JALIYAH MUHAMMAD, On her own Behalf and all Others Similarly Situated, Plaintiff/Appellant, v. COUNTY BANK OF REHOBOTH BEACH, DELAWARE, EASY CASH TELECASH AND MAIN STREET SERVICE CORPORATION, JOHN DOE AND JOHN ROE, Defendants/Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO.: ON MOTION FOR LEAVE TO APPEAL FROM JULY 14, 2005 DECISION OF APPELLATE DIVISION ON INTERLOCUTORY REVIEW OF ORDER ENFORCING MANDATORY ARBITRATION CLAUSE Sat Below: Hon. Howard H. Kestin. P.J.A.D. Hon. Steven L. Lefelt, J.A.D. Hon. Joseph A. Falcone, J.A.D. SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-0558-04T3

SUPREME COURT OF NEW JERSEY
DOCKET No. _____

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

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INTRODUCTION

This case is about access to justice for ordinary citizens. The decisions below will irreparably injure Plaintiff and a putative class of New Jersey consumers by effectively extinguishing their claims that they paid exorbitant and illegal interest on the defendants' short-term "payday loans." Plaintiff contends that defendants Easy Cash, Telecash, and Main Street Service Corp. (the "Easy Cash" defendants) committed usury by charging her over 600% interest, and that defendant County Bank of Rehoboth Beach, Delaware aided and abetted them by adding its name to their loans to make them appear legal. Plaintiff claims that, by engaging in this usurious enterprise, these defendants violated New Jersey's Consumer Fraud Act ("CFA") and RICO laws.

The decisions below would extinguish these claims. Both courts enforced an exculpatory provision barring Plaintiff from raising class claims that defendants put in their loan contract's arbitration clause. Without class-wide relief, Plaintiff and the putative class members have no economically viable remedy for their claims based on $200 payday loans. *See Riley v. New Rapids Carpet Center*, 61 N.J. 218, 225 (1972) ("If each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit or the victim too disadvantaged to seek relief.") Moreover, defendants

exacerbated the clause's exculpatory effect by limiting Plaintiff's discovery in arbitration to the value of her surviving *individual* claims. She thus would have to prove her allegations that defendants engaged in an enterprise to evade usury laws with only $180 worth of discovery. These terms do not facilitate claims resolution; they serve only to suppress claims by consumers. This case therefore is not about arbitration, but exculpation.

The Court should grant this appeal and hold that defendants' arbitration clause is unconscionable and against public policy under well-established New Jersey law. It is procedurally unconscionable because Plaintiff and other borrowers had no meaningful choice over it: County Bank refuses to do business without the clause, and other payday lenders impose similar ones. It is substantively unconscionable because its terms banning class-wide claims by small-loan borrowers and limiting discovery to the value of their individual claims are one-sided and exculpatory.

Finally, this appeal raises issues of great public importance that have deeply divided courts. This year alone, the California Supreme Court and two other appellate courts have struck down arbitration clauses that ban class actions as unconscionable because they prevent consumers from vindicating their claims.[1] At

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[1] *See Discover Bank v. Superior Ct.*, 113 P.3d 1100, 30 Cal. Rptr. 3d 76, 87 (Cal. 2005); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 820 (Ill. App. 2005); *Whitney v. Alltell Commun.*,

the same time, several other courts have upheld almost identical provisions.[2] What hangs in the balance in these cases is the ability of consumers with modest-size damages to vindicate their statutory rights and hold powerful corporations accountable under the law *in any forum*.

QUESTIONS PRESENTED

1. Is an exculpatory provision in an adhesion contract that prohibits small loan borrowers from seeking class-wide relief on their Consumer Fraud Act and State RICO claims unconscionable or against public policy under New Jersey law?

2. Is an adhesive contract provision that limits consumers to $180 worth of discovery to prove that the defendants engaged in an illegal enterprise to evade State usury laws unconscionable or against public policy under New Jersey law?

3. If adhesive, exculpatory contract provisions are unenforceable under generally applicable New Jersey law, does either the Federal Arbitration Act (9 U.S.C. § 2) or the New Jersey Arbitration Act (NJSA § 2A:23B-6(a)) preempt this contract law whenever these provisions appear in an arbitration clause?

