Alternative, For Class Decertification (the "Motion").

This Reply is made and based upon the following Memorandum of Points and Authorities, the pleadings and other papers on file herein and any oral argument the Court may permit at the hearing of this matter.

DATED this 9 day of November, 2011.

GORDON SILVER

GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
MARK S. DZARNOSKI
Nevada Bar No. 3398
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Attorneys for Defendants
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

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

WAL-MART IS CONTROLLING AND IS NOT LIMITED IN ITS APPLICATION.

The Nevada Supreme Court has previously relied upon United States Supreme Court, United States Circuit Court of Appeals and United States District Court decisions regarding FRCP 23 to interpret NRCP 23. See e.g. Shuette v. Beazer Homes Holdings Corp, 121 Nev. 837. 124 P.3d 530, 537, 544 (2005). Plaintiffs' argument that Wal-Mart Stores v. Dukes, 131 S.Ct. 2541, (June 20, 2011) ("*Wal-Mart Stores*") should not be viewed as controlling law in this case is all the more specious since it cited federal court decisions as authority on seventeen (17)

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separate occasions in its Motion for Class Certification. [1] [2] Not one single Nevada case has been cited by Plaintiffs wherein the Nevada Supreme Court even remotely indicated that it did not interpret NRCP 23 compatibly with its federal counterpart. Suggesting that the *Wal-Mart Stores* "holding need not be followed" by this Court is not the product of rational legal analysis, but rather is entirely a product of Plaintiffs' political belief that the decision was simply "among the United States Supreme Court's high-profile, anti-class action decisions."

Nor should this Court for a minute accept Plaintiffs' invitation to severely limit *Wal-Mart Stores*' applicability to Title VII actions or a unique set of facts. Even the cases cited by Plaintiffs do not do so.

For instance, in Ramos v. SimplexGrinnell LP, 2011 WL 2471584 at 5 (E.D.N.Y. June 21, 2011), the United States District Court, E.D. New York considered a matter wherein employees of a fire alarm and sprinkler system manufacturer, installer, and seller brought action under New York Labor Law seeking to recover unpaid prevailing wages for their work on various public works projects. Far from limiting the application of the Wal-Mart Stores requirement that plaintiff must demonstrate that it can prove its case utilizing class-wide proof, the federal district court specifically recognized this requirement. ["Finally, although the efforts of the *Wal--Mart* plaintiffs to prove their case with statistical evidence failed, plaintiffs here have come forward with class-wide proof culled from defendant's electronic data that, as discussed in greater detail below, is sufficiently reliable to be presented at trial." Id.]. The court expressly recognized that liability must be "susceptible to class-wide proof." Id. at 6.

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[1] Blackie v. Barrack, 524 F. 2d 891, 901 (9th Cir. 1975) cert denied 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed 2d 75 (1976); Esplin v . Hirschli, 402 F.2d 94, 101 (10th Cir. 1968); In re Folding Carton Antitrust Litigation, 75 F.R,D. 727 (N.D.111. 1977); Robidoux v. Celani, 987 F.2d 931, 936 (2nd Cir. 1993); Swanson v. American Consumer Industries, 415 F.2d 1326 (7th Cir., 1969); Riordarn v. Smith Barney, 113 F,R.D. 60 (N.D.Ill., 1986); Sala V. National Railroad Passenger Corp., 120 F.R.D. 494, 497 (E.D.Pa., 1988); Harris v. Palm Springs Alpine Estates, 329 F.2d 909, 913-914 (9th Cir., 1964); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998); McQuilken v. A& R Development Corp. 576 F. Supp. 1023, 1029 (E.D. Pa. 1983); Stoltz v. United Broth. Of Carpenters and Joinders, 620 F.Supp. 396 (1985); Amchen Products, Inc. v. Windsor, 521 U.S. 591, 625-626 (1997); Williams v. Lane, 129 F.R.D. 636, 639 (N.D.lll,, 1990); Linney V. Cellular Alaska Pshp., 151 F.3d 1234, 1240 (9th Cir. 1998); Zinsr v. Accufix Research Institute, Inc., 253 F.3d 1180, 1189 (9th Cir., 2001); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir., 1996); Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992)

[2] Similarly, Plaintiffs cite to seven federal cases in their Opposition to the instant motion.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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Similarly, in Public Employees 'Retirement System of Mississippi v. Merrill Lynch & Co., Inc., 2011 WL 3652477 at 7 (S.D.N.Y. August 22, 2011), the United States District Court, S.D. New York considered a case where investors brought a putative class action against an investment firm, alleging securities fraud in connection with firm's sale of mortgage pass-through certificates. While the federal district court did, as represented by Plaintiffs, say "(a)ccordingly, the Court finds that *Wal–Mart* has little to no bearing on the issues before the Court and certainly does not change its June 15, 2011 ruling in any respect," it did not do so in the context of indicating that the commonality test enunciated in Wal-Mart Stores was not prevailing law. Rather, the district court found that "(t)he common questions presented by this case—essentially, whether the Offering Documents were false or misleading in one or more respects -are clearly susceptible to common answers." Id. at 7. The decision in Public Employees 'Retirement System of Mississippi v. Merrill Lynch & Co., Inc., supra., relied primarily on the fact that the allegedly false information contained in written offering documents were given to *all* investors and, therefore, class-wide proof of liability existed.

Thus, in Ramos, supra., the existence of class-wide statistical proof was central to certification. In Public Employees 'Retirement System of Mississippi, supra., that ALL class members received the same offering material which allegedly contained misrepresentations was central to certification. In the case sub judice, Plaintiffs cannot offer class-wide proof of non-service of ALL class members.

Of further significance, neither Ramos nor Public Employees 'Retirement System of Mississippi involved employment discrimination claims under Title VII. Wal-Mart Stores' commonality test applies to all class actions not just to those brought under Title VII.

Wal-Mart Stores is all the more directly applicable in this case because it is a policy and practice case. Absent class-wide proof of a pattern and practice of sewer service directed at all class-members, liability can only be determined based upon individualized inquiry regarding each class member.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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II.

PLAINTIFFS HAVE FAILED TO SATISFY WAL-MART STORES COMMONALITY.

Plaintiffs argue that they have satisfied commonality as follows: "Plaintiffs have already averred, and will further confirm through discovery, the following general and specific 'significant proof' of a policy and practice by this agent of Rapid Cash that resulted in potentially thousands of illegally obtained default judgments." [See Opposition at 6:9-12]. However, as set forth in Defendants' instant motion, averments, allegations and the illusive promise of what might be learned in future discovery do not satisfy Plaintiffs' present burden in moving for class certification. Rule 23 factors must be satisfied at the time of certification and what could or might be learned in future discovery is irrelevant.

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, 102 S.Ct. 2364, and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.*, at 161, 102 S.Ct. 2364; see *id.*, at 160, 102 S.Ct. 2364 ("[A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable").
>
> Wal-Mart Stores, supra. at 2551.

In their Opposition, Plaintiffs claim that "(u)nlike in *Dukes,* there is abundant evidence of a policy and practice by Rapid Cash's agent to not actually serve lawful process on these defendants, resulting in due process violations and void default judgments." [Opposition at 7:2-4]. That is simply not true. At most, there is evidence that On Scene Mediations, on some individualized and discrete occasions, falsified affidavits of service.

Plaintiffs set forth 22 items that they argue constitute class-wide proof of "a policy and practice" of sewer service sufficient to satisfy Wal-Mart Stores. [Opposition at 6:12-8:15.] . However, regurgitation of allegations contained in the Amended Complaint is not sufficient to satisfy Plaintiffs' burden. Further, many of the 22 items advanced by Plaintiffs are completely irrelevant to class certification issues. For instance, whether Maurice Carroll had a license or

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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was required to have a license issued by the Nevada Private the Investigators Licensing Board [items 1, 16, 19 and 21] is irrelevant to whether service of process was made on Rapid Cash customers. That Vilisia Coleman may have been a convicted felon [item 2] and/or the statements of her counsel while he was representing her in her criminal case [item 15] have no bearing on whether On Scene Mediations personnel served process upon Rapid Cash customers.

The crux of Plaintiffs' case is (1) Rapid Cash filed 1,760 collection cases in Justice Court in 2004, 3,009 cases in 2005, 2,020 cases in 2006, 2,886 cases in 2007, 3,162 cases in 2008, and 3,826 cases in 2009, and typically employed On Scene Mediations to serve process (a total of 16,663 cases); (2) On Scene Mediations engaged in a pattern and practice of sewer service directed toward all putative class members; and (3) Rapid Cash obtained default judgments against putative class members who were not served process by On Scene Mediations.

Clearly, the glue that holds together Plaintiffs' case from a class perspective is whether On Scene Mediations engaged in a pattern and practice of sewer service against Rapid Cash customers on a class-wide basis. This Court's duty is to perform a rigorous analysis of Rule 23 requirements and to "probe behind the pleadings" to see whether Plaintiffs' claims are susceptible of generalized class-wide proof.

Plaintiffs proudly assert that "four Class members have come forward to state under oath that they were in fact not served in direct contradiction of an affidavit of service of process prepared by On Scene and filed by Rapid Cash." [Opposition, 8:13-15]. Those testimonials represent .0024% of the total of the 16,663 lawsuits alleged to have been filed.

Plaintiffs further tout the "confession" of Maurice Carroll wherein he "admitted to Metro that he had falsified affidavits of service." The source material for this statement is the Declaration of Warrant/Summons of LVMPD Det. Chio dated 7/21/10. Therein, Det. Chio states that Carroll acknowledged falsifying 17 affidavits of service that were billed to Richland Holdings on June 14, 2010. No general corporate pattern or practice of sewer service was admitted to and Carroll was only criminally charged with falsifying only those 17 affidavits of service.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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In their Opposition, Plaintiffs cite to the statements of Sergio Pinto and Niekyta Lonsoria. However, Plaintiffs do not dispute and never even address Defendants' citation to the Pinto and Longoria's interviews with Metro wherein they acknowledge a three year pattern and practice of actually serving summons and complaints interrupted by only sporadic and infrequent requests to falsify affidavits. By their statements, it can be established that the pattern and practice was for service to be made: the exception was sewer service.

Finally, Plaintiffs claim but do not prove "an unusually high percentage of personal service of process purportedly completed the same day that On Scene Mediations received the summons, a highly dubious and suspicious achievement." [Opposition at 7:3-4]. Plaintiffs do not challenge Defendants' assertions contained in the instant motion that the only evidence upon which this contention is based is the Violeta Hernandez analysis of 33 files containing affidavits of service dated June 13, 2008 and June 17, 2008. Not only do we not know how these two particular dates were chosen for analysis, but the number of cases examined represent less than 0.2% of the total cases alleged to have been filed. Nor is there any indication that any or all of the Rapid Cash customers who were the subject of the 33 cases were not, in fact, served with a summons and complaint. Plaintiffs offer only mere speculation that not all summonses could be served on the same date.

Against this total absence of generalized proof of a class-wide pattern and practice of sewer service, Defendants reminded the Court in their moving papers that, between 2004 and 2010, at least 1,484 cases were closed due to non-service and 1,742 cases were in abeyance awaiting service. Thus, in at least 19.4% of the cases alleged to have been filed by Rapid Cash during the Class Period, no affidavit of service of process was returned by On Scene Mediations clearly dispelling Plaintiffs' claims of a pattern and practice of falsifying affidavits of service on the same date as receipt thereof. Plaintiffs' response to these statistics and conclusion: .... absolute and total silence.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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III.

THE CREATION OF SUBCLASSES DOES NOT CURE THE OVERBROAD DEFINITION

In their Opposition, Plaintiffs have essentially admit that the class certified includes individuals who may not be entitled to relief. Plaintiffs suggest that any overbreadth or standing issues can be dealt with via the future creation of subclasses.

Plaintiffs wholly fail to address one of the central problems with this class certification as presented in the instant Motion. The class certified is as follows:

> All customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, and for which the only evidence of service of process was an affidavit signed by a representative of On Scene Mediations and who claim not to have been served. (emphasis added)

Notice is being sent to a class of persons as follows:

> All customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, and for which the only evidence of service of process was an affidavit signed by a representative of On Scene Mediations.

In other words, the requirement that putative class members must "claim not to have been served" is an express prerequisite for class membership. Yet, the Notice goes to all customers regardless of whether they have ever claimed and/or will ever claim not to have been served.

Along with the Notice is a postcard where the addressee of the Notice is asked to check a box as to whether or not he/she was served. Significantly, pursuant to the Court's September 29, 2011 Order, any person receiving the Notice who does not return the postcard still remains a Class Member. This, notwithstanding that such a person does not even fall within the express class definition because he/she has never claimed not to have been served.[3] Thus, if 16,663 Notices are mailed out and no one opts out or returns a postcard, the Class will consist of 16,663 persons who have never claimed not to have been served. Clearly, a person cannot be designated part of a subclass unless they are members of the broader class in the first place.

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[3] Indeed, even those persons who are sent Notices that are returned as undeliverable remain members of the Class.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

The above conundrum highlights the problem that the class expressly certified by the Court is not objectively ascertainable. Rather than looking at any objective criteria which existed as of a time relevant to the class period, the process embraced by the Court requires it to look toward present or future claims of non-service before ascertaining class membership. Yet, even absent such a claim, the September 19, 2011 Order recognizes all Rapid Cash customers to whom the Class Notice was sent as Class Members.

Once again, the case law cited by Plaintiffs does not support the position they are advancing. Plaintiffs cite to *Elliott v. ITT Corp.*, 150 F.R.D. 569, 575 (N.D. Ill. 1992) for the proposition that "a temporarily overbroad class" is perfectly acceptable in class actions. In Elliott, a US Magistrate Judge recommended that a class **not** be certified because of a lack of predominance.[4] In his analysis, the magistrate judge expressly recognized that "the class must be adequately defined and clearly ascertainable before a class action may proceed." Id at 574. He further stated that the class must be able to be "ascertained by reference to objective criteria." Id. Although denying certification, the magistrate judge found the class to be objectively ascertainable because "inclusion in the class turns on the presence or absence of documentary evidence that a plaintiff was advised in advance of their loan closing that insurance was optional." Id. Elliott simply cannot be read as authority for the proposition that class members do not require standing and/or that the class need not be ascertainable by objective proof, temporarily or otherwise.

Similarly, Kohen v. Pacific Management Co. LLC, 571 F.3d 672, 677 (7th Cir., 2009), cited by Plaintiffs, actually supports the arguments advanced by Rapid Cash. Therein, the district court certified a class of "all persons who between May 9 and June 40, 2005 bought a June Contract in order to close out a short position." Liability was predicated upon claims that the Defendant had cornered the market of the particular contract in violation of the Commodity Exchange Act. Because buyers during the class period could be easily identified with objective evidence, no issue of ascertainability existed. However, defendants therein argued that some

[4] It is curious that Plaintiffs suggest this Court should ignore the US Supreme Court decision in Wal-Mart Stores, supra., while citing a US Magistrate Judge's recommendations as authority.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

members of the ascertainable class might not have suffered damages because they profited from their contracts.

The Seventh Circuit Court of Appeals affirmed certification noting that class members who suffered no damages could be identified after class-wide liability determinations were made. Significantly, all members of the class were subjected to the same liability creating conduct of defendant: i.e. cornering the market.

Even while affirming the certification, the Court of Appeals firmly stated that "if the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad. Id. at 677. Further, the Circuit Court stated that "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." Id.

While the express class definition only includes those who claim not to have been served, the post-Notice inclusion as a Class Member of any putative class member who does not expressly indicate he was served insures that the Class includes members who could not have been injured by Defendants' conduct. Further, the evidence before this Court establishes that Rapid Cash customers were served with process and that the instances of sewer service were exceptions to the general policy and practice of On Scene Mediations to serve process and sign truthful affidavits of service. Thus, "a great many persons who have suffered no injury at the hands of the (D)efendant" will be impermissibly swept into the Class. This is an issue of liability and damages, not simply of damages alone.

The Kohen Court further explicitly recognized the "in terrorem character of a class action." Id. at 678. "When the potential liability created by a lawsuit is great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good." Id.

Finally, Mims v. Stewart Title Guaranty Co., 590 F.3d 298, 301 (5th Cir., 2009) involves a case where the district court actually **rejected** a class definition as "too broad because it would include individuals who were not eligible for the R-8 credit" which formed the basis of the liability claims. Id. at 307. The district court certified a far narrower class than requested by

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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plaintiffs therein. The Court of Appeals affirmed the more narrow class defined by the district court because it utilized the objective generalized proof of Defendant's own Underwriting Guidelines to establish a limited and ascertainable class. Id. at 307-308.

While this Court has previously stated that On Scene Mediations' sewer service raises issues of significant public concern, so too does certification of a defective and improper class raise significant issues of whether a litigant can obtain the fair, just and equitable imposition of justice that our constitution, laws and rules require. Subjecting Rapid Cash to the "in terrorem character of a class action" merely because this case involves issues of great public concern is improper. Sacrificing Rapid Cash's legal rights to the altar of "public concern" does nothing to vindicate the judicial system.

IV.

THERE IS NO RULE 23(B) PREDOMINANCE

There is no rational basis for treating defenses to fraud on the court claims differently based upon whether the claim is made by Motion or by separate legal action. Merely because no party raised the defense of lack of diligence or equitable estoppel in *La Potin v. La Potin,* 339 P.2d 123 (Nev. 1959) does not mean such a defense does not exist as argued by Plaintiffs.

That the required ulterior purpose in an abuse of process claim is a question for the finder of fact is irrelevant to class certification issues. An ulterior purpose is not subject to generalized class-wide proof when at least 20% of cases filed by Rapid Cash were dismissed or put in abeyance due to lack of receipt of an affidavit of service from On Scene Mediations.

Statutes of limitations, offsets, and the amount of individual recovery (whether denominated as damages or disgorgement/restitution) all require individualized proof. Plaintiffs only response appears to be that the Court can sort these issues out later. That position is totally at odds with the legal requirement that Plaintiff establish his right to certification at the time of certification, not later.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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V.

RULE 23(B)(2) IS UNAVAILABLE

Plaintiff again contends that the Wal-Mart Stores case is not controlling authority. Plaintiffs' other arguments simply ignore the US Supreme Court's express language that individualized monetary relief is not permitted pursuant to Rule 23(b)(2) regardless of whether the relief is denominated as equitable relief rather than money damages.

VI.

RULE 23(B)(1) IS NOT SATISFIED

Plaintiffs wholly fail to explain how individual cases might result in inconsistent or varying adjudications other than because of individual factual differences between the litigants. Clearly, any litigant who could prove, by clear and convincing evidence, that a fraud upon the court occurred because they did not receive service of process would be entitled to have the default judgment set aside unless a valid defense was interposed and proven. To suggest that two courts hearing the same facts might be predisposed to issue contradictory rulings under these circumstances is disingenuous. The law is clear. That one plaintiff in one action might not prevail because he/she fully satisfied his/her default judgment 6 years ago without then complaining about non-service and took out four more loans from Rapid Cash since that time while another plaintiff in another action who complained about non-service immediately after the first wage garnishment might prevail is simply no reason to certify a class. Those would not be inconsistent judgments as they would be based upon factual dissimilarities which will, of necessity, have to be considered on a case-by-case basis even in a class action.

VII.

CONCLUSION

For the reasons set forth in Defendant's initial Brief and herein, the Rapid Cash Defendants' Motion to Reconsider Class Certification should be GRANTED or, in the alternative, the Class should be decertified. Plaintiffs' total reliance upon allegations contained in the Amended Complaint combined with speculative assertions about what they might learn in

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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discovery falls hopelessly short of satisfying Plaintiffs' burdens to obtain class certification. If the Court believes that it is even remotely possible for Plaintiffs to later discover information from which it can reasonably argue that their claims are susceptible to class-wide proof, then it should decertify the class and permit Plaintiffs to conduct discovery regarding these certification issues. It is a deprivation of Rapid Cash's rights to certify the class and allow Plaintiffs to attempt to satisfy their evidentiary burdens later.

DATED this 9 day of November, 2011.

GORDON SILVER

GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
MARK S. DZARNOSKI
Nevada Bar No. 3398
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Attorneys for Defendants
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

OF COUNSEL:
Alan S. Kaplinsky
Martin C. Bryce, Jr.
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: 215.665.8500
Facsimile: 215.864.8999

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 10th day of November, 2011, she served a copy of the **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER CLASS CERTIFICATION**, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Dan L. Wulz, Esq.
Venicia Considine, Esq.
Legal Aid Center of Southern Nevada, Inc.
800 South Eighth Street
Las Vegas, NV 89101
Fax: (702) 388-1642

J. Randall Jones, Esq.
Jennifer C. Dorsey, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
Fax: (702) 385-6001

Anna Dang, an employee of
GORDON SILVER

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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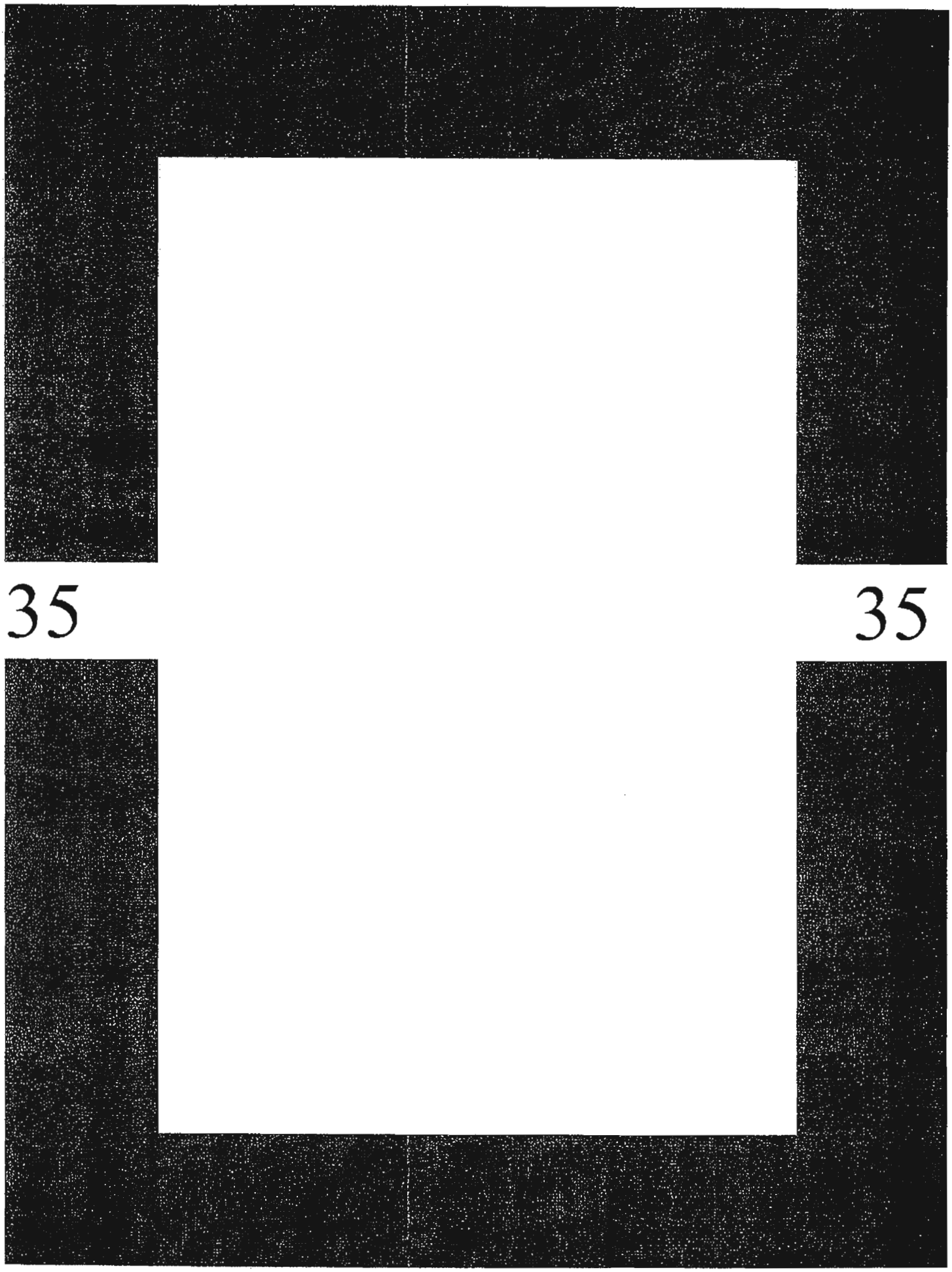

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CLERK OF THE COURT

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

CASANDRA HARRISON, et al. Plaintiffs vs. FMMR INVESTMENTS, INC., et al. Defendants	.	CASE NO. A-624982 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

TUESDAY, NOVEMBER 11, 2011

APPEARANCES:

FOR THE PLAINTIFFS:	JENNIFER DORSEY, ESQ. VENICIA CONSIDINE, ESQ.
FOR THE DEFENDANTS:	MARK S. DZARNOSKI, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 22, 2011, 9:03 A.M.

(Court was called to order)

THE COURT: Good morning.

MS. DORSEY: Good morning, Your Honor.

MR. DZARNOSKI: Good morning.

THE COURT: Can we do the motion for reconsideration first.

MR. DZARNOSKI: Yes, Your Honor.

MR. DZARNOSKI: As you know, Your Honor, between the time you initially heard this case and issued your decision certifying the class, the United States Supreme Court issued a seminal decision on procedural due process requirements under Walmart Stores v. Dukes, and that interim decision by the Supreme Court of the United States has raised significant issues regarding your initial ruling, and I think that justifies reconsideration.

THE COURT: Thank you.

Ms. Dorsey.

MS. DORSEY: We completely disagree that Dukes applies. We think it's a pretty limited Title 7 case. The issue there was that there were 1.5 million people with 1.5 million different employment decisions. There simply was no commonality there, whereas we have a far more simple class here that you've already certified and found commonality for.

THE COURT: Anything else, Mr. Dzarnoski?

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MR. DZARNOSKI: Presuming I get to argue if you decide against reconsideration the merits of our motion for decertification, then I have nothing else at this point.

THE COURT: Okay. The motion to reconsider is denied.

Now if we could go to the motion for decertification.

MR. DZARNOSKI: Thank you, Your Honor.

In making the motion for decertification, Your Honor, I can assure you that we're acutely aware of the judicial interest that is in this case where to the extent possible, and I emphasize the words "to the extent possible," the Court would like to resolve all of the issues of service of process by On Scene Mediations in one proceeding, there's no question it should like to do that.

THE COURT: I made the offer to you almost a year ago that your client could vacate every one of the judgments that had been certified by On Scene Mediations, and you said no.

MR. DZARNOSKI: Absolutely not.

THE COURT: Okay. So we're here.

MR. DZARNOSKI: So we're here. The judiciary also has another interest that is higher than just wanting to resolve the issues of On Scene Mediations' process, and that's supplying due process.

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THE COURT: Or lack of process.

MR. DZARNOSKI: Or lack of service of process. It's to provide litigants with due process under law. There is no question that the Walmart Stores versus Dukes case at its core is one that establishes the minimum requirements in the context of a class action case as to what type of analysis the Court must go through in certification of a class.

Whenever a litigant comes before a court and says, a United States Supreme Court decision is not controlling precedent, that's pretty close to a tacit admission that if that Supreme Court decision is controlling precedent then the outcome is going to be detrimental to their side. And that is exactly the situation that we have here.

Before I go into whether or not Dukes-Walmart applies, if you already agree that Walmart v. Dukes in the federal precedent under Federal Rule 23 applies in Nevada, then I'm going to skip that argument in the interest of time.

THE COURT: No, I don't agree.

MR. DZARNOSKI: In every case that has been cited in the initial pleadings for certification of the class up until now in this case the Nevada Supreme Court has relied upon the United States Supreme Court, Court of Appeals, and Federal District Court decisions interpreting Federal Rule of Civil Procedure 23 and applying it to Nevada. There has never been --

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THE COURT: You're aware there were legislative issues with Federal Rule of Civil Procedure 23 last session; correct?

MR. DZARNOSKI: Yes.

THE COURT: Okay.

MR. DZARNOSKI: However, it has nothing to do with the interpretation of the commonality test, nothing to do with the interpretation of typicality. All of those requirements the Nevada Supreme Court has always looked to federal precedent. For the opposing side in this case to argue that federal precedent doesn't apply when in their instant -- when in their original motion they cited federal precedent, what was it, 17 times, and in their opposition to the current motion also citing several federal cases to support their interpretation of a Nevada rule of civil procedure just belies the fact that the United States Supreme Court decision in Walmart v. Dukes does not apply.

Now, if you end up making a decision just simply stating clearly that you don't believe that the test in Walmart v. Dukes applies in Nevada, I mean, I guess I can be happy with that. And, as you've said before, we're all going to be trucking all the way up to Carson City. But, you know, I prefer not going to Carson City on that basis.

THE COURT: How about we talk about commonality and typicality, which I agree Rule 23 in the federal system and

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Nevada Rule 23 are similar.

MR. DZARNOSKI: Very good. Thank you.

Walmart v. Dukes, although it was in the context of a Title 7 case, is very, very similar to the case that is in front of us in that both of them are pattern and practice cases. In this case the allegations are that On Scene Mediations engaged in a pattern and practice of non-service of process on cases that were brought by Rapid Cash in Justice Court. The only -- what the Supreme Court talked about is the glue that holds together the case, is the common issue, and the common issue has got to be is there a pattern and practice at On Scene Mediations by which service of process is not made on a classwide basis in order to sustain this case.

It is the requirement of the plaintiffs at this stage of the process not to just say, I've alleged a pattern and practice. That clearly is insufficient.

THE COURT: There's a felony conviction.

MR. DZARNOSKI: There's a felony conviction for the failure to serve 17 people who were customers of Richland Holdings. We are talking about 16,000 cases that were brought in Justice Court and a conviction of 17 Richland Holdings customers does not establish a policy and practice of non-service that is applied to an entire 16,000-person class, especially when you take the other facts that have been brought to the attention of this Court. The plaintiffs have

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cited the warrant of Detective Ciao as giving evidence supposedly to sustain the pattern and practice. And we've thoroughly analyzed that particular warrant and the statements that were made. The statements that were made by those individuals that are relied upon by plaintiffs are that, it was my policy and practice for three years to serve process and summons -- summons and complaint upon these people, on a few occasions I was asked to and did falsify affidavits. The statement was not, I was asked to falsify a few statements for Rapid Cash, by the way; it was for Richland Holdings. It's important to note that Richland Holdings was deemed a victim by that same jury that convicted Maurice Carroll.

My client is in the same position as Richland Holdings. My client is a victim of On Scene Mediations to the extent they failed to serve process on anyone and paid them. My client's not the bad guy here. My client is a victim, and they are being drug into a class action lawsuit where it is impossible by a classwide proof or generalized proof to show a classwide system of non-service of process. That's exactly what Dukes was all about.

So Dukes walks through and it talks about, well, what kind of proof would a person need to do -- present to the court in order to find a pattern and practice. Well, one was they talked about anecdotal evidence. And, I mean, that was almost so thoroughly shot down when you bring up three people

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who claim not to have been served and the class which you're speaking of is 16,000 potential people, three people testifying that they were not served is not sufficient anecdotal evidence to allow this case to go forward as a class action. That simply is not possible.

The second was, let's go forward and look at whether or not the plaintiffs can bring statistical evidence that could be applied on a classwide basis. And in that case there was significant amount of some statistical evidence that was brought forward; however, it didn't cover the entire class. And the Supreme Court made a -- made a very thorough analysis, saying, listen, you can't go out and bring a little bit of statistical evidence showing that some part of your proposed class may in fact be injured, that statistical evidence has to reach the breadth of the entire class.

And in this case the only statistical evidence that has been brought forward by these plaintiffs at this stage of the proceedings is they say they've looked at 30 cases that were filed on two dates in Justice Court and what they found was that on one day 13 summonses and complaints were given to On Scene Mediations and they claimed to have served 13 people. Then they claim two other people at On Scene Mediations each had seven or ten,and they claim to have all served them on the same day. So we've got 30 people over two days that they are presenting and trying to make the argument, I suppose, that

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that constitutes a pattern -- evidence of a pattern and practice that stretches over the course of six years and 16,000 cases.

They don't state, by the way, that any of those people were not served. Haven't done that. They say, all of them couldn't have been served. Well, I might even agree that all 30 of them weren't served on those two days, but that doesn't mean 20 of them weren't, doesn't mean 15 of them weren't and that they ran out of time so that they decided then, we're going to dummy up the affidavits on another 15, especially when you have the testimony of the people who did the process serving who say that, I served process and it was only a rare exception that I didn't.

You also have -- if you don't want to believe those people, then you've got the investigator from the Las Vegas Metropolitan Police Department. He looked at specifically Rapid Cash -- certain Rapid Cash people. He says, well, I ended up getting somehow a list of Rapid Cash people and I actually talked to seven of them. And we don't know how those 30 were chosen, but he talked to seven of them, and he says four of them say they were served, three of them say they weren't. Okay. Now you've got the detective himself stating that he has looked at a sample, probably a very skewed sample, probably a sample that was 30 people that they claim served on one day, and he finds out that, yeah, in fact people were

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served. So once again you've got evidence in front of this Court that specifically countermands any inference that on a classwide basis a policy and practice of non-service occurred. You have evidence of an aberration in a small portion of people who were not served.

If somehow we could weed down a class to define it in such a way that it was objectively ascertainable and it only included those people within that smaller subset, we wouldn't have a problem. But what we do is we have a problem where you've set up a mechanism -- or you've countenanced a mechanism whereby we're sending 16,000 notices out to every customer who had a default judgment entered against them that's a customer of Rapid Cash. You tried to resolve, very creatively, the problem that these people never claimed that they weren't served by including a questionnaire in the notice that goes out. You say, hey, send this questionnaire back, tell me were you served or weren't you served. But the problem arises -- in your order you say, it doesn't matter if they return that card, if they don't return that card they're still a member of my class.

THE COURT: If they mark the box that they were served, they're not part of my class.

MR. DZARNOSKI: But if they don't return anything and they don't opt out --

THE COURT: I understand, Mr. Dzarnoski.

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MR. DZARNOSKI: So we're going to have -- I mean, you've been through class actions before. You know how many -- or you have a pretty good idea of how many people are actually going to either opt out or send a card in. It's just not going to happen. There's going to be -- so you're going to have a class of 16,659, because I'm sure the four class representatives will turn in their card, you're going to have a class of close to -- or could, 16,659 people who never once have made a claim that they weren't served that are part of the class even though that is supposedly your class definition, that they have to have claimed they're not served.

We went through -- we've been through Supreme Court mediation in this case, and, I mean, frankly, the problem -- this is the exact problem that prevents any settlement from occurring in this case. It's the same problem with your offer that you made early in this litigation. If someone has never claimed that they were not served with process and my client got a default judgment against them and they collected money, your offer basically was, hey, vacate that and have them give back their money. And that's the result of what this class action is seeking, even if they're not injured and don't claim --

THE COURT: You can always re-serve them and pursue the judgment by using a different agent than On Scene.

MR. DZARNOSKI: And, Your Honor, my response to that

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rhetorically, because I don't think you're going to answer it, is why should my client be required to refile 16,663 lawsuits in Justice Court when there is no complaint by right now 16,593 people -- or 59 people that they were never served. This is a problem that doesn't exist, and yet the relief that is being looked for is to give all of them some relief when they don't even claim that they're entitled to relief, when they don't even fall within a definition of your class.

My client can't be expected to refund -- I mean, let's suppose they collected 5,000 judgments at $1,000 apiece. That's a lot of money. They're going to have to -- what you're suggesting is even though there's no injured person, no person that even falls within the class definition, no person that can be proved within the class unless they stand up and give you testimony that they weren't served, you're saying, give them all their money back and file 15,000, 16,000 new cases. I mean, that is not due process, and that does not conform with what the requirements are in Dukes.

The federal cases, and especially Dukes, are a response to what's been referred to as the "interrorem" [phonetic] effect of a class action lawsuit. And you've just described in perfect -- perfectly the interrorem nature of this lawsuit, and that's why litigants in class -- defendants in class action cases are entitled to have at this stage of the process, you, as the Judge, to go beyond the pleadings to

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require the plaintiffs to set forth for you a mechanism and demonstrate to you that they will in fact be able to demonstrate this policy and practice that will -- that was applied to 16,000 people. And short of doing that, all we've got is a situation where my client has to live in deadly fear and go through the entire class action litigation when we may end up with four people who end up making a claim and my client is in a position where the worst-case scenario is they're looking at 16,600 that the Federal Courts, including the Walmart court, has said that's just not fair, that doesn't comport with due process.

All I'm asking for is this Court to sit there and say to the plaintiffs, listen, you really have to show me how you're going to prove this, don't tell me that you can do it in discovery, don't tell me you've alleged it in your complaint, show me. And that's something that they haven't done, and it's something they can't do. And they can't do it in part because of the way this class is defined and the way the notice is going out and if somebody doesn't make a claim that they've not been served that they're still part of the class.

I -- for the life of me I can't see how people who don't even fit into your class definition can be assumed to be part of the class because they don't return a card and then they're entitled to relief. That just to me, seeing it from

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my perspective, I just do not understand how that can possibly be the outcome of this case. That's the discussion on the commonality.

The other aspect of this is in terms of the creation of subclasses. You know, they've argued that you can resolve all of these things after -- after fact, after you've already proceeded down the route of sending out notices to 16,000 people, pulling 16,000 people in the class who aren't entitled to be there, that somehow you create a subclass. In other words, they're saying, create a subclass of people who aren't part of the class. Well, that is truly putting the cart before the horse. You can't have a subclass unless they fall within the definition of the class to begin with. So creation of subclasses is no way to manage this case.

None of the cases that were cited -- I'm not going to go through them one by one, because I know you read all of this stuff, I don't know how, but you do --

THE COURT: I had two roller bags at home last night.

MR. DZARNOSKI: Yeah. And you had a few late ones from me. I'm sorry. But, you know, the analysis went through every one of those cases that were cited by plaintiffs, every one of those decisions specifically went back and stated that if you don't have the objectively identifiable class and you can't prove injury or damages by generalized classwide proof,

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then you don't have a class action. Those cases are absolutely 100 percent supportive of the position that we've advanced.

The 23(b)(2) class certification, very briefly, there's no question under Walmart that this class can't be certified under 23(b)(2). The Walmart court was very specific. It said, if you don't have an aggregate amount of damages from which people would share equally and classwide -- in other words, a classwide damage, then you can't proceed under 23(b)(2). Now, the U.S. Supreme Court went even further and said, you probably can't even do 23(b)(2) under those circumstance. But what it is very clear on is if any individual member of that class might be entitled to monetary relief, not damages, monetary relief, then that cannot proceed as a 23(b)(2) class action. And primarily the reason for that is to protect the individuals who would not otherwise be entitled to notice under 23(b)(2). So it was a protective measure, it wasn't anti class action as suggested by the plaintiffs, time was pro due process to protect both the defendant and people who would be caught up in a class action where they would be giving up valuable rights to monetary relief. And it doesn't matter that they phrase it as disgorgement, doesn't matter if they phrase it as restitution, doesn't matter if it's equitable relief, the Supreme Court said, if it's monetary relief it doesn't matter whether it's

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damages or equitable, it does not fall under 23(b)(2). There could be no clearer expression.

And under 23(b)(1) just very briefly, the plaintiff -- I mean, they say and they allege there's a danger of inconsistent, varying adjudications. That's nonsense. The only reason there would be a different adjudication is if somebody couldn't prove that they -- that they weren't served. They have the burden of proof to prove they weren't served in order to be entitled to relief. If they can't prove it, they're not entitled to relief. So if one --

THE COURT: Do you want me to have Mr. Carroll come here and ask him on every affidavit for all 16,000 if he served and have him take the Fifth?

MR. DZARNOSKI: No. You don't have to do that. We're going to have people who will be able to come up, same people who testified in front of Detective Ciao, who will claim, just as they did to Detective Ciao, our standard policy and practice was serving individuals and it was only under the rare circumstances that I was asked on a few occasions not to serve process and just submit a false affidavit. I don't care what Mr. Carroll says. Mr. Carroll -- I don't need Mr. Carroll.

THE COURT: Don't you think you should, since he's your agent?

MR. DZARNOSKI: I don't need Mr. Carroll. He's a

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process server. He's not going to -- he's not going to be believable. Why would I put him on as a witness? I mean, there's no purpose in putting him on as a witness. Just because Mr. Carroll would say or wouldn't say he served process doesn't prove my case. These individuals have to forward and they have to prove that they weren't served. So if I somebody's going to come up -- the only thing -- the proof issue that you're talking about in this, somebody's going to say, I wasn't served. I bet that there'd probably be an awful lot of people now who know, hey, all I've got to do is say I wasn't served and I'm going to get all my money back that was loaned to me by Rapid Cash. You might have those people. But, you know what, that's why we have -- there are defenses that have been briefed for you, as well, one of which is that if somebody was collected upon five years ago, let's say they took three additional loans, failed to pay those loans, also went to a default judgment, also had their wages garnished and they've never raised a stink about being not served with process in this case, then there is a clear defense of a laches, lack of diligence, and that significantly undermines any claim that someone might have that they weren't served process.

