IN THE SUPREME COURT OF THE STATE OF NEVADA

PRINCIPAL INVESTMENTS, INC.. d/b/a RAPID CASH, GRANITE FINANCIAL SERVICES, INC., d/b/a RAPID CASH, FMMR INVESTMENTS, INC., d/b/a RAPID CASH, PRIME GROUP, INC., d/b/a RAPID CASH and ADVANCE GROUP, INC. d/b/a RAPID CASH, Petitioners, *vs.* The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE ELIZABETH GONZALEZ, District Judge, Respondent, and CASSANDRA HARRISON, EUGENE VARCADOS CONCEPION QUINTINO and MARY DUNGAN, Real Parties in Interest.	Case No. Electronically Filed Dec 17 2010 01:49 p.m. Tracie K. Lindeman District Court No. A624982

PETITION FOR WRIT OF MANDAMUS
OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION
With Supporting Points And Authorities

DANIEL F. POLSENBERG
Nevada Bar No. 2376
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 474-2616

MARK DZARNOSKI
Nevada Bar No. 3398
GORDON SILVER
3960 Howard Hughes Parkway
Ninth Floor
Las Vegas, Nevada 89169
(702) 796-5555

MARTIN C. BRYCE, JR.
(Admitted Pro Hac Vice)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PETITION AND RELIEF SOUGHT 1

ISSUES PRESENTED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE PROPRIETY OF WRIT RELIEF 7

II. THE STANDARD OF REVIEW 8

III. THE ARBITRATION PROVISIONS 9

A. The Arbitration Provisions in Harrison's, Varcados's and Dungan's Contracts 9

B. The Arbitration Provision in Quintino's Contract 12

IV. RAPID CASH HAS NOT WAIVED THE RIGHT TO ARBITRATION 13

A. The Federal Arbitration Act Applies When Determining Whether A Party May Have Waived its Right to Compel Arbitration 13

1. *The FAA Controls These Contracts* 13

2. *The Issue of Waiver Is Governed by the FAA* 14

3. *Pursuant to The Arbitration Provisions, the Arbitrator Is Charged With Determining the Enforceability and Scope of the Arbitration Agreements, Including Whether Such Agreements Have Been Waived* 15

B. The Rapid Cash Defendants Did Not Waive Their Right to Compel Arbitration Under the Express Language of the Parties' Arbitration Provisions 17

V. ENFORCEMENT OF THE ARBITRATION PROVISIONS IS NOT AGAINST PUBLIC POLICY. 20

A. Enforcement of the Parties' Arbitration Provision Will Not Violate Any Public Policy 20

B. The Arbitration Provisions and their Class Action Waiver Are Not Unconscionable 22

CONCLUSION 29

VERIFICATION viii
CERTIFICATE OF COMPLIANCE ix
CERTIFICATE OF SERVICE x

TABLE OF AUTHORITIES

Cases

Action Indus., Inc. v. U.S. Fidelity & Guaranty Co.,
358 F.3d 337 (5th Cir. 2004) 15

Adams v. Ga. Gulf Corp.,
237 F.3d 538 (5th Cir. 2001) 8

Alascom, Inv. v. ITT North Elec. Co.,
727 F.2d 1419 (9th Cir. 1984) 8

AT&T Mobility LCC v. Concepcion,
___, U.S. ___, 130 S.Ct. 3322 (2010) 22

AT&T Techs. Inc. v. Communications Workers,
475 U.S. 643, 106 S. Ct. 1415 (1986) 16

Benson Pump Co. v. S. Cent. Pool Supply,
325 F. Supp. 2d 1152 (D. Nev. 2004) 5, 17

Bradford-Scott Data Corp. v. Physician Computer Network, Inc.,
128 F.3d 504 (7th Cir. 1997) 7, 8

Britton v. Co-op Banking Group,
916 F.2d 1405 (9th Cir.1990) 17

Brown v. Dillard's, Inc.,
430 F.3d 1004 (9th Cir. 2005) 17

Burch v. District Court,
118 Nev. 438, 49 P.3d 647 (Nev. 2002) 23

Burden v. Check into Cash of Kentucky, LLC,
267 F.3d 483 (6th Cir. 2001) 27

Bushley v. Credit Suisse First Boston,
360 F.3d 1149 (9th Cir. 2004) 8

C.B.S. Employees' Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.,
716 F. Supp. 307 (W.D. Tenn. 1989) 7

Caudle v. American Arb. Ass'n,
230 F.3d 920 (7th Cir. 2000) 27

Chiron Corp. v. Ortho Diagnostic Sys.,
207 F.3d 1126 (9th Cir. 2000) 15

Cicle v. Chase Bank USA,
583 F.3d 549 (8th Cir. 2009) 27

Circuit City Stores, Inc. v. Adams,
532 U.S. 105, 121 S.Ct. 1302 (2001) 22

Circuit City Stores, Inc. v. Ahmed,
283 F.3d 1198 (9th Cir. 2002).....24

Circuit City Stores, Inc. v. Najd,
294 F.3d 1104 (9th Cir. 2002).....24

Citifinancial, Inc. v. Farmer,
2006 WL 1273712 (S.D. Miss. May 9, 2006).....19

Clark Co. Public Employees v. Pearson,
106 Nev. 587, 798 P.2d 136 (1990).....8

Clerk v. ACE Cash Express, Inc.,
2010 U.S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010).....24

Columbia Credit Services, Inc. v. Billingslea,
2007 WL 1982721 (Cal. Ct. App. July 10, 2007).....24

Cotton v. Sloan,
4 F.3d 176 (2d Cir. 1993).....20

Crandall v. AT&T Mobility, LLC,
2008 WL 2796752 (S.D. Ill. July 18, 2008).....24

Credit Acceptance Corp. v. Davisson,
644 F. Supp.2d 948 (N.D. Ohio 2009).....14, 19, 24

Daugherty v. Washington Square Sec., Inc.,
271 F. Supp.2d 681 (W.D. Pa. 2003).....16

Davidson v. Cingular Wireless, LLC,
2007 WL 896349 (E.D. Ark. Mar. 23, 2007).....24

Dienese v. McKenzie Check Advance of Wis., LLC,
2000 U.S. Dist. LEXIS 20389 (E.D. Wis. Dec. 11, 2000).....27

Eaves-Leanos v. Assurant, Inc.,
2008 WL 1805431 (W.D. Ky. Apr. 21, 2008).....24

Enderlin v. XM Satellite Radio Holdings, Inc.,
2008 WL 830262 (E.D. Ark. March 25, 2008).....24

Estate of Wildhaber v. Life Care Ctrs. of Am., Inc.,
2010 U.S. Dist. LEXIS 80563 (D. Nev. July 13, 2010).....23

Fid. Fed. Bank, FSB v. Durga Ma Corp.,
386 F.3d 1306 (9th Cir. 2004).....14

Fidelity Nat'l Corp. v. Blakely,
305 F. Supp.2d 639 (S.D. Miss. 2003).....18, 19

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938, 115 S. Ct. 1920 (1995).....16

Fisher v. A.G. Becker Paribas Inc.,
791 F.2d 691 (9th Cir.1986) 17

Fluke v. CashCall,
2009 U.S. Dist. LEXIS 43231 (E.D. Pa. May 21, 2009) 24

Freedman v. Comcast Corp.,
988 A.2d 68 (Md. Ct. of Special App. 2010) 24

Gay v. CreditInform,
511 F.3d 369 (3d Cir. 2007) 27

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444, 123 S. Ct. 2402 (2003) 16

*Guadagno v. E*Trade Bank*,
2008 WL 5479062 (C.D. Calif. Dec. 29, 2008) 24

Honig v. Comcast of Georgia, LLC,
537 F. Supp. 2d 1277 (N.D. Ga. 2007) 24

Howard v. Wells Fargo Minn., N.A.,
2007 WL 2778664 (N.D. Ohio Sept. 21, 2007) 28

Howsam v. Dean Witter Reynolds,
537 U.S. 79, 123 S. Ct. 588 (2002) 16

Hoxworth v. Blinder, Robinson & Co.,
980 F.2d 912 (3d Cir. 1992) 17

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,
379 F.3d 159 (5th Cir. 2004) 21, 27

