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INTRODUCTION

Plaintiff Jaliyah Muhammad has argued that a payday loan contract's mandatory arbitration clause is unconscionable under New Jersey law because it bars her from asserting $180 claims through a class action and affords her minimal discovery with which to prove these factually complex statutory claims. *Amicus curiae* Chamber of Commerce of the United States (the "Chamber") responds primarily by asserting that (1) class action and discovery rights are *always* waivable by consumers under New Jersey law; and (2) even if such waivers can be unconscionable, this Court has no authority to apply New Jersey law to Defendants' arbitration clause here. The Chamber is wrong on both counts.

First, New Jersey law is clear that non-negotiable contracts stripping consumers of their statutory rights are unconscionable. *See, e.g., Collins v. Uniroyal, Inc.*, 64 N.J. 260, 263 (1974); *Lucier v. Williams*, 366 N.J. Super. 485, 492-93 (App. Div. 2004). Moreover, this Court has held repeatedly that class actions are essential for vindicating small-value consumer claims like Plaintiff's here. *See, e.g., In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 435 (1983) ("A consequence of the class action is the equalization of the ability of the parties to prepare and pay for the advocacy of their rights."). Thus, the Chamber's argument that companies can always waive consumers' class action rights through adhesive contracts is contrary to established New Jersey law.

Second, the Chamber's multitude of arguments for why the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, prohibits this Court from applying New Jersey law barring exculpatory class action waivers and discovery restrictions have no merit. The FAA does not expressly preempt New Jersey law because the Act *has no express preemption provision*. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Stanford Univ.*, 489 U.S. 468, 477 (1989). Nor does the FAA impliedly preempt this New Jersey law because this application of widely recognized State contract law principles is consistent with the FAA's underlying purpose to "place arbitration agreements upon the same footing as other contracts." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted).

Likewise, the Chamber's argument that the FAA requires this Court to refer these issues to an arbitrator is wrong because the class action ban and discovery restrictions are part and parcel of the arbitration requirement Plaintiff is challenging. Under the FAA, courts, not arbitrators, resolve challenges to the validity of arbitration clauses. *See, e.g., Prima Paint, Inc. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

Finally, the Chamber's arguments based on Defendants' belated offer to pay arbitration costs and the payday loan contract's Delaware choice of law clause simply parrot the Defendants' unavailing arguments. The last-minute offer to pay costs does not and cannot cure this arbitration clause's infirmities because the

offer was expressly conditioned on a continued waiver of class action rights, and a unilateral offer of an unconscionable term without an acceptance does not bind a party under New Jersey law. Likewise, the choice of law argument fails because New Jersey has a materially greater interest than Delaware in applying its own laws to loans made to New Jersey consumers, and any Delaware law upholding these exculpatory terms would be contrary to fundamental New Jersey policy for protecting consumers.

For all these reasons, the Court should reject the Chamber's (and Defendants') litany of arguments for avoiding application of New Jersey law to Defendants' mandatory arbitration clause. Instead, the Court should hold under well-established New Jersey contract and consumer protection law that this arbitration clause is unconscionable as it would apply in this case to bar consumers from seeking class-wide relief and obtaining adequate discovery for their small-value, but factually complex statutory claims.

I. THE CHAMBER IGNORES WELL-ESTABLISHED NEW JERSEY LAW GOVERNING EXCULPATORY ADHESION CONTRACTS AND CLASS ACTIONS.

Like Defendants, the Chamber barely tries to defend this mandatory arbitration clause under New Jersey law. Indeed, the Chamber cites no New Jersey law whatsoever to rebut Plaintiff's argument that the arbitration clause is procedurally unconscionable because she lacked meaningful choice over its inclusion in these payday loan contracts. Instead, the Chamber presents a mini-essay (*Amicus* Brief at 46-49) on the purported societal benefits of non-

negotiable adhesion contracts.

The Court should reject this paean to contracts of adhesion because it is contrary to decades of New Jersey law. In *Rudbart v. North Jersey Dist. Water Supply Comm'n*, 127 N.J. 344 (1992), the Court began its inquiry into whether a contract term was unconscionable by addressing if the contract was one of adhesion because "such a contract 'does not result from the consent of [the adhering] party,'" so that "the distinct body of law surrounding contracts of adhesion represents the legal system's effort to determine whether and to what extent such non-consensual terms will be enforced." *Id*. at 353-54 (quoting *Vasquez v. Glassboro Serv. Ass'n*, 83 N.J. 86, 104 (1980)); *see also Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 389-90 (1960) ("Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds."). The Court thus should reject the Chamber's pronouncement (Brief at 46) that "generic aspersions on [adhesion contracts] have no place in the law of this or any other state." Under *Rudbart*, *Vasquez*, *Henningsen* and a host of other cases, whether this arbitration clause is adhesive is the necessary starting point in determining whether it is unconscionable.[1]