And I'll go further to indicate that the burden of proof here is clear and convincing evidence. Fraud on the Court, which is their claim, requires clear and convincing

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evidence. It's the plaintiffs that are going to have to provide clear and convincing evidence. The only clear and convincing evidence that is available in this case is for them to establish a classwide policy or practice of non-service that extends to all the people. And for all the reasons I just went through, I mean, that is simply not intellectually possible or practically possible in this case.

If you have no further questions --

THE COURT: Nope.

Ms. Dorsey.

MS. DORSEY: I'll try to be brief, Your Honor. Mr. Dzarnoski makes a very impassioned argument, just like he did the first time we addressed class certification and you granted class certification. And the entire basis of his renewed effort is Dukes. And Dukes is a federal case, as you know. It's a Title 7 case at best because it discusses FRCP 23, at best it's persuasive. But nothing about Dukes should persuade you to change your original certification decision. Nothing. Dukes didn't change the rules, Dukes merely addressed the situation that was presented to the court there. And the fact situation is just simply completely different.

And the problem with Mr. Dzarnoski's argument is that Dukes -- there were two elements that had to be proven in Dukes. The first was that people were passed over for

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promotion. The second one was because of a policy or practice of discrimination. We don't have to prove a policy or practice of anything here. We have to prove that people weren't served. But a policy and practice is a way that we can demonstrate that.

But policy and practice is not an element of our claims. So Dukes is just not a good fit with the facts of our case. So the bottom line is that Dukes didn't change the rules, it didn't change the commonality analysis that you already went through, that you already determined was completely satisfied based on the information that we provided you, and there's simply no reason for you to change your decision. Nothing other than Dukes has happened since the last time we stood before you and argued this case. We have literally been in and out of the Supreme Court settlement process for almost a solid year now. We've had no additional information. We haven't even been able to start discovery to find out how many people we're truly dealing with, because we just haven't gotten there yet.

So nothing has changed, and there's absolutely no reason for you to change your decision at this point and decertify this already certified class.

THE COURT: Thank you.

Mr. Dzarnoski, anything else?

MR. DZARNOSKI: No, Your Honor.

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THE COURT: The motion to decertify the class is denied. We've previously established commonality, typicality, and numerosity. There is significant proof and evidence of common factual issues on specific factors that the Court has determined related to the false affidavits provided by the agent of the defendants and fraud that was committed upon the Justice Court by the agent of the defendants.

These facts that have been alleged and the proof that has been submitted at this time are sufficient for the class certification to remain.

If we could go to the motion to approve the notice.

MS. DORSEY: I have nothing to add other than the pleading -- or what we've submitted.

THE COURT: Mr. Dzarnoski wants you to pay for it. Do you want to say anything about that? He added that part.

MS. DORSEY: Oh. He wants me to --

THE COURT: I don't remember what brief it is was in, but he said, yeah, if you're going to still leave the class in place, make the plaintiffs pay for it.

MS. DORSEY: He did. He did say that. And in my reply I argued that there were -- there was sufficient authority for you to decide that Rapid Cash needs to foot the bill.

THE COURT: Anything else, Mr. Dzarnoski?

MR. DZARNOSKI: No. If you're going to keep that in

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place, I don't think there's a legal justification. We made an offer under a contingency that -- to pay for things for a class action administrator under a certain set of facts which didn't come to pass because of your ruling. So I think the plaintiffs under general principles again of due process -- it's their claim, they're bringing the class action, and regardless of whether I think it should go forward or not, if it does go forward, my clients to be nailed with the payment of the mailing is just wrong.

THE COURT: Okay. The defendants will bear the burden of the proof of the -- burden of the cost of the mailing. The defendants have the list of all the clients, and it's not previously been provided, but it will. I have previously suggested you might want to have a claims administrator involved in this process. I understand you were unable to agree on such a person. I've previously approved the form of the notice. So please send it out.

Anything else?

MR. DZARNOSKI: No. I just want to make certain -- you did consider the fact that there was no counterclaim yet and that there may be a requirement for something else later.

THE COURT: There may be. And someday you may do that. And when you do, I'll deal with it. But I'm not there yet, because you haven't filed it yet.

MR. DZARNOSKI: You know, but, Your Honor, my time

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hasn't even come to file because the arbitration motion, there's no order. I'll have 10 days from the date the order is submitted to file a responsive pleading.

MS. DORSEY: It'll be exchanged today, Your Honor.

THE COURT: I can only do so much. I don't write all the orders myself. I write a very small percentage of the orders myself.

MR. DZARNOSKI: I understand. But I guess again where I'm confused is they're supposed to submit an order under the rules within 10 days.

THE COURT: They are.

MR. DZARNOSKI: They haven't done it.

THE COURT: You've been very, very bad, Ms. Dorsey.

MS. DORSEY: I apologize.

THE COURT: Okay.

MR. DZARNOSKI: Now because -- now because they've been bad, you're going to have my client pay for a class notice that won't include counterclaims and possibly have my clients pay --

THE COURT: Okay. I approved this class a year ago. You guys have been messing around with each other for that whole time when I think the notices have gone out about nine months ago. You haven't. I understand why, but you haven't. So we're going to get it out now. And if you file a counterclaim, great, we'll deal with it.

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MR. DZARNOSKI: Your Honor, when you say we've been messing around, I'm going to point out that the notice -- or the hearing on certification was in October of last year, and when you say we've been messing around, plaintiffs didn't submit an order for a full year in order --

MS. DORSEY: She never got the last --

THE COURT: That's because you guys were trying to settle the case. Which is fine. I think it's a great thing to try and settle the case. The Justice Court would love it if you would fix all of these cases that are in limbo. But your client doesn't want to. That's okay. We will go through this process and make a determination as to whether those need to be changed in some fashion.

MR. DZARNOSKI: One objection I have is I'm going to say that the plaintiffs refuse to settle it, as opposed to the defendants being refusing to settle it.

THE COURT: It doesn't matter who refused to settle. You didn't settle.

MR. DZARNOSKI: All right. But, I mean, you say we've refused, you said --

THE COURT: "We," the "we," you guys. Not me. I'm not involved in that process. It's you guys.

MR. DZARNOSKI: I understand.

THE COURT: You, y'all, the group of you standing there at the tables.

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MR. DZARNOSKI: Thank you.

THE COURT: All y'all get it together and get this notice out.

MS. DORSEY: Thank you, Your Honor.

THE COURT: Have a lovely day. Please submit the orders in a timely fashion from now on, Ms. Dorsey.

MS. DORSEY: We will really work hard to do that, Your Honor.

THE PROCEEDINGS CONCLUDED AT 9:39 A.M.

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

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Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

11/26/11

DATE

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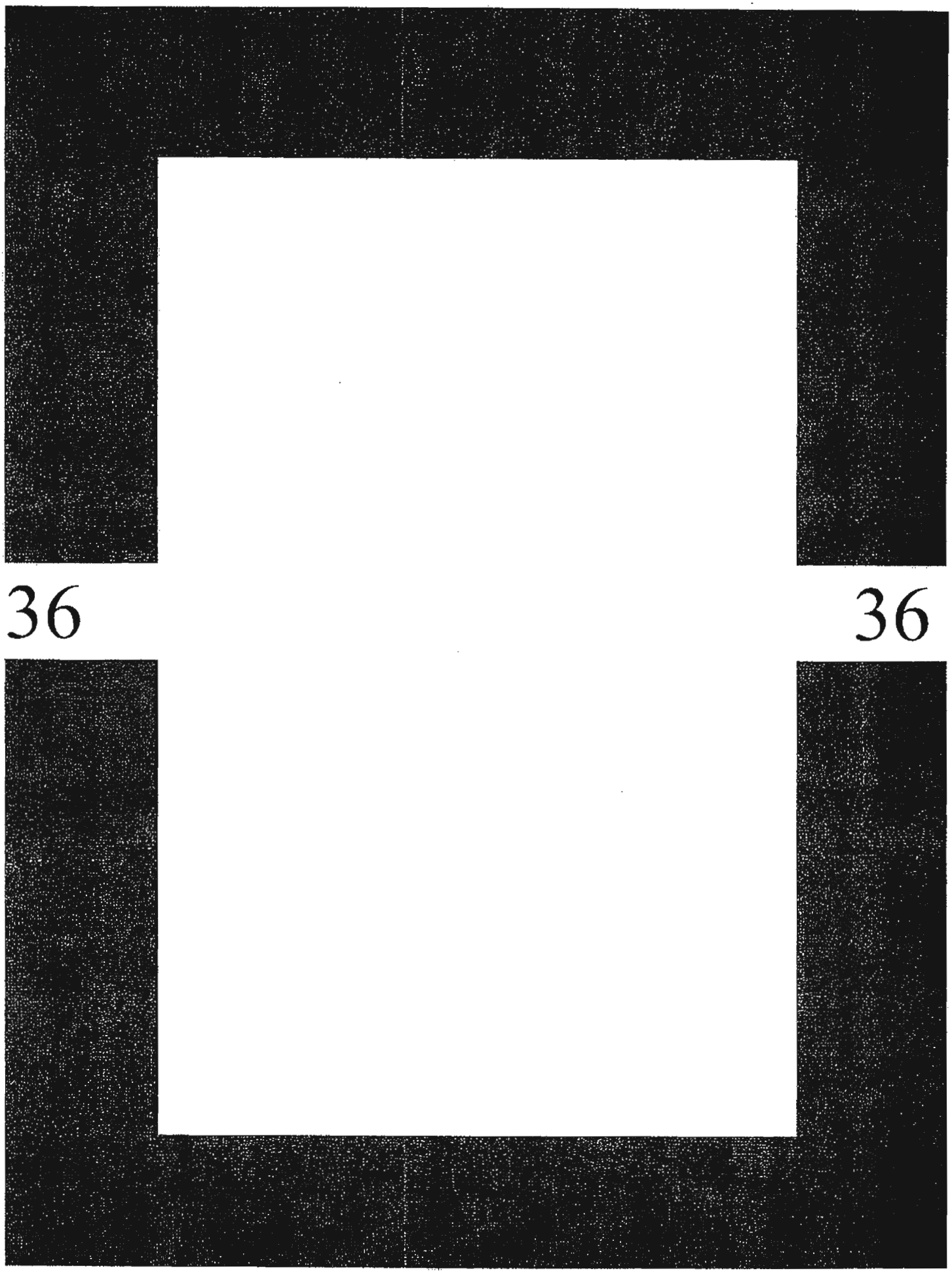

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RIS
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com

Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

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Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia

Case No.: A-10-624982-B
Dept. No.: XI

THE CLASS'S REPLY IN SUPPORT OF MOTION TO APPROVE CLASS NOTICE

Date of Hearing: November 18, 2011
Time of Hearing: In Chambers

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THE CLASS'S REPLY IN SUPPORT OF MOTION TO APPROVE CLASS NOTICE

I.

ARGUMENT

A. The Class Notice Is Not Premature.

Rapid Cash contends that a notice to the class would be premature because it intends to file Counterclaims against the Class Representatives and the Class Members. This assertion is made despite the fact that Rapid Cash has in place in Justice Court default judgments against each Class Representative and each Class Member as defined. Unless and until Rapid Cash is ordered to proceed to set aside any particular default judgment and does so, such a Counterclaim herein would be premature, not ripe, and duplicative. Indeed, Rapid Cash appears to acknowledge same in stating: "In the event the Court sets aside any of the default judgments obtained by Rapid Cash, then Rapid Cash has valid actions to recover upon the original loans...." (Opposition at 3:19-21) (emphasis added).[1] Even then, assuming default judgments are set aside, the instant Class action is not based in any way whatsoever upon the loan agreements. As such, pursuant to NRCP 13, any counterclaim based on a loan agreement would not be compulsory herein – permissive at best – and this Court would be well within its discretion to so hold and allow Rapid Cash to pursue any such counterclaim in Justice Court. Following this procedure would also avoid turning this class action attacking void default judgments for lack of service of process into a wholly unrelated payday-loan-collection class action, a development that would not be in the best interests of this certified class or serve judicial economy.

[1] The Class does not envision this Court setting aside default judgments obtained by Rapid Cash in Justice Court. Rather, the Class envisions this Court issuing an injunction ordering Rapid Cash itself to set side default judgments it obtained in Justice Court.

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In its Opposition 3:22-26, Rapid Cash also alludes to additional claims it may make which it never made in suing the Class in Justice Court. Such claims include the proposition that in obtaining a loan through presentment of a post-dated check, some Class members may have made false representations of promising to deposit sufficient funds to cover presentment of the check, which might support an action by Rapid Cash for fraud. This argument is just plain wrong for many reasons. First, Rapid Cash's additional claims against its customers related to making these loans are too late. Such issues and claims are now res judicata in a Justice Court judgment, encompassing any claim which was or could have been made. In the event a default judgment is set aside, then and only then it would be incumbent upon Rapid Cash to persuade the Justice Court to permit the filing of an amended complaint to assert any such new claims. All of that has nothing to do with this class action.

This theory is also barred by statute. Upon default, NRS 604A.485 limits in detail the amount a licensee may collect from a customer, leaving no room to claim additional amounts for "fraud." Regulations enacted by the Division of Financial Institutions buttress the statutes by providing in NAC 604A.230(d) that "a licensee shall not collect or attempt to collect any interest incidental to the check other than the fees set forth in this chapter and chapter 604A of NRS." And further, NRS 604A.490 places detailed limits on the amount a licensee may collect for a check not paid upon presentment (one or two $25 fees, depending upon facts not relevant here) and further provides at subsection (4) that "a customer is not liable for damages pursuant to NRS 41.620 or to criminal prosecution for a violation of chapter 205 of NRS unless the customer acted with criminal intent." Of course, all this makes perfect sense because everyone knows that when the customer presents the check that the customer does not have the funds to cover the check, which would obviate the need for the loan altogether. Thus, these purported

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new claims are frivolous and should have zero impact on this Court's class-action-notice decisions.

B. Rapid Cash Should Bear the Costs Associated with the Notice.

Rapid Cash at 4:7-16 of its Opposition states that its offer to pay for notice to the Class was conditioned on the identities and addresses of Class members remaining confidential and being provided to Rust Consulting; if such information is to be provided to Class Counsel, then Rapid Cash submits that Plaintiffs should be required to pay all costs associated with notice.

This Court has the discretion to shift the costs of notice to Rapid Cash. Although the general rule articulated by the United States Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974), is that the plaintiff initially bears the cost of notice to the class, "occasionally, 'the district court has some discretion' in allocating the cost of complying with an order concerning class notification.'" Hunt v. Imperial Merchant Services, Inc., 560 F.3d 1137, 1143 (9th Cir. 2009) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 359 (1978)). "Many district courts have placed notice costs on the class action defendant once the defendant's liability has been established" in some way, such as in the granting of a motion for injunctive relief. Hunt, 560 F.3d at 1143 ("These district court decisions point us towards recognizing, as commentators have suggested, a general principle that 'interim litigation costs, including class notice costs, may be shifted to defendant after plaintiff's showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure,'" quoting NEWBERG ON CLASS ACTIONS § 8:6 (4th ed. 2007)). In such circumstances, the district court "may consider the totality of circumstances to decide whether shifting notice costs is just in that particular case." Id. at 1144.

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This case presents such circumstances. This certified class action was brought on behalf of consumers with the least means for maintaining such a lawsuit. They are members of this class because they were so financially destitute that their only source of immediate funds was to take out – and then default on – a high-interest, short-term, payday loan. And in addition to certifying this class action, this Court has already found that plaintiffs made a showing of some success on the merits of their claims. It entered a temporary restraining order and order terminating wage garnishments in response to the Plaintiffs' Motion for Rule 23 no-contact order or, alternatively, for a preliminary injunction in November 2010. Although the preliminary injunction hearing was taken off calendar by stipulation of the parties and the TRO was permitted to expire, injunctive relief was found appropriate, even if only temporarily. Thus, this case presents the special circumstances that justify departing from the Eisen rule and shifting the class-notice costs to Rapid Cash.

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II.

CONCLUSION

Accordingly, and for all the foregoing reasons, the Class's Motion to Approve Notice should be granted in its entirety, and Rapid Cash should be ordered to pay the associated costs.

DATED this 14th day of November, 2011.

By: /s/ Dan L. Wulz

Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF
SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
And
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17TH FL.
Las Vegas, Nevada 89169
Class Counsel

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CERTIFICATE OF MAILING

I hereby certify that on the 14th day of November, 2011, the foregoing **THE CLASS'S REPLY IN SUPPORT OF MOTION TO APPROVE CLASS NOTICE** was served on the following person(s) by U.S. Mail:

William M. Noall, Esq.
Mark S. Dzarnoski, Esq.
Gordon & Silver, Ltd.
3960 Howard Hughes Parkway 9th Floor
Las Vegas, NV 89169

Alan S. Kaplinsky
Martin C. Bryce, Jr.
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

/s/ Rosie Najera
An employee of Legal Aid Center of Southern Nevada

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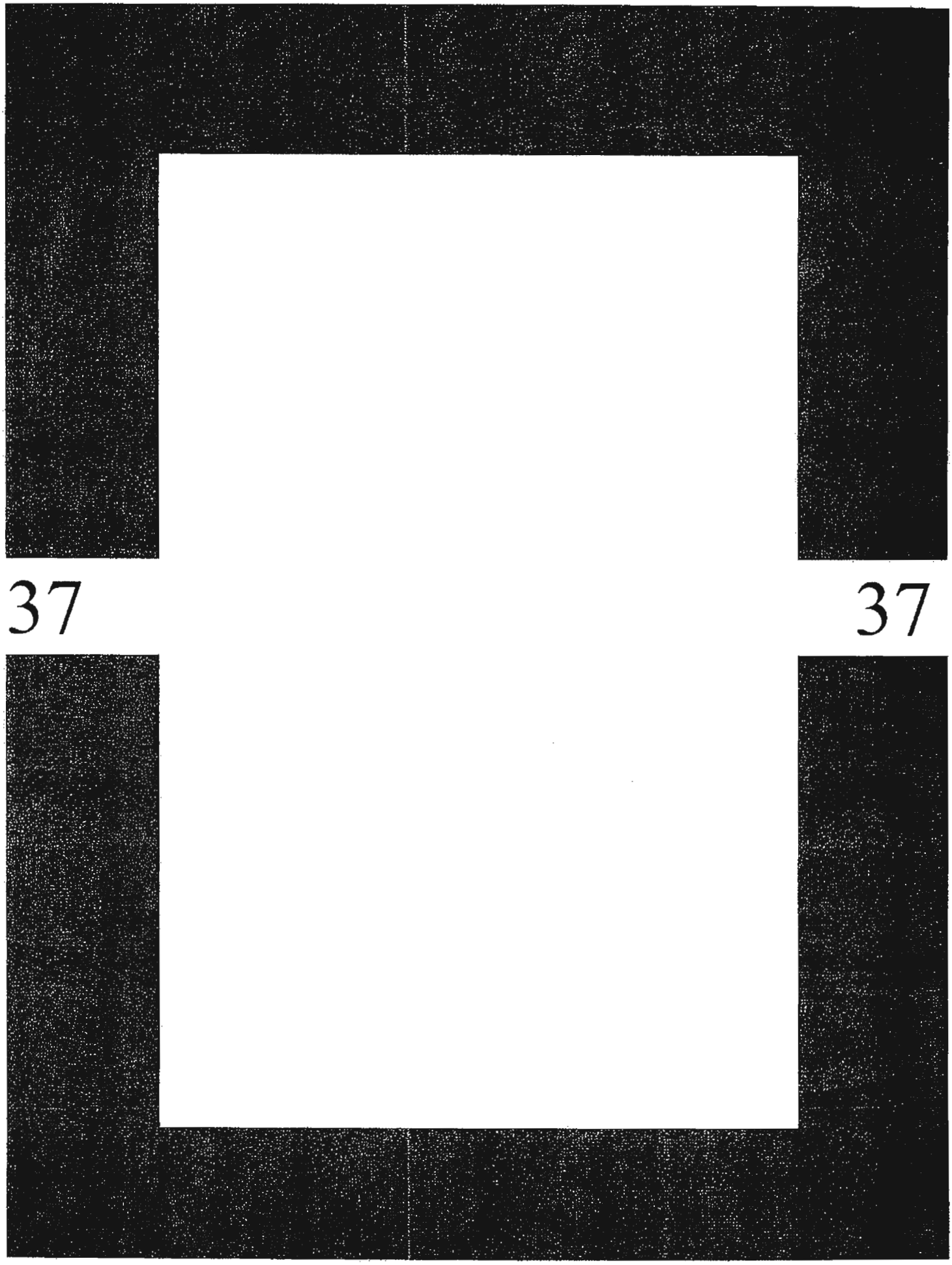

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CLERK OF THE COURT

ORDD
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated,

Plaintiff,

vs.

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; ADVANCED GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive,

Defendants.

Case No. A624982
Dept. XI

ORDER DENYING MOTION TO COMPEL ARBITRATION OF THE FIRST AMENDED COMPLAINT

Defendants 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 ADVANCED GROUP, INC.

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d/b/a RAPID CASH (hereafter "Rapid Cash") brought this "Motion to Compel Arbitration of First Amended Complaint and Stay All Proceedings" (the "Motion") on for hearing before this Court on October 25, 2011. The Class appeared by and through Class Counsel, J. Randall Jones, Esq., Kemp, Jones and Coulthard, LLP, and Dan L. Wulz, Esq., Legal Aid Center of Southern Nevada, Inc.; the Rapid Cash defendants appeared by counsel Mark S. Dzarnoski, Esq., Gordon & Silver, Ltd. The Court, having reviewed the Motion, the Class's Opposition, Defendants' Reply, the file, and the pleadings on file herein, and having heard and considered the arguments of the parties, hereby FINDS and ORDERS as follows:

The Motion is **DENIED**. Despite an arguable jurisdictional issue, the filing of the First Amended Complaint raises some separate issues that allow Rapid Cash to file and the Court to adjudicate the instant motion.

The Court finds that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (Apr. 27, 2011), is not dispositive of this case. The decision by the United States Supreme Court in the Concepcion case would not have countenanced the arbitration provision in this case being applied to these particular circumstances where Rapid Cash has utilized the Justice Court system repeatedly with the filing of false affidavits of service, securing of default judgments, and garnishing of wages. To do so would violate the public policy of the State of Nevada. This Court denied a previous motion by Rapid Cash to compel arbitration of the Class Members' claims, and the Court deemed Rapid Cash' arbitration clause unenforceable not under a state-wide policy declaring such clauses unenforceable but because Rapid Cash's own actions resulted in a waiver of its arbitration rights and permitting the Rapid Cash defendants to enforce any portion of their long-ignored arbitration provisions would violate public policy. The Court continues to find that Rapid Cash's conduct in its collection efforts constitutes a waiver of the right to elect arbitration of the claims in this action. Rapid Cash waived its ability to compel

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arbitration because, *inter alia*, it knew of its right to arbitrate, acted inconsistently with that right in filing thousands of justice court cases against the Class members, and prejudiced the Class members by its inconsistent acts in taking default judgments and pursuing collections. In making that prior determination, and again in issuing this decision and order, this Court has placed, and continues to place, the Rapid Cash contracts on equal footing with other contracts to reach this case-specific conclusion that Rapid Cash's own conduct invalidated and/or resulted in the unenforceability of its arbitration clauses, as *Concepcion* expressly permits. The Court further finds that the Class members' claims fall outside the scope of the arbitration agreement.

IT IS SO ORDERED.

DATED this 30th day of November, 2011.

DISTRICT COURT JUDGE

Prepared and submitted by:

Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

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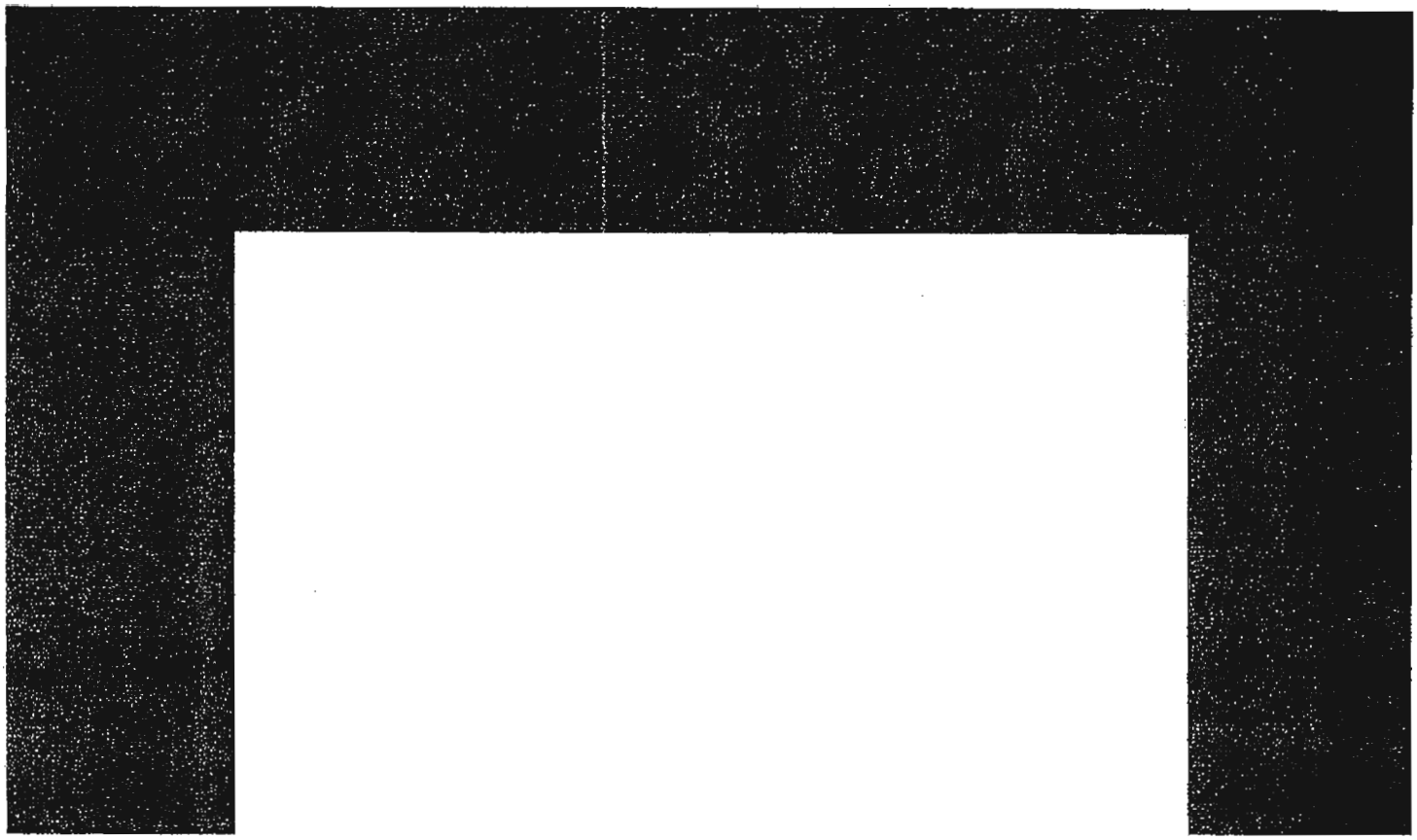

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CLERK OF THE COURT

NEOJ
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com

Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman, and DOES I

Case No.: A-10-624982-B
Dept. No.: XI

NOTICE OF ENTRY OF ORDER TO RECONSIDER CLASS CERTIFICATION OR. IN THE ALTERNATIVE, MOTION TO DECERTIFY CLASS

Date of Hearing: November 22, 2011
Time of Hearing: 9:00 a.m.

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PLEASE TAKE NOTICE that an Order Denying Motion to Reconsider Class Certification or, in the Alternative, Motion to Decertify Class was entered in this matter on December 5, 2011, a copy of which is attached hereto.

DATED this 7th day of December, 2011.

KEMP, JONES & COULTHARD, LLP

By: _____

JENNIFER C. DORSEY, ESQ.
Nevada Bar No. 6456
3800 Howard Hughes Parkway, 17TH Fl.
Las Vegas, Nevada 89169
Class Counsel

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of December, 2011, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following person(s) by U.S. Mail:

Mark S. Dzarnoski, Esq.
Gordon & Silver, Ltd.
3960 Howard Hughes Parkway 9th Floor
Las Vegas, NV 89169

_____
An employee of Kemp, Jones & Coulthard

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CLERK OF THE COURT

ORDD
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiff, vs. 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; ADVANCED GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive, Defendants.	Case No. A624982 Dept. XI **ORDER DENYING MOTION TO RECONSIDER CLASS CERTIFICATION OR, IN THE ALTERNATIVE, MOTION TO DECERTIFY CLASS** Date: November 22, 2011 Time: 9:00 a.m.

Defendants 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 ADVANCED GROUP, INC.

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d/b/a RAPID CASH (hereafter "Rapid Cash") brought this "Motion to Reconsider Class Certification or, in the Alternative, Motion to Decertify Class" (the "Motion") on for hearing before this Court on November 22, 2011. The Class appeared by and through Class Counsel, Jennifer C. Dorsey, Esq., Kemp, Jones and Coulthard, LLP, and Venicia Considine, Esq., Legal Aid Center of Southern Nevada, Inc.; the Rapid Cash defendants appeared by and through counsel Mark S. Dzarnoski, Esq., Gordon & Silver, Ltd. The Court, having reviewed the Motion, the Class's Opposition, Defendants' Reply, the file, and the pleadings on file herein, and having heard and considered the arguments of the parties, and for good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Reconsider Class Certification is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants' Alternative Motion to Decertify Class is hereby DENIED. The Court continues to find sufficient and significant facts and proof to support certification as previously ordered.

DATED this 30 day of NOV, 2011

DISTRICT COURT JUDGE

Prepared and submitted by Class Counsel:

Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com

APPROVED AS TO FORM

GORDON & SILVER, LTD.

By: _____
MARK DZARNOSKI, ESQ. (3398)
3960 Howard Hughes Pkwy. 9th Floor
Las Vegas, Nevada 89169
Attorneys for Defendants

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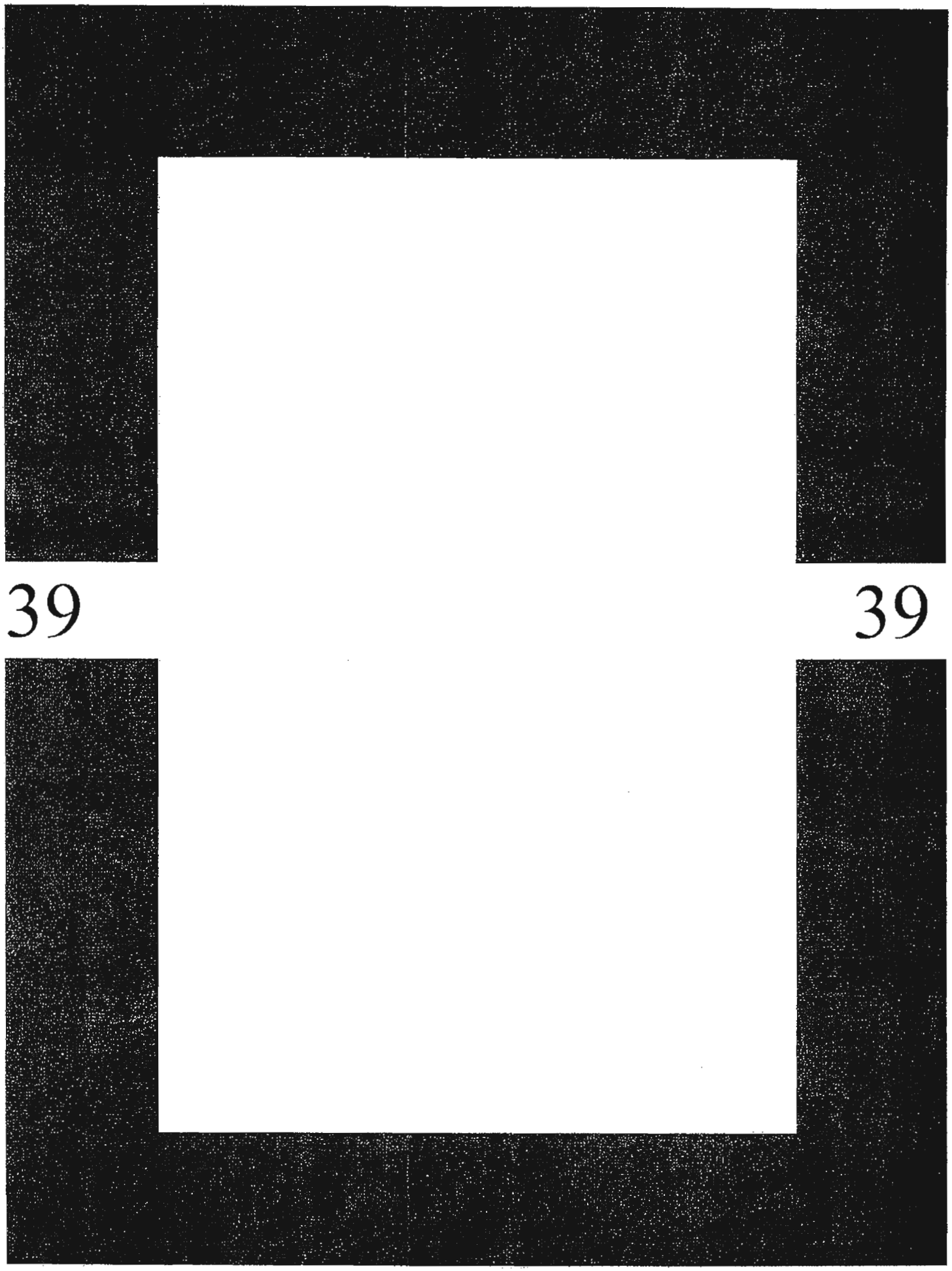

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CLERK OF THE COURT

NEOJ
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com

Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman, and DOES I

Case No.: A-10-624982-B
Dept. No.: XI

NOTICE OF ENTRY OF ORDER GRANTING MOTION TO APPROVE NOTICE

Date of Hearing: November 22, 2011
Time of Hearing: 9:00 a.m.

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PLEASE TAKE NOTICE that an Order Granting Motion to Approve Notice was entered in this matter on January 13, 2012, a copy of which is attached hereto.

DATED this 17th day of January, 2012.

KEMP, JONES & COULTHARD, LLP

By: _____
JENNIFER C. DORSEY, ESQ.
Nevada Bar No. 6456
3800 Howard Hughes Parkway, 17TH Fl.
Las Vegas, Nevada 89169
Class Counsel

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of January, 2012, the foregoing **NOTICE OF ENTRY OF ORDER** was served on the following person(s) by U.S. Mail:

Mark S. Dzarnoski, Esq.
Gordon & Silver, Ltd.
3960 Howard Hughes Parkway 9th Floor
Las Vegas, NV 89169

_____
An employee of Kemp, Jones & Coulthard

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CLERK OF THE COURT

ORDG
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiffs, vs. 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; ADVANCED GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive, Defendants.	Case No. A624982 Dept. XI **ORDER GRANTING MOTION TO APPROVE NOTICE** Date: November 22, 2011 Time: 9:00 a.m.

Plaintiffs, CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated brought this "Motion to Approve Notice" (the "Motion") on for hearing before this Court on

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November 22, 2011. The Class appeared by and through Class Counsel, Jennifer C. Dorsey, Esq., Kemp, Jones and Coulthard, LLP, and Venicia Considine, Esq., Legal Aid Center of Southern Nevada, Inc.; 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; ADVANCED GROUP, INC. d/b/a RAPID CASH ("the Rapid Cash defendants") appeared by counsel Mark S. Dzarnoski, Esq., Gordon & Silver, Ltd. The Court, having reviewed the Motion, Rapid Cash's Opposition, Plaintiffs' Reply, the file, and the pleadings on file herein, and having heard and considered the arguments of the parties, and for good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion to Approve Notice is hereby GRANTED, the form of Notice (for mailing) attached to the Motion is APPROVED for mailing.

On or before January 29, 2012, the Rapid Cash defendants shall dispatch these notices by first class mail to all persons against whom the Rapid Cash defendants or any of them obtained a default judgment where the service of process affidavit was signed by a representative of On Scene Mediations; the Rapid Cash defendants shall bear the costs associated with preparation and service of the notices.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Rapid Cash defendants shall provide Class Counsel with a full and complete copy of the mailing list utilized for service of the notices no later than five calendar days following the mailing of the Notices.

DATED this 13th day of January, 2012.

DISTRICT COURT JUDGE

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Prepared and submitted by:

Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

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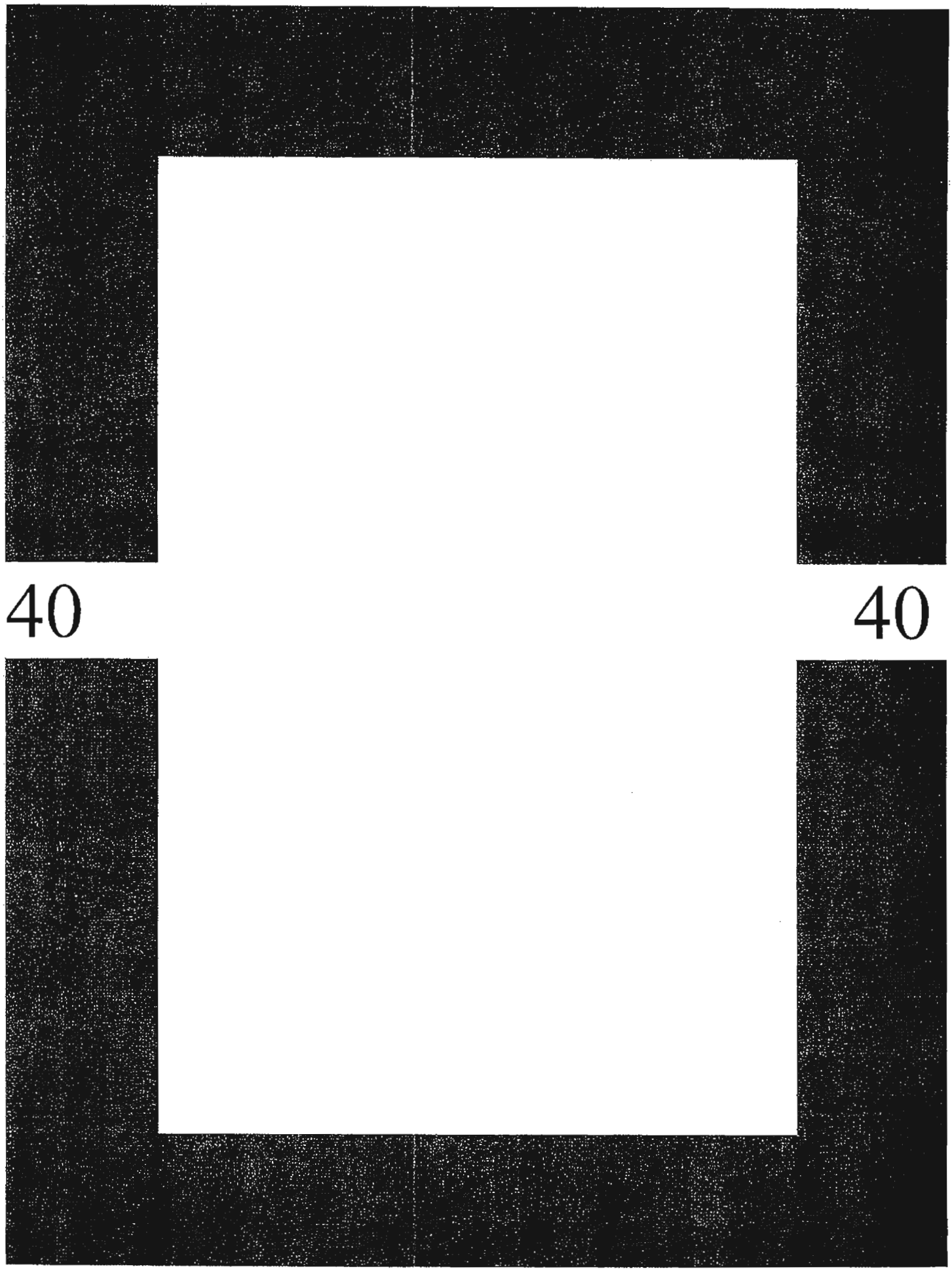

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CLERK OF THE COURT

MDSM
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com

Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman, and DOES I through X, inclusive,

Defendants.

