IN THE NEW MEXICO COURT OF APPEALS

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

Plaintiff-Appellee,

v.

CLK MANAGEMENT, INC. f/k/a
BAT SERVICES and
CASH ADVANCE NETWORK, INC.

Defendants-Appellants.

No. 29,702
Consolidated with No. 30,142

Second Judicial District Court
No. CV 2008-13084
The Honorable Nan Nash

BRIEF IN CHIEF OF APPELLANT CASH ADVANCE NETWORK, INC.

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this Brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2007, the body of the Brief-in-Chief, as defined by Rule 12-213(F)(1), contains 7,807 words.

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I. SUMMARY OF THE PROCEEDINGS

A. NATURE OF THE CASE

This is an appeal of the Second Judicial District Court's Order dated November 18, 2009, in which the trial court, relying on *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215, denied Appellant Cash Advanced Network, Inc.'s ("CANI") motion to compel arbitration and stay trial court proceedings pending arbitration of the parties' dispute pursuant to a written arbitration agreement. SuppRP 616, 617. In the arbitration agreement, which is governed by the Federal Arbitration Act, 9 U.S.C. §§1-16 (the "FAA"), Plaintiff Andrea Felts' ("Felts") expressly agreed to submit to binding arbitration all claims and disputes she had in connection with certain loans she obtained from MTE Financial Services, Inc. ("MTE"). RP1:87, 89; RP2:570, 572. Just as important, the arbitration agreement unmistakably requires that the arbitrator determine in the first instance whether the agreement is enforceable and whether Felts' claims are arbitrable.

B. SUMMARY OF BACKGROUND FACTS

This case arises out of certain loan agreements between Felts and MTE, and between Felts and Ameriloan. On December 3, 2007, Felts obtained a loan in the amount of $400.00 from Paycheck Today, a trade name used by MTE, over the internet. The loan, commonly referred to as a payday loan, had an annual interest

rate of 684.375%. RP1:86; RP2:286, 571. The lender on the loan agreement Felts signed is identified as "MTE Financial Services, Inc. d/b/a Paycheck Today." *Id.* Felts claims she paid a total of $650.00 on this loan, and all but $50.00 of that amount was applied toward interest on the loan. RP2:287.

On December 4, 2007, Felts obtained another $400.00 loan from Cash Advance Network, another of MTE's trade names, at an interest rate of 730%. RP1:89; RP2:287, 569. As with the first loan, the lender on the loan agreement Felts signed is identified as "MTE Financial Services, Inc. d/b/a Cash Advance Network." *Id.* Felts claims she also paid a total of $650.00 on this loan, and all but $50.00 of that amount was applied toward interest on the loan. RP2:288.

On February 7, 2008, Felts obtained a loan (again over the internet) in the amount of $500.00 from Ameriloan at a rate of 521.43%. RP1:91; RP2:288, 574. Felts claims she made four payments on this loan. RP2:288. With regard to each of these loans, Felts authorized the lender to make automatic withdrawals from her bank account for the loan payments. RP2:287, 288.

Each of the loans made to Felts is evidenced by a Loan Note and Disclosure (RP1:86, 89, 91; RP2:569, 571, 574 (copies of the same)), which was electronically transmitted to Felts over the Internet. The three Notes are claimed to be virtually identical. RP2:288.

The two MTE loan agreements (collectively, the "Note") contain a binding arbitration agreement which covers all claims and disputes between the parties, including disputes relating to the arbitration agreement:

> AGREEMENT TO ARBITRATE ALL DISPUTES: By signing below and to induce us, MTE Financial Services, Inc. d/b/a Cash Advance Network, to process your application for a loan, you and we agree that any and all claims, disputes or controversies that we or our servicers or agent have against you or that you have against us, our servicers, agent, 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 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 joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A RESPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION. This Agreement To Arbitrate All Disputes shall apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims shall 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 MN 55405." . . .

RP1:87, 90; RP2:570, 572.

The arbitration agreement provides that the cost of a participatory hearing, if one is held at any parties' request, for claims of $15,000 or less will be paid by MTE. The cost of a hearing for claims greater than $15,000 but less than $75,000 would be shared, unless the arbitrator ordered otherwise. To reduce any expense to Felts associated with arbitration, the arbitration agreement provides that a hearing would take place at a location near Felts' residence. *Id.*

The arbitration agreement states that it is made pursuant to a transaction involving interstate commerce, and is governed by the FAA. *Id.* Felts does not dispute that the FAA applies to the arbitration agreement.

The Note contains a governing law clause which provides that federal law and the laws of the jurisdiction where MTE (the lender) is located govern the transaction, and the latter jurisdiction has sole authority to adjudicate issues over all matters. RP1:87, 89; RP2:569, 572.

The arbitration agreement contained in the Note is followed by the following notice:

> NOTICE: You and we would have had a right or opportunity to litigate disputes through a court and have a judge or jury decide the disputes but have agreed instead to resolve disputes through binding arbitration.

RP1:87, 90; RP2:570, 572.

