IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Oral Argument Requested

REPLY BRIEF OF APPELLANT CASH ADVANCE NETWORK, INC.

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TABLE OF CONTENTS

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, the body of the Brief-in-Chief, as defined by Rule 12-213(F)(1), contains 4,394 words.

TABLE OF AUTHORITIES

New Mexico Cases Page

Other Jurisdiction Cases

Statutes

INTRODUCTION

Felts' brief shows that, in considering the arbitrability of her claims, the trial court erred by disregarding the clear and unmistakable delegation provision contained in the parties' arbitration agreement that "any and all claims, disputes or controversies ... that arise out of ... this Agreement to Arbitrate All Disputes" required the arbitrator, not the court, to decide whether the arbitration agreement was unconscionable. The Supreme Court of the United States, in *Rent-A-Center, West, Inc. v. Jackson*, No. 09-497, 561 U.S. ___, 2010 WL 2471058, *5 (June 21, 2010), held that unless a party *specifically* challenges the delegation provision in the trial court, which Felts did not do, it must be treated as valid and must be enforced under the Federal Arbitration Act, 9 U.S.C. §§1-16 ("FAA").

Felts' brief attempts to undermine the law favoring the enforcement of the parties' arbitration agreement and subject consumer arbitration agreements to a unique level of scrutiny in violation of the FAA. Whether the FAA preempts state laws conditioning the enforcement of arbitration agreements governed by the FAA on the availability of class wide procedures is an issue pending before the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, No. 09-893, 2010 WL 303962 (U.S. May 24, 2010) (granting writ of *certiorari*).

I. THE FACTS DO NOT SHOW THAT CANI WAIVED ITS RIGHT TO ARBITRATION.

A. The Trial Court's Factual Finding Should Not Be Disturbed.

Felts failed to inform this Court that the trial court rejected her argument below and found that CANI did not waive its right to arbitration. Supp. RP 694. Felts did not file an appeal or cross-appeal of the trial court's finding on this issue. Accordingly, this Court should find that it is without subject matter jurisdiction to hear the merits of Felts' argument on this issue. *See Olguin v. County of Bernalillo*, 109 N.M. 13, 15, 780 P.2d 1160, 1162 (1989).

Moreover, the issue of waiver was a factual question for the trial court to decide. *See Garcia v. Marquez*, 101 N.M. 427, 431, 684 P.2d 513, 517 (1984). Felts had the burden of proving waiver, *see Dumais v. American Golf Corp.*, 150 F.Supp.2d 1182, 1191 (D.N.M. 2001), and failed to do so. The trial court found that CANI did not waive its right to seek arbitration. Supp. RP 694. "The rule is that findings of fact unfavorable to appellee, not attacked by cross-appeal, must stand." *Cooper v. Albuquerque Nat'l Bank*, 75 N.M. 295, 307, 404 P.2d 125, 133 (1965). The trial court's decision was based on substantial evidence and, therefore, this Court should not substitute its judgment for that of the trial court by reversing that decision. *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶28, 137 N.M. 26, 106 P.3d 1273.

B. Substantial Evidence Supports A Finding Against Waiver.

Assuming, *arguendo*, that this Court considers the issue of waiver, it must also consider that Felts' contention that CANI waived its right to arbitration because it twice sought "dispositive" relief misstates the record and misapplies applicable law. CANI was not initially named as a defendant. Felts attempted to include CANI in the case by improperly serving it with a copy of the complaint, forcing CANI to move to quash the summons for insufficiency of process and failure to name CANI as a party. RP1:37. Felts later recognized the deficiency of her pleading and moved to amend the complaint to include CANI, acknowledging that both CANI and CLK "specifically dispute that the Court has jurisdiction over them." RP2:283. The court never decided the motion because CANI agreed to withdraw it pending the filing of an amended complaint naming CANI as a defendant. RP1:162. Moreover, the motion was not "dispositive" of any merits issue in the case.