Irving v. Ebix, Inc.,
2010 WL 3168429 (S.D. Ca. Aug. 10, 2010) 17

Jenkins v. First American Cash Advance of Ga., Inc.,
400 F.3d 868 (11th Cir. 2005) 27

Kaneff v. Delaware Title Loans, Inc.,
587 F.3d 616 (3d Cir. 2009) 27

Kindred v. District Court,
116 Nev. 405, 996 P 2d 903 (2000) 8

Konica Minolta Business Solutions, U.S.A., Inc. v. Allied Office Products, Inc.,
2006 WL 3827461 (S.D. Ohio Dec. 27, 2006) 14

Lewallen v. Green Tree Servicing, L.L.C.,
487 F.3d 1085 (8th Cir. 2007) 19

Magee v. Advance America Servicing of Ark., Inc.,
2009 WL 890991 (W.D. Ark. April 1, 2009) 24

Marley v. Macy's South,
2007 WL 1745619 (S.D. Ga. June 18, 2007) 24

Martin v. Delaware Title Loans, Inc.,
2008 WL 4443021 (E.D. Pa. Oct. 1, 2008) 24

Moses H. Cohn Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1, 103 S. Ct. 927 (1983) 17

Motors Ins. Corp. v. Pasco, Inc.,
2007 WL 184718 (N.D. Ohio Jan. 19, 2007) 19

Nevada Gold & Casinos, Inc. v. Am. Heritage, Inc.,
121 Nev. 84, 110 P.3d 481 (2005) 19

P & M Corporate Finance, LLC v. Paparella,
2010 WL 4272829 (E.D. Mich. Oct. 22, 2010) 18

Parilla v. IAP Worldwide Serv.,
368 F.3d 269 (3d Cir. 2004) 21

Providian National Bank v. Screws,
894 So. 2d 625 (Ala. 2003) 24

Round Hill Gen. Imp. Dist. v. Newman,
91 Nev. 601, 540 P.2d 104 (1981) 7

Sanders v. Comcast Cable Holdings, LLC,
2008 WL 150479 (M.D. Fla. Jan. 14, 2008) 24

Sanders v. Robinson Humphrey/American Express, Inc.,
634 F. Supp. 1048 (N.D. Ga. 1986) 27

SDS Autos, Inc. v. Chrzanowski,
2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007) 24

Shaw Group, Inc. v. Triplefine Int'l Corp.,
322 F.3d 115 (2d Cir. 2003) 14

Smith Barney, Inc. v. Critical Health Sys. of N.C.,
212 F.3d 858 (4th Cir. 2000) 15

Southland Corp. v. Keating,
465 U.S. 1, 104 S.Ct. 852 (1984) 22

Sovak v. Chugai Pharm. Co.,
280 F.3d 1266 (9th Cir. 2002) 14, 17, 19

Staples v. The Money Tree, Inc.,
936 F. Supp. 856 (M.D. Ala. 1996) 14

State v. District Court,
116 Nev. 374, 997 P.2d 130 (2000) 7

Stiles v. Home Cable Concepts, Inc.,
994 F. Supp. 1410 (M.D. Ala. 1998) 24

Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,
559 U.S. ___, 130 S. Ct. 1758 (2010) 4

Subway Equip. Leasing Corp. v. Forte,
169 F.3d 324 (5th Cir. 1999) 18

Thomas O'Connor & Co. v. Ins. Co. of North America,
697 F. Supp. 563 (D. Mass. 1988) 14

Ting v. AT&T,
319 F.3d 1126 (9th Cir. 2003) 23

Tsadilas v. Providian Nat'l Bank,
786 N.Y.S. 2d 478 (1st Dep't. 2004) 24

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468, 109 S. Ct. 1248 (1989) 5, 14

Walker v. J.C. Bradford & Co.,
938 F.2d 575 (5th Cir. 1991) 20

Webb v. ALC of West Cleveland, Inc.,
2008 WL 4358554 (Ohio Ct. App. 2008) 24

Wright v. Circuit City Stores, Inc.,
201 F.R.D. 525 (N.D. Ala. 2001) 24

Zawikowski v. Beneficial National Bank,
1999 WL 35304 (N.D. Ill. Jan. 11, 1999) 27

Zimmer v. CooperNeff Advisors, Inc.,
523 F.3d 224 (3d Cir. 2008) 20

Statutes

9 U.S.C. Sections 1-16 ..... 8, 13

NRS 34.170 7

NRS Chapter 598 3

NRS Chapter 604A 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRINCIPAL INVESTMENTS, INC.. d/b/a RAPID CASH, GRANITE FINANCIAL SERVICES, INC., d/b/a RAPID CASH, FMMR INVESTMENTS, INC., d/b/a RAPID CASH, PRIME GROUP, INC., d/b/a RAPID CASH and ADVANCE GROUP, INC. d/b/a RAPID CASH, Petitioners, *vs.* The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE ELIZABETH GONZALEZ, District Judge, Respondent, and CASSANDRA HARRISON, EUGENE VARCADOS CONCEPION QUINTINO and MARY DUNGAN, Real Parties in Interest.	Case No. District Court No. A624982

PETITION AND RELIEF SOUGHT

Petitioners Principal Investments, Inc., d/b/a Rapid Cash, Granite Financial Services, Inc., d/b/a Rapid Cash, FMMR Investments, Inc., d/b/a Rapid Cash, Prime Group, Inc., d/b/a Rapid Cash and Advance Group, Inc., d/b/a Rapid Cash (collectively, "Rapid Cash") petition this Court to issue an extraordinary writ of mandamus or, in the alternative, prohibition (i) commanding the respondent district court and judge to vacate its November 29, 2010 order denying the Rapid Cash entities' "Motion to Compel Arbitration and Stay All Proceedings" in the underlying action, Case No. A-624982 and (ii) directing the district court instead to grant that motion.

ISSUES PRESENTED

The district court in this case denied a motion to compel arbitration. The court did not find fault in the arbitration agreements, themselves, which were broad in scope and bilateral in application and even allowed the plaintiffs either to opt-out of them or to rescind the underlying loan agreement. Instead, the court held that circumstances precluded their enforcement, raising the issues:

1. Did the district court manifestly err in holding that Rapid Cash waived the contractual right to arbitration by initiating collection actions in small claims court consistent with the terms of the arbitration provisions?

2. Did the district court manifestly err in holding that it is against public policy to allow Rapid Cash to bring collection claims in court while compelling arbitration of separate and distinct tort and/or fraud claims arising out of the service of those collection complaints?

STATEMENT OF THE CASE

Plaintiffs/real-parties-in-interest Cassandra Harrison, Eugene Varcados Concepion Quintino and Mary Dungan ("plaintiffs" or the "borrowers") obtained loans from one of the defendant/petitioner Rapid Cash entities. (App. 6, 7, 8.) Each loan agreement executed by the borrowers—and some executed multiple agreements as they obtained multiple loans—contained an arbitration provision requiring borrowers individually to arbitrate any and all claims against Rapid Cash. (App. 39, 45, 60, 103.) Under the contract, each borrower could have opted out of the arbitration provision within 30 days of receiving the loan proceeds without any effect on the loan, or any borrower could have rescinded their loan transactions at no charge. (App. 39, 45, 59, 106.) The borrowers here did not do either.

These borrowers defaulted on their loans (App. 6-7, 29-35), and in each instance, a Rapid Cash entity sued a borrower in the Las Vegas Justice Court. (App. 3.) In those collection actions, however, Rapid Cash's process server failed to serve collection complaints against the borrowers, although he verified that he had. (App.

3.) Defaults were taken in those collection actions. (App. 7-9.) The borrowers did not move to set aside either the defaults in the justice court or any resulting judgments.

Instead, and notwithstanding the parties' arbitration provisions, after the process server's alleged failure to serve process for non-affiliated debt collection company became public knowledge, the borrowers commenced the underlying action in the respondent district court. (App. 2.) Plaintiffs contend that their rights were violated when the process server failed to serve them, and the complaint names the Rapid Cash entities, as well as the process servers, as defendants. (App. 2.) The borrowers seek a variety of relief[1] on behalf of themselves and a putative class of others similarly situated.