Case No.: A-10-624982-B
Dept. No.: XI

MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS; ALTERNATIVE MOTION TO STRIKE COUNTERCLAIM CLASS ACTION ALLEGATIONS

Date of Hearing:
Time of Hearing:

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MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS; ALTERNATIVE MOTION TO STRIKE COUNTERCLAIM CLASS ACTION ALLEGATIONS

Plaintiffs and Class Representatives, Casandra Harrison, Eugene Varcados, Concepcion Quintino, and Mary Dungan, individually and on behalf of themselves and all others similarly situated, by and through counsel, Dan L. Wulz, Esq. and Venicia Considine, Esq., LEGAL AID CENTER OF SOUTHERN NEVADA, INC., and J. Randall Jones, Esq. and Jennifer C. Dorsey, Esq., KEMP, JONES & COULTHARD, LLC, pursuant to NRCP 12(b)(5) move this Court to dismiss Defendants' Counterclaims. In the alternative, Plaintiffs move to strike Rapid Cash's counterclaim class action allegations pursuant to NRCP 12(f) and NRCP 23(d)(4).

DATED this 26th day of January, 2012.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: /s/ Dan L. Wulz

DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

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NOTICE OF HEARING

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM on for hearing before the Court at the courtroom of the above-entitled Court on the 28 day of February, 2012, at 9:00 a.m. in Department XI of said Court.

DATED this 26th day of January, 2012.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: /s/ Dan L. Wulz

DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

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MEMORANDUM OF POINTS AND AUTHORITES

I.

INTRODUCTION

Payday-loan borrowers against whom Rapid Cash obtained default judgments without actual service of process filed this class action for relief from those fraudulently obtained judgments in September 2010. Rapid Cash avoided having to answer with a motion to dismiss, numerous motions to compel arbitration, writs, appeals, a protracted Nevada Supreme Court Settlement Conference process, and other delays. When Rapid Cash finally answered on January 4, 2012, it asserted counterclaims for breach of contract, fraud, and unjust enrichment, all purportedly against the entire Plaintiff class and all designed to take a second run at collecting the payday-loan debts for which Rapid Cash already sued these class members and was already awarded default judgments.[1]

Rapid Cash cannot maintain its counterclaims. First and foremost, these claims have already been brought and resolved in Rapid Cash's favor, making their reassertion in this litigation categorically barred by the doctrine of claim preclusion. Although the class seeks to invalidate those judgments, until that relief is achieved, these claims are res judicata and premature, and Rapid Cash's counterclaims must now be dismissed.

Even if Rapid Cash's right to bring claims arising from these loans were not completely barred by the doctrines of claim preclusion and ripeness, complete dismissal of the counterclaims would still be required. Rapid Cash has failed to state viable claims for fraud or unjust enrichment. Moreover, Counterclaims may not be asserted on a class-

[1] Albeit default judgments now challenged as void.

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wide basis, and Rule 23 gives this Court the discretion to control the scope of this class action by disallowing counterclaims against the named plaintiffs, too, leaving Rapid Cash free to bring all of these claims in separate justice court actions if and when their original judgments are voided and set aside. At a minimum, as Rapid Cash's payday-loan claims for damages against the thousands of class members cannot satisfy Rule 23, Rapid Cash's class action allegations should also be stricken under NRCP 12(f) or 23(d)(4).

II.

ARGUMENT

A. Rapid Cash's Counterclaims are Barred by the Doctrine of Claim Preclusion Because They Have Already Been Adjudicated, and Rapid Cash Has Obtained its Full Relief.

There are two species of res judicata: issue preclusion and claim preclusion. Although often used to describe both "species," the term "res judicata" really just refers to claim preclusion. Thus, in 2008, the Nevada Supreme Court abandoned the term "res judicata" in favor of using only "claim preclusion" and "issue preclusion." Five Star Capital Corporation v. Ruby, 194 P.3d 709, 713 (Nev. 2008).

Essentially the civil equivalent of double jeopardy, the doctrine of claim preclusion achieves finality "by preventing a party from filing another suit that is based on the same set of facts that were presented" in a prior suit. Five Star, 194 P.3d at 712. It applies "to all claims that were or could have been raised in the initial case" and precludes "an entire second suit that is based on the same set of facts and circumstances as the first suit." Id. "The doctrine 'is triggered when a judgment is entered. A valid and

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final judgment on a claim precludes a second action on that claim or any part of it.'" Id. at 711 (citing University of Nevada v. Tarkanian, 879 P.2d 1180, 1191 (Nev. 1994)). "The claim preclusion doctrine 'embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach [than the doctrine of issue preclusion].'" Id. (citing Tarkanian, 879 P.2d at 1191). The purpose of claim preclusion is "to obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit." Id. at 712.

Every one of Rapid Cash's counterclaims is barred by the doctrine of claim preclusion. All three of Rapid Cash's counterclaims seeks repayment of, or damages arising from, a payday loan customer's receipt of, and default upon, a Rapid Cash loan. But Rapid Cash has already sued these customers to recover these loan funds and, in each case, has been awarded a default judgment. Indeed, that's one of the requirements for their membership in this class action: each class member is the subject of a default judgment that Rapid Cash obtained against them, albeit through improper sewer service practices. And Rapid Cash even acknowledges that its attorneys "obtained default judgments in favor of RAPID CASH against each of" these class members, and "ultimately . . . obtained orders of wage garnishment" against the named class representatives and others "to collect upon the judgments obtained in the Justice Court Collection Actions." Counterclaim at 9, ¶ 18. As a result, each of these counterclaims has already been fully adjudicated and is now barred.

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Only three factors must be satisfied for the doctrine of claim preclusion to apply: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." Five Star, 194 P.3d at 713. All three of these factors are satisfied here. The parties are the same as Rapid Cash (or its parent or affiliate) has already prosecuted a lawsuit against each and every one of the Plaintiffs and members of the Class it now seeks to assert a counterclaim against, and Rapid Cash admittedly took each of those lawsuits to judgment (again, that's a prerequisite for class membership). Counterclaim at ¶ 18. Although the Class challenges the validity of those judgments and seeks to have this Court invalidate them, unless and until that occurs, they are facially valid, and thus claim preclusion attaches.

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Moreover, the claims in those justice court cases and Rapid Cash's current counterclaims are based on the very same set of facts. For example, in the justice court action against Eugene Varcados, Rapid Cash alleged: Mr. Varcados entered into a contract with Rapid Cash wherein he borrowed $1764.71, which he agreed to repay and that the check Mr. Varcados executed for repayment was dishonored.[2] See Justice Court Complaint, Principle Investments Group, Inc., v. Eugene R. Varcados, at 3-6, hereinafter

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[2] This Court may take judicial notice of the allegations in the Justice Court complaint against Mr. Varcados. Nev. Rev. Stat. §47.150 ("A judge or court may take judicial notice whether requested or not."); Occhiuto v. Occhiuto, 625 P.2d 568, 569 (Nev. 1981) (citing Giannopulos v. Chachas, 257 P. 618 (Nev. 1927)) ("It is a general rule that courts should not take judicial notice of their records in another and different case, even though the cases are connected, but this rule is not so inflexible in its application that under no circumstances can judicial notice be invoked to take cognizance of the record in another case.")

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Exhibit 1. Rapid Cash's counterclaim similarly alleges that it loaned money to Mr. Varcados "in exchange for" his promise of repayment with interest, and that he failed to tender that repayment, despite Rapid Cash's demands. See Counterclaim at 10-11. The same holds true for the claims against all of the named class representatives and those asserted against the class as a whole.

It is of no consequence that the justice court lawsuits asserted only claims for breach of contract. The doctrine of claim preclusion bars not only the claims that were brought, but also those that could have been asserted upon the same set of facts. Five Star, 194 P.3d at 711. Rapid Cash's breach of contract, fraud, and unjust enrichment claims are all based upon the same set of facts for each individual class member: each was given a loan that it failed to repay under contractually established terms, and the failure to repay in accordance with those terms was a breach of contract, fraudulent, and left each customer unjustly enriched. See generally Counterclaim. Nothing prevented Rapid Cash from asserting this full slate of claims in its original justice court suit, as all claims are based on the same set of facts for each individual borrower and obtaining its default judgment on all of those claims. Thus, the doctrine of claim preclusion is plainly triggered, and each of Rapid Cash's counterclaims is barred and must now be dismissed.

B. Defendants' Counterclaims Must be Dismissed as Unripe Because Rapid Cash's Default Judgments Have Not Yet Been Overturned.

At a minimum, Rapid Cash's claims are unripe because they assume that Rapid Cash has not already obtained judicial relief for the unpaid payday loans that are the subject of Rapid Cash's default judgments. The doctrine of ripeness "focuses on the timing of the

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action rather than on the party bringing the action." Herbst Gaming, Inc. v. Heller, 141 P.3d 1224, 1230-31 (Nev. 2006) (citing In re T.R., 80 P.3d 1276, 1279 (Nev. 2003)). "A primary focus in such cases has been the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy. Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present." Id. "The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." In re T.R., 80 P.3d at 1279.

As Rapid Cash has already obtained relief for the conduct alleged in its counterclaims (in the form of default judgments – many of which it has already collected upon through garnishment and otherwise), those counterclaims essentially assume that the default judgments will be successfully set aside as a result of this class action litigation, leaving Rapid Cash in a position to be able to recommence efforts to collect those alleged debts. Indeed, Rapid Cash expressly acknowledges this prematurity, as it prefaces its claims with the statement that its debt-collection claims are "compulsory counterclaims"[3] asserted "in the event the court in the Class Action Lawsuit voids any or all judgments" in the justice court actions. Counterclaim, ¶ 22 and ¶ 121-22. Unless and until that happens, however, Rapid Cash's injuries are purely hypothetical, its claims are all premature and unripe, and they should be dismissed without prejudice to reassert them at

[3] These claims are not compulsory counterclaims either, as they go beyond the very narrow, sewer-service facts that give rise to this class action lawsuit. See Executive Mgmt., Ltd. v. Ticor Title Ins. Co., 963 P.2d 465, 478 (Nev. 1998).

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a later time (subject, of course, to all valid defenses and other rights and remedies), and in the appropriate forum (most likely justice court).

C. Rapid Cash Has Failed to State a Cognizable Fraud Counterclaim, Subjecting its Sixth through Ninth Claims for Relief to Dismissal.

Even if all of Rapid Cash's counterclaims were not barred by the doctrines of claim preclusion and ripeness, its fraud claims would still be subject to dismissal because the simple, breach-of-contract facts alleged do not give rise to fraud claims worthy punitive-damage implications. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." NRCP 9(b). "Pleading with particularity is required 'in order to afford adequate notice to the opposing part[ies],' 'so that they can defend against the charge and not just deny that they have done anything wrong.'" Rocker v. *KPMG, LLP.*, 148 P.3d 703, 707-08 (Nev. 2006) (abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670 (Nev. 2008)). "The circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake." Brown v. Kellar, 636 P.2d 874 (Nev. 1981). Malice, intent, knowledge and other conditions of the mind of a person may be averred generally. Id.

It is assumed that Rapid Cash knows the time, place and identity of the parties to whom it lent money, yet those particulars are not alleged. Rapid Cash does allege that each of the possibly 17,000 class members knowingly made false representations regarding their willingness to repay the money which they borrowed. This is a practical impossibility as Rapid Cash, given the nature of its payday loan business, lends money to

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a population which is forced by whatever circumstance to borrow money on incredibly unfavorable terms. And it is particularly instructive that when Rapid Cash sues its borrowers on defaulted payday loans, Rapid Cash never alleges fraud.

In sum, the facts alleged by Rapid Cash give rise to nothing more than the simplest breach of contract claim. Rapid Cash's fraud claim is grossly overpled and must be dismissed on that basis as well.

D. Rapid Cash's Unjust Enrichment Claims Are Invalidated by the Contract Allegations and Must Be Dismissed as a Matter of Law.

Rapid Cash has alleged both breach of a written contract and unjust enrichment. These theories are legally inconsistent and cannot be pleaded together as a matter of law. The Nevada Supreme Court has made it clear that "[a]n action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." Leasepartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182, 187 (Nev. 1997). "The doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another or should pay for." Id. (quoting 66 AM.JUR.2D Restitution § 11 (1973)). "To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles." Lipshie v. Tracy Investment Co., 566 P.2d 819, 824 (Nev. 1977).

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The thrust of Rapid Cash's counterclaims is the class members' alleged failure to repay payday loans under the terms of written contracts with each individual class member. See, e.g., Counterclaim at ¶¶ 25, 34, 43, 55 and 63 (noting that the class members "entered into a written contract with RAPID CASH entitled the 'Deferred Deposit Agreement & Disclosure Statement'"). Indeed, these contracts were the basis for Rapid Cash's justice court actions to collect these alleged debts and the resulting default judgments and writs of garnishment. See, e.g., Exhibit 1 at 3-7. As Rapid Cash acknowledges that its relationship with these purported counterclaim defendants is contractual, and Rapid Cash has already recovered against them on a contractual basis and is now reasserting those contractual claims, Nevada law precludes Rapid Cash from also pursuing recovery under an unjust enrichment theory. Accordingly, Rapid Cash's Tenth Claim for Relief for Unjust Enrichment must be dismissed as a matter of law.

E. Rapid Cash's Counterclaims Should Be Dismissed Because Classwide Counterclaims Are Not Permitted.

Even if Rapid Cash's counterclaims were not barred and subject to immediate dismissal under res judicata and other principles, they must be disallowed. The United States Supreme Court in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985), observed that absent class members are almost never subject to counterclaims. "Because of the representative nature of class suits, absent class members are, in a very real sense, nonlitigating parties." ALBA CONTE AND HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 4:34, at 299 (4th ed. 2002). "They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or

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costs. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claims which were litigated." Shutts, 472 U.S. at 809. "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." Id.

Due to this representative nature of class actions, Rule 13, which permits the assertion of counterclaims, "is inapplicable in a class context," and thus, counterclaims "are purely discretionary with the court." NEWBERG, supra § 4:34 at 299-300; accord, Allapattah Services, Inc. v. Exxon Corp., 333 F.3d 1248, 1260 n.14 (11th Cir. 2003); see also Turner v. Legacy Health Sys., 2006 WL 657175, at *4-5 (Or. Cir. Feb. 22, 2006) (citing Shutts and NEWBERG and dismissing class counterclaims because certification was not appropriate and "the Court doubts whether the unnamed class members in this case could be parties subject to Legacy's counterclaims even if the statutory requirements . . . were met."). "The inapplicability of counterclaims under that rule in a class action context is manifest when one compares the basically passive nature of a class member with the policies underlying Rule 13." Id. at 300. Those policies are "not promoted in a class context." Id. "Assertion of counterclaims against absent class members is" also "inconsistent with" the objectives of Rule 23. Id. at 306. It will "discourage" participation, "encourage opting out," serve to "fragment the controversy" and promote

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"the economies of neither the parties nor the court," "defeat the utility of the class device," and generally "emasculate the basic objectives of class actions." Id. at 306-07. As the court held in In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 349 (E.D. Penn. 1976), when dismissing class counterclaims, "all counterclaims that purport to state a cause of action against unnamed class members must be dismissed," because "counterclaims may be brought against unnamed class members only if and when these class members intervene or file claims in these actions." Thus, "counterclaims should be disallowed in Rule 23 suits as contrary to the basic policies underlying representative class litigation." NEWBERG, supra § 4:34 at 307.

Thus, "[g]enerally, trial courts should use their management powers to prevent counterclaims from undermining class actions." Consumer Class Actions, National Consumer Law Center, 7th e.d., § 7.7, at 103 (2010). And NRCP 23(c)(4) gives the district court the discretion to exclude or include "particular issues" from a class action. As the United States Supreme Court explained in Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 881 (1984), the scope of claims to be decided in a class action "is a matter of judicial administration." "Nothing in Rule 23 requires as a matter of law that the District Court" adjudicate all issues raised in a class action. "Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions." Id. Thus, "under Cooper, a court hearing a class action can simply enter an order providing that it is not adjudicating any claims that the defendant has against the class members, thereby remitting the defendant to whatever remedy it would ordinarily

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pursue in such circumstances," like bringing its claims in a separate and distinct lawsuit. Consumer Class Actions, National Consumer Law Center, 7th e.d., § 7.7, at 103 (2010).

Disallowing counterclaims in class actions also does not prejudice defendants as it "does not preclude their assertion in independent actions." Id. This is particularly true when the counterclaims are "no more than debt collection actions which may be prosecuted separately." Rental Car of New Hampshire, Inc. v. Westinghouse Elect. Corp., 496 F. Supp. 373, 381 (D. Mass. 1980). See also Agostine v. Sidcon Corp., 69 F.R.D. 437, 443 (E.D. Penn. 1975) (dismissing counterclaim in Truth in Lending class action, noting that "federal courts should be loath to become immersed in the debt collection" counterclaims asserted in Truth in Lending actions); Crawford v. Equifax Payment Services, Inc., 1998 WL 704050, at *7 (N.D.Ill. Sept. 30, 1998) (declining to exercise jurisdiction over debt collection counterclaims against the class, suggesting that the claims should be brought instead in the state's "special small claims courts that have streamlined and cost-effective procedures designed to handle these types of small individual contract actions.").[4] Plus, "it is difficult to conceive of a counterclaim against an entire class which is not more properly regarded as a common defense." NEWBERG, supra § 4:34 at 307.

[4] Rapid Cash's assertion that its counterclaims are "compulsory" is unsustainable. Each of Rapid Cash's counterclaims arises out of the loan transactions, but none of the claims in this class action challenges those transactions or Rapid Cash's rights associated with those loans. The class action claims arise only from the manner of Rapid Cash's use of the justice system. Thus, Rapid Cash's counterclaims arise out of different transactions or occurrences than the class action claims, and they are therefore not "compulsory." See NRCP 13(a).

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In the event that this Court does not dismiss Rapid Cash's counterclaims under claims preclusion principles, it should disallow Rapid Cash's counterclaims by dismissing them and leaving Rapid Cash free to attempt to pursue those claims in separate suits against each of the thousands of individual counterclaim defendants. The absent class members are not opposing parties subject to counterclaims, they are not actively participating in this litigation in the level necessary to fairly protect themselves from the debt-collection counterclaims of Rapid Cash, and it would violate due process to subject them to counterclaims in such a representative manner. And even if the named plaintiffs are amenable to counterclaims, this Court retains the discretion, and should exercise that discretion, to prevent Rapid Cash from pursuing those separate claims inside this class action. To allow Rapid Cash to reassert the debt-collection claims in this fraudulent-judgment action that targets only the manner in which those debt-collection judgments were obtained, not the merits of those debt-collection claims, would transform this streamlined case into a payday-loan collection action. It is not in the best interests of this Court, or the class that it is obligated to protect, to allow Rapid Cash to hijack this very limited case as a vehicle for a premature do-over on its botched debt-collection cases against the class members. Accordingly, this Court should disallow and dismiss Rapid Cash's counterclaims without prejudice to bring them elsewhere if and when they become ripe again.

F. Rapid Cash's Counterclaims Against the Absent Defendants Must Be Dismissed Because they are not Independently Certifiable Under Rule 23.

Even if this Court were to reject Newberg and the majority approach and consider

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allowing Rapid Cash to pursue its debt-collection counterclaims in this fraud-on-the-court class action, those counterclaims still cannot be pursued on a class-wide basis because Rapid Cash cannot satisfy Rule 23's requirements for class certification. "Any such claim against the entire class (counterclaim class) would be permitted only because of the presence of Rule 23." Id. Thus, in order for a defendant to assert class-wide counterclaims, the defendant "would have to satisfy all Rule 23 criteria" for its counterclaim class, because "whatever adequate representation exists for a class representative with respect to common issues does not extend to individual issues arising from counterclaims against individual class members." Id. at 302; NEWBERG, supra § 3:2 at 217 ("Such a counterclaim, if permitted by the court under applicable civil procedure rules, would also have to satisfy Rule 23 class criteria."); accord, Defendant Class Actions, 91 HARV. L. REV. 630, 637 (1978) (noting that a defendant class action must independently satisfy Rule 23).

Rapid Cash's counterclaims are not amenable for class treatment. Unlike the Class Plaintiffs' claims, which arise out of a singular policy, pattern, and practice of sewer service by Rapid Cash's agent On Scene Mediations, Rapid Cash's counterclaims arise out of thousands of separate and independent loan transactions. Regardless of the legal theory underlying its claims, be it breach of contract, fraud, or unjust enrichment, the gist of each action is for the collection of a debt from one of thousands of different people acting with different motivations and under different circumstances. Whereas Plaintiffs' class claims arise from a single course of conduct by a lone defendant (Rapid Cash) by

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and through its agent On Scene, Rapid Cash's counterclaims arise from thousands of separate transactions against independent actors and cannot be proven upon a common course of conduct or by demonstrating a uniform policy, pattern, or practice by a single defendant and its agents. Rapid Cash argued in its motion to reconsider this Court's class certification order that a certifiable class requires "a common issue the resolution of which will advance the litigation," and "[i]f significant elements of a claim or defense require individualized proof by each class member, class certification is inappropriate." Rapid Cash's Motion to Reconsider Class Certification or, in the Alternative, Motion to Decertify Class at 3 (quoting Sprague v. General Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998)). Rapid Cash's individualized collection claims do not present that requisite common issue and cannot be prosecuted without individualized proof against each class member. Regardless, the individualized issues presented by each collection case would predominate over any common issues, further militating against counterclaim-class certification. Accordingly, Rapid Cash's counterclaims cannot be asserted on a class-wide basis against the absent (or, as Rapid Cash designates them, the "doe defendants" or "putative") members of this certified class. Rapid Cash's fifth, ninth, and tenth claims for relief must be dismissed.

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G. Rapid Cash's Counterclaim Class Action Allegations Should Be Stricken Under Rule 12(f) and 23(d)(4) Because No Counterclaim Class Is Maintainable.

NRCP 12(f) allows this Court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

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NEV. R. CIV. PROC. 12(f). Rule 23(d)(4) provides this Court with a second basis for striking unsustainable class allegations from pleadings, as it allows the district court to require "that the pleadings be amended to eliminate there from allegations as to representation of absent persons, and that the action proceed accordingly." NEV. R. CIV. PROC. 23(d)(4); see also Rehberger *v. Honeywell Int'l, Inc.*, 2011 WL 7810681 *8 (M.D. Tenn. Feb. 28, 2011) (noting that, under these rules, the court "has authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained. For example, if the complaint shows that individual questions will necessarily predominate, the court can strike the class allegations"). Should this Court permit Rapid Cash to maintain its counterclaims, its inability to obtain class certification for a counterclaim class renders the counterclaim class actions against absent (or "putative") class members immaterial and impertinent. Accordingly, this Court should order those allegations stricken from the Counterclaim and direct Rapid Cash to amend its pleading to eliminate these unsustainable allegations.

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III.
CONCLUSION

Rapid Cash has already had its day in court to recover the funds it loaned to the class members, and it obtained full relief in the form of default judgments, many of which Rapid Cash even collected upon by garnishing class members' wages. Until this Court declares those judgments void and sets them aside, Rapid Cash lacks the right to reassert those claims in any form – particularly a counterclaim designed to hijack this very narrow class action. Even if its claims were not res judicata and unripe, dismissal would still be required because they are inadequately pled, and cannot be alleged against absent class

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members. Accordingly, and for all the foregoing reasons, Rapid Cash's Counterclaim must be dismissed in its entirety. But should this Court permit any portion of those counterclaims to survive, Rapid Cash's counterclaim-class allegations must be stricken under NRCP 12(f) and 23(d)(4).

DATED this 26th day of January, 2012.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: /s/ Dan L. Wulz

DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

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EXHIBIT 1

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COM
LIZZIE R. HATCHER, ESQ.
Bar No. 000247
302 E Carson Ave. Suite 620
Las Vegas, NV 89101
(702) 386-2988
Attorney for Plaintiff

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JUSTICE COURT
CLARK COUNTY, NEVADA

08C-046202

PRINCIPLE INVESTMENTS GROUP, INC. dba RAPID CASH, Plaintiff, vs. EUGENE R. VARCADOS, Defendant	Case No.: Dept No. 3

COMPLAINT

COMES NOW, the Plaintiff, PRINCIPLE INVESTMENTS GROUP, INC., dba RAPID CASH, a Nevada Corporation licensed to do business within the State of Nevada, by and through counsel, LIZZIE R. HATCHER, ESQ., and files this complaint alleging as follows:

I.

That Rapid Cash is duly licensed to do business within the State of Nevada, County of Clark.

II.

That at all times mentioned herein, the Defendant EUGENE R. VARCADOS, was a Resident of Clark County, Nevada.

III.

That on or about June 15, 2008 the Defendant entered into a contract with Rapid Cash wherein the Defendant borrowed $1764.71. That the Defendant agreed to repay the loan.

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IV.

That on or about June 29, 2008, the Defendant executed a check in the amount of $1764.71 for the repayment of the monies borrowed.

V.

That the check was dishonored and returned for insufficient funds.

VI.

That demand has been made upon the Defendant for payment of the loan in the amount of $1764.71 to no avail.

VII.

That as a result of the failure of the Defendant to repay the loan, the Plaintiff has been damaged in the amount of $1764.71 .

VIII.

That as a result of the check being returned, the Plaintiff has incurred $75.00 for fees from its bank.

IX.

That the Plaintiff has incurred attorney's fees and costs in bringing this action against the Defendant.

WHEREFORE, Plaintiff prays judgment as follows:

1. For a judgment against the Defendant in the amount of $1839.71 plus interest at the legal rate.

2. For reasonable attorney's fees and costs.

3. For such other and further relief as to the Court may seem just and proper in the premises.

DATED this 9th day of Sept, 2008.

LIZZIE R. HATCHER, ESQ.
Bar No. 000247
302 E. Carson Ave., Ste. 620
Las Vegas, NV 89101
(702) 386-2988

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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,

Appellants,

vs.

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; AND MARY DUNGAN, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Respondents.

No. 57625

FILED

FEB 04 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING MOTION

Respondents have filed a motion requesting this court to dismiss this appeal for lack of jurisdiction. We deny the motion. This denial is without prejudice to respondents' right to renew the motion, if necessary, upon completion of settlement proceedings.

It is so ORDERED.

Douglas, C.J.

cc: Ara Shirinian, Settlement Judge
Gordon & Silver, Ltd.
Kemp, Jones & Coulthard, LLP
Legal Aid Center of Southern Nevada

SUPREME COURT
OF
NEVADA

(O) 1947A

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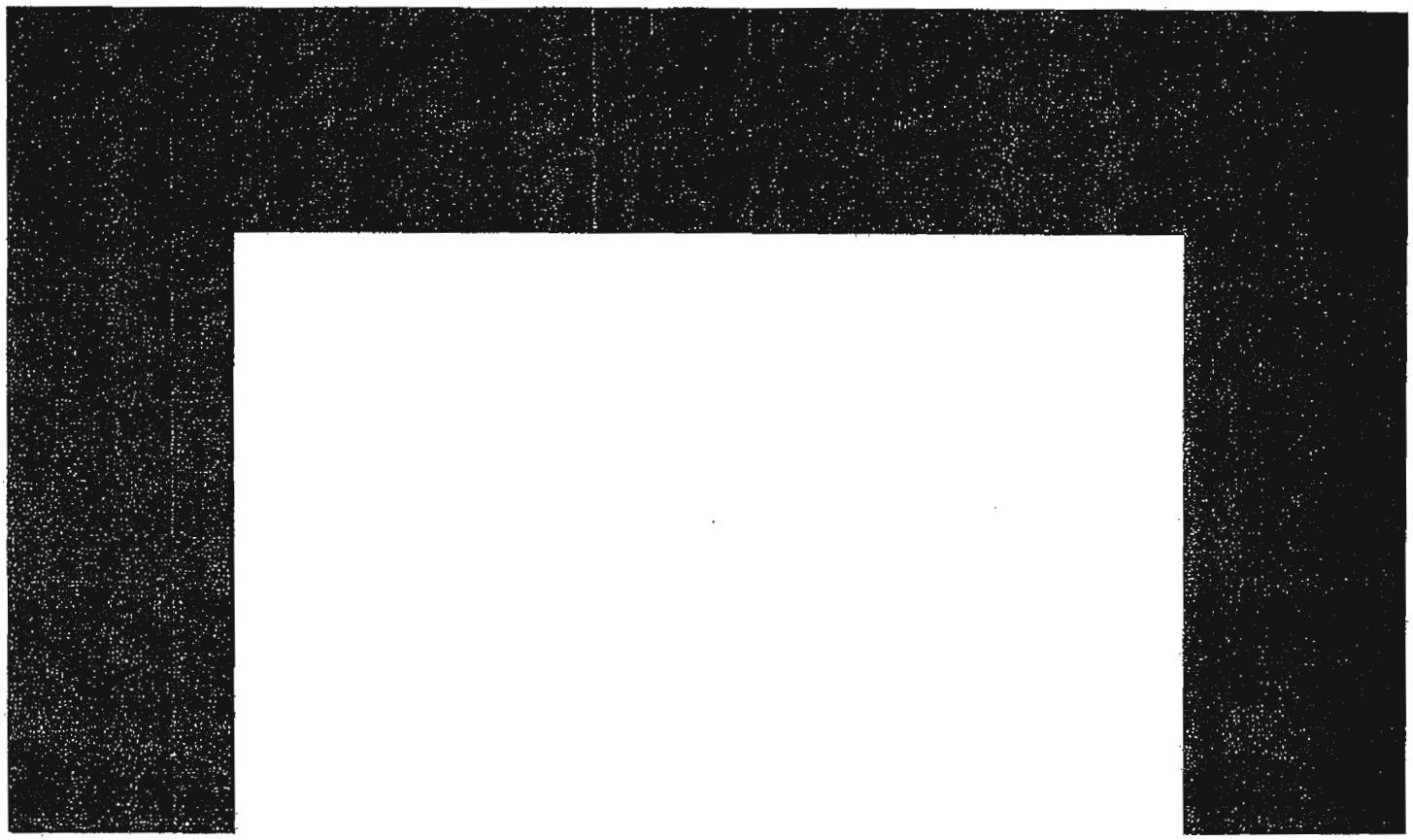

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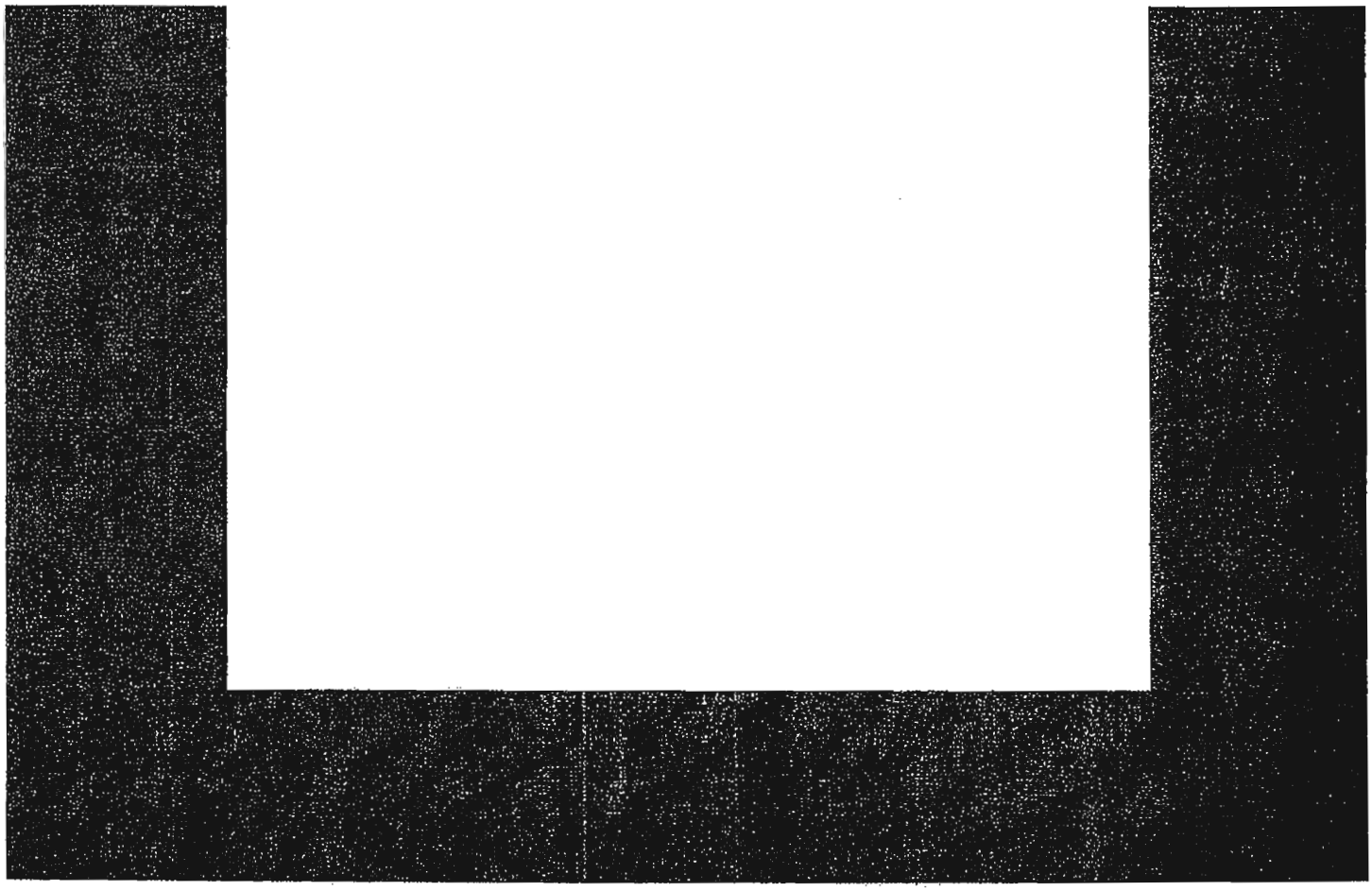

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CLERK OF THE COURT

MOT
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com

Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

000768

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia

Case No.: A-10-624982-B
Dept. No.: XI

PLAINTIFFS' MOTION TO APPROVE NOTICE

Plaintiffs and Class Representatives, Casandra Harrison, Eugene Varcados, Concepcion Quintino, and Mary Dungan, individually and on behalf of themselves and all others similarly

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situated, by and through counsel, Dan L. Wulz, Esq. and Venicia Considine, Esq., LEGAL AID CENTER OF SOUTHERN NEVADA, INC., and J. Randall Jones, Esq. and Jennifer C. Dorsey, Esq., KEMP, JONES & COULTHARD, LLC, pursuant to the Court's Minute Order dated September 23, 2011 and "Order Granting Class Certification and Appointing Class Counsel" filed September 29, 2011, moves this Court for its Order approving the notice to be mailed to the Class, attached.

DATED this 14th day of October, 2011.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: /s/ Dan L. Wulz
DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101

and

J. RANDALL JONES, ESQ. (1927)
JENNIFER C. DORSEY, ESQ (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

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NOTICE OF HEARING

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above MOTION TO APPROVE NOTICE on for hearing before the Court at the courtroom of the above-entitled Court on the 18 day of November, 2011, at In Chambers a.m. in Department XI of said Court.

DATED this 14th day of October, 2011.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: /s/ Dan L. Wulz
DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101

and

J. RANDALL JONES, ESQ. (1927)
JENNIFER C. DORSEY, ESQ (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

MEMORANDUM OF POINTS AND AUTHORITES

On September 29, 2011, the Court filed its "Order Granting Class Certification And Appointing Class Counsel," providing notice would be mailed to the Class in a form approved by the Court.

On September 23, 2011 by Minute Order the Court recommended changes to Paragraphs "B" and "C" of the form of notice to be mailed which had been provided by Plaintiffs. The Notice attached contains the changes as recommended by the Court, and may be mailed to

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members of the Class on a date to be established by the Court upon approval and as stated in the "Order Granting Class Certification and Appointing Class Counsel."

DATED this 14th day of October, 2011.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: /s/ Dan L. Wulz

DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101

and

J. RANDALL JONES, ESQ. (1927)
JENNIFER C. DORSEY, ESQ (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

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DISTRICT COURT
CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated,
Plaintiffs,
vs.
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; ADVANCE GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive,
Defendants.

CASE NO. A-10-624982-B
DEPT. XI

CLASS ACTION

DO NOT BE ALARMED. YOU HAVE NOT BEEN SUED.
THIS NOTICE IS MERELY TO TELL YOU THAT THE ABOVE LAWSUIT HAS BEEN CERTIFIED AS A CLASS ACTION AND THAT YOU HAVE BEEN IDENTIFIED AS A POTENTIAL CLASS MEMBER.
PLEASE READ THE ENTIRE NOTICE TO LEARN HOW TO EXERCISE YOUR RIGHTS

THIS NOTICE EXPLAINS:

A. WHAT THE LAWSUIT IS ABOUT
B. PURPOSE OF THIS NOTICE
C. BECOMING A CLASS MEMBER
D. OPT OUT

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A. **WHAT THIS LAWSUIT IS ABOUT:** A class action lawsuit was filed in the Eighth District Court of Nevada alleging that Rapid Cash unlawfully obtained default judgments in collections actions filed in Justice Court, Clark County, Nevada, without first serving the summons and complaint on its customers as required by law. It is alleged that the process server, Maurice Carroll and On Scene Mediations, failed to serve the summons and complaint but filed an affidavit with the Justice Court certifying that they completed service, which allowed Rapid Cash to obtain default judgments against its customers based upon the false affidavits. The Complaint seeks to set aside the default judgments obtained using false affidavits of service and to recover some money Rapid Cash collected in satisfaction of the default judgments. Rapid Cash denies the allegations.

WHAT IS SERVICE OF PROCESS? Service of Process means the personal delivery of documents (a summons and complaint) to the person being sued. It is the procedure used to give a legal notice of a court case to a person. It allows the person being sued to respond to the court.

B. **PURPOSE OF THIS NOTICE:** This Notice is sent to inform you about your legal rights. It is being sent to all Rapid Cash customers who **may** be class members under the lawsuit description above, to advise that Department XI of the Eighth Judicial District Court, Clark County, Nevada, has certified a class action on their behalf. If you want to pursue a claim individually or do not wish to be included in this class action, fill in the OPT OUT form in this packet and return via US Postal Service to Rust Consulting, 625 Marquette Ave # 880, Minneapolis, MN 55402.

C. **YOUR RIGHTS:** You must return the Postcard Questionnaire (see #1) checking the "WAS NOT" box if it is true that *you were not served,* in order to be a class member. But if you were served, then check the "WAS" box and return the Postcard Questionnaire. If you fail to return the Postcard Questionnaire, the Court will presume you are a class member until further notice.

D. **OPT OUT:** You may OPT OUT of the case (see #2) by returning the Postcard Questionnaire stating you request exclusion. You will not be allowed to pursue individual claims against Rapid Cash unless you opt out.

#1 RETURN THE POSTCARD: If you were not served with a summons and complaint by Rapid Cash and want to be included in this Class Action, check the appropriate box on the POSTCARD and mail the POST CARD on or before _____.

#2 OPT OUT: If you do not want to be a member of the Class or receive any other benefit of the litigation including any future settlement, you must inform the Court that you are going to OPT OUT of the Class by checking the Request for Exclusion box below and mailing the POST CARD on or before _____.

When the Court first certified this case as a class action, it appointed the following attorneys to represent all members of the Class: Dan Wulz and Venecia Considine at Legal Aid Center, 800 South Eighth St., Las Vegas, NV 89101; and J. Randall Jones and Jennifer Dorsey at Kemp, Jones & Coulthard, LLP, 3800 Howard Hughes Parkway, 17th Flr., Las Vegas, NV 89169. Together, these attorneys are Class Counsel. You will not be charged for these lawyers.

POSTCARD

Check the appropriate box, fill in your name, complete address and phone number and return the pre-addressed postcard. A stamp is required.