The Note also contains an "Agreement Not to Bring, Join or Participate in Class Actions" which consents, inter alia, to the entry of injunctive relief to stop such a lawsuit, and it contains a "Survival" clause, providing that the arbitration agreement and agreement not to participate in class actions shall survive repayment and/or default of the Note. *Id.*[1]

Felts signed the Note electronically by checking the authorization box, indicating her agreement to the terms of the Note, and typing her name into the electronic signature field below that box. RP1:88, 90; RP2:570, 573.

C. COURSE OF PROCEEDINGS BELOW

1. Felts Files A Lawsuit Despite Her Agreement To Arbitrate All Disputes.

On December 15, 2008, Felts filed this putative class action against MTE; two trade names, Paycheck Today and Cash Advance Network ("CAN"), which Felts alleges are trade names used by MTE; Ameriloan; CLK Management, Inc. f/k/a Bat Services, Inc.; and Pinion Management, Inc.[2] RP1:1. Felts alleges that these entities are in the business or originating and/or servicing internet payday

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[1] The Ameriloan Loan Note and Disclosure contains similar arbitration agreement, choice-of-law clause, and a provision not to participate in class actions. RP1:92; RP1:575.

[2] Ameriloan is a registered trade name and mark of CLK Management, Inc., a Kansas corporation and the parent corporation of Pinion Management, Inc. RP2:300.

loans in violation of New Mexico law. RP1:1, 2. On June 24, 2009, Felts amended her complaint to add CANI as a defendant. RP2:299. While Felts fails to aver a nexus between her and the putative class and all of the defendants, she nevertheless alleges that she is among a class of borrowers who have entered into loan agreements *where any of the defendants* is listed as a the lender. RP2:303, 304. She claims that CANI is under an agreement with MTE and actually does business as "Cash Advance Network." RP2:300. She seeks to hold CANI liable for violations of state law on the basis that the loan practices of all of the defendants are fraudulent and usurious.[3]

2. CANI And CLK Move To Compel Arbitration And Stay Proceedings.

On September 17, 2009, CANI moved to stay the trial court proceeding pending arbitration of Felts' claims or, alternatively, to compel Felts to arbitrate her claims pursuant to the FAA. RP 2:551. CANI argued, among other things, that the FAA governs the enforcement of the arbitration agreement and, because the arbitration agreement covered all of Felts' claims, including claims relating to the enforceability of the arbitration agreement, the issue of arbitration was for the

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[3] Felts asserts these claims: (1) violation of the New Mexico Unfair Practices Act, NMSA 1978, § 57-12-2(D); (2) violations of the Small Loan Act, NMSA 1978, § 58-15-1 *et seq.*; (3) unjust enrichment; (4) equitable disgorgement; and (5) equitable and injunctive relief. RP 2:299-310.

arbitrator, not the court, to decide. RP2:558-563. CANI further argued that, although the District Court previously denied a similar motion filed by CLK Management, Inc. ("CLK") in the same case based upon the ruling of *Fiser*, the court should consider severing the class action waiver clause and enforce the balance of the arbitration agreement in accordance with the parties' agreement. RP2:563-565.

In her opposition to CANI's motion (SuppRP 589), Felts argued that the arbitration agreement was an effort by defendants to hide their alleged unlawful internet payday lending activities. SuppRP 589, 590. She claimed CANI tried to obscure its role in an "unlawful internet lending enterprise," SuppRP 590, and kept their practices and relationships from being exposed through the enforcement of arbitration clauses contained in the loan agreements. SuppRP 591. Felts also argued that CANI, like CLK, had no evidence to rebut the "wealth of evidence" she presented concerning the exculpatory nature of the class waiver. SuppRP 592. To demonstrate that claims like her claims could not find representation in New Mexico, she attached four affidavits, the substance of which showed only that some attorneys maintain the view that small, individual consumer claims are not worth their efforts. SuppRP 600-613.

In its reply, CANI pointed out that, unlike the *Fiser* plaintiff, adequate relief on an individual basis was available to Felts in arbitration under the New Mexico

Unfair Practices Act ("UPA"), Felts' first cause of action, which was specifically designed to encourage litigants to bring and attorneys to handle small consumer claims. SuppRP 639. The *Fiser* Court did not discuss whether the mandatory attorney fee provision of the UPA for successful litigants provides a mechanism for resolution of claims such as those asserted by Felts. Thus, the argument that the arbitration agreement which contains a class waiver is exculpatory under *Fiser* was misplaced. SuppRP 639.

With regard to CLK's earlier March 26, 2009 motion to compel arbitration of Felts' claims, RP1:56, CLK likewise argued for the enforceability of the arbitration agreement. In response to Felts' reliance on *Fiser* for the proposition that class bans in arbitration agreements are unconscionable, RP1:73,77, CLK argued that *Fiser* does not apply because, among other reasons, Felts' claims were not small claims and, when combined with the statutory damages that may be awarded under the UPA, as well as the fact that a prevailing plaintiff is entitled to attorney's fees under the UPA (a provision not considered in *Fiser*), the class waiver contained in the arbitration agreement did not preclude Felts from obtaining relief. RP 2:176-177.