Rapid Cash moved to compel arbitration. (App. 101.) The borrowers opposed arbitration, raising a veritable "laundry list" of contentions, including that Rapid Cash had waived the right to arbitration (App. 121), that the arbitration provisions were unconscionable because of their class action waivers (App. 122), that the borrowers' claims were beyond the scope of the arbitration provisions (App. 122-123), that the arbitration provisions violated public policy (App. 123), and that it was in the public interest to litigate the claims. (App. 123.)

The district court denied the motion to compel arbitration. (App. 231.) The court ruled that Rapid Cash had waived the contractual right to arbitrate and that Nevada public policy militated against compelling arbitration of the borrowers' claims. (App. 232.) The district court reasoned that: (i) Rapid Cash had waived the right to compel arbitration under the contract by instituting prior collection actions in the Justice Court, and (ii) because the borrowers were alleging fraud with regard to

---

[1] Plaintiffs seek compensatory damages, punitive damages, injunctive relief and attorneys' fees; and the complaint also purports to state claims for "Equity for Fraud upon the Court," abuse of process, negligent hiring/supervision/retention, negligence, civil conspiracy, violation of NRS Chapter 604A and violation of NRS Chapter 598. (App. 1-25.)

Rapid Cash's service of the collection complaints, public policy militated against arbitration. (App. 225-226.) The Court reasoned:

> Unfortunately, the conduct of the defendant in its collection efforts in my [opinion] constitutes a waiver of the right to elect arbitration. In the Court's opinion it is against public policy to allow litigation, even if it is in the Small Claims Court, and then require arbitration of those claims which arise from the alleged tortious and fraudulent conduct of defendants and its agents in those collection activities.

(App. 226).

Of significance, however, the district court did not find that the actual contract terms – including the class action waiver – or any aspect of the arbitration provision violated any law or policy. To the contrary, the court noted the consumer-friendly aspect of the provision, stating:

> I agree with you that that this is a very well-written arbitration clause, and the right to reject [the] arbitration provision is probably one that would generally make this clause valid.

(App. 202).

The court entered its order on November 29, 2010. (App. 231.) This petition followed.

SUMMARY OF ARGUMENT

The district court's denial of arbitration ruling is erroneous and needs to be reversed. The United States Supreme Court recently reaffirmed that when "enforcing an agreement to arbitrate or construing an arbitration clause, courts ... must 'give effect to the contractual rights and expectations of the parties'" and that "'the parties' intentions control.'" *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. ___, 130 S. Ct. 1758, 1773-74 (2010). Furthermore, it is well settled that a party cannot waive the right to arbitration unless it has acted inconsistently with the parties' arbitration agreement. That is not the case here.

The arbitration agreement provides that each party may file a lawsuit against the other, and then the other party may elect to arbitrate the dispute. The arbitration

provisions did not require Rapid Cash to arbitrate their collection actions unless the borrowers demanded that. In other words, because the arbitration provisions expressly permitted Rapid Cash to bring collection actions against the borrowers, Rapid Cash's actions are simply not inconsistent with the arbitration provisions and cannot, as a matter of law, constitute waiver. *See, e.g., Benson Pump Co. v. S. Cent. Pool Supply*, 325 F. Supp. 2d 1152, 1157 (D. Nev. 2004) ("A party asserting waiver of a right to arbitration must demonstrate . . . acts inconsistent with that existing right.").

Moreover, compelling arbitration in the instant action – consistent with the terms of the arbitration provisions – cannot constitute a violation of any public policy. Indeed, both federal and Nevada law favor arbitration in general and require it in this particular case.

In this petition, Rapid Cash asks this Court to (i) apply clear federal and state law regarding arbitration and waiver, which mandates the conclusion that Rapid Cash did not waive the right to compel arbitration of the borrowers' claims; (ii) vacate the District Court's order denying the motion to compel arbitration; and (iii) direct the District Court to grant defendants' "Motion to Compel Arbitration and Stay All Proceedings."

The contract calls for it to be governed by the Federal Arbitration Act, and the "central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, __ U.S. ___, ___, 130 S. Ct. 1758, 1773 (2010) (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1256 (1989)).

The arbitration provisions in this case provide that, while one contractual party may file a lawsuit against the other, the other party may then elect to arbitrate the

dispute. (App. 39.)[2] Specifically, the Arbitration Provision states that the party electing to arbitrate must provide the other party with written notice, and that such notice "may be given after a lawsuit has been filed and may be given in papers or motions in the lawsuit." (App. 39.) The Arbitration Provision also explicitly states that, regarding any other pending or previous litigation, ***"nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision."*** (App. 39, 45, 59.) In short, the Rapid Cash Defendants' collection actions were permitted by, and consistent with the terms of, the arbitration provisions. Under the plain terms of the arbitration provisions entered into by the parties, initiating litigation in collection of a debt cannot constitute waiver of the right to compel arbitration if a later suit is brought by the borrower.

In addition, the arbitration provisions entered into by the parties are drafted broadly to require arbitration of virtually every possible type of claim, including "claims of every kind and nature, including but not limited to, initial claims, counterclaims, cross-claims and third-party claims, and claims based on any constitution, statute, regulation, ordinance or common law rule (including rules relating to contracts, negligence, ***fraud or other intentional wrongs***) and equity. (App. 39, 45, 59.) As the Supreme Court has noted, the Federal Arbitration Act, which preempts conflicting state law and public policy, requires that arbitration agreements be enforced according to their terms. In the instant case, the Respondents and the Rapid Cash Defendants each agreed that any claims for fraud or intentional wrongs would be covered by their arbitration provisions and must be arbitrated upon demand by either party. Indeed, parties are free to agree to arbitration of any claims, and a court does not violate Nevada public policy by enforcing the FAA and compelling arbitration under a valid arbitration agreement.

---

[2]The Quintino Arbitration Provision exempts small claims or justice court actions brought by the borrower or the Rapid Cash Defendants from mediation or arbitration.

(continued)

In short, federal law compels the enforcement of the arbitration provisions at issue here. Thus, this Court should (i) vacate and expunge the district court's order denying the Rapid Cash Defendants' motion to compel arbitration and stay all proceedings, and (ii) direct the district court to enter an order granting the Rapid Cash Defendants' motion to compel arbitration and stay all proceedings.

ARGUMENT

I.

THE PROPRIETY OF WRIT RELIEF

A writ of mandamus "shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law . . . upon affidavit, on the application of the party beneficially interested." NRS 34.170. Mandamus is available to compel a district court to perform an act that the law requires as a duty of the district court or to reverse an arbitrary or capricious exercise of discretion by the district court. *See State v. District Court*, 116 Nev. 374, 379, 997 P.2d 130 (2000) (citing NRS 34.170; *Round Hill Gen. Imp. Dist. v. Newman*, 91 Nev. 601, 540 P.2d 104 (1981)).

If Rapid Cash were forced to incur the burden and expense of litigation before the arbitration issue is reviewed on appeal, it would severely undercut both the right to appeal and their ultimate right to arbitration. *See, e.g., Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997) (benefits of arbitration are lost if the parties are required to proceed in court while an appeal of the order denying arbitration is undertaken); *C.B.S. Employees' Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 716 F. Supp. 307, 310 (W.D. Tenn. 1989), *aff'd*, 912 F.2d 1563 (6th Cir. 1990). If a party must undergo the expense and delay of litigation before being able to appeal, the advantages of arbitration – speed and economy – are lost forever. *Id.* This consequence is serious, perhaps irreparable. *Id.*

(App. 88.)

(citing *Alascom, Inv. v. ITT North Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984)). As the Seventh Circuit observed:

> Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced. Immediate appeal ... helps to cut the loss from duplication. Yet combining the costs of litigation and arbitration is what lies in store if a district court continues with the case while an appeal ... is pending.

Bradford-Scott Data Corp., 128 F.3d at 506.

