.

WHEREFORE, Plaintiff demands judgment against Defendants in an amount greater than Fifty Thousand Dollars ($50,000), together with attorneys' fees and interest and other costs and punitive damages.

COUNT III
NEGLIGENCE
PLAINTIFF v. ALL DEFENDANTS

78. Plaintiff incorporates by reference all facts and allegations set forth in this Complaint.

79. The Defendants were negligent in the following respects:

a. failing to institute appropriate policies and procedures to comply with the applicable laws;

b. failing to institute policies, train personnel, and supervise personnel regarding lawful financing and/or sales presentations;

c. failing to institute policies, train personnel, and supervise personnel regarding proper pre-sale inspections of vehicles;

d. failing to institute policies, train personnel, and supervise personnel regarding Title transfers;

e. failing to institute policies, train personnel, and supervise personnel regarding financing agreements;

f. failing to institute policies, train personnel, and supervise personnel regarding sales of and performance obligations related to service contracts.

g. failing to hire competent and/or honest personnel, such as mechanics and salespeople;

h. failing to properly train and/or supervise its personnel;

i. failing to honor RISCs and their other promises and representations described more fully above and below.

j. failing to properly inspect the vehicle, detect defects therein, and/or report said defects to the Plaintiff;

k. violating 13 Pa.C.S.A. § 101 et seq., 75 Pa. C.S.A. § 7131 et seq., 69 P.S. § 601 et seq., 37 PaC. § 301 et seq.

80. Plaintiff suffered actual damages proximately caused by Defendants' negligence as alleged above.

81. The Defendants' actions as hereinbefore described were reckless, outrageous, willful, and wanton, thereby justifying the imposition of exemplary, treble and/or punitive damages.

WHEREFORE, Plaintiff demands judgment against the Defendants in an amount greater than Fifty Thousand Dollars ($50,000), together with attorneys' fees and interest, and punitive damages.

COUNT IV
BREACHES OF EXPRESS AND IMPLIED WARRANTIES
PLAINTIFF v. ALL DEFENDANTS

82. Plaintiff incorporates by reference all facts and allegations set forth in this Complaint.

83. The representations of the Defendants regarding the condition of the subject vehicle and the terms of sale constituted express warranties and implied warranties of the laws in the Commonwealth of Pennsylvania.

84. The vehicle was not merchantable, in breach of the implied warranty of merchantability, and it was not fit for the ordinary purposes for which such goods are sold.

85. Plaintiff suffered actual damages proximately caused by these breaches of warranties as alleged above.

WHEREFORE, Plaintiff demands judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with attorneys' fees, interest, costs, and punitive damages.

COUNT V
NEGLIGENT MISREPRESENTATION
PLAINTIFF v. ALL DEFENDANTS

86. Plaintiffs incorporate by reference all facts and allegations set forth in this Complaint.

87. The conduct of the Defendants as alleged in addition to and in the alternative constituted separate negligent misrepresentations that were false because of the failure to exercise reasonable care or competence in obtaining or communicating the information, including but not limited to misrepresentations about the history, condition and safety of the vehicle and the terms of sale and financing.

88. The Defendants supplied information including but not limited to that financing was final and approved, that Defendants would pay off Plaintiff's trade, the vehicle was in good, operable and safe condition, that the vehicle had not been in an accident, that the vehicle was good, safe and operable, that the vehicle had not been in an accident, that the paperwork was being completely lawfully, that the defendants were paying for the balance on plaintiff's trade, and that defendants were charging plaintiff lawfully for title, registration, lien recording, and aftermarket products, which induced plaintiff to purchase the vehicle and/or taking or refraining from taking action with respect to the vehicle, such as returning the vehicle or rescinding the purchase contract and/or filing suit.

89. As a direct and proximate result of these negligent misrepresentations, the Plaintiff suffered damages as alleged.

WHEREFORE, Plaintiff demands judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with attorneys' fees, interest, costs, and punitive damages.

COUNT VI
BREACH OF FIDUCIARY DUTY, AND
COVENANTS OF GOOD FAITH AND FAIR DEALING
PLAINTIFF v. ALL DEFENDANTS

90. Plaintiff incorporates all facts and allegations set forth in this Complaint.

91. At the Defendants' request and inducement, the Plaintiff surrendered substantial control over their financing of the subject purchase.

92. At all times relevant, Defendants promised to take good care of the Plaintiff and take care of all matters related to the purchase, financing, and titling of the subject vehicle.

93. Plaintiff financed purchase of the subject vehicles was Plaintiff's single greatest investment.

94. Defendants stood in a position of trust and confidence.

95. By virtue of their position of trust and confidence, their unequal sophistication and expertise, Defendants had the means to take advantage and exercise undue influence over Plaintiff.

96. The Defendants stood in a fiduciary relationship with the Plaintiff.

97. The Defendants exploited their fiduciary relationship by deceiving the Plaintiff regarding the parties' respective rights and duties under the subject RISCs, and concealing the nature of Defendants' conduct (misconduct).

98. The Defendants exploited their fiduciary relationship in causing the Plaintiff's delay in bringing this action.

99. The Defendants breached their duty of good faith and fair dealing as follows:

a) Unlawfully, arbitrarily, capriciously, and, in bad faith, denying and/or failing to honor their duties and obligations under the RISC;

b) Denying their duties under the RISC to deny Plaintiff the benefits to which he was entitled under RISCs;

c) Concealing the unlawful nature of their conduct;

d) In general, by self-dealing to the substantial detriment of Plaintiff and in violation of the provisions of the agreement and the parties' agreements, understandings.

100. By its aforesaid conduct, breaches, violations and failures, Defendants failed to discharge their professional and fiduciary duties with the care, skill, prudence and diligence under the circumstances then prevailing as required by a prudent person or entity acting in a like capacity and familiar with such matters.

101. By its aforesaid conduct, breaches, violations and failures, Defendant violated and failed to discharge adequately his professional and fiduciary duties.

102. Defendants' aforesaid breaches of its duty of good faith and fair dealing and violations of their professional and fiduciary responsibilities caused Plaintiff to suffer the damages outlined above and below.

WHEREFORE, Plaintiff demands judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with incidental, consequential and exemplary damages.

COUNT X
VIOLATION OF THE UNIFORM COMMERCIAL CODE
PLAINTIFF v. ALL DEFENDANTS

103. Plaintiff incorporates all facts and allegations set forth in this Complaint.

104. The Plaintiff fulfilled all of his duties and obligation under the subject contract(s) and/or he was prevented from performing by the Defendants' misconduct.

105. The Plaintiff did not default under the subject contract.

106. On or about March 19, 2008, plaintiff sent defendant Chase Auto Finance a request for an accounting, statement of account and a list of collateral, among other things, pursuant to 13 Pa.C.S.A. § 9210.

107. Defendant Chase Auto Finance never responded to plaintiff's request.

108. The aforementioned violations of the UCC entitle Plaintiff individually to actual and statutory damages pursuant to 13 Pa.C.S.A. § 9625 related to each individual contract.

WHEREFORE, Plaintiff demands judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with all damages to which she is entitled under the UCC, together with interest, costs, and treble damages and such equitable relief as the Court may find appropriate.

COUNT XII
VIOLATION OF PENNSYLVANIA UNFAIR TRADE PRACTICES
PLAINTIFFS v. ALL DEFENDANTS

109. Plaintiffs incorporate by reference all facts and allegations set forth in this Complaint.

110. The actions and omissions of Defendants as hereinbefore and hereinafter described constitute violations of the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa.C.S.A. sec. 201-1 et. seq., which are in-and-of-themselves fraudulent, deceptive and misleading, constituting violations of the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S.A. sec. 201-1 et. seq.

111. The actions and omissions of Defendants has hereinbefore and hereinafter described constitute violations of the following sections of the UTPCPL 73 P.S. § 201-2(4):

> (ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
>
> (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
>
> (vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
>
> (vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
>
> (ix) Advertising goods or services with intent not to sell them as advertised;
>
> (xi) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
>
> (xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

Pennsylvania Motor Vehicle Sales Finance Act

112. Defendants are licensed pursuant to 69 P.S. § 604.

113. Pursuant to 69 P.S. § 610, Defendants' licenses may be revoked if it has violated any provision of the MVSFA.

114. Pursuant to 69 P.S. §§ 610 and 612, Defendants must maintain satisfactory records to determine that the business is being operated in accordance with the MVSFA and may not falsify any records.

115. Defendants violated 69 P.S. §§ 610 and 613-615 by defrauding the Plaintiffs.

116. Defendants violated 69 P.S. §§ 610 and 613-615 by failing willfully to perform a written agreement with the Plaintiff.

117. Defendants charged improper, unlawful, false or excessive amounts for Title Certificate transfer, lien recording, tire tax, documentary fee and registration.

118. If the attached Buyer's Order, RISC and/or MV-4ST are accurate, then Defendants violated 69 P.S. §§ 610 and 618 by collecting any tax or fee to be paid to the Commonwealth and then failing to issue a true copy of the tax report to the purchaser.

119. If the attached Buyer's Order, RISC and/or MV-4ST are accurate, Defendants violated 69 P.S. §§ 610 and 618 by issuing a false or fraudulent tax report.

120. If the attached Buyer's Order, RISC and/or MV-4ST are accurate, then Defendants violated 69 P.S. §§ 610 and 618 by failing to pay any tax or fee over to the Commonwealth at the time and in the manner required by law.

121. Defendants violated 69 P.S. § 610 by engaging in unfair, deceptive, fraudulent or illegal practices or conduct in connection with any business regulated under the MVSFA.

122. Plaintiffs claim all damages to which they are entitled arising from Defendants' violations of the Unfair Trade Practices and Consumer Protection Law.

123. The actions and omissions of Defendants as hereinbefore and hereinafter described constitute violations of the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S.A. sec. 201-1 et. seq., which are in-and-of-themselves fraudulent, deceptive and misleading, constituting violations of the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S.A. sec. 201-1 et. seq.

124. Plaintiffs claim all damages to which they are entitled arising from Defendants' violations of the Unfair Trade Practices and Consumer Protection Law.

WHEREFORE, Plaintiffs demand judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with attorney's fees, interest, costs, and treble damages.

BENSLEY LAW OFFICES, LLC

BY: _____ 06/19/2008

WILLIAM C. BENSLEY
Attorney for Plaintiffs

VERIFICATION

I hereby verify that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief. This verification is made subject to the penalties set forth in 18 Pa. C.S. Sec. 4904 relating to unsworn falsification to authorities.

SILVANO GHALI

DATE: 6/9/08

EXHIBIT "B"

BENSLEY LAW OFFICES, LLC
By: William C. Bensley
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1500 Walnut Street, Suite 900
Philadelphia, PA 19106
Email: wcbensley@bensleylawoffices.com
(267) 322-4000

Attorneys for Plaintiffs

ASSESSMENT OF DAMAGES HEARING:
☒ IS ☐ IS NOT REQUIRED

☒ JURY ☐ NON-JURY ☐ ARBITRATION

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION
JUNE TERM, 2008
NO. 3505

SILVANO E. GHALI
1409 Beverly Drive
Quakertown, PA 18951

v.

PERUZZI AUTOMOTIVE GROUP
130 Lincoln Highway
Fairless Hills, PA 19030
and
ROBERT JOHN TATTERS
130 Lincoln Highway
Fairless Hills, PA 19030
and
CHASE AUTO FINANCE
PO Box 901076
TX 1-0056
Fort Worth, TX 76155-2732

PLAINTIFF'S FIRST AMENDED COMPLAINT
NOTICE TO DEFEND

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find our where you can get legal help.

Philadelphia Bar Association
Lawyer Referral
and Information Service
One Reading Center
Philadelphia, Pennsylvania 19107
(215) 238-6333

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas espuestas en las paginas siguientes, usted tiene veinte (20) disa de plazo el partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado immediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagartal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede consequir asistencia legal.

Asociacion de Licenciados
de Filadelfia
Servicio de Referencia e
Informacion Legal
One Reading Center
Filadelfia, Pennsylvania 19107

BENSLEY LAW OFFICES, LLC
BY: William C. Bensley
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Attorney for Plaintiffs

SILVANO E. GHALI 1409 Beverly Drive Quakertown, PA 18951 v. PERUZZI AUTOMOTIVE GROUP 130 Lincoln Highway Fairless Hills, PA 19030 and ROBERT JOHN TATTERS a/k/a ROBERT JOHN TATTERSALL 130 Lincoln Highway Fairless Hills, PA 19030 and CHASE AUTO FINANCE PO Box 901076 TX 1-0056 Fort Worth, TX 76155-2732	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL TRIAL DIVISION JUNE TERM, 2008 NO.

PLAINTIFF'S FIRST AMENDED COMPLAINT
CIVIL ACTION:
FRAUD: (4010)

PARTIES

1. Plaintiff, Silvano E. Ghali, is an adult individual presently residing at 1409 Beverly Drive, Quakertown, PA 19851.

2. Defendant, Peruzzi Automotive Group ("PAG") is a corporation licensed to do business in the Commonwealth of Pennsylvania, regularly conducting business in the City of Philadelphia and having a principal place of business located at 130 Lincoln Highway, Fairless Hills, Pennsylvania 19030; at all times relevant, acting alone or in concert with others, PAG, formulated, directed, concealed, controlled,

conspired, substantially assisted, enabled and/or participated in the acts and practices set-forth in this Complaint.

3. Defendant, Robert John Tatters a/k/a Robert John Tattersall, is a supervising agent and/or employee of Defendant PAG and holds a management position at and/or with said Defendant, and at all times relevant, acting alone or in concert with others, formulated, directed, concealed, controlled, conspired, substantially assisted, enabled and/or participated in the acts and practices set forth in this Complaint.

4. Defendant, Chase Auto Finance ("Chase") is a corporation licensed to do business in the Commonwealth of Pennsylvania, that regularly does business in Philadelphia County, and that has headquarters located at 900 Stewart Avenue, Garden City, NY 11530-4855; and at all times relevant, acting alone or in concert with others, formulated, directed, controlled, conspired, substantially assisted, enabled and/or participated in the acts and practices set-forth in this Complaint.

VENUE

5. Upon information and belief, defendants PAG and Tatters continuously and habitually presented and promoted Colonial to the public as a Philadelphia County automobile dealer.

6. Upon information and belief, defendants PAG and Tatters continuously and habitually solicit Philadelphia County residents in Philadelphia County.

7. Defendant PAG's website, www.peruzzi.com, is fully interactive. It permits a user to schedule an appointment with the service department, to browse new and used vehicle inventory, to request specific price quotes on specific vehicles, to build a desired vehicle to specifications, to submit trade in information, to apply for financing, and to apply for employment (Exhibit A).

8. Defendant PAG's Website includes "Philadelphia" in its meta-name and meta-data search terms. Meta-names and meta-data search terms are phrases and words that are included in the source code

of a webpage and submitted to search engines in order to increase the chances that the target audience will view the web page. These words are placed in the source code of the webpage so that an internet user who searches for one of those terms will be directed to that particular webpage. By including the word "Philadelphia," in the meta-name and meta-data of Defendant's webpage are advertisements which are intended to target Philadelphia residents. (Exhibit B).

9. Upon information and belief, defendants PAG and Tatters continuously and habitually send and sent direct mail solicitations to Philadelphia County residents.

10. Upon information and belief, defendants PAG and Tatters continuously and habitually solicit and solicited Philadelphia County residents by telephoning them in their homes.

11. Upon information and belief, defendant PAG continuously and habitually causes advertisements to be published in Philadelphia County periodicals, including but not limited to the Philadelphia Daily News and the Philadelphia Inquirer.

12. Defendant PAG continuously and habitually advertises in Philadelphia County and/or as a Philadelphia Dealer (Exhibit C).

13. Defendant PAG has a billboard in Philadelphia on Interstate 95 North located at approximately mile marker 31 and approximately 8/10 of a mile from exit 32 Academy Road.

14. Upon information and belief, defendants PAG and Tatters continuously and habitually sold and sell vehicles to Philadelphia County residents.

15. Upon information and belief, during all times relevant and to this day, Chase has had dealer agreements with many motor vehicle dealers within Philadelphia County. Said agreements were/are performed in Philadelphia.

16. Upon information and belief, during all times relevant and to this day, Chase has purchased and serviced hundreds and hundreds of Retail Installment Sales Contracts related to Philadelphia residents from Philadelphia motor vehicle dealers.

17. Said Retail Installment Sales Contracts are performed in Philadelphia by Philadelphia residents.

18. Chase collects hundreds and hundreds of monthly payments from Philadelphia residents sent from Philadelphia related to the aforementioned Retail Installment Sales Contracts.

19. Upon information and belief, PAG and Tatters regularly sold vehicles in Philadelphia County.

20. Upon information and belief, PAG and Tatters operated "tent-sales" in Philadelphia County.

21. Upon information and belief, PAG and Tatters presented motor vehicles for sale in Philadelphia County.

22. Upon information and belief, PAG and Tatters regularly transported Philadelphia residents to and from Philadelphia County for the purpose of selling motor vehicles to them.

23. Upon information and belief, PAG and Tatters regularly delivered vehicles to Philadelphia County.

24. Upon information and belief, PAG and Tatters maintain bank accounts in Philadelphia County.

FACTS AND ALLEGATIONS

25. At all times relevant hereto, defendants acted by and through their agents, servants, and employees who acted within the scope of their authority and within the course of their employment.