NAME: _____ PHONE : _____

ADDRESS: _____

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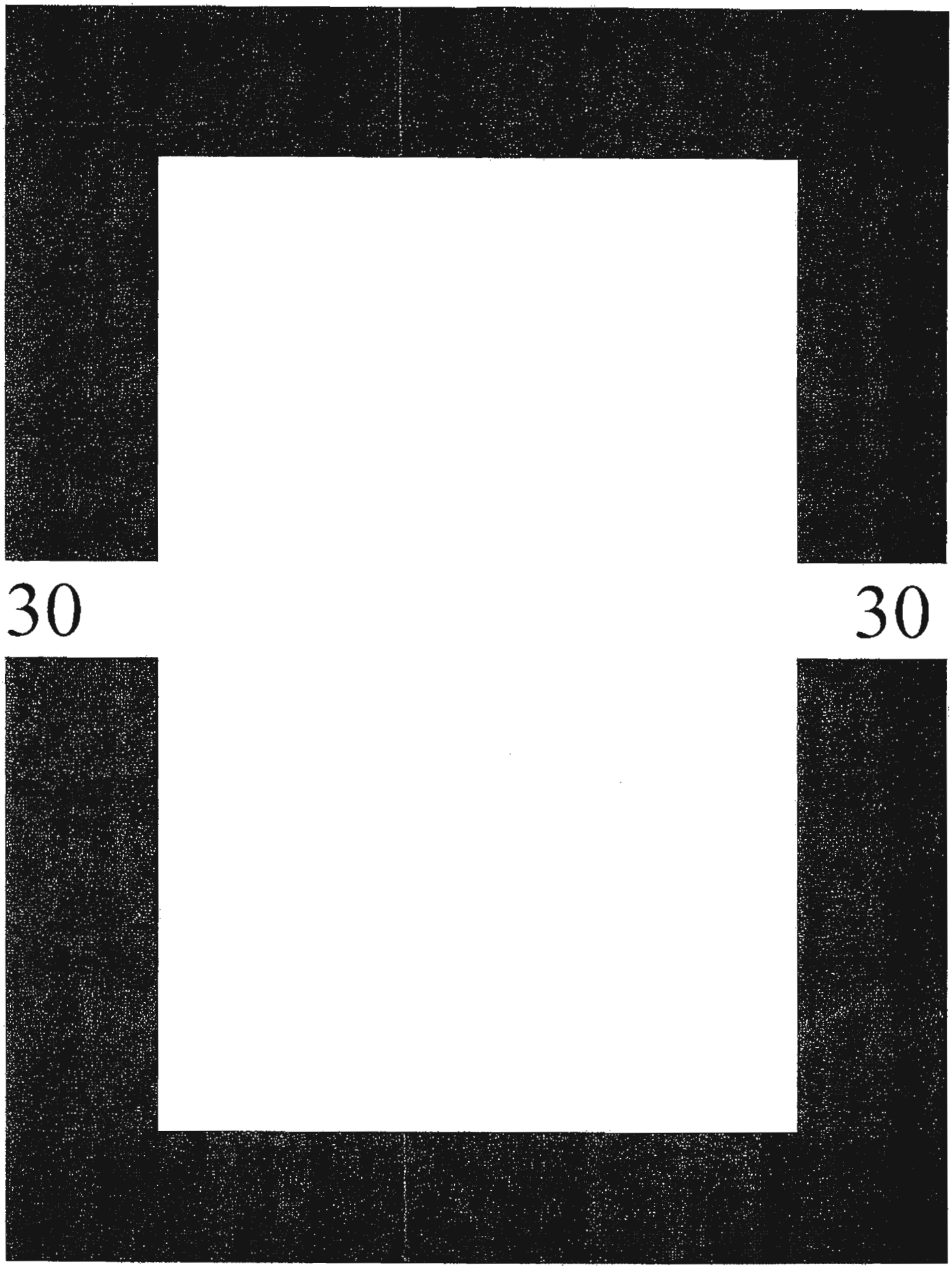
Question #1: If you were not served, check the ☐WAS NOT box to become a member of the class. If you were served, check the ☐WAS box; which means you will not be a class member.

#1: I ☐WAS NOT ☐WAS SERVED A SUMMONS AND COMPLAINT BY RAPID CASH IN A COLLECTION ACTION FILED IN JUSTICE COURT.

Question #2: Whether you were served or not served, check the box below if you would like to opt out of this class action and be removed from the class action completely.

#2: REQUEST FOR EXCLUSION

☐ I REQUEST TO BE EXCLUDED FROM THE CLASS ACTION. I DO NOT WANT TO TAKE PART IN THIS LAWSUIT.



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CLERK OF THE COURT

RPLY
GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
Email: wnoall@gordonsilver.com
MARK S. DZARNOSKI
Nevada Bar No. 3398
Email: mdzarnoski@gordonsilver.com
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Fax: (702) 369-2666
Attorneys for Defendants
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

DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated,

Plaintiffs,

vs.

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; ADVANCE GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive,

Defendants.

CASE NO. A-10-624982-B
DEPT. XI

REPLY TO OPPOSITION TO MOTION TO COMPEL ARBITRATION OF FIRST AMENDED COMPLAINT AND STAY ALL PROCEEDINGS

Hearing Date: October 25, 2011
Hearing Time: 9:00 a.m.

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Defendants 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 (the "Rapid Cash Defendants") submit this Reply Brief in Support of their Motion to Compel Arbitration of First Amended Complaint and Stay All Proceedings ("Motion to Compel").

This Reply is made and based upon the following Memorandum of Points and Authorities, the pleadings and other papers on file herein and any oral argument the Court may permit at the hearing of this matter.

DATED this 18TH day of October, 2011.

GORDON SILVER

GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
MARK S. DZARNOSKI
Nevada Bar No. 3398
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Attorneys for Defendants
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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

In their Opposition to the Rapid Cash Defendants' Motion to Compel ("Opposition Brief"), Plaintiffs concentrate their efforts on trying to avoid the force of the Supreme Court's April 27, 2011 decision in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), which

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broadly held that private arbitration agreements must be enforced according to their terms and that state laws and policies ***cannot*** be invoked to preclude enforcement of agreements to arbitrate, as such would contravene the policies of the Federal Arbitration Act ("FAA"). Plaintiffs' efforts to sidestep *Concepcion* – which clearly requires enforcement of the parties' arbitration agreements in this case – are unsupported by *any* post-*Concepcion* authority and must fail. Indeed, each and every one of the state law grounds raised by Plaintiffs in their Opposition Brief as putative basis for denying enforcement of the parties' arbitration agreements is expressly preempted by the FAA under the reasoning of *Concepcion.*

Plaintiffs also argue that the Rapid Cash Defendants' Motion to Compel the claims set forth in the Amended Complaint is procedurally improper because it allegedly constitutes a "fatally late" "motion for reconsideration" of the Court's November 29, 2010 decision denying Defendants' request for arbitration of Plaintiffs' claims set forth in the ***original*** Complaint. Plaintiffs are wrong; Defendants' instant motion is not a "motion for reconsideration," but rather a *new* motion to compel arbitration of *new* claims and theories set forth in a *newly-filed* Amended Complaint. Indeed, the law is clear that where, as here, a plaintiff files an amended complaint changing the theory or scope of the plaintiff's claims, the right to compel arbitration is "revived." This principle applies here and requires consideration of Defendants' Motion to Compel arbitration of the claims set forth in the Amended Complaint.

For all of the reasons set forth herein and in the Rapid Cash Defendants' initial Brief, this Court should find that, under the controlling authority of *Concepcion*, valid and enforceable arbitration agreements exist between the parties. Accordingly, the Court should enter an Order directing the Plaintiffs to proceed to individual arbitrations of their claims, and should stay these proceedings during the pendency of the arbitrations.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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II.

ARGUMENT

A. Defendants' Motion To Compel Arbitration Is Not An Improper "Motion For Reconsideration," But A Properly-Brought Motion To Compel Arbitration Of The Claims Set Forth In Plaintiffs' Amended Complaint.

1. The Filing Of Plaintiffs' Amended Complaint Revived The Rapid Cash Defendants' Right To Move To Compel Arbitration.

Plaintiffs' primary argument in their Opposition Brief is that Defendants' Motion to Compel constitutes a "fatally late motion for reconsideration" of the Court's November 29, 2010 Order denying the earlier request to compel arbitration of the claims set forth in Plaintiffs' original complaint. Plaintiffs' argument is wrong, and ignores well-settled law holding that, where, as here, the plaintiff files an amended complaint changing the scope or theory of plaintiff's claims, the right to move to compel arbitration is revived.

This principle is best exemplified by the Eleventh Circuit's recent decision in *Krinsk v. Suntrust Banks, Inc.*, No. 10-11912, ___ F.3d. ___, 2011 WL 3902998 (11th Cir. Sept. 7, 2011). There, the borrower filed a class action complaint alleging various federal and state law claims against its lender, SunTrust Bank ("SunTrust"), after SunTrust unilaterally suspended the borrower's right to access her home equity line of credit. SunTrust then averred in filed pleadings that it was not asserting its right to arbitrate, and instead filed a motion to dismiss the complaint. After the litigation had proceeded for several months, the district court granted SunTrust's motion to dismiss, but gave the Plaintiff leave to amend her complaint. After Plaintiff filed an amended complaint, SunTrust raised its right to arbitrate for the first time, and filed a motion to compel arbitration of the claims set forth in the amended pleading. The district court denied the motion to compel on the ground that SunTrust allegedly had "waived" its right to arbitrate by expressly stating in earlier-filed pleadings that it was not electing to arbitrate, and SunTrust filed an appeal to the Eleventh Circuit.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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The Eleventh Circuit reversed, holding that the filing of the plaintiff's amended complaint had "revived" SunTrust's right to compel arbitration. *Krinsk*, 2001 WL 3902998, at *5. While noting the general principle that "the invocation of the judicial process ordinarily establishes a waiver of the defendant's right to compel arbitration," the court held that "the defendant will be allowed to plead anew in response to an amended complaint, as if it were the initial complaint, when the 'amended complaint ... changes the theory or scope of the case.'" Id. (citation omitted). Applying this principle in the arbitration context, the Eleventh Circuit held that **"courts will permit the defendant to rescind his earlier waiver, and revive his right to compel arbitration," if it is "shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims."** Id. (citations omitted) (emphasis added). Applying these principles, the Eleventh Circuit in *Krinsk* held that "SunTrust's right to compel arbitration, even if waived with respect to the claims in the Original Complaint, was revived by Krinsk's filing of the Amended Complaint ...." Id. at *7; see *also Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 113 (2d Cir. 1987) (courts will permit the defendant to revive his right to compel arbitration if it is shown that the amended complaint changes the scope or theory of the plaintiff's claims); *Envirex, Inc. v. K.H. Schussler Fur Umwelttechnik GMBH*, 832 F. Supp. 1293, 1296 (E.D. Wis. 1993) ("new allegations in the amended complaints rejuvenate[d] right to demand arbitration").

The principle that the filing of an amended complaint revives the defendant's right to compel arbitration applies with even greater force here. Indeed, unlike the situation in *Krinsk* where the defendant had averred in earlier-filed pleadings that it was waiving its right to compel arbitration of the claims set forth in the original complaint, the Rapid Cash Defendants here have ***consistently*** maintained their right – as a matter of law and contract – to compel arbitration of the Plaintiffs' claims. Moreover, the Plaintiffs' Amended Complaint in this case materially and

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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substantially changed the scope and theories underlying Plaintiffs' claims, by adding, *inter alia*, new allegations seeking declaratory relief, disgorgement, restitution, imposition of a constructive trust, injunctive relief and "special damages." The brand new allegations articulating a right to these forms of equitable relief are set forth at length in the Amended Complaint. See Amended Complaint, ¶ 2 (new allegations articulating claims to "declaratory" relief, "disgorgement," "restitution," "imposition of a constructive trust," and "injunctive relief."); ¶ 65 (new allegations articulating claim to "special damages of attorney's fees and litigation costs"); ¶ 81 (same); ¶ 87 (same); ¶ 96 (same); ¶ 100 (same); ¶ 107 (same); ¶ 113 (same); ¶¶ 117-132 (setting forth all new allegations as to "remedies/additional legal theories"); pp. 23-24 (setting forth in "Prayer for Relief" new allegations as to claims for declaratory relief, injunctive relief, and "special damages.").

Under the authority of *Krinsk*, the Rapid Cash Defendants' Motion to Compel constitutes a properly-brought motion, the right to which was revived by the filing of the Plaintiffs' Amended Complaint.

Existing Nevada case law dictates the same outcome. In Randono v. Ballow, 100 Nev. 142, 676 P2.d 807 (1984) (per curiam), the defendant answered a complaint that was subsequently dismissed with leave to amend. Id. In response to the amended complaint, defendants filed a motion to change venue, which plaintiffs claimed was untimely for not being made in response to the original complaint. Id. The district court disagreed and transferred venue of the case. Id. In ruling on plaintiffs' appeal, the Nevada Supreme Court affirmed, reasoning that a distinct amended complaint supersedes the original complaint and a defendant has the right to plead *de novo* to the amended complaint. Id. at 143, 676 P2.d at 808.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

2. Plaintiffs' Suggestion That The "Law Of The Case" Doctrine Should Bar Defendants' Motion To Compel Arbitration Is Flatly Wrong.

Without explicitly invoking the doctrine, Plaintiffs appear to suggest that the "law of the case" doctrine – as reflected in Nevada's local motion practice rules[1] -- should bar the Court's consideration of Defendants' Motion to Compel of the claims set forth in the Amended Complaint because Defendant's earlier motion to compel arbitration of claims set forth in the original complaint was already considered and denied by the Court's November 29, 2010 decision. See Opposition Brief, p. 8. As made clear above, however, the Rapid Cash Defendants' instant Motion to Compel is not a "motion for reconsideration" of the Court's November 29, 2010 decision, but ***a procedurally proper new motion to compel arbitration of claims set forth in an amended complaint.*** Indeed, Defendants' motion also raises a significant new issue – *Concepcion* – that as a procedural matter could not have been raised before now.

Even if there were any merit to Plaintiffs' suggestion that the instant Motion to Compel is a "motion for reconsideration" of the Court's prior Order – which there is not – neither the "law of the case" doctrine nor Nevada's local motion practice rules embracing that doctrine would operate to bar reconsideration of the legal issues governing the enforceability of the parties' arbitration agreements in light of the Supreme Court's intervening, controlling decision in *Concepcion*. To the contrary, Nevada law is clear that when there is "an intervening decision that constitutes a change in controlling law, courts subject to the previously decided law of the case may depart from it and apply the new rule of law." *Tien Fu Hsu v. County of Clark*, 173 P.3d 724, 728 (Nev. 2007).

[1] EDCR 2.24(a), cited by Plaintiffs, states that "[n]o motion once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of court...."

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

3. The Prior Appeal To The Nevada Supreme Court Does Not Divest This Court Of Jurisdiction To Consider Defendants' Motion To Compel Arbitration.

Plaintiffs' argument that the Rapid Cash Defendants' earlier appeal from the Court's November 29, 2010 decision may divest this Court of jurisdiction to consider Defendants' present Motion to Compel of the claims set forth in Plaintiffs' subsequently-filed Amended Complaint also is incorrect.

Plaintiffs correctly note that Defendants' earlier-filed appeal from the November 29, 2010 decision denying the motion to compel arbitration of Plaintiffs' claims set forth in the original complaint is still pending. Under Nevada law, however, an appeal that is potentially "jurisdictionally-defective" or "imperfect" – as Plaintiffs characterize the Rapid Cash Defendants' pending appeal in this case (Opposition Brief, p. 8) -- does not divest the trial court of jurisdiction. Plaintiffs themselves cite to the Supreme Court of Nevada for the assertion that "when an appeal is ***perfected,*** the district court is divested of jurisdiction to revisit issues that are pending before this court . . . ." *Mack-Manley v. Manley*, 138 P.3d 525, 529-30 (Nev. 2006) (emphasis added). Given Plaintiffs' own characterization of the pending appeal as "jurisdictionally-defective," therefore, the district court has not been divested of jurisdiction to consider the instant Motion to Compel.

Moreover, even where an appeal is perfected, that appeal only divests the trial court of jurisdiction to decide issues directly relating to the specific matter on appeal. *See, e.g., Foster v. Dingwall*, 228 P.3d 453, 455 (Nev. 2010) ("when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, [but] the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order ...."). Thus, if the appeal has been perfected, as the Rapid Cash Defendants contend, such appeal does not divest this Court of jurisdiction to decide an entirely new motion

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

to seeking to compel arbitration, based on an intervening change in the controlling law, of a newly-amended complaint setting forth new allegations and theories.

B. The Supreme Court's Decision in *Concepcion* Unequivocally Requires Enforcement Of The Parties' Valid Arbitration Agreements In This Case.

As Defendants made clear in their initial Brief, the Supreme Court's April 2011 decision in *Concepcion* broadly held that state laws and doctrines – such as Nevada's waiver doctrine and its "public policy" – cannot be invoked to preclude enforcement of the express terms of the parties' Arbitration Provisions here. To the contrary, *Concepcion* mandates that this Court enforce the parties' Arbitration Provisions, including the class action waivers, according to their terms. See Motion to Compel, pp. 13 to 20.

As discussed below, each of the arguments raised by Plaintiffs in their Opposition Brief in an effort to avoid the force of *Concepcion* fails as a matter of law.

1. The Scope Of The Preemption Rule Announced in *Concepcion* Is Not Limited In Its Application To State Laws That "Automatically" Invalidate Class Action Waivers.

Plaintiffs' first argument advanced in an effort to sidestep *Concepcion* is that the rule announced by the Supreme Court applies only to require preemption of state laws which permit "automatic" or "mechanical" invalidation of class action waivers, *i.e.*, not judicially-imposed, discretionary state law rulings that could result in the invalidation of a class action waiver as here.[2] Opposition Brief, pp. 9-10.

Plaintiffs' argument is flatly wrong and, indeed, they do not cite a single case to support the proposition that *Concepcion* is so limited. This is not surprising because the Supreme Court in *Concepcion* made abundantly clear that its ruling was a broad one:

[2] Contrary to Plaintiffs' suggestion, the California state law found preempted in *Concepcion* was not a "mechanical" or "automatic" law, but rather a *court*-formulated test employed by California courts for determining the validity of class action waivers contained in arbitration agreements.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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> States [cannot take steps that] ... conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms .... Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations ... States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons ....

Concepcion, 131 S.Ct. at 1750 n.6, 1752, 1753 (citations omitted).

Moreover, and consistent with the Supreme Court's pronouncement, numerous decisions issued post-*Concepcion* have held that state courts may not invoke ***any*** state *judicially-created* laws and doctrines, including laws and doctrines that do not result in the "automatic" or "mechanical" invalidation of class action waivers, to preclude enforcement of an otherwise valid private arbitration agreement. See Motion to Compel, p. 4 n. 2 (citing numerous cases); see *also Litman v. Cellco Partnership*, ___ F.3d ___, 2011 WL 3689015 (3d Cir. Aug. 24, 2011) (New Jersey judicially-created rule finding class action waivers unconscionable was preempted by the FAA post-*Concepcion*); *Fensterstock v. Educ. Partners*, No. 09-1562, 2011 WL 2582166 (2d Cir. June 30, 2011) (concluding that earlier opinion holding class actions waivers unconscionable under state law no longer viable in light of *Concepcion*); *Bellows v. Midland Credit Management, Inc.*, No. 09-cv-1951, 2011 WL 1691323 (S.D. Cal. May 4, 2011) (same); *Day v. Persels & Assocs., LLC*, No. 8:10-CV-2463, 2011 U.S. Dist. LEXIS 49231 (M.D. Fla. May 9, 2011) (same). Consistent with this uniformly broad interpretation of *Concepcion*, courts have invoked the preemption doctrine outside of the class waiver context to invalidate *other* types of state laws and policies that conflict with the FAA. For example, courts have long recognized and have continued to recognize post-*Concepcion* that state laws seeking to exempt from arbitration claims brought on behalf of the "public," such as those for injunctive relief, are preempted by the FAA. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Am Gen'l Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 89-90 (4th Cir. 2005) (state precedent barring state law claims

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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from arbitration preempted); *Ope Internat'l v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 446-47 (5th Cir. 2001) (state law invalidating arbitration agreements which required arbitrations to occur out-of-state preempted); *Nelson v. AT&T Mobility LLC*, No. 10-4802, 2011 WL 3651153, at *2-3 (N.D. Cal. Aug. 18, 2011) (FAA under reasoning announced in *Concepcion* preempts state laws prohibiting the arbitration of claims seeking injunctive relief); *In re Gateway LX6810 Computer Prods. Litig.*, No. 10–1563, 2011 WL 3099862, at *3 (C.D. Cal. July 21, 2011) (holding that "Plaintiffs' claims for injunctive relief [under state law] must be resolved in arbitration pursuant to the DRP [dispute resolution provision of the limited warranty at issue]"); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, No. C10–2553, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (same); *Zarandi v. Alliance Data Sys. Corp.*, No. CV 10–8309, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (rejecting plaintiff's "request to bifurcate the claims seeking injunctive relief because the FAA preempts state law to the extent it prohibits arbitration of a particular type of claim"); *Kaltwasser v. AT&T Mobility Inc.*, No. 07-0411, 2011 WL 4381738 (N.D. Cal. Sept. 20, 2011) (finding preempted state law that applied public policy contract principals to disfavor and indeed prohibit arbitration of entire categories of claims).

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2. There Is No "Vindication Of Rights" Exception To The Rule Announced In *Concepcion*.

Plaintiffs' next argument is that *Concepcion* should not apply in this case to require enforcement of the parties' arbitration agreements because such application would hinder the "important social policies" underlying Nevada state laws by precluding Plaintiffs from "vindicating" their state statutory rights in court. Opposition Brief, pp. 10-11.

This is precisely the argument broadly rejected by the Supreme Court in *Concepcion*, and it should be rejected by this Court as well. In striking down California's "Discover Bank" rule in *Concepcion*, the Supreme Court recognized the possibility that state social policies could be thwarted because "small-dollar claims ... might ... slip through the system" given the cost of

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

proving a claim. *Concepcion*, 131 S.Ct. at 1753. Yet, in words equally fatal to Plaintiffs' argument here, the Supreme Court explained: "But States cannot require a procedure that is inconsistent with the FAA, ***even if it is desirable for unrelated reasons.***" Id. (citation omitted) (emphasis added).

Moreover, at least three courts have already rejected this precise "vindication of rights" argument post-*Concepcion*. See *Arellano v. T-Mobile USA, Inc.*, No. 10-5663, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) ("plaintiff argues that 'the arbitration clause is void because it agrees to forego substantive rights afforded by statute.' ... this argument was rejected by *Concepcion* ...."); *In re DirectTV Early Cancellation Fee Marketing & Sales Practices Litig.*, No. 09-2093, 2011 WL 4090774, at *6 (C.D. Cal. Sept. 6, 2011) ("'After *Concepcion*, [plaintiff's] argument that provisions of his arbitration agreement effectively establishes barriers to bringing small claims in arbitration, thereby exempting [Defendants] from liability, is untenable.'"); *Kaltwasser v. AT&T Mobility Inc.*, No. 07-0411, 2011 WL 4381738 (N.D. Cal. Sept. 20, 2011) (holding that "vindication of rights" doctrine has no viability after *Concepcion*, at least insofar as class action waivers are concerned).

3. Plaintiffs' Argument That *Concepcion* And The FAA Apply Only In Federal Court Is Utterly Without Merit.

Amazingly, Plaintiffs devote three pages of their Opposition Brief to arguing that the FAA, and the Supreme Court's decision in *Concepcion*, applies only in federal court and, therefore, not in state court. Opposition Brief, pp. 11-14. The sole basis for this unfounded argument is Plaintiffs' speculation that: "[h]ad the issue in *Concepcion* reached the U.S. Supreme Court from a state court, there could not have been five votes for preemption" because Justice Thomas has allegedly stated in past dissents that the FAA should not apply in state court and therefore, presumably, would have cast a vote against preemption in *Concepcion*." Id., p. 12. Needless to say, this argument must be rejected, as it is based on sheer conjecture and is

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

contrary to the express language of *Concepcion*. See *Concepcion*, 131 S.Ct. at 1753 (holding that because California's *Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress..., [it] is preempted by the FAA.").

Plaintiffs' argument also is contrary to long-standing, well-settled law holding that the FAA applies fully in state court. See, *e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (U.S. 2006) ("the FAA 'created a body of federal substantive law,' which is 'applicable in state and federal courts.'") (citing *Southland Corp. v. Keating*, 465 U.S. 1, 12 (U.S. 1984)); see *also Burch v. Second Judicial District Court of State of Nevada*, 49 P.3d 647 (Nev. 2002) (pre-*Concepcion* decision applying the FAA). Indeed, numerous state courts have applied *Concepcion* since it was handed down by the Supreme Court. *See, e.g., Zevgolis v. Pericic*, No. 30317/2010, 2011 WL 3558228 (N.Y. Sup. Ct. Aug. 15, 2011) (applying *Concepcion*); *Wallace v. Ganley Auto Group*, No. 95081, 2011 WL 2434093 (Ohio App. June 16, 2011) (applying *Concepcion*); *NAFTA Traders., Inc. v. Quinn*, 339 S.W.3d 84 (Tex. May 13, 2011) (applying *Concepcion*); *NAACP of Camden County East v. Foulke Management Corp.*, No. A-1230-09T3, 2011 WL 3273896 (N.J. Super. App. Div. Aug. 2, 2011) (applying *Concepcion*). Finally, Plaintiffs' argument is utterly belied by the fact that the Supreme Court vacated at least two state Supreme Court decisions and remanded them for consideration in light of *Concepcion*. See *Missouri Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011) (Mo. Supreme Court); *Sonic Automotive v. Watts*, 131 S. Ct. 2872 (2011) (S.C. Supreme Court). Clearly, it would not have done so if the FAA did not apply in the state courts.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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C. All Of The State Law Arguments Against Enforceability Of The Arbitration Agreements Raised By Plaintiffs Are Expressly Preempted By The FAA, Under The Reasoning Of *Concepcion*.

1. The FAA Preempts Plaintiff's Argument Based On Nevada's "Waiver" Doctrine.

Plaintiffs argue that the Arbitration Provisions here are unenforceable because "Rapid Cash, by its categorical rejection and habitual ignoring of the [Arbitration Provisions], waived any right to invoke the arbitration clause (containing the class action ban) in its payday loan contracts." Opposition Brief, p. 14.

As the Rapid Cash Defendants demonstrated in their initial Brief, however, any application of Nevada's "waiver" doctrine to preclude enforcement of the parties' Arbitration Provisions is expressly preempted under *Concepcion*, as such application would directly impede the enforcement of the express terms of the Arbitration Provisions, thereby frustrating the FAA's purpose to ensure that such private arbitration agreements are enforced according to their terms. This conclusion is mandated by the fact that the Arbitration Provisions, ***by their express terms***, provide that even if a claim is litigated in court, "nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision." Arbitrations Provisions ¶ 2.

Completely ignoring the force of *Concepcion's* preemption ruling -- which is fatal to Plaintiffs' invocation of Nevada's "waiver" doctrine here -- Plaintiffs simply proceed to argue that Rapid Cash waived its right to arbitrate by filing prior collection actions against borrowers in Justice Court. Opposition Brief, pp. 14-15. Again, and as Defendants already have established, the plain language of the relevant Arbitration Provisions – which must be enforced according to their terms under *Concepcion* – expressly provide that the parties may file court actions and that "nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision." Arbitration Provisions ¶ 2; see *also* Quintino Arbitration Provision as "Exemptions to Mediation and Arbitration." See Motion to Compel, pp. 4 to 25.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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Finally, even if the Court could consider the "waiver" argument, which under *Concepcion* it cannot, numerous courts have rejected the same "waiver" argument advanced by Plaintiffs here, *i.e.*, that the institution of some form of prior litigation as permitted by the parties' arbitration agreement constituted a waiver of the right to compel arbitration of a subsequent claim. See Motion to Compel, p. 18, n. 7 (citing numerous cases).[3]

2. The FAA Preempts Plaintiffs' Arguments Based On Nevada's "Unconscionability" Doctrine.

Again ignoring the reach of *Concepcion,* Plaintiffs argue that the class action waivers contained in the parties' Arbitration Provisions here are substantively "unconscionable" under Nevada law and, therefore, unenforceable. Opposition Brief, p. 19. This argument rests exclusively on Plaintiffs' assertions that the class action waiver contained in those agreements is "one-sided" and "exculpatory" because it "impedes the pursuit of a judicial remedy." Id., pp. 19-20.

Plaintiffs' arguments boil down to their contention that the Arbitration Provisions are unenforceable as "unconscionable" under state law because they are adhesion contracts that unfairly benefit Defendants by virtue of the class action waivers. Although Defendants do not concede the Arbitration Provisions or their class action waivers would be unconscionable under any state law, the Court need not reach the substantive "unconscionability" issue given that the FAA preempts state law to the extent it would invalidate the Arbitration Provisions because they contain class action waivers. Indeed, Plaintiffs' argument is ***precisely*** the argument rejected by the Supreme Court in *Concepcion*.[4] The Court in *Concepcion* made clear that the enforcement of

[3] Defendants also established in their initial Brief, that under the express language of the Arbitration Provisions, the question whether or not Rapid Cash waived the Arbitration Provisions is itself a matter for the arbitrator – *i.e.*, not the Court -- to decide. See Motion to Compel, p. 19 n. 8 (citing cases).

[4] The Supreme Court also recognized that whether the arbitration provision before it was an adhesion contract was irrelevant, explaining that "the times in which consumer contracts were anything less than adhesive are long past." 131 S.Ct. at 1750.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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arbitration clauses ***cannot*** be conditioned upon the availability of class-wide arbitration procedures. *Concepcion*, 131 S.Ct. at 1748 ("requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). Following *Concepcion*, courts uniformly have held that decisions finding arbitration agreements unenforceable as "unconscionable" under state law because they contain class action waivers are preempted by the FAA, under the reasoning of *Concepcion*.[5]

In short, *Concepcion* is directly applicable to this case, and nullifies the Plaintiffs' reliance on any state law rule or policy holding arbitration agreements with class action waivers to be "unconscionable." Pursuant to *Concepcion*, a state law rule that conditions the enforceability of an arbitration agreement on the availability of class procedures is preempted by the FAA – no ifs, ands or buts. *Concepcion* requires that the class action waivers contained in the Arbitrations Provisions be enforced as a matter of federal law, the FAA.

Plaintiffs' final argument that the Arbitration Provisions are "*procedurally* unconscionable" because they were presented on a "take-it-or-leave-it basis," Opposition Brief, p. 18, also fails. [6] Contrary to Plaintiffs' contention, the Arbitration Provisions contained bold-

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[5] *See Litman v. Cellco Partnership*, ___ F.3d ___, 2011 WL 3689015 (3d Cir. Aug. 24, 2011) ("We understand the holding of *Concepcion* to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether the class arbitration 'is desirable for unrelated reasons.' Therefore, we must hold that, contrary to our earlier decisions in Homa and in this case, the rule established by the New Jersey Supreme Court in Muhammad is preempted by the FAA. It follows that the arbitration clause at issue here must be enforced according to its terms, which requires individual arbitration and forecloses class arbitration."); *Bellows v. Midland Credit Management*, No. 09-CV-1951, 2011 WL 1691323 (S.D. Cal. May 4, 2011); *Zarandi v. Alliance Data Sys. Corp.*, No. CV 10-8309, 2011 WL 1827228 (C.D. Cal. May 9, 2011); *Arellano v. T-Mobile USA, Inc.*, No. C 10-5663, 2011 WL 1842712 (N.D. Cal. May 17, 2011); *D'Antuono v. Serv. Rd. Corp.*, 2011 U.S. Dist. LEXIS 57367 (D. Conn. May 25, 2011), *cert. for interlocutory review*, 2011 WL 2222313 (D. Conn. June 7, 2011); 6, 2011); *Bernal v. Burnett*, No. 10-CV-1917, 2011 WL 2182903 (D. Colo. June 6, 2011); *Day v. Persels & Assocs., LLC*, No. 8:10-CV-2463, 2011 U.S. Dist. LEXIS 49213 (M.D. Fla. May 9, 2011); *Reeners v. Verizon Communications, Inc.*, No. 3-11-0573, 2011 WL 2791262 (M.D. Tenn. July 14, 2011); Alfeche v. Cash America Int'l, Inc., No. 09-0953, 2011 U.S. Dist. LEXIS 90085 (E.D. Pa. Aug. 12, 2011).

[6] The related argument advanced by Plaintiffs, that the loan Agreement *as a whole* (as opposed to the Arbitration Provision specifically) is "procedurally unconscionable" under Nevada law, Opposition Brief at p. 17, is barred by the *Prima Paint* doctrine. Specifically, the United States Supreme Court has held that a court may only consider challenges directed specifically and solely to the arbitration agreement. *Buckeye Check Cashing, Inc. v. Cardegna*,

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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faced, capitalized provisions notifying Plaintiffs of their right to reject or "opt out" of the Arbitration Provisions within 30 days of the date of their applications. Arbitration Provisions at ¶ 1. Moreover, Plaintiffs were on notice that the rejection of the Arbitration Provisions "[would] not affect [their] right to Services or the terms of Services." Id. The vast majority of courts have held that where, as here, consumers have the right to reject arbitration provisions, there is no procedural unconscionability.[7]

D. Plaintiffs' Claims Are Within the Scope Of The Arbitration Provisions.

Plaintiffs' argument of last resort, that their claims in this action fall outside the scope of the parties' Arbitration Provisions, is specious both factually and legally. As the Rapid Cash Defendants already have established, the Supreme Court and the Ninth Circuit have clearly held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ...." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25

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546 U.S. 440, 448-49; *Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). Thus, an arbitration agreement must be upheld and enforced by the courts even though the rest of the contract may later be held invalid by the arbitrator. *Prima Paint*, 388 U.S.at 404. See *also JLM Indus. V. Stolt-Neilsen SA*, 387 F.3d 163, 169 (2d Cir. 2004) ("an assertion that the [lease contract] itself, and not merely the arbitration clause contained therein, has been forced upon [the plaintiffs]" barred by *Prima Paint* as "claims of unconscionability and adhesion contracts are similarly included within the *Prima Paint* rule.").

[7] *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.*, 2010 Md. App. LEXIS 12, at *39-40 (Ct. of Special App. of Md. Jan. 28, 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. Oct. 3, 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*, Case No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007); *Honig v. Comcast of Georgia, LLC*, Civil Action No. 1:07-cv-1839-TCB, 537 F. Supp. 2d 1277 (N.D. Ga. Jan. 31, 2007); *Sanders v. Comcast Cable Holdings, LLC*, No. 3:07-cv-918-J-33HTS (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., 8th App. Dist. Sept. 25, 2008); *Wright v. Circuit City Stores, Inc.*, Case No. CV 97-B-0776-5 (N.D. Ala. Feb. 5, 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).

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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(1983); *Mundi v. Union Sec. Life Ins. Co.* 555 F.3d 1042, 1044 (9th Cir. 2009) ("In determining whether parties have agreed to arbitrate a dispute, we apply 'general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor or arbitration.'") (citation omitted); *Balar Equip. Corp. v. VT Leeboy, Inc.*, 336 Fed. Appx. 688, 689 (9th Cir. 2009) ("In the absence of any express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."). Thus, the United States Supreme Court has held that a ***presumption*** of arbitrability exists where a contract contains an arbitration clause, and that an order to arbitrate should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *AT&T Technologies, Inc.*, 475 U.S. at 650. Indeed, the Supreme Court in *Concepcion* recently reiterated that "the FAA was designed to promote arbitration." 131 S.Ct. at 1749.

Even aside from the strong presumption in favor of arbitrability, Plaintiffs' claims are clearly covered under the broad language of the Arbitration Provisions and the Quintino Arbitration Provision. All of Plaintiffs' claims relate to the Rapid Cash Defendants' attempts to collect on their loans. The Arbitration Provisions expressly provide that the claims subject to arbitration include claims relating to "our collection of any amounts you owe." See Arbitration Provisions at ¶ 2 (broadly defining "Claim" to mean "any claim, dispute or controversy between you and us ... that arises from or relates in any way to Services you request or we provide, . . . **our collection of any amounts you owe**, . . . and claims based on any . . . common law rule (including rules relating to contracts, negligence, **fraud or other intentional wrong**) . . . .") (emphasis added). The Quintino Arbitration Provision similarly provides that the claims subject

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to mediation and/or arbitration include claims arising out of "common law" and claims relating to the "collection of any Loan." See Quintino Agreement at "Meaning of 'Claims."

There can be no doubt that – given the strong federal presumption in favor of arbitration and the broad language of the Arbitration Provisions -- Plaintiffs' claims in this action fall within the scope of the Arbitration Provisions.

While the Plaintiffs style their claim as a tort claim and assert that this claim has no significant relationship to the Arbitration Provisions, Plaintiffs fail to note that this supposed tort claim is directly related to the Rapid Cash Defendants' collection efforts pursuant to the Arbitration Provisions, which were undertaken in full compliance with the Arbitration Provisions which allowed for small claims actions. It is telling that the Plaintiffs are forced to rely almost entirely on cases involving sexual assault, in addition to a few other unrelated cases, and that they were entirely unable to find any case that involved the denial of arbitration of torts related to collection efforts in a lending agreement. In essence, Plaintiffs' tort claims regard alleged tortious actions taken by the Rapid Cash Defendants pursuant to their collection efforts under the Agreements. Since both the Arbitration Provisions and the Quintino Arbitration Provision expressly include claims related to the collection of the debt, these claims are clearly within the scope of these provisions.

Plaintiffs also assert that the alleged tortious conduct taken by the Rapid Cash Defendants was an "unforeseeable tort" and thus not arbitrable. They rely upon *Aiken v. World Fin. Corp.*, 644 S.E.2d 705 (S.C. 2007) for this assertion, a case where several years after repaying his loan, Aiken's personal information was stolen by employees of the lender. While the South Carolina court declined to compel arbitration for this entirely unforeseeable tort, it did note that it "does not seek to exclude all intentional torts from the scope of arbitration. For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underlying

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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contract (e.g., breach of fiduciary duty, misappropriation of trade secrets) would be within the contemplation of the parties in agreeing to arbitrate." *Aiken*, 644 S.E.2d at 709. In the instant case the alleged tortious conduct is entirely related to the Rapid Cash Defendants' collection efforts - collection efforts that were entirely foreseeable when the Plaintiffs fail to repay their respective loans. The Arbitration Provisions cover claims related to "intentional wrongs," and there is nothing unforeseeable about a party committing a tort while enforcing a contractual right - i.e., the Rapid Cash Defendants' collection efforts. See, e.g., *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986) ("tort claims are within the scope of arbitration agreements and that express exclusion of tort claims in a broadly worded arbitration agreement is required.") (citing *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 406-07 (1967).

Finally, the Plaintiffs' rely upon a public policy argument in an attempt to convince this Court to refuse to enforce the clearly worded Arbitration Provisions. However, as noted by the Supreme Court, states may not ignore the FAA, or create procedures "inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753. In the instant case, the Arbitration Provisions clearly allow for cases to be litigated in court without waiving any rights either party has under the Arbitration Provisions, and this Court should enforce the Arbitration Provisions agreed to by the parties.

III.

CONCLUSION

For the reasons set forth in Defendant's initial Brief and herein, the Rapid Cash Defendants' Motion to Compel should be granted and Plaintiffs should be ordered to proceed with the individual arbitrations of their claims. Further, this action should be stayed during the

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

pendency of the individual arbitrations.

DATED this 18th day of October, 2011.

GORDON SILVER

GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
MARK S. DZARNOSKI
Nevada Bar No. 3398
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Attorneys for Defendants
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

OF COUNSEL:
Alan S. Kaplinsky
Martin C. Bryce, Jr.
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: 215.665.8500
Facsimile: 215.864.8999

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 18th day of October, 2011, she served a copy of the **REPLY TO OPPOSITION TO MOTION TO COMPEL ARBITRATION OF FIRST AMENDED COMPLAINT AND STAY ALL PROCEEDINGS**, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Dan L. Wulz, Esq.
Venicia Considine, Esq.
Legal Aid Center of Southern Nevada, Inc.
800 South Eighth Street
Las Vegas, NV 89101
Fax: (702) 388-1642

J. Randall Jones, Esq.
Jennifer C. Dorsey, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
Fax: (702) 385-6001

Anna Dang, an employee of
GORDON SILVER

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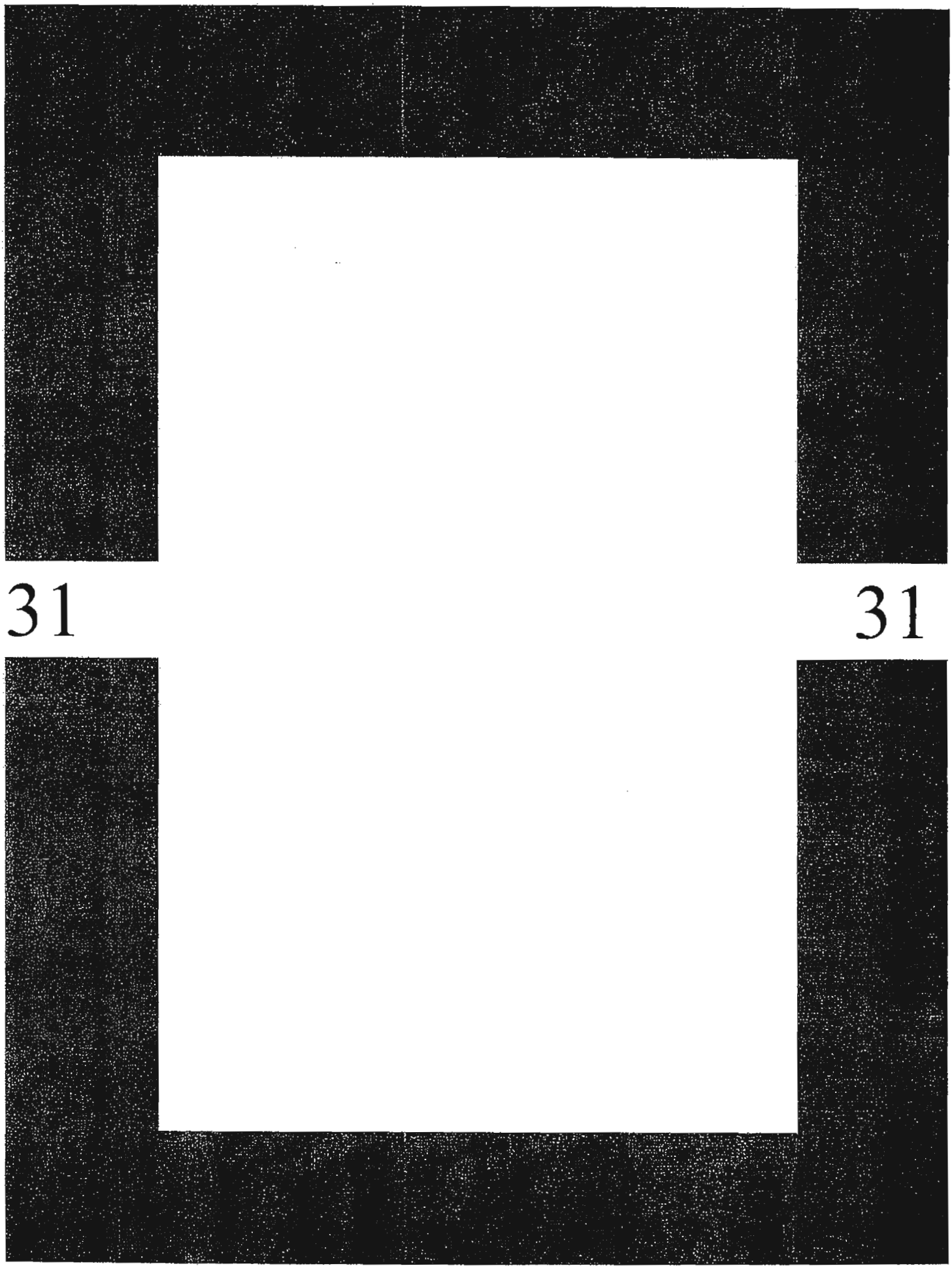
Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555



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OPPM
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman, and DOES I through X,

Defendants.