[1] Since adhesion is the *starting point* under *Rudbart*, 127 N.J. at 354, the Chamber's discussion of this issue as if it were outcome-determinative is misleading because it ignores the

Likewise, the Chamber's substantive unconscionability arguments barely reference and ultimately are undermined by controlling New Jersey law. The Chamber's New Jersey law argument is based largely on the Appellate Division's decisions below and in *Gras v. Assoc's First Capital Corp.*, 346 N.J. Super. 42 (App. Div. 2001). *See Amicus* Brief at 11-12; *see also* Defendants' Brief at 36-37. These arguments fail for several reasons.

First, *Gras* does not create a *per se* rule upholding *all* class action waivers in adhesive consumer contracts. Indeed, *Gras* is distinguishable on its facts in several ways that are material under New Jersey law. On procedural unconscionability, *Gras* did not address the lack of consumer choice or the degree of economic compulsion present in the payday lending transactions here. *See* Plaintiff's Brief at 12-16. On substantive unconscionability, *Gras* did not address the effect of barring class actions for claims of only $180 coupled with rules limiting a consumer's discovery based on the surviving individual claim's value. Given these significant differences, *Gras*'s finding that "[the CFA's] objectives can be vindicated in the arbitration forum," 346 N.J. Super. at 53, simply does not apply to Plaintiff's claims here.

Second, to the extent *Gras* and the decision below *do* purport

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additional evidence here showing lack of consumer choice (most notably, the pervasiveness of mandatory arbitration clauses within the payday lending industry) as well as the bases for finding this arbitration clause substantively unconscionable.

to uphold *all* adhesive contracts banning consumer class claims, they were wrongly decided. In *Gras*, the Appellate Division looked mostly to *federal* statutory cases in deciding whether a mortgage lender's arbitration clause barring class claims was enforceable as a matter of *State* law under the CFA. *See* 346 N.J. Super. at 49-51. *Gras* then framed the issue before it as "whether an inherent conflict exists between arbitration and the underlying purpose of [the CFA]." *Id*. at 52. Respectfully, that is *not* the question presented here. Plaintiff is not arguing that there is an inherent conflict so that CFA and other statutory claims can *never* be arbitrated. Plaintiff has always conceded that CFA claims are generally arbitrable, *provided that the terms of an arbitration clause do not effectively bar her from vindicating her statutory claims*. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) ("And so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

The question here thus is whether the terms Defendants put into *this arbitration clause* specifically barring class claims and severely limiting discovery will prevent Plaintiff and putative class members from vindicating their small-value, but factually complex statutory claims *in this case*, thereby making it function as an exculpatory clause. To the extent *Gras* and the court below

would validate this exculpatory application of Defendants' mandatory arbitration clause, their holdings cannot be squared with controlling New Jersey law established by this Court.

As discussed in our Brief on the Merits (pp. 16-18) and the *Amicus Curiae* Briefs of Legal Services of New Jersey (pp. 13-20, 24-32) and the Attorney General (pp. 16-20), decades of this Court's precedent have established as settled New Jersey law that: (1) adhesive contracts that contravene public policy by abridging an adhering party's statutory rights or remedies are unconscionable; and (2) the class action mechanism is essential for consumers to vindicate small-value statutory claims like those here. First, this Court has long held that adhesive form contracts limiting a company's liability to consumers or otherwise undermining statutory protections of ordinary citizens are presumptively unconscionable. *See*, *e.g.*, *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 263 (1974) (tire manufacturer's contract limiting liability to consumers to price of tire was "patently unconscionable"); *McCarthy v. NASCAR, Inc.*, 48 N.J. 539, 543 (1967) (invalidating standard-form liability release for stock car drivers; holding that "prescribed safety requirements may not be contracted away, for if they could be the salient protective purposes of the legislation would largely be nullified."); *Henningsen*, 32 N.J. at 404 (finding car manufacturer's disclaimer of implied warranty protections "so inimical to the public good as

to compel an adjudication of its validity.").[2] This generally applicable New Jersey law against non-negotiable waivers of statutory protections thus applies to Defendants' mandatory arbitration clause just as it does to any other contract.