Section 16 of the FAA explicitly provides for an immediate appeal of the denial of a motion to compel arbitration. *See* 9 U.S.C. § 16(a). Congress's intent in enacting section 16 was to favor arbitration, and it did so by authorizing immediate appeals from orders denying arbitration. *See, e.g., Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1153-54 (9th Cir. 2004); *Adams v. Ga. Gulf Corp.*, 237 F.3d 538, 540 (5th Cir. 2001).

Accordingly, this Court should hear Rapid Cash's petition.

II.

THE STANDARD OF REVIEW

In "reviewing arbitration agreements, the issue of 'whether a dispute is arbitrable is essentially a question of construction of a contract.'" *Kindred v. District Court*, 116 Nev. 405, 410, 996 P 2d 903, 907 (2000) (citing *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990)). As such, "the reviewing court is obligated to make its own independent determination on this issue, and should not defer to the district court's determination." *Id.*

III.

THE ARBITRATION PROVISIONS

A. The Arbitration Provisions in Harrison's, Varcados's and Dungan's Contracts

The third page of the agreement contains the following heading in bold face and capitalization: "**ARBITRATION PROVISION**". Immediately thereafter, the arbitration provision provides, in capitalized letters:

> VERY IMPORTANT. READ THIS ARBITRATION PROVISION CAREFULLY. IT SETS FORTH WHEN AND HOW CLAIMS (AS DEFINED IN SECTION 2 BELOW) WHICH YOU OR WE HAVE AGAINST ONE ANOTHER WILL BE ARBITRATED INSTEAD OF LITIGATED IN COURT. IF YOU DON'T REJECT THIS ARBITRATION PROVISION IN ACCORDANCE WITH SECTION 1 BELOW, UNLESS PROHIBITED BY APPLICABLE LAW, IT WILL HAVE A SUBSTANTIAL IMPACT ON THE WAY IN WHICH YOU OR WE RESOLVE ANY CLAIM WHICH YOU OR WE HAVE AGAINST EACH OTHER NOW OR IN THE FUTURE.

(App. 39, 45, 59.) The arbitration provision allows the borrower the ability to opt-out of arbitration within 30 days by providing a written notice:

> 1. **Right To Reject Arbitration.** If you do not want this Arbitration Provision to apply, you may reject it within 30 days after the date of your application ("Application") for check cashing, credit, loan or other services from us ("Services") [by delivering to us at any of our offices or] by mailing to us in care of Tiger Financial Management, LLC, Attn: Legal Department, 3527 North Ridge Road, Wichita, Kansas 67205, a written rejection notice which provides your name, address, the date of the Application, the address of the store where you submitted the Application and states that you are rejecting the related Arbitration Provision. If you want proof of the date of such a notice, you should send the notice by "certified mail, return receipt requested." If you use such a method, we will reimburse you for the postage upon your request. Nobody else can reject arbitration for you; this is the only way you can reject arbitration. Your rejection of arbitration will not affect your right to Services or the terms of Services. If you reject this Arbitration Provision, it shall have the effect of rejecting any prior arbitration provision or agreement between you and us that you did not have the right to reject; it will not affect any prior arbitration provision or agreement which you had a right to reject that you did not exercise.

(App. 39, 45, 59.) As stated, a borrower's exercise of the opt-out right would have had no affect on her ability to obtain a loan or the terms of her loan.

In its preamble, the arbitration provision provides "that either party may elect to require arbitration of any Claim...." A party electing the arbitration of a claim "must give written notice of an election to arbitrate." (App. 39, 45, 60.) The arbitration provision also establishes that "[e]ven if all parties have elected to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claim asserted in that lawsuit, and nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision." (*Id.* at ¶ 2.[3])

The arbitration provision requires the individual arbitration of all Claims:

> 5. **NO CLASS ACTIONS OR SIMILAR PROCEEDINGS; SPECIAL FEATURES OF ARBITRATION.** IF YOU OR WE ELECT TO ARBITRATE A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO: (A) HAVE A COURT OR A JURY DECIDE THE CLAIM; (B) OBTAIN INFORMATION PRIOR TO THE HEARING TO THE SAME EXTENT THAT YOU OR WE COULD IN COURT; (C) PARTICIPATE IN A CLASS ACTION IN COURT OR IN ARBITRATION, EITHER AS A CLASS REPRESENTATIVE, CLASS MEMBER OR CLASS OPPONENT; (D) ACT AS A PRIVATE ATTORNEY GENERAL IN COURT OR IN ARBITRATION; OR (E) JOIN OR CONSOLIDATE CLAIM(S) INVOLVING YOU WITH CLAIMS INVOLVING ANY OTHER PERSON. THE RIGHT TO APPEAL IS MORE LIMITED IN ARBITRATION THAN IN COURT. OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

---

[3] The arbitration provision broadly defines "Claim" to cover every conceivable dispute: "The term 'Claim' means any claim, dispute or controversy between you and us (including 'related parties' identified below) that arises from or relates in any way to Services you request or we provide, now, in the past or in the future; the Application (or any prior or future application); any agreement relating to Services ('Services Agreement'); any of our marketing, advertising, solicitations and conduct relating to your request for Services; our collection of any amounts you owe; our disclosure of or failure to protect any information about you; or the validity, enforceability or scope of this Arbitration Provision." (App. 39, 45, 59.) The arbitration provision defines "Services" as including a loan. (*Id.* at ¶ 1.)

(App. 40, 46, 60.) However, the arbitration provision permits the borrower to bring an individual action in small claims court. (*Id.* at ¶ 2.)

In the event of a successful individual arbitration, the arbitration provision allows that the award to the borrower will be increased to $100 over the jurisdictional limit of the small claims court within the jurisdiction.[4]

> In addition, if you prevail in an individual (non-class) arbitration against us in which you are seeking monetary relief from us, we agree that the arbitrator shall award as the minimum amount of your damages (excluding arbitration fees and attorneys' fees and costs, if any) an amount that is $100 greater than the jurisdictional limit of the small claims court (or your state's equivalent court) in the county in which you reside. For example, if such a court can decide claims up to $5,000, then if you prevail in an individual arbitration, you will receive a minimum of $5,100 even if the amount you would otherwise be entitled to receive is less than that amount.

(App. 40, 46, 60.)

The arbitration provision is governed by the Federal Arbitration Act: "This Arbitration Provision is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA, and not Federal or state rules of civil procedure or evidence or any state laws that pertain specifically to arbitration, provided that the law of Kansas, where we are headquartered, shall be applicable to the extent that any state law is relevant in determining the enforceability of this Arbitration Provision under Section 2 of the FAA." *Id.* (App. 40, 46, 60.)

The arbitration provision requires that Rapid Cash will pay all of the costs of arbitration and the arbitrator must award a successful borrower his or her attorneys' fees:

> We will consider any good faith request you make for us to pay the administrator's or arbitrator's filing, administrative, hearing and/or other fees if you cannot obtain a waiver of such fees from the administrator and we will not seek or accept reimbursement of any such fees. We will also pay any fees or expenses we are required by law to pay or that

[4] The jurisdictional limit of justice courts in Nevada is $10,000.

> we must pay in order for this Arbitration Provision to be enforced. Each party must normally pay for its own attorneys, experts and witnesses. However, we will pay all such reasonable fees and costs you incur if you are the prevailing party and/or where required by applicable law and/or the administrator's rules. The arbitrator shall not limit the attorneys' fees and costs to which you are entitled because your Claim is for a small amount. Also, to the extent permitted by applicable law and provided in any Services Agreement, you will pay any reasonable attorneys' fees, collection costs and arbitration fees and costs we incur if we prevail in an arbitration in which we seek to recover any amount owed by you to us under the Services Agreement.

App. 39, 45, 60.)

B. The Arbitration Provision in Quintino's Contract

Concepcion Quintino sought three loans in April and May 2006. Each time he entered into the "Deferred Deposit Agreement & Disclosure Statement." (App. 86, 91, 96.) All three agreements permitted Quintino one day within which to rescind without being responsible for the finance charge. (App. 34.). All three agreements contain an arbitration agreement where Quintino was to first seek mediation for any disputes and, if mediation was unsuccessful, then submit the matter to binding arbitration. (*Id.* at ¶ 37.) Quintino has not sought to exercise his right to mediation or presented the matter to arbitration. (*Id.*) Nor did he seek to rescind his loans. (*Id.* at ¶ 30.)