Felts' argument that CANI waived its right to arbitration by filing a motion to dismiss the case because the court lacked jurisdiction over MTE, a necessary and indispensable party, which Felts named as a defendant, but failed to serve with the complaint, is also without merit. Waiver is defined as "[t]he intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of the right." *United Nuclear Corp. v. General Atomic Co.*, 93

N.M. 105, 115, 597 P.2d 290, 300 (1979). Waiver of a right to arbitrate is not to be found lightly and "all doubts as to whether there is a waiver must be resolved in favor of arbitration." *Id.* at 114. Waiver will only be found when a party against whom the waiver is alleged engages in conduct that is totally inconsistent with the right to arbitrate, *and* that conduct results in prejudice to the other party. *See Bd. of Educ. Taos Mun. Sch. v. Architects, Taos*, 103 N.M. 462, 463, 709 P.2d 184, 185 (1985); *United Nuclear*, 93 N.M. at 115 (mere dilatory conduct by the party seeking arbitration, absent prejudice to the opposing party, does not constitute waiver).

The trial court correctly concluded that Felts failed to show that CANI engaged in conduct that was inconsistent with the right to arbitrate. This is because CANI's motion to dismiss addressed the court's jurisdiction, not the merits of the case. A party does not waive the right to arbitration by taking steps, as CANI has done, to protect its rights when claims are asserted against that party in a judicial forum. See *Bernalillo County Med. Ctr. Emp. Ass'n Local Union No. 2370 v. Cancelosi*, 92 N.M. 307, 310, 587 P.2d 960, 963 (1978) (filing of motion to dismiss prior to motion for arbitration does not constitute waiver); *Dean Witter Reynolds, Inc. v. Roven*, 94 N.M. 273, 609 P.2d 720 (1980) (taking defensive action to vacate judgment does not constitute waiver where right to arbitration was asserted before hearing on motion to vacate judgment). Moreover, a waiver cannot

be inferred by CANI's attempt to address initial jurisdictional issues while still asserting its right to arbitration. *See United Nuclear*, 93 N.M. at 115.

The record also shows that Felts was not prejudiced by any of CANI's actions. *See Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989) (under the FAA, inconsistent behavior alone is not enough; the party asserting waiver must have suffered sufficient prejudice). An inquiry into the prejudice requirement focuses on the intent of a party to litigate and reliance thereon by the other party. "[T]his reliance takes the form of preparation for trial in the belief that the other party intends to litigate rather than to demand arbitration." *Bd. of Educ.*, 103 N.M. at 463. Felts obviously did not place any reliance on CANI's conduct; in fact, Felts made her own conditional offer to submit her claims to arbitration. (Supp. RP 614) The merits of this case were not touched upon in CANI's motion to dismiss.[1] No discovery was taken by any of the parties on the issue presented in CANI's motion and, in fact, discovery was stayed pending CLK's appeal of its arbitration motion. The litigation was not at an advanced stage; a trial date was not in sight and CANI did not pursue judicial

[1] Felts states she was "forced" to respond to the exhibits attached to CANI's motion, but she actually relied upon the allegations of her complaint in her response and merely argued that the court should strike those exhibits. RP2:392, 393. Felts claimed that very little was known about the defendants (RP2:404) and argued that "discovery is vital" to determine the issue of MTE's sovereign immunity and the relationship of the defendants. RP2:393-394.

remedies against Felts. Under these facts, Felts cannot have been prejudiced. *See Dumais*, 150 F.Supp. at 1191.

The cases cited by Felts on pages 11 and 12 of her response from other jurisdictions do not support her assertion of waiver. All of those cases involved instances in which the party asserting a right to arbitration engaged in extensive discovery and protracted litigation on the merits of the case, and delayed asserting their right to arbitrate. CANI has not engaged in similar conduct. Rather, CANI carefully, consistently and strenuously preserved its right to compel arbitration by asserting its right to arbitrate in a letter to Felts at the outset (Supp. RP 643), in its motion to protect itself from discovery until the arbitration issue was decided (RP2:462), by objecting to the jurisdiction of the court to proceed in the absence of MTE (RP2:329), and promptly moving to stay proceedings and compel arbitration. RP2:551. For these reasons, the trial court's finding on the issue of waiver should not be disturbed.