3. The District Court Denies CANI's And CLK's Motions Based Solely On *Fiser*.

On November 18, 2009, the District Court entered an order denying CANI's motion. SuppRP 652, 653. It held that Felts' claims constitute small consumer claims within the meaning of *Fiser* and, as such, "prohibitions against class relief are contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims," and are unenforceable. *Id.* The District Court also held that the class action waiver is not severable from the arbitration agreement. *Id.* The November 18, 2009 Order with regard to the enforceability of the arbitration agreement is virtually identical to the District Court's prior Order dated July 7, 2009 in which it denied CLK's motion to compel arbitration.[4] RP2:312.

On December 10, 2009, CANI timely filed an appeal of the Order dated November 18, 2009. SuppRP 691. In the meantime, CLK had already filed an appeal of the July 7, 2009 Order. RP2:345. Upon the stipulated motion of the parties, by Order dated February 8, 2010, this Court consolidated both appeals.

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[4] Felts and CANI agreed to have the Court decide CANI's motion on the papers. Tr:9/24/09: 24, 25.

II. ARGUMENT

A. STANDARD OF REVIEW.

The arbitration agreement at issue provides that it is governed by the FAA. RP1: 87, 90; RP2:570, 572. Section 2 of the FAA provides that, where a contract evidencing a transaction "involving commerce" contains a written provision to resolve by arbitration a controversy thereafter arising out of such contract or transaction, such written provision is "valid, irrevocable, and enforceable" save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2. There is a liberal policy in favor of arbitration under federal and state law. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468, 478 (1989); *Spaw-Glass Constr. Servs., Inc. v. Vista De Santa Fe, Inc.*, 114 N.M. 557, 558, 844 P.2d 807, 808 (1992) (arbitration is *highly favored* in New Mexico); *Fernandez v. Farmers Ins. Co.*, 115 N.M. 622, 625, 857 P.2d 22, 25 (1993)(reaffirming the strong public policy in New Mexico favoring the resolution of disputes by arbitration). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983).

Under the FAA, the Court's inquiry is limited to two issues: (1) whether the parties entered into a valid agreement to arbitrate and (2) whether the arbitration agreement encompasses the claims asserted. *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 649 (1986).

The standard of review from an order denying a motion to compel arbitration is de novo. *Piano v. Premier Distrib. Co.,* 2005-NMCA-018, ¶4, 137 N.M. 57, 107 P.2d 11. That standard of review applies to each of the issues in this case. Thus, in making the inquiry as to the enforceability of the arbitration agreement, this Court should be guided by the strong and deeply-entrenched policy favoring arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *Moses H. Cone Memorial Hospital*, 460 U.S. at 24 ("Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

B. THE DISTRICT COURT ERRED BY FAILING TO REFER THE QUESTION OF ARBITRATION TO THE ARBITRATOR IN ACCORDANCE WITH THE PARTIES' ARBITRATION AGREEMENT.

CANI argued that, because the parties agreed to have an arbitrator decide all disputes between them, including issues relating to their agreement to arbitrate disputes, the arbitrator, and not the court, should decide whether the arbitration agreement and class waiver was unconscionable. Indeed, the arbitration agreement

provides for arbitration of "any and all claims, disputes or controversies. . .that arise out of your application for one or more loans, the Loan Agreements" and "*this Agreement To Arbitrate Disputes*." RP1:87, 90; RP2:570, 572. It includes all "disputes as to the matters subject to arbitration. . ." *Id.* The arbitration agreement here is not only broad enough to cover all aspects of the parties' relationship and their transaction, *see State of N.M. ex rel. King v. The American Tobacco Co.*, 2008-NMCA-142, ¶14, 145 N.M. 134, 194 P.3d 749, but also unmistakably provides that all disputes regarding the validity and enforceability of the arbitration agreement must be resolved by an arbitrator.

1. The FAA Mandates That Courts Enforce Arbitration Agreements In Accordance With Their Terms.

The question of arbitrability is generally an issue for judicial determination, except where "the parties clearly and unmistakably" agreed that the arbitrator should decide the issue. *AT&T Technologies*, 475 U.S. at 649; *see*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Dream Theater, Inc. v. Dream Theater*, 124 Cal.App.4th 547, 552 (2004). This is because "[t]he terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated." *Christmas v. Cimarron Realty Co.*, 98 N.M. 330, 332, 648 P.2d 788, 790 (1982).

Under the broad reach of the FAA, claims are arbitrable if the issues "touch matters covered by" the parties' contract, regardless of the legal labels attached to those allegations. *Mitsubishi*, 473 U.S. at 625, n. 13. The use of broad arbitration clauses require the court to focus on the subject matter of the dispute, *see*, *K.L. House Construction Co. v. City of Albuquerque*, 91 N.M. 492, 494, 576 P.2d 752, 754 (1978), keeping in mind that there is a "presumption of arbitrability" such that an 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. *AT&T Technologies*, 475 U.S. at 650.

