IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

CAPLIN ENTERPRISES, INC. ET AL — APPELLANT

V. — CASE NO. 2011-CA-01332

DENISE ARRINGTON, ET AL — APPELLEE

APPEAL FROM THE CLARKE COUNTY CIRCUIT COURT

REPLY BRIEF OF APPELLANT

Oral Argument Requested

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ARGUMENT

1) Whether, or not, the Federal Arbitration Act is applicable so as to bar arbitration because of interstate commence concerns.

The Plaintiffs begin their brief with an argument that wasn't raised in the Appellant's brief concerning the Federal Arbitration Act's authority, or lack thereof, because of the Commerce Clause of the Federal Constitution. The Plaintiffs argue there is no interstate commerce since all Defendants and Plaintiffs are instate. However the trial court denied this same argument noting that the Supreme Court had previously denied that same argument. (Tr. Vol. II Pg. 155-156.)

The Supreme Court stated, "Were there any residual doubt about the magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged, that doubt would dissipate upon consideration of the 'general practice' those transactions represent." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57-58 (U.S. 2003). Further saying the Commerce Clause, "'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" Id. at 56-57 (citing *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

The trial court found that when taken in the aggregate the check cashing business affects interstate commerce. (Tr. Vol. II Pg. 156.) Furthermore the Mississippi Supreme Court has ratified this position in an opinion that compelled arbitration by ruling, "the contract in the aggregate involves economic activity affecting interstate commerce." *Equifirst Corp. v. Jackson*, 920 So. 2d 458, 463 (Miss. 2006).

The Plaintiffs use this position to further their contention that arbitration would limit the liability of the Defendants. "Arbitration agreements merely submit the question of liability to another forum--generally speaking, they do not

waive liability." *McKenzie Check Advance of Miss.,LLC v. Hardy*, 866 So. 2d 446, 454 (Miss. 2004). As such this position is clearly contrary to the Court's ruling and is unsupported by case law.

2) Whether, or not, the *alleged* actions of the Defendants made the arbitration provision per se unenforceable.

The Plaintiffs present this issue as the second issue in the Statement of the Issues in the Appellees' brief. However it is not one of the actual subsets of the Appellees' argument and no authority is presented to support this contention. It is presumed that the Appellees are referring to unfounded allegations in their statement of facts. As previously noted these factual issues are not properly before the Court as no proof was submitted of them at the trial level as the Trial Court was only challenged with the validity of the arbitrations provisions at that time.

Such puffery is merely the attempt to prejudice this Court against the Defendants by making allegations of violations of Miss. Code Ann. § 75-67-515(4) and § 75-67-519(5). Section 75-67-515(4) states, "Any fee charged by a licensee for cashing a check shall be posted conspicuously to the bearer of the check before cashing the check, and the fee shall be a service fee and not interest." Again the Appellees have presented no proof of such. In fact, as much as counsel for.the Appellees tried to provoke Ms. Sumrall into stating such she maintains that

the customers are charged a one time fee per check throughout her deposition. Similarly, § 75-67-515(4) states, "No check cashed under the provisions of this section shall be repaid by the proceeds of another check cashed by the same licensee or any affiliate of the licensee. A licensee shall not renew or otherwise extend any delayed deposit check." Again the Appellees have yet to present any testimony or evidence that such occurred. Nor should it be presented on this matter at this stage of the trial as the case is only at the stage of determining if the arbitration provision was valid and not if the Plaintiffs allegations are true.

3) Whether, or not the Arbitration Provision was procedurally unconscionable.

The crux of the Plaintiffs' argument for upholding the Trial Court's ruling of procedurally unconscionability is the Plaintiffs' misunderstanding of the arbitration provision. The Plaintiffs repeatedly go to the well of Ms. Sumrall's deposition to argue if she's not an expert on arbitration proceedings then the Plaintiffs were incapable of being understanding and being responsible for contracts they freely and voluntarily entered. Further without a single bit of evidence from any one of the individual Plaintiffs as to whether or not they understood the provision, this argument is meritless and speculation. Additionally the Plaintiffs cite no authority that follows this theory that an **employee's** lack of

understanding of arbitration invalidates an arbitration provision.