Case No.: A-10-624982-B
Dept. No.: XI

OPPOSITION TO MOTION TO RECONSIDER CLASS CERTIFICATION OR, IN THE ALTERNATIVE, MOTION TO DECERTIFY CLASS

Date of Hearing: November 22, 2011
Time of Hearing: 9:00 a.m.

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I.

INTRODUCTION

Last year, after full briefing and extended oral argument, this Court certified this case as a class action on behalf of Rapid Cash customers against whom Rapid Cash obtained default judgments without ever having served those customers with notice of the lawsuit. The pervasive failure of service was the result of a widespread sewer-service practice by Rapid Cash's agent, On Scene Mediations, in the very concentrated locale of Clark County, Nevada. This class – currently defined as "All customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, and for which the only evidence of service of process was an affidavit signed by a representative of On Scene Mediations and who claim not to have been served" – was certified under NRCP 23(b)(1), (2), and (3) after this Court concluded, *inter alia*, that there is "a laundry list of common questions . . . common to the class members." Order Granting Class Certification and Appointing Class Counsel ("Class Certification Order") at 3 & n.1.

Among the United States Supreme Court's high-profile, anti-class action decisions in the 2011 term was *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (June 20, 2011). Our Highest Court decertified a 1.5 million-member, nationwide employment discrimination class action on behalf of female Wal-Mart employees who brought Title VII claims alleging that Wal-Mart management's pay and promotions decisions on the local level disproportionately favor men. *Dukes* is the hook on which Rapid Cash hangs its request for reconsideration and rehashes its old arguments long-since rejected by this Court when conferring class status. But nothing about the *Dukes* decision justifies reconsideration or decertification of this now-certified class. As it interprets *Federal* rule 23, *Dukes* is not controlling in this case governed by Nevada's state version of the rule. Regardless, *Dukes* is limited to its extraordinary facts and its principles have little application beyond Title VII class action cases, thus, *Dukes* has no application in this unique case of rampant fraud on the

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court and abuse of process with "a laundry list" of overarching, common questions of law and fact that prevail over any individualized issues.

This Court made the right decision when it certified this class and drafted a thoughtful order memorializing it, and neither *Dukes* nor any other reason Rapid Cash offers belies the wisdom of that decision and justifies reconsideration. Plaintiffs incorporate by this reference all evidence submitted and arguments made during the lengthy class certification process[1] and ask this Court to deny this motion in its entirety and permit this class action to proceed as properly certified by this Court.

II.

ARGUMENT

A. *Dukes* – an FRCP 23 Case – is Not Controlling Authority in this NRCP 23 Case.

Rapid Cash is incorrect in arguing that "because the Nevada Supreme Court relies upon federal precedent in interpreting NRCP 23(a)" then *Dukes* must determine the outcome here. Motion to Reconsider Class Certification or, in the Alternative, Motion to Decertify Class at 3:14-16. Federal and circuit court cases "are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Las Vegas Novelty, Inc. v. Fernandez*, 787 P.2d 772, 776 (Nev. 1990) (quoted in *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 38 P.3d 872, 877 (Nev. 2002)). However, "Federal court interpretations of Federal Rules of Civil Procedure, as counterparts to the Nevada Rules of Civil Procedure, are persuasive but not controlling authority." *Greene v. Eighth Judicial District of the State of Nevada ex. Rel.* 990 P.2d 184, 185 (Nev. 1999), *quoting Bowyer v. Taack*, 817 P.2d 1176, 178 (Nev. 1991) (overturned on other grounds), *Coury v. Robison*, 976 P.2d 518 *quoting* in footnote 4, *Dougan v. Gustaveson*, 835 P.2d 795, 797 (Nev. 1992) (the interpretation of a federal counterpart to a Nevada Rule of Civil Procedure is not

[1] This includes Plaintiff's Motion to Certify Class filed on September 9, 2010, Reply in Support of Motion to Certify Class filed on October 18, 2010, the subsequent Motion for Clarification, and the argument at all related hearings.

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controlling, but may be persuasive). Thus, *Dukes*' application to this case is persuasive at best, and its holding need not be followed.

B. *Dukes* Changes Nothing.

Even if *Dukes* could be applied in this state court case, this heavily factual Title VII decision simply has no relevance in this abuse-of-process and fraud-on-the-court matter. *Dukes* has little reach beyond the employment discrimination context. *See, e.g.*, Suzette M. Malveaux, *How Goliath Won: the Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 52 (2011) (opining that, "given the very fact-specific nature" of Dukes, "it may have a limited impact on cases brought in other substantive areas and under statutes other than Title VII"). *Dukes* does not overrule any prior case law or make any new law whatsoever. Rather, the Court yet again applied the particular analytical framework for pattern or practice employment discrimination class actions set 34 years ago in *Teamsters v. United States,* 431 U.S. 324 (1977), as amplified by the particular analytical framework for employment discrimination class actions laid out almost 30 years ago in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, (1982). Rapid Cash nonetheless attempts to rehash arguments once made and rejected by wrapping them in *Dukes* dressing.

But the distinct facts of *Dukes* also render it inapposite to this case. "One of the most expansive class actions ever," *id.* at 2547, *Dukes* was brought on behalf of 1.5 million Wal-Mart employees, claimed that thousands of managers on the local level exercised discretion over pay and promotions disproportionately in favor of men, causing a disparate impact on female employees. *Id.* Although the three plaintiffs could not identify a corporate policy for such treatment, they alleged that because Wal-Mart was aware of this disparate effect, its refusal to cabin its managers' authority amounted to disparate treatment. *Id.* at 2548. But the majority did not believe that the individualized employment experiences of 1.5 million employees spread across the nation and working under thousands of different managers who were not acting pursuant to a corporate policy of discrimination shared a sufficiently common link to permit these 1.5 million claims to be treated on a classwide basis.

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The crux of a Title VII inquiry is the reason for a particular employment decision, i.e., *why* someone was disfavored. *Dukes*, 131 S.Ct. at 2552. *Falcon* held that in an employment discrimination class action case, the "conceptual gap" between an individual's discrimination claim and the existence of a class of persons who have suffered the same injury must be bridged by "significant proof" that an employer operated under a general policy of discrimination. *Id.* at 2552-53. But the *Dukes* plaintiffs' only evidence of a general discrimination policy was a sociologist's opinion that Wal-Mart's corporate culture made it vulnerable to gender bias. Worse yet, even he could not calculate whether .5% or 95% of the management decisions were discriminatory, and his opinion "elicited criticism from the very scholars on whose conclusions" his analysis relied upon. *Id.* at 2553-54 & n.8.[2]

The proof required in a federal employment discrimination class action is very different than the proof required in other types of class actions: one must provide convincing proof of a companywide discriminatory policy in order to establish *any* common question under FRCP 23(a)(2). *Id.* at 2556-57 ("Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded they have not established the existence of any common question."). Thus, nothing in *Dukes* changes this Court's proper application of NRCP 23 in certifying this Class, nor has this very fact-specific, employment-discrimination case done anything to revitalize Rapid Cash's arguments previously made in opposition to class certification and rejected by this Court.[3] In recognizing the inapplicability of *Dukes*, beyond its limited facts, this Court will be in good

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[2] Respondents' other claim, that Wal-Mart gave local supervisors discretion over employment matters, i.e., that it allowed discretion, is just the opposite of a uniform practice that would provide the commonality needed for a class action. *Id.* at 2554. Allowing discretion might result in a disparate impact claim. But given Wal-Mart's size and geographical scope, it was deemed "quite unbelievable" that all managers would exercise their discretion in a common way without some common direction, which proof was lacking. *Id.* at 2554-55.

[3] While all of the evidence submitted and arguments made in Plaintiff's Motion to Certify Class filed on September 9, 2010 and Reply in Support of Motion to Certify Class filed on October 18, 2010, should be sufficient, the Class nonetheless responds to Rapid Cash's remaining arguments.

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company. *See, e.g., Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc.*, 2011 WL 3652477 at 7 (S.D.N.Y. August 22, 2011) ("the facts in *Wal-Mart*, a case in which three named plaintiffs sought to represent a class of 1.5 million women . . . are entirely distinguishable from the facts of the instant securities class action. Accordingly, this Court finds that *Wal-Mart* has little to no bearing on the issues before the court and certainly does not change its [prior class action certification] ruling in any respect.")[4]

C. Regardless of *Dukes*, Commonality Has Been Sufficiently Established.

Even if this Court concludes that *Dukes* imposes a new, higher burden of proof of commonality on Class Plaintiffs, that standard has been more than satisfied in this case. Plaintiffs have already averred, and will further confirm through discovery, the following general and specific "significant proof" of a policy and practice by this agent of Rapid Cash that resulted in potentially thousands of illegally obtained default judgments:

1. In late 2003, the Nevada Private Investigators Licensing Board, charged by law with licensing process servers, issued Maurice Carroll individually and d/b/a On Scene Mediations a $2,500 citation for serving summons/complaints without a license. The Board ordered Carroll to stop doing business. He did not do so.

2. One of Maurice Carroll's principal assistants, who signed many of the false affidavits of service provided to and filed by Rapid Cash, was Defendant, Vilisia Coleman, who during her employment, was a convicted felon.

3. The Las Vegas Metropolitan Police Department ("Metro") has taken calls from people who complained that they were never served with process from as early as 2004 and claimed that Maurice Carroll's company never served them the required court papers, and default judgments were taken.

4. During 2004-2010, On Scene Mediations served as Rapid Cash's exclusive agent to fulfill Rapid Cash's responsibility under JCRCP 4(a) to serve the Summons and a copy of the Complaint on each defendant borrower.

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[4] Even courts considering the impact of *Dukes* on other employment cases have found *Dukes* distinguishable on its facts and therefore inapplicable. *See, e.g., Ramos v. SimplexGrinnell LP*, 2011 WL 2471584 at * 5 (E.D.N.Y. June 21, 2011) ("The relevant facts and circumstances in Wal-Mart have little bearing here "because the claim was based on general . . . practices" not "individualized representations").

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5. Rapid Cash filed 1,760 cases in 2004, 3,009 cases in 2005, 2,020 cases in 2006, 2,886 cases in 2007, 3,162 cases in 2008, and 3,826 cases in 2009, and typically employed On Scene Mediations to serve process.

6. The affidavits of service of process submitted in support of those filings reflect an unusually high percentage of personal service of process purportedly completed the same day that On Scene Mediations received the summons, a highly dubious and suspicious achievement.

7. Sometime after January, 2009, when civil cases began being assigned to only two Justices of the Peace in Clark County, Nevada, Las Vegas Township, the Court noticed this unusual pattern, and the Court made counsel for Rapid Cash aware of the suspicious nature of such representations.

8. Thus, Rapid Cash was on actual notice of or was willfully blind to and recklessly disregarded this pattern, and continued to file such affidavits of service.

9. Another pattern becomes evident from Rapid Cash's Justice Court practices: when a Rapid Cash defendant would move to set aside a default judgment on the basis of lack of service, the Rapid Cash attorney – presumably with the express consent of his/her client, Rapid Cash, and in any event an act done on behalf of Rapid Cash for which Rapid Cash is responsible and charged with knowledge – would stipulate to set the default judgment aside instead of having the process server come in and testify at an evidentiary hearing, suppressing discovery of the fraud. This pattern points to guilty knowledge by Rapid Cash that it was filing falsified affidavits of service.

10. Sergio Pinto, employed to serve process by Maurice Carroll/On Scene Mediations, admitted to Metro that he was told by "the ladies in the office" to falsify affidavits of service, claiming that he made service of process to individuals, but had not done so.

11. Sergio Pinto told Metro that Maurice Carroll also directed him to falsify affidavits of service.

12. Niekyta Lonsoria, employed to serve process by Maurice Carroll/On Scene Mediations, admitted to Metro that she signed affidavits of service at the direction of Maurice Carroll without ever having gone out to perform the services, in effect falsifying Affidavits.

13. Maurice Carroll admitted to Metro that he had falsified affidavits of service, but claimed that his office manager, Vilisia Coleman, told him the documents had been served while he was out of town.

14. In August, 2010, Maurice Carroll and Vilisia Coleman were both criminally indicted.

15. Coleman's criminal defense attorney, meanwhile, has stated the On Scene Mediations sewer service policy was in place at Carroll's direction at the time she was hired.

16. Accordingly, at all times relevant herein, Rapid Cash knew or was on constructive notice that Maurice Carroll and On Scene Mediations were not operating a licensed process serving company.

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17. At all times relevant herein, Rapid Cash knew, or was willfully blind to and recklessly disregarded, or was on constructive notice that On Scene Mediations was providing false affidavits of service to Rapid Cash, which Rapid Cash nevertheless proceeded to file in the Justice Courts of Clark County, Nevada

18. Rapid Cash, as the plaintiff in actions it filed in the Justice Courts of Clark County, Nevada, was responsible for the service of the summons and complaint to each defendant it sued. JCRCP 4(a); JCRCP 4(d)(6).

19. Rapid Cash did not properly serve members of the Class. Instead, Rapid Cash employed On Scene Mediations, which it knew or should have known was not a licensed process server, and which provided to Rapid Cash false affidavits of service claiming to have completed service of process on the Class. The affidavits were sworn under penalty of perjury and notarized, and filed by Rapid Cash.

20. Because those affidavits were not supported by proper service, the default judgments obtained are void. *Gassett v. Snappy Car Rental*, 111 Nev. 1416, 906 P.2d 258 (Nev. 1995).

21. Rapid Cash is entirely responsible for the acts of its employee and/or agent, On Scene Mediations, under common law respondeat superior and/or as its agent, because it either intentionally or negligently hired or failed to properly supervise an unlicensed process server, and/or knew, or was willfully blind to and recklessly disregarded the blatant evidence that On Scene as engaging in sewer service practices.

22. To date four Class members have come forward to state under oath that they were in fact not served in direct contradiction of an affidavit of service of process prepared by On Scene and filed by Rapid Cash.

See Affidavits of Cassandra Harrison, Eugene Varcados, Conception Quintino, and Mary Dungan attached to the original Motion for Class Certification; *see also* Affidavits of Violeta Hernandez and Venicia Considine attached to the Reply Brief. In sum, all of these facts and circumstances demonstrate what this Court accurately summarized in its Class Certification Order:

> There are questions of law or fact common to the Class, in that the Class Representatives have alleged general corporate policies as the focus of the litigation including the On Scene Mediations policy and practice of providing falsified affidavits of service to its employers and/or principals, and a Rapid Cash policy and practice of using an unlicensed process server, and either condoning sewer service or willfully and recklessly disregarding highly suspicious claims of superhuman service-of-process feats. With respect to questions of law, another common question of mixed fact and law is whether Rapid Cash may be held accountable for the acts of its employee or agent, On Scene Mediations. Rapid Cash fails to demonstrate how these claims lack the common nucleus of facts or

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legal theory required to satisfy this prong of the Class certification analysis.

Unlike in *Dukes*, there is abundant evidence of a policy and practice by Rapid Cash's agent to not actually serve lawful process on these defendants, resulting in due process violations and void default judgments. And the First Amended Complaint "provides a laundry list of common questions" that this Court has already found to be "among the questions of law common to the class members." Class Certification Order at 3 n.1. Thus, the plaintiffs have established the "common mode" of wrongful conduct that was missing in *Dukes* 131 S.Ct. at 2554, and it cannot be seriously denied that this certified class action has "the capacity . . . to generate common answers apt to drive the resolution of the litigation" as *Dukes* requires. *Id.* at 2551. Accordingly, this Court properly granted class certification, and *Dukes* does nothing to change that fact.

D. The Class as Certified is not Defectively Overbroad.

Rapid Cash next contends that the scope of the certified class is impermissibly broad because it includes Rapid Cash judgment debtors who merely ***claim*** they were not serviced, and not just those who ***actually*** were not served. As a result, the Class as now constructed may include persons who are lying about service and were not, in fact, injured by Rapid Cash's sewer-service practices. Motion at p. 12. Given the extraordinary circumstances in this case, however, the Court has properly tailored an approach that meets the unique challenges presented while providing due process for everyone, and this possible overbreadth does not require reconsideration or decertification.

1. Future Subclasses are Likely.

The Court has ordered that notice be given to all *potential* members of the Class, i.e., customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, and for which the only evidence that the defendant received service of process of Rapid Cash's lawsuit was an affidavit signed by a representative of On Scene Mediations. The notice will call upon potential members of the Class to state whether they were or were not served. Those who

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admit they were served are not in the Class. Those who claim they were not served are members of the Class. Plaintiffs suspect that at that point, Rapid Cash will not provide anyone from On Scene Mediations who will controvert any Class member's claim of lack of service; also, for a certain number of claimants Rapid Cash will have nothing with which to question the credibility of such claim. That group of such claims might well be considered proven based on the Class's generalized foundational proof and an individualized, uncontroverted claim; that group might well become a designated subclass consisting of:

> Customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, for which the only evidence that the defendant received service of process of Rapid Cash's lawsuit was an affidavit signed by a representative of On Scene Mediations, and who have made a verified claim of lack of service of process which stands uncontroverted.

For such a subclass, the Court through this class action process will have provided a common answer as to liability for this group of claims, satisfying even a *Dukes* heightened standard for commonality in employment discrimination cases; and, moreover, the Court can provide a common answer in providing a remedy to this subclass.

As to some other number of claims, discovery may or may not show that Rapid Cash has some other business record which it feels may call into question the credibility of a claim of lack of service and that Rapid Cash may desire to present. If so, and if the Court allows it under conditions to be prescribed, this group might well become another designated subclass, and determination of these claims, if any, might well be delegated to a special master. And again, for such a group of claimants, the Court through this class action process will provide answers to common questions.

There would then remain for consideration a group of members of the Class as the Court has now defined it who neither return a form claiming not to have been served nor opt out, i.e., those who do not respond at all. Neither the Class nor the Court has articulated what the process will be for determining the status of this group of members of the Class, which might

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well become another subclass. But it is not essential to do so at this point in the case. It will be important to see how many members of the Class fall into this category and what discovery of Rapid Cash may reveal as to this category of members of the Class. Answers to these preliminary questions may well trigger solutions or proposals for solutions that neither the parties nor the Court presently envision.

2. *The Inclusion of Potentially Uninjured Persons in the Class Definition is Permissible.*

Regardless, a temporarily overbroad class is not unusual in class actions. Courts have recognized that some class actions involve a process, that class definitions evolve, and that subclasses may ultimately be created. While Rapid Cash views the class definition as a snapshot rather than a movie, arguing that today the Class as defined includes persons who may not have been injured, and for those who claim to have been injured may include some which required individualized determinations, such arguments do not defeat class certification. A class may be certified even though it may include some persons who have no claims, provided that the class definition makes it administratively feasible to identify who is or is not a class member at a later date. As an Illinois district court explained when rejecting in *Elliott v. ITT Corp.*, 150 F.R.D. 569, 575 (N.D. Ill. 1992) (internal citations omitted), the same position Rapid Cash now takes:

> Thus, they contend that the injury essential to class membership cannot be determined without individual adjudications. This problem is, however, present in many class actions. A class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant. Normally, the question of injury to individual class members is deferred until after resolution of the common questions. While there are cases where surrounding circumstances cast doubt on the existence of the class as defined, those cases tend to be the exception, rather than the rule. If class certification were denied at this early stage on the basis that injury to individual class members would have to be proven on an individual basis, many classes might never be certified. . . . Other authority adds that while a class does not have to be so ascertainable that every potential member can be specifically identified at the commencement of the action, the description of the class must be sufficiently definite so that it is "administratively feasible" for a

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> court to ascertain whether a particular individual is a member of the class.

Accord, Kohen v. Pacific Management Co. LLC, 571 F.3d 672, 677 (7th Cir., 2009) (noting, "it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be unknown, or the facts bearing on their claims may be unknown, this possibility does not preclude class certification"); *Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298, 301 (5th Cir., 2009) (holding that the district court was not required to determine that every class member had suffered damages as a prerequisite to class certification). This Court has defined the Class in a way that ensures that it is "administratively feasible" to ultimately ascertain the members of the Class. For now, that is all that is required.

E. NRCP 23(b)(3) Predominance Exists.

Rapid Cash next contends that NRCP 23(b)(3) predominance does not exist for several reasons, none of which has any merit. Rapid Cash first argues that it intends to assert as a defense on an individualized basis the timing of the Class Members' filing of this action, which cannot be resolved on a classwide basis. Rapid Cash relies on NRCP 60(b) as its authority for this defense. Motion at 15. But Rapid Cash's reliance on this rule is misplaced. It is true that Rule 60(b) *motions* must be filed within a reasonable time, so courts might deny such *motions* for lack of diligence or when equitable estoppel principles apply. Motion at 15 (citing *In re Harrison Living Trust*, 112 P.3d 1058 (Nev. 2005)). But the instant action is not a Rule 60(b) ***motion***; it is an ***independent action in equity***. In fact, Rule 60(b) itself expressly disclaims, "This rule does not limit the power of a court to entertain an independent action...." As a result, deadlines and timing principles for Rule 60(b) *motions* have no application in this case.

The Nevada Supreme Court has recognized that Rule 60(b)'s timing concerns do not apply to independent actions in equity to set aside default judgments. In *La Potin v. La Potin*, 339 P.2d 123 (Nev. 1959), Mrs. La Potin filed an independent action on June 27,

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1955, to set aside a divorce decree granted to the husband almost six years earlier on July 21, 1949. She contended that the divorce decree was void for the reason that the court granting the decree was without jurisdiction. That court had proceeded to exercise jurisdiction upon the basis of an affidavit of service upon the wife in New York. Her independent action was founded upon the assertion that the affidavit of service was false and that the wife had never been served. After determining that the record established that Ms. La Potin indeed had not been served, the Supreme Court of Nevada simply said: "It follows from well-established principles of law that the divorce court was without jurisdiction, and that the divorce decree was void." *La Potin*, 339 P.2d at 123-4. At no time did the court offer any concern that Rule 60(b)'s time considerations prevented Mrs. La Potin from the relief she sought in this independent action. This Court should employ this straightforward, cut-and-dried approach from the Nevada Supreme Court here to conclude that Rule 60(b)'s time limits provide no lack-of-diligence or equitable estoppel defenses for Rapid Cash in this independent action.[5]

Rapid Cash then argues that the Class's claims for abuse of process require proof of an ulterior purpose other than resolving a legal dispute and, as it is undeniable that some Rapid Cash borrowers who were sued were in fact served with process, it is simply not possible for the Class to provide generalized proof of an ulterior purpose. This, however, is a question of fact for the finder of fact, which can be addressed with generalized proof based on the large numbers of non-served versus served Rapid Cash customers.

Additionally, Rapid Cash offers the generic argument that damages suffered by each member of the Class are individual and unique, defeating commonality. But no damages have been pled in this case, other than attorney's fees as special damages for having to bring

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[5] Even if in the conduct of these proceedings there comes a time when Rapid Cash satisfies this Court that it has and must be allowed to assert some individualized defense as to some number of claims, and as discussed *supra*, this Court can at that time determine whether to address such claims through creation of a subclass and delegation to a Special Master. Even then, many common questions of fact or law still predominate.

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this action. Those damages are being incurred by the Class on a classwide basis and will therefore be plainly capable of lump-sum, classwide proof.

Rapid Cash then mentions in one sentence of its Motion on page 16 that any "damages" of each member of the Class would be offset by the amount of the loan which the borrower failed to pay. This is not accurate. First, Rapid Cash has already reduced such a claim to a default judgment against every Class member in Justice Court. Unless and until those default judgments are set aside, such a claim is premature, unripe, and duplicative. Second, this case is not based in any way whatsoever upon the loan agreements. Thus, any counterclaim based on a loan agreement would not be compulsory and would, at best, be permissive. This Court must not turn this class action attacking void default judgments for lack of service of process into a wholly unrelated payday-loan-collection class action.

Last, Rapid Cash argues that a two-year statute of limitations applies to an abuse of process claim. Assuming without acknowledging the correctness of this assertion, the Class again points out that this case is a process. Such an issue can be addressed and solved at a later time through creation of a subclass, if indeed abuse of process as a legal theory of recovery is litigated to finality.

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F. NRCP 23(b)(2) Certification is Appropriate.

Rapid Cash next assumes that the Class is seeking compensatory damages (it's not, other than attorney's fees as special damages), and then uses that incorrect assumption to argue that *Dukes* somehow requires the conclusion that this case cannot be certified under NRCP 23(b)(2) because individualized monetary relief is sought. But, *Dukes* is not controlling authority. *See supra* at pp. 3-6. Even if it were controlling, it would not support Rapid Cash's argument in this regard. *Dukes* held under federal law, specifically citing 42 U.S.C. Sec. 2000e-5(g)(2)(B)(i) and (ii), that backpay is neither an injunction nor a declaratory judgment within the meaning of FRCP 23(b)(2). On this point, (a) the Class's request for disgorgement, restitution in equity, or imposition of a constructive trust is not the same as backpay, and (b) with all due respect to Justice Scalia, if the High Court in *Dukes*

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meant to foreclose all equitable remedies in an FRCP 23(b)(2) class action for an injunction or a declaratory judgment, then that just strains credulity. The Supreme Court of Nevada is not likely to so interpret NRCP 23(b)(2), and may well conclude that equitable remedies are necessarily implied by "final injunctive or corresponding declaratory relief" within NRCP 23(b)(2).

Moreover, this Court has not only certified this case as a class action under NRCP 23(b)(2), but also under NRCP 23(b)(3). *See* Class Certification Order ¶8. Thus, to the extent any equitable remedies involving monetary relief would be viewed as "damages," they would be properly recovered in a class action certified under (b)(3). Indeed, this Court is requiring notice to the Class with an opportunity to opt out, providing full due process protections for a typical (b)(3) damages class action.

Lastly, in Rapid Cash's Motion at 18:3-5, Rapid Cash again mentions that it has valid counterclaims to assert against every Class member based on their default under the loan agreements. That argument has already been refuted above. If and when Rapid Cash files such a counterclaim, the Class will move to dismiss it for the reason that it is premature, unripe, duplicative, and permissive only.

G. NRCP 23(b)(1) is Satisfied.

Finally, Rapid Cash argues that class certification was inappropriate because NRCP 23(b)(1), which deals with the risk of inconsistent or varying adjudications, was not satisfied. Rapid Cash argues that the only risk of inconsistent or varying adjudications arises out of the individual circumstances of each Class member as it earlier argued with respect to commonality and an impermissibly broad class definition. As explained in detail *supra*, this case is a process, and perhaps three subclasses will be carved out as the case develops, the Class responds to the notice, and discovery ensues. Common questions of law or fact overarch what may become three subclasses, and common questions of law or fact even more obviously exist within subclasses. Abandoning the individual Class members to fend against Rapid Cash on their own in individual arbitrations or separate court actions creates a plain

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risk of inconsistent or varying adjudications, most of which, or a few groups of which, depend upon similar facts. Thus, this Court properly concluded that NRCP 23(b)(i) is satisfied, and Rapid Cash has offered no newly persuasive reason to reverse that decision.

H. The Claims are not Subject to Arbitration.

The Class's Opposition to the Motion to Compel Arbitration of the First Amended Complaint is incorporated by this reference, along with the Court's October 25, 2011, denial of that Motion.

III.

CONCLUSION

This Court's decision to certify this class was thoughtful, well-reasoned, and supported by the law and the facts, and nothing in *Dukes* dictates otherwise. Accordingly, for all the reasons set forth above and those articulated in the briefing and oral arguments that led to the Class Certification Order, neither reconsideration nor decertification is warranted, and Rapid Cash's motion must be denied in its entirety.

DATED this 25th day of October, 2011.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: _____

DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101

and

J. RANDALL JONES, ESQ. (1927)
JENNIFER C. DORSEY, ESQ (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2011, the foregoing **PLAINTIFFS' OPPOSITION TO MOTION TO RECONSIDER CLASS CERTIFICATION OR, IN THE ALTERNATIVE, MOTION TO DECERTIFY CLASS** was served on the following person(s) by U.S. Mail:

William M. Noall, Esq.
Mark S. Dzarnoski, Esq.
Gordon & Silver, Ltd.
3960 Howard Hughes Parkway 9th Floor
Las Vegas, NV 89169

Alan S. Kaplinsky
Martin C. Bryce, Jr.
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

An employee of Kemp, Jones & Coulthard, LLP

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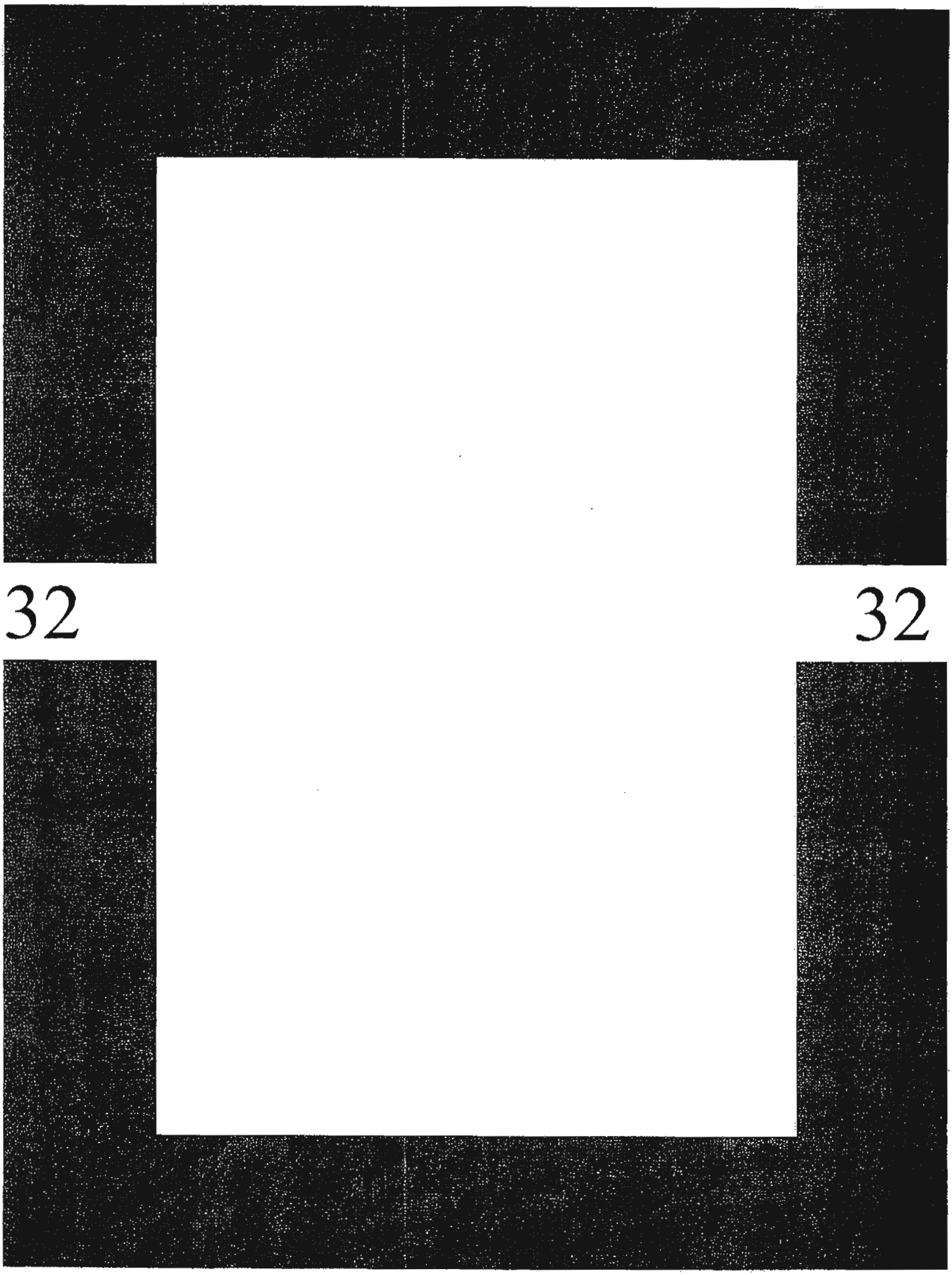

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DISTRICT COURT
CLARK COUNTY, NEVADA
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CASANDRA HARRISON, et al. Plaintiffs vs. FMMR INVESTMENTS, INC., et al. Defendants	CASE NO. A-624982 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTION TO COMPEL ARBITRATION

TUESDAY, OCTOBER 25, 2011

APPEARANCES:

FOR THE PLAINTIFFS: DAN I. WULZ, ESQ.
J. RANDALL JONES, ESQ.

FOR THE DEFENDANTS: MARK S. DZARNOSKI, ESQ.

COURT RECORDER: JILL HAWKINS
District Court

TRANSCRIPTION BY: FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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LAS VEGAS, NEVADA, TUESDAY, OCTOBER 25, 2011, 9:02 A.M.

(Court was called to order)

THE COURT: If I could go to the Harrison case.

MR. JONES: Your Honor, good morning. We are here on the Harrison case. Randall Jones and Dan Wulz on behalf of the plaintiff.

MR. DZARNOSKI: Good morning, Your Honor. Mark Dzarnoski on behalf of the defendants.

THE COURT: It's your motion, Mr. Dzarnoski.

MR. DZARNOSKI: Since we last visited the motion to compel arbitration of the original complaint on file in this matter, Your Honor, two significant events have occurred. One is there's been a filing of a amended complaint after our motion to dismiss had been granted and you gave leave to amend.

Second, the United States Supreme Court issued an opinion in ATT Mobility v. Concepcion that has some significant repercussions or significant application to the case before us.

In the opposing papers the plaintiffs have set forth that we are impermissibly seeking a reconsideration of the matter that is before the Nevada Supreme Court from your first decision on arbitration. And I'd like to address that first.

And that arises, of course, from the filing of the first amended complaint. Needless to say, we weren't

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surprised by the argument, by the filing of it and the opposition papers. This isn't something that we ignored, it's not something we didn't look at; in fact, we had three different law firms with multiple lawyers address this particular issue. And what we have found by basis of our research is that not only is this a permissible motion that we have filed, but it's absolutely necessary on our part to file this to preserve our right to appeal. It is substantially possible, if not likely, that the Nevada Supreme Court would dismiss our appeal based upon the fact that it is now moot because the original complaint has been supplanted by the first amended complaint.

The language that the Supreme Court -- Nevada Supreme Court has used in the Randono v. Ballow [phonetic] case is particularly appropriate in this case. There, following a motion to dismiss without asking for a dismissal because of improper venue on the original complaint, an amended complaint was filed, and the defendant then filed the motion for change of venue. And in that case the Nevada Supreme Court said that, "Upon the filing of the amended complaint that superseded the original complaint and that the defendant then had the right to plead de novo to the amended complaint."

That's the same situation that we have in this case. We have not previously moved for arbitration of the amended

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complaint, nor --

THE COURT: Of this amended complaint.

MR. DZARNOSKI: -- of this amended complaint, nor have you ruled on a motion for arbitration of this amended complaint.

In addition to the Randono case we cited a string of cases, including primarily Krinsky-Suntrust Banks, where again the issue of the impact of filing an amended complaint on a motion to compel arbitration was explored, and in that line of cases, particularly with Krinsky, the decision was made that even if the defendants did not move to compel arbitration of the first -- I'm sorry, the original complaint, upon the filing of a first amended complaint it retriggered their right to file a motion to compel arbitration on the amended complaint and no waiver existed.

That's an extremely important string of cases, because, this case, it's not like we didn't even file a motion to compel arbitration, we did. In this case we filed it then, so we certainly can't be viewed to have waived the arbitration, and upon the filing of the amended complaint it retriggers in us the right to move to compel arbitration.

In that line of cases many of them relied on whether or not there was a change in the allegations of the complaint. There were changes in the allegations of the complaint between the complaint and the first amended complaint in this case.

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There's a whole new cause of action for declaratory judgment. That was the basis upon which we originally moved to dismiss and you granted the motion to dismiss because they mentioned declaratory judgment in one paragraph, never set forth a cause of action for it, never set forth any claim for relief. So you granted them the right to amend their complaint. They've done so. We now have a new complaint dealing with a new cause of action for declaratory judgment. And under those circumstances then we have a right to compel arbitration under the amended complaint.

They've also asked for new types of relief. They ask for disgorgement, restitution, imposition of a constructive trust, and special damages. All of those changes would give us a right to retrigger our right to file a new motion to compel arbitration that is not before the Nevada Supreme Court currently. Therefore, in our view you certainly have jurisdiction to hear the matter as to whether or not you should order arbitration in this case.

Now, I'm not going to rehash all the reasons why you didn't grant our motion the first time. I want to focus on the reasons you did. And the reasons you did grant the motion in the first place is you said primarily Rapid Cash filed 16,223 cases in Justice Court as collection actions and as against Nevada public policy in order to enforce the arbitration provision in light of them using the Justice

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Courts for collection actions. ATT Mobility --

THE COURT: That's not exactly what I said, Mr. Dzarnoski.

MR. DZARNOSKI: No. You said it was a waiver and the reason it was a waiver --

THE COURT: That's not exactly what I said, Mr. Dzarnoski.

MR. DZARNOSKI: Well, I believe that's what was listed in the -- or is in the transcript, Your Honor. That's how I recall it. That's the basis of your decision was that we filed all these Justice Court cases and these people had to now have the right, because of a waiver under public policy, to be able to go in and -- now and file this action. That's the way I recall it. Maybe you could tell me how you recall it differently to help guide my argument from here if it wasn't public policy.

THE COURT: It was public policy. But the public policy was based only on the utilization of the Justice Courts as a collection measure, but also the what has been characterized as "sewer service" --

MR. DZARNOSKI: Sure.

THE COURT: -- which is, of course, the main issue in the case before me in the class action allegations.

MR. DZARNOSKI: I absolutely agree with that, Your Honor. I'm sorry. I --

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THE COURT: All right. Just so we're clear, 'cause --

MR. DZARNOSKI: We are. It's still public policy.

THE COURT: Okay.

MR. DZARNOSKI: It's Nevada public policy that --

THE COURT: But the public policy is not based solely upon the utilization of the Justice Courts.

MR. DZARNOSKI: Two prongs.

THE COURT: Clearly two prongs interdependent.

MR. DZARNOSKI: I'll grant you that. Yes. In terms of the Concepcion case, it makes no difference whether there's two prongs, four prongs, or eight prongs of public policy; the line of cases in Concepcion and what --

THE COURT: So you think your alleged agent lying to the Justice Courts is not a sufficient public policy for the State of Nevada to exercise jurisdiction --

MR. DZARNOSKI: According to Justice --

THE COURT: -- and determine that it is outside the scope of your arbitration provision?

MR. DZARNOSKI: According to Justice Scalia and four other members of the United States Supreme Court, absolutely not.

THE COURT: Okay.

MR. DZARNOSKI: The decisions that they have issued, as well as we have gone through -- and I think we've

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enumerated virtually every case that has been decided post Concepcion dealing with public policies trumping the Federal Arbitration Act, and there's not one, not a single case.

THE COURT: There's not even one close to this, Mr. Dzarnoski.

MR. DZARNOSKI: Your Honor, I understand that from a factual standpoint there's not a case close to this.

THE COURT: Okay.

MR. DZARNOSKI: But the issue isn't whether you have a factual difference in whether you are going to strike an arbitration provision. The line of cases says that Federal Arbitration Act is like the spades suit --

THE COURT: Yes.