All three Agreements contain the identical "**Agreements for Resolving Disputes**" (hereinafter, "Quintino Arbitration Provision").

> The Quintino Arbitration Provision broadly defines Claims:
>
> **Meaning of "Claims."** Claims means any and all claims, disputes or controversies that arise under common law, federal or state statute or regulation, or otherwise, and that we or our servicers or agents have against you or that you have against us, our servicers, agents, directors, officers and employees. "Claims" also includes any and all claims that arise out of (i) the validity, scope and/or applicability of this Mediation Agreement or the Arbitration Agreement appearing below, (ii) your application for a Loan, (iii) the Agreement, (iv) any prior agreement between you and us, including any prior loans we have made to you or (v) our collection of any Loan. "Claims" also includes all claims

> asserted as a representative, private attorney general, member of a class or in any other representative capacity, and all counterclaims, cross-claims and third party claims.

(App. 87, 92, 97.) The Quintino Arbitration Provision exempts small claims actions from arbitration and mediation. (*Id.* at 3.)

The Quintino Arbitration Provision also contains an arbitration agreement providing for individual arbitration in the event the parties are unable to resolve their Claims in mediation. (*Id.* at 3.) The Quintino Arbitration Provision also provides that it is governed by the Federal Arbitration Act. (*Id.* at 3.)

IV.

RAPID CASH HAS NOT WAIVED THE RIGHT TO ARBITRATION

Rapid Cash has not waived the right to compel arbitration in this case simply by having previously filed collection actions against the individual borrowers in Justice Court. To the contrary, the borrowers' waiver argument is defeated by the plain language of the arbitration provisions, as well as case law interpreting similar agreements, and it finds no basis in the facts of this case in any event.

A. The Federal Arbitration Act Applies When Determining Whether A Party May Have Waived its Right to Compel Arbitration

1. *The FAA Controls These Contracts*

The arbitration provisions at issue here explicitly provide that the FAA governs them. The arbitration provision for all Respondents except Quintino states that it "is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA, and not . . . any state laws that pertain specifically to arbitration . . . ." (App. 40, 46, 60.) The Quintino Arbitration Provision similarly reads: "This Arbitration Agreement is made pursuant to a transaction involving interstate commerce. It will be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as amended ("FAA")." (*See* App. 88, 93, 98.) This language makes unmistakably clear that any issues concerning the interpretation of the arbitration provisions are to be considered under the FAA, and not under state law. *See, e.g., Credit Acceptance*

Corp. v. Davisson, 644 F. Supp.2d 948, 954 (N.D. Ohio 2009) (finding FAA applied because "the Contract itself provides that '[t]he Federal Arbitration Act governs this Arbitration Clause.... The Arbitration Clause is governed by the Federal Arbitration Act . . . and not by any state arbitration law.'"); *Staples v. The Money Tree, Inc.*, 936 F. Supp. 856, 858 (M.D. Ala. 1996); *Thomas O'Connor & Co. v. Ins. Co. of North America*, 697 F. Supp. 563, 566 (D. Mass. 1988); *see also Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479, 109 S. Ct. at 1256 (1989)) (courts must "rigorously enforce [arbitration] agreements according to their terms").

Plaintiffs never have disputed that the FAA governs the arbitration provisions at issue in this matter.

2. *The Issue of Waiver Is Governed by the FAA*

In addition, the federal courts have clearly held that whether a party has waived its contractual right to compel arbitration is governed by the FAA, and not state law. *See, e.g., Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1312 (9th Cir. 2004) ("the FAA, not state law, supplied the standard for waiver of the right to compel arbitration.") (citing *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002)); *Konica Minolta Business Solutions, U.S.A., Inc. v. Allied Office Products, Inc.*, 2006 WL 3827461, at *11 (S.D. Ohio Dec. 27, 2006) (noting that "the issue of arbitrability under the FAA is a matter of federal law"). Indeed, the United States Supreme Court has made clear that state law can only be applied if the parties clearly evidence their intent to be bound by such law. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62, 115 S. Ct. 1212, 1218-19 (1995). "In other words, the strong default presumption is that the FAA, not state law, applies the rules for arbitration." *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002)). *Accord Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 123 (2d Cir. 2003) (without clear language of incorporation, a general choice of law provision held not to have incorporated state arbitration law into an arbitration agreement); *Action*

Indus., Inc. v. U.S. Fidelity & Guaranty Co., 358 F.3d 337, 341 (5th Cir. 2004) (same).

Under the foregoing authority, even when faced with a general choice-of-law clause requiring the application of state law, the federal courts have refused to apply state law to arbitration issues such as waiver.[5] *See, e.g., Sovak*, 280 F.3d at 1269-70 (where arbitration agreement contained an Illinois choice-of-law clause, the court held that "waiver of the right to compel arbitration is a rule for arbitration, such that the FAA controls."); *see also Mastrobuono*, 514 U.S. at 64, 115 S. Ct. at 1219 (general choice-of-law provision in contract did not require application of state law to arbitration clause); *Smith Barney, Inc. v. Critical Health Sys. of N.C.*, 212 F.3d 858, 861 n.1 (4th Cir. 2000) (same); *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1131 (9th Cir. 2000) ("*Mastrobuono* dictates that general choice of law clauses do not incorporate state rules for arbitration.").

There is nothing, and plaintiffs point to nothing, in the Loan Agreements or the arbitration provisions that even purports to require the application of state law to arbitration issues such as waiver. Furthermore, as noted above, there is clear and unmistakable language in the arbitration provisions that requires the application of the FAA. Therefore, Respondents' waiver argument must be considered under the FAA.

3. *Pursuant to The Arbitration Provisions, the Arbitrator Is Charged With Determining the Enforceability and Scope of the Arbitration Agreements, Including Whether Such Agreements Have Been Waived*

As an initial matter, the arbitration provisions expressly provide that the arbitrator—and not the District Court—is charged with determining the validity, enforceability, and scope of the arbitration provisions. Specifically, the arbitration provisions state that "you and we agree that either party may elect to require arbitration of any Claim ...." (App. 39, 45, 59.) Of significance, the term "Claim" –

---

[5]The Arbitration Provision provides for the application of Kansas law to the extent

(continued)

explicitly made subject to arbitration – is defined to include "any claim, dispute or controversy between you and us . . . that arises or relates in any way to . . . ***the validity, enforceability or scope of this Arbitration Provision.***" (App. 39, 45, 59 (emphasis added).[6])

The above-quoted contractual language makes clear that it is the arbitrator who is charged with determining whether the arbitration provisions are enforceable or if a particular dispute is arbitrable. While absent an agreement to the contrary, the courts often decide so-called "gateway matters" such as "whether a concededly binding arbitration clause applies to a certain type of controversy," *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 2407 (2003), this rule does not apply where the parties have "'clearly and unmistakably provided otherwise'" in their arbitration agreement. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83, 123 S. Ct. 588, 591 (2002) (quoting *AT&T Techs. Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418 (1986)); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1921 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter.") (emphasis in original). As one federal court explained, "[g]enerally, courts and arbitrators need to look no further than the language of the written contract between the parties to find 'clear and unmistakable evidence' that the parties intended to submit the question of arbitrability to arbitration." *Daugherty v. Washington Square Sec., Inc.*, 271 F. Supp.2d 681, 687 (W.D. Pa. 2003).

---

any state law would be relevant. (App. 40, 46, 60.)

[6] Similarly, the Quintino Agreement provides that "'Claims' also includes any and all claims that arise out of (i) the validity, scope and/or applicability of this Mediation Agreement or the Arbitration Agreement . . . ." (App. 87, 92, 97.)

B. The Rapid Cash Defendants Did Not Waive Their Right to Compel Arbitration Under the Express Language of the Parties' Arbitration Provisions

Plaintiffs argue that the Rapid Cash defendants, by filing prior collection actions against the borrowers in justice court, waived their right to compel the arbitration of the claims raised in this separate, subsequent district court litigation. Any such argument fails both under the clear language of the arbitration provisions and as a matter of common sense.