II. THE PARTIES AGREED, AND THE UNITED STATES SUPREME COURT MANDATES, THAT THE ARBITRATOR, NOT THE COURT, DECIDES THE ISSUE OF UNCONSCIONABILITY.

Felts asserts the trial court's ruling on the question of arbitrability was correct because she argues: (1) the parties did not clearly and unmistakably agree that the arbitrator would decide the issue of arbitrability; and (2) even if such an

agreement existed, it would be unenforceable. The first assertion[2] is contrary to the plain language of the arbitration agreement, which provides for arbitration of "any and all claims, disputes and controversies" that "arise out of ... this Agreement to Arbitrate All Disputes." RP2:570, 572. Felts' second assertion is contrary to black-letter law under the FAA and precedent set by the U.S. Supreme Court in *Rent-A-Center*.

A. Because Felts Did Not Challenge The Delegation Provision Specifically, It Must Be Treated As Valid And Must Be Enforced.

The Supreme Court in *Rent-A-Center* explained the effect and enforceability of a delegation provision, such as the one contained in the arbitration agreement at issue, as follows:

> **"An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other."**

(Emphasis added). *Rent-A-Center, supra,* at *4. The Supreme Court held that, under the FAA, when a party *specifically* challenges the enforceability of a delegation provision, a court considers *that* challenge, but where a party challenges

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[2] Felts' extended commentary in her footnote 8 cuts both ways. Felts cannot, on the one hand, claim that CANI is liable for making a contract with her in violation of the UPA and the Small Loan Act and, on the other hand, argue that CANI cannot avail itself of the arbitration provision contained in that very contract, which covers any and all claims, disputes or controversies "*no matter by whom or against whom the claim is filed.*" RP2:570, 572 (emphasis added).

the enforceability of an arbitration agreement as a whole, that challenge is for the arbitrator. *Id.,* at *5.

Here, the parties' agreement contains a delegation provision which states: "[Y]ou and we agree that any and all claims, disputes or controversies ... **that arise out of ... this Agreement To Arbitrate All Disputes ...,** including disputes as to the matters subject to arbitration, shall be resolved by binding individual ... arbitration." RP2:570, 572. Felts *did not dispute* that she entered into the arbitration agreement, or that it included within it a delegation of authority to an arbitrator to decide all issues "aris[ing] out of ... this Agreement to Arbitrate All Disputes." Rather, her challenge rested on grounds of unconscionability of the arbitration agreement as a whole. That dispute necessarily "[aro]se out of" the arbitration agreement and was, therefore, clearly and unmistakably delegated to the arbitrator.

Moreover, Felts *did not challenge the delegation provision* as being unconscionable. She merely asserted that the court had to determine whether the arbitration agreement was enforceable. Supp. RP 592, n.4. This argument is contrary to *Rent-A-Center* because, under the holding of that case, where the parties' agreement contains a valid delegation provision that is not specifically challenged, the delegation provision is valid and must be enforced. Since Felts did not allege that the delegation provision was unconscionable, but rather, that the

arbitration agreement as a whole was unconscionable, the issue of arbitrability is for the arbitrator, not the court, to decide.

Felts' reliance on *Buckeye* to support her argument that the court, not the arbitrator, decides whether the arbitration agreement is enforceable is misplaced. The U.S. Supreme Court has rejected the argument that a delegation provision can be disregarded because of an assertion, under state law, that the arbitration agreement as a whole is unconscionable. The U.S. Supreme Court stated that it made no difference that the arbitration provision sought to be enforced in *Buckeye* was contained in a contract unrelated to arbitration, and explained,

> "The severability rule is a 'matter of substantive federal arbitration law,' and we have repeatedly 'rejected the view that the question of 'severability' was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court.'"