Second, this Court also has long held that class actions are essential for consumers to vindicate small-value claims under the CFA and other statutes. *See*, *e.g.*, *Strawn v. Canuso*, 140 N.J. 43, 67 (1995); *In re Cadillac*, 93 N.J. at 435; *Riley v. New Rapids Carpet Center*, 61 N.J. 218, 225 (1972); *Kugler v. Romain*, 58 N.J. 522, 538 (1971). These holdings apply with special force to cases like this one involving allegations of a complex scheme to commit fraud resulting in relatively small individual damages. *See*, *e.g.*, *Strawn*, 140 N.J. at 68 ("[A] class action is the superior method for adjudicating consumer fraud claims."); *In re Cadillac*, 93 N.J. at 435 ("[T]he class action rule should be construed liberally in a case involving allegations of consumer fraud[.]"). In light of these cases holding that class actions are necessary to prevent consumer fraud and that adhesive contract terms waiving statutory protections are unconscionable, the Appellate Division decisions below and in *Gras* are contrary to well-established New Jersey law.

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[2] *See also Lucier*, 366 N.J. Super. at 492-93 (striking liability limitation in home inspection contract); *Jasphy v. Oskinsky*, 364 N.J. Super. 13, 21-22 (App. Div. 2003) (striking liability limitation in fur storage service's standard-form customer contract).

The Chamber's arguments based on these rulings should be rejected.[3]

The Chamber tries to distinguish this and other Courts' opinions recognizing the essential role of class actions in vindicating small-value consumer fraud claims like Plaintiff's by arguing (Brief at 18-20) that obstacles to individual adjudication somehow disappear whenever a case goes from court to arbitration. The Chamber bases its call for a drastic departure from established New Jersey law on generalized statements by other courts that do not even purport to address bans on class claims. *See*, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (case ordering arbitration of international antitrust dispute between companies). Although these assertions about the relative ease of individual arbitration are purely factual in nature, the Chamber produces no evidence showing that small-value consumer claims like Plaintiff's *ever actually have been arbitrated* on a widespread basis.[4] Of course, the record

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[3] In an effort to bolster its argument based on the decision below and *Gras*, the Chamber (Brief at 13-15) cites a string of cases from other states as though their sheer number dictates what New Jersey law is. Respectfully, the Court's role when faced with a clear split of authority on a state law question is *not* simply to follow the majority, but rather to determine which side's reasoning most closely parallels established principles of New Jersey law.

[4] The Chamber's use (Brief at 27) of "public opinion" polls purporting to show public sentiment favoring arbitration must be taken with several grains of salt. For example, the Harris Interactive study cited *and commissioned* by the Chamber excluded 98% of possible participants (over 30,000 from a 31,000-adult sample), including *everyone ordered to arbitrate by a court*.

below shows just the opposite, that in more than eight years that County Bank has been requiring consumers across the country to sign its arbitration clause banning class actions, only two have even tried to arbitrate claims. Pa160. Moreover, in one of the few other cases where courts have addressed this same factual assertion with the help of real evidence, they concluded that a class action ban for small-value consumer claims was effectively exculpatory, and thus unconscionable. *See Ting v. AT&T*, 182 F. Supp. 2d 902, 915, 935-36 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003). Thus, the Court should reject the Chamber's assertions here about the transformative powers of arbitration because they are unsubstantiated, contrary to record evidence, and belied by common experience.[5]

Harris Interactive, *Arbitration* (Apr. 2005), at 4. Moreover, parts of this minuscule study were conjectural at best because people were asked, for example, how arbitration compared to litigation *without having litigated claims*. *Id*. at 5. In any event, opinion polls do not determine the law. *Cf*. 37 N.J. Reg. 3968(b) (Dep't of Banking and Insurance, Div. Of Banking response to comments to proposed NJAC 3:4-4) at 7 ("The Department notes that usury law is not dependent on whether consumer demand for the loan product exists. Loans in excess of usury limits are prohibited even if the consumer desires the product.")

[5] A Pennsylvania court also ignored this distinction in a recent opinion finding two arbitration clauses unconscionable for barring class treatment of small-value consumer claims. *See Thibodeau v. Comcast*, No. 4526; *Afrolian v. AT&T Wireless*, No. 0469 (Pa. Ct. Common Pleas, Phila. County Jan. 24, 2006) at 15 ("Most consumer complaints involve minuscule claims. No individual consumer could or ever will litigate most consumer claims. The cost of lawyers, fees, and expert witnesses makes individual lawsuit or arbitration so completely impractical as to be fairly and properly characterized as impossible.").