Under the FAA, parties are free to agree to assign the authority to decide issues of arbitrability to the arbitrator. "Just as arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question of 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter . . . A court must defer to an arbitrator's arbitrability decision where the parties submitted that matter to arbitration." *First Options of Chicago*, 514 U.S. at 943 (italic in original). The FAA leaves it to the parties to establish the nature and scope of their arbitration agreement. Thus, the issue of who should decide arbitrability is determined by what the parties agreed in their contract, not state policies. *Casias v. Dairyland Ins. Co.*, 1999-NMCA-046, ¶11, 126 N.M. 772, 975 P.2d 385 (the terms of the parties' agreement set forth the

parameters of the issues to be arbitrated). *See Freedman v. Comcast Corp.*, 190 Md. App. 179, 210-211, 988 A.2d 68, 86-87 (2010)(parties can contract for the arbitrator to determine the "validity, enforceability and scope" of an arbitration clause). Therefore, when parties explicitly provide in their agreement that the arbitrator should decide disputes concerning the arbitration agreement itself, whether the arbitration agreement is enforceable must be decided by the arbitrator, not the court. *See Stewart v. Paul, Hastings, Janofsky & Walker*, 201 F.Supp.2d 291, 292 (S.D.N.Y. 2002) (holding that a claim that the arbitration agreement was unconscionable was to be decided by the arbitrator where the parties agree that the arbitrator would resolve disputes as to whether the arbitration clause was void or voidable).

2. The Parties Here Delegated To The Arbitrator The Authority To Decide All Issues, Including Whether The Arbitration Agreement Is Unconscionable.

In this case the parties have agreed that the arbitrator, not a court, would decide issues regarding not only the parties' loan agreement, but also the arbitration agreement. The clear and unmistakable language in the arbitration agreement grants to the arbitrator the exclusive jurisdiction to determine whether the arbitration agreement is enforceable. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 451-52 (2003) (plurality op.) (when "parties agreed to submit to the arbitrator 'all disputes, claim, or controversies arising from or

relating to this contract or the relationships which result from this contract,'. . . the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question" whether the agreement forbids the use of class arbitration).

In its newly issued opinion, *Stolt-Neilsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. _____, 2010 WL 1655826 (April 27, 2010), the U.S. Supreme Court restated the principle that arbitration "is a matter of consent, not coercion," and that private agreements to arbitrate are enforced according to their terms. *Id.* at 12. The Supreme Court held that the parties may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to do so.[5] In this case, the District Court disregarded the clear and unmistakable language of the parties' arbitration agreement that the arbitrator was to decide all disputes concerning the parties' arbitration agreement. By doing so, the District Court failed to take into consideration the well established law that arbitration is a matter of contract between the parties. *AT&T Techs., Inc.*, 475 U.S. at 648.

Moreover, the FAA leaves it to the parties to "specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. Here, the

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[5] On May 3, 2010, the U.S. Supreme Court granted certiorari in *Am. Express Co. v. Italian Colors Restaurant*, 2001 WL 1740528 (U.S. May 3, 2010), vacated the judgment in which the Second Circuit Court of Appeals held that the question as to the enforceability of a class action waiver in an arbitration agreement was for the court, rather than the arbitrator to decide, and remanded the case for further consideration in light of *Stolt-Neilsen*.

parties incorporated the Code of Procedure of the NAF in their arbitration agreement, which provides for arbitration "under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed." RP1:87, 90; RP2:572, 570. Rule 20 of the Code of Procedure of the NAF governs the authority of arbitrators and provides that the arbitrator shall have the power to rule on all issues, including questions of arbitrability and the validity and enforceability of the arbitration agreement, and unconscionability.[6] RP2:562.

By adopting the rules of the NAF, the parties committed to provide the arbitrator with the exclusive authority to decide jurisdiction. When the parties incorporate rules into their arbitration agreement, as in the arbitration agreement at issue, the court must review those rules as it would any other contract under New

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6 Rule 20 states:

> "An Arbitrator shall have the power to rule on all issues, Claims, Responses, questions of arbitrability, and objections regarding the existence, scope, and validity of the Arbitration Agreement including all objections relating to jurisdiction, unconscionability, contract law and enforceability of the Arbitration Agreement."

The arbitration agreement provides that the rules of the NAF may be obtained at www.arb-forum.com. RP1:87, 90; RP2:572, 570. The New Mexico courts have cited to arbitration rules as authority in governing arbitration. *See, e.g., Five Keys, Inc. v. Pizza Inn, Inc.*, 99 N.M. 39, 41-42, 653 P.2d 870, 872-73 (1982). A court may take judicial notice of such rules. *See* NMRA, Rule 11-201(B)(1) and (2); *Century Satellite, Inc. v. Echostar Satellite, LLC*, 395 F.Supp.2d 487, 493 (E.D. Tex. 2005) (judicial notice taken of AAA rules).

Mexico law. *See Medina v. Holguin*, 2008-NMCA-161, ¶9, 145 N.M. 303, 197 P.3d 1085. When the rules incorporated by the parties in their agreement delegate exclusive jurisdiction to the arbitrator, all issues regarding arbitration, including as in this case whether the arbitration agreement is unconscionable and whether arbitration should be on a class basis, must be left for the arbitrator to decide, not the court. *See Brake Masters Systems, Inc. v. Gabbay,* 206 Ariz. 360, 366-367, 78 P.3d 1081, 1087, 1088 (2003) (by incorporating AAA rules in their agreement, parties agreed that the arbitrator would decide arbitrability issues); *Terminix Int'l Co. v. Palmer Ranch Ltd.*, 432 F.3d 1327, 1333 (11th Cir. 2005) (under AAA rules incorporated by the parties in their arbitration agreement, arbitrator is to determine questions of arbitrability); *Anderson v. Pitney Bowes, Inc.*, 2005 WL 1048700 *2 (N.D. Cal., May 4, 2005) (parties' agreement gave arbitrator authority to resolve all claims, including questions of unconscionability); *Dream Theater, supra* (agreement which specified that arbitration would be held in accordance with AAA rules evidenced the parties' intent that the arbitrator was to decide whether the dispute was subject to arbitration); *Smith v. Gateway, Inc.*, 2002 WL 1728615 *3 (Tex. App.-Austin, July 26, 2002) (claim that the arbitration agreement was unconscionable was for the arbitrator to decide); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472 (1st Cir. 1989) (incorporation of ICC rules evidence the parties' intent for the arbitrator to decide all issues).