Rent-a-Center, at *7 n.4 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)). Under established case law, Felts' claim of unconscionability should have been left for the arbitrator to decide.[3]

[3] Under the NAF rules, the arbitrator has the authority to decide unconscionability. CANI's Brief in Chief, p. 16, n.6. Felts' casual dismissal of these rules ignores preemptive federal law which provides that the parties may "specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

B. Arbitration Is Not Impracticable – The Parties May Choose Their Arbitrator.

The delegation provision is not "made impracticable" by the absence of the NAF as an arbitration forum. This is because the arbitration agreement not only speaks to the issue of which forum is to be used, but also specifies the *rules* that are to apply. The NAF rules provide for the selection of an arbitrator by *mutual consent of the parties*. Supp. RP 645. Contrary to Felts' assertion, those rules are in effect and can be found on the NAF's website. As a matter of contract law, the chosen rules are applicable to the parties' arbitration even though the NAF may no longer be available as the chosen forum. *Medina v. Holguin*, 2008-NMCA-161, ¶9, 145 N.M. 303, 197 P.3d 1085 (rules adopted by parties for arbitration are to be treated like any other contract).

Moreover, the Consent Decree to which the NAF is a party does not negate the arbitrability of this dispute; it merely limits the availability of the NAF as the forum. Section 5 of the FAA fills in this gap by enabling the court to designate or appoint one or more arbitrators where a party "fail[s] to avail himself of [the] method" provided for naming an arbitrator, where "there [is] a lapse in the naming of an arbitrator," or "in filling a vacancy." 9 U.S.C. §5. *See also* NMSA 1978, §44-7A-12(a), which provides that the district court appoints an arbitrator when the method selected by the parties fails; *Brown v. ITT Consumer Financial*, 211 F.3d 1217 (11th Cir. 2000)(rejecting challenge to arbitration agreement where chosen

arbitration forum was unavailable in light of remedy available under Section 5); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1327-28 (9th Cir.1987)(same); *Ex parte Warren*, 718 So.2d 45, 48 (Ala. 1998)("[W]here the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a different arbitrator").

Unlike the trio of cases cited by Felts at page 20, in which courts from other jurisdictions held that the parties' identification of the NAF was the "exclusive" forum for arbitration, nothing here suggests that the NAF is integral to the parties' agreement to arbitrate disputes. *See Adler v. Dell, Inc.*, No. 08-13170, 2009 WL 4580739, *2, 3 (E.D. Mich., Dec. 3, 2009) in which the court disagreed with the reasoning of the case cited by Felts, *Carideo v. Dell, Inc.*, No. 061772, 2009 WL 3485933, *4 (W.D. Wash. Oct. 26, 2009), holding that the mandatory nature of §5 of the FAA evidences Congress' intent that "arbitration remain the prevailing method of resolving disputes" even if the parties' chosen forum is unavailable.

Surely, Felts never considered the NAF integral to her agreement; she argued that the NAF should not arbitrate her dispute (Supp. RP 595) and agreed to submit her claims to arbitration before an independent arbitrator "mutually agree[d]" by the parties in the manner provided by the NAF rules. Supp. RP 614. The selection of the NAF, as opposed to the NAF rules, likewise is not integral to

CANI, which is willing to have another arbitrator appointed. *See Brown*, 211 F.3d at 1222; *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876 (Tenn. 2007)(holding that the choice of a specific forum which is unavailable is not integral to the arbitration agreement); *McGuire, Cornwell & Blakey v. Grider*, 771 F. Supp. 319 (D. Colo. 1991)(naming a forum unwilling to arbitrate some disputes was not central to the agreement since another arbitrator could be appointed under the FAA).

III. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE SOLELY BECAUSE IT PROVIDES FOR ARBITRATION ON AN INDIVIDUAL BASIS.