Finally, any suggestion (*see* Defendant's Brief at 35-36) that New Jersey's adoption of the Revised Uniform Arbitration Act (RUAA), N.J. Stat. Ann. 2A-23B, reflects a legislative endorsement of arbitration clauses banning consumer class actions is also wrong. The RUAA's provision stating that a "court may not order *consolidation* of the claims of a party to an agreement to arbitrate if the agreement prohibits *consolidation*," N.J. Stat. Ann. 2A-23B-10c (emphasis added), addresses only when courts can consolidate arbitrations of claims in *existing* cases (as under N.J. Stat. Ann. 4:38 in court). It does not address the very different question of when class action treatment (as under N.J. Stat. Ann. 4:32) is necessary or appropriate for arbitrable claims. The RUAA's legislative history makes this differentiation crystal clear by expressly *disavowing* any intention to address class action issues: "***However, section 10 is not intended to address the issue as to the validity of arbitration clauses in the context of class-wide disputes.***" Comment to RUAA § 10 by National Conference of Commissioners on Uniform State Laws at 37 (emphasis added) (available at http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.pdf), adopted as part of New Jersey Act's legislative history by S. No. 514 (210th Session), Sponsor's Statement at 18 ("Except where noted in this Statement, the sponsor of the bill endorses the content of the Uniform Act's Official Comments."). The New Jersey Arbitration Act thus does not address the issues presented here,

and does not reverse the decades of this Court's precedent holding that class actions are essential for consumers to vindicate small-value fraud claims like Plaintiff's here.

For all these reasons, the Court should reject the Chamber's and Defendants' State law arguments and hold under well-established New Jersey law that Defendants' mandatory arbitration clause is unconscionable as its terms barring consumer class actions and severely restricting discovery rights would apply to Plaintiff's small-value, but factually complex statutory claims in this case.

II. THE CHAMBER'S FEDERAL PREEMPTION ARGUMENTS HAVE NO MERIT.

The crux of the Chamber's argument is that New Jersey law does not matter because any State laws that would invalidate terms that Defendants or any other company insert into a mandatory arbitration clause are preempted by the Federal Arbitration Act. The Court should reject the Chamber's sweeping preemption arguments because they are wrong as a matter of federal law, and because adoption of this unrestrained freedom-of-contract doctrine would be dangerous for consumers, workers, and other vulnerable parties who have to sign standard-form contracts as a matter of survival in today's economy. *See Henningsen*, 32 N.J. at 389-90.

First, the Chamber's argument that Section 2 of the FAA expressly preempts New Jersey law is wrong because *there is no express preemption provision* in this or any other section of the Act. Section 2 states that contractual arbitration agreements

"shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. On its face, Section 2 does not preempt any state laws. Thus, the U.S. Supreme Court has held that "[t]he FAA contains no express pre-emption provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477. The Chamber's express preemption argument therefore is wrong as a matter of plain statutory application.

Second, the FAA does not impliedly preempt the New Jersey contract law principles at issue here because these principles are ones of general application that do not single out arbitration clauses for different or less favorable treatment than other contracts. The Chamber is correct that the FAA, like any federal statute, preempts state laws that "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Congress enacted the FAA in 1925 with the purpose to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to *place arbitration agreements upon the same footing as other contracts*." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (quoting without citation H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2

(1924)). Based on these purposes, the Supreme Court has held in numerous cases that courts "may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assoc's, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citing *Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987)) (emphasis in original). The preemption question here thus turns on whether the State law principles at issue apply *only* to arbitration clauses or more broadly to other types of contracts.

As the arguments herein demonstrate, Plaintiff's State law challenge to this arbitration clause is based on equitable principles that New Jersey courts apply to all manner of contracts, and thus are not preempted. For example, Plaintiff's argument that the arbitration clause is procedurally unconscionable because she lacked meaningful choice over this adhesive provision is based on principles this Court has applied to securities instruments (*Rudbart*, 127 N.J. at 353); an eviction clause in migrant farm-worker contracts (*Vasquez*, 83 N.J. at 103-04); and a liability waiver in a manufacturer's warranty (*Henningsen*, 32 N.J. at 389-90), among other types of terms.[6] Likewise, Plaintiff's argument

[6] In light of *Henningsen*'s finding of a lack of consumer choice based on the pervasive use of a contract term within an industry, 32 N.J. at 390-91 ("There is no competition among the car makers in the area of the express warranty. Where can the buyer go to negotiate for better protection?"), Defendants' argument (Brief at 14, 54) that industry-wide imposition of a contract term is *encouraged* by the law is wrong and should be

that the clause is substantively unconscionable because its class action ban and severe discovery restrictions would prevent her from vindicating her claims is based on anti-exculpatory principles New Jersey courts have applied to a variety of terms, including express damages limitations (*Collins*, 64 N.J. at 263; *Lucier*, 366 N.J. Super. at 492-93), and implied warranty waivers (*Henningsen*, 32 N.J. at 404). Finally, this Court and other courts' recognition that class actions are essential for vindicating small-value consumer claims arose in response to arguments made against class certification (*In re Cadillac*, 93 N.J. at 437); to offers of judgment made to named plaintiffs (*Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004)); and to judicial forum-selection clauses that bar class claims (*Dix v. ICT Group, Inc.*, 106 P.3d 841, 845 (Wash. App. 2005); *AOL v. Superior Ct.*, 90 Cal. App. 4th 1, 17-18 (2001)). Since none of these principles single out or disfavor arbitration clauses, they are not preempted by the FAA.