26. On or around September 1, 2007, Plaintiff, visited the defendants' sales dealership located at 130 Lincoln Highway, Fairless Hills, Pennsylvania 19030.

27. Prior to the execution of any contracts, the Defendants' agents, including but not limited to Defendant Tatters, and/or those identified on the attached documents, made the following representations expressly and/or impliedly about the subject vehicle:

a) the subject vehicle had 33,533 miles on it at the time ownership was transferred to Plaintiff;

b) the odometer reading and disclosure statement reflected the actual mileage;

c) the odometer reading and disclosure statement was reliable and accurate;

d) the subject vehicle had not been damaged or been involved in any accidents;

e) the subject vehicle was in good, safe and operable condition;

f) the subject vehicle was free of defects;

g) defendants would pay off plaintiff's trade vehicle;

h) Plaintiff was being charged lawfully amounts paid to public officials for fees;

i) Defendants were charging a lawful documentary fee;

j) Defendants would transfer lawfully Title and registration;

k) the sale was conducted and the paperwork was completed lawfully;

l) the Defendants lawfully for a Service Contract;

m) Defendants were charging lawfully for all charges and fees.

28. Prior to the execution of any agreements, the Defendants' agents, including Tatters, and/or those identified on the attached sales document, concealed the following facts from the Plaintiffs about subject vehicle:

a) the vehicle was damaged and was in an accident;

b) the vehicle was not free of defects;

c) the vehicle had frame/structural damage;

d) the vehicle was unsafe;

e) the Defendants were charging improperly for and/or overcharging for document fees;

f) the Defendants did not charge lawfully for amounts paid to others;

g) the Defendants did not conduct the sale and/or financing or complete the paperwork lawfully;

h) the defendants did not payoff plaintiff's trade vehicle as promised;

i) the defendants charged plaintiff for paying off plaintiff's trade vehicle;

j) the defendants were not charging lawfully for all charges and fees.

29. By a Buyer's Order (BO) and Retail Installment Sales Contract dated November 10, 2006 (RISC), the Plaintiff and Defendants ostensibly and apparently agreed to the terms for the financed purchase/sale of a 2003 Hummer (VIN: 5GRGN23U43H141958) (Exhibits A and B).[1]

30. The Defendants provided to Plaintiff an Odometer Disclosure Statement dated September 1, 2007 certifying ostensibly under oath that the subject vehicle had traveled 33,533 miles as of the date of transfer of ownership (Exhibit C).

31. PAG signed a Department of Transportation MV-4ST Form, under oath, which stated that PAG transferred ownership of the vehicle to Plaintiff on September 1, 2007 (Exhibit D).

32. The aforementioned MV-4ST form indicated that PAG paid to public officials a total of $63.50 for title, registration and lien fees (Exhibit D).

33. If the vehicle had, and if Plaintiff had known that the vehicle had more than the stated mileage on it, had an unreliable odometer, had required or undergone significant repairs, would require significant repairs, had been in a prior accident, had been damaged, and/or had a damaged structure/frame,

[1] Under Pennsylvania Law, the RISC controls a financed motor vehicle purchase.

or if the Plaintiff had known that the odometer disclosure statement was false, fraudulent, unreliable or unlawful, that any charges or fees were unlawful, false or inaccurate, that any paperwork was completed unlawfully, or the true total cost of the purchase, or that the Defendants would not honor their agreements, then he would have not purchased the vehicle.

34. After taking delivery, plaintiff noticed that the hood did not seem to be aligned properly the vehicle's bumpers' paint chipped and fell off.

35. After taking delivery, plaintiff noticed that the vehicle pulled, shimmied and made strange noises.

36. Plaintiff repeatedly complained to PAG and was told that everything plaintiff described was normal and was a result of inexact manufacturing specifications.

36. The vehicle was involved in one or more serious collisions prior to September 1, 2007, in which it sustained a damaged frame/structure (Exhibit E).

37. The vehicle was sold with a damaged frame/structure (Exhibit E).

38. The vehicle was sold in an unsafe, unmerchantable and unfit condition (Exhibit E).

39. At all times relevant, defendant PAG held itself out to the public as an expert in motor vehicle collision damage inspection, detection and repair (Exhibit F).

40. At all times relevant, defendant PAG provided the following guarantee to the public:

WRITTEN GUARANTEE:

> At the **Peruzzi Collision Center**, we pledge to return the vehicle to it's pre-loss condition with the highest level of craftsmanship, using only the best techniques, products and parts available. We proudly stand behind our work by guaranteeing all sheet metal repairs, welds, plastic repairs and refinishing for the lifetime of the vehicle. All after-market and replacement sheet metal will carry the manufacturer's warranty.

(Exhibit F).

41. Defendants did not give Plaintiff a copy of the written disclosures in a form for Plaintiff to keep before Plaintiff had actually signed the RISC.

42. Defendants represented that they were signing the Title Certificate of the car over to Plaintiff by representing that it would process the Title with the Department of Motor Vehicles, by acting as an agent of the Department of Motor Vehicles to provide his with a temporary tag and a temporary registration, and by using various contract documents that asserted that she was the owner of the car and was giving up a security interest in the car

43. Although Defendants gave Plaintiff possession of the car on, because Defendants did provide the vehicle as represented and promised, and did not sign Title of the car over to him, it did not give his actual use of that credit that day.

ADDITIONAL ALLEGATIONS

44. Defendants never expressed in any manner any allegation that Plaintiff supplied any false or unverifiable information in connection with the transaction.

45. Defendants never expressed in any manner any allegation that any of Defendants actions were as set forth herein were taken as a result of any false or unverifiable information supplied by the Plaintiff.

46. Defendants never expressed in any manner any allegation that Plaintiff was to blame for any of Defendants' actions.

47. The Plaintiff has no experience in or specialized knowledge related to the automotive industry, and/or related to motor vehicles, motor vehicle sales, motor vehicle repair, and/or consumer finance.

48. At all times relevant, Defendants promised to take good care of the Plaintiff.

49. Defendants stood in a position of trust and confidence.

50. Plaintiff surrendered substantial control over the financing of the subject purchase.

51. By virtue of their position of trust and confidence, their unequal sophistication and expertise, Defendants had the means to take advantage and exercise undue influence over Plaintiff.

52. The purchase of a motor vehicle is one of the largest investments that many, if not most, consumers make.

53. The subject purchase was the Plaintiff's first or second greatest investment.

54. The Defendants stood in a fiduciary relationship with the Plaintiff.

55. The Defendants exploited their fiduciary relationship by deceiving the Plaintiff regarding the party's respective rights and duties under the RISC, and concealing the nature of Defendant's conduct (misconduct).

56. The established business practices discussed in the preceding paragraphs caused Plaintiffs to misunderstand how Defendants were treating the Credit Contract, caused a delay in receiving Title ownership, caused Plaintiff to suffer, by his dealings with Defendants, annoyance, embarrassment, fear, and other general distress damages, and caused Plaintiff to be denied the benefits of the consumer protection statutes specifically designed to protect him.

57. PAG is a member of the Pennsylvania Independent Automobile Dealers Association.

58. PAG is a member of the Pennsylvania Automotive Association.

59. The Defendants are in the business and regularly extend credit to consumers in the manner described above.

60. PAG is a licensed installment seller in the Commonwealth of Pennsylvania.

61. The subject vehicle was purchased by the Plaintiff primarily for personal use.

62. The Defendants induced and entered into the subject purchase-sale agreements with a then present and conscious intention to breach, reject, and/or refuse to honor their obligations under said agreement.

63. The established business practices discussed in the preceding paragraphs were created, implemented, approved, and/or supervised by the Defendants.

64. As a result of the Defendants' unlawful actions, the Plaintiff has been deprived of the use of the vehicle, has incurred expenses for replacement transportation, has suffered damage to his credit rating and credit reputation, and has suffered extreme emotional distress, frustration, humiliation, and/or embarrassment.

65. Plaintiff has been and will continue to be financially damaged due to Defendants' intentional, reckless, wanton, and/or negligent failure to honor their contractual obligations and the damage to their credit rating and reputation.

66. During all times relevant the Defendants deceived the Plaintiff into believing Defendants' actions were lawful, and/or concealed their actions' unlawful nature.

67. At all times relevant, the Plaintiff relied on Defendants' apparent and claimed experience, sophistication and expertise in inspecting, repairing, selling and/or financing motor vehicles.

CHASE AUTO FINANCE

68. Pursuant to the express terms of the RISC, State common law of assignments, and Statutory law, Chase Auto Finance "stepped into the same shoes" as the Dealer Defendants and became derivatively, jointly, severally and fully liable for all of the Dealer Defendants' misconduct.

69. Plaintiff advised defendant Chase Auto Finance of the dealer's misconduct as alleged herein and defendant Suntrust refused to acknowledge its potential derivative liability.

70. Defendant Chase Auto Finance denied that the dealer's misconduct could in any way affect the parties' respective rights and duties under the RISC.

PATTERN AND PRACTICE

71. According to Pa.R.E. 404(b)(2), "[e]vidence of other crimes, wrongs, or acts may be admitted [into evidence] for other purposes, such as proof of **motive**, opportunity, **intent**, **preparation**, **plan knowledge**, identity or **absence of mistake or accident**." Pa.R.E. 404(b)(2) (emphasis added).

Arbitration

72. The contracts at issue were contracts of adhesion presented to Plaintiffs on a take or leave it basis without any meaningful opportunity to negotiate and/or choose the terms and conditions.

73. The subject RISC contains an arbitration clause, which is unconscionable and invalid.

74. The clause is procedurally unconscionable, because it is inconspicuous and was concealed from the Plaintiff by placement on the back of the RISC, the rushed presentation of the documents for Plaintiff's signature, and the Defendants' failure and/or refusal to provide copies of the RISC to the Plaintiff in a form that he could keep before execution.

75. The Defendants controlled the documents during the signing process, held and obscured the documents face up on the table, and pointed and directed Plaintiff to sign at a particular place.

76. The Defendants rushed the Plaintiff through the signing process and deprived Plaintiff of the opportunity and/or induced plaintiff not to examine fully the fronts and backs of the various documents and all of the terms and conditions.

77. The subject arbitration clause was substantively unconscionable as unreasonably and unfairly one-sided and favorable to the defendants in that it deprived Plaintiff but not Defendants of nearly every important mechanism reasonably necessary to protect a consumer and to prosecute a consumer fraud case.

78. The subject arbitration clause deprived plaintiff but not defendants of the right to be a member of a class and consolidate claims. The clause deprives plaintiff of meaningful discovery as is necessary to establish state-of-mind, pattern and practice, and entitlement to punitive damages.

COUNT I
FRAUD
PLAINTIFF v. ALL DEFENDANTS

79. Plaintiffs incorporate by reference all facts and allegations set forth in this Complaint.

80. Prior to the execution of any contracts, the Defendants' agents, including but not limited to Defendants PAG and Tatters, and/or those identified on the attached documents, made the following representations expressly and/or impliedly about the subject vehicle:

a) the subject vehicle had not been damaged or been involved in any accidents;

b) the subject vehicle was in good, safe and operable condition;

c) the subject vehicle was free of defects;

d) defendants would pay off plaintiff's trade vehicle;

e) Plaintiff was being charged lawfully for taxes;

f) Plaintiff was being charged lawfully amounts paid to public officials for title, registration and lien fees;

g) Defendants were charging a lawful documentary fee;

h) Defendants would transfer lawfully Title and registration;

i) the sale was conducted and the paperwork was completed lawfully;

j) Defendants were charging lawfully for all charges and fees.

81. Prior to the execution of any agreements, the Defendants' agents, including Tatters, and/or those identified on the attached sales document, concealed the following facts from the Plaintiffs about the subject vehicle:

a) the vehicle was damaged and was in an accident;

b) the vehicle was not free of defects;

c) the vehicle had frame/structural damage;

d) the vehicle was unsafe;

f) the Defendants were charging improperly for and/or overcharging for document fees;

f) the Defendants did not charge lawfully for amounts paid to others;

g) the Defendants did not conduct the sale and/or financing or complete the paperwork lawfully;

h) the defendants did not payoff plaintiff's trade vehicle;

i) the defendants charged plaintiff for paying off plaintiff's trade vehicle;

j) Defendants were not charging lawfully for all charges and fees.

82. The misrepresentations and omissions identified in the immediately preceding paragraphs, were known or should have been known to Defendants to be false when made, were material in nature, and were made with the intent to deceive, defraud and/or induce the Plaintiff, and in fact, induced him to purchase the automobile at the price listed in the purchase agreement.

83. The Defendants knew that the Plaintiff had no special knowledge in the purchase, financing and condition of automobiles and would rely on their representations.

84. The Plaintiff relied on the Defendants' misrepresentations and was induced to sign the RISC and other documents related to which he apparently and ostensibly purchased and financed the aforementioned automobile at the inflated amount listed in the purchase agreement.

85. As a result of the aforementioned conduct, the Plaintiff suffered the damages outlined above and below.

86. The Defendants' actions as hereinbefore described were reckless, outrageous, willful, and wanton, thereby justifying the imposition of exemplary, treble and/or punitive damages.

WHEREFORE, Plaintiff demands judgment against the Defendants in an amount greater than Fifty Thousand Dollars ($50,000), together with attorneys' fees, interest, other costs and punitive damages.

COUNT II
BREACH OF CONTRACT
PLAINTIFF v. ALL DEFENDANTS

87. Plaintiff incorporates by reference all facts and allegations set forth in this Complaint.

88. This and all subsequent causes of action are pleaded in the alternative and/or in addition to Plaintiff's cause of action for fraud.

89. In the alternative, on September 1, 2007, Plaintiff Ghali apparently and/or ostensibly was misled to believe that he had contracted with Defendants for the purchase of the vehicle as well as taxes, registration, tags, service contract, and transfer of title, which agreement was final and included all payment and financing terms.

90. Plaintiff performed or satisfied all of his obligations under the aforementioned finance purchase agreement.

91. The Plaintiff was at no time relevant in default.

92. The Defendants never claimed in writing or otherwise at any time that the Plaintiff was in default.

93. The defendants breached the contracted by failing to deliver the vehicle as promised.

94. The Defendants breached and/or anticipatorily breached all of the agreements thereby relieving Plaintiff of any duty to perform thereunder.

95. As a result of Defendants' breach, the Plaintiff suffered the damages outlined above and in the following additional ways:

a. increased purchase costs;

b. damaged credit rating and reputation;

c. deprived of the use and enjoyment of the vehicles;

d. incurred cost of replacement vehicles;

e. spent time resolving problems created by Defendants' breach;

f. incurred other incidental and consequential damages, including emotional distress; and,

g. incurred increased interest and other expenses for financing the purchase of the vehicle.

96. The Defendants' actions as hereinbefore described were reckless, outrageous, willful, and wanton, thereby justifying the imposition of exemplary, treble and/or punitive damages.

WHEREFORE, Plaintiff demands judgment against Defendants in an amount greater than Fifty Thousand Dollars ($50,000), together with attorneys' fees and interest and other costs and punitive damages.

COUNT III
NEGLIGENCE
PLAINTIFF v. ALL DEFENDANTS

97. Plaintiff incorporates by reference all facts and allegations set forth in this Complaint.

98. The Defendants were negligent in the following respects:

a. failing to institute appropriate policies and procedures to comply with the applicable laws;

b. failing to institute policies, train personnel, and supervise personnel regarding lawful financing and/or sales presentations;

c. failing to institute policies, train personnel, and supervise personnel regarding proper pre-sale inspections of vehicles;

d. failing to institute policies, train personnel, and supervise personnel regarding Title transfers;

e. failing to institute policies, train personnel, and supervise personnel regarding financing agreements;

f. failing to institute policies, train personnel, and supervise personnel regarding sales of and performance obligations related to service contracts.

g. failing to hire competent and/or honest personnel, such as mechanics and salespeople;

h. failing to properly train and/or supervise its personnel;

i. failing to honor RISCs and their other promises and representations described more fully above and below.

j. failing to properly inspect the vehicle, detect defects therein, and/or report said defects to the Plaintiff;

k. violating 13 Pa.C.S.A. § 101 et seq., 75 Pa. C.S.A. § 7131 et seq., 69 P.S. § 601 et seq., 37 PaC. § 301 et seq.

99. Plaintiff suffered actual damages proximately caused by Defendants' negligence as alleged above.

100. The Defendants' actions as hereinbefore described were reckless, outrageous, willful, and wanton, thereby justifying the imposition of exemplary, treble and/or punitive damages.

WHEREFORE, Plaintiff demands judgment against the Defendants in an amount greater than Fifty Thousand Dollars ($50,000), together with attorneys' fees and interest, and punitive damages.

COUNT IV
BREACHES OF EXPRESS AND IMPLIED WARRANTIES
PLAINTIFF v. ALL DEFENDANTS

101. Plaintiff incorporates by reference all facts and allegations set forth in this Complaint.

102. The representations of the Defendants regarding the condition of the subject vehicle and the terms of sale constituted express warranties and implied warranties of the laws in the Commonwealth of Pennsylvania.

103. The vehicle was not merchantable, in breach of the implied warranty of merchantability, and it was not fit for the ordinary purposes for which such goods are sold.

