No. 22-CV-524

DISTRICT OF COLUMBIA COURT OF APPEALS

ANDRE BROWN,
Appellant,
v.

TROY CAPITAL, LLC, *et al*
Appellees.

On appeal from the Superior Court of the
District of Columbia, Civil Division

APPELLANT'S *COMBINED* OPENING BRIEF

AGAINST TROY CAPITAL, LLC AND PROTAS, SPIVOK & COLLINS, LLC

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List of Parties

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3. Protas, Spivok, & Collins, LLC., *Appellee*
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Acronyms

Andre Brown – "Mr. Brown"
Troy Capital, LLC – "Troy" or "Plaintiff"
Protas, Spivok, & Collins, LLC. – "Protas"
First Investors Servicing Corporation – "FISC"
First Investors Financial Services – "FIFS"
Fair Debt Collections Practices Act – "FDCPA"
District of Columbia Consumer Practices and Procedures Act – "CPPA"
District of Columbia Debt Collection Law – "DCDCL"
Protas document titled "Retail Installment Sale Contract" – "RISC

Jurisdiction

Orders compelling arbitration and staying proceedings operate as an order granting an injunction and necessitates the immediate, interlocutory review of the Court under § 11–721(a)(2)(A), the Court has jurisdiction.

Questions Presented

1. Whether the Court's decision Brown v. Troy Capital, LLC, et al., No. 18-cv-797 (Feb. 18, 2022)("Brown I") holding Troy and Protas failed to prove an enforceable contract to arbitrate between either and Mr. Brown permits Troy a do-over allowing Troy to introduce new "evidence" to prove an enforceable agreement that both failed to prove over four years ago?
2. Whether the trial court *again* erred in finding that Troy and Protas prove the existence of an enforceable arbitration agreement
3. Whether the trial court erred in holding the "waiver of class action rights" not unconscionable and "clear."
4. Whether Troy-Protas effects waiver/forfeiture/default or taking other action inconsistent with an alleged right to arbitrate by choosing to file this action in Civil II branch or by expressly consenting to the

judicial process by actively participating in the litigation or by actively litigating this action prior to the arbitration motion or by doing all?

5. Whether the trial court again erred in refusing to grant Mr. Brown an evidentiary hearing and ordering arbitration despite Mr. Brown's multiple unopposed arguments regarding the delegation clause including its procedural and substantive unconscionability?

Preliminary Statement

Troy Capital, LLC ("Troy") is a debt buyer that purchases debts for pennies on the dollar that banks and other creditors are barred from pursuing or no longer wish to pursue and for which Troy seeks recovery of full value. Protas, Spivok, & Collins, LLC, ("Protas") is a debt collection law firm that files debt collection actions in the District of Columbia on behalf of debt buyers like Troy. Troy and Protas filed this action against Mr. Brown in Civil II. Mr. Brown counterclaimed and brought third-party claims against Troy-Protas. The dispute is not between Mr. Brown and FISC or concerning a "payment extension" thus the alleged FISC arbitration agreement that is not assigned to Troy-Protas is irrelevant. Mr. Brown counterclaims and cross-claims under the Fair Debt Collection Practices Act ("FDCPA"), the District of Columbia Consumer Protection and Procedures Act ("CPPA"), the District of Columbia Debt Collection

Law ("DCDCL") in addition to malicious prosecution and abuse of process relating to Troy-Protas' debt collection practices.

Most of these Troy-initiated lawsuits, like lawsuits filed by other debt buyers around the country, end in default judgments or harsh consent agreements against black and brown folks on meritless claims. Troy's lawsuit against Mr. Brown was headed down that path as Troy never served Mr. Brown. In this action, Troy seeks a deficiency judgment allegedly resulting from repossession of a vehicle. Looking to obtain a quick default judgment, Troy requested entry of default and default judgment against Mr. Brown. The default was later vacated when counsel for Mr. Brown so moved. Troy then switched strategies. Mr. Brown propounded discovery, Troy propounded discovery, Troy filed a motion to dismiss and Mr. Brown opposed. Troy-Protas' then filed arbitration motions. The trial court granted both arbitration motions Mr. Brown appealed and the Court vacated and remanded the judgment in Brown I. The trial court then permits Troy-Protas to supplement the record in an unprecedented do-over opportunity to prove an arbitration agreement to Mr. Brown's great prejudice. The trial court again grants both motions and Mr. Brown now appeals a second time the same question.

Statement of Facts

The procedural process employed below is enormously unfair and prejudicial to Mr. Brown. This is the second appeal on the same question despite the Court's determination that neither Troy nor Protas prove an enforceable agreement to arbitrate with Mr. Brown in Brown I. The trial court improperly construes Brown I to enable Troy-Protas a do-over to prove what both failed to prove the first time. Mr. Brown spent four years appealing the trial court's previous erroneous decision and now is forced to do the same thing all over again. The rules say Troy-Protas' burden is to prove an enforceable arbitration agreement using summary judgment evidence in each's opening arbitration motion. Mr. Brown's burden is not triggered until Troy-Protas' burden is met. Both failed four years ago and again today. If Mr. Brown is worthy of real justice as oppose to a subjugated inferior kind typically suffered by black and brown folks, Troy-Protas lose as both fail to prove an enforceable agreement in 2018 when both arbitration motions were filed. Mr. Brown being required to fight the same battle twice demonstrates a privilege afforded to Troy-Protas that is not only unfairly denied to Mr. Brown but denies Mr. Brown access to the judicial system by forcing him to leap over the same mountain twice when as a distressed debtor Mr. Brown can ill afford to do so.

