IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ANDREA J. FELTS
on behalf of herself and all others
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 G. Nash

PLAINTIFF-APPELLEE ANDREA J. FELTS' ANSWER BRIEF

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STATEMENT OF COMPLIANCE

As required by New Mexico Rule of Appellate Procedure 12-213(G), we certify that this Brief complies with the type-volume limitation of Rule 12-213(F)(3). The body of this Brief, as defined by Rule 12-213(F)(1), contains 10,945 words.

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I. INTRODUCTION

This case involves the enforceability of a mandatory arbitration clause that Defendants-Appellants Cash Advance Network, Inc. ("CANI"), and CLK Management, Inc., f/k/a BAT Services, Inc. ("CLK") (collectively "Defendants"), have included in their standard consumer loan contracts. However, this case is not actually about arbitration. It is about whether a corporation can prohibit its customers from taking part in a class action (in arbitration *or* in court) when the particular circumstances of the case dictate that the case proceed as a "class action[] or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). As explained below, the uncontradicted evidentiary record in this case establishes that enforcing Defendants' arbitration clause would make it effectively impossible for consumers to bring legal actions against them for relatively small-value, yet demonstrably complex claims. The court below therefore properly held that generally-applicable principles of New Mexico law governing the enforceability of contracts forbid Defendants from attempting to escape liability for the wrongs they have committed against New Mexico consumers.

As this brief will first explain, CANI's appeal should be dismissed because CANI waived its right to compel arbitration by seeking dispositive relief from the court on two separate occasions. CANI is not entitled to a second bite at the apple—in arbitration—merely because its prior attempts to resolve this case on the merits in court were unsuccessful. For this reason alone, this Court should affirm the order denying CANI's motion to compel arbitration.

Second, notwithstanding waiver, this Court should affirm the orders below denying both Defendants' motions to compel arbitration because the district court properly concluded that the issue of enforceability of Defendants' arbitration clause was for the court—not the arbitrator—to

decide. *Rent-A-Center West, Inc. v. Jackson,* No. 09-497, slip op. at 5 n.1. (June 21, 2010), confirms that this issue was for the court to decide because there was no "clear and unmistakable evidence" that Plaintiff-Appellee Andrea J. Felts agreed to delegate this issue to the arbitrator and, regardless, any purported "agreement" with respect to this delegation is unenforceable under generally-applicable principles of New Mexico contract law.

Third, the district court correctly determined, consistent with controlling precedent, that the provision in Defendants' arbitration clause prohibiting class actions is "contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims." RP2:312-13; SuppRP:652-53. As this brief highlights, Felts submitted substantial evidence to the court demonstrating that Defendants' class action ban would effectively exculpate Defendants from liability for small-value, yet complex consumer claims. Defendants have submitted no evidence to the contrary. As such, this Court should affirm the orders below, and hold that Defendants' class action ban violates New Mexico public policy, and is therefore unconscionable.

Fourth, Defendants' class action ban cannot be severed from the remainder of the arbitration clause because it is an essential feature of that clause. As such, the district court properly concluded that the arbitration clause was unenforceable in its entirety.

Finally, contrary to Defendants' assertions, the orders below pose no conflict with federal law, and Defendants waived this argument by failing to present it below.

For all of these reasons, the district court's orders should be affirmed.

II. SUMMARY OF THE PROCEEDINGS

A. RELEVANT PROCEDURAL HISTORY

On December 15, 2008, Felts filed a class action complaint against Defendants alleging violations of the New Mexico Unfair Practices Act ("UPA"), NMSA §§ 57-12-1 *et seq.*, and the New Mexico Small Loans Act, NMSA §§ 58-15-1 *et seq.*, and seeking equitable relief for unjust enrichment, disgorgement of profits, and injunctive relief on behalf of herself and other New Mexico residents who engaged in loan transactions with Defendants. RP1:1-12.[1]

In response to the complaint, CLK filed a motion to stay proceedings in the district court and compel arbitration of Felts' claims. RP1:56-68. Felts opposed CLK's motion, arguing, among other things, that the issue of enforceability of the arbitration clause is for the court to decide, and that the provision in Defendants' arbitration clause prohibiting class actions is unconscionable under generally-applicable principles of New Mexico law. RP1:73-83.

On July 7, 2009, the district court ruled in favor of Felts. RP2:312-13. The court held that it had jurisdiction to decide whether the arbitration agreement was valid because Felts "challenged the arbitration clause itself and specifically the class action waiver contained therein . . . ." RP2:313. After noting Felts had raised small consumer claims within the meaning of *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, 144 N.M. 464 (2008), the court held that the class action ban in CLK's arbitration clause was "contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims." *Id.* The court concluded that

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[1] The First Amended Class Action Complaint, RP2:299-310, which is the operative complaint, is similar in all material respects to Felts' original complaint, except that it names CANI as a defendant.

CLK's class action ban was unenforceable under New Mexico law, and denied CLK's motion to compel arbitration. *Id.*

At no point during the briefing of CLK's motion to compel arbitration or at any time prior to the court's ruling did CANI seek to compel arbitration of Felts' complaint. Instead, CANI first filed a motion to dismiss on the ground that CANI was not related to the entity "Cash Advance Network" that had extended a loan to Felts. RP1:37-41. In response, Felts offered to dismiss CANI if it provided a sworn statement that it "had nothing to do" with the loans and was not associated with the other defendants. RP2:400-01. CANI failed to provide any statement or other information that would support its contentions. Subsequently, CANI withdrew its motion. RP2:315-17. CANI next filed a second motion to dismiss where it admitted that it was involved in extending the "Cash Advance Network" loan, but argued that Felts' claims should be dismissed because she had not served Defendant MTE Financial Services, Inc., which purportedly possessed tribal sovereign immunity that somehow cloaked all Defendants. RP2:329-36. The court denied CANI's second motion to dismiss. SuppRP:616.[2]

On September 17, 2009—over nine months after Felts filed her original complaint and after CANI filed two separate motions to dismiss on grounds having nothing to do with arbitration—CANI filed its own motion to compel arbitration of Felts' claims based on the same arbitration clause that the court earlier found to be unenforceable. RP2:551-67. Felts' opposition argued, among other things, that neither Defendant has offered any evidence to refute Felts' substantial body of evidence regarding the exculpatory nature of Defendants' class action ban,

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[2] This Court summarily denied CANI's application for interlocutory appeal concerning its failed second motion to dismiss. SuppRP:718.

SuppRP:591-92, and that CANI waived its right to compel arbitration by requesting dispositive relief from the court on two occasions prior to seeking to enforce the arbitration clause, SuppRP:593-95. Felts further argued that Defendants' designated arbitral forum, the National Arbitration Forum ("NAF"), no longer arbitrates consumer cases pursuant to a consent decree NAF entered into with the Minnesota Attorney General in July 2009, which makes arbitration of Felts' claims impossible. SuppRP:595-96. Finally, Felts argued that the class action ban, and the provision designating NAF as Defendants' chosen arbitral forum, are two integral provisions that are not severable from the remainder of the arbitration clause. SuppRP:596-98.

On November 18, 2009, the district court denied CANI's motion to compel arbitration in an order nearly identical to its July 7, 2009 order denying CLK's motion, adding only that the "class action ban is not severable" from the arbitration clause. SuppRP:652-53.

Both CLK and CANI timely filed appeals, RP2:345; SuppRP:691, which this Court consolidated, SuppRP:783.