104. Plaintiff suffered actual damages proximately caused by these breaches of warranties as alleged above.

WHEREFORE, Plaintiff demands judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with attorneys' fees, interest, costs, and punitive damages.

COUNT V
NEGLIGENT MISREPRESENTATION
PLAINTIFF v. ALL DEFENDANTS

105. Plaintiffs incorporate by reference all facts and allegations set forth in this Complaint.

106. The conduct of the Defendants as alleged in addition to and in the alternative constituted separate negligent misrepresentations that were false because of the failure to exercise reasonable care or competence in obtaining or communicating the information, including but not limited to misrepresentations about the history, condition and safety of the vehicle and the terms of sale and financing.

107. The Defendants supplied information including but not limited to that financing was final and approved, that Defendants would pay off Plaintiff's trade, the vehicle was in good, operable and safe condition, that the vehicle had not been in an accident, that the vehicle was good, safe and operable, that the vehicle had not been in an accident, that the paperwork was being completely lawfully, that the defendants were paying for the balance on plaintiff's trade, and that defendants were charging plaintiff lawfully for title, registration, lien recording, and aftermarket products, which induced plaintiff to purchase the vehicle and/or taking or refraining from taking action with respect to the vehicle, such as returning the vehicle or rescinding the purchase contract and/or filing suit.

108. As a direct and proximate result of these negligent misrepresentations, the Plaintiff suffered damages as alleged.

WHEREFORE, Plaintiff demands judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with attorneys' fees, interest, costs, and punitive damages.

COUNT VI
VIOLATION OF THE UNIFORM COMMERCIAL CODE
PLAINTIFF v. ALL DEFENDANTS

109. Plaintiff incorporates all facts and allegations set forth in this Complaint.

110. The Plaintiff fulfilled all of his duties and obligation under the subject contract(s) and/or he was prevented from performing by the Defendants' misconduct.

111. The Plaintiff did not default under the subject contract.

112. On or about March 19, 2008, plaintiff sent defendant Chase Auto Finance a request for an accounting, statement of account and a list of collateral, among other things, pursuant to 13 Pa.C.S.A. § 9210.

113. Defendant Chase Auto Finance never responded to plaintiff's request.

114. The aforementioned violations of the UCC entitle Plaintiff individually to actual and statutory damages pursuant to 13 Pa.C.S.A. § 9625 related to each individual contract.

WHEREFORE, Plaintiff demands judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with all damages to which she is entitled under the UCC, together with interest, costs, and treble damages and such equitable relief as the Court may find appropriate.

COUNT VII
VIOLATION OF PENNSYLVANIA UNFAIR TRADE PRACTICES
PLAINTIFFS v. ALL DEFENDANTS

115. Plaintiffs incorporate by reference all facts and allegations set forth in this Complaint.

116. The actions and omissions of Defendants as hereinbefore and hereinafter described constitute violations of the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa.C.S.A. sec. 201-1 et. seq., which are in-and-of-themselves fraudulent, deceptive and misleading, constituting violations of the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S.A. sec. 201-1 et. seq.

117. The actions and omissions of Defendants has hereinbefore and hereinafter described constitute violations of the following sections of the UTPCPL 73 P.S. § 201-2(4):

> (ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(ix) Advertising goods or services with intent not to sell them as advertised;

(xi) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

Pennsylvania Motor Vehicle Sales Finance Act

118. Defendants are licensed pursuant to 69 P.S. § 604.

119. Pursuant to 69 P.S. § 610, Defendants' licenses may be revoked if it has violated any provision of the MVSFA.

120. Pursuant to 69 P.S. §§ 610 and 612, Defendants must maintain satisfactory records to determine that the business is being operated in accordance with the MVSFA and may not falsify any records.

121. Defendants violated 69 P.S. §§ 610 and 613-615 by defrauding the Plaintiffs.

122. Defendants violated 69 P.S. §§ 610 and 613-615 by failing willfully to perform a written agreement with the Plaintiff.

123. Defendants charged improper, unlawful, false or excessive amounts for Title Certificate transfer, lien recording, tire tax, documentary fee and registration.

124. If the attached Buyer's Order, RISC and/or MV-4ST are accurate, then Defendants violated 69 P.S. §§ 610 and 618 by collecting any tax or fee to be paid to the Commonwealth and then failing to issue a true copy of the tax report to the purchaser.

125. If the attached Buyer's Order, RISC and/or MV-4ST are accurate, Defendants violated 69 P.S. §§ 610 and 618 by issuing a false or fraudulent tax report.

126. If the attached Buyer's Order, RISC and/or MV-4ST are accurate, then Defendants violated 69 P.S. §§ 610 and 618 by failing to pay any tax or fee over to the Commonwealth at the time and in the manner required by law.

127. Defendants violated 69 P.S. § 610 by engaging in unfair, deceptive, fraudulent or illegal practices or conduct in connection with any business regulated under the MVSFA.

128. Plaintiffs claim all damages to which they are entitled arising from Defendants' violations of the Unfair Trade Practices and Consumer Protection Law.

129. The actions and omissions of Defendants as hereinbefore and hereinafter described constitute violations of the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S.A. sec. 201-1 et. seq., which are in-and-of-themselves fraudulent, deceptive and misleading, constituting violations of the Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S.A. sec. 201-1 et. seq.

130. Plaintiffs claim all damages to which they are entitled arising from Defendants' violations of the Unfair Trade Practices and Consumer Protection Law.

WHEREFORE, Plaintiffs demand judgment against the Defendants in excess of Fifty Thousand Dollars ($50,000), together with attorney's fees, interest, costs, and treble damages.

BENSLEY LAW OFFICES, LLC

BY: _____

WILLIAM C. BENSLEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I do hereby certify that service of a true and correct copy of the preceding was made on this day, August 15, 2008, by first-class mail, postage prepaid hand delivery on the following:

John A. Livingood, Jr., Esquire
Margolis Edelstein
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106
For Peruzzi and Tatters

Andrew M. Schwartz, Esquire
Marshall, Dennehey, Warner,
Coleman & Goggin, P.C.
1845 Walnut Street, 17th Floor
Philadelphia, PA 19103
For Chase Auto Finance

BENSLEY LAW OFFICES, LLC

By: _____
WILLIAM C. BENSLEY
ATTORNEY FOR PLAINTIFF

VERIFICATION

WILLIAM C. BENSLEY, ESQUIRE, hereby states that he is the attorney for the plaintiff(s) in this action, and he makes this verification on behalf of the plaintiff herein, being authorized to do so, and verifies that the facts contained in the foregoing pleading are true and correct to the best of his knowledge, information and belief. The undersigned understands that the statements herein are made subject to the penalties of 18 Pa.C.S. Sec. 4904 relating to unsworn falsification to authorities.

Date: 08/18/2008

WILLIAM C. BENSLEY

EXHIBIT A

AUTOMOTIVE GROUP

www.peruzzi.com

DATE	STOCK #	DEAL #	CUST. #	PURCHASER
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

☐ NEW ☐ USED ☐ DEMO ☐ RENTAL ☐ PRIOR USE

YR.	MAKE	MODEL	TYPE
[illegible]	[illegible]	[illegible]	[illegible]

COLOR	TRIM	MILEAGE
[illegible]	[illegible]	[illegible]

VIN	COLOR	TRIM
[illegible]	[illegible]	[illegible]

PURCHASER

STREET

CITY	STATE	ZIP
[illegible]	[illegible]	[illegible]

PHONE RES.	PHONE BUS.
[illegible]	[illegible]

E-MAIL ADDRESS

LIC. #

SOC. SEC. NO.

DATE OF BIRTH

DESCRIPTION OF TRADE IN

DESCRIPTION OF TRADE IN #2

COLLISION COVERAGE

WARRANTY INFORMATION

FACTORY WARRANTY - The factory warranty constitutes all of the warranties with respect to the sale of this item/items. The seller hereby expressly disclaims all warranties, either expressed or implied, including any implied warranty of merchantability or fitness for a particular purpose, and neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of the item/items.

USED CAR WARRANTY - Used car is covered by a limited warranty by dealer in a separate document.

"AS IS" This motor vehicle is sold "AS IS" without any warranty either expressed or implied. The purchaser will bear the entire expense of repairing or correcting any defects that presently exist or that may occur in the vehicle.

PURCHASER'S SIGNATURE X

USED CAR CONTRACTUAL DISCLOSURE STATEMENT: THE INFORMATION YOU SEE ON THE WINDOW FORM OF THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

PURCHASER'S SIGNATURE X

If you cancel this purchase agreement or refuse to take delivery of the vehicle ordered, except as permitted by law, you shall, at our option, forfeit as damages the amount of

PURCHASER'S SIGNATURE X

☐ BUYER ACKNOWLEDGES THAT IF THIS BOX IS CHECKED THIS AGREEMENT CONTAINS AN ARBITRATION CLAUSE. BUYER HAS READ ALL PAGES OF THIS AGREEMENT AND

DEALER LIST PRICE	[illegible]
[illegible]	[illegible]
BALANCE	[illegible]
SERVICE CONTRACT	[illegible]
PRE-PAID MAINTENANCE	[illegible]
SALES TAX	[illegible]
REGISTRATION	[illegible]
ONLINE REGISTRATION FEE	[illegible]
ONLINE DEALER FEE	[illegible]
TRANSFER OWNERS TAG	[illegible]
LIENHOLDER (if needed)	[illegible]
TITLE APPLICATION	22.50
MESSENGER	[illegible]
DOCUMENTARY	[illegible]
[illegible]	[illegible]
TOTAL	[illegible]
CASH ON DELIVERY	[illegible]
TOTAL CASH	[illegible]
Amount Financed After Down Payment	[illegible]

Case ID: 080603505

EXHIBIT B

CHASE

RETAIL INSTALLMENT CONTRACT

Date 09/01/2007

1. ☐ If this box is checked, this is a simple interest contract *WITH* a "Balloon Payment" as the last scheduled payment. If this box is not checked, this is a simple interest contract *WITHOUT* a "Balloon Payment" as the last scheduled payment.

2.

Buyer (and Co-Buyer) Name and Address (Include County and Zip Code)	Seller (Creditor) Name and Business Address
SILVANO E GHALI 1409 BEVERLY DR DUNKERTOWN PA 18951 CO: 095006	PERKIT MITSUBISHI 130 LINCOLN HWY FAIRLESS HILLS PA 19030

3. **WHO IS BOUND:** You, the Buyer (and Co-Buyer, if any), may buy the vehicle described below for cash or on credit. By signing below, you choose to buy the vehicle on credit under the terms on the front and back of this Contract and are individually liable (jointly and severally if both a Buyer and Co-Buyer sign below) for any amount due. In this Contract, "we," "us," and "our" mean the Seller named above and, after assignment and acceptance, the Seller's assignee. JPMorgan Chase Bank, N.A., acting on its own or as agent for an affiliated entity (and any subsequent assignee).

4. **DESCRIPTION OF VEHICLE:** You agree to buy and we agree to sell the following vehicle.

New, Used or Demo	Year	Weight (lbs.)	Make and Model	Body Type	Vehicle Identification No.	Key No.	Use for Which Purchased
USED	2002	2	NISSAN R2	4 DOOR UTILITY	5GRGN23U43H141958		___ personal ___ business ___ agricultural ___ _____

If truck – Describe body, gross vehicle weight and major items of equipment sold:

N/A

5. **NOTICE TO BUYERS OF USED OR DEMONSTRATION VEHICLES: The information you see on the window form for this vehicle is part of this Contract. Information on the window form overrides any contrary provisions in the contract of sale.**

6. FEDERAL TRUTH-IN-LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS	TOTAL SALE PRICE
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.	The total cost of your purchase on credit, including your downpayment of $ 14500.00
14.49 %	$ 8905.24	$ 21649.16	$ 30554.40	$ 45054.40

PAYMENT SCHEDULE: Your payment schedule will be 60 monthly payments of $ 509.24 each, due on the same day of each month starting on 09/20/2007

BALLOON PAYMENT: If this Contract is checked with "Balloon Payment" above, your payment schedule will be N/A monthly payments of $ N/A each, due on the same day of each month starting on N/A, and then your last payment ("Balloon Payment") will be $ N/A due on N/A

PREPAYMENT: You have the right to pay off this Contract early. If you do so, you will not have to pay a penalty.

SECURITY: You are giving us a security interest in the motor vehicle being purchased.

LATE FEE: If a payment is more than 10 days late, you may be charged 2% of the unpaid amount of that payment.

OTHER ITEMS: Please read this Contract, including the reverse side, for additional information on security interests, nonpayment, default, and our right to require repayment in full before the scheduled maturity date.

7. **IF YOU DO NOT MEET YOUR OBLIGATIONS UNDER THIS CONTRACT, YOU MAY LOSE YOUR VEHICLE.**

8. ITEMIZATION OF THE AMOUNT FINANCED

1. Cash Price:
   A. Cash price of vehicle (including sales tax of $ 1356.55 any, accessories, their installation and taxes) $ 33196.66

2. Downpayment:
   A. Net agreed value of trade-in (2002 year, LINCOLN make, NAVIGATOR model) $ 4500.00
   B. Manufacturer's rebate applied to downpayment $ N/A
   C. Cash Downpayment $ 10000.00
   D. Total Downpayment (A + B + C) $ 14500.00

2. Downpayment:
   A. Net agreed value of trade-in (2002 year, LINCOLN make, NAVIGATOR model) $ 4500.00
   B. Manufacturer's rebate applied to downpayment $ N/A
   C Cash Downpayment $ 10000.00
   D. Total Downpayment (A + B + C) $ 14500.00

3. Unpaid Balance (1A Less 2D) $ 16835.39

4. Other charges, including amounts paid to others on your behalf:
   A. Cost of Optional Credit Life and/or Accident and Health Insurance for the term of this Contract Paid to the Insurance Company of Companies Named Below:
   Life $ N/A Disability, Accident and Health $ N/A $ N/A*

   I request Optional Gap coverage under the terms in Section 20 and for the amount shown in Section 4C. If no amount is shown and you have not received a copy of a Gap waiver or insurance policy, there is no Gap coverage.

   B. Official fees paid to government agencies for:
   XX Lien Filing Fee $ 5.00
   XX License and Registration Fee $ 23.00
   XX Certificate of Title Fee $ 22.50
   XX Other Govt Fees $ 36.00

   Buyer's and Co-Buyer's Initials X X

   C. Other Charges (identify who will be paid and purpose):
   To N/A For Optional Gap Coverage $ N/A*
   To FIDELITY For SERVICE CONTRACT $ 2811.00*
   To N/A For N/A $ N/A*
   To PERUZZI MITSUBISHI For DOC FEE $ 55.00*
   To N/A For N/A $ N/A*
   To N/A For N/A $ N/A*
   To N/A For N/A $ N/A*
   To ONLINE SVC PRUVIDER For DLRF $ 40.00*

   D. Total other charges and amounts paid to others on your behalf (A + B + C) $ 2992.50

5. Amount Financed (sum of 3 plus 4D) $ 21649.15

** We may retain or receive a portion of these amounts.

9. Additional Disclosures Required by State Law
   6. Finance Charge $ 8905.24
   7. Time Balance **(Total of Payments) (5 plus 6) $ 30554.40
   8. Payment Schedule: See Federal Truth-In-Lending Disclosures above.

10. **PROMISE TO PAY:** You promise to pay us the Amount Financed shown above, plus a Finance Charge applied to the unpaid balance of the Amount Financed each day. The daily rate Finance Charge is equal to 1/365th of the Annual Percentage Rate shown above.

11. **PAYMENTS BEFORE OR AFTER DUE DATE:** This is a simple interest contract. This means that since we compute your Finance Charge each day on the unpaid balance of the Amount Financed, the amount of the Finance Charge shown above may vary depending upon when your payments are received. Therefore, the earlier you make payments before their due dates, the less Finance Charge you will owe. The later you make payments after they are due, the greater the Finance Charge. If you pay on time, you will not owe a late fee and we will apply your payment first to accrued Finance Charge and then to the unpaid balance of the Amount Financed. If you pay late, you will owe a late fee and we will apply your payment first to accrued Finance Charge, then to the scheduled unpaid balance of the Amount Financed, then to unpaid late fee, and then to the remaining unpaid balance of the Amount Financed. If you make any payments after they are due, including payments due because we allow you to extend the term of this Contract, your final payment will be larger than originally scheduled. We will advise you of any additional amount you owe us after you make your last payment (if it is $1.00 or more). We will send you a check for any amount owed you (if it is $1.00 or more).

12. **BALLOON PAYMENT:** IF THIS CONTRACT IS CHECKED WITH "BALLOON PAYMENT" ABOVE, THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS. THE LAST SCHEDULED PAYMENT IS SUBSTANTIALLY LARGER THAN EACH OF THE OTHER SCHEDULED PAYMENTS. The due date and amount of this last scheduled payment are shown above. That amount may be less than what we estimate the vehicle will be worth at the time such payment is due. Paragraph 16 on the reverse side entitled "LAST PAYMENT OPTIONS" applies. The odometer reading referred to in Section (B)(3) of such paragraph is N/A miles, the excess mileage charge referred to in Section (B)(3) of such paragraph is N/A per mile and the disposition fee referred to in Section (B)(1) of such paragraph is N/A.

