COPY

No. 29,702

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ANDREA J. FELTS,
on behalf of herself and all others
similarly situated,

Plaintiffs-Appellees,

v.

CLK MANAGEMENT, INC. f/k/a
BAT SERVICES, INC.,

Defendant-Appellant.

COURT OF APPEALS OF NEW MEXICO
FILED
JUL 30 2010

ON APPEAL FROM THE BERNALILLO COUNTY COURT
SECOND JUDICIAL DISTRICT
CASE NO. CV 2008 13084
JUDGE NAN G. NASH

DEFENDANT-APPELLANT CLK MANAGEMENT, INC., f/k/a BAT SERVICES, INC. REPLY BRIEF

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INTRODUCTION

Appellee Felts ("Felts") begins her Answer Brief with the remarkable statement that "this case is not actually about arbitration." *See* Answer Brief, 1. Contrary to Felts' desire, this appeal is entirely about arbitration – *it is an appeal from an order denying CLK's motion to compel arbitration.* To be precise, this case is about the application of preemptive federal law regarding arbitration, including the presumptions and policies in favor of arbitration that are dictated by federal law. Recent United States Supreme Court rulings iterate and solidify the preemptive force of these federal laws and policies, and make clear that the district court was wrong to deny CLK's motion to compel arbitration.

Felts has clearly and unmistakably agreed to arbitrate *all disputes* involving the subject loan agreements, *expressly including disputes over which matters are subject to arbitration.* Because Felts has not specifically challenged the clause in the arbitration agreement that delegates to the arbitrator the authority to resolve disputes surrounding the arbitration agreement, the district court's decision must be reversed, and this matter remanded with directions to order this dispute to arbitration.

I. ARGUMENT

a. The District Court Erred In Deciding The Validity Of The Arbitration Agreement

i. The United States Supreme Court Decision in *Rent-A-Center, West, Inc. v. Jackson* Forecloses Any Argument That the Issue Of Validity is to be Decided by the District Court, and Requires Reversal of the Decision Below.

Felts claims that the district court had authority to decide the validity of the arbitration agreement, relying on her assertion that she is challenging the arbitration agreement itself, as opposed to challenging the validity of the contract as a whole.[1] However, even assuming that Felts has specifically challenged the arbitration provision (and she has not), the United States Supreme Court's recent decision in *Rent-A-Center, West, Inc. v. Jackson*, --U.S.--, 130 S.Ct. 2772 (June 21, 2010), makes it clear that her challenge is not enough to avoid a mandatory referral of this dispute to the arbitrator. The Court in *Rent-A-Center* held that, unless the party seeking to avoid arbitration mounts a *specific challenge to the so-called "delegation provision" contained in the arbitration agreement,* the Court must refer the dispute to arbitration. Here, Felts did not challenge the delegation

[1] CLK specifically maintains that Felts's argument here fails as well for the reasons set forth in its Opening Brief at pages 8-12.

provision, and *Rent-A-Center* makes clear that this dispute must therefore be referred to arbitration.[2]

Prior to *Rent-A-Center*, it was well established that where a party mounts an attack against the entire contract (as opposed to specifically attacking the arbitration agreement within the contract), the arbitration agreement is severable from the contract, and the issue of contract validity, including the arbitration provisions therein, is to be determined by the arbitrator, not the court. *See Buckeye*, 546 U.S. 440, 444. The United States Supreme Court determined in *Buckeye* that only where a party specifically challenges the arbitration agreement itself can the issue of the validity of the arbitration agreement be determined by the court. *Id.*

The Supreme Court in *Rent-A-Center* further narrowed the circumstances in which a court may decide the validity of arbitration agreements containing so-called "delegation provisions," however, holding that a court may *only* do so where the party seeking judicial review *has specifically challenged the delegation*