Inc., __S.W.3d__, 2005 WL 1544777 at *9 (Mo. App. July 5, 2005).

[2] *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005); *Walther v. Sovereign Bank*, 872 A.2d 735, 751 (Md. 2005); *Strand v. U.S. Bank Nat'l Assoc. ND*, 693 N.W.2d 918, 926 (N.D. 2005).

STATEMENT OF THE MATTER INVOLVED

A. The Underlying Payday Loan Transactions

Plaintiff Jaliyah Muhammad was a part-time student at a business college when she took out her first payday loan to pay for school books. Pa804.[3] She financed her tuition through student loans, but paid other expenses out of pocket. She had no credit history besides student loans, and no credit cards. *Id.*

On May 26, 2003, Ms. Muhammad obtained a $200 payday loan from the defendants in exchange for a loan note requiring a lump sum payment of $260 (including a $60 finance charge) by June 13. Pa13. This amounts to an annual interest rate of 608.33%. Pa804. When she could not repay this balance, she twice paid additional $60 charges to extend the same $200 principal. Pa13. In total, she paid $180 interest on a $200 loan she had for under two months.

Although Plaintiffs' loan papers listed County Bank as the lender, Easy Cash marketed these loans to New Jersey consumers through the mass media and over the internet. Pa8. After the consumer signs a loan form and transmits it to defendant Easy Cash by facsimile, Easy Cash arranges to transfer funds to the consumer's checking account. Pa10. By listing County Bank as the lender, the defendants claim exemption from New Jersey's usury

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[3] Citations to Pa___ are to the Appellate Division appendix, which has been reproduced and filed with this Motion. Citations to PA___ are to the Supreme Court Appendix filed herewith.

limits under Section 521 of the federal Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), 12 U.S.C § 131d, which allows state chartered banks to "export" their home states' interest rate laws throughout the country. Since Delaware places no limit on the interest its banks charge, County Bank can make loans in New Jersey that would violate this State's civil and criminal usury limits if made by any non-banking entity. *Id.*

B. The Defendants' Mandatory Arbitration Clause

The defendants' payday loan contract is made up entirely of usurious interest terms and exculpatory dispute resolution provisions. In addition to the interest terms described above, the contract has a mandatory arbitration clause which states that:

> You and we agree that any and all claims, disputes or controversies between you and us and/or the Company . . . shall be resolved by binding ***individual (not joint)*** arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed.

Pa187 (emphasis added). The clause's incorporation of NAF's Code of Procedure includes the following limits on the rights of Plaintiff and other payday loan borrowers:

- NAF Rule 19 (A): barring any consolidation of claims, except "with the consent of all other parties." Pa227;
- NAF Rule 29(B)(2): allowing discovery only if "[t]he cost is commensurate with the amount of the Claim; Pa233.[4]

[4] NAF's Rules also allow arbitrators to force any consumer who does not prevail on her claims to pay the defendant's attorney

These restrictions on consumers' rights are a core component of the defendants' usurious enterprise. When County Bank decides whether to enter into lending partnerships, it looks at "the attitude of local courts with regard to the enforcement of agreements with consumers to arbitrate disputes." Pa390. County Bank will not operate in California or West Virginia "because of unsatisfactory legal opinions and/or unfavorable judicial decisions," holding that mandatory consumer arbitration clauses barring class-wide claims are unenforceable. *Id.* *See, e.g., West Va. ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W.Va. 2002); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002). The belief that they can avoid class-wide liability with an arbitration clause is fundamental to the defendants' business model.

This belief might be attributable to the marketing claims of their ostensibly neutral arbitrator, the National Arbitration Forum. NAF sells its arbitration system to companies as "do it yourself civil justice reform." Pa526. It promises them they can "eliminate class actions," (*id.*); provide "[v]ery little, if any, discovery," (Pa519); and deter consumer claims by allowing prevailing *defendants* to recover their costs and attorney fees, so

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fees and arbitration costs. *See* Pa527 (interview with NAF Managing Director Ed Anderson, who states that "The rules of the [NAF] allow the arbitrator to award the prevailing party the cost of the arbitration, including attorney fees.").