B. FACTS RELATING TO DEFENDANTS' BUSINESS PRACTICE AND LOAN CONTRACTS

At the time Felts filed her complaint, Defendants were in the business of offering New Mexico consumers short-term loans, commonly referred to as "payday loans." RP2:300-302. Defendants' form of payday lending entailed transmitting loans (often ranging from $400 to $500) over the internet. *Id.* These loans were repayable by making four payments of interest only, with each payment after the fourth payment to be made in an amount equal to at least the accrued interest plus $50 of the principal. *Id.* Defendants extended these loans at interest rates

ranging from 521% to 730%, and required their customers to authorize automatic withdrawals from their bank accounts for the payments. *Id.*

Between December 2007 and February 2008, Felts obtained three of these loans from Defendants. *Id.* The first loan, extended to Felts by "MTE Financial Services, Inc. d/b/a Paycheck Today," was for $400 at a 684.375% annual percentage rate. RP2:300. The second loan, extended to Felts by "MTE Financial Services, Inc. d/b/a Cash Advance Network," was for $400 at a 730% annual percentage rate. RP2:301. The third loan, extended by Ameriloan, a trade name and registered trade mark for CLK, was for $500 at a 521.43% annual percentage rate. RP2:300, 302.[3]

Each of Felts' loans was evidenced by a Loan Note electronically transmitted over the internet. RP1:86, 89, 91; RP2:569, 571, 574. The Notes include a binding, mandatory arbitration clause, which requires every consumer claim against Defendants to be arbitrated "by and under the Code of Procedure" of the NAF "in effect at the time the claim is filed." RP1:87, 90; RP2:570, 572. The clause also contains provisions banning class actions, requiring consumers to instead proceed with their claims on an individual basis. *Id.*

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[3] Although these loans are extended to New Mexico consumers under the names of numerous companies, Felts presented evidence demonstrating that Defendants jointly operate their lending enterprise in Overland, Kansas, SuppRP:590 (listing authorities), and that CLK is the "man behind the curtain," collecting on loans offered in the name of at least 500 different companies, RP1:73, 93-96. Although New Mexico law requires payday lenders to obtain a license and agree to regulation by the State as a condition of extending loans, none of the Defendants here was licensed at the time they extended loans to Felts and other members of the putative class. RP1:73.

C. FACTS RELATING TO THE ENFORCEABILITY OF DEFENDANTS' ARBITRATION CLAUSE

In response to CLK's motion to compel arbitration, Felts submitted affidavits from seven New Mexico-licensed attorneys establishing that, absent the class action mechanism, legal representation for consumers who seek to challenge the lending practices of companies like Defendants' simply does not exist.[4] These attorneys stated that they would not agree to represent the plaintiff on an individual basis in an action against a payday lender raising the types of claims alleged here, where the amount of the loan is a mere $500 or less, and that New Mexico consumers will find it "difficult if not impossible to find [any] New Mexico licensed attorney" to bring such an action. RP1:97-98 (Crowley Aff.); RP1:99-100 (Gahan Aff.); RP1:101-02 (Hacker Aff.); RP1:104-05 (Hildebrandt Aff.); RP1:106-07 (Hertzler Aff.); RP1:108-09 (Sanchez Aff.); RP1:112-13 (Tiwald Aff.). These attorneys further testified that this type of action is not economically feasible even with the fee and cost-shifting provisions of New Mexico's UPA, and possibility of treble damages. *Id.*

Also in response to CLK's motion, Felts submitted the affidavit of an attorney who defends lending companies against consumer claims. RP1:110.[5] This attorney attested that he

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[4] Clayton Crowley has practiced law for 16 years in a wide range of areas, including consumer law. RP1:97. Gregory Gahan has practiced law for 19 years, focusing on general civil litigation. RP1:99. Michael Hacker has practiced law for 18 years, focusing on consumer bankruptcy and civil matters. RP1:101. Corbin Hildebrandt has practiced law for 23 years, representing civil plaintiffs in consumer and debtor/creditor cases. RP1:103. Brandon Hertzler has practiced law for three years, focusing on general civil matters, including consumer cases. RP1:106. Alfred Sanchez has practiced law for 25 years, focusing on consumer bankruptcy and civil matters. RP1:108. John Tiwald has practiced law for 35 years, focusing on personal injury and consumer matters. RP1:112.

[5] Andrew Simons, of Sutin Thayer & Browne, P.C., has practiced law for 16 years, and represents title and consumer lenders in various matters. RP1:110.

can not recall one instance of defending a lending company "in a lawsuit in which a private bar member represented a consumer-plaintiff in an individual action against such a [company] in which the total amount in dispute was $500 or less." RP1:110.

In response to CANI's motion to compel arbitration, Felts submitted even more evidence demonstrating that Defendants' class action ban, if enforced, would exculpate Defendants from the claims asserted here. SuppRP:600-613. Notably, two former Assistant Attorney Generals, Deborah DeMack and Richard Word, who both served in the Consumer Protection Division of the New Mexico Attorney General's Office, spoke to the practical effects of enforcing a class action ban in cases such as this.[6] DeMack stated that she reviewed "hundreds" of complaints filed by consumers against payday, car title, and small loan installment lenders, including internet payday lenders like Defendants, but she "turned down or had prospective clients decline to pursue" these cases "because the economies of these small individual cases do not make them financially feasible to pursue." SuppRP:601-02. She noted, "[e]ven with the relatively favorable consumer laws in the State of New Mexico, there are relatively few consumer Plaintiff lawyers in the State," and that "[i]t is not economically feasible to accept many cases of this nature owing to [the] prolonged nature of the litigation and the limited resources of consumers." SuppRP:603.

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[6] DeMack has practiced law for 8 years, primarily representing consumers in civil matters and bankruptcies. SuppRP:600. She is a member of the National Association of Consumer Advocates, the National Association of Consumer Bankruptcy Attorneys, and the Bankrupcy Law Section and the Solo Practitioner and Small Firm Section of the New Mexico State Bar Association. SuppRP:600. DeMack served as Assistant Attorney General for 6 years. SuppRP:601. Word has practiced law for 21 years, primarily representing consumers in disputes with businesses. SuppRP:610. He is a member of the National Association of Consumer Advocates, and served as an Assistant Attorney General for 4 years. SuppRP:611.

DeMack concluded she "would not agree to represent a consumer plaintiff in an individual action against an internet payday lender, regardless of the amount involved." SuppRP:603. This is because, "based on [her] personal experience in dealing with payday, car title and other small loan lenders, internet payday lenders in particular, where the average loan is $500 or less, where actual damages were not likely to exceed triple this amount, even if one or more claims could be brought under a fee shifting statute such as New Mexico's [UPA], such an action . . . would not be economically feasible or in the best economic interests of the consumer-plaintiff under any permissible fee arrangement." SuppRP:603. DeMack also stated that she is not aware of any New Mexico attorney who would agree to represent a consumer in such a lawsuit. *Id.*

Word likewise noted "[s]everal aspects of this case [that] make it extremely unlikely" that an attorney could feasibly bring an action such as this absent a class action, including "the number of entities alleged to be involved in making the loans at issue, claims of sovereign immunity, and the use of the internet to facilitate or make the loans." SuppRP:612-13. As Assistant Attorney General, Word worked extensively on matters relating to payday lending and attempted to identify New Mexico-licensed attorneys who might represent individual payday loan borrowers against lenders, but found no one. SuppRP:611-12. Word further noted that the class action ban here would be exculpatory because "few if any payday loan customers in New Mexico are aware of the statutory or regulatory requirements imposed on payday lenders operating in New Mexico," including the licensing requirements. SuppRP:613.