MR. DZARNOSKI: -- it is the trump card. Public -- state public policy falls below it. And I don't -- it doesn't matter what facts you can generate whereby a court would sit there and say, from these facts we can derive a public policy on why that arbitration provision shouldn't be enforced. That's what Concepcion says, that it's state public policy. No matter what interest you're trying to advance, no matter how positive those interests should be --

THE COURT: We all agree it's bad to lie to the court system.

MR. DZARNOSKI: Your Honor, there is no doubt about that.

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THE COURT: Okay.

MR. DZARNOSKI: There's a different remedy. It's not -- just because somebody lies to the court system still doesn't mean that the state has a public policy that can trump the Federal Arbitration Act.

THE COURT: But it's outside the arbitration provision, don't you think?

MR. DZARNOSKI: I'm sorry. Is which outside the arbitration provision, the claims that they're making?

THE COURT: The actions related to the misrepresentation to the court systems do not appear to me to fall within your arbitration provision taking even aside the public policy issue.

MR. DZARNOSKI: The arbitration clause covers all actions in connection with collections. I mean, certainly the filing of the lawsuit was a collection action. We've all defined it -- we've all defined it that way. Everybody understands that when the action was filed in Justice Court it was a collection action. The arbitration agreements specifically say, any action that involves collection actions that arises out of --

THE COURT: Correct.

MR. DZARNOSKI: -- collection actions. And --

THE COURT: This is a different case, though.

MR. DZARNOSKI: I don't understand how it would be

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different if you've got a collection action and the thing that is being complained of here is something that derived exclusively from that collection action. We wouldn't be here if there weren't a collection action that was filed, because there wouldn't have been any service or lack of service or anything else regarding service. It only arises because of the filing of those collection actions. And those are specifically part of each of the arbitration provisions.

THE COURT: Okay.

MR. DZARNOSKI: And furthermore, the arbitration provisions make it clear that if there is any action that is filed that is a new action outside of Justice Court, any new claims -- and this new claim again arises solely because of the collection action, so a new claim that has been asserted by these plaintiffs that arises out of this collection action are specifically also excluded from the arbitration agreement -- or, I'm sorry, encompassed within the arbitration agreement.

In the opposition papers the plaintiffs here have very definitely set forth the right test for what constitutes a waiver. But that right test is that my clients have to take an action that is inconsistent with the language of the arbitration agreement itself, not that it's inconsistent with some public policy. And in this case my clients have followed exclusively the provisions of the arbitration agreement. The

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arbitration agreement carves out those collection actions, so in filing the collection actions they can't be considered inconsistent with the arbitration agreement itself.

So under that circumstance my clients have completely satisfied the terms of the arbitration agreements, have taken no action in any court in which they have indicated that they have given up their right to arbitrate the claims that are reserved in the arbitration agreement. And the only way that that can be considered inconsistent is inconsistent with public policy. And I grant you all the things you said about these people not being served is a significant event, it is something that needs to be redressed. But that doesn't mean it needs to redressed via class action. They're not being precluded from setting aside their judgments in Justice Court, they're not precluded from filing an arbitration in which they will get a minimum, if they win, of $10,100, they have all the remedies are available. It's just that they don't have a class action remedy. And there is no reason why this Court should give them a class action remedy when the law specifically -- the United States Supreme Court is saying, I'm sorry, the public policy just isn't enough.

THE COURT: Thank you.

Mr. Jones.

MR. JONES: Good morning, Your Honor.

The irony of Rapid Cash's position is from my

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perspective almost breathtaking. I'd like to follow up on -- first of all I'd like to follow up on a point that you made, Judge, and then I'll get to some other issues. But you asked a question, doesn't this fall outside the actions that are contemplated by the arbitration clause. And I understand Counsel's argument that, no, it doesn't because it's all related to this arbitration clause and that the FAA essentially trumps everything, anything and everything that has to do with this relationship between these borrowers and this payday lender. So I guess that would beg the question to me if that's true, if the Supreme Court intended the FAA to basically become this umbrella that just grabs everything and anything related to this kind of a relationship, then I presume Rapid Cash would agree -- and I'm using certainly what I think would be somewhat of an extreme example, but I think based on Counsel's argument an example that would fall squarely within what he would argue or has argued to you today.

If Rapid Cash and one of its principals in furtherance of its desire to collect on what it believed to be a properly owing debt, sent people out and beat the bejesus out of the borrowers to make them pay and they decided to sue, then apparently they'd have to sue in arbitration, because that falls within the relationship. And I'm kind of stunned by that argument, and I don't think that's at all what the

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Supreme Court intended by Concepcion at all.

But let me just start -- go back to the beginning here about EDRC -- or EDCR 2.24(a). Your Honor, I'm not going to belabor that. The Court can decide for itself. That's a procedural issue. We think that they have not complied with it. I understand Counsel's argument, but I would also raise what I think is a related issue, which we raise in our briefs, that at least it's something that the Court needs to consider that there is a motion pending at the present time with the Supreme Court to consider whether or not Rapid Cash properly appealed the decisions of this Court in the first instance. And it seems to us that while that motion's pending this Court lacks jurisdiction. And I at least raise that issue, and I think it's something that needs to be considered by the Court.

Getting to what I believe to be the heart of the question, Concepcion case, it clearly does not. And I think it's laid out clearly in our briefs, but I'm going to just hit on a couple of the highlights. First of all, number one, there's no automatic ban on class actions in Nevada. That's a clear distinction from what was found in Concepcion. As you know, Judge, in the Concepcion case California had a ban on any mandatory arbitration clauses for class actions. It was an outright ban. There was a specific rule that said you can't do that. And that is what the Supreme Court was considering in California. That does not exist in this case,

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and that has never been the law in this case in terms of any either statutory Supreme Court-imposed ban on that issue. They're looked at on a case-by-case basis, and the Supreme Court and the District Courts will decide those on a case-by-case basis. That is a critical distinction between this case and Concepcion.

Number two, the Court found -- in this case previously you found, as I understand it, and I know there was some discussion here earlier as to what you found, but what I thought you were dealing with, one of the central issues to your decision was a waiver, a waiver of the arbitration clause.

Now, Judge, Counsel has said that Rapid Cash has not waived its right to arbitrate in this case. They waived it in all the other cases. When you file a suit to collect a debt and you have an arbitration clause in your contract that is the basis of your suit in Justice Court to collect a debt, then you are waiving your arbitration clause. What they did, they picked their poison, so to speak, they chose to ignore their own arbitration clause, and they chose to sue. And that's what they did. And so that cow, if you will, out of the barn. It's gone. They can't put it back in the barn. They made a decision, a conscious decision, and they satisfied all the criteria of waiver. It was their clause in their adhesion contract, so they can't say they didn't know about

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it. They specifically ignored their own clause and chose a different means of recovery, they chose to file a lawsuit.

So, Judge, I've been involved in lots of cases with arbitration clauses in contracts, including some where we've gone all the way through the process in litigation and got right up to a trial, where there's been discovery, there's been depositions and interrogatories, requests to produce, pretrial motions, and then somebody tries to invoke an arbitration clause, and the courts have said pretty consistently, no, you've waived it. That's -- that case is not even nearly as extreme as this one where they've already finished the process. They went through and got default judgments. So that waiver is a fait accompli. It's over, it's done. They can't now come back later and say, well, you know what, forget about that, this is a different case. No, it's not. It's all a part of -- in fact, that waiver is the heart of this case, is that you decided to go and use sewer service to collect your debts in Justice Court and now you want to try to get out of that by saying --

And, Judge, look, I certainly know this Court is not naive. Counsel's argument that my clients' putative class members, actually now class members, all have the right to go to arbitration, they can still have all their remedies. We all know, all of us in this -- every lawyer in this courtroom, and I presume the Court knows, as well, that's an absurd

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proposition in reality. The practical realities of that don't exist. We know that these people are for the most part disenfranchised, poor, people who are going to these payday loan companies to get loans. The chances of them ever actually trying to exercise their rights on an individual basis -- and I think we have a great quote where the Supreme Court Justices recognize this, that anybody that sues over $30 is either a fanatic or an idiot, because it's too much trouble and hassle and problems to try to do that and it's too expensive. So as a practical matter that will never happen.

So if Rapid Cash gets this on, they know what the result will be, that they will have gotten away with this sewer service, this violation of what I certainly agree is a public policy issue. So, as a practical matter, that's just never going to happen.

And then the final point I'll make for the moment is the FAA specifically applies to federal cases. This is not a federal case. Concepcion was a federal case. And the Supreme Court talked about that issue in its decision and said -- so we now have a State Court case. We also know that Justice Thomas has repeatedly said you handle State Court cases and state law issues differently. So we don't have an automatic attachment of the FAA in this particular case in the first place.

And the final point I'll leave you with, Judge, is

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they've got this opt-out clause that they argue about, as well. It was not specifically referenced, but, again, as a practical matter that opt-out clause is meaningless. It's got to have some actual ability to be utilized by the party that has the so-called opt-out right.

So for all those reasons, Judge, your ruling for was correct. Concepcion doesn't change anything, and in fact I think from my perspective it makes our position stronger that this is an exception to that case. For all the reasons that I've referenced I think the case itself gives this Court plenty of grounds and bases to say this is a different circumstance. And as a practical matter, Your Honor, if the Court rules otherwise, it's -- there's no question that these class members will go without a remedy, that Rapid Cash will have accomplished its goal, this so-called sewer service, to take advantage of these people one more time, get judgments it should have never got, and have -- these people will never have a practical opportunity for any kind of effective or real remedy against this improper conduct.

THE COURT: Thank you, Mr. Jones.

While there is a potential jurisdictional issue, the amendment of the complaint appears to raise a separate ability of the defendants at this time to raise this issue anew. And while I certainly appreciate, Mr. Dzarnoski, your arguments, I do not believe that the decision by the United States Supreme

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Court in the Concepcion case would have countenanced the arbitration provision in this case being applied to these particular circumstances where your client has utilized the Justice Court system repeatedly with filing of false affidavits of service, securing of default judgments, and garnishing of wages. To do so would violate the public policy of the State of Nevada. And while I certainly understand that you intend to pursue this issue, I do not believe that the kind of activities that occurred and are alleged in this complaint and that I've certified as a class are within the scope of the arbitration provision, as well.

So you have all the three or four different issues you guys need. Go up to Carson City, have a great time.

Anything else?

MR. JONES: Your Honor, I'll prepare the order and run it by Counsel.

THE COURT: That'd be lovely.

MR. DZARNOSKI: Thank you, Your Honor.

THE PROCEEDINGS CONCLUDED AT 9:27 A.M.

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

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Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

11/7/11

DATE

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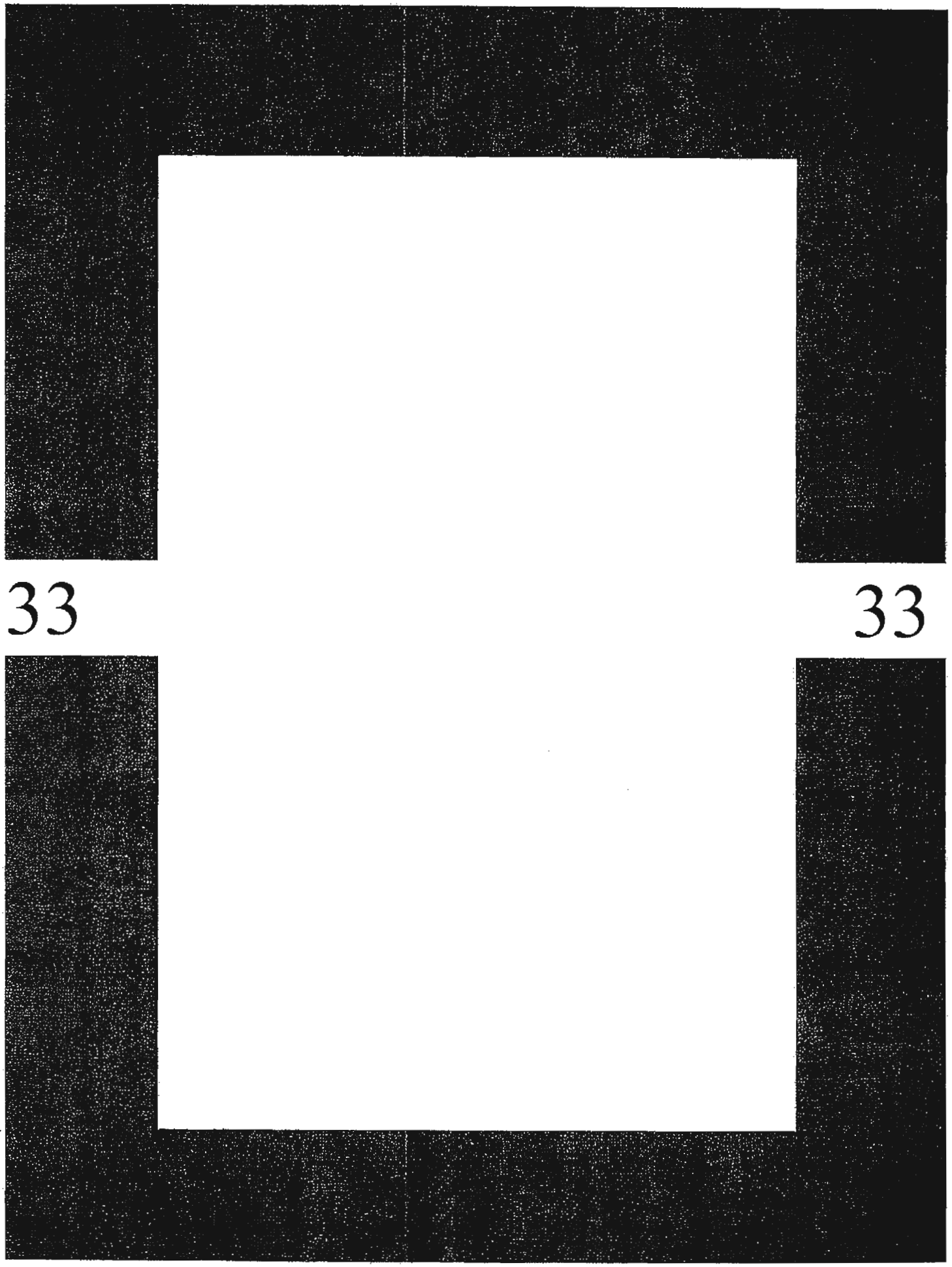

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CLERK OF THE COURT

OPPS
GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
Email: wnoall@gordonsilver.com
MARK S. DZARNOSKI
Nevada Bar No. 3398
Email: mdzarnoski@gordonsilver.com
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Fax: (702) 369-2666
Attorneys for Defendants
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

DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiffs, vs. 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; ADVANCE GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive, Defendants.	CASE NO. A624982 DEPT. XI **OPPOSITION TO PLAINTIFFS' MOTION TO APPROVE NOTICE** **Hearing Date: November 18, 2011** **Hearing Time: (In Chambers)**

COMES NOW Defendants 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 (the "Rapid Cash

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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Defendants"), by and through their counsel Gordon Silver, and file this Opposition to Motion to Approve Notice (the "Motion").

This Opposition is made and based upon the following Memorandum of Points and Authorities, the pleadings and other papers on file herein and any oral argument the Court may permit at the hearing of this matter.

DATED this 2 day of November, 2011.

GORDON SILVER

GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
MARK S. DZARNOSKI
Nevada Bar No. 3398
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Attorneys for Defendants
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

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

1. By Order of the Court, the parties submitted, by letters dated September 21, 2011, competing Proposed Orders regarding class certification.

2. Additionally, Plaintiffs submitted a Proposed Class Notice on September 21, 2011.

3. Defendants did not object to the form and content of the Proposed Class Notice submitted by Class Counsel other than arguing that the Class Notice is premature.

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4. On September 23, 2011, the Court issued a Minute Order containing some suggested revisions to the Proposed Class Notice.

5. Plaintiffs have revised the Proposed Class Notice originally submitted on September 21, 2011 and seek approval thereof.

II.

THE CLASS NOTICE IS PREMATURE

After pre-answer motion practice is completed, assuming that Rapid Cash will be required to file an Answer, it presently intends on asserting Counterclaims against the Class Representatives and the Class Members. Class Members need to be informed of those counterclaims in order to intelligently decide whether to exercise their opt out rights. Thus, until the matter is joined by Answer and Counterclaim, the Notice is premature.

In their September 21, 2011 letter to the Court, Class Counsel asserted that "we cannot imagine a legitimate basis for a counterclaim." Class Counsel further asserted that Rapid Cash should not be allowed to "hijack this class action and turn it into a collection action by counterclaiming against the Class."

Certainly, it is not hard to envision a legitimate factual and legal basis for advancing counterclaims against the Class Representatives and the Class Members. It is undisputed that none of the Class Representatives or putative class members repaid Rapid Cash the amount they borrowed. All were in default at the time the collection actions were filed against them. In the event the Court sets aside any of the default judgments obtained by Rapid Cash, then Rapid Cash has valid actions to recover upon the original loans including but not limited to possible actions for breach of contract and unjust enrichment. Additionally, each of the Class Representatives and each of the Class Members tendered a post-dated check to Rapid Cash and promised to deposit sufficient monies to cover presentment of the check on a date certain. In many cases, such representations appear to have ben false at the time they were made and might support an action in fraud for such misrepresentation.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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At this stage of the proceedings, it is not proper to dismiss any and all possible counterclaims that Rapid Cash may have without them even having been reduced to an Answer and Counterclaim. To require a putative class member to decide whether to exercise an opt-out choice without providing him/her with knowledge of counterclaims asserted against him/her is unfair.

III.

RESERVATION OF OTHER OBJECTIONS

The Class Notice identifies Rust Consulting, 625 Marquette Ave # 880, Minneapolis, MN 55402 as Class Administrator. Earlier in this litigation, Rapid Cash offered to pay for the Class Action Administrator and the cost of the Notices IF AND ONLY IF the customer lists and customer addresses were to remain confidential and not disclosed to Class Counsel. Retaining confidentiality in the names and addresses was the purpose of seeking a Class Action Administrator. Inasmuch as the Court has ordered the confidential information to be supplied to Class Counsel, it is Rapid Cash's position that no Class Action Administrator is necessary and Plaintiffs should be required to pay all costs associated with the Notices.

Rapid Cash reiterates its position lest silence be construed as a waiver of this position.

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

IV.

CONCLUSION

For the above and foregoing reasons, this Court should deny Plaintiffs' Motion as premature.

DATED this 2 day of November, 2011.

GORDON SILVER

GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
MARK S. DZARNOSKI
Nevada Bar No. 3398
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Attorneys for Defendants
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

OF COUNSEL:
Alan S. Kaplinsky
Martin C. Bryce, Jr.
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: 215.665.8500
Facsimile: 215.864.8999

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 2nd day of November, 2011, she served a copy of the **OPPOSITION TO PLAINTIFFS' MOTION TO APPROVE NOTICE**, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Dan L. Wulz, Esq.
Venicia Considine, Esq.
Legal Aid Center of Southern Nevada, Inc.
800 South Eighth Street
Las Vegas, NV 89101
Fax: (702) 388-1642

J. Randall Jones, Esq.
Jennifer C. Dorsey, Esq.
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
Fax: (702) 385-6001

Anna Dang, an employee of
GORDON SILVER

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Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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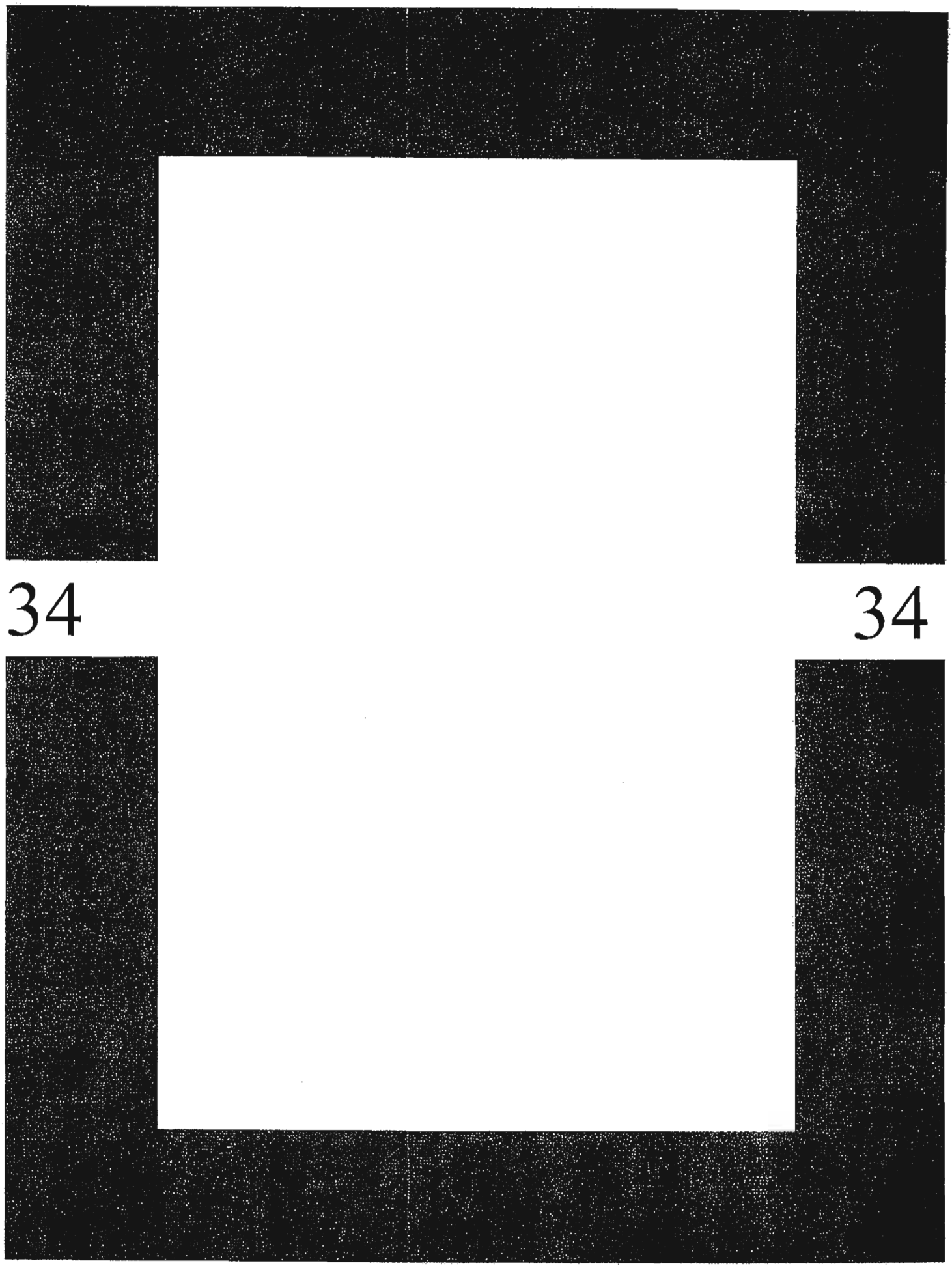

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GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
Email: wnoall@gordonsilver.com
MARK S. DZARNOSKI
Nevada Bar No. 3398
Email: mdzarnoski@gordonsilver.com
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Fax: (702) 369-2666
Attorneys for Defendants
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

DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiffs, vs. 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; ADVANCE GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive, Defendants.	CASE NO. A-10-624982-B DEPT. XI **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER CLASS CERTIFICATION OR IN THE ALTERNATIVE FOR DECERTIFICATION** **Hearing Date: November 22, 2011** **Hearing Time: 9:00 a.m.**

Defendants 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 (the "Rapid Cash Defendants") submit this Reply Brief in Support of their Motion to Reconsider Class Certification or, in the

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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Case No. 59837

In the Supreme Court 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,

Appellants,

vs.

CASSANDRA HARRISON; EUGENE VARCADOS CONCEPION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ELIZABETH GONZALEZ, District Judge
District Court Case No. A624982

APPELLANTS' APPENDIX
VOLUME 4
PAGES 680-928

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 474-2616
DPolsenberg@LRLaw.com
JHenriod@LRLaw.com

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

MARTIN C. BRYCE, JR., *Pro Hac Vice*
BALLARD SPAHR LLP
1735 Market Street, Fifty-First Floor
Philadelphia, PA 19103
(215) 665-8500
Bryce@ballardspahr.com

Attorneys for Appellants

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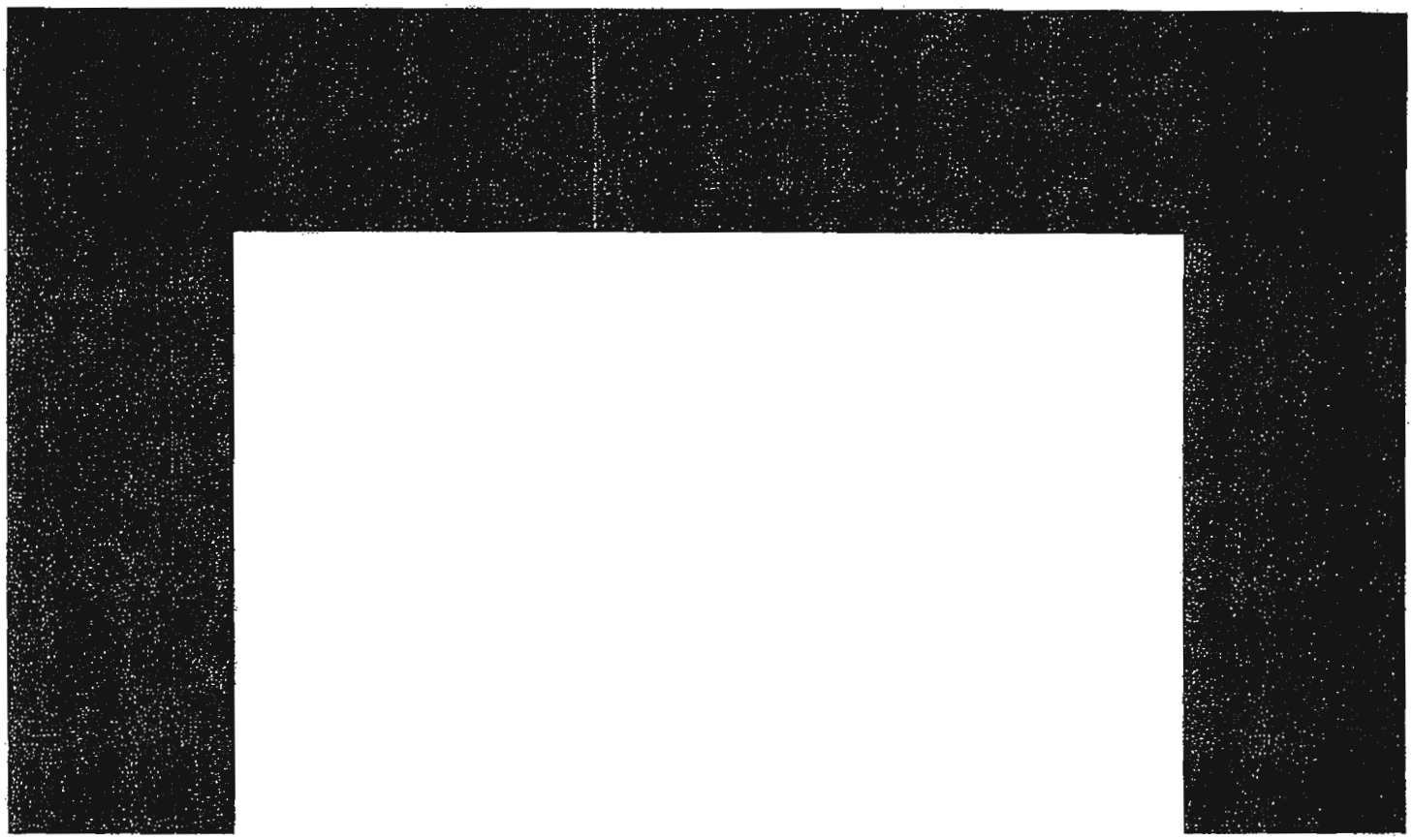

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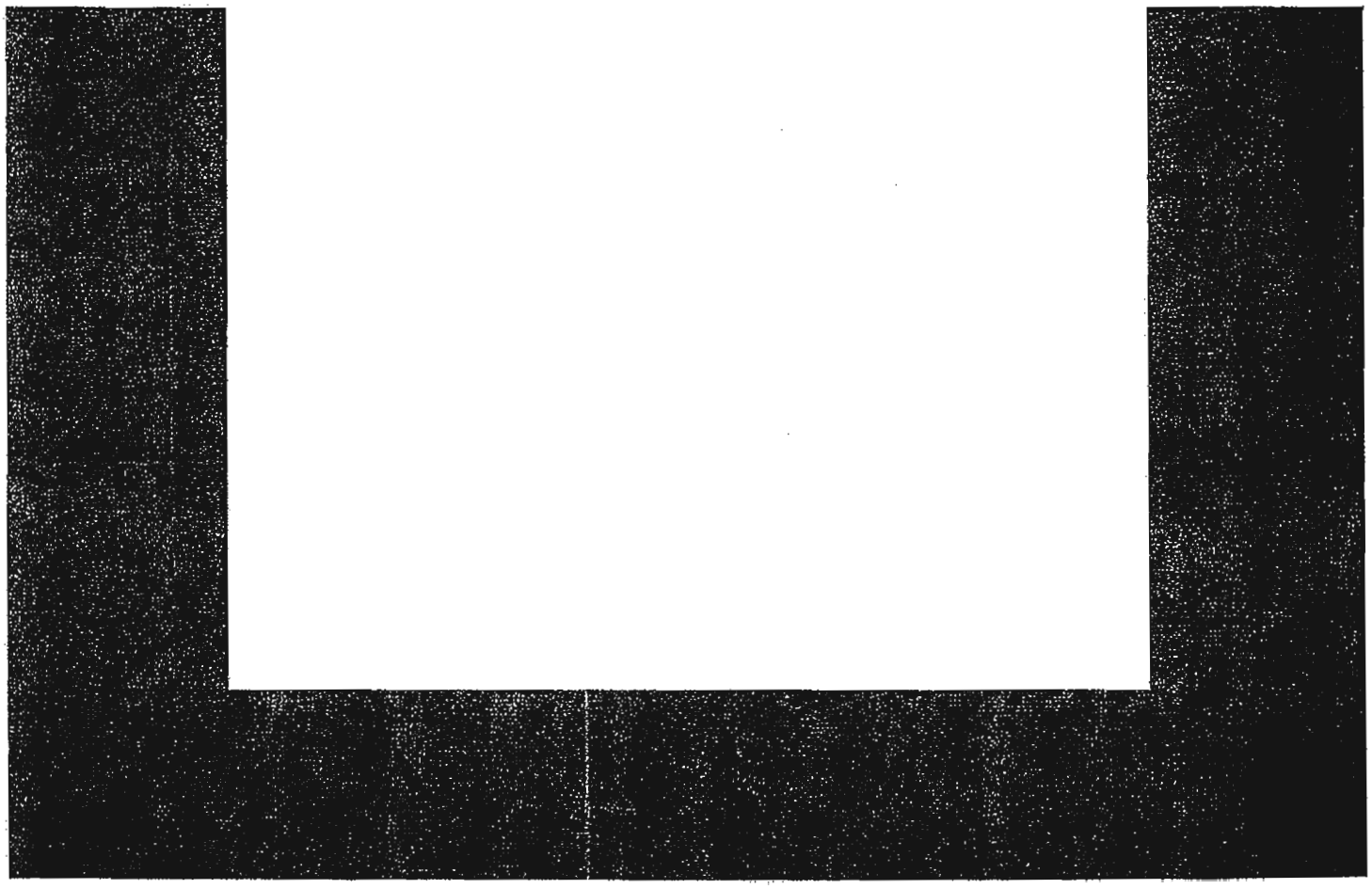

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OPPM
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com

Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia

Case No.: A-10-624982-B
Dept. No.: XI

OPPOSITION TO MOTION TO COMPEL ARBITRATION AND STAY ALL PROCEEDINGS

Date of Hearing: October 25, 2011
Time of Hearing: 9:00 a.m.

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I.

INTRODUCTION

This is Rapid Cash's second bite at the motion-to-compel-arbitration apple. This Court thoughtfully denied this very same request last year after finding that Rapid Cash had waived its contractual right to arbitration of the class members' claims by using the justice court as its personal collection agency in nearly 17,000 cases over five years and never once abiding by the arbitration clause in each of the loan agreements it was collecting under.

Since the denial of Rapid Cash's motion to compel, the United States Supreme Court dealt a blow to state laws that mechanically prohibit arbitration clauses in consumer contracts with its 5-4 decision in AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (Apr. 27, 2011), that the Federal Arbitration Act preempted California's blanket rule classifying collective-arbitration waivers in consumer contracts as unconscionable and therefore unenforceable. Reinvigorated by Concepcion's anti-consumer-class-action message, Rapid Cash essentially asks this Court to reconsider and reverse its well-reasoned denial of the original request to force these potentially thousands of Rapid Cash customers into individual arbitrations to set aside the default judgments that Rapid Cash fraudulently obtained against them with On Scene Mediations' sewer service practices.

But Concepcion changes nothing. Rapid Cash's arbitration clause was deemed unenforceable not under a state-wide policy declaring such clauses unenforceable, but because Rapid Cash's personal actions had resulted in a waiver of its arbitration right and permitting this specific defendant to enforce any portion of its long-ignored arbitration provision would violate public policy. This Court already placed this agreement on equal footing with other contracts to reach its case-specific conclusion that Rapid Cash's own conduct invalidated its arbitration

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clause, as Concepcion expressly permits. Rapid Cash's request must – yet again – be denied, allowing this now-certified class action to proceed.

II.

STATEMENT OF FACTS[1]

A. On Scene Was Rapid Cash's Process Server for Rapid Cash's Clark County, Nevada, Justice Court Actions Against Allegedly Defaulting Payday Loan Customers.

Rapid Cash is a short-term or "payday" lender and also an automobile-title pawn lender. From 2004-2010, Maurice Carroll, d/b/a On Scene Mediations served as Rapid Cash's agent to fulfill Rapid Cash's responsibility under JCRCP 4(a) to serve Summonses and complaints on each defendant-borrower sued by Rapid Cash. An unreasonably high number of affidavits from On Scene attest that summons and complaints were personally served on the day they were received from Rapid Cash (a near-miracle in process serving). In the rare case that a defendant learned of his suit in time to set aside the default, Rapid Cash's attorney would swiftly stipulate to the set-aside to avoid any evidentiary hearing on the validity of the service, suppressing the discovery of the fraud. Sewer service became an all-too-frequent occurrence for On Scene and its employees according to "office manager" Vilisia Coleman, a policy directive that came from owner Carroll. Both Coleman and Carroll were indicted for these practices. Coleman entered into a plea agreement, and Carroll was convicted on 35 felony counts. Jeff German, Process Server Convicted on 35 Felony Accounts, LVRJ (Oct. 11, 2010).

On Scene's sewer service allowed Rapid Cash to file an astounding number of collection lawsuits against its customers allthewhile totally ignoring the arbitration clause in each of its loan agreements. During the six-year period from 2004-2009, Rapid Cash filed 16,663 cases in the Clark County Justice Court system, a whopping average of 2,777 cases per year and 53 cases

[1] These facts are taken from the First Amended Complaint and Rapid Cash's Motion to Compel Arbitration, as well as Plaintiffs' attached Affidavits, all of which are incorporated herein.

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each week, collecting default judgments and garnishing wages of borrowers who had zero notice that their rights had been judicially determined.

In January 2009, only two Justices of the Peace in Las Vegas Township were assigned civil cases. Shortly thereafter, the Justices noticed an unusual pattern of purported same-day service in On Scene's affidavits. When the Court made Rapid Cash counsel aware of the suspicious nature of such representations, On Scene affidavits suddenly began showing an interval of time between receipt of the Summons and successful completion of service, instead of the same-day service that was a hallmark of On Scene affidavits.

B. The Universal Victimization of an Entire Class of Rapid Cash Borrowers.

Rapid Cash, through the acts of its agent On Scene and by condoning or – at the very least – overlooking the blatant misconduct by its process server, perpetrated a widespread fraud on the Clark County Justice Courts and potentially thousands of Rapid Cash customers. This illegal and fraudulent pattern, policy, and practice by Rapid Cash and its agent deprived these defendants of due process of law, resulting in potentially thousands of void default judgments with no opportunity to respond or defend. The outcome was that Rapid Cash obtained void default judgments and garnishments, undermining the foundation of the legal system. **There is no evidence that Rapid Cash sought to arbitrate any of these cases.**

Class Representatives Cassandra Harrison, Eugene Varcados, Concepcion Quintino, and Mary Dungan were all Rapid Cash customers sued by Rapid Cash. At no time before this case was filed did Rapid Cash ever seek to invoke its arbitration clause. Instead, in each of these thousands of cases, Rapid Cash ignored its own arbitration clauses and wielded instead the power of the Clark County court system by filing a complaint in Justice Court, issuing summonses, and ordering each defendant to answer in court. Rapid Cash, through its attorneys, then filed sworn affidavits of successful service from On Scene Mediations and when the defendant-borrowers failed to answer, obtained default judgments complete with costs and attorney's fees, all of which it would often collect through writ of execution or garnishment. Most did not learn that Rapid Cash had sued them until their paychecks were ultimately

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garnished. See Affidavits of Cassandra Harrison, Eugene Varcados, Concepcion Quintino, and Mary Dungan, attached hereto as Exhibits 1, 2, 3 and 4, respectively.

C. Plaintiffs Initiated this Class Action on Behalf of all Similarly Situated Victims of Rapid Cash's Sewer Service.

On September 9, 2010, Plaintiffs filed this action on behalf of the Class, which was certified by Order on September 29, 2011. The certified class consists of:

> All customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, and for which the only evidence of service of process was an affidavit signed by a representative of On Scene Mediations and who claim not to have been served.

Order Granting Class Certification and Appointing Class Counsel at p. 4.

D. After Ignoring its Arbitration Clause to File Nearly 17,000 Justice Court Lawsuits, Rapid Cash Unsuccessfully Moved this Court to Compel Arbitration.

The first time Rapid Cash asked for arbitration was not any one of the 16,663 times it filed complaints against its consumers and obtained default judgments against them, it was after Plaintiffs filed this Class Action. Rapid Cash's September 30, 2010, Motion to Compel Arbitration asked this court to enforce the arbitration clauses and class certification ban in Rapid Cash's loan agreements and force these victims of Rapid Cash's void default judgments into individual arbitrations. But after full briefing and a lengthy oral argument, this Court rejected Rapid Cash's pleas and certified the class. That decision was grounded in waiver and public policy concerns:

> Unfortunately, **the conduct of the defendants** in its collection efforts in my [sic] constitutes **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 Small Claims Court, and then require arbitration of those claims which arise from the alleged tortious and fraudulent conduct of defendants and it's agents in those collection activities.

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Transcript of Motion to Compel Arbitration at 30:4-10, attached here as Exhibit 5 (emphasis added). The November 29, 2010, Order Denying Motion to Compel Arbitration concludes:

> The Motion is denied. **The Court finds that the Movants waived their right to demand arbitration in that Defendants knew of their right to arbitrate, acted inconsistently with that right in filing thousands of justice court cases against the putative Class members, and prejudiced the putative Class members by their inconsistent acts in taking default judgments and pursuing collections. The Court further finds that it is against public policy to allow litigation, even if it is in 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.**

Order Denying Motion to Compel Arbitration at p. 2 (emphasis added), attached hereto as Exhibit 6. The September 29, 2011, Order Granting Class Certification and Appointing Class Counsel reiterates:

1. The pre-dispute resolution provisions of the underlying payday loan contracts are unenforceable for the reasons that Defendants have waived those provisions and enforcement would be against public policy, as this Court ruled with respect to the forced arbitration provision.

2. The class-action-ban portion of the arbitration clause, to the extent present in any underlying payday loan contract of a Class Representative of Class member, is likewise unenforceable pursuant to the public policy of the State of Nevada. Given the claims involving lack of service of process, this class action provides the only means by which a Class member with no knowledge of the underlying Justice Court suit can assert rights and secure a remedy, and, for the Class members who might eventually become aware of the underlying Justice Court suits upon garnishment or otherwise, this class action provides the only practical and effective means to vindicate rights and secure a remedy given the size of the claims involved.

Order Granting Class Certification and Appointing Class Counsel at p. 2.

Rapid Cash attempted to challenge the original denial of its request to compel arbitration by writ, but it was denied because an immediate appeal was statutorily available. See Order dated January 18, 2011, attached hereto as Exhibit 7. Rapid Cash filed a fatally late notice of appeal and has requested that the Supreme Court deem its writ petition the functional equivalent

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of a timely appeal. The Class moved to dismiss the appeal as untimely. The Court denied the motion to dismiss without prejudice, allowing the Class to renew the motion after mandatory settlement conferences are completed. See Order dated Feb. 4, 2011, attached hereto as Exhibit 8. With this Court's denial of the original motion still pending (in some very challenged fashion) before the Nevada Supreme Court, Rapid Cash asks this court a second time to enforce its long-ignored contractual provisions and compel arbitration and ban this now-certified class action.