The law is clear that the Rapid Cash Defendants are to be afforded the presumption that they did not waive the right to compel arbitration, as any doubts concerning waiver must be resolved in favor of arbitration as held by the United States Supreme Court. *See, e.g., Moses H. Cohn Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941-42 (1983); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (citing *Moses H. Cohn Mem'l Hosp.*); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 926 (3d Cir. 1992). "[W]aiver of a contractual right to arbitration is not favored." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir.1986); *see also Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005). Rather, waiver of a right to compel arbitration is analyzed in light of "the strong federal policy favoring enforcement of arbitration agreements." *Fisher*, 791 F.2d at 694. Consequently, the party claiming waiver bears a heavy burden. *See, e.g., Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir.1990).

A waiver may only be found as a result of a party's actions that are inconsistent with its contractual right to arbitration. *See, e.g., Britton*, 916 F.3d at 1412; *Benson Pump Co. v. S. Cent. Pool Supply*, 325 F. Supp. 2d 1152, 1157 (D. Nev. 2004) ("A party asserting waiver of a right to arbitration must demonstrate . . . acts inconsistent with that existing right."); *Irving v. Ebix, Inc.*, No. 10-cv-762 JLS (BLM), 2010 WL 3168429, at *9 (S.D. Ca. Aug. 10, 2010) (waiver of a contractual right to arbitration is not favored, and requires acts inconsistent with right to arbitration); *P & M Corporate Finance, LLC v. Paparella*, Case No. 2:10-cv-10448, 2010 WL 4272829, at *3 (E.D.

Mich. Oct. 22, 2010) (a party may waive an arbitration agreement by "taking actions that are completely inconsistent with any reliance on an arbitration agreement).[7]

Here, the parties' arbitration provisions expressly contemplated the Rapid Cash entities' institution of collection actions. Consequently, bringing such actions cannot be inconsistent with the contractual right to compel arbitration of plaintiffs' subsequent claims in the underlying district court action. Indeed, plaintiffs' claims in the underlying action present factual and legal issues distinct from those raised in the collection actions. Therefore, it would strain credulity to conclude that Rapid Cash's institution of collection actions amounts to a waiver of the contractual right to compel arbitration of legally and factually distinct claims, asserted in a later-filed class action. See, e.g., *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999) (party only invokes the judicial process so as to waive arbitration when it litigates a specific claim it subsequently seeks to arbitrate); *Fidelity Nat'l Corp. v. Blakely*, 305 F. Supp.2d 639, 642 (S.D. Miss. 2003) (waiver impossible where lender did not seek to litigate issues surrounding the present counterclaim in its instant collection action).

The language of the arbitration provision, itself, mandates the conclusion that Rapid Cash's bringing collection actions cannot amount to a "waiver." First, the arbitration provision expressly contemplates that one party may file a court action – just as Rapid Cash brought collection actions – and the other party may or may not choose to arbitrate the same. (App. 39, 45, 59-60.) Second, the arbitration provision also explicitly states that, regarding any other pending or previous litigation, ***"nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision."*** (App. 39, 45, 59 (emphasis added). The Quintino Arbitration Provision expressly exempts small claims actions – such as the Rapid Cash's collection actions – from arbitration. *See* Quintino Arbitration Provision at "Exemptions to Mediation

---

[7]Nevada law, should it apply, also requires conduct inconsistent with the contractual right to arbitrate in order to find a waiver. *See Nevada Gold & Casinos, Inc. v. Am.*

(continued)

and Arbitration." (App. 88, 93, 98.) This language defeats plaintiffs' "waiver" argument.

The lower court's finding of waiver flies in the face of some rather well-settled authority. Numerous courts have rejected the same "waiver" argument advanced by plaintiffs here, that the institution of some prior form of litigation as permitted by the parties' arbitration agreement constituted a waiver of the right to compel arbitration of a subsequent claim. *See, e.g., Credit Acceptance Corp. v. Davisson*, 644 F. Supp.2d 948, 956-57 (N.D. Ohio 2009) (collection agency did not waive its right to compel arbitration of class action counterclaim by filing suit against debtor in state court, because the arbitration clause specifically contemplated either party could file a lawsuit and the other could elect arbitration); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1091 (8th Cir. 2007) (lender's civil action to collect debt through proof of claim could not constitute waiver of right to compel arbitration of subsequent adversary complaint as the parties' arbitration agreement explicitly permitted lender to file such a claim); *Citifinancial, Inc. v. Farmer*, 4:06CV4LR 2006 WL 1273712 (S.D. Miss. May 9, 2006) (institution of collection action could not constitute waiver of right to compel arbitration of subsequent counterclaim in light of the express language of the arbitration agreement permitting such); *Fidelity Nat'l Corp. v. Blakely*, 305 F. Supp.2d 639, 642 (S.D. Miss. 2003) (same). As in these cases, the "waiver" argument raised by Respondents here must fail on the shoals of the express language of the parties' arbitration provisions.

In addition, "prejudice or harm to the party alleging waiver by litigation" is a required element of any claim as to waiver, and Respondents have failed to establish any such prejudice here. *See, e.g., Motors Ins. Corp. v. Pasco, Inc.*, No. 06-2911, 2007 WL 184718, at *8 (N.D. Ohio Jan. 19, 2007); *Sovak*, 280 F.3d at 1270) (in order to establish waiver of an arbitration provision, party must prove that he "suffered

---

Heritage, Inc., 121 Nev. 84, 90-91, 110 P.3d 481, 484 (2005).

prejudice from [Movant's] delay in moving to compel arbitration"); *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231 (3d Cir. 2008) ("Whether party has waived its right to arbitrate by its litigation conduct depends on prejudice to opposing party."); *Cotton v. Sloan*, 4 F.3d 176, 179 (2d Cir. 1993) ("[w]aiver will be inferred when a party engages in protracted litigation that results in prejudice to the opposing party"); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991) ("[w]aiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.").

Here, in a weak effort to establish the requisite prejudice, plaintiffs conflate the collection cases with the underlying district court case. Plaintiffs experience no prejudice if they are compelled to arbitrate the underlying action in accordance with the arbitration provision. Plaintiffs cannot assert any prejudice from Rapid Cash seeking arbitration of the instant action of plaintiffs' district court claims.

V.

ENFORCEMENT OF THE ARBITRATION PROVISIONS IS NOT AGAINST PUBLIC POLICY.

A. Enforcement of the Parties' Arbitration Provision Will Not Violate Any Public Policy

Plaintiffs contend that public policy mandates that the Court invalidate the parties' Arbitration Provision because this matter would otherwise be "swept under the rug." (App. 127:26.) This argument fails for several reasons.

First, there is nothing preventing these borrowers, or any other members of the putative class, from moving to vacate their defaults in the Justice Court actions. Rapid Cash merely seeks to have plaintiffs' separate, affirmative suit arbitrated as the parties have agreed.

Second, courts have repeatedly rejected plaintiffs' argument that public policy requires certain disputes to be heard in open courts. In fact, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.* rejected the argument that the non-public nature of arbitration and the lack of a written decision would result in decreased public

awareness of discriminatory employment policies and ineffective appellate review. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33, 111 S. Ct. 1647, 1654-1656 (1991).

Similarly in *Parilla v. IAP Worldwide Serv.*, 368 F.3d 269 (3d Cir. 2004), the Third Circuit rejected and reversed a district court determination that the rules governing arbitration of employment disputes improperly required the confidentiality of arbitration and arbitration awards. The Third Circuit held that the rules requiring confidentiality were not unreasonable:

> Each side has the same rights and restraints under those provisions and there is nothing inherent in confidentiality itself that favors or burdens one party vis-à-vis the other in the dispute resolution process. Importantly, the confidentiality of the proceedings will not impede or burden in any way [the plaintiff's] ability to obtain any relief to which she may be entitled.

Id. at 280. Significantly, the Third Circuit rejected the precise argument raised by the borrowers in this case, that the non-public nature of arbitration would make it more difficult for future claimants. *Id.* Noting that the United States Supreme Court upheld arbitration in *Gilmer*, the Third Circuit concluded that the arbitration agreement was not unconscionable. *Id.* at 281. *Accord Iberia Credit Bureau, Inc.*, 379 F.3d at 175-76 (argument consists of nothing more than outdated and generalized attacks on arbitration).