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[2] In footnote 8 of her Answer Brief, Felts claims that CLK cannot enforce the arbitration agreement at all because CLK has maintained it has no contractual relationship with Felts. However, Felts ignores that her Complaint alleges a contractual relationship with CLK. RP 300, ¶¶ 6 and 7; 302-303, ¶¶ 26-35 For purposes of deciding a motion to compel arbitration, allegations in a complaint are taken as true and plaintiff is bound by them. *See Heisel v. York*, 46 N.M. 210, 213, 125 P.2d 717, 720 (N.M. 1944); *see also Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001) ("[A] court may not consider allegations or theories that are in consistent with those plead in the complaint."). .

provision. Rent-A-Center at 2778-79. A "delegation provision" is a provision within an arbitration agreement that delegates to the arbitrator the authority to decide the validity of the arbitration agreement itself. Felts' alleged contract with CLK contains such a delegation provision.[3]

The Court in *Rent-A-Center* ruled that a delegation provision "is simply an additional, antecedent agreement the party seeking arbitration asks the [court] to enforce, and the FAA operates on this additional arbitration agreement just as it does any other" *and must give effect to the parties' agreement. Rent-A-Center*, 130 S.Ct. at 2777-78. Thus, a delegation provision is severable from the arbitration agreement in which it is contained. *Id.* As such, in order for a challenge to a delegation provision to be determined by the court, the delegation provision itself must be specifically challenged. *Id.* The *Rent-A-Center* Court found that the party seeking to avoid the delegation provision did not make "a specific challenge to the delegation provision" and thus the district court properly sent the entire matter to

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[3] The subject agreement to arbitrate sets forth, "You and we agree that *any and all claims, disputes or controversies* that we or our servicers or agents have against you or that you have against us, our servicers, agents, directors, officers and employees, *that arise out of* your application for one or more loans, the Loan Agreements that govern your repayment obligations the loan for which you are applying or any other loan we previously made or later make to you, *this Agreement To Arbitrate All Disputes*, collection of the loan or loans, or alleging fraud or misrepresentation, whether under the common law or pursuant to federal or state statute or regulation, or otherwise, *including disputes as to the matters subject to arbitration, shall be resolved by binding individual (and not class) arbitration.*" (emphasis added) RP 87

arbitration. Justice Stevens summed up the Court's decision, stating, "Even where a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge to the arbitrator unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator." *Rent-A-Center*, at 2781 (Stevens, J., dissenting). *Rent-A-Center* utterly forecloses any possibility that the district court had the power to determine the arbitration agreement's validity, because Felts clearly did not challenge the delegation provision in the arbitration agreement.

Felts' complaint challenges neither the arbitration agreement nor the delegation provision contained therein. Even Felts' Opposition to CLK's Motion to Compel Arbitration lacks a specific challenge "to the particular line in the agreement that purports to assign such challenges to the arbitrator." *See* RP, 73-83. At no time has Felts *ever* complained that she did not agree to have any dispute heard by an arbitrator. In fact, as set forth in footnote 11 of the Answer Brief, Felts offered to have this matter sent to arbitration in its entirety if CLK would agree to forgo the class action waiver.[4] Thus, her eleventh-hour objection to the arbitration agreement is limited to "the class action ban" – it is *not*, by her own admission, an objection to an arbitrator deciding the dispute. *See* RP, 76.

[4] Felts's claim that CLK rejected her offer to arbitrate because it wanted to keep NAF as the forum is not supported by the record and is untrue. Given the issues set forth by the record, it was clearly the surrender of the waiver of class action that motivated CLK to reject the offer.

Because Felts unquestionably has *not* mounted a specific attack on the delegation provision contained in the arbitration agreement at issue, *Rent-A-Center* makes clear that the district court improperly decided the issue of validity of the arbitration agreement, and therefore the decision below must be reversed with instructions to refer this matter to arbitration.

ii. Felts Has Waived Any Arguments Regarding the Scope of The Arbitration Agreement and has Clearly and Unmistakably Agreed to Arbitrate All Issues Regarding The Arbitration Agreement

Felts' belated argument that the arbitration agreement at issue does not clearly and unmistakably provide that the question of the arbitration agreement's validity is to be determined by the arbitrator fails on numerous grounds. First, in the district court, Felts did not attack the scope of the arbitration agreement. Instead, Felts only claimed that the class action waiver rendered the entire agreement *invalid* and unenforceable. RP 76. The issue of the scope of the arbitration agreement was neither presented to, nor considered by, the district court. RP 312-314. Felts cannot now raise this issue for the first time on appeal, and accordingly she has waived it. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶24, 127 N.M. 282, 289 (1999) (refusing to consider issues on appeal that were not raised at the trial court).

