IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

A. DAVID DAVIS, JARED A. DAVIS, STEPHEN K. CURTIS, WILLIAM FOLTYN, L. PATCHES BERRY, EDNA M. FORBES, MELISSA SHONGO, CNG FINANCIAL CORPORATION and CHECK N'GO OF FLORIDA, INC.,

Appellants,

CASE NO: 4D07-141

L.T. Case No.: 502001CA001164XXOCAI

vs.

DONNA REUTER, individually and on behalf of others similarly situated,

Appellee.
_____/

APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Plaintiff-appellee Donna Reuter moves the Court to dismiss this appeal for lack of jurisdiction, and states as follows:

1. Defendants-appellants have filed notice that they are appealing the trial court's non-final order **granting their motion** to compel arbitration. In that order, collateral to it compelling arbitration in accordance with defendants' motion, the trial court struck the portions of the arbitration agreement "purporting to waive the ability to bring or participate in a class action. . . ." (Order on Defendants' Motion to Lift Stay, Compel Arbitration, and Stay Proceedings and Order Staying Action and Compelling Arbitration, p. 8, attached as Exhibit A).

2. Defendants contend this Court has appellate jurisdiction in this matter pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), which permits appeals of non-final orders that determine "the **entitlement** of a party to arbitration." (Emphasis added).

3. However, as demonstrated below, defendants are not, and could not, appealing the trial court's determination that they are entitled to arbitration; defendants are actually appealing the trial court's collateral determination regarding the viability of the class action ban. Thus, as defendants are not appealing a non-final appealable order within the purview of Rule 9.130(a)(3)(C)(iv), this Court lacks jurisdiction over this non-final appeal.

ARGUMENT

Defendants filed a Motion to Lift Stay, Compel Arbitration, and Stay Proceedings, which Judge Elizabeth Maass granted in part by compelling the parties to participate in arbitration and staying the action pending completion thereof. (Exhibit A, p. 8). Collateral to finding the defendants are entitled to arbitration, the court also found that the portions of the parties' arbitration agreement that "purport[] to waive the ability to bring or participate in a class action" are unconscionable and ordered they be stricken from the agreement. (Exhibit A, p.8).

Defendants have filed notice that they are appealing the trial court's "non-final order determining the entitlement of a party to arbitration," Defendants' Notice of

Appeal of Non-Final Order, pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), which permits appeals of non-final orders that determine "the **entitlement** of a party to arbitration." Fla. R. App. P. 9.130(a)(3)(C)(iv) (emphasis added). As the trial court found in defendants' favor by ruling that they are entitled to arbitration, defendants cannot appeal that ruling. Defendants must, therefore, be appealing the trial court's collateral ruling on the viability of the class action ban, which is not a non-final appealable order under the Florida Rules of Appellate Procedure. This Court should, therefore, dismiss defendants' appeal for lack of jurisdiction.

I. DEFENDANTS ARE SEEKING INTERLOCUTORY REVIEW OF THE TRIAL COURT'S ORDER STRIKING THE CLASS ACTION BAN IN THE ARBITRATION AGREEMENT AS UNCONSCIONABLE.

It was defendants that moved the trial court to compel arbitration in this action. The trial court entered a ruling favorable to defendants by compelling the parties to participate in arbitration. Defendants cannot appeal the trial court's determination that they are entitled to arbitration, because this is the very ruling they sought. *See Adams v. Shiver*, 890 So. 2d 1199, 1200 (Fla. 1st DCA 2005) ("It is well settled that when a litigant requests and receives a favorable ruling, she cannot later, on appeal, be heard to complain of the trial court's action in acceding to her request.") (citing Arsenault v. Thomas, 104 So. 2d 120 (Fla. 1958)); *see also Logan v. Scheffler*, 441 So. 2d 666, 668 (Fla. 3d DCA 1983) ("A party cannot avail himself of that portion of

the decree which is favorable to him and secure its fruits, while prosecuting an appeal to reverse such portion as mitigates against him.").