The Chamber cannot seriously dispute that these New Jersey law principles are generally applicable, but it tries anyway. Based on the fact that this Court has not directly addressed the validity of adhesive contracts banning consumer class actions, the Chamber argues (Brief at 23) that courts cannot "manufacture new principles

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rejected. To the extent Defendants or the Chamber are arguing that *different* procedural unconscionability rules should apply to arbitration clauses than to other contracts, this argument cannot be squared with the FAA's purpose of placing these clauses "upon the *same footing* as other contracts." *Gilmer*, 500 U.S. at 24.

in the context of thwarting an arbitration agreement," because "[t]o put it bluntly, 'no state can apply to arbitration(when governed by the [FAA]) any novel rule.'" Quoting *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004). This argument starts from a mistaken premise, then compounds its error by applying a faulty legal analysis. First, Plaintiff does *not* ask the Court to "manufacture new principles," but to apply widely-recognized principles of New Jersey law to the new setting of a mandatory arbitration clause. Second, nothing in the FAA or its underlying purposes bars courts from applying a "novel rule" to an arbitration clause *if that rule would also apply to other types of contracts*. *See*, *e.g.*, *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1106-07 (Cal. 2005) (holding for first time addressing arbitration clause that class action waivers can be unconscionable; noting lower court case applying rule to *judicial* forum-selection clause).

Indeed, the Chamber's argument that new rules can never apply to arbitration clauses, but first must be applied to some other type of clause, is *itself* a novel rule that puts arbitration clauses on *different footing* from all other contracts. This argument is factually and legally baseless.

Finally, the Court should reject the Chamber's *truly* blunt argument (Brief at 33) that the FAA preempts this application of New Jersey's anti-exculpatory principles to any arbitration clause because "*few businesses would be willing to roll the dice by*

including an arbitration provision in their consumer contracts; class arbitration just seems to present too many risks." (emphasis added). This argument lays bare what is really at stake in this case. The Chamber and Defendants do not want arbitration at all; they want to eliminate the risk of large-scale liability altogether by deterring consumer claims. In pursuit of this goal, they are trying to wipe out almost a half-century of New Jersey law protecting consumers, workers, and other vulnerable parties against non-negotiable exculpatory contracts that would strip away their legal rights under the Consumer Fraud Act and other public interest statutes. What the Chamber wants for its members and for predatory lenders like Defendants here is the right to do business in New Jersey without any risk of meaningful liability for recidivist wrongdoing.[7] This is why Legal Services of New Jersey was exactly right in saying (Certification in Support of Motion for Leave to Appear as *Amicus Curiae* at ¶ 8) that, "from the perspective of low-income New Jersey consumers, this is one of the most important cases ever to reach this Court."

Fortunately for Plaintiff and other New Jersey consumers and workers, the Chamber's preemption argument fails miserably as a

[7] *See* Myriam Gilles, "Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action," 104 Mich. L. Rev. 373, 430 (2005) ("Allowing companies to simply opt out of exposure to collective litigation is no more defensible than a system in which corporations may decide whether they wish to be exposed to federal antitrust, securities, or civil rights laws.").

matter of federal law. First, as discussed herein, this New Jersey law is not preempted under controlling U.S. Supreme Court authority because this State law applies broadly to other types of contract terms. Thus, the effect of applying this law here is to place Defendants' mandatory arbitration clause on the "same footing" as other contracts. In fact, it is the Chamber's argument, that arbitration of class claims "*just seems to present too many risks*" to businesses, which demonstrates the very hostility to arbitration that the FAA was enacted to reverse. This is why the California Supreme Court unanimously rejected this argument:

> Far from holding that the invalidation of a class action waiver discriminates against arbitration, the Court of Appeal below reasoned in effect that arbitration is an inferior forum and therefore cannot be trusted with classwide claims. The court's conclusion regarding the unsuitability of arbitration to class actions reflects, as we stated in the context of another proposed limitation on arbitration, 'the very mistrust of arbitration that has been repudiated by the United States Supreme Court.' Moreover, . . . there is nothing to indicate that class action and arbitration are inherently incompatible.

Discover Bank v. Superior Court, 113 P.3d at 1113 (citation omitted). The Chamber's implied preemption argument here should be rejected for the same reasons.