On November 13, 2017, Troy Capital, LLC ("Troy") opted out of arbitration electing to file this action in Civil II where it sought a deficiency amount allegedly resulting from the repossession and sale of a Hyundai Azera-V6 VIN# KMHFC46F26A136665 ("Vehicle") previously owned by Mr. Andre Brown. Troy alleges in its Verified Complaint that Mr. Brown owed Troy "a deficiency balance in the sum of $12, 975.47." [JA43]. Attached to Troy's Verified Complaint is an "Explanation of Calculation of Surplus or Deficiency" ("Notice"). [JA46]. Also attached to Troy's Complaint is a "CONSENT TO HAVE PROCEEDINGS CONDUCTED BY HEARING COMMISSIONER" signed by Troy's counsel Protas.[JA52]. Troy never served Mr. Brown. After filing a false affidavit averring service on December 6, 2017 Troy, through its counsel Protas, requests entry of default on January 4, 2018 and default judgment against Mr. Brown on January 18, 2018; filing a motion for default judgment on January 19, 2018. [JA2, JA53-54]. On January 5, 2018, the Clerk entered a default against Mr. Brown and sent Mr. Brown notification. [JA55]. Counsel moved to vacate the default which was vacated on March 8, 2018. [JA3]. The parties also entered a Scheduling Order. [JA56].

Mr. Brown filed an Answer to Troy's complaint and filed class counterclaims against Troy and Protas based on repossession laws (16

DCMR § 300 *et seq*), the FDCPA, the CPPA, the DCDCL, malicious prosecution and abuse of process. [JA58, JA63]. Mr. Brown served discovery on Troy and Protas on April 24, 2018. [JA133]. Troy served Mr. Brown discovery dated April 24, 2018. [JA132]. Troy responded to Mr. Brown's discovery on May 24, 2018 with merit-based objections including "overly broad in time and scope," vague, "not reasonably calculated to lead to the discovery of admissible evidence," "duplicative," and "unduly burdensome." Troy also objected on intent to move for arbitration. [JA135-137]. After serving its own discovery requests, Troy moved to dismiss on May 15, 2018. [JA86]. Mr. Brown opposed on May 29, 2018. [JA88].

Protas filed an arbitration or in the alternative motion to dismiss Mr. Brown's cross-claims on June 4, 2018 where Protas attaches a single document, "payment-extension-arbitration-agreement" bared on the letterhead of third-party "First Investors Servicing Corporation" ("FISC') and containing no reference to Troy, Protas, Crown Asset Management, LLC ("Crown"), First Investors Financial Services ("FIFS"), First Investors Auto Receivables Corporation ("FIARC") or Wells Fargo, N.A., all of which are implicated as assignees of the RISC to which Troy claims ownership. [JA92, JA44, JA45, JA47]. The alleged "arbitration agreement" is not assigned to Troy/Protas. The hearsay document identifies FISC as

the only signatory and contains the word "waived" and other written comments wholly ignored by Troy-Protas to this day. [JA92]. Troy filed an arbitration motion the day after using the same third-party untrustworthy hearsay document. [JA96-102]. The document titled "Application for Payment Extension" is the sole basis both Troy-Protas rely to compel arbitration as no other documents are attached including the missing RISC and the other documents Troy-Protas rely on **four years later**. Troy-Protas do not invoke the delegation clause in either's motion but instead submits the arbitrability question to the court. *See* Troy's & Protas Mot. (2018).

Mr. Brown timely opposed both motions on June 18th and 19th of 2018. [JA103-108]. Mr. Brown did not agree to arbitrate his claims against Troy-Protas. On June 20, 2018, docketed on June 26, 2018, Protas filed a Reply to Mr. Brown's opposition sandbagging Mr. Brown by filing new untrustworthy hearsay documents purporting to prove an assignment of the "payment-extension-arbitration-agreement." [JA109-129]. The documents do not as Brown I determined. [JA34]. The Reply documents too are third-party titled "Bill of Sale" purporting to be an assignment of "Accounts" from Crown to Troy and referencing an "Agreement," "certain Accounts" and "accounts listed in Exhibit 'A'" [JA119], a "Retail Installment Sale Contract" ("RISC") [JA112], and another document titled

"Bill of Sale and Assignment" purporting to be an assignment from FIFS to Crown. [JA117]. The "Bill of Sale and Assignment" references "Accounts.. ..as set forth in the Account Schedule attached hereto as Exhibit I" and "delivered by Closing Date" and "as described in the Agreement." [JA117]. Protas do not attach any of the agreements or documents referenced in either of the purported assignments or any affidavits to its Reply.