Finally, Felts submitted two additional affidavits in response to CANI's motion to compel arbitration from New Mexico attorneys who stated that this case presents a number of factors that

make individual claims against Defendants "impracticable," including the "small amounts involved for a given defendant debtor," along with complications from the "defense of Sovereign Immunity," and "the level of complexity involved in sorting through proper corporate identities of Defendants . . . ." SuppRP:605-06 (Hildebrandt Aff.); *see also* SuppRP:608 (Tiwald Aff.) (the defense of sovereign immunity and the "shell game," in which Defendants attempt to "hide who the actual players are," require "a great deal of expensive discovery and time/expense in motions and briefing" that "make[s] the time and expense involved not worth the risk of losing the case").[7] These attorneys further stated that, "[e]ven assuming the possibility of recovery of attorney fees, treble damages, and the like offered by some Federal Statutes and the New Mexico [UPA], the smaller individual case, standing alone, still is essentially not practical to handle, even for someone who is a relative specialist in consumer law." SuppRP:605 (Hildebrandt Aff.); *see also* SuppRP:608 (Tiwald Aff.) ("[T]he arbitrator is under no compulsion to follow the attorney fee-shifting provisions of New Mexico law.").

At no time did Defendants offer any evidence to refute the substantial body of evidence Felts submitted to the district court demonstrating that Defendants' class action ban, if enforced, would indeed be exculpatory.

III. ARGUMENT

A. STANDARD OF REVIEW

An order denying a motion to compel arbitration is reviewed *de novo*. *Cordova v. World Finance Corp. of New Mexico*, 2009-NMSC-021, ¶11, 146 N.M. 256 (2009). However, under

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[7] Hildebrandt (SuppRP:604) and Tiwald (SuppRP:607) also provided affidavits in response to CLK's motion to compel arbitration.

New Mexico's "right for any reason doctrine," a reviewing court "may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require [the reviewing court] to look beyond the factual allegations that were raised and considered below." *State v. Vargas*, 2008-NMSC-019, ¶8, 143 N.M. 692, 695 (2008). Thus, appellate courts "will affirm a district court's decision if it is right for any reason, so long as the circumstances do not make it unfair to the appellant to affirm." *Cordova*, 2009-NMSC-021, ¶18, 146 N.M. 256 (citation omitted).

B. DEFENDANT CANI WAIVED ITS RIGHT TO COMPEL ARBITRATION

As a preliminary matter, this Court need not reach the merits of CANI's appeal because CANI waived its right to compel arbitration, and for that reason alone CANI is not entitled to reversal here.

A party waives its right to arbitration when it "invokes the court's discretionary power, prior to demanding arbitration, on a question other than its demand for arbitration." *Wood v. Millers Nat'l Ins. Co.*, 96 N.M. 525, 527-28, 632 P.2d 1163, 1165-66 (1981); *see also Board of Educ. Taos Mun. Schools v. The Architects, Taos*, 103 N.M. 462, 465, 709 P.2d 184, 187 (1985) ("Waiver of the right [to arbitrate] may be inferred from any decision to take advantage of the judicial system, whether through discovery or direct invocation of the court's discretionary power, or both."). As the New Mexico Supreme Court explained, "[t]o hold otherwise would permit a party to resort to court action until an unfavorable result is reached and then switch to arbitration." *Wood*, 96 N.M. at 528, 632 P.2d at 1166. Courts in other jurisdictions likewise hold that where a defendant requests dispositive relief in court before seeking to compel arbitration, the defendant waives its purported right to arbitration. *Khan v. Parsons Global*

Services, Ltd., 521 F.3d 421, 428 (D.C. Cir. 2008) (defendant waived right to arbitration when it requested dispositive relief in court by introducing evidence outside the pleadings before moving to compel arbitration); *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917, 922 (8th Cir. 2009) (payday lender waived right to compel arbitration after seeking dismissal of complaint for want of subject matter jurisdiction and for failure to state a claim three months before moving to compel arbitration because "lender sought a decision on the merits, . . . an immediate and total victory in the parties' dispute"); *see generally Cabintree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (to avoid waiver, the party seeking to compel arbitration must "do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration").

While the party arguing waiver must demonstrate that it was prejudiced by the other party's failure to invoke its purported arbitration right, *Board of Educ. Taos Mun. Schools*, 103 N.M. at 463, 709 P.2d at 185, prejudice "manifests itself in myriad ways," *Hooper*, 589 F.3d at 923. For example, court have found prejudice where a party had to participate in discovery prior to the motion to compel arbitration, *Board of Educ. Taos Mun. Schools*, 103 N.M. at 464, 709 P.2d at 186, or was forced to litigate substantial issues on the merits, *Hooper*, 589 F.3d at 924.

Here, CANI waived its right to compel arbitration because—on *two* separate occasions—CANI sought dispositive relief from the district court before moving to compel arbitration. RP1:37-40; RP2: 329-341. Notably, with CANI's second motion to dismiss, regarding whether Defendant MTE Financial Services, Inc. possessed tribal sovereign immunity that cloaked all Defendants, CANI introduced evidence outside of the pleadings, including documents from the Modoc Tribe to demonstrate the alleged immunity. RP2: 329-341. Felts

was prejudiced by CANI's failure to invoke its purported arbitration right because Felts was forced to litigate the merits of both CANI's motions and respond to evidence that CANI introduced outside the pleadings. *See* RP1:123-52 (Felts' response to CANI's first motion to dismiss and eight attached exhibits demonstrating CANI's role in extending the loans at issue); RP2:389-414 (Felts' response to CANI's second motion to dismiss and four attached exhibits demonstrating CANI is liable for violating New Mexico law regardless of the alleged tribal affiliations of MTE Financial Services).[8] Accordingly, this Court should affirm the denial of CANI's motion to compel arbitration because CANI waived its right to compel arbitration. Nonetheless, should this Court determine that CANI did not waive its purported arbitration right,

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[8] Defendants maintain that they have no contractual relationship with Felts. CANI Br. 6; CLK Br. 1 n.1. As Felts explained in her opposition to CLK's motion to compel arbitration, RP1:80-82, Defendants cannot avoid defining their role in the payday lending enterprise here by claiming they are "not a signatory" to any agreement with Felts, but then in the same breath attempt to enforce the arbitration clause to which they are "not a signatory." RP1:80-82. "Generally, third parties who are not signatories to an arbitration agreement . . . cannot compel arbitration." *Horanburg v. Felter*, 2004-NMCA-121, ¶16, 136 N.M. 435, 439 (N.M. App. 2004); *see also Monette v. Tinsley*, 1999-NMCA-40, ¶10, 126 N.M. 748, 750 (N.M. App. 1999) (one who is "not a signatory to the contract is generally not bound by the contract's arbitration clause"). The only exceptions to this rule are where: (1) the non-signatory defendant has entered into an entirely separate contract with the plaintiff than the contract that contains the arbitration clause, but this entirely separate contract incorporates by reference the arbitration clause of the other contract; or (2) the plaintiff's claims against the non-signatory defendants are "inextricably woven" into the contract that contains the arbitration clause. *Monette*, 1999-NMCA-40, ¶11, 126 N.M. at 751. Neither of these exceptions apply here. This case does not involve cross-referencing contracts, where the contract that fails to contain its own arbitration clause incorporates by reference the arbitration clause of another. Instead, the contracts here are simply the loan agreements—which all contain arbitration clauses—to which CANI and CLK are either signatories and therefore can seek to enforce the arbitration clause, or they are not signatories and cannot seek to enforce the arbitration clause. Defendants cannot have it both ways by arguing that they are not signatories to the loan contracts but can nonetheless enforce the arbitration clauses of the loan contracts. Nor does this case involve claims that are "inextricably woven" into the loan contracts: Felts does not seek to enforce any provision in the loan contracts against Defendants, but instead she alleges that the loans are unlawful and any monies paid towards the loans must be returned.

which Felts does not concede, Felts will demonstrate below that CANI's appeal fails on the merits.