Defendants must, therefore, be appealing the trial court's collateral ruling that the class ban in the parties' arbitration agreement is unconscionable and unenforceable. As demonstrated below, this collateral ruling is not a non-final appealable order and, consequently, cannot be heard on interlocutory appellate review.

II. FLORIDA RULES OF APPELLATE PROCEDURE DO NOT PERMIT INTERLOCUTORY REVIEW OF THE TRIAL COURT'S ORDER STRIKING THE CLASS BAN PROVISION FROM THE ARBITRATION AGREEMENT.

The appeal jurisdiction of Florida district courts is provided in Florida Rule of Appellate Procedure 9.030(b)(1). Essentially, district courts have appeal jurisdiction over final orders, certain administrative actions, and "non-final orders of circuit courts as prescribed by rule 9.130." R. 9.130(b)(1)(A)-(C). Rule 9.130 strictly limits the types of non-final orders that may be reviewed on appeal in order "to reduce the number of appealable pretrial orders and to discourage piecemeal review." *Westwood One, Inc. v. Flight Express, Inc.*, 940 So. 2d 1241, 1243 (Fla. 5th DCA 2006) (citation omitted). Courts have therefore "narrowly construed the scope of the rule" so that only those orders specifically identified by Rule 9.130 may be reviewed by district courts. *Id.*

Rule 9.130(a)(3)(C)(iv), under which defendants assert this Court has appeal jurisdiction in this action, specifies that district courts have jurisdiction to review non-final orders of lower courts that determine "the **entitlement** of a party to arbitration."[1] (Emphasis added). Here, defendants moved the trial court to find they are entitled to arbitration, which the court did, and now seek to appeal a collateral ruling in that non-final order that does not relate to their entitlement to arbitration in this action. Not only is this collateral ruling not subject to interlocutory review under Rule 9.130, but defendants' attempt to have this Court dictate the manner in which arbitration must occur is a maneuver that has been repeatedly rejected by the district courts of this state.

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1 It is important to note that nothing in the Federal Arbitration Act ("FAA") or federal policy favoring arbitration preempts Florida state procedural rules with respect to appellate review. *See, e.g., Webb v. American Employers Group,* 268 Neb. 473, 480-81 (Neb. 2004) (applying state procedural rules to determine whether an order denying a motion to compel arbitration is final for purposes of appeal); *Toler's Cove Homeowners v. Trident Const.*, 586 S.E. 2d 581, 584 (S.C. 2003) (noting, "There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate."); *Muao v. Grosvenor Properties Ltd.*, 99 Cal.App.4th 1085, 1091-92 (Cal. App. 2002) (noting that the legislative history of the FAA indicates that Congress intended § 16 to apply only to federal, as opposed to state, court proceedings). *See generally Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 247-249 (Md. 2001) (listing cases where state courts concluded that the FAA did not preempt state procedural rules). Therefore, Rule 9.130 of the Florida Rules of Appellate Procedure, rather than federal law, governs the Court's jurisdiction in this matter.

1. Florida Rule of Appellate Procedure 9.130 does not permit interlocutory review of the trial court's non-final order striking the class action ban provision from the arbitration agreement.

Rule 9.130 permits review of only a particular set of non-final orders, including those orders that determine a party's entitlement to arbitration. *Ebbitt v. Terminix International*, 792 So. 2d 1275, 1276 (Fla. 4th DCA 2001), explained that the "use of the word 'entitlement' in the rule reflects that the rule was intended to authorize appeals from orders determining if a party has a right to arbitration." If the finding of a trial court at issue before a district court does not concern the **entitlement** to arbitration specifically, the district court must dismiss the appeal for lack of jurisdiction.