"[t]here is no such thing as a 'no risk' arbitration for either side." (Pa527). *See also* Pa535-41 (NAF promotion of no-class action rule and instructions to companies on how to ban consumer class actions). In light of promises like these, it is hardly surprising that arbitration clauses banning class actions and using NAF as the arbitrator are pervasive in the payday lending industry. *See* Pa595-600 (competitors' arbitration clauses).[5]

In any event, the defendants' exculpatory contract terms governing arbitration have had their intended effect. Since County Bank began putting its name on payday loans nation-wide in 1997, ***only two (2) consumers have ever managed to arbitrate their claims against the bank***. Pa160.

PROCEDURAL HISTORY

A. The Superior Court and Federal Court Proceedings

Plaintiff filed this case as a putative class action in the Superior Court of New Jersey, Union County, on February 2, 2004, alleging that the Easy Cash defendants were the real lenders of her payday loans, and they committed usury by charging her interest rates of over 600% APR. Pa10. She claimed these loans violated

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[5] *See also* Robert W. Snarr, Supervising Examiner, Federal Reserve Bank of Philadelphia,, *Compliance Corner*, Spring 2002, at CC2 ("The inclusion of mandatory arbitration clauses within payday loan contracts appears to be standard operating procedure among payday lenders and banks that partner with payday lenders to originate their loans.")

New Jersey's civil usury limit of 16% APR (NJSA § 31:1-1(a)), as well as its criminal usury limit of 30% APR (NJSA § 2C:21-19); (Pa17-18). She further alleged that Easy Cash conspired to evade State usury laws by naming County Bank as the lender when, in fact, the Easy Cash defendants financed, marketed, originated, and serviced these loans, and bore all of the risk through an agreement to indemnify County Bank. Pa11. Plaintiff claimed that this enterprise violated the Consumer Fraud Act, NJSA § 56:8-2, *et seq.*, and the New Jersey RICO statute's prohibition against criminal usury racketeering, NJSA § 2C:41-1. Pa15-16, 18-20. She also charged that County Bank's role in this scheme violated the Consumer Fraud Act and the RICO statute's prohibition against aiding and abetting usury, NJSA § 2C:5-2. Pa 16-17, 20-21.

On March 16, 2004, defendants removed the case to federal court, alleging that federal law completely preempted Plaintiff's claims because County Bank was the actual lender, so that any usury claim against County Bank was a federal claim under DIDMCA. Plaintiff moved for remand, arguing that removal was improper because she never charged County Bank with usury, and her actual allegations that the other defendants committed usury (while County Bank aided and abetted them) were not preempted. On June 10, 2004,the Federal District Judge William Martini granted the motion and remanded the case to the Superior Court. Pa415-16.

The defendants then moved to compel Plaintiff to arbitrate her individual claims under the contract's mandatory arbitration clause. Plaintiff opposed the motion, arguing that this clause was a non-negotiable, adhesive provision that the defendants imposed on payday loan borrowers because of their superior sophistication and bargaining power as the dominant players in the payday lending market, where these clauses are ubiquitous. Pa330-34. Moreover, she alleged that the clause's terms barring class-wide relief, limiting discovery based on the value of *individual* claims, and requiring arbitration before the overtly pro-lender NAF were unfairly one-sided. Pa334-40. In advance of the arbitration motion, Plaintiff served discovery to ascertain the exculpatory effects of the arbitration clause. Pa260-86.

The Superior Court granted the defendants' motion and denied Plaintiff's discovery requests. The court held that the arbitration clause was not procedurally unconscionable because its terms were all on one page, and that its limitations on Plaintiffs' rights were not substantively unconscionable. Pa799, Tr. 48:9-12,15-23. The court even suggested that the class action ban might help consumers if it reduced their attorney fees. Pa774-75, Tr. 23:6-17, 24:3-8. In response to Plaintiff's argument that the discovery limits would prevent her from uncovering the true relationships among the defendants, the court found that one

deposition was enough to prove her racketeering claims. Pa 762, TR. 11:9-18 ("**Mr. Cuker:** 'We need to know how money really changes hands between these parties.' **The Court:** 'So you take one deposition to get the answer to that.'").