C. THE ISSUE OF WHETHER DEFENDANTS' ARBITRATION CLAUSE IS UNENFORCEABLE IS FOR THE COURT, NOT THE ARBITRATOR, TO DECIDE

CANI raises two arguments, one of which is shared by CLK, in support of its contention that the district court erred in determining the enforceability of Defendants' arbitration clause on the ground that this issue was for the arbitrator to decide. CANI argues that the arbitration clause "clearly and unmistakably" delegates the question of whether the arbitration clause is enforceable to the arbitrator, and that *Buckeye*, 546 U.S. 440, forbids the trial court from making this determination. CANI Br. 12, 16, 18; CLK Br. 8 (raising the *Buckeye* argument). As explained below, these arguments are meritless.

1. There is No "Clear and Unmistakable Evidence" that Felts Agreed to Have the Arbitrator Decide Whether the Arbitration Clause is Enforceable.

The U.S. Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), held that courts should not assume that parties agreed to have the arbitrator decide whether a given dispute is arbitrable "unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* (citations omitted). The *First Options* "clear and unmistakable evidence" standard "is meant to be a high one, and the normal presumptions in favor of arbitration do not apply." *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005); *see also Granite Rock Co. v. Int'l Brotherhood of Teamsters*, No. 08-1214, slip op. at 11 (June 29, 2010) (presumption of arbitrability applies "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand"). Here, the arbitration

clause fails to "clea[rly] and unmistakabl[y]" delegate the issue of enforceability of the arbitration clause to the arbitrator. Accordingly, the issue was properly for the court.

First, there is no provision within Defendants' arbitration clause clearly delegating that the arbitrator will decide whether the arbitration clause is unenforceable. For example, the "clear and unmistakable" delegation in *Rent-A-Center,* No. 09-497, slip op. at 2, provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement [to arbitrate] including, but not limited to and claim that all or any part of this Agreement is void or voidable." In contrast, there is no identifiable delegation clause here that clearly sets forth that disputes regarding the enforceability of the arbitration clause are for the arbitrator. Instead, Defendants' arbitration clause consists of one lengthy paragraph that lacks any subheadings or structure, the first sentence of which contains 168 words, eighteen commas, and seven instances of the word "or," which buries among myriad other subjects of disputes "this Agreement To Arbitrate Disputes" as subject to arbitration. RP1:87, 90; RP2:570, 572. If Defendants intended to obtain Felts' "clear and unmistakable" agreement to arbitrate this issue, they surely would not have obscured the only language that could possibly evidence this intent by burying it within a 168-word sentence.

Second, the clause's reference that arbitration shall proceed "by and under the Code of Procedure of the National Arbitration Forum ("NAF")," RP1:87, 90; RP2:570, 572, likewise fails to demonstrate that the parties reached an agreement that the arbitrator would decide the enforceability of the arbitration clause. *See generally Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1406 (Cal. Ct. App. 2003) ("The inability to receive full relief is artfully hidden by merely

referencing the Better Business Bureau rules, and not attaching those rules to the contract for the customer to sign. The customer is forced to go to another source and find out the full import of what he or she is about to sign—and must go to that effort prior to signing."). Quite simply, consumers will not find an oblique reference to an arbitration forum to be a "clear and unmistakable" statement that they agreed to have an arbitrator decide the enforceability of the arbitration clause. In short, because there is no "clear and unmistakable" evidence that Felts reached an agreement with Defendants about this issue, it was properly for the court—not the arbitrator—to decide.

2. Any Purported Delegation of the Issue of Enforceability of the Arbitration Clause to the Arbitrator is Unenforceable Under Generally-Applicable Principles of New Mexico Contract Law.

Even if the Court finds Defendants have provided "clear and unmistakable evidence" of an agreement to arbitrate the issue of enforceability of the arbitration clause, which Felts does not concede, the language purportedly delegating this issue to the arbitrator is unenforceable under generally-applicable principles of New Mexico contract law.

Delegation provisions, *i.e.,* provisions that delegate to the arbitrator the issue of whether an arbitration agreement is enforceable, are themselves subject to enforceability challenges based on generally-applicable principles of state contract law. *Rent-A-Center,* No. 09-497, slip op. at 4, 10 ("generally applicable contract defenses, such as fraud, duress, or unconscionability," may be applied to invalidate provisions of an arbitration clause, including delegation provisions) (citation omitted). Challenges to the enforceability of a delegation provision under generally-applicable

state contract law are for the court—not the arbitrator—to decide, so long as the challenge is to the delegation provision itself, not the arbitration clause generally. *Id.* at 8-9.[9]

Here, Defendants' purported delegation "provision" is itself unenforceable under generally-applicable principles of New Mexico contract law. A contract term is unenforceable "where performance by a party 'is made impracticable without his fault by the occurrence of an event[,] the non-occurrence of which was a basic assumption on which the contract was made.'" *Summit Properties, Inc. v. Public Service Co. of New Mexico*, 2005-NMCA-090, ¶ 32, 138 N.M. 208, 219 (N.M. App. 2005) (citation omitted). This generally-applicable doctrine of impossibility, *id.*, renders Defendants' delegation provision unenforceable here because, as Felts explained in her opposition to CANI's motion to compel arbitration, SuppRP:595-96, performance of this provision was "made impracticable" by a consent decree NAF entered into with the Minnesota Attorney General in July 2009 in which it agreed to completely and immediately cease its consumer arbitration business. RP2:411-17.[10] It is therefore impossible

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[9] If a party fails to challenge the enforceability of the delegation clause specifically, *Rent-A-Center* holds that the delegation clause must be enforced according to its terms, so that the arbitrator determines the issue of enforceability of the arbitration clause. No. 09-497, slip op. at 8-9. As explained below, Felts challenges the enforceability of the delegation clause specifically, which is therefore an issue for the court—not the arbitrator—to decide.

[10] The consent decree was entered into after a July 14, 2009 complaint filed by the Minnesota Attorney General—the chief law enforcement officer in NAF's home state—alleged that NAF and its corporate affiliates violated Minnesota's statutory prohibitions against consumer fraud, deceptive trade practices, and false advertising based on NAF's undisclosed financial relationship with one of the country's largest debt collection law firms. Compl., *State of Minnesota v. Nat'l Arbitration Forum*, No. 27-CV-09-18550, ¶¶ 2, 32 (Minn. Dist. Ct. July 14, 2009), *available at* http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaint ArbitrationCompany.pdf. According to the Complaint, NAF marketing materials boasted to creditors that consumers facing arbitration would "just hand over the money" because they would be "totally intimidated by the arbitration process." *Id.* ¶ 96. The Complaint revealed that NAF, despite depicting itself as having "no relationship with any party," in fact "works closely with

for NAF to determine whether Defendants' arbitration clause is enforceable because NAF no longer handles consumer arbitrations. Accordingly, the provision purportedly delegating this issue to NAF has been rendered an impossibility through no fault of Felts, and is therefore unenforceable.