However, even if this Court determines that these arguments are properly presented, they fail. Felts argues that the arbitration agreement at issue does not clearly and unmistakably provide that the question of the arbitration agreement's validity is to be determined by the arbitrator. Felts conveniently does not even identify the offending language. Instead, Felts focuses on whether there is a specific sub-heading, and the length of the arbitration agreement. However, the actual language of the arbitration agreement is clear and unmistakable. *See* footnote 3, *supra*. Clearly "*All disputes*" arising out of the agreement to arbitrate, "*including disputes as to the matters subject to arbitration*" "shall be resolved" by arbitration. This language was not "obscured" as Felts suggests; it is in the same font as the rest of the three-page loan agreement, in a paragraph prominently labeled, "Agreement To Arbitrate All Disputes". Furthermore, Felts was able to review the agreement at her own pace, on the internet in her home.[5] This case is a far cry from the facts of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), relied upon by Felts. In that case, the person objecting to arbitration had not even signed the arbitration agreement. Compare *id.* at 938, with *Rent-A-Center, West, Inc. v. Jackson*, --U.S.--, 130 S.Ct. 2772, 2777 (June 21, 2010) (ruling that the a delegation clause that covered "any dispute" arising out of the

[5] Felts's argument seems to be more akin to a procedural unconscionability argument, i.e., that she was surprised by this agreement due to duress or overly technical language. Felts made no argument regarding procedural unconscienability to the district court, and thus cannot make that argument here.

arbitration agreement dictated that issues of the arbitration agreement's validity must be determined by the arbitrator). Thus, it is certain that the arbitration agreement between Felts and CLK does contain clear and unmistakable language that the parties intended all disputes arising out of the arbitration agreement to be determined by the arbitrator.

iii. Felts Has Waived Any Arguments Regarding the National Arbitration Forum and its Rules, and Such Arguments do not affect Felts Agreement to Arbitrate All Disputes, in Any Event.

Felts' argument pertaining to the National Arbitration Forum ("NAF") are not properly before the Court and, even if considered, Felts' arguments fail on the merits. Felts now argues for the first time on appeal that the NAF reference in in the arbitration agreement negates her agreement to arbitrate the validity of the arbitration agreement, and that the failure of the NAF negates her agreement to arbitrate the validity of the arbitration agreement. However, these issues are not properly presented in this appeal, because Felts never raised these issues below, nor did the district court consider or rule on them. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶24, 127 N.M. 282, 289 (1999) (issues not raised before the trial court may not be considered on appeal). Thus, for this reason alone, this claim must be summarily dismissed.

Even if this Court determines that these issues are properly presented for the first time on appeal, Felts' arguments fail. First, Felts appears to argue that a reference to the NAF rules in the arbitration agreement indicates that the parties failed to reach an agreement that the arbitrator is to decide which issues are subject to arbitration. That argument fails because CLK does not rely on the NAF rules to prove that the parties agreed that the arbitrator would decide which issues are subject to arbitration. Instead, CLK relies on the plain language of the arbitration agreement, which states that "*disputes as to the matters subject to arbitration shall be resolved by binding individual (and not class) arbitration.*" *See* Answer Brief, 15-16.