B. The Appellate Division Proceedings

The Appellate Division granted Plaintiff's Motion for Leave to Appeal on October 7, 2004. On July 14, 2005 the Appellate Division affirmed the Superior Court and ordered Plaintiff to arbitrate her individual claims. PA 51. Before reaching the arbitration issues, the court opined that legislative action would be needed to make payday lending illegal, as though New Jersey's usury laws did not exist. PA 53, 63-64. The court then rejected Plaintiff's argument that defendants' mandatory arbitration clause is unconscionable.

The Appellate Division found that "there was clearly unequal bargaining power between the parties," but held this did not amount to procedural unconscionability because there was no evidence that Plaintiff tried to alter the clause's terms. PA 70-71. The court also found that Plaintiff's need to pay for school was not as compelling as that of employees who face arbitration clauses as a condition of their employment. PA 73.

As to substantive unconscionability, the court found that the validity of the ban on class actions was controlled by *Gras v. Associates First Capital Corp.*, 346 N.J. Super. 42 (App. Div.

2001), which upheld an arbitration clause barring class claims in a higher priced home mortgage loan. PA79-80. The court also upheld the clause's restrictions on discovery, finding that it "does not place any more restrictive limits on the parties than do our Rules of Court regarding actions filed in Small Claims Court." PA 56-57.[6] Finally, the Appellate Division rejected Plaintiff's argument that NAF is a biased forum, finding that parties can never allege bias until after they arbitrate, PA 57-59, and denied Plaintiff's discovery requests relating to the fairness of the defendants' chosen arbitral forum. PA 85-86.[7]

THE ERRORS COMPLAINED OF

Plaintiff respectfully submits that the Appellate Division erred in making the following rulings:

1. That the arbitration clause is not procedurally unconscionable because there is no evidence that Plaintiff sought to alter its terms or was under economic duress, (PA 71, 73);

2. that the arbitration clause's express term barring class-wide claims by consumers is not unconscionable because the

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[6] The court understandably did not address whether Plaintiff's claims that four corporate defendants engaged in an enterprise to evade the usury laws in loans made to thousands of consumers could ever be forced into Small Claims Court.

[7] Presiding Judge Kestin issued a separate concurring opinion arguing that the court should not have addressed the validity of NAF's procedures in light of the defendants' [unilateral] offer to arbitrate Plaintiff's [individual] claims in another arbitral forum. PA87.

Consumer Fraud Act's goal to root out consumer fraud must be "harmonized" with the "'*competing and compelling* public policy favoring arbitration,'" (PA 80-81) (quoting *Gras*, 346 N.J. Super. at 53-54) (emphasis added);

3. that the clause's severe limitation on discovery is not exculpatory because "[NAF] Rule 29 does not place any more restrictive limits on the parties than do our Rules of Court regarding actions filed in Small Claims Court," (PA 76-77); and

4. that the trial court's denial of Plaintiff's discovery requests relating to the fairness of the arbitral forum was proper because "judicial interference" undermines the goals of arbitration, (PA 83).

REASONS FOR GRANTING INTERLOCUTORY APPEAL

I. PLAINTIFF AND THE PUTATIVE CLASS WILL SUFFER IRREPARABLE HARM IF DEFENDANTS' EXCULPATORY CONTRACT TERMS ARE ENFORCED.

Plaintiff and the putative class members face irreparable injury under NJ Rule 2:2-2(b) because, if enforced, the exculpatory terms in defendants' arbitration clause will extinguish their statutory claims. These consumers cannot feasibly vindicate their CFA, RICO, and usury law claims arising from $200 payday loans without bringing a class action. Nor can they prove claims alleging that defendants engaged in a multi-party enterprise to evade State usury laws through the rental of a bank charter with only $180 worth of discovery. The decisions below enforcing these

restrictions would visit irreparable injury on Plaintiff and other payday loan borrowers by extinguishing their statutory claims.