III.

ARGUMENT

Rapid Cash's motion must be denied. Despite its cute attempts to characterize this effort as its first motion to compel arbitration of the claims in the First Amended Complaint, it is really just an untimely request for reconsideration of this Court's previous denial of the very same relief. If this Court decides to consider the motion on its merits, it must be denied yet again. Concepcion does not dictate otherwise. This Court based its finding that Rapid Cash's clauses are unenforceable upon an analysis of Rapid Cash's individualized practices, not a state-wide policy. Nevada law and this Court's denial of Rapid Cash's first motion to compel arbitration are entirely consistent with this jurisprudence, which was not compromised by Concepcion. Moreover, Concepcion does not change the outcome here because the feature of California law that the Concepcion majority found repugnant to the FAA does not exist in Nevada law. The facts of Concepcion also materially distinguish it from this case primarily because Rapid Cash class members would not be able to vindicate their rights effectively in individual arbitrations, whereas the Concepcion plaintiffs could. Rapid Cash's arbitration clause and class action ban remain unenforceable for the very reasons this Court has already articulated. This motion must be denied again.

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A. Rapid Cash's Motion is a Fatally Late Motion for Reconsideration, which this Court May Lack Jurisdiction to Decide.

Rapid Cash's motion to compel arbitration on the First Amended Complaint is nearly identical to its original motion denied in the November 29, 2010, Order Denying Motion to Compel Arbitration. EDCR 2.24(a) states, "No motion once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." Rapid Cash violated EDCR 2.24(a) by failing to seek leave to reassert its year-old request. EDCR 2.24(b) also places a 10-day time limit on motions for reconsideration – another rule ignored by Rapid Cash's instant motion. These procedural errors alone dictate the denial of this renewed request.

The Class also questions this Court's jurisdiction to hear this motion due to the pendency of Rapid Cash's challenge to this Court's denial of the first motion to compel in the Nevada Supreme Court. Rapid Cash essentially filed an untimely appeal from that initial denial, and the Class moved to dismiss that effort. The Court denied the motion "without prejudice to respondents' right to renew the motion, if necessary, upon completion of settlement proceedings." See Exhibit 8. The Class intends to renew that motion as soon as the parties are released from the Supreme Court's Settlement Program. Nevertheless, there is an (albeit jurisdictionally defective and thus, imperfect) appeal from the original denial of the motion to compel pending in the Nevada Supreme Court, which may impact this Court's jurisdiction to even consider the instant motion. See Mack-Manley v. Manley, 138 P.3d 525, 529-30 (Nev. 2006) ("when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court").

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B. The United States Supreme Court's Ruling in Concepcion Does Not Compel Reconsideration of the Denial of Rapid Cash's Motion to Compel Arbitration or Otherwise Render its Arbitration Clauses and Class Action Bans Enforceable under the Circumstances of this Case.

1. Concepcion *'s Reach is Limited to* State-Wide Rules Categorically Invalidating Arbitration Clauses.

The question in Concepcion was "whether § 2 [of the Federal Arbitration Act] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." 131 S. Ct. at 1746. California's blanket rule was known as the Discover Bank rule, and it mechanically invalidated a class action ban in an arbitration clause—and forced the parties into non-consensual class arbitration— whenever there was a consumer contract of adhesion with predictably small damages and an allegation that the defendant engaged in a scheme to cheat consumers. Id. The United States Supreme Court held 5-4 that "California's Discover Bank rule is preempted by the FAA." Id. at 1753. The High Court reasoned that the California rule would effectively prohibit arbitration of a broad category of claims and would impose procedures – namely class wide arbitration – against the parties' consent, which would be inconsistent with and preempted by the FAA. Id.

Rapid Cash contends that Concepcion applies in this case and renders the application of general principles of Nevada contract law preempted by the FAA. But Concepcion does not hold that every arbitration clause and class action ban is always enforceable in every case. The issue in Concepcion was the automatic invalidation of a class action ban, which is inconsistent with, and therefore preempted by, the FAA. There is no automatic, blanket Nevada rule that invalidates Rapid Cash's class action ban; this Court denied arbitration because it found that Rapid Cash specifically waived its right to arbitration through its own, highly personalized actions, not under any state-wide rule invalidating consumer arbitration clauses. In short,

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Concepcion stands for the limited proposition that only those categorical rules of state law that permit automatic or mechanical invalidation of arbitration clauses pose a conflict with, and are therefore preempted by, the FAA. Concepcion, 131 S. Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.") (emphasis added).[2]

2. Concepcion Does Not Eliminate the District *Court's Power to Deny Arbitration* if it Would Prevent Consumers from Vindicating Their Statutory Rights.

Concepcion also does not disturb longstanding Supreme Court jurisprudence holding that statutory claims are arbitrable only if "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 628, 637 (1985) quoted in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); see also EEOC v. Waffle House, Inc., 534 U.S. 279, 295 n.10 (2002) (statutory claims may be arbitrated as long as a party can vindicate her substantive rights) (citation omitted); Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000) ("[C]laims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum') (citation omitted); Vimar Seguros y Reaseguros SA v. M/V Sky Reefer, 515 U.S. 528, 540 (1995) (holding that, if an arbitration provision were to operate "as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy"). In order for the FAA to

[2] Additionally, the Concepcion Court was concerned that even though AT&T had a "blow up" clause California law might nonetheless require AT&T to arbitrate on a class action basis. 131 S. Ct. at 1750-53. Concepcion therefore stands for the additional proposition that requiring class arbitration would be particularly unfair to non-consenting parties and would violate the FAA because of features unique to class arbitration. Accordingly, *Concepcion's* preemption holding is – and should be – limited to state laws that would mechanically invalidate class action bans without any regard to the exculpatory effects of those bans and force the parties into non-consensual class arbitration, which are two features of the Discover Bank rule that are not in Nevada law.

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require enforcement of class action bans even where enforcement would prevent the parties from effectively vindicating their statutory rights, the Supreme Court would have had to overrule this prior precedent. Concepcion did not do that, and, indeed, there is no question that the Mitsubishi line of cases remains good law after Concepcion, as both Mitsubishi and Gilmer are cited as authority in the majority decision. Concepcion, 131 S. Ct. at 1748 (citing Mitsubishi Motors); Id. at 1749, n.5 (citing Gilmer).

Refusing to enforce an arbitration clause when the particular facts and circumstances of the case prove that the terms prevent the parties from vindicating their statutory rights is entirely consistent with the FAA. See Green Tree Fin. Corp, 531 U.S. at 92 ("[A] party seek[ing] to invalidate an arbitration agreement . . . bears the burden of showing" that the clause would prevent her from vindicating her statutory rights); 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1462-63 (2009) (declining to rule on enforceability of arbitration clause when issue of whether plaintiffs could vindicate their rights had not been fully briefed below, and the Court would not ("invalidate arbitration agreements on the basis of speculation")). Such a state-law rule clearly would not "stand[] as an obstacle to the accomplishment" of any Congressional purpose. Concepcion, 131 S. Ct. at 1753. The claims in this case involve lack of service of process and a class action is the only "practical and effective means to vindicate right and secure a remedy given the size of the claims involved." Order Granting Class Certification and Appointing Class Counsel, at 2. The very unique facts and circumstances in this case are what make Rapid Cash's arbitration clauses unenforceable.

3. The FAA Applies To Federal – Not State – Cases.

Concepcion also has no impact in this case because the FAA applies to federal – not state law – based cases. "[S]tate law, whether of legislative or judicial origin," may be applied to

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invalidate arbitration clauses "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (emphasis in original). The U.S. Supreme Court has acknowledged that state contract law of unconscionability "may be applied to invalidate arbitration agreements without contravening" the Federal Arbitration Act (FAA). Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

Concepcion, unlike this case, arose in federal court and its application is limited to federal cases. The Concepcion Court had no occasion to consider the extent to which its rule would apply in a state court proceeding. Concepcion should be understood as a pronouncement that extends only to the context of that case—a case litigated in federal court. See e.g. Arellano v. T-Mobile USA, Inc., 201 1 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (repeatedly noting that Concepcion's preemption holding is the rule "at least for actions in federal court") (emphasis added).

Had the issue in Concepcion reached the U.S. Supreme Court from a state court, there could not have been five votes for preemption because Justice Thomas—who provided the crucial fifth vote for the Concepcion majority—has consistently maintained that the FAA does not apply to cases in state court. Since the 1995 case of Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 285 (1995), Justice Thomas has been adamant that the FAA in general, and § 2 in particular, "does not apply in state courts." Id. at 285 (Thomas, J., dissenting). As he explained, at the time of the FAA's passage in 1925, "laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance," and as such it "would have been extraordinary for Congress to attempt to prescribe procedural rules for state courts." Id. at 286, 288-29 (emphasis in original); see also

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Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) (dissenting from Court's holding that FAA preempted a California law on the ground that, "in state-court proceedings, the FAA cannot displace a state law that delays arbitration until administrative proceedings are completed"); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting) (because the FAA does not apply in state courts, "in state-court proceedings, the FAA cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law"); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting) (because FAA does not apply in state courts, FAA cannot preempt state court's interpretation of arbitration agreement); Doctor 's Assocs., Inc., 517 U.S. at 689 (Thomas, J., dissenting) (dissenting from Court's holding that FAA preempted a Montana law on the ground that "§ 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to proceedings in state courts").

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The only way Concepcion could be extended to state court actions would be for Justice Thomas to completely abandon the position to which he has steadfastly adhered in five different cases.[3] Justice Thomas's concurrence in Concepcion, which arose in federal court, that the "Discover Bank rule is pre-empted" by the FAA, can mean only that the Discover Bank rule is preempted by the FAA in federal courts. So long as one takes Justice Thomas at his consistent word, it follows that he would not have voted the way he did had Concepcion, like this case, arisen in a state court. Cf United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir.

[3] Rapid Cash's suggestion that the FAA applies here because its customers were engaging in interstate commerce when they obtained their loans is absurd. These transactions were wholly local. Rapid Cash customers went into Rapid Cash's local offices and obtained cash loans. When these customers defaulted on those loans, Rapid Cash sued them in Nevada's Justice Courts and hired local process server On Scene to serve the summonses and complaints (or more accurately, not serve them) inside Nevada. As the Agreement's statement that the FAA applies is based upon the purported interstate-commerce nature of this transaction, which does not exist, the mere statement that the FAA applies is of no consequence and cannot be the basis for applying it in this case.

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2006) (per curiam) (examining Supreme Court plurality opinion to predict outcomes based on likely vote of Justice Kennedy); Jacobsen v. U.S. Postal Serv., 993 F.2d 649, 664 n.2 (9th Cir. 1992) (counting votes to consider whether "the Supreme Court would have five votes for holding a post office is a nonpublic forum"). Thus, Concepcion has no application to this state court action.

C. Concepcion *does not Revitalize Rapid Cash's Unenforceable Arbitration* Clauses or Class Action Bans.

1. Rapid Cash Waived Its Right to Enforce the Arbitration Clause by Its Prolific Use of the Court System.

Rapid Cash's class-action-ban-infused arbitration clause is unenforceable because Rapid Cash, by its categorical rejection and habitual ignoring of this provision, waived any right to invoke the arbitration clause (which contains the class action ban) in its payday loan contracts. The Supreme Court of Nevada has articulated a three-prong test for waiver of an arbitration clause. A waiver may be shown when the party seeking to arbitrate: (1) knew of its right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party by his inconsistent acts. Nevada Gold & Casinos, Inc. v. Am. Heritage, Inc., 121 Nev. 84, 90-91, 110 P.3d 481 (Nevada 2005) (finding waiver through litigation conduct). Rapid Cash's conduct satisfies all three elements of the waiver test.

First, there can be no legitimate dispute that Rapid Cash is aware of this provision as it is contained in its own form contracts. Second, Rapid Cash has acted in a manner completely inconsistent with its right to arbitrate claims arising from its payday loan agreements by filing thousands of lawsuits per year for years in the Justice Courts of Clark County, purportedly to enforce its rights under these agreements. There is no evidence that Rapid Cash has **even once** demanded arbitration in one of these payday loan cases. And, indeed, **every member of the Class as defined has not only been sued by Rapid Cash but also suffered entry of a default judgment in Justice Court months or years before Rapid Cash now utters the phrase "arbitration clause."** The Ninth Circuit has held that when a defendant makes a "conscious

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decision to continue to seek judicial judgment on the merits of the arbitrable claims," he has then waived the right to compel arbitration. Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 759 (9th Cir. 1988). Rapid Cash has not merely acted in a manner inconsistent with a right to arbitrate, with 16,663 justice court lawsuits – an average of 53 new cases filed each week in blatant disregard of its own arbitration clauses – Rapid Cash may very well be the Clark County court system's Customer of the Decade.

Third and finally, Rapid Cash's conduct has caused significant prejudice to the Class. In the context of waiver of the right to arbitrate, "prejudice" refers to inherent unfairness, i.e., a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage. As articulated by the Supreme Court of Nevada, prejudice may be shown inter alia where a party has litigated "substantial issues on the merits." Nevada Gold and Casinos, Inc., 121 Nev. at 91. Rapid Cash chose to litigate against every member of the Class. It filed suit and then, primarily through its agent On Scene, falsely represented to the Justice Court that it had successfully served the Summons and Complaint. Rapid Cash then filed applications for default and default judgments, with affidavits, further invoking the power of the Justice Court and seeking a judicial resolution. It then applied for court costs and attorney's fees, and obtained judgments against every member of the Class and then enforced those judgments through garnishments and other action. Such deliberate invocation of the judicial process and power to one party's advantage and another's detriment is precisely the kind of inherent unfairness and prejudice that compelled this Court to find waiver last year.

Indeed, the facts of this case are so outrageous that no reported case could be found wherein a party demanded arbitration after having secured a judgment against its opposing party. As this Court expressed in October 2010:

> I certainly think it is problematic for [Rapid Cash] to try and enforce an arbitration provision that is brought as a result of a discovery of problem with process in the other actions that they chose to litigate despite the arbitration provision and the definition of claim.

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Exhibit 5 at 8:17-22. These facts[4] now require a reaffirmation of that finding by denying Rapid Cash's motion yet again.

2. *Rapid Cash's Class Action Ban Is Unconscionable and Therefore* Unenforceable.

The Court in D.R. Horton, Inc. v. Green stated, "[g]enerally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a . . . clause as unconscionable." 120 Nev. 549, 553, 96 P.3d 1159 (2004) (citing Burch v. Dist. Ct., 118 Nev. 438, 443, 49 P.3d 647, 650 (2002)). Procedural unconscionability concerns unequal bargaining power. D.R. Horton, 120 Nev. at 554 (citing Armendariz v. Foundation Health Psychcare, 6 P.3d 669, 690 (Cal. 2000)). Substantive unconscionability "focuses on the one-sidedness of the contract terms." Id. (quoting Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir. 2003). While both procedural and substantive unconscionability are required for a court to refuse to enforce a contract clause as unconscionable, the Nevada Supreme Court has held that less evidence of substantive unconscionability is required where procedural unconscionability is great. See Burch, 118 Nev. at 444 (citing Armendariz, 6 P.3d at 690). The converse must also be true – less procedural unconscionability is required in cases involving great substantive unconscionability. See, e.g., 15 WILLISTON ON CONTRACTS § 1763A (3d ed. 1972) ("Essentially a sliding scale is

[4] The jurisprudence in this area demonstrates that courts consistently find waiver on far less court-based conduct. Simply bringing a motion to dismiss or seeking summary judgment has been held inconsistent with arbitration and waives the right to arbitrate the dispute. Karnette v. Wolpoff & Abramson, L.L.P., 444 F. Supp.2d 640 (E.D. Va. 2006); see also Atkins v. Rustic Woods Partners, 525 N.E.2d 551, 555 (Ill. Ct. App. 1988) (submitting substantive issues to the court for determination manifests an intent to abandon the right to arbitrate); Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 619 So.2d 908, 914 (Miss. 1993) (waiver found after party sought summary judgment). The overarching inquiry is the degree to which the party seeking to compel arbitration has engaged in acts that demonstrate a desire to resolve the claims judicially rather than through arbitration. Filing suit, applying for, and securing a default judgment necessarily indicates a desire to resolve claims judicially rather than through arbitration. Rapid Cash's conscious decision to litigate with its borrowers waived any right it had to force its borrowers into arbitration.

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invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves."). Where great substantive unconscionability exists, less evidence of procedural unconscionability is required to find a contract clause unconscionable.

a. Rapid Cash's Arbitration Clause is Procedurally Unconscionable.

"An adhesion contract has been defined as a standardized contract form offered to consumers of goods and services essentially on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." Obstetrics and Gynecologists v. Pepper, 693 P.2d 1259, 1260 (Nev. 1985) (emphasis added). "The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms." Id. Rapid Cash's pre-printed, form loan contract is a contract of adhesion. It was presented on a take-it-or-leave-it basis with no discussion that any of its terms were negotiable. See Affidavits of Plaintiffs, attached as Exhibit Nos. 1, 2, 3, and 4. This alone establishes procedural unconscionability in Nevada. D.R. Horton, 120 Nev. at 554 ("clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms. . . because of unequal bargaining power, as in an adhesion contract") (emphasis added).

As a highly profitable and sophisticated company, Rapid Cash's bargaining power is far superior to that of its consumers. On its website, Rapid Cash boasts it operates over 100 locations in 11 states and "serves more than twenty-five states on the internet."[5] Rapid Cash consumers, on the other hand, are far from economically powerful. Rapid Cash consumers live paycheck to paycheck, without credit options, and are forced by their dire financial circumstances to sign whatever triple-digit interest paperwork is set before them in order to acquire funds they are under pressure to obtain at that moment.

[5] http://www.speedycash.com/our-company/ "Rapid Cash" is used in 3 states, "Speedy Cash" is the company name.

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b. The Opt-*Out Clause Does Not Save Rapid Cash's Arbitration Clause from* Being Invalidated as Unconscionable.

Rapid Cash's "Opt-Out" clause purports to give consumers the right to reject forced, binding, pre-dispute arbitration, but it does not save this clause from its unconscionability. Rapid Cash would have this Court believe that the existence of this clause implies that consumers have been provided an opportunity to bargain and so the pre-printed form contract is not procedurally unconscionable. However, this theory fails because Rapid Cash customers have no realistic or meaningful opportunity to bargain. F. Paul Bland, Jr. & Claire Prestel, Challenging Class Action Bans in Mandatory Arbitration Clauses, 10 CARDOZO J. CONFLICT RESOL. 369, 387-389 (2009). "Burying an opt-out clause in a fine-print contract does not mean that every consumer or employee who fails to opt out has chosen arbitration voluntarily." Id. at 387. Companies utilize such language as a strategy, knowing that most consumers, and few if any potential class members, fully read contracts. Simply adding this language does not indicate that the consumer understands arbitration or how it differs from litigation.

Rapid Cash argues that the consumer has a meaningful time to opt out because three of the four contracts allow 30 days to opt out.[6] Any such opt-out provision is not meaningful and does not substitute for a realistic opportunity to bargain. A meaningful time to be allowed to opt out would be after a dispute has developed. It is highly probable that few, if any, Rapid Cash consumers have opted out of arbitration. However, this clause does not change the contract from a take-it-or-leave-it contract of adhesion to an equally negotiated contract. Between the unsophisticated consumer and the business savvy payday loan companies, there is a great disparity and, in reality, no bargaining power on the part of the consumer. A six-page contract, in 10 point font, with the arbitration provision covering 2 ½ single-spaced pages at the end of the contract, does not present the consumer with a meaningful choice. Complicated language in a dense layout of small print and compact spacing prevents consumers from comprehending the meaning of the arbitration clause and the class action ban. Essentially, the opt-out provision is hidden in a maze of fine print and not pointed out to the consumer who is rushed into signing an

[6] Concepcion Quintino's loan agreement does not contain the opt-out provision.

agreement without having the important terms explained. Rapid Cash loan agreements are procedurally unconscionable contracts of adhesion, and the opt-out provision does not change that fact.

c. Rapid Cash's Class Action Ban is Substantively Unconscionable Because It Is Exculpatory in this Case.

Rapid Cash's class action ban is also substantively unconscionable because it effectively serves as an exculpatory clause, relieving Rapid Cash of any liability for wrongdoing in situations like this, where the potential recovery to individuals is small and a lack of financial and legal sophistication by the consumer is the norm. Noted conservative Judge Posner has cogently observed, "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004). The Ninth Circuit affirmed this reasoning in Ting v. AT & T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), aff'd with regard to unconscionability, 319 F.3d 1126 (9th Cir. 2003). In Ting, the district court not only held that the prohibition on class actions was substantively unconscionable because it was one-sided and non-mutual, but also because it acted as a de facto exculpatory clause. Ting, 182 F. Supp. 2d at 930-31.

When a class action ban impedes the pursuit of a judicial remedy (here for fraud on the court), the class action ban is exculpatory. Rapid Cash has thwarted the pursuit of legal remedies by denying class members their right to know they were being sued and thus Rapid Cash fraudulently manipulated the court to obtain default judgments violating the legal right of the Class. It is obvious these consumers are unaware there is a remedy. A class action is the only practical manner to stop Rapid Cash from benefitting from its fraud.[7]

Enforcement of Rapid Cash's class action ban in this case encourages Rapid Cash's slide into dubious and illegal behavior because the company has then effectively created a wall against

[7] These facts are materially distinguishable from Concepcion. Concepcion did not consider cases where class members would have no opportunity to vindicate their rights because they may not even be aware they were sued. The Court in Concepcion believed the plaintiffs could vindicate their rights outside of a class action whereas here, there are class members that do not yet know their rights have been violated.

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its customers' ability to seek assistance when wronged. The issue here reaches well beyond a claim arising out of the agreement; it is sewer service and the deprivation of due process to class members. Allowing this class action ban encourages not just pushing the legal envelope, but going beyond the legal and intentionally hindering the constitutional rights of consumers in order to streamline collection practices.

A class action ban that acts as an exculpatory clause is substantively unconscionable. Because Rapid Cash's class action ban exculpates Rapid Cash from liability on a class-wide scale, its class action ban is substantively unconscionable and cannot be enforced.

d. Rapid Cash's Class Action Ban is Also Substantively Unconscionable Because It Is One Sided.

Rapid Cash's class action ban is unconscionable because it is one sided. The provision states that neither Rapid Cash nor the consumer has the right to participate in a class action as a class representative or class member. It is highly doubtful that Rapid Cash would ever sue its customers in a class action, but Rapid Cash's customers may, at times, have reason to bring a class action against Rapid Cash. Rapid Cash is not giving up an equal right because Rapid Cash's rights remain intact while the consumers are stripped of a remedy. Thus this class action ban lacks the bilaterality required in an arbitration clause.

The facts of this case illustrate the non-mutuality of this clause in practice, too. In every case for every Class member, Rapid Cash chose to resort to the court. Rapid Cash hired attorneys, filed litigation, hired the process server, filed multiple pleadings to obtain default judgments, and often issued writs and garnished income. At every step, Rapid Cash consciously choose not to arbitrate. On the other hand, the Class members in this case, arguably following Rapid Cash's lead, are looking to this Court for relief. Now, Rapid Cash has decided that the arbitration provision, and particularly the class action ban, is required. Rapid Cash must not be permitted to use this provision as a sword and a shield, while leaving its consumers defenseless.

If this Court finds the class action ban unenforceable, then the entire arbitration clause is void by its own text. In its motion and supporting documents Rapid Cash points to the

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arbitration provisions of the payday loan agreements, with the exception of Section 9, which provides: "if Section 5(C) [class action ban], (D) and/or (E) [joinder or consolidation of claims] is declared invalid in a proceeding between you and us...this entire Arbitration Provision (other than this sentence) shall be null and void. . . ."[8] See Exhibit A, among other loan agreements, attached to Affidavit of Richard Duke Gee. Such an "if we can't have the class action ban, we don't want arbitration at all" term is often referred to as a "blow up" clause.

It is not difficult to discern why Rapid Cash would write a blow up clause into its deals. Courts, constrained by review provisions of federal law, will not overturn an arbitrator's decision except in the most narrow and rare of circumstances. One federal court of appeals recently held that arbitrators' decisions may not be overturned even when their legal reasoning is "wacky,"[9] and another held that arbitrators' decisions can't be overturned even if they include "gross errors"[10] of legal reasoning. The United States Supreme Court itself has held that arbitrators' decisions may not be overturned even when their findings of fact are "silly."[11] So, while it is apparent that Rapid Cash is happy to force individual disputes with its borrowers into arbitration without any meaningful review, if the Court strikes the class action ban, then Rapid Cash wants no part of a class action taking place in arbitration; instead, Rapid Cash wants what it denies its borrowers: the protection of due process and meaningful review in court. Rapid Cash's choice to include a blow-up clause places the validity of the entire arbitration provision on the enforceability of the class action ban.

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[8] In the Harrison, Varcados, and Dungan contracts, Section 9 states, "If any part of this Arbitration Provision cannot be enforced, the rest of this Arbitration Provision will continue to apply; provided, however, that if Section 5(C),(D) and/or (E) is declared invalid in a proceeding between you and us, without in any way impairing the right to appeal such decision, this entire Arbitration Provision (other than this sentence) shall be null and void in such proceeding." There is no class action ban in Quintino's contract.

[9] Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2006).

[10] Pfeifle v. Chemoil Corp., 73 Fed.Appx. 720, 723 (5th Cir. 2003) (quoting Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994)).

[11] Major League Baseball Players *Ass'n* v. Garvey, 532 U.S. 504, 509 (2001).

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Absent this class action, legal representation for consumers to challenge Rapid Cash for sewer service will not exist. This case is not economically viable on an individual basis due to the small amount of damages at stake to each individual consumer, compared with the complexity and potential cost of litigating the particular claims involved. AT&T itself argued that the rule it sought would not mandate enforcement of every class action ban and argued that courts could invalidate agreements that are "egregiously unfair" and upon finding "that a customer is unable to vindicate her rights on an individual basis." Concepcion, Reply Br. for Petitioner, 2010 WL 4312794.[12]

Additionally, without the aid of an attorney and this class action, many consumers will not be aware that their legal rights have been violated. There is group of Rapid Cash customers who may not have knowledge of the underlying Justice Court lawsuit because collection has not begun against them. If they are not aware of the default judgment and have not been collected on yet, this class action is the only means for the consumer to assert their rights. State supreme courts have struck down class action bans in part on the ground that the vast majority of consumers, absent the class action device, would not realize that they have a claim. See Kinkel, 857 N.E.2d at 268 ("The typical consumer may feel that such a charge is unfair, but only with the aid of an attorney will the consumer be aware that he or she may have a claim that is supported by law. . . ."); Scott, 161 P.3d at 1007 ("Without [class actions], many consumers may not even realize that they have a claim. The class action provides a mechanism to alert them to this fact.") (internal citations omitted).

Should this Court require further evidence of the class members' inability to vindicate their rights in individual arbitrations, the Class hereby requests an evidentiary hearing during which it may offer proof that, inter alia, customers have not filed against Rapid Cash, it would be impossible to secure counsel to fight Rapid Cash on their individual behalves, many class

[12] Concepcion's conclusion that class-wide proceedings were not necessary in that case for the plaintiffs to effectively vindicate their rights does not compel the same conclusion here because the facts of this case clearly distinguish it from Concepcion. See supra at pp. 9-16.

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members remain yet unaware their rights have been violated, and the complexity and fraud-on-the-court-based nature of the issues in this class action demand class treatment.

3. *The Class Members' Claims Fall Outside the Scope of the Arbitration* Clause.

Rapid Cash's arbitration clause and class action ban are also unenforceable in this case because the Class's claims fall outside the scope of these provisions. The Rapid Cash arbitration clause/class action ban is worded in the most broad way imaginable, requiring that the parties arbitrate any dispute that "arises from or relates in any way to," the payday loan agreements. See, e.g., Deferred Deposit Agreement and Disclosure Statement, page 3, ¶ 2, Exhibit A, among other loan agreements, attached to Affidavit of Richard Duke Gee. Courts interpreting and applying such broadly worded arbitration clauses have held that the dispute must bear a significant relationship to the contract, and at least one court has refused to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings. As the instant dispute has no real relationship to the payday loan contracts that contain the arbitration clauses that Rapid Cash has long ignored, arbitration should not be compelled.

a. The Dispute Does Not Have a Significant Relationship to the Contract.

When deciding whether a claim falls within the scope of an arbitration agreement, courts 'focus on factual allegations in the complaint rather than the legal causes of action asserted.'" Jones v. Halliburton Co., 583 F.3d 228, 240 (5th Cir. 2009) (quoting Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V., 372 F.3d 339, 344 (5th Cir. 2004)). Jones v. Halliburton Co. demonstrates the inapplicability of contractual arbitration clauses to certain tort claims. Jones involved an alleged rape of an employee by her coworkers in Iraq that was covered by worker's compensation, but nonetheless held beyond the scope of an arbitration clause in her employment contract, which provided: "You understand that the Dispute

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Resolution Program requires, as its last step, that any and all claims that you might have against Employer related to your employment . . . must be submitted to binding arbitration instead of to the court system." 583 F.3d at 235 (emphasis original). Discussing broad arbitration clauses and Fifth Circuit and United States Supreme Court precedent, the Jones court expressed:

> Of course, although this [expansive reach, governing disputes of anything "related to" the contract] reach is broad, it is not unbounded. Pennzoil recognized that a dispute need only "'touch' matters covered by" the arbitration agreement to be arbitrable, (citations omitted); in the same discussion, however, it defined an arbitrable dispute under a broad clause as one "having a significant relationship to the contract,"—here, Jones' employment contract" regardless of the label attached to the dispute"—(citation omitted). It further noted: "[E]ven broad clauses have their limits."

Id. at 235 (citation omitted). Thus, even the most broadly worded arbitration clauses, which are construed such that a dispute need only "touch" matters covered by the arbitration agreement, are not unbounded: **the arbitrable dispute must still bear a significant relationship to the contract.**

The dispute in this case is not an arbitrable dispute because it has nothing whatsoever to do with the payday loan contract, let alone a significant relationship to the contract. The essence of this case is the commission of a fraud upon the court through the filing of falsified affidavits of service of process. This claim stands without reference to, and independent of, the payday loan contracts. Hill v. Hilliard, 945 S.W.2d 948 (Ky. Ct. App. 1996), relied upon in Jones, illustrates this point. Rejecting the argument that a broad clause requiring arbitration of any controversy "arising out of employment" compelled arbitration of a claim arising from sexual assault by a coworker, the Hill court held, "The only connection those torts and crimes have with [plaintiff]'s employment is that they were committed by a co-worker and occurred while on a business trip. The mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative. What [the supervisor] is accused of doing is independent of the employment relationship." Jones,

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583 F.3d at 236 (internal citations omitted). The Jones Court further noted that Jones's claim that Halliburton was vicariously liable for the assault strengthened its conclusion that the case was beyond the scope of the arbitration clause. Id. at 237.

The Class's claims in this case – based on the **tortious conduct** of Rapid Cash and its agent On Scene in abusing the justice court system and Plaintiffs' due process rights – similarly bear an insufficient relationship to the payday loan contracts in which the subject arbitration clauses are found. Parties cannot reasonably be held to have intended to contract to arbitration of events with no significant relationship to the contract in making a payday loan agreement of a few hundred dollars. In denying (for a second time) Defendant's Motion to Compel Arbitration for lack of relation between the class claims and the underlying loan agreements, this Court would be in good company. See, e.g., Hyde v. RDA, Inc., 389 F. Supp. 2d 658, 664 (D. Md., 2005) (finding that Fair Credit Reporting Act (FCRA) claim did not bear any significant relationship to the automobile contract and that the transaction giving rise to the FCRA claim was separate and independent from the transaction involving the arbitration agreement); see also Ford v. NYLCare Health Plans of Gulf Coast, Inc., 141 F.3d 243, 251 (5th Cir., 1998) (holding that a doctor's false advertising claim against health maintenance organization (HMO) was not related to contract between doctor and HMO covering the performance of medical services; Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1516 (10th Cir., 1995) (finding that antitrust claim based on market behavior was not related to parties' licensing agreement); Parfi Holding, AB v. Mirror Image Internet, Inc., 817 A.2d 149, 151 (Del. 2002) (finding breach of fiduciary duty claim unrelated to contract containing arbitration clause).

b. This Court Should Refuse to Apply a Contractual Arbitration Clause to Unforeseeable Torts.

These arbitration clauses also should not apply in this case because it concerns tortioius conduct that could not have been reasonable foreseeable to Rapid Cash's borrowers. A court is within its discretion to refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

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Aiken v. World Fin. Corp., 644 S.E.2d 705, 709 (S.C. 2007), reh. den., 2007 S.C. LEXIS 234 (S.C. May 23, 2007), cert. den. sub nom. World Fin. Corp. v. Aiken, 552 U.S. 991 (2007). Aiken took out a series of loans from World Finance in 1997-1999, paying off the last loan in 2000, which required him to provide personal information. Around 2002, certain employees of World Finance stole his personal information and obtained sham loans. Aiken sued World Finance alleging various identity theft legal theories. World Finance moved to compel arbitration under a broadly worded arbitration clause. Aiken, 644 S.E.2d at 707 (emphasis added). The Court denied World Finance's motion to compel arbitration, noting that cases holding that the matter must still involve a "significant relationship" between the asserted claims and the contract in which the arbitration clause is contained. Id. at 708. The Court then rejected World Finance's argument there was a significant relationship between Aiken's claims and the underlying loan agreement:

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> We find this argument unpersuasive. In our opinion, the "relationship" asserted by World Finance between Aiken's tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of "significant." Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable. "[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement.").

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Id. (internal citations omitted). And although Aiken had paid his loans in full when the employees' tortious acts occurred, the Court did not consider the timing of the employees' tortious conduct relevant to the arbitrability of Aiken's claim, reasoning that "even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law," so "this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." Id.

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Plaintiffs' claims against Rapid Cash concern egregious tortious conduct that could not possibly have been foreseen by the Class members at the time they entered into the payday loan agreements containing the arbitration clause. Consequently, in signing the agreement to arbitrate, no class member agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, this Court should follow Aiken and similarly refuse to compel arbitration.

4. Enforcement *of Rapid Cash's Arbitration Clause Would Violate Public* Policy Because its Effect Would be to Perpetuate a Fraud on the Court and Violate the Public Interest Purpose of this Lawsuit.

It is well settled that a court will not enforce a contract provision in violation of public policy. State Farm Mut. Auto. Ins. Co. v. Hinkle, 488 P.2d 1151 (Nev. 1971) (lack of uninsured motorist protection in auto insurance contract against public policy and void). The Rapid Cash arbitration clause as applied to the facts of this case is void as against the public policy of the courts to control their own dockets and to prevent abuses of the judicial process.

By way of analogy, courts refuse to enforce no-waiver provisions in arbitration clauses because a court's authority to determine that a party has waived its right to arbitration through litigation conduct derives from its inherent authority to control its docket, which cannot be limited by a contract between parties to litigation. Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341, 348 (5th Cir. 2004) ("The inclusion of a 'no-waiver' clause does not eliminate the district court's inherent power to control its docket."). Moreover, enforcing such provisions would sanction an abuse of the judicial process. Id.; S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 85-86 (2nd Cir. 1998); Home Gas Corp. v. Walter's of Hadley, Inc., 532 N.E.2d 681, 684-85 (Mass. 1989).

Once Rapid Cash filed one case, and indeed thousands of cases, it submitted itself to the jurisdiction of the courts. If indeed Rapid Cash engaged in the litigation conduct of which it is accused herein, then it simply cannot be heard to complain it is helpless to correct such an abuse of the judicial process due to the presence of a contractual arbitration clause. The Court always

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retains its inherent power to control its own docket, and parties before the Court simply cannot contract it away. Rapid Cash's arbitration provision must be held unenforceable in this case in violation of public policy.

Courts also have refused to enforce arbitration clauses in cases brought in the public interest. Broughton v. Cigna Health Plans, 988 P.2d 67 (Cal. Ct. App. 1999) (motion to compel arbitration denied where plaintiffs sought a public interest injunction to restrain future deceptive advertising practices); see also Cruz v. PacifiCare Health Sys., Inc., 66 P.3d 1157, 1164-65 (Cal. 2003) (extending Broughton to claims for public injunctive relief under California's unfair competition law); Zavala v. Scott Brothers Dairy, Inc., 49 Cal. Rptr. 3d 503, 510 (Cal. Ct. App. 2006) ("Certainly, plaintiffs' injunctive relief claim under the unfair business practices act (Bus. & Prof. Code, § 17200) is not arbitrable.").

While Plaintiffs do seek relief for themselves and those similarly situated and not solely in the interest of the public, there can be no doubt that this case presents a significant public interest component. If indeed Rapid Cash engaged in the litigation conduct of which it is accused herein, then it has undermined the integrity of the judicial system. It is in the public interest that the judicial system hear this matter in a public proceeding rather than sweep it under the rug in four private, individual arbitrations. Rapid Cash's arbitration provision must be held unenforceable in this case brought in the public interest.

IV.

CONCLUSION

This Court has already denied Rapid Cash's motion to compel and this is simply a fatally late motion for reconsideration, which this court may lack jurisdiction to decide. Rapid Cash's argument that Concepcion changes the result of the last motion to compel arbitration is a hail-Mary attempt that falls flat. This Court deemed Rapid Cash's arbitration clause unenforceable not under a state-wide policy declaring such clauses unenforceable, but because Rapid Cash's personal actions had resulted in a waiver of its arbitration right and permitting this specific defendant to enforce its long-ignored arbitration provision would violate public policy.

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Enforcement would also be against public policy and deny hundreds if not thousands of consumers the opportunity to vindicate their rights. Rapid Cash's years of utilizing Clark County's justice courts as its personal collection agency through nearly 17,000 cases has dispossessed this well-seasoned litigant of any right to now compel arbitration of this consumer-protection class action. Defendants' Motion to Compel Arbitration and Stay All Proceedings must be denied in its entirety as its arbitration clause and class action ban remain unenforceable.

DATED this 7th day of October, 2011.

Respectfully Submitted by Class Counsel:

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

By: /s/ Venicia Considine

DAN L. WULZ, ESQ. (5557)
VENICIA CONSIDINE, ESQ. (11544)
800 South Eighth Street
Las Vegas, Nevada 89101

and

J. RANDALL JONES, ESQ. (1927)
JENNIFER C. DORSEY, ESQ (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2011, the foregoing OPPOSITION TO MOTION TO COMPEL ARBITRATION AND STAY ALL PROCEEDINGS was served on the following person(s) by U.S. Mail:

William M. Noall, Esq.
Mark S. Dzarnoski, Esq.
Gordon & Silver, Ltd.
3960 Howard Hughes Parkway 9th Floor
Las Vegas, NV 89169

Alan S. Kaplinsky
Martin C. Bryce, Jr.
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

/s/ Rosie Najera
An employee of Legal Aid Center of Southern Nevada

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EXHIBIT "1"

AFFT
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Attorneys for Plaintiffs and Putative Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated, Plaintiffs, v. 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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman; and DOES I through X, inclusive, Defendants.	Case No.: A-10-624982-B Dept. No.: XI

AFFIDAVIT OF CASANDRA HARRISON

I, CASANDRA HARRISON, being duly sworn deposes and states as follows:

1. I entered the Rapid Cash store on North Jones Blvd to obtain a loan.

2. The store has customer windows. There are no desks to sit at to obtain a loan.

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3. I walked up to a window and the Rapid Cash employee asked me where I worked, for documents to prove my income, and checking account information.

4. The employee typed into a computer.

5. After I was approved for the loan, the employee pushed the papers through her window to me to sign. She held the loan money in her other hand at the time.

6. The employee went over when the payment was due but there was no discussion of the additional contents of the loan agreement.

7. The papers were presented on a take-it-or-leave it basis; there was no discussion of any opportunity to negotiate any of its terms.

8. There was no discussion about the arbitration provision contained in the loan agreement, or the ability to opt-out of the arbitration provision within thirty (30) days after the date of my application.

9. To the best of my knowledge and recollections, the statements, dates, and amounts contained in paragraphs 1 through 9 above are true and accurate

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Casandra Harrison

CASANDRA HARRISON

SUBSCRIBED AND SWORN to before me this 1st day of October, 2010.

Notary Public

Notary Public - State of Nevada
County of Clark
ELIZABETH MONTES
My Appointment Expires
June 3, 2012
No. 95-1876-1

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EXHIBIT "2"

AFF
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Attorneys for Plaintiffs and Putative Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman; and DOES I through X, inclusive,

Defendants.

Case No.: A-10-624982-B
Dept. No.: XI

AFFIDAVIT OF EUGENE VARCADOS

I, EUGENE VARCADOS, after first being duly sworn, deposes and states as follows:

1. I am a resident of Clark County, Las Vegas, Nevada.

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2. I signed loan agreements with Rapid Cash at a store on Maryland Parkway and Karen Avenue and a store located on Sahara Avenue and Decatur Boulevard.