Also, the case upon which Felts relies, *Harper v. Ultimo*, 113 Cal.App.4th 1402 (2003), is inapplicable to the case at bar. In *Harper*, the arbitration agreement referenced rules that severely limited the plaintiff's ability to receive full *substantive relief* on their claims. *Id.* at 1407. Felts has made no such claim in this case. The "surprise" and "oppression" regarding limits on *substantive relief* that supported the *Harper* decision, simply are not present in this case. The FAA dictates that parties must be free to contract the procedures by which they want to administer their claims. *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008) ("[T]he FAA lets parties tailor . . . many features of arbitration by contract . . . including . . . which issues are arbitrable."). This Court is bound to honor the

parties' agreement. *Volt Information Sciences v. Board Of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) (holding that private agreements to arbitrate must be enforced according to their terms).

Second, Felts argues that failure of the NAF as a forum necessarily results in the failure of Felts' agreement that the arbitrator determine all issues regarding the arbitration agreement. As a preliminary matter, Felts failed to raise this issue before the district court, and therefore this issue is not properly presented to this Court. *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶24, 127 N.M. 282, 289 (1999) (issues not raised before the trial court may not be considered on appeal). Additionally, Felts' position is simply incorrect as a matter of federal arbitration law.

Federal appellate courts that have addressed this issue have determined that the Federal Arbitration Act (9 U.S.C § 1, *et.seq.*, the "Act") provides that where an arbitration forum has failed, the Act steps into to cure the lapse. *Reddam v. KPMG, LLP*, 457 F.3d 1054, 1059-1060 (9th Cir. 2006) (FAA provides for a cure to a defective forum); *Brown v. ITT Consumer Financial Corp*, 211 F.3d 1217, 1222 (11th Cir. 2000) ("Section 5 of the FAA provides a mechanism for appointment of an arbitrator where 'for any reason there shall be a lapse in the naming of an arbitrator . . .' The unavailability of the [forum] does not destroy the arbitration clause").

Moreover, the authority that Felts relies upon simply does not apply here. Those cases involve arbitration clauses wherein the choice of forum or rules was an "integral part" of the arbitration agreement, thus the court was not able to apply rules or appoint a forum to which the parties had not specifically agreed. This concept has been mostly limited to cases where the parties have chosen arbitration forums and rules that had specific application to the substantive nature of the probable disputes between the parties. *See e.g., In Re Solomon Shareholders' Derivative Litigation*, 68 F.3d 544 (2nd Cir. 1995) (holding that arbitration by the New York Stock Exchange to be the exclusive forum for shareholder dispute). There is nothing in the arbitration agreement at issue that would suggest the choice of NAF as being anything other than an "ancillary logistical concern,", i.e., the parties needed to have procedural rules and a forum for dispute resolution and they just so happened to pick NAF. *See Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (holding that failure of NAF as a forum does not negate arbitration agreement as there was no evidence that designation of NAF was integral to the arbitration agreement). Pursuant to the FAA, the district court must cure the lapse created by NAF's failure and appoint a new arbitration forum. Thus, Felts' claims that compliance with the delegation provision is now impossible for lack of rules or forum is simply incorrect.[6]

[6] In her inordinately long footnote 12, Felts sets forth a complete separate argument

b. The District Court Erred In Determining That This Case Involved "Small Consumer" Claims Within The Meaning Of *Fiser v. Dell*

Felts argues that the district court properly determined that her complaint set forth "small" consumer claims within the meaning of *Fiser v. Dell Computer Corp.*, 2008 NMSC-0046, 144 N.M. 464 (2008) and thus a class action waiver in the arbitration agreement was unenforceable under New Mexico contract law. As noted above, this claim was not appropriately considered by the district court, and should have been referred to arbitration. Even if the district court properly considered this claim, its decision was wrong, and must be reversed.[7]

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as to why the delegation clause in unenforceable. This argument is based upon the same basic reasoning that Felts uses to argue that the class action waiver in the arbitration agreement is unenforceable- that the NAF rules would allow the Appellants to somehow escape liability for alleged misconduct. *See* Answer Brief, note 12. This argument fails for the same reasons that her arguments regarding the class waiver fails. See Section b, *infra*.