This Court has long held that the class action mechanism is essential for consumers to vindicate modest-size claims. In *Riley v. New Rapids Carpet Center*, 61 N.J. 218 (1972), the Court reversed a denial of class certification of CFA claims challenging a retailer's bait-and-switch tactics. In holding that class treatment was proper and, indeed, necessary, the Court explained (in words that should resonate here) that:

> The subject of consumer fraud has emerged as a major problem of our commercial scene. Being unequal to the vendor, the consumer is easily overreached. When the selling pitch is directed to the unsophisticated poor, the problem is heightened, for the dollar impact upon the victim is intensified and a society which provides for its poor itself feels the burden of this imposition. . . . If each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit or the victim too disadvantaged to seek relief. Thus the wrongs could go without redress, and there would be no deterrence to further aggressions. If there is to be relief, a class action should lie unless it is clearly infeasible.

Id. at 224-25.[8]

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[8] *See also Strawn v. Canuso*, 140 N.J. 43, 67 (1995) ("For all of those claimants who rely on the seller's duty to disclose, it would be a hollow system of justice that awarded recovery to some homeowners while denying recovery to others similarly situated."); *In re Matter of the Cadillac V8-6-4 Class Action*, 93 N.J. 412, 437 (1983) ("Individual actions or a test case may be an inferior alternative to the class action when the economics of the situation make it impossible for the aggrieved members to vindicate their rights by separate actions.") (citation omitted); *Kugler v. Romain*, 58 N.J. 522, 539-40 (1971) ("'Individual actions by each of the defrauded consumers is often impracticable

Based on this Court's decisions supporting class actions under the Consumer Fraud Act, the Appellate Division recently concluded:

> [T]here is an overarching principle of equity to consider in the application of the class certification rule. The principle is that class actions should be liberally allowed where consumers are attempting to redress a common grievance under circumstances that would make individual actions uneconomical to pursue.

Varacallo v. Massachusetts Mutual Life Ins. Co., 332 N.J. Super. 31, 45 (App. Div. 2000). These cases thus demonstrate that the class action device is essential for consumers with modest damages to vindicate their statutory rights under New Jersey law.

The U.S. Supreme Court, the Third Circuit, and other courts have echoed this recognition of the critical function of class actions. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the U.S. Supreme Court found that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* at 617. Likewise, the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974), reversed a denial of class certification based in part on its finding that:

> A critical fact in this litigation is that petitioner's individual stake in the damages award is only $70. No

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because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct.'") (quoting *Vasquez v. Superior Court*, 484 P.2d 964, 968-69 (Cal. 1971)).

> competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

The Third Circuit similarly held in a recent case involving claims under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, that "[r]epresentative actions . . . appear to be fundamental to the statutory structure of the FDCPA," so that, "lacking this procedural mechanism, meritorious FDCPA claims might go unredressed because the awards in an individual case might be too small to prosecute an individual action." *Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004).[9]

Courts thus have prohibited a variety of practices that corporate defendants use to prevent consumers from bringing class actions because doing so would strip them of their underlying

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[9]*See also Linder v. Thrifty Oil Co.*, 2 P.3d 27, 30-31 (Cal 2000) ("Courts have long acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit . . . provides small claimants a method of obtaining redress.") (citations omitted); *Friar v. Vanguard Holding Corp.*, 434 N.Y.S.2d 698, 706 (App. Div. 1980) ("By construing the availability of class action relief narrowly, the judiciary is seen as denying access to the courts to thousands of individuals whose minimal damages are greatly outweighed by the prohibitive costs involved in prosecuting a lawsuit against a wealthy opponent."); *Cruz v. All Saints Healthcare Sys., Inc.*, 625 N.W.2d 344, 348-49 (Wis. App. 2001) ("[G]iven the economic realities of this case, class action may be the only effective means to implement the legislature's intent to provide redress fo unreasonable charges. . . The individual amounts at issue are small and not likely to justify individual suits.")