Ms. Sumrall repeatedly stated that she told the customers that signing the arbitration provision means the party is waiving their right to a trial by jury. (Deposition of Shawana Sumrall Pg. 16, 28, 38, 43, and 45). Such is actually beyond any duty she has. "Duties to disclose or to act affirmatively, such as explaining the terms of a contract, do not arise in arm's length transactions or under an ordinary standard of care." *MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167*, 177 (Miss. 2006).

The Plaintiffs have submitted no evidence that any individual Plaintiff failed to read, or understand, the arbitration provision. The Plaintiffs full argument is speculation based, concerning Ms. Sumrall's knowledge of arbitration procedures and legal knowledge as if someone should depend on a check cashing store for legal advice. Further the Plaintiff customers have the option to go to different check advance stores to seek the terms they find agreeable from competing stores should they disagree with the arbitration provision.

The Plaintiffs also makes the same mistake in relying on *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 715 (Miss. 2002) review of *Entergy Miss. Inc. v. Burdette Gin Co.* as the Plaintiffs in *McKenzie Check Advance* to argue the necessity that the arbitration provision is reasonably related to the business risks. The Court in

Mckenzie explained the difference:

> Justice Diaz next cited a case dealing with an indemnity clause, not an arbitration clause, to find that "the defendants must show that 'the provision was reasonably related to the business risks of the parties.'" Id. (quoting *Entergy Miss. Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207-08 (Miss. 1998)) (quoting *Bank of Indiana, Nat'l Ass'n v. Holyfield*, 476 F. Supp. 104, 109 (S.D. Miss. 1979)). In *East Ford, Inc. v. Taylor*, this Court held:
>
> 'While *Burdette* concluded that an indemnity clause within a contract of adhesion is presumptively unconscionable, the same is not true for arbitration clauses. *Burdette* involved an agreement to indemnify, which essentially allows a party to contract away or escape liability. Arbitration agreements merely submit the question of liability to another forum--generally speaking, they do not waive liability.' *McKenzie Check Advance* at 454.

As such the Plaintiffs have no authority to support their argument upholding the Trial Court's ruling and cannot counter the Appellant's authority that such ruling was in error.

4) Whether, or not the Arbitration Provision was substantively unconscionable.

The Plaintiffs continue to argue the Arbitration Provision was substantively unconscionable because of unequal judicial remedies. As previously noted in depth in the Appellant's brief Mississippi's combined Courts have rejected that

argument as best stated in *Pridgen v. Green Tree Fin. Servicing Corp.,* "That is, the fact that judicial remedies were not available to both parties did not make the clause unconscionable or unenforceable." *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 658 (S.D. Miss. 2000).

The Plaintiffs also cite a United States Supreme Court decision to argue that arbitration costs "could" be considered prohibitive to a party. However the case in fact ruled, "we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden." *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 92 (U.S. 2000). In the case at hand, not a single Plaintiff testified concerning costs or their ability to pay arbitration costs. In fact the Plaintiffs have not presented any evidence to the Court on this issue. The fact that the check manager was unclear of arbitration costs has no relevancy nor is it proof that arbitration is cost prohibitive. The Plaintiffs are unable to cite any authority to support this point.

The Plaintiffs continue to argue that the contract was one of adhesion but fail to submit any authority that a contract of adhesion makes an arbitration provision unenforceable.

As such this Court should overturn the Trial Court's ruling that the arbitration agreement was substantively unconscionable. The Plaintiffs have offered no authority upholding the Trial Court's ruling and cannot counter the Appellant's authority that such ruling was in error.

CONCLUSION

The Plaintiff Appellees failed to present any authority to support the Trial Court's ruling of procedural or substantive unconscionability that contradict the points of error raised by the Appellants. The Plaintiff Appellees failed to present any evidence that the Trial Court was correct concerning font sizes or that mutuality of judicial remedies was required to make this arbitration agreement enforceable. All the Plaintiff Appellees could show to support the Trial Court's ruling was speculation gleaned from the check manager's deposition to support theories that are unsupported by controlling authority. It is requested that this Court review the points of error presented in the Appellant's brief, overturn the Trial Court's ruling, and issue an Order compelling arbitration.

Respectfully Submitted,

CAPLIN ENTERPRISES, INC. ET AL

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CERTIFICATE OF SERVICE

I, George C. Nicols, do hereby certify that I have this date forwarded via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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Hon. Lester F. Williamson, Jr.
Clarke County Circuit Judge
P.O. Box 86
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This the 28th day of June, 2012.

George C. Nicols