A. *Fiser* Cannot Be Applied To Create A Per Se Rule Invalidating Consumer Arbitration Agreements.

Felts cannot show that she is unable to vindicate her rights in arbitration as opposed to a judicial forum. *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000)(noting that the Court rejected generalized attacks on arbitration based on suspicion that arbitration weakens protections afforded under the law). So, she sought to invoke *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 464, 188 P.3d 1215 by classifying her claim as "small" under the *Fiser* standard. But *Fiser's* assessment of the size of the claim depended heavily on factors pertinent to that case which are not present here. In particular, the *Fiser* Court identified as compelling the absence of incentives for an individual to pursue a solo action for a recovery of "ten to twenty dollars." *Id.* at ¶17. *Fiser* did not hold that all consumers' lending claims are too small to be pursued by individual

arbitration. Indeed, that result would be the very *per se* rule against arbitration that the Supreme Court disavowed.

The trial court not only failed to consider that Felts' claim was substantially larger than the amount at issue in *Fiser,* but also erroneously focused on Felts' argument that she would not be able to find an attorney to pursue her individual action. *See* Tr. 12:17-13:23. The affidavits Felts relied on to support this argument were largely conclusory and contained little more than the views of a small number of attorneys who would not represent a consumer "against an internet payday lender, regardless of the amount involved," (Supp. RP 603), are predisposed to think that multi-issue cases render the pursuit of individual claims impracticable (Supp. RP 605), or simply are biased against arbitration (Supp. RP 608) or the payday lending industry. (Supp. RP 611). No conclusion can be drawn from these affidavits that Felts could not vindicate her rights in arbitration.

As we pointed out in our Brief in Chief at pp. 23-24, the UPA was designed specifically to encourage consumers to bring claims that would otherwise not be too small to pursue. Contrary to the views of those attorneys who have submitted affidavits on Felts' behalf, the New Mexico Supreme Court has already held that the UPA provides effective remedies to individual claimants, stating:

> "[T]he award of attorney fees and costs on appeal is entirely consistent with the statutory purpose of creating a private remedy to address wrongs resulting from unfair or deceptive trade practices. This aware to parties who successfully press their claims, and uphold

> them on appeal, makes the private remedy ***an effective one,*** especially in view of the sometimes minor nature of the damage claim that the statute specifically contemplates, $100 to $300."

Hale v. Basin Motor Co., 110 N.M. 314, 321-22, 795 P.2d 1006, 1013-14 (1990) (emphasis added). Moreover, Felts' argument based upon on cases from other jurisdictions that judges may be reluctant to award of attorney's fees has no weight in this case. The UPA leave no discretion to trial judges on this issue, but rather, mandates that the court award attorney's fees to the prevailing claimant, regardless of whether the plaintiff proves *any* damages. *See* NMSA 1978, §57-12-10(C).

B. New Mexico Law Is Preempted By The FAA.

The trial court largely ignored that the enforcement of the arbitration agreement at issue is a matter of preemptive federal law under the FAA.[4] There is no question that the FAA (which is applicable to the parties' arbitration agreement) not only placed arbitration agreements on an equal footing with other contracts, but also "'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983)).

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[4] The basis of CANI's motion was that the FAA governed the enforcement of the parties' arbitration agreement and that the court is bound to apply federal substantive law under the FAA, RP1:558-561, and, as such, CANI has not waived this argument.

While unconscionability is a contract defense, the U.S. Supreme Court has rejected the narrow interpretation of this defense to invalidate arbitration agreements, explaining that the FAA precludes state courts from "rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). *See also Buckeye*, 546 U.S. at 446 (under the FAA "the enforceability of [an] arbitration agreement [cannot] turn on [state] public policy.") While the defense of unconscionability may apply to a contract, §2 of the FAA permits the invalidation of agreements to arbitrate only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. New Mexico law does not apply unconscionability to invalidate class action waivers in "any" or all contracts, but only arbitration contracts involving consumers with small claims. Therefore, state laws which render consumer arbitration agreements unconscionable solely because they contain a class waiver are preempted by the FAA.[5]

[5] Felts' assertion in footnote 16 that *Stolt-Neilsen* has no bearing on this case because it neither addresses unconscionability nor involves a consumer claim is misplaced. The Supreme Court restated in that case the rule that private agreements are enforced according to their terms under the FAA. *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S.Ct. 1758, 1773 (2010). This is a preemption holding.