claims. In *Weiss*, the Third Circuit held that a defendant could not stave off a class action by making repeated offers of judgment under Federal Rule 68 to "pick off" the named plaintiffs, finding that this practice could leave consumer claims unredressed because individual damages were too small to prosecute. *Weiss*, 385 F.3d at 345. Likewise, courts have struck down choice-of-law and forum-selection clauses that bar consumer class claims as exculpatory and against public policy. *See, e.g., America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 17-18 (2001) ("The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the . . . forum selection clause.").[10]

These cases, like those discussed in Part III below striking down arbitration clauses with express class action bans, all hold that class actions are essential for consumers to vindicate modest-size damages claims. Without this essential mechanism, payday loan borrowers with $200 claims will be irreparably harmed.

Here, the injury to Plaintiff and other borrowers is beyond dispute because this arbitration clause, besides barring class claims, severely restricts their access to evidence by limiting

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[10] *See also American Online, Inc. v. Pasieka*, 870 So. 2d 170, 171-72 (Fla. Dist. Ct. App. 2004) (following California *AOL* case); *Dix v. ICT Group, Inc.*, 106 P.3d 841, 845 (Wash. App. 2005) ("Requiring Ms. Dix and Mr. Smith to litigate their [Consumer Protection Act] claim in Virginia without the benefit of a class action procedure as is allowed in Washington . . . undermines the very purpose of the CPA, which is to offer broad protection to the citizens of Washington.")

discovery to the value of their remaining *individual* claims. Simply put, Plaintiff cannot prove her claim that the four corporate defendants created a sham enterprise to evade State usury laws with only $180 worth of discovery. *See Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005) (arbitration rules allowing "just one deposition as of right and additional depositions only at the discretion of the (arguably biased) arbitration panel . . . in extraordinary circumstances and for good cause shown," significantly prejudice employee claimants).[11]

Accordingly, the decisions below ordering Plaintiff to arbitrate her claims on an individual, non-class basis under these rules will irreparably injure her and other payday loan borrowers by extinguishing their statutory causes of action.

II. DEFENDANTS' MANDATORY ARBITRATION CLAUSE IS UNCONSCIONABLE UNDER APPLICABLE NEW JERSEY CONTRACT LAW.

New Jersey's unconscionability law creates a standard of "good faith, honesty in fact and observance of fair dealing," that is meant "to make realistic the assumption . . . that [an] agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion." *Kugler*, 58 N.J. at 544. The need for this doctrine is

[11] *Cf. Armendariz v. Foundation Health Psychare Serv's, Inc.*, 6 P.3d 669, 684 (Cal. 2000) (employees forced to arbitrate statutory claims "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses . . .").

"most acute when the professional seller is seeking the trade of those most subject to exploitation-the uneducated, the inexperienced and people of low incomes." *Id.*

In applying this doctrine, New Jersey courts look at (1) disparities in knowledge and bargaining power between the parties in forming the contract that create opportunity for exploitation (so-called "procedural unconscionability"); and (2) the fairness of the contract terms themselves and the public interests they affect ("substantive unconscionability"). *Lucier v. Williams*, 366 N.J. Super. 485, 491 (App. Div. 2004). As a general rule, liability-limiting provisions between parties of unequal bargaining power are presumed unenforceable. *Id.* ("The farther apart the contracting parties are in their relative strength the greater is the probability that the exculpatory clause will be held invalid.") (citation omitted).

Here, the defendants' arbitration clause is procedurally unconscionable because it is a non-negotiable, adhesive provision imposed by experienced lending companies against payday loan borrowers with limited commercial experience and credit options. *See* Pa804. The clause is a pre-printed, standard-form provision, transmitted between borrower and lender by facsimile with no opportunity for negotiation. Pa185-88. Moreover, these payday loan borrowers have no meaningful choice regarding this clause because

County Bank ***will not do business where it cannot impose an arbitration clause banning class actions***, Pa390, and because these types of clauses are pervasive within the payday lending industry. *See, e.g.*, Pa595-600. The clause's adhesive nature and the gross imbalance in sophistication and bargaining power between the parties render it procedurally unconscionable. *See, e.g., Vasquez. v. Glassboro Service Ass'n, Inc.*, 83 N.J. 86, 103 (1980) (striking eviction provision from migrant farmworker's contract, finding that "[n]either farmworkers nor consumers negotiate their contracts; both must accept the contract as presented to them.")[12]