3. The store had several customer windows. There are no desks to sit and read loan documents.

4. Typically, there were four or five people in the store at one time.

5. Excluding the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule, there was no discussion of the additional contents of the loan agreement.

6. There was no discussion about the arbitration provision contained in the loan agreement, or the ability to opt-out of the arbitration provision within thirty (30) days after the date of my application.

7. The pages of the loan agreement were loose when presented to me, and the last page, the signature page, was on top of the pile of papers and obscured the remainder of the loan agreement.

8. Rapid Cash obtained my signature on the signature page of the loan agreement, kept the signed copy, and gave me a complete unsigned copy of the loan agreement with a receipt stapled over the terms on the first page.

9. Rapid Cash's pre-printed form loan agreements were presented to me on a take-it-or-leave-it basis.

10. There was no opportunity to negotiate the terms of the loan agreement prior to signing.

11. To the best of my knowledge and recollections, the statements, dates, and amounts contained in paragraphs 1 through 11 above are true and accurate.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

EUGENE VARCADOS

SUBSCRIBED AND SWORN to before me this 5th day of October, 2010.

Notary Public - State of Nevada
County of Clark
VIOLETA L. HERNANDEZ
My Appointment Expires
No: 95-1821-1 April 13, 2011

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EXHIBIT "3"

AFF
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Attorneys for Plaintiffs and Putative Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Vargeados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman; and DOES I through X, inclusive,

Defendants.

Case No.: A-10-624982-B
Dept. No.: XI

AFFIDAVIT OF CONCEPCION QUINTINO

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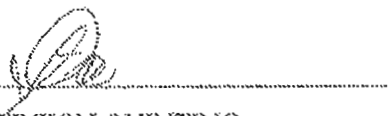
I, CONCEPCION QUINTINO, having been sworn declare and state,

1. I entered the Rapid Cash store on South Maryland Parkway to obtain a loan.
2. The store has two customer windows and a sign that states, "Wait in Line." There are no desks to sit and obtain a loan.
3. I got into the line with my husband, where approximately 7 people were waiting ahead of me.
4. After thirty to thirty-five minutes, it was my turn to approach the window.
5. At the window, the Rapid Cash employee asked me where I worked, for documents to prove my income, and checking account information.
6. The Rapid Cash employee walked away to obtain approval for the loan, this was the bulk of the time I stood at the window, waiting for approval.
7. The employee returned and typed into a computer. She then walked away and returned with several loose papers.
8. The employee put the signature page in front of me and asked me to sign it.
9. I signed and then the employee signed.
10. The papers were presented on a take-it-or-leave it bases; there was no discussion of any opportunity to negotiate any of its terms.
11. There was no discussion about the arbitration provision contained in the loan agreement.
12. The entire process took place standing at the window with a line of people behind me, making me feel rushed.
13. To the best of my knowledge and recollections, the statements, dates, and amounts contained in paragraphs 1 through 7 above are true and accurate.

I declare and affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 5th day of October, 2010.



CONCEPCION QUINTINO

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SUBSCRIBED AND SWORN to before
me this 3rd day of October, 2010.

Elizabeth Montes
Notary Public

Notary Public - State of Nevada
County of Clark
ELIZABETH MONTES
My Appointment Expires
June 3, 2012
No. 96-1076-1

I declare that I translated every line of the Affidavit of Concepcion Quintino in Spanish is an authentic and correct translation.

Violeta Hernandez
Violeta Hernandez.

SUBSCRIBED AND SWORN to before
me this 2nd day of October, 2010.

Elizabeth Montes
Notary Public

Notary Public - State of Nevada
County of Clark
ELIZABETH MONTES
My Appointment Expires
June 3, 2012
No. 96-1076-1

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EXHIBIT "4"

AFF
Dan L. Wulz, Esq. (5557)
Venicia Considine, Esq. (11544)
LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
800 South Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-1070 x 106
Facsimile: (702) 388-1642
dwulz@lacsn.org

J. Randall Jones, Esq. (1927)
Jennifer C. Dorsey, Esq. (6456)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
jrj@kempjones.com
Attorneys for Plaintiffs and Putative Class Counsel

DISTRICT COURT

CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated,

Plaintiffs,

v.

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; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman; and DOES I through X, inclusive,

Defendants.

Case No.: A-10-624982-B
Dept. No.: XI

AFFIDAVIT OF MARY DUNGAN

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I, MARY DUNGAN, having been sworn declare and state,

1. I am a resident of Clark County, Las Vegas, Nevada.
2. I signed loan agreements with Rapid Cash at a store on Boulder Highway and Nellis Boulevard.
3. The store had several customer windows. There are no desks to sit at and read loan documents.
4. Excluding the finance charge, the amount financed, the total of payments, and the payment schedule, there was no discussion of the additional contents of the loan agreement.
5. The pages of the loan agreement were stapled when presented to me and the Rapid Cash agent folded the loan agreement to the last page and said "sign here," without discussing the contents of the pages of the loan agreement between the first page and the last page.
6. I cannot recall whether Rapid Cash provided me with a copy of the loan agreement.
7. Rapid Cash's pre-printed form loan agreements were presented to me on a take-it-or-leave-it basis.
8. There was no opportunity presented to negotiate the terms of the loan agreement prior to signing.
9. To the best of my knowledge and recollections, the statements, dates, and amounts contained in paragraphs 1 through 10 above are true and accurate.

I declare and affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 5th day of October 2010.

Mary A. Dungan

MARY DUNGAN

SUBSCRIBED AND SWORN to before me this 5th day of October, 2010.

Violeta L. Hernandez

Notary Public

Notary Public - State of Nevada
County of Clark
VIOLETA L. HERNANDEZ
My Appointment Expires
April 13, 2011
No: 98-1137-1

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EXHIBIT "5"

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

CASANDRA HARRISON, et al. Plaintiffs vs. PRINCIPAL INVESTMENTS, INC., et al. Defendants	CASE NO. A-624982 DEPT. NO. XI Transcript of Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

TUESDAY, OCTOBER 12, 2010

APPEARANCES:

FOR THE PLAINTIFFS:	DAN I. WULZ, ESQ. JENNIFER DORSEY, ESQ. J. RANDALL JONES, ESQ.
FOR THE DEFENDANTS:	MARK S. DZARNOSKI, ESQ. MARTIN BRYCE, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

CASANDRA HARRISON, et al. Plaintiffs vs. PRINCIPAL INVESTMENTS, INC., et al. Defendants	.	CASE NO. A-624982 DEPT. NO. XI Transcript of Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

TUESDAY, OCTOBER 12, 2010

APPEARANCES:

FOR THE PLAINTIFFS:	DAN I. WULZ, ESQ. JENNIFER DORSEY, ESQ. J. RANDALL JONES, ESQ.
FOR THE DEFENDANTS:	MARK S. DZARNOSKI, ESQ. MARTIN BRYCE, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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LAS VEGAS, NEVADA, TUESDAY, OCTOBER 12, 2010, 9:15 A.M.

(Court was called to order)

THE COURT: Oh. Good. My case I have to make disclosures on.

Mr. Jones, I was on the phone with Mr. Jones your brother and Mr. Peek and Mr. Campbell, and I apologize for being late.

MR. JONES: Your Honor, I understand.

THE COURT: All right. Here's my disclosures on this case. Or at least I think they relate to this case. This is Case Number A-624982. I used to be chairman of the board of Clark County Legal Services before I was a judge. And I think, Mr. Dzarnoski, you called me about issues related to this case and who you should talk to within the court system.

MR. DZARNOSKI: Spoke with Judge Togliatti.

THE COURT: And I sent you somewhere else. Or did she call me and say who I should send you to?

MR. DZARNOSKI: I spoke with Judge -- I spoke with -- I spoke with Judge Ritchie.

THE COURT: Okay.

MR. DZARNOSKI: Judge Ritchie asked Judge Togliatti to call me, and I spoke with Judge Togliatti. I never spoke with you, Your Honor.

THE COURT: My note says I can't remember if I

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actually talked to you or Jenna or Melissa asked me who you should talk to.

MR. DZARNOSKI: You did not speak with me.

THE COURT: Okay. I was on vacation when some of the issues related to these kind of things occurred, and as presiding civil judge I delegated an administrative investigation on this to Judge Togliatti, who was acting as presiding civil judge at that time. She reported on the results of her investigation, which was mainly how many cases did we have in District Court that were affected by the process server issue at a civil judges meeting. And when I was recruiting attorneys to do pro bono, I think at Jones Vargas, I asked Barbara Buckley if they were filing a class action, and she said yes.

And then I also have a disclosure about John Gutke, who I think now works for your firm and used to be my law clerk.

MR. DZARNOSKI: He does work for our firm.

THE COURT: Okay. Those are all my disclosures.

MR. DZARNOSKI: May I have a moment to speak with --

THE COURT: You may have a moment.

MR. DZARNOSKI: -- my client representative?

THE COURT: And by the way, I don't think that anything that I just told you would cause me not to be fair, which is why I didn't disqualify myself. But I went through

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the list for you.

MR. DZARNOSKI: Thank you.

(Pause in the proceedings)

MR. DZARNOSKI: None of those disclosures cause us concern, Your Honor.

THE COURT: All right. Then let's start with your motion to compel arbitration and stay all proceedings.

MR. DZARNOSKI: May I as a preliminary matter introduce Mr. Martin Bryce from Ballard Spar.

MR. BRYCE: Good morning, Your Honor.

THE COURT: Good morning.

MR. DZARNOSKI: And I tried to get an order shortening time on admitting him pro hac vice. We have circulated it to opposing counsel. If they would not object, I have an order.

THE COURT: Is there any objection?

MR. JONES: No objection, Your Honor.

THE COURT: I'd be happy to sign your order, Mr. Dzarnoski. And I'm sorry, but I got it yesterday and I couldn't set it for today because I didn't have a day's judicial notice.

MR. DZARNOSKI: I understand. We tried Friday, and you were in trial or something.

THE COURT: I'm always in trial. There you go.

MR. DZARNOSKI: Thank you, Judge.

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THE COURT: All right. It's your motion.

MR. DZARNOSKI: Again good morning, Your Honor.

Let me start with the observation that I'm fully aware that you have ruled on far more arbitration clauses than I'm ever going to read in my lifetime. That said, my review of the current arbitration agreement that Rapid Cash is using is that it's probably the most consumer-friendly arbitration provision I've ever seen, and I'm hoping that you also believe that.

Insofar as I am aware, the two most recent cases that have sort of bubbled through our District Court system that involve arbitration clauses and class action waivers were before you and were before Judge Denton. You compelled arbitration in an -- for an arbitration clause containing a class action waiver in the Nissan Motors case in October of 2008. Judge Denton compelled arbitration in the Hyundai Motors case about a week after your decision, and that has been sent up to the Nevada Supreme Court on a writ of mandamus and is currently pending before the Supreme Court of the State of Nevada.

THE COURT: For almost two years.

MR. DZARNOSKI: Yes. I had the opportunity last night to read the supplemental briefs that have recently been filed in that case, and I would first like to bring your attention to the fact that the Nevada Supreme Court is acutely

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aware of two recent United States Supreme Court cases that are at issue or are relevant to this case. And one is Stolt-Nielsen. Excuse me for turning my back, Your Honor.

THE COURT: It's all right, Mr. Dzarnoski. I know there's a lot of paperwork that you probably need to get.

MR. DZARNOSKI: The second is Rent-A-Center West, Inc. v. Jackson. And the Nevada Supreme Court had asked most recently for supplemental briefs in light of those two cases for the parties to brief whether or not the District Court would have jurisdiction to hear claims regarding the validity and enforceability of arbitration agreements if the arbitration agreement provides that that should go forward and be decided by an arbitrator.

THE COURT: Can I ask a question, though, to sort of cut to the chase here.

MR. DZARNOSKI: Yes, Your Honor.

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

My question is, though, given the filing of the litigation by Rapid Cash and its related entities, don't you think there has been a waiver of the arbitration provision given the wording that is contained in it?

MR. DZARNOSKI: No, Your Honor.

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THE COURT: Tell me why.

MR. DZARNOSKI: Yes, Your Honor. First, I believe that the issue of waiver, again, would be decided by the arbitrator, rather than before this Court. That goes to the issue of the validity, the enforceability, and the scope of the arbitration agreement. Those are covered clearly and unambiguously in both the older version of the arbitration agreement and the current version of the arbitration agreement. So that issue I don't even think is before you. So I think an arbitrator would be the one to decide whether there's been a waiver. But let's dispense with that for a moment and let me answer the question.

The old agreement specifically excludes from the definition of claims those things that were filed in the Small Claims Court, reserves the right for the parties to file actions in Small Claims Court. The newer version of the -- I'll call it the state-of-the-art arbitration agreement specifically indicates again that those cases can be filed in Small Claims Court, and it contains the language that there is no waiver that should be inferred or implied from filing the cases.

And let me look at the exact language in here. Quote, "Even if the 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

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lawsuit, and nothing in that litigation shall constitute a waiver of any rights under this arbitration provision."

So therefore we have a clear statement that there's no waiver by filing of a Small Claims Court action. Does that answer your question?

THE COURT: Not really. But I understand the position.

MR. DZARNOSKI: Okay. May I ask, though, and cut to the chase, why is it the language isn't sufficient?

THE COURT: I think here you have claims that go beyond -- I'm sorry, litigation claims in this complaint that go beyond what could be argued would be subject to an arbitration provision especially given the manner in which at least one of the codefendants, who apparently has now been convicted, conducted himself.

MR. DZARNOSKI: Well, I --

THE COURT: So I certainly think that it is problematic for your client to try and enforce an arbitration provision that is brought as a result of a discovery of problems with process in the other actions that they chose to litigate despite the arbitration provision and the definition of claim.

MR. DZARNOSKI: Well --

THE COURT: Because the arbitration provision says -- it sets forth when and how claims "which you or we have

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against one another will be arbitrated instead of litigated in court." Okay. That's great. Your guys picked litigation. Even if it's in Small Claims, and I assume the argument the argument under the newer definition, that means that you don't get to -- you get to not have a waiver. But given some of the other conduct that's alleged, it is of concern to me as to whether I should determine that is a waiver of the provision because of at least the nature of what went on in these very unusual circumstances and the unusual nature of the claims in this particular case.

MR. DZARNOSKI: Thank you for that clarification.

THE COURT: Do you understand what I'm saying?

MR. DZARNOSKI: I do.

THE COURT: Because this complaint isn't just, we don't owe the money, or, we were forced to -- or executed this agreement for payday loan or whatever it's called under duress. This isn't -- that's not what this case is about. This case is a lot bigger than that.

MR. DZARNOSKI: Absolutely much bigger than that. However -- and let me respond in two ways. One, I think that the issue you're bringing up now is different than the issue of waiver. The case of Stolt-Nielsen, for instance, makes it very clear that under the Federal Arbitration Act the parties are free and the United States Supreme Court will allow parties to define anything they want to arbitrate. I mean,

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they could specifically identify this, this, this, and this that they want to arbitrate and exclude that. And when they have done that and they have specifically put the things that are included in the arbitration and they have excluded other claims from the arbitration agreement, then the agreement of the parties will be enforced. And you wouldn't have a waiver situation if you have carved out a specific portion of claims that you are not going to arbitrate. So you don't have the issue of waiver. That's what we've done here.

But the other issue, more directly to what you are speaking of, is that, again, in the definition of "claims" under both agreements the claims involve -- include a broad array --

THE COURT: Yeah, it does.

MR. DZARNOSKI: -- of matters, one of which is specifically included "disputes arising out of collection of any amounts you owe."

THE COURT: And that's small Arabic (5) -- or, I'm sorry, small Roman (v).

MR. DZARNOSKI: That's in the new arbitration agreement under "Definition of Claim."

THE COURT: And it's under "Meaning of Claims," small Roman (v).

MR. DZARNOSKI: That would be under the old arbitration agreement, correct. So we have a specific

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reference to anything that derives in both of them out of collection efforts. There is -- I don't see any way you can get around looking at this as the filing of a Small Claims Court matter that is excluded from the definition of claims for arbitration is not part of the collection effort that Rapid Cash has undertaken in order to get its money.

So we are specifically dealing with all claims that might arise out of the collection issues with respect to both agreements. And therefore, even though it involves failure to serve process, it still derives out of those collection claims. And keep in mind that every one of those parties or persons who claim -- although right now we have four, let's keep that in mind, we don't have a massive amount of people who have claimed that they have not been served process. The conviction that you just referred doesn't have anything to do with Rapid Cash customers. None of those victims that were subject to the criminal prosecution came from Rapid Cash's customers. That dealt solely with a collection agent, and I can't remember the collection company -- Richland Holdings, I believe. So we have four people that are sitting here. All four of those people could file a 60(b) motion to set aside their default judgment in Small Claims Court and proceed. And all four of those, as a matter of fact, could choose arbitration if they wanted to. They could make a filing and choose arbitration on their own. But --

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THE COURT: And do you think the County Commission is going to approve the master that Justice Court asked for to assist with that process?

MR. DZARNOSKI: Your Honor, I -- you mentioned that I have discussed with Judge Togliatti, and I'm not certain I should make that the request as to what I --

THE COURT: I don't -- yeah. Okay. I just know that there's something on the County Commission agenda about a master for Justice Court dealing with it.

MR. DZARNOSKI: And believe me, Your Honor, Rapid Cash is ready, willing, and able to assist the County and anybody else to try and resolve all of these claims.

Now, I would also like to point out, though, Your Honor, in terms of the first arbitration agreement -- because we -- you have to look at the terms of both.

THE COURT: Okay.

MR. DZARNOSKI: In the older arbitration agreement clearly the issue of falsification of affidavits would fall under the definition of claims, because the definition of claims is "Any claim, dispute, or controversy between you and us that arises from or relates in any way to service --" oh. I'm sorry. This is -- this is the new one. Let me get to the old one. Lots of paper.

"Claims means any and all claims, disputes, or controversies that arise under common law, federal or state

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statute or regulation, or otherwise." Doesn't say, in connection with this agreement. It doesn't say that are limited to collection matters. There's no limitation whatsoever. It is broad and covers every single claim or dispute that arises under common law or under statute.

Every claim that the plaintiffs have made in this case arise under common law or under statute. So under that circumstance, no matter how bizarre, you look at the situation that we're all facing now, clearly the first agreement covers all of those disputes. I argue strenuously that because it is in connection with collection efforts that it falls under both the current agreement and the initial agreement. But the first agreement certainly covers all of those claims.

THE COURT: Thank you, Mr. Dzarnoski.

MR. DZARNOSKI: Is there any further questions?

THE COURT: Not yet. I'll probably have more to you after the other side goes.

MR. DZARNOSKI: Thank you, Your Honor.

THE COURT: I do see a lot of arbitration provisions. This one's better than most.

MS. DORSEY: I would agree with you. It is better than most on the surface. It absolutely looks better. But in effect it's no better than any other.

And, Your Honor, I think that you got right to the heart of the question, which is, given the filing of the

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litigation in the ridiculous numbers by Rapid Cash -- we're talking about almost 17,000 Justice Court actions in the last five years, 17,000. We don't have a single anecdotal piece of evidence that they've ever tried to arbitrate a single claim under their agreement with any of these customers, but we do know that they've used the Justice Court in the last year -- last five years 17,000 times.

And so when we look at what constitutes a waiver under Nevada law we look to that Nevada Gold case particularly. And the two factors that I think are most important, the first one is conduct that indicates an intent to waive, conduct that indicates that you would prefer to use the District -- or prefer to use the court system over arbitration. I think 17,000 cases probably gets us there.

And interestingly enough, the defendant has failed to provide you with any case of litigation of this type of magnitude where a court did not find that there was waiver. And in fact I would suggest that this is such an egregious -- such an egregious case of using the court systems over invoking an arbitration clause that you won't find a case that's quite this severe.

And the second prong under the Nevada Gold case is prejudice. And we also know that of these 17,000 cases they've taken most of these to judgment, and there have been numerous courts that have held that if you take a case through

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litigation to judgment, the person you get the judgment against is sufficiently prejudiced that there's a waiver found. This is a pretty clear-cut case of waiver. I would -- I would argue that you probably wouldn't find a case of such a clear indication to waive the arbitration provision.

Now, defense counsel cited to two different recent Supreme Court cases, and he suggests that these Supreme Court cases would lead you to decide that there was no waiver here. The first one is the Stolt-Nielsen case. And he tells you that this case out of the Supreme Court says the parties' agreements have to be enforced on their terms.

The Stolt-Nielsen case is so completely distinguishable on its facts that it has absolutely no application here. In Stolt-Nielsen we were talking about two multi-national companies, not consumers, not payday loan consumers who really have no options monetarily like our clients do. The case is so distinguishable. And essentially what the Stolt-Nielsen case holds is that when you have two sophisticated, multi-national businesses you can apply the contract that they have -- that they've negotiated between them. It is not a case that applies any state law. It's completely a federal case. And the issues that you're presented with in this case are not present in that case. So that's just simply not a case that you need to look to when you decide the issue in front of you right now.

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The other thing that I want to talk about is how this clause truly, even though it may appear to be a better consumer clause, in fact I think defense counsel said that it was one of the most consumer-friendly provisions he's ever seen, how it doesn't in fact make it more consumer friendly. He essentially indicates that we've got this opt out clause and so --

THE COURT: It does. It has a right to reject arbitration after they give you the money.

MS. DORSEY: A right to reject the -- that's absolutely true. But what it doesn't do is it doesn't change the fact that this is a completely adhesion contract. None of these customers can change a single word in the agreement at the time that it's being signed. What it does allow someone to do is within the 30 days after they go home after signing this agreement they can send a certified letter to Kansas, saying, I don't want to have arbitration apply to me in the event that we have some kind of a dispute.

Well, in order for those kind of clauses to be enforceable they need to be meaningful. And the disputes in this case all arose more than 30 days after the signing of these contracts. So none of these customers would have ever had the opportunity to recognize that they should opt out of this arbitration clause, because the conduct that the defendants are involved in all happened more than 30 days

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later. So this is just not a meaningful opt out provision. It doesn't change the nature of this as an adhesion contract.

So essentially what you have here is a provision that forecloses the ability for these consumers to come into court. Now, they've suggested -- there are four plaintiffs at this point. They've suggested that all four of these plaintiffs could go to the Justice Court and they can file an action to have their default judgments reopened. Again, we need to look at how realistic this is. First of all, that's just the four that we represent right now. As you know, we framed this as a class action because we believe that of those 17,000 lawsuits they filed in the last five years there are going to be more than four people who were the victim of the service that was employed for our clients.

So essentially what they're saying is that these low-income clients need to get a lawyer, they need to go to court, and they need to set aside these judgments, so that they're suggesting that these people can actually, one, get a lawyer to do this for them, and, two, that the court system can actually shoulder the burden of having all of these people individually file lawsuits. And, as you know, Your Honor, that's not something that this court system can bear, particularly if we get up to the kind of numbers that we anticipate in this case, particularly 17,000.

And finally, what makes them think that they

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wouldn't then invoke the arbitration clause and force all of these people into arbitration even if they individually filed these lawsuit? So if they're suggesting that with these four we need to have the -- they're invoking the arbitration clause and that it should apply, there's no reason for us to believe that they wouldn't do the exact same thing if these people filed individual actions to set aside those default judgments.

I also want to address the scope of these arbitration clauses, because defense counsel discussed those with you. The -- he notes that the definition of "claims" is extremely broad. And I would agree with that. It's extremely broad. But what it isn't is so broad that these consumers should have known at the time that they signed these agreements that an action like this, an action arising from fraud, not from legitimate collection activities, but actual fraud would be covered under an arbitration provision in a loan agreement. That's just not something that's foreseeable.

And so even, Your Honor, if the language appears to include something all encompassing, he indicates that it includes any common-law or statutory claim whatsoever, so it's completely all encompassing. But the law says that there have to be -- says that there has to be limits on these incredibly broad provisions. Courts have held that you can't apply contractual arbitration agreement to tortious conduct that a consumer could not have reasonable foreseen when entering into

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the agreement; and here this dispute really has nothing to do with the contractual relationship between these parties, but the subsequent post-contractual tortious conduct by these parties and a fraud on the court.

So we cited to the Aiken case in our brief, Your Honor. And, like the court in the Aiken case, this Court should refuse to interpret this arbitration clause so broadly to apply it to outrageous tortious conduct that the consumers could not have possibly anticipated. And that's exactly what we're asking this Court to find here, that this is --

THE COURT: And that's your public policy argument.

MS. DORSEY: That is the public policy argument.

And unless you have any questions --

THE COURT: No. Thanks.

Mr. Dzarnoski.

MR. JONES: Your Honor, and I apologize, I've got a deposition that starts at 10:00, and I'm going to have to run. So I wanted to let you know that's why I was leaving.

THE COURT: Thank you, Mr. Jones. Have a nice day.

MR. JONES: Although I would be very interested to stay to the end of this argument, but --

THE COURT: I'm sure we'll be done soon.

MR. JONES: In that case, Your Honor, I may --

THE COURT: It's only 9:41.

MR. JONES: I may wait another few minutes.

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THE COURT: Unless you've got to drive down to Howard Hughes, you might make it.

MR. JONES: I will wait for a few more minutes, Your Honor. Thank you.

THE COURT: Mr. Dzarnoski.

MR. DZARNOSKI: Thank you, Your Honor.

I'm going to start out a little bit in a backwards direction. But let me address the last point as to foreseeability and Counsel's argument that nobody could foresee that this might -- these arbitration provisions might include claims of fraud. Let me read from the arbitration provision.

"'Claim' is to be given the broadest possible meaning and includes 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, common law, including rules relating to contracts, negligence, fraud, or other intentional wrongs in equity."

You've got an arbitration agreement that in its own explicit language tells the person that it is going to include claims of fraud. I don't see how you can make a claim that anybody who reads that would not understand that the arbitration agreement would cover claims of fraud.

THE COURT: But don't you think it's against public

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policy to have all fraud claims covered by an arbitration provision?

MR. DZARNOSKI: No, Your Honor.

THE COURT: Okay.

MR. DZARNOSKI: The Federal Arbitration -- the Federal Arbitration provision -- or Administration Act has been specifically found by the United States Supreme Court to trump state statutes and/or state public policy provisions because the parties are allowed to arbitrate. And in this particular case the Federal Arbitration Act applies. Public policy issue just simply isn't going to fly in the face of the public policy that the United States Congress had when it enacted the Federal Arbitration Act. So you've got two public policies. I mean, you can either enforce the public policy that the United States Supreme Court set for us, and the Congress of the United States said is preeminent, or you can enforce what the Counsel here believes is a state public policy. We think the choice is pretty clear and ought to be done with the United States Supreme Court and the Congressional legislation.

As to, again, issue of waiver, Counsel had brought up some Nevada caselaw dealing with the issues of waiver. I'd point out that all of those cases involve proceeding in litigation with respect to a particular claim. We wouldn't be sitting here today saying that since we proceeded with a claim

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to collect and we went into the Justice Court to collect, that we --

THE COURT: But don't you think that's in and of itself against public policy to go in and get a judgment and then under your arbitration provision to try and specifically take out any actions relating to those collection activities, including, arguably, setting aside the judgment?

MR. DZARNOSKI: They can bring those claims in the Small Claims Court action. We're not saying they can't bring those claims. They have the relief in that action. And we would not be able to remove those claims in that action to arbitration, because we have proceeded with the litigation.

THE COURT: But the claims that are being made in this case, which would then be a compulsory counterclaim in the Small Claims Court action, would not fall within the jurisdiction of either the Small Claims Court or the Justice Court, and then I have a joinder problem when all of those cases get transferred by Justice Court up to District Court from a practical standpoint.

MR. DZARNOSKI: And from a practical standpoint if that happened and they did -- and you're right, if they asserted those compulsory counterclaims, we had the issues of jurisdiction and it gets moved back up here to you, you know what, we file another motion to compel arbitration because these provisions say that any counterclaims or new claims that

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come in are then subject to the arbitration provision. So we're right back where we are today.

But you're right, that is -- that is what should happen under this agreement if they are going to be following the agreement, is they should be asserting those in Small Claims Court. We will then have to decide what happens in Small Claims Court when the facts play out. But you can't make a decision based on what might happen later after Small Claims.

But I also want to point out that they indicate that that's unworkable, and you seem to be accepting that a little bit --

THE COURT: Only from a practical, administrative standpoint as the presiding judge of the Civil Division, not in my capacity here today as a Business Court judge.

MR. DZARNOSKI: And I am ever hopeful that we will find a way to work with the special master and the Legal Aid Society of Southern Nevada to find a mechanism to keep the judicial system from being overburdened by this problem. That is in all of our interests, and I think that we can do that. But we don't need to do it within the context of this case.

THE COURT: Let me ask you another question to focus on. Ms. Popick [sic] said there were about 17,000 examples anecdotally of times that your client had chosen the litigation system and there was never a selection by your

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client of arbitration in this jurisdiction for any of its customers enforcing an agreement.

MR. DZARNOSKI: Collection actions. We've only brought collection actions.

THE COURT: Okay. But all of them have been litigation, as opposed to some other collection actions have an arbitration that they proceed through for purposes of the collection, and then file a petition with the court to confirm an arbitration award.

MR. DZARNOSKI: We have never filed -- we, my clients, have never filed a direct claim for arbitration. It is my understanding that there has been, and I'm not sure in this jurisdiction, maybe I could get a nod, that there has been a request for removal to arbitration. I'm not sure in this jurisdiction, as well. In other jurisdictions there have been requests to remove Small Claims Court actions to arbitration by the customer.

Now, and I also want to bring this out as very important, because Counsel's saying these people, it's not workable for them to file in Small Claims Court. Don't discount the fact that each of these people could claim or file for removal and arbitration on their own. As you saw in this -- in this agreement, that is a very, very valid alternative for each of these individuals to follow because of the bump-up provision in terms of damages.

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THE COURT: Extra hundred bucks?

MR. DZARNOSKI: No. An extra 10,000, Your Honor. The minimum amount of the judgment is the jurisdictional limit of the Justice Court plus $100. So if they're out there with a $300 loan and they go to arbitration and they win and they get a money judgment against my client, in arbitration they get a judgment for a minimum of $10,100 plus attorney fees. So you tell me how this prejudices any of these customers to have -- to have the ability to go in and challenge in arbitration. This is what makes this so consumer friendly.

THE COURT: No, I think this is a better arbitration provision. I've said it a couple of times. This arbitration provision taken in total is a better arbitration provision than many I have seen. My concerns are, and I think I've hit them for you, are waiver and the public policy issue. And, you know, those are to me the two central concerns, because I think your client in drafting the agreement probably did a very, very good job. The question is once we get past the drafting and we're in the how do they act with respect to the agreement, we may have some problems.

MR. DZARNOSKI: But when you get to how you act -- and again, on the issue of waiver I've already covered the aspect that the cases that have been brought forward by plaintiffs' counsel are cases where we've proceeded in litigation as to a specific claim. They say we have never --

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we haven't shown a case to you where there's been this number of Small Claims Court actions that have been filed where a court has not found a waiver. Well, Your Honor, they haven't brought forth a case where anybody's filed Small Claims Court actions and collection agent actions in a Small Claims Court and subsequently had somebody or some court rule that there is a waiver. That has not happened, and they don't have a case that they can provide to you that shows that.

The fact of the matter is that the Rapid Cash defendants have not taken any action or filed any action or proceeded in any litigation that is inconsistent with their rights under this arbitration agreement. And again, and I can't emphasize the Stolt-Nielsen case enough, the Stolt-Nielsen case stands squarely for that proposition that the parties can decide which claims get arbitrated and which claims don't. And when the parties decide that, then that's the way the agreement is going to be enforced.

The Rapid Cash defendants have filed their actions in Small Claims Court because that was a carve out from the arbitration provision agreement. For a carve out, something not covered by the arbitration agreement, to now be considered a waiver of the agreement ignores the carve out to begin with. The carve out was there for a reason, and that reason was to prevent that from occurring.

Very briefly, this clearly is not a contract of

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adhesion when, as you noted, they have 30 days to opt out of the arbitration provision. Not only do they have the right to opt out of the provision, but they keep the money. This isn't a question where they opt out and they have to return the money and rescind the agreement. The agreement is in full force and effect, they keep the money, and the terms of the agreement -- the lending agreement stay in full force and effect.

I fear that one of the things that is going through your head, and Counsel is bringing this up, they're saying there's more than four people. And you're talking about case manageability already at this point in the litigation.

THE COURT: I don't know we're going to have more than four people, because the motion to certify a class is on the chamber calendar in a couple weeks, and I may not certify the class given the no class provision in the agreements. But that's a different issue that we're not doing today.

MR. DZARNOSKI: Okay. And there's other deficiencies there. But you're right. We have four people. That's what we've got. I don't care that there were 17,000 complaints filed or default judgments taken in this case. First of all, it's a big leap of faith for these plaintiffs to come forward to you, Your Honor, and tell you that there's going to be more than four people or that there's going to be a hundred or there's going to be a thousand. There is no

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evidence that they've presented, no evidence that has been presented in the criminal trial, no evidence before this Court or anywhere that this was a systematic and systemic problem that spanned for five years. And I have put in as a proffer of proof in one of our other motions that is before you the fact that I've spoken with the lead detective, Nate Chio [phonetic], in this case, and we are cooperating and providing information and names and contact information. And he's told me outright, I've contacted customers of Rapid Cash, I'm looking for victims so I can add you as a victim to our file, Rapid Cash, because you paid $500,000 for this guy to serve process, and he sits there and he tells me numerous people that he's interviewed acknowledge that they've been served process. I don't have a number yet of people who haven't been served process. Nor do they. Despite this ongoing investigation -- I mean, this has been in the papers for how long? Months.

THE COURT: Since this summer.

MR. DZARNOSKI: Yeah. And we have four --

THE COURT: I was on vacation.

MR. DZARNOSKI: We have a grand total of four customers of Rapid Cash who are saying that they weren't served. And there's no proof of that yet. They're just saying that they haven't been served or that they had no notice of these.

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Now, we have our own little goody bag when we get into discovery, if we have to, where we can show them the contacts that were made with these individual plaintiffs and what was done to apprise them of their problems and for them -- I mean, we're not at the evidentiary stage. But what you're faced with now is four people and a valid, binding arbitration agreement.

And, like I said, I fear that you're thinking down the road towards manageability issues that -- in a worst-case scenario. And believe me, if I were in your shoes as the person who has to handle this huge building, I might be doing the same thing. But my clients today are entitled to a decision based on the case that is before us. And that case before us is four people and a valid arbitration agreement and no issues of manageability, and the fact that each of these four people could walk in, demand arbitration after trying to set aside their judgment, get $10,100 plus attorney fees if they prevail, which is far more relief than they would ever get in a class action lawsuit. The class action lawsuit is not protecting their interests better than the arbitration would. It's being pursued for other purposes, but not for the protection and the ultimate outcome for these four people. And you shouldn't be making your decision based on those four people and manageability.

THE COURT: Thank you, Mr. Dzarnoski. I appreciate

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that. And I want to compliment counsel on the briefs. They were very well done, and the arbitration provision in my mind is very clear.

Unfortunately, the conduct of the defendant in its collection efforts in my 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.

So the motion to compel arbitration and stay the proceedings is denied.

There's one other motion that's on calendar for today, and then there's also a motion to certify the class that is on for October 15th on the chambers calendar. First, do you want to have oral argument on the motion to certify the class, Mr. Dzarnoski?

MR. DZARNOSKI: Yes, Your Honor. I've made that request in my opposition.

THE COURT: Do you want me to move you to the 19th, or the 21st, a Tuesday or a Thursday?

MR. DZARNOSKI: Either one is fine.

MS. DORSEY: I think I'd prefer the 21st.

THE COURT: 21st?

MR. DZARNOSKI: Could we do both those motions, the

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one today and the certification of the class on that day?

THE COURT: Well, let me get to my note on that one, because I do have a note to ask a question. Shift my file a little here.

So, Susan, if we could move the motion that's on the 15th to the 21st.

And then the other motion we have is the motion for essentially a no contact order. Is that an easy way to phrase it?

MS. DORSEY: Yes.

THE COURT: And basically what you're asking me, Mr. Wulz and Ms. Popick, is that I not permit any additional collection efforts with requests to any Rapid Cash judgment at this point.

MR. WULZ: That's true. And we also have other concerns since they have judgments against a few of the class members, and we would have concerns about oral contacts with them, trying to get them to settle, give up their remedies in this case.

THE COURT: I'm not inclined to grant such a broad order until I certify the class. Do you want me to wait and hear the motion on the same day as I have the motion to certify the class?

MR. WULZ: That's -- it's more -- typically it's more appropriate to hear the motion for class cert and then

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the motion for a Rule 23 order.

THE COURT: So I'm going to continue that motion which is on today for the 21st, as well, Mr. Dzarnoski?

MR. DZARNOSKI: I'm sorry?

THE COURT: So the 21st, as well.

MR. DZARNOSKI: Yes.

THE COURT: Just so you're getting all these notes of dates.

MR. DZARNOSKI: Thank you.

THE COURT: Okay. Anything else?

MS. DORSEY: No.

THE COURT: Any housekeeping matters?

Thank you for coming. Go to your Department 9 case.

MS. DORSEY: Thank you.

THE PROCEEDINGS CONCLUDED AT 9:59 A.M.

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

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Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

10/14/10

DATE

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EXHIBIT "6"

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CLERK OF THE COURT

ORDD
GORDON SILVER
WILLIAM M. NOALL
Nevada Bar No. 3549
Email: wnoall@gordonsilver.com
MARK S. DZARNOSKI
Nevada Bar No. 3398
Email: mdzarnoski@gordonsilver.com
JEFFREY HULET
Nevada Bar No. 10621
Email: jhulet@gordonsilver.com
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Fax: (702) 369-2666
Attorneys for Defendants
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

DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiffs, vs. 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; ADVANCE GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive, Defendants.	CASE NO. A624982 DEPT. XI **ORDER DENYING MOTION TO COMPEL ARBITRATION**

Now on this 12th day of October, 2010, comes on for hearing "Motion To Compel Arbitration and Stay Proceedings" (the "Motion") filed by Defendants, Principal Investments, Inc. d/b/a Rapid Cash; Granite Financial Services, Inc. d/b/a Rapid Cash; FMMR Investments,

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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Inc., d/b/a Rapid Cash; Prime Group, Inc., d/b/a Rapid Cash, and Advance Group, Inc., d/b/a Rapid Cash (hereafter "Rapid Cash"). Plaintiffs appeared by counsel, J. Randall Jones, Esq., Jennifer C. Dorsey, Esq., Kemp, Jones and Coulthard, LLC, and Dan L. Wulz, Esq., Legal Aid Center of Southern Nevada, Inc. Defendants, Rapid Cash, appeared by counsel Mark S. Dzarnoski, Esq., Gordon Silver, and Martin Bryce, Ballard Spar.

The Court, having reviewed the Motion, Plaintiff's Opposition, Defendants' Reply, the file, and the pleadings on file herein, and having considered the arguments of the parties, hereby FINDS and ORDERS as follows:

The Motion is denied. The Court finds that the Movants waived their right to demand arbitration in that Defendants knew of their right to arbitrate, acted inconsistently with that right in filing thousands of justice court cases against the putative Class members, and prejudiced the putative Class members by their inconsistent acts in taking default judgments and pursuing collection. The Court further finds that 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.

IT IS SO ORDERED.

DATED this 29th day of November, 2010

DISTRICT COURT JUDGE

Prepared and submitted by:

GORDON SILVER

WILLIAM M. NOALL, Nevada Bar No. 3549
MARK S. DZARNOSKI, Nevada Bar No. 3398
JEFFREY HULET, Nevada Bar No. 10621
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Tel: (702) 796-5555
Attorneys for Defendants
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

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

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EXHIBIT "7"

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 GOFF GONZALEZ, DISTRICT JUDGE,
Respondents,
and
CASSANDRA HARRISON; EUGENE VARCADOS CONCEPION QUINTINO; AND MARY DUNGAN,
Real Parties in Interest.

No. 57371

FILED

JAN 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying a motion to compel arbitration and to stay the district court proceedings.

Generally, an appeal is an adequate legal remedy precluding writ relief. See Pan v. Dist. Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Since an order denying a motion to compel arbitration is appealable under NRS 38.247(1)(a), petitioners have an adequate legal remedy in the form of an appeal from the district court's order. See NRAP 4(a)(1) (stating that the notice of appeal must be filed within 30 days from

SUPREME COURT
OF
NEVADA

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the date when written notice of entry of the order appealed from is served). Thus, we decline to consider this petition for extraordinary relief, NRAP 21(b); Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991), and we

ORDER the petition DENIED.

Douglas, C.J.

Saitta, J.

Hardesty, J.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Ballard Spahr Andrews & Ingersoll, LLP
Gordon & Silver, Ltd.
Lewis & Roca, LLP/Las Vegas
Kemp, Jones & Coulthard, LLP
Legal Aid Center of Southern Nevada
Eighth District Court Clerk

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EXHIBIT "8"