Buyer's Initials Co-Buyer's Initials. By initialling here, you acknowledge that you understand these charges and the provisions of paragraph 16 entitled "Last Payment Options", on the reverse side of this Contract.

13. CREDIT INSURANCE: YOU CANNOT BE DENIED CREDIT SIMPLY BECAUSE YOU CHOOSE NOT TO BUY CREDIT INSURANCE. CREDIT LIFE INSURANCE AND CREDIT ACCIDENT AND HEALTH INSURANCE ARE NOT REQUIRED TO OBTAIN CREDIT. INSURANCE WILL NOT BE PROVIDED UNLESS YOU SIGN AND AGREE TO PAY THE ADDITIONAL CHARGE. The policies or certificates issued by the insurer will describe the terms and conditions in further detail.

If you want the following insurance, sign below:
☐ Life (☐ Buyer ☐ Co-Buyer ☐ Both) at a premium of $ N/A for a term of N/A.
Credit life insurance will pay your debt on this Contract up to $ N/A
☐ Disability, Accident and Health (Buyer Only) at a premium of $ N/A for a term of N/A.
Credit disability, accident and health insurance will pay your debt on this Contract up to $ N/A
The name of the insurer is N/A of N/A
Name Home Office Address

Buyer Signature Date Co-Buyer Signature Date

WARNING: Any insurance provided by the Seller does not cover liability for injury to persons or damage to property of others unless indicated in the policy.

9. Additional Disclosures Required by State Law
   6. Finance Charge $ 8503.24
   7. Time Balance **(Total of Payments) (5 plus 6) $ 38554.48
   8. Payment Schedule: See Federal Truth-in-Lending Disclosures above.

10. PROMISE TO PAY: You promise to pay us the Amount Financed shown above, plus a Finance Charge applied to the unpaid balance of the Amount Financed each day. The daily rate Finance Charge is equal to 1/365th of the Annual Percentage Rate shown above.

11. PAYMENTS BEFORE OR AFTER DUE DATE: This is a simple interest contract. This means that since we compute your Finance Charge each day on the unpaid balance of the Amount Financed, the amount of the Finance Charge shown above may vary depending upon when your payments are received. Therefore, the earlier you make payments before their due dates, the less Finance Charge you will owe. The later you make payments after they are due, the greater the Finance Charge. If you pay on time, you will not owe a late fee and we will apply your payment first to accrued Finance Charge and then to the unpaid balance of the Amount Financed. If you pay late, you will owe a late fee and we will apply your payment first to accrued Finance Charge, then to the scheduled unpaid balance of the Amount Financed, then to unpaid late fee, and then to the remaining unpaid balance of the Amount Financed. If you make any payments after they are due, including payments due because we allow you to extend the term of this Contract, your final payment will be larger than originally scheduled. We will advise you of any additional amount you owe us after you make your last payment (if it is $1.00 or more). We will send you a check for any amount owed you (if it is $1.00 or more).

12. BALLOON PAYMENT: IF THIS CONTRACT IS CHECKED WITH "BALLOON PAYMENT" ABOVE, THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS. THE LAST SCHEDULED PAYMENT IS SUBSTANTIALLY LARGER THAN EACH OF THE OTHER SCHEDULED PAYMENTS. The due date and amount of this last scheduled payment are shown above. That amount may be less than what we estimate the vehicle will be worth at the time such payment is due. Paragraph 16 on the reverse side entitled "LAST PAYMENT OPTIONS" applies. The odometer reading referred to in Section (B)(3) of such paragraph is N/A miles, the excess mileage charge referred to in Section (B)(3) of such paragraph is N/A per mile and the disposition fee referred to in Section (B)(1) of such paragraph is N/A.

_____ Buyer's Initials _____ Co-Buyer's Initials. By initialling here, you acknowledge that you understand these charges and the provisions of paragraph 16 entitled "Last Payment Options", on the reverse side of this Contract.

13. CREDIT INSURANCE: YOU CANNOT BE DENIED CREDIT SIMPLY BECAUSE YOU CHOOSE NOT TO BUY CREDIT INSURANCE. CREDIT LIFE INSURANCE AND CREDIT ACCIDENT AND HEALTH INSURANCE ARE NOT REQUIRED TO OBTAIN CREDIT. INSURANCE WILL NOT BE PROVIDED UNLESS YOU SIGN AND AGREE TO PAY THE ADDITIONAL CHARGE. The policies or certificates issued by the insurer will describe the terms and conditions in further detail.

If you want the following insurance, sign below:
☐ Life (☐ Buyer ☐ Co-Buyer ☐ Both) at a premium of $ N/A for a term of N/A.
Credit life insurance will pay your debt on this Contract up to $ N/A.
☐ Disability, Accident and Health (Buyer Only) at a premium of $ N/A for a term of N/A.
Credit disability, accident and health insurance will pay your debt on this Contract up to $ N/A.
The name of the insurer is N/A (Name) of N/A (Home Office Address).

Buyer Signature _____ Date _____ Co-Buyer Signature _____ Date _____

WARNING: Any insurance provided by the Seller does not cover liability for injury to persons or damage to property of others unless indicated in the policy.

14. PROPERTY INSURANCE: Insurance coverage for loss or damage to the vehicle (collision, fire and theft) is required and you have the option of furnishing the required insurance either through your existing policies or you may purchase equivalent insurance coverage through anyone you wish acceptable to the Seller. If you elect to purchase this coverage through the Seller, it will be furnished by N/A for the initial term of N/A at a premium of N/A, but such charge is not included in this Contract.

IMPORTANT: THE TERMS OF THIS CONTRACT ARE CONTAINED ON BOTH SIDES OF THIS PAGE. READ THE ADDITIONAL TERMS ON THE REVERSE SIDE BEFORE SIGNING BELOW.

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this Contract and retain its right to receive a part of the Finance Charge.

BY SIGNING THIS CONTRACT, YOU ACKNOWLEDGE THAT IT CONTAINS AN "AGREEMENT TO ARBITRATE DISPUTES" ON THE REVERSE SIDE, THAT YOU HAVE READ IT AND AGREE TO ITS TERMS.

NOTICE TO BUYER: Do not sign this contract if blank. You are entitled to an exact copy of the contract you sign. Keep it to protect your legal rights.

Buyer Signs X _____ Co-Buyer Signs _____

By signing here, the Seller agrees to the terms of this Contract and assigns this Contract to Seller's assignee under the terms agreed to by Seller and Seller's assignee.

Seller (Creditor) Signs PEB1774 MTTSUBISHI By _____ Title _____

Undersigned hereby acknowledges receipt from Seller of a true, correct and complete copy of this Contract at time of execution.

Buyer Signs X _____ Co-Buyer Signs _____

BUYER'S COPY

15. **SUMMARY NOTICE:** You have the right to prepay all or any part of the balance of the Amount Financed at any time without penalty or premium. Because the Finance Charge is being charged and collected on the outstanding balance of the Amount Financed and is not precomputed, there will be no rebate of the Finance Charge in the event of prepayment. You will not have the right to reinstate this Agreement after repossession unless we allow it.

16. **LAST PAYMENT OPTIONS:** If this Contract has a balloon payment as the last scheduled payment, instead of making that payment you may only "refinance" your last scheduled payment or return and transfer the vehicle to us as set forth below.
(A) If you want to "refinance" your last scheduled payment, you must first pay all amounts you owe under this Contract (including the accrued Finance Charge) due as of the date of your last scheduled payment (but not including your last scheduled payment). You may refinance your last scheduled payment at equally favorable terms. This means that your finance charges continue to accrue at the Annual Percentage Rate indicated on the front of this contract and you continue to make your regular payments monthly until you pay the amount owed under this Contract in full. We may require you to sign a new loan agreement setting forth the terms of the refinanced balloon payment.
(B) If you want to return and transfer the vehicle to us instead of making the last scheduled payment, you must give us written notice that you would like to do so at least 30 days before the last scheduled payment is due. You must then deliver the vehicle to us either two days before the last scheduled payment is due, at a place designated by us. At the same time you must give us the title to the vehicle, which shows no other liens other than our own, and all other papers we need signed by you in order to transfer ownership of the vehicle. You must also meet each of the following conditions (numbered 1 through 4) by the date the last scheduled payment is due in order for us to accept the vehicle in full payment of the last scheduled payment. (1) You must pay us the disposition fee, if any, shown in paragraph 12 entitled "Balloon Payment" on the front of the Contract (or you must pay us all amounts you owe under this Contract (including the accrued Finance Charge) through the date you deliver the vehicle to us, except for the amount of the last scheduled payment); (2) if, when you deliver the vehicle to us, the vehicle's odometer reads greater than the allowed mileage stated in paragraph 12 entitled "Balloon Payment" on the front of this Contract, you must pay us the amount stated in that paragraph for each such excess mile over the allowed mileage; (3) if the vehicle is not in "good running order and condition" when you deliver it to us, you must pay us the amount it costs us or would cost us to put the vehicle in good running order and condition. In order to be in "good running order and condition," the vehicle must have, among other things, no less than four matching tires of equal quality to the originals, plus a spare of equal quality or of the type originally provided by the manufacturer of the vehicle, with each tire having at least one-eighth inch of remaining tread at its shallowest point, and no scratches, chips, cracks, or other damages in the glass, body, or interior beyond normal wear and tear.

If you disagree with the amount we determine is necessary to restore the vehicle to "good running order and condition," you may obtain, at your expense and within 10 days of our determination, a written estimate of such amount from an independent appraiser acceptable to us. If you do so, the amount you must pay us will be the lesser of (a) the charge determined by us to restore the vehicle to "good running order and condition," or (b) the charge determined by the appraiser to restore the vehicle to "good running order and condition. If you deliver the vehicle to us in satisfaction of the last scheduled payment and meet each of the above conditions, we will then bear the entire risk of loss or benefit of gain if and when we dispose of the vehicle.

17. **OWNERSHIP AND RISK OF LOSS:** You agree to pay us all you owe under this Contract even if the vehicle is damaged, destroyed or missing. You agree not to sell, transfer, or remove the vehicle from the United States for more than 30 days without our written permission. You agree to maintain the vehicle in good condition and repair, except wear and tear caused by ordinary use, and to permit us to inspect the vehicle at any reasonable time. You agree not to expose the vehicle to misuse or confiscation or to permit anyone to use the vehicle for any unlawful purpose. You agree to keep the vehicle free of any claims and seizures by any governmental authority. You agree not to rent the vehicle to others or to carry passengers for hire. If we pay any repair bills, storage bills, taxes, fines, or other charges on the vehicle, you agree to repay the amount when we ask for it. You agree to keep the vehicle at your address listed on the front of this Contract unless you notify us in writing that the vehicle will be kept at a different location. You will immediately notify us of any change in your address or the address where the vehicle is regularly located. Any amount we pay will be added to the amount you owe us and will be due immediately. This amount will earn finance charges from the date we paid it at the Annual Percentage Rate in this Contract until payment in full.

18. **SECURITY INTEREST:** You are giving us a security interest in the vehicle being purchased, any proceeds of the vehicle, and any accessories, equipment and replacement parts installed in the vehicle. The security interest also covers: (1) insurance premiums or other products financed in this Contract, (2) proceeds of insurance policies on the vehicle, and (3) proceeds of any insurance policies on your life or health which are financed in this Contract. These secure payment of all amounts you owe in this Contract and in any transfer, renewal, extension, modification, refinancing, or assignment of this Contract. It also secures your other agreements in this Contract. You will cause or cooperate in causing our security interest filed on the vehicle to be shown on the title. You will not allow any subordinate or other liens to be placed on the vehicle.

19. **REQUIRED PHYSICAL DAMAGE INSURANCE:** You agree to have physical damage insurance covering loss or damage to the vehicle for the term of this Contract. You will make us loss payee and provide evidence of insurance. If the vehicle is lost or damaged, you agree that we can use any insurance settlement either to repair the vehicle or to apply to your debt.

20. **OPTIONAL GUARANTEED AUTO PROTECTION (GAP) COVERAGE:** Gap coverage is not required to obtain credit and you may purchase it from any company you want which is authorized to sell such coverage and is acceptable to the Seller. If you elect to purchase Gap coverage under this Contract, it will be furnished by the Gap company and at the cost stated in Paragraph 8 Subparagraph 4C of the Itemization of the Amount Financed located on the reverse side of this Contract. The contract issued by the Gap company will describe the terms and conditions of this coverage. To purchase Gap coverage under this Contract initial the space provided in Paragraph 8 Subparagraph 4C of the Itemization of the Amount Financed located on the reverse side of this Contract. This coverage will not be provided if you do not initial in the appropriate space provided.

21. **INSURANCE CHARGES REFUNDED TO US:** If any charge for required insurance is returned to us, it may be credited to your account or used to buy similar insurance or insurance which covers only our interest in the vehicle. If any charge for optional insurance or other products financed in this Contract, is returned to us (for example, a refund on credit life insurance), it will be credited to your account or returned to you.

22. **DEFAULT:** It will be a default if any of the following events occur: (1) you fail to pay any regular monthly payment when due, (2) you break any other promise to us, (3) you die or cannot pay your debts as they become due, (4) any person tries to take any of your property by legal proceedings while it is in your possession or control, (5) you made materially false statements in applying for this credit, or (6) you file for bankruptcy or insolvency proceedings are initiated by or against you.

23. **REMEDIES FOR DEFAULT:** Upon the occurrence of any event of default, our rights include: (a) the right to declare all sums due on this Contract to be immediately due and payable; (b) the right to require you to deliver the vehicle to us at a place reasonably convenient to you and to us; (c) the right to obtain possession of the vehicle, with or without process of law, if you do not deliver it to us. You authorize us to peaceably enter upon any premises where the vehicle may be kept in order to take possession of the vehicle and anything found in the vehicle. If there is any personal property in the vehicle at the time of repossession, we will give you notice of our possession of such property at your last known address as shown by our records. You can retrieve your personal property during normal business hours at the place where the property is being stored. If you do not claim such property within 30 days after the mailing of the notice, we may sell or otherwise dispose of such property in a reasonable manner and distribute the proceeds according to applicable law. You authorize us to use your license plates for the vehicle in moving the vehicle to the place of storage.

If you were in default more than 15 days before we took possession of the vehicle, you must pay our actual, necessary and reasonable costs of retaking, storing and repairing the vehicle. Our costs must be supported by receipts or other satisfactory proofs of payment.

We will sell the vehicle at private sale after the 15-day redemption period referred to below and we will send you reasonable notice of the sale. We will apply the proceeds of any sale or other disposition to pay the reasonable expenses of sale, the lawful expenses of retaking and storing the vehicle, then to any other costs permitted by law, and then to the balance of what you owe under this Contract. You will be entitled to any surplus, but will be liable for any deficiency, to the extent permitted by law.

You may redeem the vehicle at any time up to 15 days after we mail you a "Notice of Repossession". The redemption price will be all sums due under this Agreement (not just past due payments) and, if default was longer than 15 days when we took possession of the vehicle, our costs of retaking, repairing and storing the vehicle.

24. **POST-JUDGMENT INTEREST:** If the full unpaid balance of this Contract becomes due for any reason and judgment is entered thereon, to the extent permitted by law, you will be liable for interest on it at the highest lawful rate until it is paid in full.

25. **COLLECTION COSTS:** If we hire an attorney who is not our salaried employee to collect what you owe, and pay the attorney a reasonable fee, you will also pay our collection costs.

26. **DELAY IN ENFORCING RIGHTS AND CHANGES OF THIS CONTRACT:** We can delay or refrain from enforcing any of our rights under this Contract without losing them. For example, we can extend the time for making some payments without extending others. Any change in terms of this Contract must be in writing and signed by us. No oral changes are binding. If any provision of this Contract conflicts with applicable law, it will be considered modified to comply with that law and the remaining provisions shall continue.

27. **WARRANTIES SELLER DISCLAIMS:** Unless the Seller makes a written warranty, or enters into a service contract within 90 days from the date of this Contract, the Seller makes no warranties, express or implied on the vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose.

28. **RIGHT TO OFFSET:** To the extent provided by operation of law, if you are in default, we can upon written notice to you and subject to your right to cure the default, [illegible]

Contract, the Seller makes no warranties, express or implied on the vehicle ...
a particular purpose.

RIGHT TO OFFSET: To the extent provided by operation of law, if you are in default, we can upon written notice to you and subject to your right to cure the default, pay all or part of the amounts owed under this Contract from any deposits or funds that you have with us without telling you ahead of time.

CREDIT REPORTING: We may obtain a consumer credit report from one or more consumer credit reporting agencies (credit bureaus) in connection with your application and as otherwise allowed by applicable law. You agree that we may also verify your employment, income, assets and debts.

GOVERNING LAW: This Contract is governed by the applicable laws of the Commonwealth of Pennsylvania, to the extent that such laws are not preempted by the laws of the United States.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The preceding NOTICE applies only to goods or services obtained primarily for personal, family, or household use. In all other cases, Buyer will not assert against any subsequent holder or assignee of this Contract any claims or defenses the Buyer (debtor) may have against the Seller, or against the manufacturer of the vehicle or equipment obtained under this Contract.