Felts relied upon *Sisneros v. Citadel Broadcasting Co.*, 2006-NMCA-102, 140 N.M. 266, 142 P.3d 34 below for the principle that the court, not the arbitrator, must decide whether a valid agreement to arbitrate exists. Unlike *Sisneros*, Felts did not claim that she was fraudulently induced into an agreement to arbitrate her claims, or that CANI made any misrepresentation regarding the existence of the arbitration agreement in the Note. She did not challenge the existence of the arbitration agreement, or that she knowingly entered into the arbitration agreement. Instead, the allegations of Felts' complaint challenge the validity of defendants' lending practices and the validity of the Note as a whole, not the arbitration agreement. As such, the validity of the arbitration agreement should have been decided by the arbitrator. *See Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006).

Moreover, Felts has never disputed that the arbitration agreement is governed by the FAA. She did not challenge that the arbitrator would determine issues regarding whether arbitration would proceed on an individual, a class, or a consolidated basis. In fact, Felts did not necessarily object to arbitration, so long as, among other things, the parties would agree to have the arbitrator decide whether to certify the action as a class arbitration. RP2:596, 614.

There was no evidence or even suggestion that the class waiver rendered either party's agreement to arbitrate their disputes to be involuntary, or that the

class waiver has any bearing on whether the parties entered into a binding agreement. The challenge to the class waiver presented an issue of enforceability of the arbitration agreement based on the issue of unconscionability. However, according to the parties' agreement, the arbitrator has exclusive jurisdiction to decide all issues relative to arbitration, including Felts' defense of unconscionability. Consequently, the District Court erred in deciding at the outset whether the arbitration agreement was enforceable because it contained a class waiver. *See Ernst & Young LLP v. Martin*, 278 S.W.3d 497, 500-501 (Tex. App.-Houston 2009) (arbitration agreement enforced where there was no argument that the parties did not knowingly agree to arbitrate claims or, specifically, agree to allow the arbitrator to decide the issue of enforceability of the contract). *But see Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App.4th 138, 67 Cal. Rptr.3d 120 (1st Dist. 2007) (holding that a provision authorizing the arbitrator to decide unconscionability was unconscionable).

Because the arbitration agreement (1) incorporates the Code of Procedure of the NAF, and (2) provides the arbitrator, not the court, must decide all issues relative to arbitration, including the validity and enforceability of the arbitration agreement and whether Felts may pursue her claims on a class basis, the District Court erred when it decided whether the arbitration agreement was unconscionable because it contained a class waiver.

C. THE DISTRICT COURT ERRED IN HOLDING THAT THE ARBITRATION AGREEMENT IS UNENFORCEABLE.

1. Felts Did Not Meet Her Burden Of Showing That The Arbitration Agreement Was Unconscionable.

A party claiming unconscionability has the burden of showing the absence of meaningful choice by the party, or procedural unconscionability, and terms that are illegal, contrary to public policy, or grossly unfair, or substantive unconscionability. *See Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985); *see also, State ex rel. Udall v. Colonial Penn Ins. Co.*, 112 N.M. 123, 126, 812 P.2d 777, 780 (1991). An analysis of unconscionability must focus on "the circumstances as they existed at the time the contract was formed." *Guthmann*, 103 N.M. at 511, 709 P.2d at 680.

As stated above, Felts did not challenge that she knowingly and voluntarily entered into a valid arbitration agreement that is governed by the FAA. She admitted in her complaint that all of the loan agreements she entered into with either MTE or Ameriloan contained an arbitration agreement. RP1:004; RP2:302-303. She did not and could not claim surprise; the arbitration agreement appears prominently in the Note and almost immediately above Felts' authorization and the box where she typed her name. RP1:87, 90; RP2:570, 572. She did not contend that the arbitration agreement was forced upon her or that she had no choice but to

sign the form of loan agreements offered to her. Rather, she sought out a loan by surfing the Internet.

Felts presented no evidence that the arbitration agreement was unconscionable. Her claim of unconscionability and the District Court's decision was, based on *Fiser's* holding that in cases involving small consumer claims, an arbitration agreement which contains a class waiver is against public policy. However, as set forth below, not only are the facts of *Fiser* distinguishable, but also the holding has no application in this case.

2. Unlike *Fiser*, Felts Has A Meaningful Remedy Available To Her In Arbitration, Even If Her Claim Is Considered To Be A Small Claim.