A number of courts have clarified the types of orders that determine a party's entitlement to arbitration, and would therefore be subject to review. For example, in *Caribbean Transportation v. Acevedo*, 698 So. 2d 604, 605 (Fla. 3d DCA 1997), the trial court ordered the parties to arbitration, stayed proceedings, and retained jurisdiction to enforce the arbitration award. *Id.* The defendant-appellant in that case sought to raise on appeal the issue that "the trial court should have dismissed the action instead of staying it." *Id.* The district court found that this issue "d[id] not relate to [the parties'] entitlement to arbitration," and therefore the appeal was "not within the scope of Rule 9.130." *Id.* The appeal was therefore dismissed for lack of jurisdiction. *Id.*

By comparison, in *Friendly Homes of the South, Inc., v. Fontice*, 932 So. 2d 634, 636 (Fla. 2d DCA 2006), the district court found that it had jurisdiction to examine an appeal from a trial court's order that determined the parties' entitlement to arbitration. In that case, the lower court had "ruled on whether a valid written agreement to arbitrate existed" and had also ruled on the issue of whether one of the parties had indeed signed the agreement. *Id*. As these two issues both concern the entitlement of a party to arbitration, the district court found it had jurisdiction to decide the appeal. *Id.*

A party's entitlement to arbitration is not implicated by a court's finding that a class action ban is unconscionable, as there is nothing inherent to arbitration that would require parties to arbitrate their disputes on an individual basis. Indeed, the United States Supreme Court has explicitly held that arbitrations may be conducted on a class-wide basis. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (stating the question of whether arbitration may proceed on a class action basis in a case where the arbitration clause is silent on the question is "a matter of state law . . .").

As further evidence that arbitrations may be handled on a class-wide basis, the American Arbitration Association has promulgated rules for handling class actions in arbitration. *See* Supplementary Rules for Class Arbitrations, at http://www.adr.org/sp.asp?id=21936. Also, JAMS, one of the largest providers of alternative dispute resolution services in the United States, now takes the position that

"it is inappropriate for a Company to restrict the right of a consumer to be a member of a class action arbitration or to initiate a class action arbitration." JAMS Policy Regarding Use of Class Action Preclusion Clauses, at http://www.jamsadr.com/images/PDF/JAMS-ClassActionPreclusionPolicy.PDF.

Clearly, prohibiting class actions is not an inherent part of arbitration such that a court order regarding the legality of a class action ban would implicate a party's **entitlement** to arbitration. As the only order of the trial court that defendants could be appealing is the order striking the class action ban language from the arbitration agreement, defendants are not seeking review of an order that determined their **entitlement** to arbitration. Accordingly, defendants are not permitted to bring an interlocutory appeal of this non-final order under Rule 9.130, necessitating that this Court dismiss defendants' appeal for lack of jurisdiction.

2. Florida Rule of Appellate Procedure 9.130 does not permit this Court to dictate the manner in which arbitration must occur.

The trial court granted defendants' motion to compel arbitration. However, the trial court, by striking from the arbitration agreement the provision banning class actions, held that plaintiffs may arbitrate as a class. By appealing this non-final order of the trial court, defendants are attempting to have this Court dictate the manner in which arbitration must occur. This attempt must fail as courts interpreting Rule 9.130 consistently find that district courts do not have jurisdiction to review collateral

matters, such as the manner, forum, or time of arbitration, as these matters fall outside of the jurisdictional grant enumerated in Rule 9.130.

In *A.G. Edwards & Sons, Inc. v. Wilson*, 523 So. 2d 1150, 1151 (Fla. 2d DCA 1987), the trial court entered orders granting the appellants' motion to compel arbitration, but the appellants nonetheless sought review of specific directions in that order, which required the parties to arbitrate "before the American Arbitration Association within a period of time specified by the trial judge." The Court of Appeal dismissed the appeal for want of jurisdiction, noting that "[w]e do not believe the rule permits an appeal where the issues relate to collateral matters, such as in this case." *Id.* The specific requirements in the trial court's order that detailed the manner in which the arbitration would proceed were deemed "matters which are not appealable," and the court properly dismissed the appeal. *Id.*

Likewise, in *Henderson v. Tandem Health Care of Jacksonville*, 898 So. 2d 1191, 1192 (Fla. 1st DCA 2005), the court held that an order requiring the plaintiff to "reschedule non-binding arbitration and to proceed at the rescheduled non-binding arbitration in a reasonable manner and in good faith" was not an order that determined "the entitlement of a party to arbitration." Therefore, the trial court's order compelling the parties to proceed with arbitration was not appealable. *Id.* at 1192. *See also Wegner v. Schillinger*, 921 So. 2d 854, 855 (Fla. 4th DCA 2006) (noting that "Florida law does not authorize multiple motions to compel arbitration").