An enforceable delegation cannot now be achieved after-the-fact by requiring Felts to arbitrate this issue in a yet-to-be-determined forum, pursuant to undisclosed rules. Such a delegation would fail the "clear and unmistakable" test because the delegation here provided that issue would be resolved "by and under" NAF's Code of Procedure, not "by" any given arbitration forum "under" any given set of rules. *See Rent-A-Center,* No. 09-497, slip op. at 5 n.1 (the "clear and unmistakable evidence" requirement "pertains to the parties' *manifestation of intent*," and "is an 'interpretive rule,' based on an assumption about the parties' expectations") (emphasis in original). To the extent a "clear and unmistakable" agreement was reached regarding the delegation, which Felts disputes, the delegation required the enforceability of the arbitration clause to be decided "by and under" the NAF Code of Procedure *only*.[11] Neither the delegation provision nor the arbitration clause provides for any alternative forum or any alternative set of rules. CANI's insistence that NAF's Code of Procedure should continue to govern this dispute,

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creditors behind the scenes," *id.* at ¶ 5, and—crucially—has shared ownership with a major debt collection enterprise, *id.* at ¶ 26.

[11] Notably, after CLK moved to compel arbitration, Felts offered to submit her claims to arbitration if Defendants agreed to allow the arbitrator to decide whether to certify the action as a class action, and if the arbitration occurred before an independent arbitrator mutually chosen by the parties, who was free to follow rules other than NAF's rules. SuppRP:614-615. Defendants, however, refused this offer, demonstrating that the designation of NAF as the arbitral forum is an essential feature of the delegation provision, and that Defendants plainly had the expectation that NAF, and no other forum, would decide the issue of enforceability of the arbitration clause. (Felts' offer has since been withdrawn.)

CANI Br. 16, 32, is mystifying, given that NAF no longer has any rules in effect to govern consumer arbitrations filed after July 2009. *E.g., Carideo v. Dell, Inc.*, 2009 WL 3485933, at *4 (W.D. Wash. Oct. 26, 2009) ("because NAF does not arbitrate consumer disputes filed after July 24, 2009, there are simply no NAF rules currently in effect for such arbitrations," and therefore, "even were the court to appoint a substitute arbitrator, the court is not persuaded that there would be applicable NAF rules 'in effect' for the substitute arbitrator to apply").[12] For the same reason,

[12] Even if the Court determined that NAF's rules somehow apply in this case, the delegation provision is still unenforceable under generally-applicable principles of New Mexico law. As explained, *infra*, class action bans that function as exculpatory clauses are unenforceable in New Mexico, and here, the delegation clause's incorporation of NAF's Code of Procedure has the effect of prohibiting consumers from proceeding on a class-action basis as envisioned by New Mexico law. NAF has long stated that "there is no need for class-wide proceedings," NAF, *Class Action Waiver Upheld Under D.C. Law* (May 30, 2007), *available at* www.arb-forum.com/adr_CaseDetails.aspx?caseid=969, so it is unsurprising that NAF rules do not permit class actions of the type envisioned by both federal and New Mexico law. NAF's procedures provide *only* for the joinder and consolidation of claims, which requires that all class members be identified and submit documentation of their arbitration agreements, and that all parties consent to the joinder of each identified class member, before the claims of any two or more individuals may be consolidated. NAF, Code of Procedure Rule 19, *available at* http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3. These requirements bear no resemblance to the class action mechanism effectuated by New Mexico Rule of Civil Procedure 1-023, which plainly envisions that class actions shall proceed on an "opt-out" basis, meaning that all qualifying class members become party-plaintiffs unless they request exclusion from the class. Rule 1-023(C)(2) NMRA (requiring notice of a class action to be sent to all class members informing them of their ability to request exclusion from the class, as judgment will include all class members who do not request exclusion). Courts interpreting Federal Rule of Civil Procedure 23, which is the counterpart to New Mexico Rule 1-023 and is an "appropriate guide" to interpreting Rule 1-023, *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158 ¶9, 143 N.M. 158, 165 (N.M. App. 2007), have repeatedly held that Rule 23 does not require class members to opt in to the class, *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1261 (5th Cir. 1977); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1973). Moreover, "[n]ot only is an 'opt in' provision not required, but substantial legal authority supports the view that by adding the 'opt out' requirement to rule 23 in the 1966 amendments, Congress *prohibited* 'opt in' provisions by implication." *Kern v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004) (emphasis in original). The "legal authority" cited in *Kern* includes 5 James W. Moore et al., Moore's Federal Practice § 23.104[2][a][ii] (3d ed. 2004) ("There is no authority for establishing 'opt-in' classes in which the class members must take

it is not the case that this Court can merely substitute a new arbitrator in place of NAF and enforce the remainder of the delegation clause. *E.g., Ranzy v. Extra Cash of Texas, Inc.*, 2010 WL 936471, at *3 (S.D. Tex. Mar. 11, 2010) (arbitration clause providing that "disputes 'shall be resolved . . . by and under the Code of Procedure of the [NAF]'" demonstrated that NAF was "clearly an integral part of the arbitration provision," and as such, the court "cannot appoint another arbitrator even though the NAF is an unavailable forum"); *Carideo*, 2009 WL 3485933, at *6 (declining to appoint arbitrator in place of NAF in part because "putative class members would have no knowledge that potential claims would be arbitrated by a substitute arbitrator"); *see generally Carr v. Gateway, Inc.*, 918 N.E.2d 598, 603 (Ill. Ct. App. 2009), *appeal allowed by* 924 N.E.2d 454 (Ill. Jan 27, 2010) ("[T]he designation of a [specific arbitral] forum such as the [NAF] 'has wide-ranging substantive implication that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.'") (citations omitted). In sum, even if this Court finds that the parties agreed to delegate the issue of enforceability of the

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action to be included in the class. Indeed, courts that have considered 'opt-in' procedures have rejected them as contrary to Rule 23."), and 7B Charles Alan Wright et al., Federal Practice & Procedure § 1787, at 214 (2d ed. 1986) ("[B]ar[ring] the claims of the passive members unless within a reasonable period they file a brief statement of their intent to prove damages" would have "the effect of obliging absent class members to opt-in, [which] is directly contrary to the philosophy of Rule 23(c)(2).") (internal citations omitted). Thus, NAF's requirements forcing putative class members to "opt-in" to the class before the action may be maintained is equivalent to having no class action mechanism whatsoever, which, as explained *infra*, would exculpate Defendants from the claims asserted here and is unconscionable in New Mexico. Accordingly, the delegation provision is unenforceable because NAF will not permit class actions of the type envisioned by New Mexico law, regardless of any evidence Felts presents demonstrating that absent the class action mechanism in this case, Defendants will escape liability for violating the State's consumer protection statutes.

arbitration clause to the arbitrator, that delegation is itself unenforceable. As such, this issue was properly for the court to decide.

3. *Buckeye* Requires the Court, Not the Arbitrator, to Decide the Issue of Enforceability of the Arbitration Clause

Defendants also argue that the issue of enforceability of the arbitration clause is for the arbitrator to decide, regardless of the delegation clause, under *Buckeye*, 546 U.S. 440. CANI Br. 18; CLK Br. 8. This argument is meritless.

Buckeye, 546 U.S. at 446, established a general principle regarding whether a court or an arbitrator decides the enforceability of an arbitration clause in cases that do not involve delegation provisions. *Buckeye* held that challenges to the enforceability of an arbitration clause are for the *court*, not the arbitrator, to decide, but that challenges to the underlying contract as a whole—and not to the arbitration clause specifically—are for the arbitrator. *Id.* In *Buckeye*, the plaintiffs had claimed that "the entire contract was void," and for that reason (according to the plaintiffs), the court could not compel arbitration, regardless of the enforceability of the arbitration clause specifically. 546 U.S. at 443. *Buckeye* rejected this argument, holding that because the plaintiffs challenged the enforceability of the contract as a whole—and not the arbitration clause specifically—the challenge was for the arbitrator, not the court, to decide. *Id.* at 446.