C. The Issue Before This Court Is Pending Before The U.S. Supreme Court In *AT&T Mobility LLC v. Concepcion.*

Although the New Mexico Supreme Court addressed preemption in *Fiser*, this question is of particular importance now that the U.S. Supreme Court has ranted *certiorari* to review this specific issue in *AT&T Mobility LLC v. Concepcion*, No. 09-893, 2010 WL 303962 (U.S. May 24, 2010).[6] In *AT&T*, the Supreme Court will address the question of whether the FAA preempts state law conditioning the enforcement of an arbitration agreement on the availability of class wide procedures where those procedures are not necessary to ensure that the parties are able to vindicate their claims. This issue involves significant state and federal policy considerations regarding the enforcement of consumer arbitration agreements. Should the U.S. Supreme Court decide that an express class waiver is fully enforceable under the FAA, then it is also likely to find that the FAA precludes a state court from utilizing public policy against individual arbitration as a ground for declaring an arbitration agreement to be unconscionable.

Because a decision in *AT&T* will likely affect, and may indeed resolve, the issue before this Court, this Court should delay its decision pending the decision of the U.S. Supreme Court.

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[6] The appeal is from the Ninth Circuit's decision in *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009), which held, similar to *Fiser*, that an arbitration agreement was unconscionable under California law because it required consumers to arbitrate small claims on an individual basis.

IV. FELTS' ARGUMENT AGAINST SEVERANCE HAS NO FACTUAL FOUNDATION.

Felts does not refute the abundant cases cited by CANI that support severance of a class waiver to preserve the integrity of the balance of the parties' arbitration agreement. Rather, Felts argues that severance is inappropriate under *Fiser* and *Cordova v. World Finance Corp. of N.M.,* 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901 (which CANI distinguished in its Brief-in-Chief) because the class waiver was "integral" to the arbitration agreement as shown by (1) CANI's refusal to accept Felts' conditional offer to go to arbitration and permit the arbitrator to decide class issues, and (2) the mention of the class waiver three times in the agreement. The record does not support the conclusion that severance of the class waiver is inappropriate on this basis.

With regard to Felts' first observation, it is noteworthy that Felts' conditional offer to proceed in arbitration was made in April 2009, more than a year after the parties entered into the arbitration agreement, after this case was commenced, and following CLK's motion to compel arbitration of Felts' claims. Supp. RP 614. CANI was not even named as a defendant at the time. It is hard to imagine how rejection of Felts' after-the-fact offer demonstrates an intent by the parties to make the class waiver an "integral" part of their arbitration agreement at the time it was formed.

Felts' second assertion, that reference to the "ban" on class actions three times in the arbitration agreement demonstrates that the class waiver is integral to the parties' agreement, is contrary to the express language of the parties' agreement which precludes a class action only "[t]o the extent permitted by law." RP1:87, 90: RP2:570. 572. Felts does not refute CANI's argument that these words demonstrate that the parties contemplated that claims might be asserted on a class basis and that the class action waiver would be enforced by the arbitrator only "to the extent permitted by law." Under these facts, the class waiver cannot be deemed to be integral to the agreement and, therefore, severance is appropriate.

CONCLUSION

For the foregoing reasons, and those reasons set forth in CANI's Brief-in-Chief, this Court should reverse the Order of November 18, 2009 and direct the District Court to stay the matter pending arbitration of Felts' claims.

Respectfully submitted,

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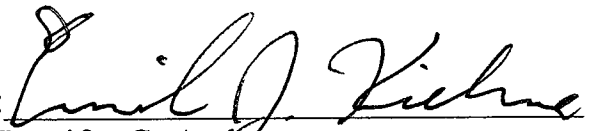
By: 
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