Second, the FAA itself is silent on the subjects of class-wide claims and party discovery rights. Where federal law is silent on subjects of state-law regulation, there is no basis for finding implied conflict preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 284-87 (1995). What the Chamber is trying to do with

this preemption argument is transform the Federal ***Arbitration*** Act, a statute addressing *forum*-selection, into the Federal ***Whatever Rules Companies Want*** Act, giving contract drafters endless discretion to re-write state laws for resolving disputes in their favor. *Cf. Lochner v. People of the State of New York*, 198 U.S. 45 (1905) (striking down state employee-protection law as an arbitrary interference with an employer's freedom to contract), *overruling recognized by Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 423 (1952). The Court should reject this sweeping freedom-of-contract argument for the same reasons the U.S. Supreme Court repudiated the *Lochner* doctrine: (1) it undermines important public policies concerning consumer and employment relationships marked by serious imbalances of contractual bargaining power; and (2) it is legally baseless under controlling State *and federal* law.

III. THE COURT, NOT AN ARBITRATOR, MUST RESOLVE THESE QUESTIONS.

The Chamber's and Defendants' argument that the FAA strips this Court of authority to decide the issues presented herein by requiring referral of these issues to an arbitrator is wrong. Echoing Defendants (Brief at 31-34), the Chamber argues (*Amicus* Brief at 8) that the Court cannot address this class arbitration ban because "the prohibition on class actions . . . is not contained with the arbitration provisions[,] and therefore "is not a 'gateway' question of arbitrability for a court" under the FAA. Once again, this argument begins with a misstatement of fact about

what the contract says, and then proceeds by making an erroneous application of the controlling law.

First, the Chamber's contention that the payday loan contract's arbitration requirement and class action ban are "separate, free-standing provision[s]" is wrong on the face of the contract itself. The contract's arbitration clause plainly states (Pa 187) that "any and all claims, disputes, or controversies . . . shall be resolved by binding ***individual (not joint) arbitration***." (Emphasis added). By requiring Plaintiff to resolve "all claims" by "individual arbitration," the arbitration clause expressly prohibits class actions. Thus, Plaintiff's challenge to this prohibition is a challenge to the validity of the arbitration clause's own terms. Under controlling U.S. Supreme Court precedent applying the FAA, courts (not arbitrators) must resolve challenges like this to an arbitration clause's validity. *See*, *e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."); *Mitsubishi Motors*, 473 U.S. at 632 ("A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate."); *Prima Paint*, 388 U.S. at 404 ("[A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate."). Since the class action ban and discovery restrictions are part of the arbitration

clause, the Court must determine their validity before it can enforce this clause.

Second, even if the arbitration clause and class action ban *were* separate, stand-alone contract terms (which they are not), the latter's validity still would be for the Court to decide because it still would be a term and condition of arbitration *wherever it appears in the contract*. The Chamber and Defendants rely heavily on the U.S. Supreme Court's *Prima Paint* decision to urge a contrary result, but their argument misconstrues and misapplies what the Supreme Court actually held there. In *Prima Paint*, the Court faced an argument by a party to the sale of a commercial paint business alleging that the sale contract (which contained an arbitration clause) was induced by the seller's fraudulent misrepresentations about its solvency and ability to perform. 388 U.S. at 398. In holding that these fraud allegations were for an arbitrator (not a court) to decide, the Court found that they did not relate to the arbitration agreement and thus did not implicate its validity:

> Accordingly, if the claim is fraud in the inducement of the arbitration clause itself– an issue which goes to the 'making' of the agreement to arbitrate–the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Id. at 403-04. Unlike the fraud allegations there relating solely to performance of *other* contract terms, Plaintiff's challenges to this contract's class action ban and discovery restrictions *do* directly implicate the arbitration clause because these waivers

apply to every claim Plaintiff has to arbitrate. These waivers of Plaintiff's rights in asserting claims thus *are* terms and conditions of her agreement to arbitrate *regardless* of whether Defendants placed a paragraph break between them or not.

Finally, the Chamber's own briefing undermines this argument for stripping the Court of authority to decide these issues. Both the Chamber (Brief at 13-15) and Defendants (Brief at 43-48) rely on a list of cases where *courts*, not arbitrators, have addressed and upheld the validity of arbitration clauses that ban class actions. If their argument that courts cannot decide these issues had merit, then all of these cases were wrongly decided. Moreover, the Court should reject any argument (*see* Defendants' Brief at 34) that these cases were superceded by the plurality decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (holding that arbitrator decides contract *interpretation* issue where valid arbitration clause is ambiguous on class claims). Subsequent to *Bazzle*, courts facing challenges to the validity of arbitration clauses that *expressly* ban class actions have held that this is an issue for courts, not arbitrators, to decide. *See*, *e.g.*, *Discover Bank v. Superior Court*, 113 P.3d at 1116 (distinguishing *Bazzle*; finding some class bans unconscionable); *Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1286 (M.D. Ala. 2005) (distinguishing *Bazzle*; enforcing class ban).