NOTICE OF PROPOSED CREDIT INSURANCE

The signers of this Contract hereby take(s) notice that group credit life insurance coverage and/or group credit disability insurance coverage will be applicable to this Contract if so marked on the front of this Contract and each such type of coverage will be written by the named insurance company. This insurance, subject to acceptance by the insurer, covers only the person signing the request for such insurance. The amount of charge is indicated for each type of credit insurance to be purchased. The term of the insurance will commence as of the date the indebtedness is incurred and will expire on the original scheduled maturity date of the indebtedness, subject to acceptance by the insurer and within 30 days there will be delivered to the insured debtor a certificate of insurance more fully describing the insurance. In the event of prepayment of the indebtedness a refund of insurance charges will be made when due.

AGREEMENT TO ARBITRATE DISPUTES

The following Arbitration Agreement can significantly affect your rights in any dispute with us. Please read it carefully before signing this Contract.

1. IF EITHER OF US CHOOSES, ANY CLAIM OR DISPUTE BETWEEN US (AS DEFINED BELOW) WILL BE DECIDED BY ARBITRATION AND NOT IN COURT OR BY A JURY TRIAL.
2. IF EITHER OF US CHOOSES TO ARBITRATE, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS OR OTHER REPRESENTATIVE ON BEHALF OF OTHER PERSONS OR AS A CLASS MEMBER OR OTHER REPRESENTED PERSON ON ANY CLASS CLAIM OR OTHER REPRESENTATIVE TYPE OF CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS OR OTHER REPRESENTATIVE ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to your credit application, this Contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose any one of the following arbitration organizations: the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org) or the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com). The arbitration shall be conducted in accordance with this Arbitration Agreement and, unless otherwise provided for in this Agreement to Arbitrate Disputes, the rules of the arbitration organization you chose (the "Arbitration Rules"). You may get a copy of the Arbitration Rules by contacting the arbitration organization or visiting its website.

The arbitrator shall be an attorney or retired judge selected in accordance with the Arbitration Rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside. The arbitrator's decision shall be in writing and either party may appeal the arbitrator's decision through the arbitration organization you chose. We will pay your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $1,500. We will also pay any additional amount of such fees that the arbitrator determines we must pay in order to make this Agreement to Arbitrate Disputes enforceable. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. The arbitrator's award shall be final and binding on all parties, except that the losing party may request a new arbitration if allowed by the Arbitration Rules. This Agreement to Arbitrate Disputes, and any arbitration conducted hereunder, shall be governed by the Federal Arbitration Act (9 U.S.C. § et seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek individual remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This agreement shall survive any termination, payoff or transfer of this Contract. If any part of this Agreement to Arbitrate Disputes, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.

EXHIBIT C

ODOMETER DISCLOSURE STATEMENT

Federal law (and State law, if applicable) requires that you state the mileage upon transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

I, PERUZZI MITSUBISHI (TRANSFEROR'S NAME - PRINT) state that the odometer now reads 38533 (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described below, unless one of the following statements is checked.

☐ (1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.

☐ (2) I hereby certify that the odometer reading is NOT the actual mileage.
WARNING — ODOMETER DISCREPANCY.

MAKE: HUMMER

MODEL: H2 BODY TYPE: 4 DOOR UTILITY

VEHICLE IDENTIFICATION NUMBER: 5GRGN23U43H141950

YEAR: 2003

TRANSFEROR'S NAME: PERUZZI MITSUBISHI (PRINTED NAME)

TRANSFEROR'S ADDRESS: 130 LINCOLN HWY (STREET)
FAIRLESS HILLS (CITY) PA (STATE) 19030 (ZIP CODE)

TRANSFEROR'S NAME X (SIGNATURE)

DATE OF STATEMENT: 09/01/2007

TRANSFEREE'S NAME: SILVANO E GHALI

TRANSFEREE'S ADDRESS: 1409 BEVERLY DR (STREET)
LANGHORNE (CITY) PA (STATE) 19051 (ZIP CODE)

TRANSFEREE'S NAME X (SIGNATURE)

SILVANO E GHALI (PRINTED NAME)

FORM NB-65-2CP 2 PART
NB-65-3CP 3 PART

Case ID: 080603505

EXHIBIT D

No. 0473453

MV-4ST (5-00)

A. VEHICLE PURCHASED

PA TITLE NUMBER (AS SHOWN ON ATTACHED TITLE)

MAKE OF VEHICLE: HONDA

MODEL YEAR: 2004

VEHICLE IDENTIFICATION NUMBER: 5FRYN28244H41959

CONDITION: ☐ GOOD ☐ FAIR ☐ POOR

B. SELLER

LAST NAME (OR FULL BUSINESS NAME) FIRST NAME MIDDLE INITIAL: PERUZZI MITSUBISHI

CO-SELLER

1ST ASSIGNMENT

C. 1ST PURCHASER

LAST NAME (OR FULL BUSINESS NAME) FIRST NAME MIDDLE INITIAL: GHALI, SILVANO E

DATE ACQUIRED/PURCHASED: 09/01/2006

CO-PURCHASER

STREET: 1409 BEVERLY DR

CITY: QUAKERTOWN STATE: PA ZIP CODE: 18951

COUNTY CODE: 09

REFER TO COUNTY CODES LISTING ON REVERSE SIDE OF PINK COPY

2ND ASSIGNMENT

D. 2ND PURCHASER

LAST NAME (OR FULL BUSINESS NAME) FIRST NAME MIDDLE INITIAL DATE ACQUIRED/PURCHASED

CO-PURCHASER

STREET

CITY STATE ZIP CODE

COUNTY CODE

REFER TO COUNTY CODES LISTING ON REVERSE SIDE OF PINK COPY

E. VEHICLE TRADED

MAKE OF VEHICLE: LINCOLN

VEHICLE IDENTIFICATION NUMBER: 5LMFU28R52LJ15815

MODEL YEAR: 2002

BODY TYPE (CP, TK, ETC.): 4DR

CONDITION: ☐ GOOD ☐ FAIR ☐ POOR

F. APPLICATION FOR REGISTRATION

ORIGINAL PLATE ✓ Check One

☐ PLATE TO BE ISSUED BY BUREAU (PROOF OF INSURANCE MUST BE ATTACHED.)

☐ EXCHANGE PLATE TO BE ISSUED BY BUREAU

☒ TEMPORARY PLATE ISSUED BY FULL AGENT

TEMP. PLATE NO.: [illegible]

☐ TRANSFER OF PREVIOUSLY ISSUED PLATE

☐ TRANSFER & RENEWAL OF PLATE

☐ TRANSFER & REPLACEMENT OF PLATE

☐ TRANSFER OF PLATE & REPLACEMENT OF STICKER

PLATE NO.

EXPIRES Month Year

REASON FOR REPLACEMENT: ☐ LOST ☐ DEFACED ☐ STOLEN ☐ NEVER RECEIVED (LOST IN MAIL)

NOTE: If "NEVER RECEIVED" block is checked, applicant must complete Form MV-44.

TRANSFERRED FROM TITLE NO.

VIN: 5LMFU28R52LJ15815

SIGNATURE OF PERSON FROM WHOM PLATE IS BEING TRANSFERRED (IF OTHER THAN APPLICANT) SIGN HERE

RELATIONSHIP TO APPLICANT

VEHICLE PURCHASED WEIGHT INFO. (IF APPLICABLE) GVWR

UNLADEN WEIGHT:

REG. REG. GROSS WT. INCLUDING LOAD

REG. REG. GROSS COMB. WT. (IF APPLICABLE)

INSURANCE COMPANY NAME: LIBERTY MUTUAL

POLICY NO. (OR ATTACH BINDER): [illegible]

POLICY EFFECTIVE DATE: 09/01/2006

POLICY EXPIRATION DATE: [illegible]

ISSUING AGENT INFORMATION

I CERTIFY THAT ON MONTH _____ DAY _____ YEAR _____ I HAVE CHECKED TO DETERMINE THAT THE VEHICLE IS INSURED AND ISSUED TEMPORARY REGISTRATION TO THE ABOVE APPLICANT, IN COMPLIANCE WITH ALL APPLICABLE PROVISIONS OF THE VEHICLE CODE AND DEPARTMENT REGULATIONS.

ISSUING AGENT (PRINT NAME): [illegible]

AGENT NO.: 355343

ISSUING AGENT SIGNATURE

TELEPHONE NO.: ( ) 215 947-55[illegible]

G. CERTIFICATION

I/WE CERTIFY THAT I/WE HAVE EXAMINED AND SIGNED THIS FORM AFTER ITS COMPLETION AND THAT THE INFORMATION GIVEN IS TRUE AND CORRECT. IF AN EXEMPTION IS CLAIMED, THE PURCHASER FURTHER CERTIFIES THAT HE/SHE IS AUTHORIZED TO CLAIM THIS EXEMPTION. I/WE ACKNOWLEDGE THAT I/WE MAY LOSE MY/OUR OPERATING PRIVILEGE(S) OR VEHICLE REGISTRATION(S) FOR FAILURE TO MAINTAIN FINANCIAL RESPONSIBILITY ON THE CURRENTLY REGISTERED VEHICLE FOR THE PERIOD OF REGISTRATION. I/WE ACKNOWLEDGE THAT I/WE MAY BE SUBJECT TO A FINE NOT EXCEEDING $5,000 AND IMPRISONMENT OF NOT MORE THAN TWO YEARS FOR ANY FALSE STATEMENT THAT I/WE MAKE ON THIS FORM.

1ST ASSIGNMENT	Signature of First Purchaser or Authorized Signer	TELEPHONE NUMBER ( ) (215) 787-145	Signature of Seller
	Signature of Co-Purchaser/Title of Authorized Signer		Signature of Co-Seller
2ND ASSIGNMENT	Signature of Second Purchaser or Authorized Signer	TELEPHONE NUMBER ( )	Signature of Seller
	Signature of Co-Purchaser/Title of Authorized Signer		Signature of Co-Seller

H. ADDITIONAL TITLE INFORMATION

NOTE: If a co-purchaser other than your spouse is listed and you want the title to be listed as "Joint Tenants With Right of Survivorship" (On death of one owner, title goes to surviving owner.) CHECK HERE ☐. Otherwise, the title will be issued as "Tenants in Common" (On death of one owner, interest of deceased owner goes to his/her heirs or estate).

NOTE: IF THE VEHICLE IS TO BE USED AS A DAILY RENTAL OR LEASED VEHICLE, CHECK THIS BLOCK ☐. IF BLOCK IS CHECKED, COMPLETE AND ATTACH FORM MV-IL.

PURCHASE PRICE (See note on reverse)	31800.00		
LESS TRADE-IN	18000.00		
TAXABLE AMOUNT	13800.00		
1. Sales Tax Due x 6% (.06) or x 7% (.07) (See note on reverse).	1120.05		
1A Exemption Reason Code (must be a number from 1 to 23 or 0)			
1B First Assignment		1B Second Assignment	
2. Title Fee	22.50		
3. Lien Fee	5.00		
4. Registration or Processing Fees	36.00		
Fee Exempt Number as assigned by the Bureau			
5. Duplicate Reg. Fee No. of Cards ____	N/A		
6. Transfer Fee	N/A		
7. Increase Fee	N/A		
8. Replacement Fee	N/A		
TOTAL PAID (Add 1 thru 8)	9. 1251.50	10.	
11. GRAND TOTAL (Add 9 & 10)	Send One Check In This Amount ➡	1251.50	

If your registration documents are not received within 90 days, please contact PennDOT

MESSENGER NUMBER:

Case ID: 080603505

EXHIBIT E

AutoClaims Solutions
PO Box 1012
Malvern, PA 19355
610 524 1234
info@autoclaimshelp.net

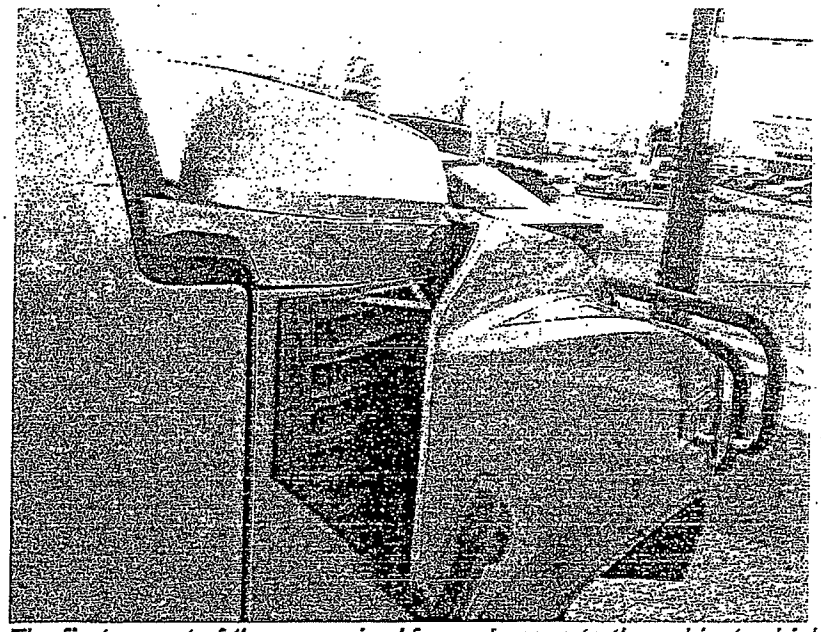
1-8-08

Bill Bensley
Bensley Law Offices, LLC
437 Chestnut Street, Suite 1006
Philadelphia, PA 19106

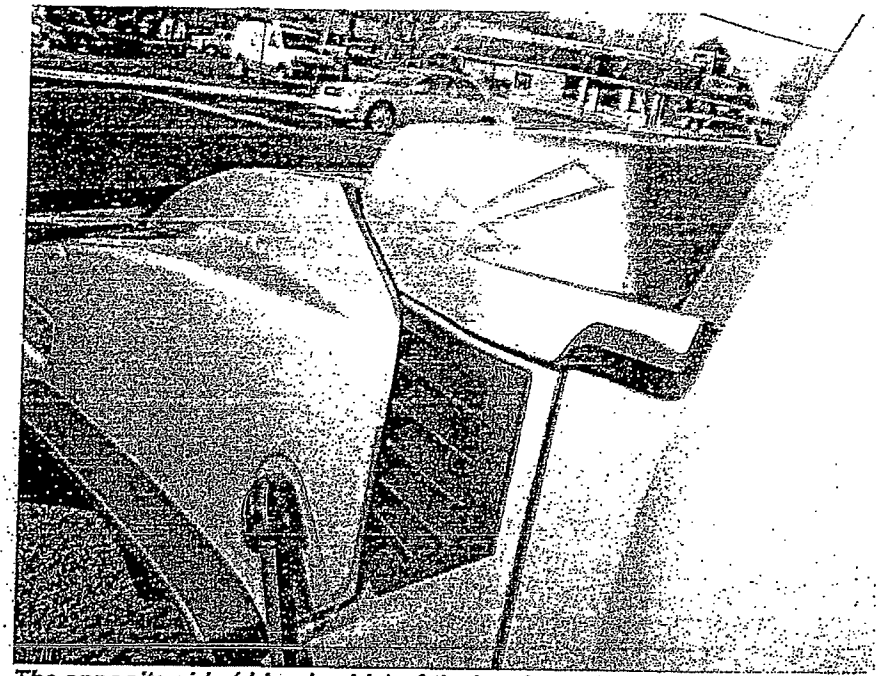
Re: 2003 Hummer H2 #5GRGN23U43H141958, Silvano Ghali

Dear Mr. Bensley,

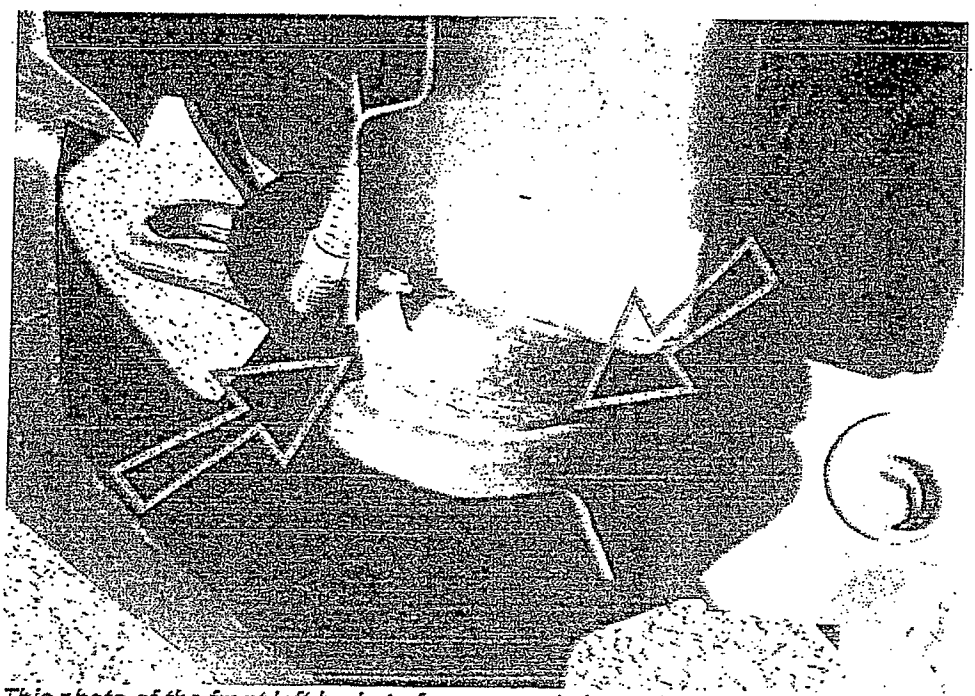
On this day I inspected the above referenced vehicle at Churchville Auto Body in Southampton, PA. The focus of my investigation was the determination of collision damage and frame damage that pre-existed Mr. Ghali's purchase of the vehicle.