Plaintiffs are ill informed, moreover, if they believe that arbitration of their claims will not result in a written decision. The arbitration provision provides that "[u]pon the timely request of either party, the arbitrator shall write a brief explanation of the basis of his or her award." (App. 40, 46, 60.) Judgment upon that same award must be entered in a court of competent jurisdiction. (*Id.* at ¶ 7.) Consequently, the decision of this case will not be "swept under the rug" here, and plaintiffs' argument evinces an anti-arbitration bias long rejected by the FAA and the courts.

Finally, and in any event, state public policies may not trump the FAA and the enforcement of arbitration provisions. The United States Supreme Court has

demonstrated the primacy of federal law by repeatedly invalidating state laws that attempt to limit the enforceability of arbitration agreements. In invalidating these laws, the Supreme Court has explained that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Perry*, 482 U.S. at 489 (emphasis added) (California statute that required litigants to be provided a judicial forum for resolving wage disputes "must give way" to Congress' intent to provide for enforcement of arbitration agreements). More recently, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121, 121 S.Ct. 1302, 1312 (2001), the Supreme Court specifically rejected arguments that broadly applying the FAA to employment contracts would "intrude[ ] upon the policies of the separate states." The Court found the policies of state laws irrelevant because "Congress intended the FAA . . . to preempt state anti-arbitration laws." *Id.* at 122. *Accord Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858 (1984) (FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").[8]

B. The Arbitration Provisions and their Class Action Waiver Are Not Unconscionable

In opposing arbitration below, plaintiffs also argued that the arbitration provisions are "unconscionable" under Nevada law, primarily because of their class action waivers. (App. 132.) Of note, the Court in its October 12, 2010 ruling did not address or otherwise rule on the issue of "unconscionability." To the contrary, at the hearing, the Court observed that the Arbitration Provision likely is "valid," stating that it agreed "that this is a very well-written arbitration clause, and the right to reject [the]

---

[8] Whether state law can be invoked to invalidate an arbitration agreement because it contains a class action waiver where state policies favor class actions is presently before the United States Supreme Court in *AT&T Mobility LCC v. Concepcion*, ___, U.S. ___, 130 S.Ct. 3322 (2010).

arbitration provision is probably one that would generally make this clause valid." (App. 129). Nonetheless, Rapid Cash will briefly demonstrate that the arbitration provision clearly is not "unconscionable" under Nevada law, and no public policy of Nevada is violated by its enforcement.

In Nevada, "[s]trong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004) (citing *Burch v. District Court,* 118 Nev. 438, 443, 49 P.3d 647, 650 (Nev. 2002)). Consistent with the policy favoring arbitration, arbitration provisions may ***only*** be invalidated if they are both procedurally and substantively unconscionable. *Id.*

Under Nevada law, a "clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract," and "often involves the use of fine print or complicated, incomplete or misleading language that fails to inform a reasonable person of the contractual language's consequences." *Id.* Substantive unconscionability, on the other hand, focuses on the "one-sidedness" of the contract terms. *D.R. Horton*, 96 P.3d at 1162-62 (citing *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003)); *Estate of Wildhaber v. Life Care Ctrs. of Am., Inc.*, No. 2:10-cv-00015-RLH-PAL, 2010 U.S. Dist. LEXIS 80563 (D. Nev. July 13, 2010). Thus, the doctrine of substantive unconscionability provides that the arbitration agreement must contain a modicum of bilaterality, and limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself. *Id.*

Procedural Unconscionability

As an initial matter, the vast majority of courts have held that, where consumers have the right to reject arbitration provisions, there is no procedural

unconscionability.[9] Here, plaintiffs clearly had a meaningful opportunity to review, and agree to or reject, the terms of the arbitration provision, or to rescind their loan agreements.[10] Plaintiffs were clearly and directly notified of their right to reject the

---

[9]*See, e.g., Clerk v. ACE Cash Express, Inc.*, No. 09-05117, 2010 U.S. Dist. LEXIS 7978, at *25 (E.D. Pa. Jan. 29, 2010); *Freedman v. Comcast Corp.*, 988 A.2d 68 (Md. Ct. of Special App. 2010); *Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *Providian National Bank v. Screws*, 894 So. 2d 625 (Ala. 2003); *Tsadilas v. Providian Nat'l Bank*, 13 A.D. 3d 190, 786 N.Y.S. 2d 478 (1st Dep't. 2004); *Marley v. Macy's South*, No. CV 405-227, 2007 WL 1745619, at *3 (S.D. Ga. June 18, 2007); *SDS Autos, Inc. v. Chrzanowski*, No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007); *Honig v. Comcast of Georgia, LLC*, 537 F. Supp. 2d 1277 (N.D. Ga. 2007); *Sanders v. Comcast Cable Holdings, LLC*, No. 3:07-cv-918-J-33HTS, 2008 WL 150479 (M.D. Fla. Jan. 14, 2008); *Davidson v. Cingular Wireless, LLC*, No. 2:06-cv- 00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007); *Martin v. Delaware Title Loans, Inc.*, No. 08-3322, 2008 WL 4443021 (E.D. Pa. Oct. 1, 2008); *Columbia Credit Services, Inc. v. Billingslea*, No. B190776, 2007 WL 1982721 (Cal. Ct. App. July 10, 2007); *Eaves-Leanos v. Assurant, Inc.*, No. 07-18, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008); *Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 06-0032, 2008 WL 830262 (E.D. Ark. March 25, 2008); *Crandall v. AT&T Mobility, LLC*, No. 07-750, 2008 WL 2796752 (S.D. Ill. July 18, 2008); *Webb v. ALC of West Cleveland, Inc.*, No. 90843, 2008 WL 4358554 (Ohio Ct. App. 2008); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 525 (N.D. Ala. 2001); *Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410 (M.D. Ala. 1998); *Guadagno v. E*Trade Bank*, No. CV 08-03628 SJO (JCX), 2008 WL 5479062 (C.D. Calif. Dec. 29, 2008); *Magee v. Advance America Servicing of Ark., Inc.*, No 6:08-CV-6105, 2009 WL 890991 (W.D. Ark. April 1, 2009); *Fluke v. CashCall*, No. 08-05776, 2009 U.S. Dist. LEXIS 43231 (E.D. Pa. May 21, 2009); *Credit Acceptance Corporation v. Davisson*, 644 F. Supp. 2d 948 (N.D. Ohio June 30, 2009).

[10]The Arbitration Provision contains the following heading in bold face and capitalization: "**RIGHT TO REJECT ARBITRATION**." "Immediately thereafter, the Arbitration Provision provides: If you do not want this Arbitration Provision to apply, you may reject it within 30 days after the date of your application ("Application") for check cashing, credit, loan or other services from us ("Services") [by delivering to us at any of our offices or] by mailing to us in care of Tiger Financial Management, LLC, Attn: Legal Department, 3527 North Ridge Road, Wichita, Kansas 67205, a written rejection notice which provides your name, address, the date of the Application, the address of the store where you submitted the Application and states that you are rejecting the related Arbitration Provision. If you want proof of the date of such a notice, you should send the notice by "certified mail, return receipt requested." If you use such a method, we will reimburse you for the postage upon your request. Nobody else can reject arbitration for you; this is the only way you can

(continued)

arbitration provision within 30 days of the date of their individual applications. (App. 39, 45, 59.) Moreover, plaintiffs were on notice that the rejection of the arbitration provision "[would] not affect [their] right to Services or the terms of Services." (App. 39, 45, 59.) As such, the arbitration provision cannot be found to have been a procedurally unconscionable contract of adhesion, as Respondents were clearly notified of their right to reject the Provision, and thus had a meaningful opportunity to agree to, or alternatively reject, the terms.[11]

In addition, the arbitration provisions and their effects were clearly and "readily ascertainable upon a review of the contract." *See D.R. Horton*, 120 Nev. at 554, 96 P.3d at 1162. In bolded and clear language, the arbitration agreement provided notice regarding rejection of the arbitration provision, waiver of the right to a jury trial, waiver of the right to participate in a class action lawsuit, and waiver of the right to bring an action in a court other than small claims court.[12]

The borrowers had many rights under the agreement: They had an unconditional right to reject the arbitration provision without losing any other contractual rights, including the basic right to obtain the loan sought, and they even had the right to rescind the loan agreement without charge. (App. 37, 43, 56, 86.) In addition, the arbitration provisions were clearly labeled, spanned more than half of the Agreement, had numerous bolded and capitalized notices regarding the "important" rights being given up, and contained a reiteration of the waiver of a right to bring claims in court or to bring a class action immediately above the signature line. The

---

reject arbitration. Your rejection of arbitration will not affect your right to Services or the terms of Services. If you reject this Arbitration Provision, it shall have the effect of rejecting any prior arbitration provision or agreement between you and us that you did not have the right to reject; it will not affect any prior arbitration provision or agreement which you had a right to reject that you did not exercise." (App. 39, 45, 59.)