The Court thus should hold that Plaintiffs' challenges to

these class action and discovery waivers are matters for a court (not an arbitrator) to decide in determining whether an arbitration clause containing these restrictions is unconscionable.[8]

IV. THE CHAMBER'S REMAINING ARGUMENTS ALSO ARE UNAVAILING.

A. The Defendants' Attempt to Rewrite the Arbitration Clause is Not Legally Binding.

Defendants' last-minute attempt to rewrite the arbitration clause by agreeing to bear costs and changing the designated arbitration service, *while keeping the clause's class action ban* (Pa. 733), cannot bind Plaintiff. The Chamber's arguments on this point (Brief at 35-43) make no mention of applicable State contract law. This is understandable because New Jersey law is clear that (1) there must be an offer and acceptance for a party's promise to create a binding contract, *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 399 (1994); and (2) a party cannot render an existing contract illusory by unilaterally changing its terms, *Russell v. Princeton Laboratories, Inc.*, 50 N.J. 30, 38 (1967). Moreover, the Third Circuit has held in addressing a similar attempt by an overreaching employer to rewrite invalid arbitration clause terms

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[8] An additional reason the Court, not an arbitrator, should decide this issue is that Defendants' chosen arbitration service, the National Arbitration Forum (NAF), has publicly committed itself to helping companies "eliminate class actions," Pa526, as part of its provision of "do it yourself civil justice reform." *Id.*; *see also* Pa535-41 (NAF instructions on how to ban consumer class actions). Having advertised this service to Defendants and other companies, NAF should be deemed unqualified to fairly resolve the important legal issues raised herein.

that "such a waiver is of no effect because 'the fairness of a contract must be viewed as of the time the contract was formed.'" *Parilla v. IAP Worldwide Services VI, Inc.*, 368 F.3d 269, 285 (3d Cir. 2004) (quoting *Lelouis v. Western Directory Co.*, 230 F. Supp. 2d 1214, 1224-25 (D. Or. 2001)). The same contract rules apply here. The Court should determine the arbitration clause's validity based on its terms when the contract was formed.

These rules barring parties from rewriting contracts should have extra force here because Defendants tried to bind Plaintiff to a unilateral offer *that still contains an unconscionable term* (the class action ban). The Chamber claims (Brief at 38) that Plaintiff's reliance interest in the original terms whose validity she challenges "lacks legitimacy," but fails to show how Defendants' interest in keeping an unconscionable class action ban by unilaterally rewriting all the *other* unconscionable terms around it is any more legitimate. Courts elsewhere have held that a drafter's interest in saving as many unconscionable contract terms as it thinks it can get away with has *no* legitimacy. *See*, *e.g.*, *Cooper v. MRM Investment Co.*, 367 F.3d 493, 512 (6th Cir. 2004) ("To sever the costs and fees provision and force the employee to arbitrate a Title VII claim despite the employer's attempt to limit the remedies available would reward the employer for its actions and fail to deter similar conduct by others."); *Lelouis*, 230 F. Supp. 2d at 1225 ("If I were to accept defendant's proposal,

employers would have no incentive to ensure that a coerced arbitration agreement is fair to both sides.").

The Chamber's final contention on this point, that any countervailing contract law interests "must fall to the policies favoring arbitration" (Brief at 38), also fails. At bottom, this is yet another federal preemption argument that proceeds from the mistaken premise that arbitration clauses are *different* from and *more favored* than other contracts. But the U.S. Supreme Court has said just the opposite, that the FAA "was designed 'to make arbitration agreements as enforceable as other contracts, but not more so.'" *Volt Info. Sciences*, 489 U.S. at 478 (quoting *Prima Paint*, 388 U.S. at 404 n.12). Thus, in addressing questions as to the existence of a valid arbitration clause under the FAA, the Supreme Court has held that courts must apply "ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Here, New Jersey contract law is clear that Defendants cannot rewrite their arbitration clause by eliminating *some* of its unconscionable terms in order to enforce others. The Court should hold that this clause is unconscionable based on its terms when the contract was formed.

B. Delaware Contract Law Does Not Apply to These New Jersey Consumer Loan Contracts.

The Chamber (Brief at 20) embraces Defendants' unavailing arguments for displacing New Jersey law with Delaware law based on

the contract's choice of law clause. The Court should reject these arguments because applicable choice of law rules compel application of New Jersey contract law to these provisions governing the rights of New Jersey consumers. As previously explained (Plaintiff's Brief at 31), New Jersey follows the *Restatement (Second) of Conflicts of Laws* § 187 in providing that a choice of law clause is unenforceable where the chosen state's law is contrary to a fundamental policy of New Jersey and New Jersey has a materially greater interest than the chosen state and any other state in applying its own law to a dispute. *See Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 342 (1992). While the Chamber and Defendants (Brief at 17-18) agree that these are the relevant factors, they misapply them to the facts of this case.