The first aspect of the unrepaired frame damage to the subject vehicle is the severe misalignment of the body panels. This view of the right side of the hood assembly shows a large gap between the hood and the cowl (arrow).

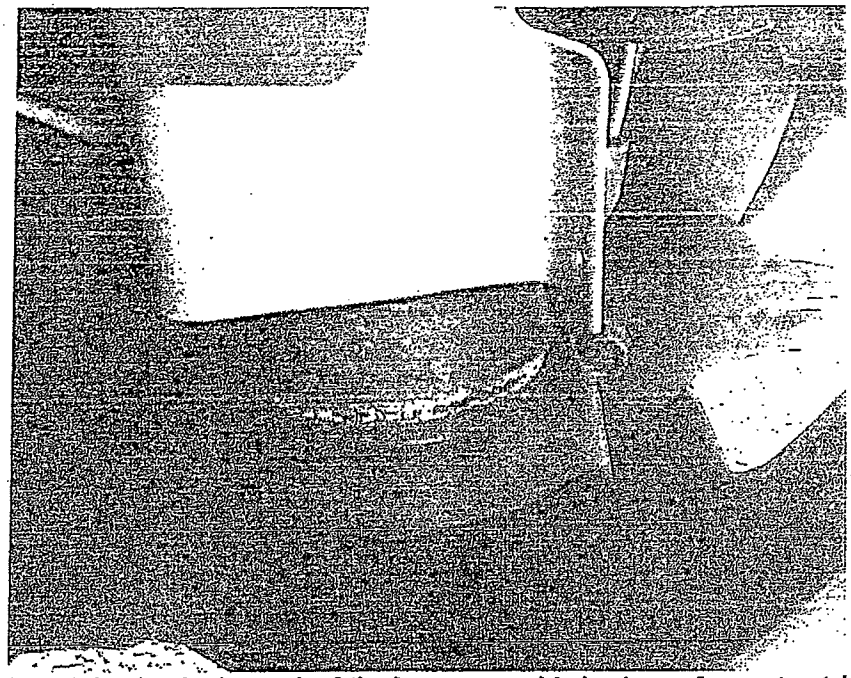


The opposite side (driver's side) of the hood panel shows virtually no gap between the hood and cowl area. This is an indication that the front end panels are mounted to inner structure that is distorted (damaged).

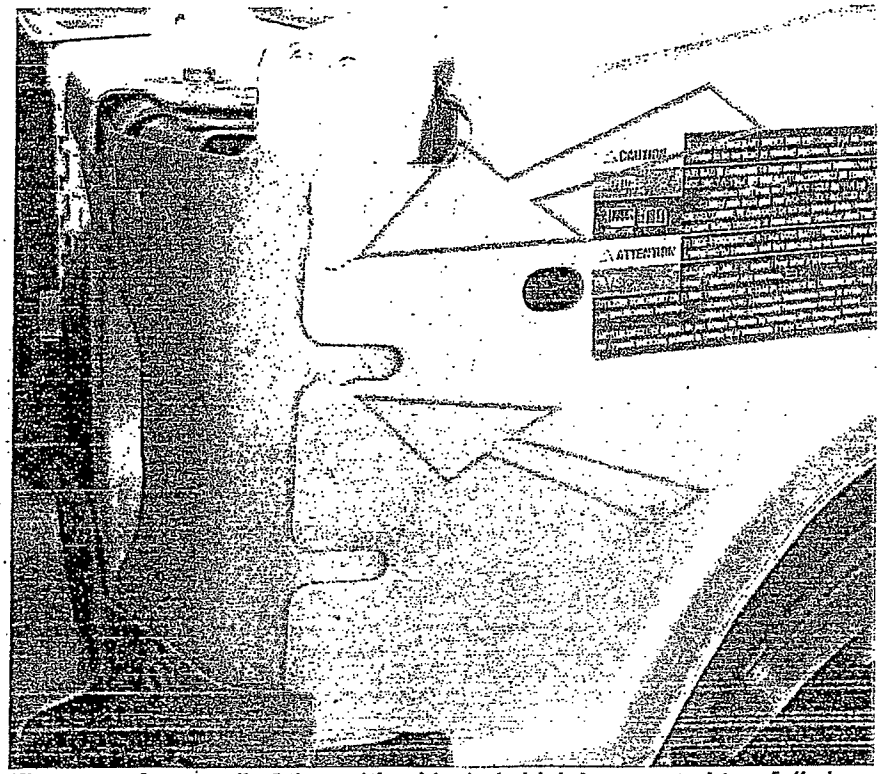


This photo of the front left body to frame mount shows that the rubber mount is stressed at the rear, evidenced by its lopsided appearance. This is an indication that the left frame rail is damaged. It should be noted that the frame damage noted in the above photo is visible from a position standing next to the vehicle and that no lifting of the vehicle was required. Anyone with any experience would have easily have seen this damage.

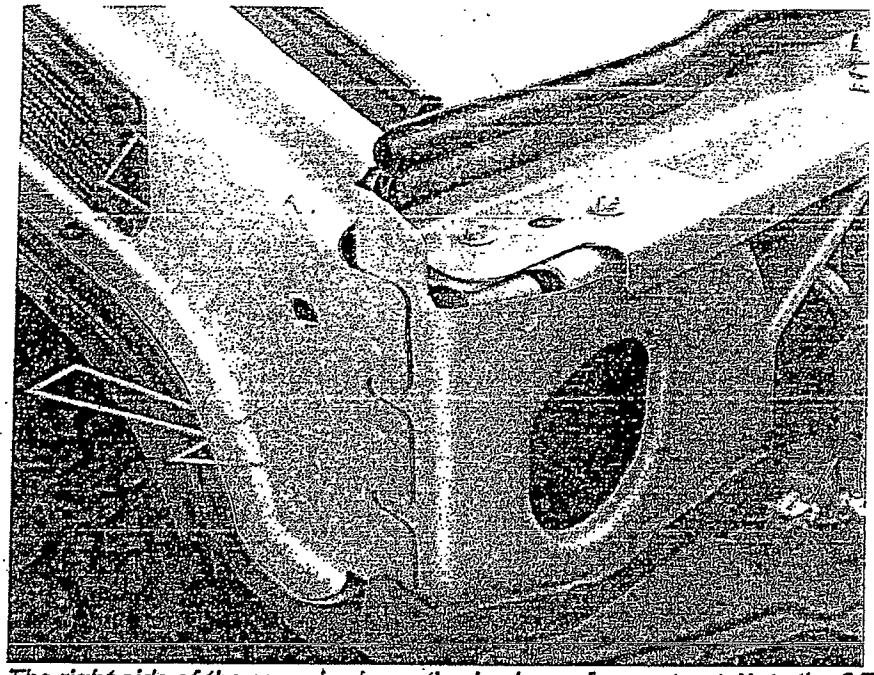
This photo shows the relationship between the left front body perch of the frame and the lower crossmember of the radiator support. The radiator support is supposed to be flat against the body mount, as opposed to its cocked position.



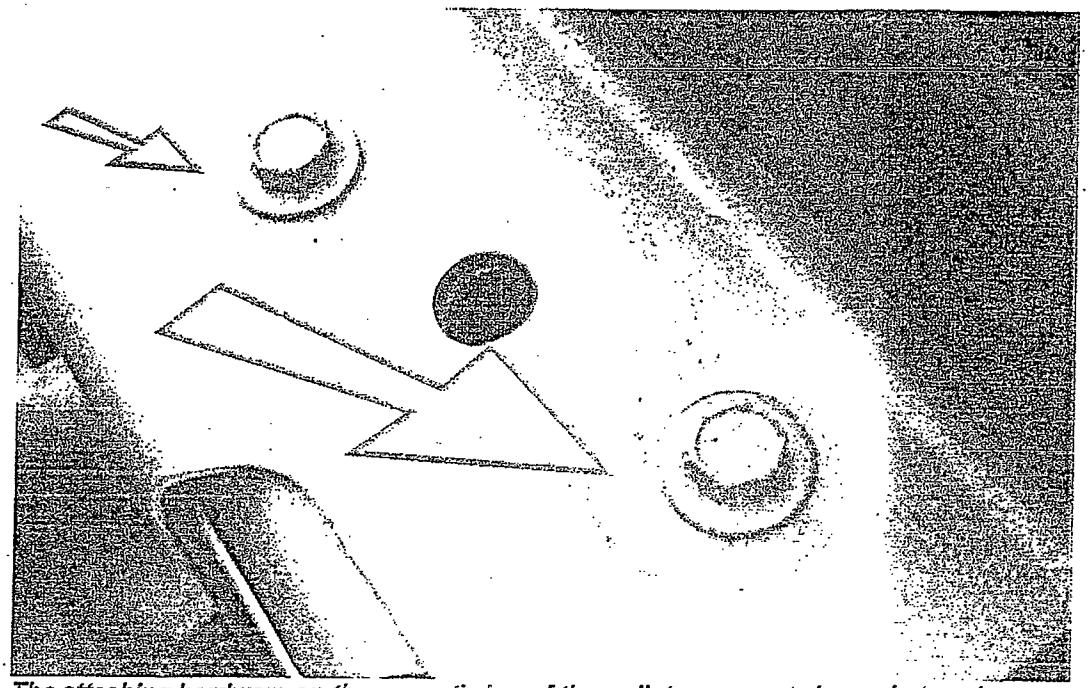
The right side body perch of the frame assembly is shown for contrast. While it is not aligned properly, it does not show the severe signs of damage present on the left side.



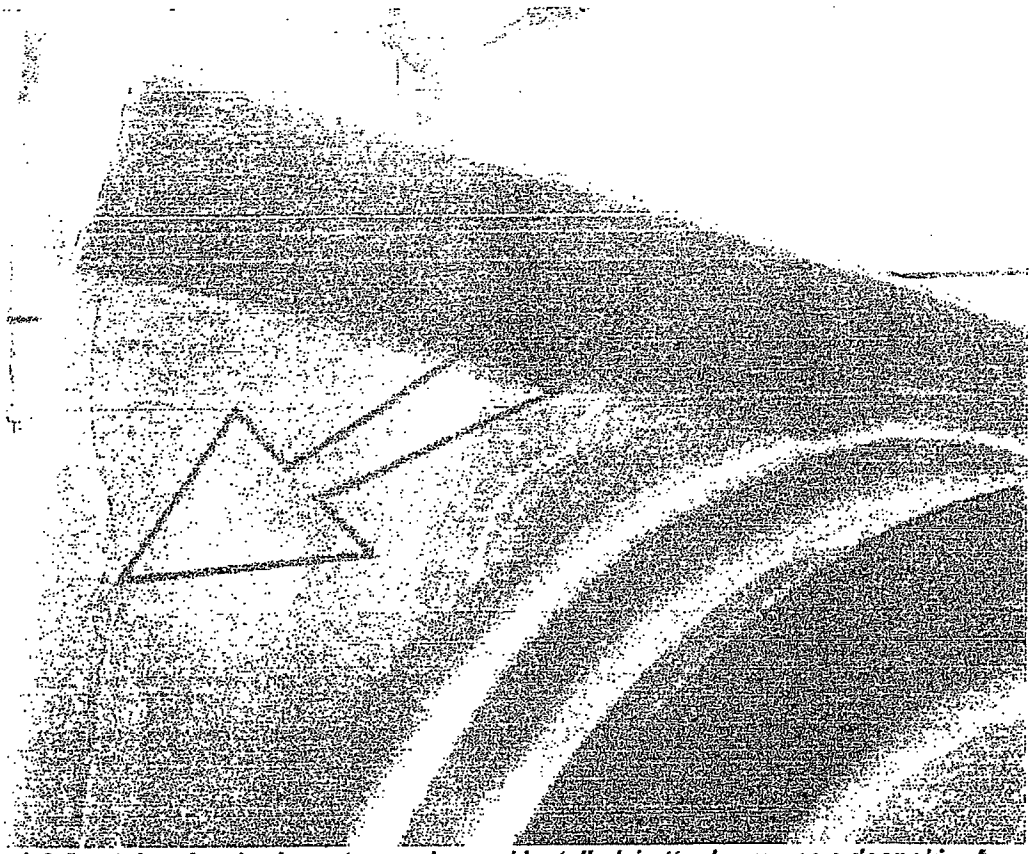
The upper frame rail of the unitized body (which is mounted to a full chassis on the H2) shows clear indications of MIG welding, which were not properly executed or dressed. One can see the grind marks left by the technician.



The right side of the same body section is shown for contrast. Note the OEM compression spot welds.



The attaching hardware on the upper tie bar of the radiator support show what are known as bolt "halos," an indication that the structure has moved off its original position.



The left front door has had a outer repair panel installed, better known as a door skin. A door skin is at best, a compromise, as those repairs have a high failure rate. The appearance of the hem flange on the left front door is unlike that of the factory door assembly.

Findings and Conclusion

The subject vehicle shows clear signs of a major collision. In addition to the indications noted above, there is paint film thickness differential on certain body panels that were refinished. For example, the left front door measured 8.7 mils and the left rear door was 9.2 mils. The unaffected body panels with their factory coatings intact measured between 4.7 and 5.3 mils uniformly.

An 18 mile test drive revealed a shimmy in the steering at speeds in excess of 55 mph. The steering was erratic and tended to drift to either side of the road, which required constant corrections.

The evidence of frame damage as well as those that indicate the vehicle was involved in a collision is abundant on this vehicle. It is inconceivable that any dealer in the automotive profession would not have seen these indications. Since the frame is clearly damaged (sway condition as well as a mash condition on the left rail) the possibility that the suspension and steering angles are aligned to specifications is remote. Therefore, the subject vehicle is unsafe to operate on public roads until the wheel alignment is attempted and corrected.

With respect to value, the subject vehicle's value is substantially diminished on the basis of the deficient repairs as well as the inherent loss of value associated with the disclosure of the collision damage. While the exact extent of the collision is undetermined at this point in time, one can be reasonably assured it was a major collision that caused the frame damage. In fact, due to the sturdy nature of this vehicle it is clear that the damage I observed was the result of a major impact. Based on the unrepaired frame damage and the knowledge of the collision damage history I project a loss of value of approximately 60% of the sale price. A clean vehicle without a history of the collision damage and no frame damage would be worth $32,185.00 according to the Kelly Blue Book value guide.

I make the foregoing statements within a reasonable degree of automotive technical certainty and reserve the right to supplement this report as new information becomes available.

Yours truly,

Charlie Barone, ASE
PA Physical Damage Appraisers lic. #150444

EXHIBIT F

We Repair ALL Makes & Models

Peruzzi
Automotive Group

Is proud to present our new state-of-the-art collision repair center located under the big radio tower, just north of our sales and service facilities on business Rt. 1 in Fairless Hills, Pa.

WRITTEN GUARANTEE:

At the **Peruzzi Collision Center**, we pledge to return the vehicle to it's pre-loss condition with the highest level of craftsmanship, using only the best techniques,products and parts available. We proudly stand behind our work by guaranteeing all sheet metal repairs, welds, plastic repairs and refinishing for the lifetime of the vehicle. All after-market and replacement sheet metal will carry the manufacturer's warranty.

Feel free to tour our facilities and recieve a free accident guide.

Our Hours:

Monday – Friday
7:30am – 6pm
Sat. By Appointment

Peruzzi Collision Center
275 Lincoln Highway
Fairless Hills, Pa 19030
Phone: 215-949-2800
Fax: 215-949-6994

www.bccws.com

We Repair ALL Makes & Models

Home
Services

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Fairless Hills, Pa 19030
Phone: 215-949-2800
Fax: 215-949-6994

Peruzzi
Automotive Group

is one of the top dealerships in the tri-state area. Peruzzi is family owned and operated serving Bucks, Montgomery and Mercer Counties for over 22 yrs. On April 6, 1984 Peruzzi opened their first new car dealership at 165 Lincoln Highway, which has become the home of Pontiac, Buick GMC. This location now has a full service center, express lube and a parts department.

In 1989 Peruzzi opened a Toyota dealership in Hatfield, Montgomery County. This dealership located at 2601 N. Bethlehem Pike (Rt. 309), Hatfield Pa. also has a full service and parts departments.

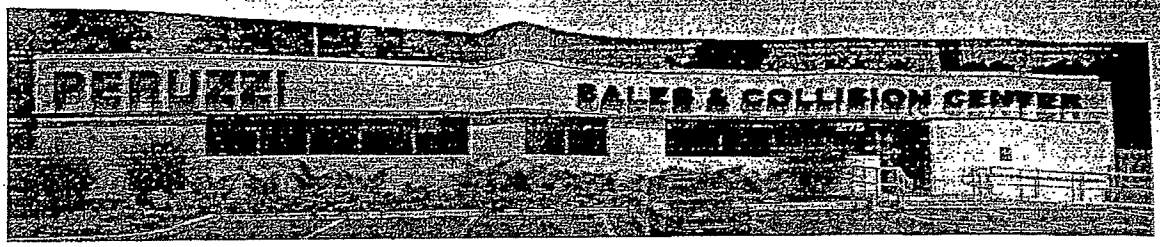
In March of 1991 Peruzzi opened their Nissan dealership located at 156 Lincoln Highway Fairless Hills Pa. Peruzzi Nissan has a full service and parts department.