Defendants moved the trial court in this case to compel arbitration, which the court did. Defendants cannot now appeal that favorable non-final order in order to ask this Court to specify that arbitration proceed on an individual, as opposed to a class-wide, basis, because the manner in which arbitration is to proceed is a collateral issue that falls outside of this Court's jurisdiction. Rule 9.130 permits non-final appellate review of only those orders that determine the entitlement of a party to arbitration. As defendants cannot appeal the Court's ruling that defendants are entitled to arbitration, because this ruling was in defendants' favor, and are merely appealing the trial court's non-final ruling regarding the manner in which arbitration is to proceed, defendants' appeal must be dismissed for lack of jurisdiction.

WHEREFORE, Appellees request that this Court dismiss defendants' appeal for lack of jurisdiction.

Dated: January 17, 2007

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IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. 502001CA001164XXXXMB

DONNA REUTER, individually and on behalf of others similarly situated,
Plaintiff(s),
vs.

A. DAVID DAVIS, JARED A. DAVIS, STEPHEN K. CURTIS, WILLIAM FOLTYN, L. PATCHES BERRY, EDNA M. FORBES, MELISSA SHONGO, CNG FINANCIAL CORPORATION and CHECK 'N GO OF FLORIDA, INC.,
Defendant(s).
_____/

ORDER ON DEFENDANTS' MOTION TO LIFT STAY, COMPEL ARBITRATION, AND STAY PROCEEDINGS AND ORDER STAYING ACTION AND COMPELLING ARBITRATION

THIS CAUSE came before the Court November 15 and 16, 2006 on Defendants' Motion to Lift Stay, Compel Arbitration, and Stay Proceedings, with all parties well represented by counsel.

In the summer of 2000 Plaintiff, Donna Reuter, was single and on maternity leave from her job as an emergency dispatch operator for Palm Beach County Fire Rescue. Prior to going on maternity leave she was taking home $780.00 every two weeks. While on leave, though, her take home pay dropped to $490.00 every two weeks. She was having difficulty making ends meet, and so began taking out "pay day" loans. Under these loans, Ms. Reuter would write a check to the lender that reflected the amount borrowed as well as a fee. The lender would agree not to present the check for payment provided Ms. Reuter returned two weeks later to redeem it. If she was unable to redeem it then, and she was not, she would pay an additional fee to "rollover" the loan another two weeks.

From June 15, 2000 until September 2, 2000, Ms. Reuter entered into seven

EXHIBIT A

transactions with Defendant Check 'n Go of Florida, Inc., receiving from $200.00 to $250.00 in each transaction and paying a finance charge between $27.00 and $32.50. She signed a Deferred Presentation Agreement ("Agreement") with identical terms in each transaction. The Agreements reflected the cost of credit to Ms. Reuter on an annual basis at 338.93% to 615.94%. The Agreements provided that if a dispute arose out of the Agreement, Ms. Reuter, Check 'n Go, or any third party involved could choose to have the dispute settled in binding arbitration conducted by the American Arbitration Association, with Check 'n Go advancing the costs of arbitration on request. Ms. Reuter forfeited her right to bring or participate in a class action in arbitration, or seek to have her claim joined or consolidated with similar claims. Ms. Reuter was desperate for the loan, and did not read the Agreements. The arbitration clauses were written on a college level, and she testified that even if she had read them she would have difficulty understanding them.

By September, 2000 Ms Reuter was in over her head financially She approached her credit union to try to get a loan to pay off Check 'n Go and the other pay day lenders she had borrowed from. She was unable to secure a loan but ran into a friend on the way out. That friend referred her to attorney Clayton Yates. Mr. Yates, who continues to represent Ms. Reuter, had developed a theory that pay day lenders were subject to the various state's usury laws. He advised Ms. Reuter simply to discontinue paying the pay day lenders On February 2, 2001, Ms. Reuter filed suit against Check 'n Go of Florida, Inc.; CNG Financial Corporation, its parent company; and several of Check 'n Go's officers and managers. On February 26, 2001, Check 'n Go removed the action to federal court. It was remanded back to this court July 13, 2001.