[7] Felts's argument at pages 31-32 of her Answer Brief that severance is inappropriate simply does not address the facts of this case that the only portion of the arbitration agreement attacked by Felts was the allegedly unconscionable class action waiver. If this Court were to uphold the district court's decision that the class action waiver was unenforceable, all that would be left is an agreement to arbitrate that was not generally attacked by Felts. For this and the reasons set forth in CLK's Opening Brief at pages 25-26, this Court must enforce the remainder of the parties' arbitration agreement should it uphold the district court's ruling on the class action waiver.

i. Felts Seeks A Recovery Of At Least $3,900.00.

At the outset, there is no dispute that Felts *is seeking thousands of dollars* in damages from CLK. She seeks a total of $1,300.00 in actual damages, plus trebled damages, for a total of at least $3,900.00. See RP, 3-4, 11. The math is indisputable. However, Felts attempts to distract the Court's attention from the substantial nature of her claims by urging that the loans be considered separately. Her argument is squarely at odds with how Felts has proceeded in this matter.

In her pleadings, at the hearing below, and in this appeal, Felts has consistently taken the position that her loans were from, and CLK is responsible for, a single lending operation. Thus, at the hearing below, her counsel asserted that her loans were from, "different Internet payday lenders that all trace back somehow to CLK." Tr. at 15:12-13. Likewise, in her Answer Brief in this Court, Felts asserts that "Defendants jointly operate their lending enterprise . . . and that CLK is the 'man behind the curtain." Answer Brief at note 3. Clearly, Felts has not treated the transactions separately, but has instead launched a singular attack against CLK for all three of her loans. Felts cannot now parse her claims solely to squeeze her case within the narrow confines of the *Fiser* ruling. And even if she were permitted to do so, each one of her claims exceeds $1,800, and thus are not "small consumer claims" within the meaning of *Fiser*.

Perhaps realizing that the amount of damages she seeks takes her case far outside of the *Fiser* decision, Felts asserts that the amount of damages at issue in this case as compared to *Fiser* is "a distinction without a difference." *See* Answer Brief, 27. As explained at length in CLK's Opening Brief, the scant amount of damages involved in the *Fiser* case was the *sine quo non* of the entire *Fiser* decision. *See* Opening Brief, 17-20. It was the lack of motivation provided to an individual plaintiff in recovering a "scant amount" of damages that underpinned the entire rationale for the decision. This matter involves more the two hundred (200) times the amount of damages than at issue in *Fiser,* and application of that ruling to this matter was error.[8]

ii. The UPA's Statutory Award Of Attorney Fees is Designed Specifically to Support Claims Involving Small Recoveries

Felts next claims that the availability of statutory attorney fees should not be considered by this Court because such awards are insufficient or are an unpredictable source of recovery. This claim must be rejected. CLK cited numerous cases in its Opening Brief to support the proposition that the *very*

[8] The affidavit evidence submitted by Appellee must be rejected. As set forth, *supra*, Appellee seeks a recovery of $3,900.00, at a minimum. Each and every affidavit she submitted dealt with a hypothetical claim of $500.00. Even if trebled, these affidavits would only apply to matters involving considerably less than half the damages at issue in this case. They are therefore irrelevant and should be rejected.

purpose of the statutory award of attorney fees under UPA is to make bringing small value cases- "$100 to $300"- viable. *See* Opening Brief, 20-22. These cases, some of which involved damages amounts less than those involved in this matter, involved numerous examples of awards of attorney fees well in excess of the actual recovery. Felts cites no authority to the contrary.

Additionally, Felts' claims that the statutory attorney fees are an uncertain source of recovery should be categorically rejected by this Court. The UPA provides that the court "shall" award attorney fees to a prevailing plaintiff. The cases Felts cites to support her proposition that courts may reduce fees are not New Mexico cases and do not involve the UPA. Under the UPA New Mexico courts have made it clear that full attorney fees are paid to a prevailing plaintiff regardless of the amount of damages awarded. *See e.g., Aguilera v. Palm Harbor Homes, Inc.*, 2004 NMCA-120, 136 N.M. 422, 99 P.3d 672 (N.M.App. 2004) (explaining the purpose of attorneys' fees and costs award under the UPA is to encourage plaintiffs to pursue justice even where the amount of damages involved are minor). Because Felts has offered no evidence or New Mexico authority to contradict this statutory mandate, her claims are pure speculation. *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (holding that speculation as to cost/fees cannot be a basis for invalidating an arbitration agreement).