In May of 1998 Peruzzi Automotive Group opened their 4th new car dealership with the addition of Mitsubishi franchise. Peruzzi Mitsubishi located at 130 Lincoln Highway Fairless Hills Pa., sells new Mitsubishi cars and trucks as well as used vehicles. Mitsubishi's service department is located across the street from the dealership at 49 Spencer Drive.

In May of 2003 Peruzzi Automotive Group opened 2 locations. Peruzzi opened the Nissan Certified Used car location at 140 Lincoln Highway Fairless Hills Pa. At this location you can find certified used Nissan cars and trucks as well as certified import cars. Then on Memorial Day 2003 Peruzzi Automotive Group opened the Collision Center. The Peruzzi Collision Center located at 275 Lincoln Highway Fairless Hills Pa. is a factory authorized repair center, with state of the art down-draft paint booths. Peruzzi's Collision Center repairs all make, and models of cars and trucks.

In May of 2004 our Toyota dealership became Peruzzi Toyota Scion. Adding Scion to our already great list of automotive franchises, only makes shopping at Peruzzi Automotive Group easier for our customers. Please visit any of our locations or you may contact us by phone or email. We look forward to helping you purchase your next car or truck.

Please visit our website @ www.peruzzi.com



We Repair ALL Makes & Models

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Services
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FAQ
Testimonials

Our Hours:

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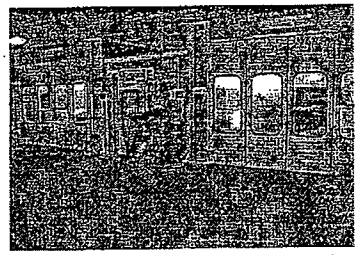
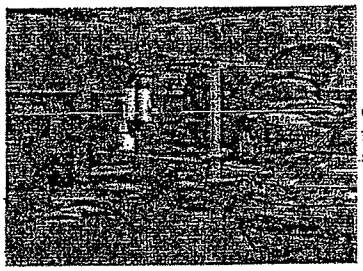
7:30am – 6pm
Sat. By Appointment

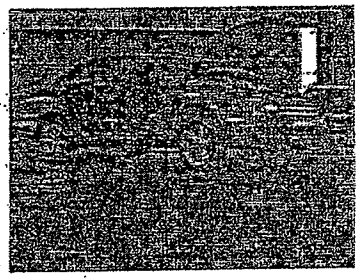
Peruzzi Collision Center
275 Lincoln Highway
Fairless Hills, Pa
19030
Phone: 215-949-2800
Fax: 215-949-6994

THE BEST EQUIPMENT, built with the latest in collision repair technology combined with an experienced and well-trained staff result in superior craftsmanship

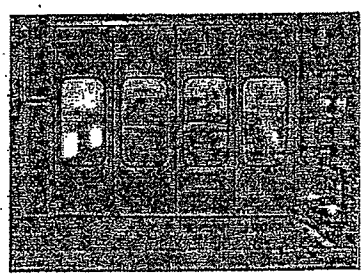




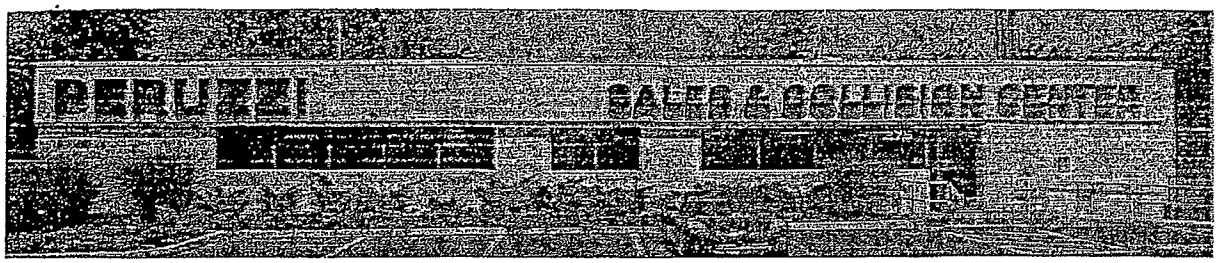
Computerized structural repair and analysis to return your vehicle to the manufacturer's specifications



Manufacturer recommended spot welding and MIG welding.



Computerized Color Tinting and downdraft paint booths for accurate and clinically clean refinishing.



We Repair ALL Makes & Models

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Our Hours:

Monday – Friday
7:30am – 6pm
Sat. By Appointment

Peruzzi Collision Center
275 Lincoln Highway
Fairless Hills, Pa 19030
Phone: 215-949-2800
Fax: 215-949-6994

Collision Repair Process

- Contact your insurance company and file a claim.
- Come to Peruzzi Collision Centers and we'll write the estimate for cost and completion time.
- If you are unable to drive your car to Peruzzi Collision Center we can have our 24 hour towing service bring your vehicle in. The number for the 24 hour towing service is 215-949-2800
- If your car is not drivable due to safety reasons, we will help set you up with an Enterprise rental car and while you vehicle is repair. If your vehicle is drivable we will schedule a convenient date for you to bring in your vehicle.
- Once you vehicle is in our shop we will begin the repairs. If there are any additional items, you and your insurance company will be notified.
- When the bodywork is completed your vehicle will color matched and painted in one of our state of the art downdraft paint booths.
- **To show our appreciation for your business, we will provide a complimentary interior clean, vacuum, and wash.**

Peruzzi Collision Center Features

- Factory Authorized Repair Facility
- Free Estimates
- Fast Quality Repairs
- Lifetime Warranty on all Collision Repairs.
- Facotry Trained Technicians
- ASI Certified
- Keystone AAA Approved
- Licensed Damaged Appraisers
- Genuine Original Parts
- State-of-the-Art Paint Booths
- Computerized Color Match System
- Preferred by Insurance Companies
- Direct Repair for Most Insurance Companies
- Competitive Rates
- Same Day Glass Replacement
- Full Line of Accessories

PERUZZI AUTOMOTIVE GROUP et al. v. SILVANO GHALI	AAA No. 144200115811

ORDER

AND NOW, this _____ day of _____, 2012, upon consideration of the Response of Claimant/Counter-Respondant, Peruzzi Mitsubishi, incorrectly identified as Peruzzi Automotive Group and Robert John Tattersall, incorrectly identified as Robert John Tatters' to Respondant/Counter-claimant's Preliminary Objections and Petition to Dismiss, and any response thereto it is hereby ORDERED and DECREED that said Objections are OVERRULED. The arbitration shall go forward pursuant to the scheduling Order of Mr. Schuchman.

_____
JERRY SCHUCHMAN, ESQUIRE

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Peruzzi Mitsubishi, incorrectly identified as
Peruzzi Automotive Group and
Robert John Tattersall,
incorrectly identified as Robert John Tatters

PERUZZI AUTOMOTIVE GROUP et al. v. SILVANO GHALI	PHILADELPHIA COUNTY COURT OF COMMON PLEAS NO. 0806 -3505

RESPONSE OF DEFENDANTS, PERUZZI MITSUBISHI, incorrectly identified as PERUZZI AUTOMOTIVE GROUP and ROBERT JOHN TATTERSALL, incorrectly identified as ROBERT JOHN TATTERS' TO PLAINTIFF'S PRELIMINARY AND JURISDICTIONAL OBJECTIONS AND PETITION TO DISMISS ARBITRATION

Claimants/Counter-Respondants, Peruzzi Mitsubishi, incorrectly identified as Peruzzi Automotive Group (hereinafter "Peruzzi") and Robert John Tattersall, incorrectly identified as Robert John Tatters (hereinafter " Robert Tattersall," collectively the "Peruzzi Parties") hereby file the within Response to Plainitff's Preliminary and Jurisdictional Objections and Petition to Dismiss the Arbitration, and in support thereof avers as follows:

I. INTRODUCTORY STATEMENT

At the outset, it should be noted that Plaintiff has included in his memorandum certain information he knows is objectionable to the Peruzzi Parties. Specifically, prior to the scheduled conference call with Mr. Schuchman on March 19, 2012, counsel conducted a conference call. At that time, the issue of the admissibility of the prior arbitration of the

Navigator case was raised. Undersigned counsel advised Mr. Bensley and Mr. Schwartz that she intended to raise the issue of the admissibility of the Navigator case to the arbitrator and would seek a ruling, but had not yet determined the proper procedure, as the ruling on the issue would potentially prejudice the arbitrator from hearing the substantive case. Consequently, this issue was not raised during the call with Mr. Schuchman on March 19, 2012.

What is particularly disturbing about Plaintiff's inclusion of this alleged evidence in his Memorandum, is that it is entirely irrelevant to the issue of the arbitrability of the matter before this forum, which concerns the sale of a Hummer to Mr. Ghali. The Navigator case was entirely separate, and in fact, undersigned counsel was first notified of that case when the Complaint appeared as an exhibit in Plaintiff's vigorous, yet meritless, attempts to prevent this case from being decided in his client's agreed upon forum (arbitration). Now, yet again, we are arguing the issue of the arbitrability of this case with AAA, a matter which has been decided on numerous previous occasions both in this forum and the Court of Common Pleas. A minor clerical error and misunderstanding cannot be used to avoid the clear intent of the Court to have the matter litigated through AAA. Plaintiff's transparent attempts to circumvent the decision he made to submit the matter to arbitration in this forum should again be overruled.

II. COUNTER-STATEMENT OF FACTS

Plaintiff has included in his Memorandum a very lengthy recitation of the purported "facts" which underlie the case, which includes a significant amount of legal argument. However, Mr. Schuchman was clear during the conference call that the Memoranda regarding the arbitrability issue should be BRIEF. Consequently, in an effort to comply with Mr.

Schuchman's instructions, the Peruzzi Parties will state only that they strenuously refute all of the "facts" contained in Plaintiff's Memorandum. The substantive issues that underlie the case will be litigated at the appropriate time during the arbitration hearing.

III. PROCEDURAL HISTORY

This case, concerning a Hummer purchased by Mr. Ghali, was initially filed in June of 2008. A true and correct copy of the docket of this matter from the Court of Common Pleas is attached hereto and marked Exhibit "A." Thereafter, pursuant to Preliminary Objections, an Amended Complaint was filed on August 18, 2008. In response to Plaintiff's Amended Complaint, the Peruzzi Parties filed Preliminary Objections on several bases concurrently with the filing of a Motion to Compel the Arbitration. See Exhibit "A."

This matter is subject to an arbitration agreement pursuant to the Retail Installment Sales Contract (hereinafter "RISC"). A true and correct copy of the RISC is attached hereto as Exhibit "B." The issue of the applicability of the Arbitration Clause and the conscionability of the contract as a whole and that provision specifically were litigated at length before the Honorable Howland W. Abramson in the Court of Common Pleas of Philadelphia County. Judge Abramson allowed extensive briefing on the issue, even following the argument hearing on this matter. In fact, Plaintiff filed the aforementioned three inch thick brief (which contained the first notice of the Navigator Complaint) following the hearing, which was held on February 6, 2009. A true and correct copy of the transcript from the hearing on the Motion to Compel the Arbitration is attached hereto and marked Exhibit "C."

During the hearing, Judge Abramson made it abundantly clear that this was not the case in which Mr. Bensley should be arguing the unconscionability of arbitration clauses, as his

client had clearly elected to ignore the very straightforward and explicit and visible warnings that the contract contained the arbitration clause (Mr. Ghali's signature actually touches the language regarding the arbitration clause being contained on the back of the contract). Moreover, Judge Abramson found that Mr. Ghali had admitted that he never reads contracts and doesn't think it's important to read contracts and the Court could not be tasked with protecting Mr. Ghali from himself. See Exhibit "C."

Following the Hearing and subsequent Briefing, on March 23, 2009, Judge Abramson issued an Order staying the case and compelling the private arbitration. A true and correct copy of the Order is attached hereto and marked Exhibit "D." Thereafter, Plaintiff (through his counsel) took no action to comply with Judge Abramson's Order and submit the within matter to binding arbitration pursuant to the Agreement to Arbitrate for two years and three months. See Exhibit "A." It is admitted that in the interim, Plaintiff and the Peruzzi Parties litigated the Navigator case (*Ghali II*) through arbitration in the Court of Common Pleas of Philadelphia County. However, the RISC that controlled that case, because it was separate from the instant matter, did not contain an Arbitration clause, and thus, was required to be litigated through the Courts. Litigation of the instant case through AAA would not have been affected by the litigation of *Ghali II* and Plaintiff's arguments that it refrained from submitting the instant matter to AAA pursuant to Judge Abramson's Order fall short. Moreover, the Peruzzi Parties have no involvement in *Ghali III* and are not a party to that action.

Because no action had been taken by Plaintiff's counsel to move the instant matter, the Court, *sua sponte* by Order of Judge Abramson, issued a new Case Management Order. See Exhibit "A." This was in no way an action by the Peruzzi Parties to waive their rights to have the matter decided in AAA, per Judge Abramson's Order and the contractual agreement to

arbitrate. Following the issuance of the new Case Management Order and in an attempt to comply with same, the Peruzzi Parties and Chase sought the advice of the Court as to how to handle the matter and whether the March 23, 2009 Order was still in effect. No specific answer was provided by the Court to these questions until the Court-imposed Pre-trial Conference that was held on or about October 19, 2011. At that time, Judge Abramson met with all counsel, and reiterated his direction that all matters related to the Hummer case (*Ghali I*) should be litigated in AAA, as evidenced by his October 19, 2011 Order which is attached hereto and marked Exhibit "E."

Prior to the October 19, 2011 Pre-Trial Conference and Order, the Peruzzi Parties and Chase filed a Motion for Non Pros based upon Plaintiff's failure to submit the matter to binding arbitration per Judge Abramson's Order. However, this Motion was filed pursuant to the Court's *sua sponte* reactivation of the case and was a valid attempt to obtain a conclusion of the matter through the court system. It did not constitute a waiver of their rights to enforce the arbitration clause, as the Court had placed the matter back before it, at least temporarily. This Motion was denied and dismissed as moot, pursuant to Judge Abramson's October 19, 2011 ruling.

Simultaneously to filing his response to the Motion for Non Pros, Plaintiff filed the initial Claim with AAA. However, in response to correspondence from AAA pertaining to payment of fees, counsel for Chase sought a stay of the AAA proceeding, due to the temporary reinstatement of the case in the Court of Common Pleas of Philadelphia County. A true and correct copy of Chase's October 3, 2011 letter is attached hereto and marked Exhibit "F." Thereafter, undersigned counsel continued to constantly attempt to resolve with AAA the questions of payment of fees in light of the currently pending status in the Court and an issue

regarding the split among the Peruzzi Parties and Chase. Correspondence dated October 17, 2009 from undersigned Counsel to Kristen Parcells of AAA, referencing numerous attempts to contact her to resolve the outstanding questions, is attached hereto and marked Exhibit "G." These correspondence clearly evidence the fact that the Peruzzi Parties and Chase were diligently attempting to comply with their duties pursuant to the AAA rules, but sought guidance from AAA without a response.

Approximately two weeks later, without a resolution to these questions posed by the Peruzzi Parties and Chase, AAA sent the November 2, 2011 referenced in Plaintiff's memorandum, declining to administer the claim. Note this is not an Order of any kind, simply a letter. In response to this letter, undersigned counsel called Ms. Parcells' supervisor at AAA, Tara Parvey, and explained that AAA's declining to administer the claim was unfounded, as the fees had been paid at that point (Chase sent the check on November 2, 2011) and the reason for the delay was that AAA had failed to answer numerous inquiries seeking clarification about the terms of the payment. Ms. Parvey explained that at that point, it was up to the Claimant as to whether they would allow the case to be re-opened. Since he so strenuously opposed the arbitration through AAA from the outset, of course, Plaintiff did not agree. Therefore, Ms. Parvey suggested that a Claim could be filed by the Peruzzi Parties, as the arbitration was Court Ordered.

Within a week of this conversation, undersigned counsel filed the within claim. Specifically, the claim DOES NOT deal with a consumer debt or consumer finance matter. Pursuant to the Counter-claim filed by Plaintiff, which attached a copy of the Court of Common Pleas Complaint, the case centers around claims of fraud and breach of contract. The Peruzzi Parties' claim merely refutes the contents of Plaintiff's Complaint. Therefore, the claim is not

prohibited by the moratorium. Additionally, the moratorium does not apply (as explained at length below), because the consumer DID agree to arbitrate.