The District Court's basis for finding the arbitration agreement unenforceable was that Felts' claim constitutes a "small claim" under *Fiser* and, as such, the prohibition against class relief is contrary to New Mexico's public policy of encouraging a resolution of small consumer claims. SuppRP 652. The New Mexico Supreme Court in *Fiser* did not find that class action waivers were *per se* unconscionable. Rather, the Court held that the class action waiver met the test for substantive unconscionability, on the facts of that case, because it violated New Mexico law "by depriving small claims consumers of a meaningful remedy and exculpating Defendant from potential wrongdoing." *Fiser*, 2008-NMSC-046, at ¶21.

Central to the issue in *Fiser*, the Court stated, was the "scant" amount of damages alleged – "just ten to twenty dollars." *Id.* at ¶3. Indeed, the Court stated "'only a lunatic or a fanatic sues for [ten to twenty dollars.].'" *Id.* at ¶17. There was no evidence in this case that Felts' or any putative class member's claim was similar to the amount that the Court in *Fiser* classified as a "small claim," or that the attorney's fees, costs, and time spent by the attorney would exceed the amount of Felts' claim.[7] *Id.* at ¶17. Felts presented no evidence that she would be unable to vindicate her rights in arbitration absent being a member of a class. The affidavits submitted by Felts in opposition to arbitration only showed that some attorneys in New Mexico maintain the view that small, consumer claims are not worth their effort. SuppRP2 600-613. However, that is not the standard by which the arbitration agreement should be reviewed. The U.S. Supreme Court has repeatedly stated: Arbitration is appropriate "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000) *citing Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Mitsubishi Motors Corp.*, 473 U.S. at 637.

[7] The recovery Felts seeks on the MTE loans alone is $650 for each loan, plus treble damages (or $3,900), plus her attorneys' fees and costs. RP2:301, 302, 309.

The arbitration agreement at issue does not prevent Felts from vindicating her rights; it does not excuse liability if she prevails and, therefore, cannot be deemed to be exculpatory. By holding that the arbitration agreement is unconscionable because of the class waiver, the District Court has placed state policy preferences above Congress's policy of ensuring the enforcement of arbitration agreements under the FAA and held an arbitration agreement, enforceable under the FAA, was invalid simply because Felts wants to be a member of a class.

Moreover, there is nothing in *Fiser* to suggest here that Felts' ability to seek a recovery is hampered by the amount of her claim. In fact, the New Mexico legislature has created fee shifting statutes to encourage litigation of claims that would otherwise involve only nominal recoveries. For example, the New Mexico Unfair Practices Act, NMSA 1978, §57-12-1 *et seq.* ("UPA"), (under which Felts makes a claim) encourages consumers to initiate and attorneys to handle claims where amounts at issue are small. *Jones v. General Motors Corp.*, 1998-NMCA-020, ¶24, 124 N.M. 606, 611, 953 P.2d 1104, 1109. The UPA would allow Felts to recover her counsel fees, costs, and treble damages if she were to prevail. *See* NMSA 1978 §57-12-10(C).

New Mexico courts have rejected similar arguments concerning the cost of bringing individual suits, rather than on behalf of a class, as being belied by the

fact that the UPA awards fees and costs. In *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶46, 136 N.M. 599, 103 P.3d 39, the court noted benefits of proceeding on an individual basis under the UPA. They included a potential waste of judicial resources and costs of adjudicating uncertain issues in a class action, and, therefore, any subsequent litigation on the same issue would be less complicated and costly. Moreover, the court noted that damage issues are less complicated and costly in an individual action than a class action which could require compiling and analyzing hundreds of thousands of individual claims. On the issue of whether a class action was a superior method of adjudication when scant amounts were involved, the Court stated:

> Plaintiffs emphasize that their claims are too small to justify the costs of individual actions so there is no other practical alternative to litigate their claims. We disagree with the premise that there that there is no other practical alternative. It is entirely feasible for Plaintiffs to bring their claims individually under the UPA. Theirs is the very type of claim the legislature envisioned when it enacted the UPA.

The Court also pointed out that individuals pursuing UPA claims are not limited to a recovery of actual damages as are class members, but benefit further from a potential recovery of statutory and treble damages to which class members are precluded. *Id.* at ¶45. *See also, Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 632-633 (D.N.M. 2007) (rejecting plaintiff's argument that a class action is a superior means of resolving a dispute because of the cost of bringing an individual

suit); *Ratner v. Chemical Bank*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ($20,000 counsel fee in case involving minimum statutory damages of $100); *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 16 (D.D.C. 1973) (because "an individual plaintiff will recover a minimum of $100, plus attorneys' fees and costs . . . the incentive offered by a class action is not necessary to enforce the provisions of the Act"). The District Court did not consider that, in addition to providing a less expensive alternative to litigation, from the perspective of the consumer litigant, rather than the attorney, an individual action may in fact be more lucrative by providing an efficient and cost effective resolution of the claim and, under the UPA, possibly treble damages which are not available to members of the class other than the named plaintiff, together with the opportunity to chose an expert adjudicator to resolve their special dispute. *See Stolt-Neilsen*, 2010 WL 1655826 at *13.