All the Defendants but Forbes and Shongo, who have not been served, filed motions seeking to dismiss Ms. Reuter's complaint or compel arbitration. Ms. Reuter resisted the motions, contending the Agreements were illegal and hence void, so that the arbitration clauses were unenforceable. The case was stayed pending the resolution of Cardegna v. Buckeye Check Cashing, Inc. On February 21, 2006, the United States Supreme Court

issued its decision in that case finding that a claim that a contract containing an arbitration clause was void as usurious must be decided by the arbitrator, and not the court. Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 546 U.S. __, 163 L. Ed. 2d 1038, 2006 WL 386362 (Feb. 21, 2006).

Defendants ask this court lift the stay that was put in place pending the Buckeye decision and order the action to arbitration, with the class waivers in place, contending the arbitration and class action waiver provisions are clear, unambiguous, and mandatory. Ms. Reuter responds that the class action waivers are unconscionable and should not be enforced.

Ms Reuter sought to bring a class action against Defendants in four counts. In Count 1, she claimed that Check 'n Go's lending practices violated Florida Statutes Chapter 687 (2000), Florida's usury law. In Count 2 she claimed that Check 'n Go's practices violated Florida Statutes Chapter 516 (2000), the Florida Consumer Finance Act. In Count 3 she alleged that Defendants violated Florida Statutes Chapter 501, Part II (2000), the Florida Deceptive and Unfair Trade Practices Act. Finally, in Count 4 she alleged that the Defendants formed an association to collect or attempt to collect an unlawful debt, and sought damages under Florida Statutes Chapter 772 (2000), the Civil Remedies for Criminal Practices Act. All the claims focus on the contention that though Check 'n Go presented itself as a check cashing business it was, in actuality, a consumer lender and the transaction fees paid were actually disguised criminally usurious interest payments.

The arbitration clause here is governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. Cardegna; Jenkins v. First American Cash Advance of Georgia, LLC, 400 F. 3d 868 (11th Cir. 2005), at footnote 5.[1] The FAA was adopted to end judicial hostility to arbitration agreements. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20; 111 S. Ct. 1647 (1991); Muhammad v. County Bank of Rehoboth Beach, Delaware, __A. 2d__, 2006 WL 2273448,

[1]The Agreements themselves recite that they affect interstate commerce within the meaning of the FAA Neither party presented evidence on this point, but both assumed the FAA governed

2006 N.J. LEXIS 1154 (N.J. S. Ct. Aug. 9, 2006). Under the FAA, an arbitration provision is enforceable except on the same grounds as would permit revocation of any contract. 9 U.S.C. §2

A class action waiver of a statutory claim within an arbitration clause is enforceable unless it is void because it defeats the statute's remedial purpose; because it is precluded by the statute sued on; or because it is unconscionable.[2]

Each of the statutes sued on is intended to regulate actions for the public good, and hence is remedial. See Fonte v. AT&T Wireless Services, Inc., 903 So. 2d 1019 (Fla. 4th DCA 2005), rev. den. 918 So. 2d 292 (Fla. 2005). The statutes' remedial purposes are not defeated by the class action waivers. The Agreements preserve to Ms. Reuter all remedies available to her under each of the statutes sued on; instead, those remedies must be sought in the alternate forum of arbitration. Further, to the extent the statutes sued on permit agency action to protect consumers' rights, that avenue remains unaffected.

The burden of proving that a statute precludes class action waiver is on the party claiming it. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20; 111 S. Ct. 1647 (1991). An intent to preclude class action waiver must be apparent from either the statute or its legislative history. Randolph v. Green Tree Financial Corp.-Alabama, 244 F. 3d 814 (11th Cir. 2001); Fonte. Ms. Reuter has not cited the Court to any statutory provision or historical reference evidencing a legislative intent to preclude a class action waiver in any of the statutes upon which she sues, and the Court independently has found none. See Fonte (no preclusion in FDUTPA); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332 (1987) (no preclusion of arbitration in federal RICO claim). Consequently, to prevail in her opposition to Defendants' Motion, she must demonstrate the class action waivers are unconscionable.