The arbitration clause is substantively unconscionable because its provision inserted by defendants barring class-wide claims is exculpatory and one-sided. New Jersey courts have long held that adhesive consumer contracts that unreasonably limit a seller's liability are unenforceable. *See, e.g., Collins v. Uniroyal, Inc.*, 64 N.J. 260, 263 (1974); *Lucier*, 366 N.J. Super. at 493. Moreover, this Court and many others have held that class actions are critical for vindicating modest-size consumer claims like those here. *Supra* at 13-14. Therefore, this clause's express requirement that modest-size consumer claims be *individually* arbitrated is exculpatory and unenforceable. *See, e.g., Discover Bank v. Shea*, 362 N.J. Super.

[12] *See also Lucier*, 366 N.J. Super. at 492 (finding limitation of liability in home inspection contract unconscionable based in part on adhesion, inequality in bargaining power, and degree of economic compulsion by consumers).

200, 215 (Law Div. 2001) ("The requirement for a [credit] cardmember to pursue a claim against Discover on an 'individual' basis . . . is an unenforceable restriction that should not be enforced.")[13]

Moreover, this prohibition's exculpatory effect is exacerbated by the defendants' use of an arbitration rule that limits discovery based on the value of claims. Without her right to bring class or aggregated claims, Plaintiff is left with individual damages claims of approximately $180. Under NAF Rule 29, she would have to prove that defendants engaged in an illegal multi-party enterprise to evade State usury laws with only $180 worth of discovery. By making it impossible for her to prove these claims, this severe discovery restriction further renders defendants' arbitration clause exculpatory and unconscionable. *See Walker*, 400 F.3d at 387 (finding arbitration rule allowing employee plaintiff only one deposition of right prejudicial and unenforceable).[14]

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[13] *See also Discover Bank v. Superior Court*, 113 P.3d 1100, 30 Cal. Rptr. 3d 76, 87 (Cal. 2005) ("[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, . . . the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

[14] Similarly, NAF's "loser pays" rule deters claims by threatening Plaintiff and other payday loan borrowers with liabilities far greater than the value of their claims. *See Licitra v. Gateway, Inc.*, 189 Misc. 2d 721, 730 (N.Y. Civ. Ct. 2001) ("The NAF Code could not only result in the consumer-claimant losing the action, but also in the imposition of an award of fees double the expenses the consumer already incurred

Besides being exculpatory, these arbitration clause terms are also extremely one-sided. The class action ban only burdens consumers because banks and lending companies never bring class claims *against* consumers. *See Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d at 85 ("Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover Bank, because credit card companies typically do not sue their customers in class-action lawsuits.") Under New Jersey law, such one-sided terms imposed by a company with superior bargaining power are unenforceable. *See Shell Oil Co. v. Marinello*, 63 N.J. 402, 409 (1973) ("It is a fallacy to state that the right of termination is bilateral. The oil company can always get another person to operate the station. It is the incumbent dealer who has everything to lose . . .").

Finally, the Appellate Division erred in holding below that New Jersey policy favoring the availability of class actions for modest-size claims under the CFA and other consumer protection laws must

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in filing the NAF arbitration. This is another example of the economics of the arbitration process having a 'chilling effect' on the consumer's rights."); *cf. Alexander v. Anthony Int'l, LP*, 341 F.3d 256, 268-70 (3d Cir. 2003) (invalidating employer's mandatory arbitration clause based in part on loser-pays rule). The "loser pays" provisions apply not only to the outcome of the arbitration itself, but also to any unsuccessful effort by plaintiff to obtain more discovery than Defendants will voluntarily provide. Pa.118 (NAF Rule 29G).

be "harmonized" or considered "in equipoise" with federal and state policy favoring arbitration. PA80-81 (quoting *Gras*, 346 N.J. Super. at 53-54). First, these two policies are not competing or mutually exclusive because a policy favoring arbitration as a forum *has nothing to do with whether class actions are a necessary procedure for vindicating certain consumer claims.* *See Discover Bank v. Superior Ct*, 30 Cal. Rptr. 3d at 91 ("[T]here is nothing to indicate that class actions and arbitration are inherently incompatible."); *cf. Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2406 (2003) (whether arbitration clause should be construed to bar class claims is governed by state law, not federal arbitration law).