To fit this case into the *Buckeye* box, Defendants argue that Felts' complaint—viewed in isolation, without any regard to the arguments raised in both of Felts' briefs in opposition to Defendants' motions to compel arbitration—challenged the enforceability of Defendants' loans contracts generally, and not the arbitration clause specifically. CANI Br. 18; CLK Br. 8. This

argument grossly misapplies *Buckeye*, because nothing in *Buckeye* or its progeny suggests that a court *must* look to a plaintiff's original complaint—and nothing else—to determine whether the challenge before it is to the arbitration clause specifically, or to the contract generally. In fact, post-*Buckeye* courts have uniformly held that a challenge to an arbitration clause specifically is for the court to decide regardless of the nature of the challenges the plaintiff makes in the original complaint. *E.g., Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 430 (5th Cir. 2004) (whether arbitration clause in automobile lease was unconscionable was for court to decide; although lessee also challenged formation of the entire contract by alleging that she did not read or understand contract documents, she independently challenged the validity of the arbitration clause by pointing to state supreme court's analysis of "identical clause"); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 791 (8th Cir. 1998) (whether arbitration clause was fraudulently induced was for court to decide because, even though the "underlying claim is for fraud in the inducement of the entire contract . . . that is not the issue with which we are faced today"). Here, Felts has plainly challenged the validity of Defendants' arbitration clause specifically and in response to Defendants' motions to compel arbitration. *See* RP1:73-115; SuppRP:591-615.[13] These challenges do not address the validity of the underlying loan contracts, and the orders below likewise addressed *only* the validity of the arbitration clause, not the loan contracts. *Id.*; *see also*

[13] Felts' challenge to the validity of Defendants' arbitration clause is separate from her challenge, explained above, to the validity of Defendants' delegation provision. Under *Rent-A-Center*, once the court determines that the delegation provision is unenforceable, then the court may consider whether the arbitration clause is unenforceable if a challenge is made to the enforceability of the arbitration clause. No. 09-497, slip op. at 8-9. Nothing in *Rent-A-Center* forbids the plaintiff from presenting both challenges in opposing a motion to compel arbitration.

RP2:312-13, SuppRP:652-53. Accordingly, under *Buckeye*, Felts' challenge to the enforceability of Defendants' arbitration clause was properly for the court to decide.

D. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DEFENDANTS' CLASS ACTION BAN IS UNENFORCEABLE AS CONTRARY TO NEW MEXICO PUBLIC POLICY

The orders below should be affirmed because the court properly concluded that the class action ban in Defendants' arbitration clause is "contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims." RP2:312-13; SuppRP:652-53. Felts submitted substantial evidence to the court demonstrating that the class action ban would effectively exculpate Defendants from liability to their customers for small-value claims, and Defendants never presented *any* evidence to the contrary. This Court should therefore hold that the class action ban violates New Mexico public policy and is unenforceable.

A contract is unconscionable where there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonable favorable to the other party." *Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985). New Mexico courts have recognized two types of unconscionability: substantive and procedural. *Id.* Substantive unconscionability concerns the legality and fairness of the contract terms themselves, while procedural unconscionability focuses on the manner in which the parties entered into the contract. *Id.* Under New Mexico law, a contract term may be held unconscionable based on a finding of substantive unconscionability alone. *Cordova*, 2009-NMSC-021, ¶32, 146 N.M. 256. As such, this Court has frequently analyzed and invalidated contract provisions solely in terms of substantive unconscionability. *E.g., id.* ("[T]he substantive unconscionability of these one-sided arbitration provisions is so compelling that we need not rely on any finding of procedural

unconscionability."); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶14, 133 N.M. 661, 667 (2003) (provision in an insurance contract held "void as substantively unconscionable").

New Mexico law regards contract terms to be substantively unconscionable when they are "contrary to public policy, or grossly unfair," *Guthmann*, 103 N.M. at 510, 709 P.2d at 679, or when they unreasonably favor the drafter of the contract at the expense of consumers. *See Monette*, 1999 NMCA 040, ¶19, 126 N.M. at 752. Such was the case in *Fiser*, 2008-NMSC-046, 144 N.M. 464, which is the case that speaks directly to the issue here.

Fiser addressed whether an arbitration clause in the defendant computer manufacturer's consumer sales contracts was unconscionable when the clause included a provision, like the one at issue here, that prohibited consumers from bringing or joining in a class action. *Id.* The New Mexico Supreme Court began its analysis by noting that New Mexico public policy "strongly supports the resolution of consumer claims," *id.* at ¶9, 144 N.M. at 467, and that class actions are "[c]ritical" to the enforcement of consumer rights in New Mexico, *id.* at ¶12, 144 N.M. at 468. The Court explained that class actions were devised for "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all," *id.* (citation omitted), and noted:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. at ¶14, 144 N.M. at 468 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

Applying the law to the facts of the case, *Fiser* held that the defendant's class action ban, "when applied to small claims plaintiffs, is contrary to New Mexico's fundamental public policy to provide a forum for relief for small consumer claims." *Id.* at ¶16, 144 N.M. at 469. The Court found that "the attorney's fees, the costs of gathering evidence and preparing the case, and the time spent educating [oneself] on the issues and organizing and presenting the claim" would "certain[ly]" outweigh any individual's potential recovery, which in that case was ten to twenty dollars. *Id.* at ¶17, 144 N.M. at 469. Under these circumstances, the Court concluded that the defendant's class action ban was "tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws." *Id.* at ¶21, 144 N.M. at 470. The Court therefore held that, "[b]ecause it violates public policy by depriving small claims consumers of a meaningful remedy and exculpating Defendant from potential wrongdoing, the class action ban meets the test for substantive unconscionability." *Id.*

Fiser controls the analysis here, and compels a finding that Defendants' class action ban violates New Mexico public policy and is thus substantively unconscionable. As explained above, Felts submitted a total of twelve attorney affidavits demonstrating that, absent a class action, Felts and other New Mexico consumers would have no effective means of seeking redress from Defendants. A former New Mexico Attorney General noted that, given the complex claims involved in this case, "few if any payday loan customers in New Mexico [will be] aware" of the illegality of Defendants' lending practices absent a class action, SuppRP:613, which alone would enable Defendants to avoid liability for violating New Mexico law. *See also Muhammad v.*

County Bank of Rehoboth Beach, Delaware, 912 A.2d 88, 100 (N.J. 2006) (class action ban in payday lender's loan contract was exculpatory in part because "without the availability of the class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged"). In fact, an attorney who defends lending companies against consumer claims stated that he cannot recall a single instance of an individual action against a payday lender like Defendants where the amount in dispute was a mere $500. RP1:110.

Even in cases where a consumer *is* somehow able to identify the illegality of Defendants' lending practices, the attorneys who submitted affidavits uniformly agreed that it would not be economically feasible for Felts or any other consumer to bring a case against Defendants on an individual basis asserting the types of claims asserted here, and that it would be highly unlikely to find a New Mexico licensed attorney to bring such an action. These attorneys agreed that a class action ban in a case like this is tantamount to an exculpatory clause because the level of complexity involved in litigating against payday lenders in particular, which entails expensive discovery and considerable time and expense in motions and briefing, makes pursuing the types of claims asserted here on an individual basis virtually impossible. Moreover, a former New Mexico Attorney General declared that the Attorney General's Office lacks the resources to pursue these types of claims on behalf of individual consumers, and that "[e]ven with the relatively favorable consumer laws in the State of New Mexico," consumers would be highly unlikely to find legal representation for the types of claims asserted here. SuppRP:603. At no time has either Defendant offered any evidence to refute the substantial body of evidence demonstrating that Defendants' class action ban, if enforced, would exculpate them from liability for the claims alleged by Felts.