IV. LEGAL ARGUMENT

A. The Peruzzi Parties Did Not Intentionally Breach any AAA Rules and Did Not Waive Any Rights to Enforce the Arbitration Clause

1. The Arbitration Clause is Both Valid and Enforceable

Specifically, the arbitration clause of the RISC that controls the transaction states:

> The front of the RISC states:
>
> BY SIGNING THIS CONTRACT, YOU ACKNOWLEDGE THAT IT CONTAINS AN "AGREEMENT TO ARBITRATE DISPUTES" ON THE REVERSE SIDE, THAT YOU HAVE READ IT AND AGREE TO ITS TERMS.
>
> On the reverse side of the RISC, the arbitration agreement states:
>
> **AGREEMENT TO ARBITRATE DISPUTES**
>
> The following arbitration agreement can significantly affect your rights in any dispute with us. Please read it carefully before signing this contract.
>
> 1. IF EITHER OF US CHOOSES, ANY CLAIM OR DISPUTE BETWEEN US AS DEFINED BELOW WILL BE DECIDED BY ARBITRATION AND NOT IN COURT OR BY A JURY TRIAL.
>
> ***
>
> 3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.
>
> Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause

> and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to your credit application, this contract, or any resulting transaction or relationship including any such relationship with third-parties who sign this contract, shall at your or our election be resolved by binding arbitration and not by a court action. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you have to arbitrate a class action. You may chose any of the following arbitration organizations . . . the arbitration shall be conducted in accordance with this arbitration agreement and, unless otherwise provided for in this agreement to arbitrate disputes, the rules of the arbitration organization you chose (the "arbitration rules"). You may get a copy of the arbitration rules by contacting the arbitration organization or visiting its website.
>
> The arbitrator shall be an attorney or a retired judge selected in accordance with the arbitration rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the Federal District in which you reside. The arbitrator's decision shall be in writing and either party may appeal the arbitrator's decision through the arbitration organization you chose. We will pay your filing, administration, service or case management and your appearance or hearing fee all up to a maximum of $1,500.00. We will also pay any additional amount of such fees that the arbitrator determines we must pay in order to make this agreement to arbitrate disputes enforceable. Each party shall be responsible for its own attorney, expert and other fees unless awarded by the arbitrator under applicable law. The arbitrator's award shall be final and binding on all parties, except that the losing party may request a new arbitration if allowed by the arbitration rules. This agreement to arbitrate disputes, and any arbitration conducted hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. §2, et seq., and not by any state law concerning arbitration.

In fact, in his deposition, (which the Court considered during the argument hearing) Plaintiff testified that the reason he didn't know about the arbitration clause is that he NEVER reads contracts, because he does not deem that to be important. Moreover, Plaintiff's counsel argued that the paperwork was always within the exclusive control of Defendants, however,

again this is false and misrepresents Plaintiff's clear testimony that he had the opportunity to review the paperwork, and felt comfortable doing so, but he did not, by his OWN VOLITION, because he was anxious to leave. A true and correct copy of the deposition transcript of Plaintiff is attached hereto as Exhibit "H"pp. 26:8-16, 29:16-30:6, 127:16-128:12. Plaintiff's response as to why he didn't read the contract even despite a prior lemon law case he had filed was, "I just didn't read it. I didn't feel that it was important to read it." See Exhibit "H" p. 30:6-7. In fact, Plaintiff never even read the entire Complaint in the within action, he only read part of it, because he did not deem that to be important either, even though he knew that he was verifying all the information in the Complaint was true. See Exhibit "H," pp. 27:2-24, 112:13-113:3.

Moreover, he never even asked for an opportunity to read the contract, though he stated unequivocally, that he felt comfortable to do so, if he had desired. Specifically, Plaintiff testified as follows:

Q. Did anybody tell you you didn't have the right to read the contract?
A. No.
Q. Did you express any doubts or concerns to anybody at Peruzzi about signing that contract in any way, shape or form?
A. Nope.

See Exhibit "H" p.49:23-50:5. Plaintiff later substantiated this testimony in the following exchange:

Q. Okay. And I just want to be clear, no one ever told you that you weren't allowed to read --
A. No.
Q. -- the contract?
A. No.
Q. Okay. And you didn't express any concerns about not being able to read it?
A. No.
Q. You didn't ask to have time to read it?
A. No.

See Exhibit "H" p. 118:21-119:8. He then later testified further regarding this point:

Q. If you had any questions about the contract, would you have felt comfortable to ask --
A. Yes.
Q. -- what particular provisions meant?
A. Uh-huh, yes.
Q. Why is that; why would you feel comfortable?
A. They're pretty friendly. I bought a vehicle from them before. I didn't really have that much of an issue with it. They seemed like they wanted to help me.

See Exhibit "H" p. 132:7-18. Plaintiff also attempted to show unconscionability in the manner the contract was presented for his signature, but he admitted that it was on the desk while they were looking for his spare keys, and he could have looked at it for the half hour he sat there, but chose not to. See Exhibit "H,"pp. 45:21-47:17, 118:6-10, 131:6-21.

During the course of the hearing, Judge Abramson warned Plaintiff's counsel that the issue of general unconscionability of arbitration clauses was not within his purview to determine. Consequently, the argument was necessarily limited to the specific facts surrounding the arbitration clause in that case, Specifically, Judge Abramson commented:

> COURT: Well, are you asking me to try arbitration and put arbitration on trial?
>
> BENSLEY: I guess there's no way of avoiding that in some respect.
>
> COURT: Oh, there is a way of avoiding it. I'm not likely to put arbitration on trial and to declare arbitration itself unconscionable.
>
> BENSLEY: And nor would I ask you.
>
> COURT: That would be quite something.
> ...
> COURT: So, I'm not going to - that's like prior restraint. I'm not going to declare arbitration unfair because there could be corruption and fraud.

...

COURT: Well, we'll only find out what will be the end result if we go to arbitration and find out. I don't think you're going to be able to prove statistically that he has x chance of failure.

See, Exhibit "C, "pp. 24:7-26:6.

Additionally, in reviewing the entire transcript, it was clear that Judge Abramson further endorsed private arbitrations as follows:

> COURT: That is kind of suggestive that he didn't care what it said as long as he got the Hummer.
>
> BENSLEY: And that's exactly what the defendants suggest, that it wouldn't have mattered. Well, I don't think that is really relevant at all.
>
> COURT: You mean we have to protect him against himself?
>
> BENSLEY: No, you have to protect him against the dealer.
>
> COURT: But if he doesn't protect himself against the dealer, why is it our job or - we know why it is your job. Why is it my job to protect him against the dealer?
>
> ...
>
> COURT: All right. Let's talk about that. You call it a risk-shifting provision. How does it shift the risk? Is there any evidence that if it went to arbitration, there would be an unfair result detrimental to your client? And what is the evidence of that?

See, Exhibit "C," pp. 12:18-13:25.

The validity of the Arbitration Clause has been litigated at length, as described above, and Judge Abramson ruled unequivocally, TWICE, that the matter should be arbitrated through binding private arbitration pursuant to the Agreement to Arbitrate contained in the RISC. Moreover, Judge Abramson, during the argument hearing, ruled that this was, in fact, an AGREEMENT to arbitrate, into which Plaintiff knowingly and willingly entered. See Exhibit

"C." Plaintiff cannot attempt to circumvent the clear wishes of the Court, by re-litigating an issue that has been decidedly resolved by the Judge on TWO occasions, that the Agreement to Arbitrate in the RISC is both valid and enforeceable. See Exhibit "D" and "E."

2. The Peruzzi Parties Did Not Breach the AAA Rules and Did Not Waive Their Rights to Have the Matter Arbitrated through AAA

At the outset, it should be noted that neither the Peruzzi Parties nor Chase have the ability to "waive" their rights to arbitrate the matter through AAA at this point, as the Court has ruled TWICE that the matter is to be litigated in AAA. Consequently, the question of jurisdiction is clearly out of the hands of the parties, and cannot thus be waived. The Court made its intentions clear and the parties cannot substitute their desires in its place. Nor can a clerical error and misunderstanding trump the power and authority of the Court.

To that end, the court has made clear that private arbitration is a preferred method to resolve disputes and are favored by the court. *See e.g.*, G.E. Lancaster Invs., LLC v. Am. Express Tax & Bus. Servs., 920 A.2d 850 (Pa. Super. 2007); Goral v. Fox Ridge, Inc., 683 A.2d 931 (Pa. Super. 1996). Moreover, "the prevailing mood is to favor arbitration as an effective method of dispute resolution." Zimmer v. CooperNeff Advisors, Inc., 523 F. 3d 224, 231 (3rd Cir. 2008), *See also*, Gay v. CreditInform, 511 F.3d 369, 378 (3rd Cir. 2007)(explaining that the Federal Arbitration Act was enacted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American Courts, and to place arbitration agreements upon the same footing as other contracts.")

The Courts have found that "waiver of an arbitration may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." Samuel J. Marranca Gen. Contracting Co., Inc. v. American Cherry Hill Assocs. Ltd. P'ship., 610A.2d 499, 501 (Pa. Super. 1992). "However, a waiver of a right to proceed to arbitration pursuant to the term of a contract providing for arbitration should not be lightly inferred and unless one's conduct has gained an undue advantage or resulted in prejudice to another he should not be held to have relinquished the right." Kwalick v. Bosacco, 478 A.2d 50, 52 (Pa. Super. 1984). Additionally, the Third Circuit has noted: "Waiver will normally be found only 'where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." Gavlick Constr. Co. v. H.F. Campbell Co., 526 F.2d 777, 783 (3d Cir. 1975).

It should be noted, that contrary to the case law cited by Plaintiffs, the Peruzzi Parties and Chase did not refuse to make a payment. Rather, they sought clarification, without response from AAA, of the terms on which the payment should be made as far as the allocation of payment to the parties and the effect of the temporarily reactivated Court of Common Pleas case. Once these issues were resolved, and on the very day the notice that AAA was declining to administer the case was sent, payment, in full, was made by Chase.

In the interests of brevity, the Peruzzi Parties will not reiterate the procedural history set forth at length above regarding the reasons for the misunderstanding and resulting failure to pay the applicable fees. However, undersigned counsel resents the implication that a fraud was committed on this tribunal and that no evidence exists of the efforts made by Chase and the Peruzzi Parties to make the required payments. To the contrary, Exhibits "F" and "G"

unequivocally demonstrate that both counsel for the Peruzzi Parties and Counsel for Chase were seeking clarification from AAA without success.

Pursuant to the standard set forth in Gavlick there was clearly no waiver, as the demand for arbitration was made by the Peruzzi Parties in its first responsive pleading. Moreover, there was no undue advantage gained by the Peruzzi Parties and Chase not paying the applicable fees while they awaited clarification from AAA. Nor was Plaintiff prejudiced by this action, as the fees may be refunded in the unlikely event that he prevails (as he adamantly believes he will) in this action. Consequently, waiver cannot be inferred by the actions of Peruzzi and Chase, nor would they have the opportunity to due so, pursuant to the Court's TWO controlling Orders.

B. Peruzzi's Filing of its Claim and AAA's Acceptance Did Not Violate any Valid Notice of Dismissal

This issue does not require significant discussion, as the main points have been argued at length above. At the outset, the dismissal was by letter and not an Order. Moreover, it does not "dismiss the action with prejudice" as Plaintiff contends. Rather, it merely states that AAA is declining to administer the matter because the fees allegedly were not paid (they were paid on this same day).

Furthermore, as previously stated, the Peruzzi Parties did take action to remedy the situation by contacting AAA whereby they were instructed by Tara Parvey to take the course of action they ultimately followed (namely filing their own claim denying Plaintiff's allegations against them and paying the applicable fee).

Consequently, Plaintiff's claims in this section are even more unfounded and baseless than those in the previous section.

C. The Initiation of this Arbitration is not in Violation of the AAA Moratorium on Administration of Debt Collection Actions

1. The Arbitration is Court-Ordered (TWICE) so the Moratorium Does Not Apply

As stated at length above, the Court of Common Pleas of Philadelphia, specifically, the Honorable Howland W. Abramson, has TWICE Ordered the matter be litigated through AAA. The first Order came on March 23, 2009 following extensive briefing and argument on the issues and the conscionability of the arbitration clause. See Exhibit "D." The second Order followed the Pre-trial Conference held with Judge Abramson in October 2011, whereby he reiterated that the proper jurisdiction for administering the claims in this case was AAA. See Exhibit "E." In AAA's letter accepting this case as filed by the Peruzzi Parties, AAA acknowledged the moratorium, but specifically stated it was accepting this case on the basis of the fact that it was court-ordered to arbitration. Moreover, undersigned counsel is sure the Court will be impressed by Plaintiff's assertion that its Order is irrelevant. However, as the AAA has already acknowledged, the Court Orders are binding on the case. AAA's Procedures for administrating Consumer Related Disputes specifically state that the moratorium does not apply to Court-ordered arbitrations. Therefore, AAA is not violating its own moratorium by complying with the Court's Order, because the moratorium does not apply to the within case for this and the reasons stated below.

2. The Matter at Hand is Not a Debt Collection Action

As previously stated, the nature of the Peruzzi Parties' claims in the instant action are merely a denial of the allegations contained in Plaintiff's Complaint and Amended Complaint filed in the Court of Common Pleas of Philadelphia. Moreover, when he filed his response to

Peruzzi's Claims, Plaintiff appended a copy of his Complaint. The nature of the claims in Plaintiff's Complaint and Amended Complaint are a muddled myriad of allegations, mostly sounding in fraud, breaches of contract and warranty and violations of various consumer protection statutes. Plaintiff's Complaint does not mention a debt collection, and in its Claim filed herein, the Peruzzi Parties make no mention of a collection of any debt. In fact, the Peruzzi Parties do not contend that the Plaintiff owes them any debt. Merely, they refute all allegations of wrongdoing on their part that are made by Plaintiff. A true and correct copy of the Peruzzi Parties' claim is attached hereto and marked Exhibit "I."

3. The Moratorium Does Not Apply Because Plaintiff Agreed to the Arbitration

The moratorium applies to "individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute..." (Emphasis added). Here, the issue of Plaintiff's agreement to arbitrate has been litigated *ad nauseum*. The issue was raised by the Peruzzi Parties' Preliminary Objections and Motion to Compel the Arbitration, both of which received a response from Plaintiff. Subsequently the Peruzzi Parties filed sur-replies to both filings and the issue was argued before Judge Abramson in a hearing on February 6, 2009. Thereafter, supplemental briefs were filed by Plaintiff and the Peruzzi Parties. See Exhibits "A" and "C." After considering all of the evidence put forth in the aforementioned filings (which constituted approximately 1500 pages of documentation) and the additional arguments made during the hearing, Judge Abramson found that the Plaintiff VOLUNTARILY AGREED to submit the matter to binding arbitration through AAA. Consequently, the moratorium does not apply, because the consumer DID agree to arbitration.

Plaintiff's argument that the agreement was contained in a "forced arbitration clause" is a thinly veiled attempt to "have another bite at the apple" and revisit this issue which has clearly and decisively been determined by the Court. The AAA should not undermine the authority of the court by providing Plaintiff yet another opportunity to revisit the issue. Just because counsel is stuck with the choices of his client does not make the agreement to arbitrate "forced." Consequently, the moratorium does not apply.

D. The Peruzzi Parties Have Not Substantially Litigated Any Matter Related to the Hummer Case (*Ghali I*) in the Courts

The Peruzzi Parties did not voluntarily litigate any matter related to the Hummer case (*Ghali I*) in the Courts. First, it should be noted that the Peruzzi Parties are not parties to *Ghali III* and have not participated in any of the pleadings or filings of that matter. They are not copied on any correspondence in that matter or any filings. Consequently, they have not litigated that matter in the Courts, and the argument of waiver as it pertains to that matter cannot in any way be asserted against the Peruzzi Parties.

However, the argument of waiver does not hold up any stronger as it pertains to litigation of *Ghali I*. The factors to consider to determine whether there has been a waiver and the standards for its application have been set forth at length in Section A of this Memorandum and will not be repeated here. However, the Peruzzi Parties asserted their right to enforce the arbitration clause in their initial responsive pleadings at the inception of this case, nearly four years ago. Moreover, after Plaintiff's failure to comply with the Order to Arbitrate and the Court's subsequent temporary reinstatement of the case in the Court of Common Pleas, the Peruzzi Parties were forced to undertake certain filings to protect its interests, in case the Court

decided to proceed therein (which it did not). These do not constitute voluntary actions by the Peruzzi Parties to litigate the matter in the courts, thus indicating an intent to waive their rights to pursue the arbitration. Rather, they were responses necessitated by the Court's *sua sponte* Orders temporarily reinstating the case because of Plaintiff's inaction. Based on the Orders as they stood at the time, the Peruzzi Parties were forced to undertake certain filings including the Motion for Non Pros and Motion to Compel the Inspection to protect its interests in the litigation. At the time of the filings, the parties had no indication as to why the Court had reinstated the matter, and were therefore compelled to litigate the matter briefly in the courts. It should also be noted that at the time the Motion for Non Pros was filed, Plaintiff STILL had not filed a claim with AAA, despite the passage of two years and 3 months since Judge Abramson's Order. Consequently, there was no waiver of the right to arbitrate and the case should remain where it was TWICE ordered by Judge Abramson, within the sound jurisdiction of AAA.

V. CONCLUSION

For the reasons set forth at length above, the Peruzzi Parties hereby request the arbitration remain in place as scheduled, and the Plaintiff's Preliminary and Jurisdictional Objections and Motion to Dismiss should be OVERRULED and DENIED.

MARGOLIS EDELSTEIN

BY:_____

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