[11]Similarly, the Agreement provided the right to rescind the loan transaction without charge. (*See* App. 86, 91, 96.)

arbitration provisions, therefore, cannot be found to have been procedurally unconscionable.

Substantive Unconscionability

As noted above, the Court can find the arbitration provisions (and class action waiver) substantively unconscionable under Nevada law only if the provisions are one-sided and lack a modicum of bilaterality. Quite simply, that exacting standard is not satisfied here because the terms of the arbitration provision apply equally to both parties. The arbitration provision, by its terms, applies ***equally*** to the borrowers and to Rapid Cash, and there has never been any assertion to the contrary. (App. 181.) Indeed, the preamble notes that the Arbitration Provision sets forth the manner in which borrowers and Rapid Cash will arbitrate claims ***against one another***. It also states that, "you and we agree that ***either party may elect to require arbitration*** of any Claim under the following terms and conditions." (App. 39, 45, 59.) (emphasis added). The arbitration provision goes on to state that, to make the arbitration election, "you or we must give written notice . . . ." (App. 39, 45, 60.) In other words, the arbitration provision is not one-sided[13] but, rather, applies equally to both borrowers and Rapid Cash– allowing either contractual party to elect to arbitrate claims brought by the other. [14]

---

[12](App. 39, 40, 41, 435-57, 59-60.)

[13]This is in addition to numerous consumer-friendly provisions contained in paragraph 4 and 8 of the Arbitration Provision, including a provision that if the customer prevails in an individual arbitration, the arbitrator shall award as a minimum amount of damages (excluding amounts for arbitration fees, attorney's fees, and costs, if any), "an amount that is $100 greater than the jurisdictional limit of the small claims court (or your state's equivalent court) in the county in which you reside." (App. 40, 56, 60.) In other words, if the Nevada small claims court can award up to $10,000, then if a customer prevails on an arbitration over a $300 loan, the customer would get, as a minimum, $10,100 (in addition to attorneys' fees). (App. 221.)

[14]The Quintino Arbitration Provision is similarly bilateral, requiring both parties to mediate and arbitrate disputes and exempting small claims actions filed by either party from mediation or arbitration. (App. 88, 93, 98.)

Regarding the class action waiver, it is well established under the FAA that arbitration agreements containing class action waivers are enforceable because class action procedures are waivable by parties to an arbitration agreement.[15] Furthermore, the Arbitration Provision explicitly exempts from the arbitration option afforded to both parties claims brought in small claims court or the equivalent court in the consumer's state of residence. (App. 39, 45, 59.[16]) Indeed, numerous courts have held that such a small claims court "carve-out" supports a finding that a class action waiver is ***not*** unconscionable or against public policy.[17]

---

[15]*See, e.g, Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009) (enforcing class action waiver); *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009) (same); *Gay v. CreditInform*, 511 F.3d 369, 393 (3d Cir. 2007) (the right to a class action [is] 'merely a procedural one' pursuant to the Federal Rules of Civil Procedure, and ... 'may be waived'") (citation omitted); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (enforcing class action waiver); *Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001) (suggesting that there is no non-waivable right to maintain a class action); *Sanders v. Robinson Humphrey/American Express, Inc.*, 634 F. Supp. 1048, 1065 (N.D. Ga. 1986) (class action rule a mere "procedural device"), *aff'd in part and rev'd in part on different grounds*, 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Dienese v. McKenzie Check Advance of Wis., LLC*, No. 99-C-50, 2000 U.S. Dist. LEXIS 20389, at *24 (E.D. Wis. Dec. 11, 2000) (enforcing arbitration clause barring class actions since "consumers are not signing away a substantive right"); *Caudle v. American Arb. Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) ("[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation"); *Zawikowski v. Beneficial National Bank*, No. 98 C 2178, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999) ("[n]othing prevents the Respondents from contracting away their right to a class action").

[16]The Arbitration Provision provides that all "Claims" are subject to arbitration, but notes that the term "does not include any individual action brought by you in small claims court or your state's equivalent court . . . any such actions and assertions of this kind will be resolved by a court and not an arbitrator." (App. 39, 45, 59.) Similarly, the Quintino Arbitration Provision provides that "You and we each have the right to bring a Claim in a small claims or the proper Las Vegas Justice Court, as long as the Claim is within the jurisdictional limits of that court." (App. 88, 93, 98.)

[17]*See, e.g., Jenkins v. First American Cash Advance of Ga., Inc.*, 400 F.3d 868, 879 (11th Cir. 2005); *Howard v. Wells Fargo Minn., N.A.*, No. 06-2821, 2007 WL 2778664, at *5 (N.D. Ohio Sept. 21, 2007) (enforcing class action waiver because "small claims lawsuits are a viable option"); *Providian National Bank v. Screws*, 894

(continued)

Because the arbitration provisions are bilateral and small claims are exempt from the requirements of arbitration, the Arbitration Provision is not substantively unconscionable.

So.2d 625 (Ala. 2003) (same).

CONCLUSION

Writ relief must be issued in this case because the district court erred by denying the Motion to Compel Arbitration and Stay All Proceedings. The arbitration provisions were validly entered into by the Rapid Cash Defendants and the Respondents; they apply to allegations of fraud and intentional wrongs; they allow for the initiation of litigation in small claims court; and, enforcement of the arbitration provisions does not violate Nevada law or public policy. As such, the arbitration provisions should be enforced and the parties should be ordered to arbitrate the instant action.

DATED this 17th day of December 2010.

LEWIS AND ROCA LLP

By: s/Daniel F. Polsenberg

DANIEL F. POLSENBERG
Nevada Bar No. 2376
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 474-2616

MARK DZARNOSKI
Nevada Bar No. 3398
GORDON SLIVER
3960 Howard Hughes Parkway
Ninth Floor
Las Vegas, Nevada 89169
(702) 796-5555

MARTIN C. BRYCE, JR.
(Admitted *Pro Hac Vice*)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Attorneys for Petitioners

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Under the penalty of perjury, the undersigned declares that he is the attorney for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made by the undersigned attorney, pursuant to NRS 15.010, on the ground that the matters stated, and relied upon, in the foregoing petition are all contained in the prior pleadings and other records of this Court and the district court, true and correct copies of which have been included in the appendix submitted with the petition.

DATED this 17th day of December 2010.

JOEL D. HENRIOD

Subscribed and sworn to before me
this 17th day of December 2010.

Notary Public

TABITHA Y. WALKER
Notary Public, State of Nevada
No. 08-8506-1
My appt. exp. October 17, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of December 2010.

LEWIS AND ROCA LLP

By: /s/ Daniel F. Polsenberg
DANIEL F. POLSENBERG
Nevada Bar No. 2376
3993 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of December 2010, I served a copy of the foregoing PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION and APPENDIX by United States mail, postage prepaid to:

Dan L. Wulz
Legal Aid Center of Southern Nevada, Inc.
800 South Eighth Street
Las Vegas, NV 89101

J. Randall Jones
Kemp Jones & Coulthard
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169

The Honorable Elizabeth Gonzalez
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89155

/s/ Mary Kay Carlton
An employee of LEWIS AND ROCA LLP