Defendants' attempts to distinguish *Fiser* do not withstand scrutiny. First, Defendants argue that *Fiser* involved claims of ten to twenty dollars, whereas the damages at issue here are several hundred dollars. CANI Br. 22; CLK Br. 14, 17.[14] This is a distinction without a difference, as Felts has demonstrated through substantial evidence that she cannot pursue her claims on an individual basis absent the class action mechanism any more than the individual plaintiff in *Fiser* was able to pursue his claims. Numerous courts in other jurisdictions have likewise refused to enforce class action bans where the amount of damages at stake to the individual matched or even exceeded what the individual recovery would be here. *E.g., Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 984 (9th Cir. 2007) (class action ban unenforceable where amount in dispute for putative class members was "in the hundreds of dollars, an objectively small amount"); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58, 61 (1st Cir. 2006) (class action ban unenforceable because complexity of litigation would entail costs in excess of the expected "few hundred dollars to a few thousand dollars" of individual recovery); *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1280 (D. Ariz. 2007) (class action ban in case involving $1,000 to $1,500 at stake to individual payday loan customer unconscionable); *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1067 (N.D. Cal. 2007), *aff'd* 322 Fed. Appx. 489 (9th Cir. Apr. 02, 2009) (class action ban unenforceable even though amount of individual damages exceeded $4,000, where ban was presented on "take it or leave it" basis, and plaintiff alleged that defendant concealed known defects in its products); *Cohen v.*

[14] Defendants represent that the amount of damages at stake to each individual consumer in this case is in the "thousands of dollars." CANI Br. 27; *see also* CLK Br. 4, 15. However, Felts' largest loan was for only $500, which should be the reference point for this Court's analysis under *Fiser*. RP1:79.

DirecTV, Inc., 142 Cal. App. 4th 1442, 1452 (Cal. Ct. App. 2006) (class action ban unenforceable where claims involving damages worth $1,000 were insufficient to warrant individual litigation); *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So.2d 600, 604 (Fla. App. Ct. 2007) (class action ban unenforceable when it prevented consumers with claims worth $379 from effectively vindicating their rights); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372-73 (N.C. 2008) (arbitration clause unenforceable in part because class action ban prevented consumers from bringing claims worth $4,500 or less). The key inquiry in all these cases, as in *Fiser*, was whether the class action ban functioned as an exculpatory clause—not whether the amount of damages at stake to the individual fell below some categorical ceiling. The district court was correct to hold that Defendants' class action ban violated New Mexico public policy because Felts presented substantial—and unrefuted—evidence that the ban, if enforced, would exculpate Defendants from liability to New Mexico consumers.

The second way in which Defendants attempt to distinguish *Fiser* is by arguing that the cost, attorneys fees, and treble damages provisions of the New Mexico UPA enable Felts to proceed with her claims on an individual basis. CANI Br. 8, 23, 27; CLK Br. 20-21. This argument ignores the facts of *Fiser*. *Fiser*, like the present case, also involved a UPA claim, yet the possibility of costs, attorneys fees, and treble damages there did not persuade the Court to hold that the defendant's class action ban was any less exculpatory. 2008-NMSC-046, at ¶2, 144 N.M. at 466. Although a proper interpretation of the UPA would provide for reasonable fees and costs, the experience of many consumer lawyers is that too often individual judges (and presumably arbitrators, to at least the same degree) are reluctant to grant significant fees that far outweigh the individual's recovery. *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983) (a

district court is vested with broad discretion to reduce a fee award based on the results obtained); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1264 (2d Cir. 1987) (noting the "general rule" that courts "will rarely find reasonable an award to a plaintiff that exceeds the amount involved in litigation"); *James v. Thermal Master, Inc.*, 562 N.E.2d 917, 920 (Ohio Ct. App. 1988) (affirming trial court's decision to reduce attorneys' fee in light of small jury award). Moreover, Felts' evidence demonstrates that attorneys in New Mexico would not be able to take these types of cases on an individual basis, notwithstanding the fee, cost, and treble damages provisions of the UPA. Again, Defendants have not attempted to refute this evidence.

The cases Defendants cite, CANI Br. 23; CLK Br. 20, 21, do not in any way demonstrate that the UPA's cost, fee, and treble damages provisions would make it feasible for Felts or others similarly situated to proceed individually here. Only two of these cases involve class actions—*Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 46, 136 N.M. 599 (N.M. App. 2004), and *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 632-33 (D. N.M. 2007)—but only to the extent that they address class certification issues. Neither *Brooks* nor *Mulford* involved a class action ban, or spoke to the circumstances under which a class action ban may be exculpatory under New Mexico law.

The remainder of the cases upon which Defendants rely are individual actions involving claims so straightforward that they were obvious to the consumer, or involving damages significantly greater than those at issue here. *E.g., Salazar v. D.W.B.H., Inc.*, 2008-NMSC-054, 144 N.M. 828, 830 (2008) (confirming award of $2,926 for plaintiff who sued automobile mechanic for breach of warranties and UPA violation after car smoked, lost oil rapidly, and "completely stopped working" months after mechanic had replaced engine; remanding for court

to consider an additional award of attorneys fees, punitive damages, and loss of use damages); *Garcia v. Coffman*, 1997-NMCA-092, ¶46, 124 N.M. 12, 22 (1997) (holding that a patient could recover attorneys fees from defendants after being awarded $2 in nominal damages and $75,000 in punitive damages); *Hale v. Basin Motor Co.*, 110 N.M. 314, 316, 759 P.2d 1006, 1008 (1990) (involving damages resulting from undisclosed defects in a car when, "[s]everal months after the purchase, the finish on the right front fender, right door, and right door pillar began to oxidize, fade, and distort"); *Augilera v. Palm Harbor Homes, Inc.*, 2004 NMCA-120, ¶2, 136 N.M. 422, 424 (N.M. App. 2004) (plaintiff sought attorneys fees after arbitrator awarded over $91,000 in compensatory damages and $100,000 in punitive damages); *Jones v. General Motors Corp.*, 1998-NMCA-020, ¶ 24, 124 N.M. 606, 607 (N.M. App. 1998) (plaintiff sought a refund of the purchase price of his car, valued at $37,979.36, when the "car required numerous repairs" and stopped running). None of these cases concerned the type of small-value, yet complex, claims at issue here, and the wrongs at issue in each of these cases were blatant enough that the individual plaintiff would have had ample incentive to pursue the case on an individual basis. In contrast, Felts' claims raise complicated issues concerning illegal lending practices, multiple corporate identities, and tribal sovereign immunity—not to mention that, unlike the plaintiffs in the cases Defendants cite, it is highly unlikely that New Mexico consumers would be aware of the illegality of Defendants' lending practices and seek to vindicate their rights absent a class action. Thus, the authorities on which Defendants rely are inapposite to the present case, and do not compel reversal of the district court's orders.

In short, Felts has presented substantial—and uncontradicted—evidence that Defendants' class action ban is exculpatory. As such, the district court properly held that *Fiser* controls the analysis here, and compels a holding that Defendants' class action ban is unenforceable.