An agreement is void as unconscionable if it is both procedurally and substantively

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[2]Ms Reuter's claim that it is void because it results in the practical exculpation of the Defendants from any claims differs from her argument that it is substantively unconscionable in semantics only.

unconscionable. Fonte. Unconscionability is determined at the time the contract is made. Fonte. Procedural unconscionability is concerned with the manner with which the agreement was reached; substantive unconscionability is concerned with the agreement's terms. Fonte. Whether a provision is unconscionable is based on a sliding scale evaluating both procedural and substantive unconscionability as a single quantum. Fonte; Voicestream Wireless Corp. v. U.S. Communications, Inc., 912 So. 2d 34 (Fla. 4th DCA 2005); Steinhardt v. Rudolph, 422 So. 2d 884 (Fla. 3d DCA 1982), rev. den. 434 So. 2d 889 (Fla. 1983).

Ms. Reuter argues the class action waivers are procedurally unconscionable because they are imbedded in contracts of adhesion that were executed under financial stress, as Check 'n Go reasonably knew. Cf. Voicestream Wireless Corp. v. U.S. Communications, Inc., 912 So. 2d 34 (Fla. 4th DCA 2005) (arbitration agreement not procedurally unconscionable where part of commercial transaction between experienced business persons and no evidence party was "vulnerable"). Check 'N Go would not have contracted with Ms. Reuter had she not signed the Agreements. Six other companies offered pay day loans in Florida in 2000. Of those, five had mandatory arbitration clauses in their contracts, and four of those had class action waivers. While Defendants contend Ms. Reuter failed to show what percentage of the pay day loan market was controlled by companies which required class action waivers, the evidence established that Ms. Reuter's behavior conformed to the industry standard: she had multiple loans outstanding from multiple lenders. Pay day lenders, including Check 'n Go, limit the number of transactions their customers may engage in at or near the same time because, consistent with common sense, as the number of loans outstanding increases the default rate increases. Thus, the relatively small number of similar companies is more important in ascertaining whether Ms. Reuter had other choices than is the percentage of the market share held by each. Further, the arbitration clauses were written in language beyond that which Ms. Reuter reasonably could be expected to understand. See Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. 1999), rev.

den. 763 So. 2d 1044 (Fla. 2000). Evidence established that the arbitration provisions were written at a college level. Ms. Reuter testified that, even now, she did not completely understand them. Cf. Raveson v. Walt Disney World Co., 793 So. 2d 1171 (Fla. 5th DCA 2001); Lantz v. Iron Horse Saloon, Inc., 717 So. 2d 590 (Fla. 5th DCA 1998) (release must be so clear and understandable that ordinary and knowledgeable party will understand it.). Defendants respond that Ms. Reuter was given the opportunity to read the class action waivers and did not; that had Ms. Reuter posed questions they would have been answered; and that Ms. Reuter was given a one day right of recission which she did not exercise. Those options were meaningful, though, only to the extent Ms. Reuter perceived she had other avenues available to her for relief from her financial predicament. Clearly, she did not.[3]

Ms. Reuter argues that the Agreement's class action preclusion is substantively unconscionable because it effectively denies her the right to competent counsel. Defendants argue that it is not substantively unconscionable because it preserves all remedies otherwise available; preserves all statutory fee claims; does not affect administrative remedies; and may be pursued without initial cost. See Jenkins (class action waiver not substantively unconscionable where fee claim preserved); cf. Powertel (substantively unconscionable where remedies limited).

Though the evidence was disputed, its greater weight supports the proposition that it would be virtually impossible for Ms. Reuter, or anyone in a similar position, to obtain competent individual representation for the types of claims brought here, particularly in 2000. The waivers are substantively unconscionable.