In case after case, courts have rejected unconscionability arguments where the plaintiff had the availability of remedies even absent participation in a class. *See Brooks*, *supra* (noting the benefits of proceeding on an individual basis); *Graybeal, supra* (incentive offered by a class action are lessened when attorneys fee and costs are recoverable); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (court enforced similar consumer arbitration clause, barring use of class mechanisms, contained in a consumer short term loan agreement in case involving

small claim); *Jenkins v. First American Cash Advance of Georgia*, 400 F.3d 868 (11th Cir. 2005) (holding that waiver of class arbitration in an arbitration agreement in a payday loan contract does not render the arbitration agreement unconscionable and unenforceable); *Snowden v. Check Point Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (holding an arbitration agreement in a deferred deposit check transaction contract was not unconscionable because it contained a provision excluding arbitration on a class basis); *Gras v. Associates First Capital Corp.*, 346 N.J. Super. 42 (App. Div. 2001) (holding that the objectives of the applicable consumer fraud act; compensating plaintiff for loss, punishing the wrongdoer with the imposition of treble damages, and awarding counsel fees, can be vindicated in an arbitration forum); *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) (arbitration clause precluding consolidation with other claims was not unconscionable). In this case, the District Court's analysis does not even consider the remedies available to Felts outside of a class action.

While *Fiser* held on a general level that class actions should be made available for small claims, the Supreme Court did not address whether a class action waiver provision is unconscionable even where a statute is involved that specifically provides for awards of attorney's fees and costs to the prevailing party in order to encourage attorneys to bring small claims and provide a means for redress. While one of the plaintiff's claims in Fiser was based on the UPA, the

Fiser Court did not discuss the attorney's fee provision of the UPA at all, and thus it is an open issue whether the attorney's fee provision of the UPA renders Felts' claim economically viable within the meaning of *Fiser*. Unlike *Fiser,* it is clear in this case that Felts, who seeks recovery of thousands of dollars, attorney's fees and her costs available under the UPA, can effectively and economically vindicate her rights in arbitration.

3. *Fiser* Should Not Apply To This Arbitration Agreement.

"On [the] facts" of the case, the *Fiser* decision created a public policy exception to the general policy of favoring arbitration when the case involves small claims. *Fiser*, 2008-NMSC-046, at ¶21. The District Court found that Felts' claims fit within that classification of small claims and, therefore, the class waiver contained in the Note was contrary to New Mexico public policy. The District Court's reading of *Fiser* is at odds with the general federal policy of promoting arbitration because the enforceability of an arbitration agreement under the FAA should not depend on the value of the claims subject to arbitration. Congress enacted the FAA to ensure that arbitration agreements are placed upon the same footing as other contracts. *Gilmer*, 500 U.S. at 24. Under preemptive federal law, the court's duty under the FAA is to enforce arbitration agreements according to the terms the parties choose to include in them. *See Doctor's Associates v. Casarotto*, 517 U.S. 681, 687 (1996)(holding statutory restrictions on arbitration

were pre-empted by the FAA). To expand *Fiser* beyond the facts of that case contravenes the fundamental principle of the FAA because it creates a standard for determining whether a contract provision is unconscionable and applies a principle of unconscionability that does not apply to other contracts under New Mexico law.

D. THE DISTRICT COURT ERRED IN HOLDING THAT THE CLASS WAIVER MAY NOT BE SEVERED.

Even if this Court were to take issue with one or more of the provisions of the arbitration agreement, the arbitration agreement is otherwise fair and mutual and, therefore, any unconscionable provision may be severed or modified and the balance of the agreement enforced.

The District Court in this case found that "prohibitions against class relief" are contrary to New Mexico's public policy of encouraging the resolution of small consumer claims. SuppRP 652. However, other than the class arbitration waiver, the District Court did not express concern about the fairness or reasonableness of other aspects of the arbitration agreement. In fact, in light of federal and New Mexico state policy favor the enforcement of arbitration agreements in accordance with the FAA, the District Court could not have concluded that the arbitration agreement itself was contrary to public policy. Therefore, to invalidate the arbitration agreement on the sole basis that it contains a class arbitration waiver

alone would undermine the federal and state policy favoring the enforcement of arbitration agreements.

In advancing the policy favoring the enforcement of arbitration agreements, courts have without reluctance severed unenforceable provisions in arbitration agreements, including class arbitration waivers in cases involving small claims, and maintained the enforceability and integrity of the balance of the parties' arbitration agreement. *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1, 26, 912 A.2d 88, 103 (2006) (severing "exculpatory" class waiver and enforcing remainder of the arbitration agreement to arbitrate disputes under the Code of Procedure of the National Arbitration Forum); *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 63 P.3d 979 (2003) (severance is proper when the only unenforceable provision was a one-sided appeal term); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (severing the class arbitration ban provision from the arbitration agreement and holding that arbitration should proceed on a class or consolidated basis); *Cohen v. Chase Bank, N.A.*, 2001 WL 183542 (D.N.J. 2010) (where class waiver violates public policy, it can be severed from an arbitration agreement); *Parker v. American Family Ins. Co.*, 315 Ill. App.3d 431, 435, 734 N.E.2d 83, 86 (3 Dist. 2000) ("[I]n order to preserve the parties' agreement to the greatest extent possible and because arbitration is an encouraged form of dispute resolution in Illinois, we hold that only the trial *de nova* clause is unenforceable.").