Moreover, a prerequisite to the validity of Felts' argument here is a presumption that a New Mexico Court will refuse to implement the attorney fee provisions of the UPA. Such a presumption is baseless and is contrary to the basic tenet of law that there is a presumption that public officials will obey the law. *Davis v. Westland Development Co.*, 81 N.M. 296, 298, 466 P.2d 862, 864 (N.M. 1970) (ruling that public officials are presumed to have obeyed statutory mandate); *see also Blancett v. Dial Oil Co.*, 2008-NMSC-011, ¶ 11, 143 N.M. 368, 372 (2008) (ruling New Mexico courts are required to apply the plain language of the UPA as written). The UPA requires a court to award attorney fees and costs to a prevailing plaintiff; Plaintiff's argument that such an award is "uncertain" must be rejected.

c. The District Court's Decision Finding The Class Action Waiver Unenforceable Is Preempted By Federal Law

Controlling principles of federal law espouse a strong policy favoring arbitration. See CLK Opening Br. at pp.15-16, 23. These policies preempt any state law provision that discriminates against arbitration or is inconsistent with the FAA. *Preston v. Ferrer*, 552 U.S. 364, 352 (2008). Felts' argument that the class action waiver is unenforceable relies exclusively upon the application of New Mexico contract law as announced in *Fiser*. *See e.g.*, Answer Brief, 23-27 However, "[w]hile the interpretation of an arbitration agreement is generally a

matter of state law . . . the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen, S.A. v. Animalfeeds International, Corp.*, 130 S.Ct. 1758, 1773(2010). The Court held that these "rules of fundamental importance" include "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." *Id.* at 1775. If a contracting party cannot be compelled to submit disputes for resolution on a class basis absent an express agreement to do so, then, *a fortiori,* where a contracting party has specifically agreed to *not* submit disputes to for resolution on a class basis, that contracting party cannot be compelled to resolve a dispute on a class-basis.

Felts argues that *Stolt-Nielsen* was only intended to apply to sophisticated parties and not to consumer contracts and thus has no impact on this case. However, there is absolutely nothing in *Stolt-Nielsen* that limits its decision as Felts suggests. Felts relies on a suggestion in Justice Ginsburg's dissenting opinion in *Stolt-Nielsen*, but notwithstanding the lack of weight to this authority, Felts' position is undermined by the fact that Justice Ginsburg relies upon a case involving a consumer claim for a mere $30.00. *Stolt-Nielsen*, 130 S.Ct. at 1758 (Ginsburg, J., dissenting). Accordingly, Felts' attempt to distinguish *Stolt-Nielsen* should be rejected.

CONCLUSION

The district court's decision was erroneous and Felts' arguments to the contrary are unavailing. First, the Supreme Court's recent decision in the *Rent-A-Center* case which Felts' did not address in her Answer Brief, mandates this entire matter be sent to arbitration. Also, in an attempt to revive the district court's decision, Felts impermissibly relies upon arguments not made to the district court, arguments that are premised on an incorrect amount of claimed damages, and arguments based upon an impermissible presumption that a New Mexico Court will violate the UPA. Thus, Court must reverse the district court and remand this matter with instructions to send this entire case to arbitration.

Respectfully submitted this 29th day of July, 2010.

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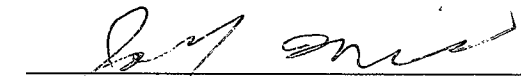
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Rule 12-213(F) NMRA. The foregoing brief, including footnotes, contains 4,331 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2007.



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