First, the legal issues presented are sophisticated, requiring specialized knowledge. The first reported case in Florida addressing the substance of Yates' usury theory was issued August 30, 2002, two years after the transactions here, and held deferred presentment

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[3] "The explosive growth of the industry is indicative of the scarcity of resources available for financial assistance to those in dire need and least able to afford the high cost of assistance " Betts v. Ace Cash Express, Inc., 837 So. 2d 294, 298 (Fla 5th DCA 2002) (footnoted citations omitted).

transactions permitted under the Money Transmitters' Code, Florida Statutes Chapter 560. See Betts v. Ace Cash Express, Inc., 827 So. 2d 294 (Fla. 5th DCA 2002).[4] The first reported Florida decision accepting Yates' theory was not issued until August 11, 2004, four years after Ms. Reuter's transactions with Check 'n Go. See Betts v. McKenzie Check Advance of Florida, LLC, 879 So. 2d 667 (Fla. 4th DCA 2004) approved at 928 So. 2d 1204 (Fla. 2006). The Florida Supreme Court did not accept Yates' theory until April 27, 2006, almost six years after Ms. Reuter's transactions with Check 'n Go. See McKenzie Check Advance of Florida, LLC v. Betts, 928 So. 2d 1204 (Fla. 2006). Even now the legal issues remain unsettled: the Florida Supreme Court expressly declined to address whether a pay day loan company is entitled to Florida Statute §560.107's safe harbor. The Defendants who or which have answered have raised other legal and factual defenses. Absent a legal exception, making a loan with annual interest in excess of 45% is loan sharking, a third degree felony, and results in the forfeiture of the right to collect not only interest, but principal. Fla. Stat. §687.071(1)(f), (3), (7), (2000). However, of the over 66,000 Check 'n Go customers who completed over 1,000,000 deferred presentment transactions with annual interest rates exceeding 45% between April 1, 1996 and September 30, 2001, none has brought an individual claim.

Second, the amounts at issue are small. Thus, clients like Ms. Reuter, parents working from payday to payday with babysitting, transportation, and employment issues, do not necessarily think they can afford attorneys or, if they do, have difficulty keeping appointments. In any event, the wages and out of pocket costs lost in prosecuting their claims dwarf the amounts sought.

Finally, businesses like Check 'n Go have a reputation for being uncollectible, meaning that even the possibility of a fee award on an individual claim is insufficient to

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[4] Fast Funding The Company, Inc. v. Betts, 758 So. 2d 1143 (Fla. 5th DCA 2000) dealt with whether the court or the arbitrator should decide whether a contract is usurious The holding has since been disapproved Cardegna v. Buckeye Check Cashing, Inc., 930 So. 2d 610 (Fla 2006)

entice competent counsel.[5] Because of that perception, Ms. Reuter's counsel elected to plead alternative theories against Check 'n Go's officers and managers, adding to the legal complexity of the case brought.

Based on the evidence presented, the Court concludes that the class action waivers here are unconscionable. While the evidence of procedural unconscionability is relatively slight, the evidence of substantive unconscionability is overwhelming. The chance that Ms. Reuter could have obtained competent counsel absent the possibility of class action status or successfully recognized a potential claim that she could pursue without benefit of counsel is effectively zero. See Reeves v. Ace Cash Express, Inc., 937 So. 2d 1136, 1138 (Fla. 2d DCA 2006) ("offending" class action waiver in FCCPA claim severable). Enforcement of the class action waivers in arbitration would be tantamount to depriving Ms. Reuter of any claims against Check 'n Go.

Based on the foregoing

ORDERED AND ADJUDGED that Defendants' Motion to Lift Stay, Compel Arbitration, and Stay Proceedings is granted, in part, and denied, in part. Those portions of the Agreements purporting to waive the ability to bring or participate in a class action or seek to have her claims joined or consolidated with similar claims are stricken. The parties are compelled to participate in arbitration under the remaining terms. This action is stayed pending completion of arbitration.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 12 day of December, 2006.

ELIZABETH T. MAASS
Circuit Court Judge

[5]Two of Ms Reuter's four counts, those under the FDUTPA and the CRCPA, provide for an award of attorney's fees.

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