The law of New Mexico is no different. The Supreme Court of New Mexico has held that where a contract contains an unconscionable term a court may enforce the remainder of the contract without the unconscionable term. *Padilla v. State Farm Mutual Automobile Insurance Co.*, 133 N.M. 661, 669, 68 P.3d 901, 907 (2003) (severing from an arbitration agreement a *de novo* appeal provision as being a violation of public policy and leaving the remainder of the arbitration agreement intact).

While we recognize in *Cordova v. World Finance Corp. of New Mexico*, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901, 911 (2009) and *Fiser* the Supreme Court of New Mexico chose to invalidate the entire arbitration agreement rather than severing the unconscionable portion thereof, both of those cases are quite distinguishable from this case. In *Cordova*, the arbitration agreement gave the lender the unilateral right to proceed in court. The Supreme Court concluded that it could not re-write the agreement to cure the lack of mutuality without interfering with the parties' reasonable expectations. The arbitration agreement at issue in this case does not contain any such unilateral or unbalanced provision. Each party is bound to arbitrate their disputes. In *Fiser*, the Supreme Court found that the class action waiver was "central to the mechanism for resolving the dispute" and therefore could not be severed. Here, the District Court made no finding that the waiver was essential to the arbitration agreement. Rather, without discussion, the

District Court merely held that "the class action ban is not severable from the CANI arbitration provision." SuppRP 652, 653.

In reaching this conclusion, the District Court did not consider that the intent of the parties, as expressed in the Note, reflects that the class action waiver is not central to the parties' bargain. In fact, the contract precludes the borrower from bringing a class action only "[t]o the extent permitted by law." RP1:87, 90; RP2:570, 572. This contract language is clear evidence of the parties' intent that the class action waiver would only apply and would only be enforced by the arbitrator "to the extent permitted by law" applicable to the case. Thus, the parties' agreement contemplates that they desired arbitration to proceed even if the class action waiver were not permitted by law. By contrast, in *Fiser*, there was no indication that the parties' contract contained any such similar provision.

In *Kristian v. Comcast Corp.*, *supra*, the U.S. Court of Appeals for the First Circuit deemed similar language in an arbitration agreement governed by the FAA to be a "savings clause" that preserved the validity of the arbitration agreement upon severance of a class action waiver. The court found that the parties implicitly agreed to severance because their contract provided that a class action waiver would be enforced "unless your state's laws provide otherwise." 446 F.3d at 61. The court found that the savings clause showed that the parties anticipated the possible severance of the class arbitration bar and, therefore, was an unmistakable

expression that the class arbitration bar was not a condition of arbitration. *Id.* at 62.

A similar conclusion is warranted here, given the analogous language in the Note. In other words, if the class waiver is found not to be "permitted by law," it is not to be given effect and can be severed from the arbitration agreement. Clearly, the parties contemplated that, despite their strong preference for individual arbitration, class arbitration was a possibility because the class waiver might run afoul of applicable state law governing their contract.

The application of the Code of Procedure of the NAF as agreed to by Felts does not in any way diminish the effect of severance. The NAF Code of Procedure includes Rule 19, which provides for consolidation of claims and parties, and class action guidelines. These rules and guidelines ensures a resolution of the parties' claims and preserves the rights of prospective class members who, under their own arbitration agreements, may affirmatively choose to participate in the arbitration and exercise their right to agree to be bound by a decision in an arbitration proceeding.

The arbitration agreement is not one-sided so that it favors one side over the other; all parties covered by the agreement are bound by the same rules and have the same advantages and disadvantages of arbitration. Neither Felts nor the District Court pointed to anything other than the class waiver to show that the

arbitration agreement is unconscionable under New Mexico law. But there was no finding made by the District Court that the class waiver was critical to the agreement and, therefore, could not be severed. Moreover, there is no evidence that the arbitration agreement is intended to further any purpose other than to provide the parties with an efficient and cost effective means of resolving their dispute.

The effect of striking the class waiver would make the agreement "silent" on the issue and, therefore, in accordance with the parties' agreement to arbitrate all disputes. It would allow the arbitrator to decide the issue of class arbitration pursuant to applicable law and the NAF rules and consider the intention of the parties, among other factors, in deciding class certification issues.

III. CONCLUSION

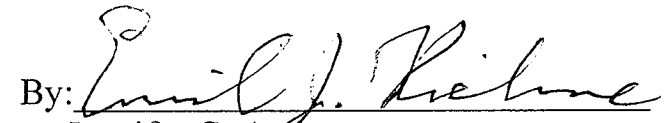
For the reasons set forth above, this Court should reverse the Order of November 18, 2009 and direct the District Court to stay the matter pending arbitration of Felts' claims.

REQUEST FOR ORAL ARGUMENT PURSUANT TO RULE 12-214 NMRA

Oral argument will assist the Court because the case involves the interaction of New Mexico and federal law governing arbitration agreements in consumer cases, and the application of the *Fiser* decision beyond the facts of that case, both of which are matters of public interest.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: 

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Date: May 17, 2010

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Chief of Appellant Cash Advance Network, Inc. was mailed to the following counsel of record, on this 17th day of May, 2010, addressed as follows:

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