Second, New Jersey law disfavoring adhesive exculpatory contracts is part of the State's general law of unconscionability and public policy governing *all* contracts. Under the arbitration statutes, this general contract law applies to arbitration clauses just like any other contract. *See Doctor's Assoc's, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C. § 2]."); *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d at 94 (under the FAA, "state courts may enforce general contract rules regarding unconscionability and public policy that preclude class action waivers.")

In short, the defendants used their superior bargaining power and knowledge to impose on financially-pressed consumers a mandatory arbitration clause whose one-sided terms would effectively extinguish their causes of action. Under New Jersey law, this is unconscionable and against public policy. Nothing in federal or state arbitration law is to the contrary.

III. THIS APPEAL RAISES ISSUES OF GREAT PUBLIC IMPORTANCE THAT HAVE DIVIDED COURTS IN NEW JERSEY AND ACROSS THE COUNTRY.

Although this Petition for interlocutory review is governed by Rule 2:2-2(b)'s "irreparable injury" standard, the issues raised herein also satisfy the grounds for certification under Rule 2:12-4. This appeal involves issues of great public importance concerning access to justice for consumers and the extent to which companies can use policies favoring arbitration as a cover for imposing one-sided and exculpatory contract terms against unsuspecting consumers in an attempt to evade accountability under state law.[15]

These issues have divided courts in New Jersey and across the country. In *Discover Bank v. Shea*, 362 N.J. Super. 200, 215 (Law Div. 2001), the Superior Court struck down a credit card lender's

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[15] *See, e.g., The Current State of Class Action Arbitration*, 22 Alternatives to High Cost Litig. 63 (2004) (validity of class bans is "the hottest issue today in consumer cases relating to arbitration."); Peter Geier, *Arbitration Clauses Unsettled: Courts Mixed on Contracts Limiting Class Actions*, National Law Journal, May 16, 2005, at 1 (companies have "increased their use of arbitration clauses in consumer contracts as courts around the country reach different conclusions abut their legality.").

arbitration clause that barred class-wide claims as exculpatory and unconscionable. In the decision below, PA 79-80, the Appellate Division held that *Shea* was superceded by *Gras v. Associates First Capital Corp.*, 346 N.J. Super. 42 (App. Div. 2001), which upheld a similar provision in a home mortgage loan. But neither *Gras* nor the decision below, which extends *Gras* to permit class action bans for virtually any type of claim—no matter how small, even attempted to square their holdings with this Court's holdings in *Riley*, *Strawn*, *Cadillac*, and *Kugler* that the class action device is essential for consumers to vindicate claims under the CFA and other statutes.

This division over whether class actions are necessary for consumers to vindicate certain claims or can routinely be waived by corporations through their non-negotiable, adhesive contracts is mirrored in recent state and federal court decisions from throughout the country.[16]

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[16] *Compare Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003); *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 236 (W.D. Wash. 2002); *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76 (Cal. 2005); *West Virginia ex rel Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002); *Powertel v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812 (Ill. App. 2005); *Whitney v. Alltell Communications, Inc.*, ___S.W.3d___, 2005 WL 1544777 (Mo. App. July 5, 2005); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004) (all holding consumer arbitration clauses unconscionable based in whole or part on express ban on class actions); *with Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005) (and cases cited therein) (upholding arbitration clauses that ban consumer class actions).

Since this Motion raises issues of great public importance about access to justice for consumers that have deeply divided courts, and since the decisions below will irreparably injure Plaintiff and other payday loan borrowers by extinguishing their statutory causes of action, the Court should grant this appeal.

CONCLUSION

For all of the reasons stated herein, the Motion for Leave to File an Interlocutory Appeal should be granted.

Dated: August 3, 2005

Respectfully submitted,

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