E. THE CLASS-ACTION BAN CANNOT BE SEVERED FROM THE REMAINDER OF DEFENDANTS' ARBITRATION CLAUSE

Defendants argue that the remainder of their arbitration clause is enforceable because the class action ban can be severed. CANI Br. 28-33; CLK Br. 25-26. This argument was flatly rejected in *Fiser*, and should be rejected here as well.

Fiser noted that, when a provision of a contract is held to be unconscionable, courts "may refuse to enforce the contract, . . . enforce the remainder of the contract without the unconscionable clause, or . . . may so limit the application of any unconscionable clause as to avoid any unconscionable result." 2008-NMSC-046, ¶24, 144 N.M. at 471 (citations omitted). In *Fiser,* the class action ban was "central to the mechanism for resolving the dispute between the parties" and therefore could not be severed. *Id.*; *see also Cordova,* 2009-NMSC-021, ¶40, 146 N.M. 256 ("[W]e must strike down the arbitration clause in its entirety to avoid a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties.").

Here, as in *Fiser and Cordova*, Defendants' class action ban is an essential feature of its arbitration clause and cannot be severed. Defendants' own actions in this case demonstrate just how integral its class action ban is to its arbitration clause: as previously explained, Felts offered to voluntarily submit her claims to arbitration if Defendants would agree to allow the arbitrator to decide whether to certify the action as a class action. SuppRP:614-615. Defendants refused this

offer (which has since been withdrawn), thus plainly taking the position that the class action ban is an essential feature of their arbitration clause.

Moreover, the fact that Defendants mention the ban three times within their arbitration clause further demonstrates that the term is crucial to Defendants' chosen dispute resolution mechanism. *See* RP1:87, 90; RP2:570, 572 (stating that disputes "shall be resolved by binding individual (and not class) arbitration"); *id.* ("THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION . . . ."); *id.* ("THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY. . . ."). The ban is the only term in the clause that appears (twice) in capital letters. *Id.* The ban is thus crucial to the arbitration clause and cannot be severed. The arbitration clause is unenforceable in its entirety, as the district court properly held.

F. THE ORDERS BELOW ARE NOT PREEMPTED BY FEDERAL LAW

Finally, Defendants argue that the orders below conflict with federal law. This Court should reject this argument outright because neither CANI nor CLK has at any time raised this argument prior to this appeal, and thus the argument has been waived because appellants cannot raise new issues on appeal. *See Brown v. Trujillo*, 2004-NMCA-040, ¶39, 135 N.M. 365, 373 (N.M. App. 2004) ("We do not review arguments that are raised for the first time on appeal.") (citation omitted). Even if this Court determines they were not waived, Defendants' preemption arguments are meritless.

Generally-applicable principles of New Mexico contract law, including those prohibiting the enforcement of contract terms that are unconscionable or violate New Mexico public policy,

are not preempted by the Federal Arbitration Act ("FAA"). The FAA contains a clause that expressly provides that arbitration clauses may be held unenforceable on "grounds [that] exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision of the FAA means that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable [and does not contravene the FAA] if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.").

Fiser addressed this very issue, noting that, "[w]hile the FAA prevents '[s]tates from singling out arbitration provisions for suspect status,' it does not give arbitration provisions special protection either." 2008-NMSC-046, ¶23, 144 N.M. at 471 (citation omitted). The Court stated that "[c]lass action bans that effectively deny consumer plaintiffs relief are invalid in New Mexico, regardless of the contracts in which they are found." *Id. Fiser* therefore held that, "[b]ecause our invalidation of the ban on class relief rests on the doctrine of unconscionability, *a doctrine that exists for the revocation of any contract*, the FAA does not preempt our holding." *Id.*; *see also Cordova*, 2009-NMSC-021, ¶38, 146 N.M. 256 ("The FAA is intended to promote inexpensive, fair, and reasonable arbitration alternatives to litigation," and "is not a license for businesses to take advantage of consumers by the imposition of one-sided, unfair, and legally unconscionable arbitration schemes.").

Defendants attempt to characterize the orders below as creating a "*de facto* categorical bar on non-class arbitration of an expansive category [sic] consumer claims," CLK Br. 24, or as

creating a rule that class action bans in arbitration clauses are "*per se* unconscionable," CANI Br. 21. Nothing could be further from the truth. As explained above, it was only after Felts submitted substantial evidence demonstrating the exculpatory nature of Defendants' class action ban that the district court held the ban violated New Mexico public policy. Nowhere in either order was a "categorical bar" or a "*per se*" rule.[15] Instead, the orders were based on New Mexico public policy that forbids the enforcement of exculpatory contract provisions in arbitration *or* in court, and thus poses no conflict with federal law.[16]

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[15] If anyone seeks to create a "*per se* rule," it is Defendants, who have urged this Court to focus solely on the amount of Felts' individual claims, without any respect to whether their class action ban would be exculpatory, and hold the claims are *per se* subject to arbitration.

[16] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), which Defendants argue conflicts with the orders below, CANI Br. 15; CLK Br. 16, has no bearing on this case for two reasons.

First, *Stolt-Nielsen*—which did not discuss unconscionability, state public policy, or preemption of state law under the FAA—concerned whether parties could be compelled to arbitrate on a classwide basis where they had not expressly agreed to do so. That issue is not present in this case. Here, there is no dispute that Defendants' arbitration clause forecloses class actions. The issue here is not (as in *Stolt-Nielsen*) whether a party may be compelled to participate in class arbitration absent a contractual basis authorizing it, but rather whether the agreement itself may be held invalid under state contract law because it is exculpatory. The Court did not address that issue in *Stolt-Nielsen*, and no party raised it. Indeed, the Court made clear that the arbitral decision under review did not rest on general contract law at all. *Id.* at 1770 (noting that the panel did not "identify[] [or] apply[] a rule of decision derived from . . . New York law").

Second, the circumstances of *Stolt-Nielsen*—involving a shipping contract between "sophisticated, multinational commercial parties," *id.* at 1769—would not have presented any public policy or unconscionability concerns even if these issues had been raised. Plaintiff AnimalFeeds admitted that "class proceedings . . . [we]re not necessary to vindicate [its] rights," and defendant Stolt-Nielsen argued that the case "present[ed] none of the issues that might arise in the context of consumer contracts of adhesion." Br. for Petitioners at 13-14, *Stolt-Nielsen*, No. 08-1190 (U.S. Aug. 28, 2009); *see also* 130 S. Ct. at 1783 (Ginsburg, J. dissenting) (noting that because the parties are "sophisticated business entities," the Court's ruling does not apply to contracts of adhesion). Here, Felts is an individual consumer who has presented substantial evidence to demonstrate that class proceedings in this case are indeed necessary to vindicate her statutory rights.

IV. CONCLUSION

For all the foregoing reasons, the district court's orders denying Defendants' motions to compel arbitration should be affirmed.

Respectfully submitted,

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STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee Andrea J. Felts requests oral argument to assist this Court in determining whether generally-applicable principles of New Mexico contract law prohibiting the enforcement of exculpatory contract provisions renders the arbitration clause at issue here unenforceable. Felts also requests oral argument to assist the Court in determining whether application of these generally-applicable state contract law principles to invalidate a provision of an arbitration clause is consistent with federal law. Given that this case will greatly impact the ability of New Mexico consumers to vindicate their rights under New Mexico's consumer protection statutes, this case warrants oral argument.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Answer Brief was mailed to the following counsel of record, on this 1 day of July, 2010, addressed as follows:

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