First, New Jersey has a materially greater interest than Delaware and other states in applying its own laws to these high-interest loans made to New Jersey consumers. In assessing the interests of different states in particular transactions, this Court looks at each state's "significant contacts." *Id*. at 345 (applying New Jersey franchisee protection statute despite choice of law clause based on location of franchise, its employees, and its investments). Here, New Jersey's contacts far outweigh Delaware's and any other state's. These payday loan transactions occurred when Plaintiff, while sitting in New Jersey, answered an Internet ad for a payday loan by faxing an application to a loan

originator at a Bala Cynwyd, Pennsylvania fax number. Pa. 184-185. The originator then faxed the note back to Muhammad in New Jersey, where she signed the note and faxed it again to Pennsylvania. The note required Muhammad to make payment by sending her check or money order payable to "County Bank **c/o Easy Cash, P.O. Box 915, Bala Cynwyd, PA 19004**." Pa. 186-188 (emphasis added). It also designated Defendant Main Street Services Corp., located in Bala Cynwyd, Pa., as the loan's servicer. Throughout these transactions, Plaintiff made no contact with any enity in Delaware. Under these circumstances, New Jersey law should govern the validity of the mandatory arbitration clause Defendants imposed through these transactions. *See Discover Bank v. Shea*, 362 N.J. Super. 200, 208-09 (Law Div. 2001) (striking Delaware choice of law clause, applying New Jersey law to Delaware bank's loans to New Jersey consumers).[9]

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[9] Defendants contend (Brief at 40-41), that *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005), *on remand*, 36 Cal. Rptr. 3d 456 (Cal. Ct. App. 2005), proves that Delaware law applies here. It does nothing of the sort. In *Discover*, after the California Supreme Court held that clauses banning class actions by small-value consumer claimants can be unconscionable (113 P.3d at 1106-07), the lower court held on remand that Delaware law applied because *the plaintiff was asserting claims under Delaware law* on behalf of a *nation-wide* class. 36 Cal. Rptr. 3d at 461-62. Where California consumers have asserted *California law claims*, courts have unanimously found Delaware and other foreign choice of law clauses unenforceable under *Discover* and Restatement § 187. *See*, *e.g.*, *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 740-41 (Cal. Ct. App. 2005) (setting aside bank's Delaware choice of law clause); *Tamayo v. Brainstorm USA*, 2005 WL 2293493 at *1 (9th Cir. Sept. 21, 2005) (setting aside

Second, to the extent the Chamber argues (Brief at 20-21) that Delaware law allows companies to enforce adhesive contracts banning class actions by consumers with small-value claims, any such law is contrary to fundamental New Jersey consumer protection policy:

> If the only available route had been pursuit of a private remedy by individual victims of the unfair practices specified by N.J.S.A. 56:8-2 such a rule would require an unrealistic expenditure of judicial energy and would be inconsistent with current trends and consumer protective legislation.

Kugler, 58 N.J. at 538. Defendants therefore cannot use a Delaware choice of law clause to strip consumers of class action remedies just as they cannot do so with their mandatory arbitration clause.

CONCLUSION

The Court should reaffirm longstanding New Jersey law protecting consumers against involuntary waivers of their statutory rights through adhesive exculpatory contracts by holding that Defendants' mandatory arbitration clause is unconscionable as it would apply to Plaintiff's claims in this case. The decision below should be reversed.

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bank's Ohio choice of law clause). Here, the Court should follow these latter opinions by applying New Jersey law to determine whether Defendants' mandatory arbitration clause is unconscionable as it would apply here to effectively bar New Jersey consumers from asserting their claims under New Jersey's consumer protection statutes.

Respectfully submitted,

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JALIYAH MUHAMMAD, On her own Behalf and all Others Similarly Situated,	:	SUPREME COURT OF NEW JERSEY DOCKET NO.: 58,430
Plaintiff/Appellant,	:	ON MOTION FOR LEAVE TO APPEAL FROM JULY 14, 2005 DECISION OF APPELLATE DIVISION ON INTERLOCUTORY REVIEW OF ORDER
v.	:	ENFORCING MANDATORY ARBITRATION CLAUSE
COUNTY BANK OF REHOBOTH BEACH, DELAWARE, EASY CASH TELECASH AND MAIN STREET SERVICE CORPORATION, JOHN DOE AND JOHN ROE,	:	Sat Below: Hon. Howard H. Kestin. P.J.A.D. Hon. Steven L. Lefelt, J.A.D. Hon. Joseph A. Falcone, J.A.D.
Defendants/Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-0558-04T3

SUPREME COURT OF NEW JERSEY
DOCKET No. 58,430

Plaintiff/Appellant's Brief in Response to *Amicus Curiae* Chamber of Commerce of the United States of America

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