Prior to Brown I, Mr. Brown filed a motion to amend counterclaims, add third party defendants and extend discovery deadline on May 25, 2018. [JA254]. Protas opposed the motion to amend counterclaims at the June 22, 2018 and expressed intent to file an opposition. [JA139]. Mr. Brown orally moved to withdraw his motion to add third-party defendants at the July 13, 2018 hearing which is granted by the trial court. [JA6]. The withdrawn proffered allegations are not docketed no judicial admissions by Mr. Brown exist. Troy-Protas continue its failure to prove an arbitration agreement between Troy and Mr. Brown four years later and despite the improper do-over. Troy files the same two "payment-extension-arbitration-agreements" containing the words "waived" and "waive" written on both. Troy filed none of the new and untimely documents filed by Protas in support of its initial arbitration motion. Neither of the alleged assignments, "Bill of Sale" or the "Bill of Sale and Assignment," identifies Mr. Brown or

reference an arbitration agreement. Also, given Protas' clear sandbag of Mr. Brown, the denial to Mr. Brown an opportunity to respond to newly and untimely filed documents, affords a privilege to Troy-Protas that Mr. Brown appears unworthy of. [JA145]. The same privilege allowing Troy, after waiving supplementing the record, to do so albeit to the great expense to Mr. Brown having already appealed the first decision. [1][JA 150-151]

Though Troy-Protas are prejudicially and improperly permitted to supplement after Brown I, despite the second-bite Troy-Protas fail again. Troy filed more third-party untrustworthy hearsay documents and introduces a brand-new affidavit by Troy's alleged CEO, Rance Willey. [JA172]. In the sham affidavit Willey attempts to authenticate multiple third-party documents of which Willey has no personal knowledge including the RISC, letters on the letterhead of FISC, an unlabeled list of purported accounts not created by Troy nor identified as "Exhibit A" as referenced in the "assignment" [JA187, 189], a purported assignment between "FIFS and Crown" and the truth and accuracy of the "payment-extension-arbitration-agreements" and all the other third-party hearsay documents attached to Willey's affidavit. [JA172-75]. The "arbitration-

[1] "The Bill of Sale evidencing Troy Capital's ownership is sufficient proof and no further investigation or discovery is necessary on this point." *See* Troy's Opp'n to Mot. for Recon. at 3 (filed in 2018)

agreement" is also absent from the purported "ACCOUNTS RECEIVABLE PURCHASE AGREEMENT." Willey has no idea what Troy purchased from Crown if anything as the last facially identified assignee of the RISC is FIARC and Wells Fargo, not FIFS. [JA215].

Neither FISC nor the "payment-extension-arbitration-agreement" is identified in the RISC at all. No assignment from FIARC/Wells Fargo to FIFS, the party that purportedly assigned the alleged agreement-containing-no-arbitration-clause to Crown is even addressed in the affidavit. The "arbitration agreement" contains no language purporting to amend the RISC. [JA93-94]. Willey also has no idea what accounts, if any, were allegedly assigned to Crown by FIFS as Mr. Brown is not identified anywhere in the alleged assignment. Willey also does not know whether the alleged "payment extension" was considered, approved, granted, denied or whether the "arbitration agreement" is "waived" as facially indicated. [JA126]. All the documents are offered to prove the truth of the matters stated within the documents thus are inadmissible hearsay and do not satisfy Rule 56. Troy-Protas have disastrously failed on every level and there is zero basis in the evidentiary record proving an arbitration agreement between Troy-Protas and Mr. Brown. Unless the laws apply differently to Troy-Protas than to Mr. Brown, the decision is clear error.

Also, the RISC attached to Protas's Reply states: "(i) only this contract and the addenda to this contract comprise the entire agreement between you and the assignee relating to this contract; (ii) any change to this contract must be in writing and the assignee must sign it." [JA44].[2] There is no arbitration agreement in the RISC. [JA44-45]. As such, an assignment of the RISC from FIFS to Crown, as deficiently claimed by Troy-Protas, contains no arbitration agreement. The RISC also contains the following "First Investors Financial Services, Inc. has sold and assigned all right, title and interest in this contract to First Investors Auto Receivables Corporation which has granted a security interest in this contract to Wells Fargo Bank, National Association." ("Wells Fargo"). [JA45]. FIFS is also identified as an assignee in the RISC. [JA44]. In other words, FIFS, FIARC and Wells Fargo are identified as assignees in the RISC with FIARC and Wells Fargo identified as the last assignees. There is no document in the record from FIARC/Wells Fargo purporting to assign the RISC to Crown/FIFS/Troy. Also very importantly, any change to the RISC must be signed by FIARC/Wells Fargo/FIFS, the alleged assignees before Crown. Troy-Protas third-party "arbitration agreement" purports a signature of FISC only, a wholly separate entity. FISC has never been an assignee of the RISC.

[2] Troy never filed the RISC in connection with its initial motion.

Two days after Protas filed its Reply attaching the untimely third-party documents, the trial court held the June 22, 2018 Status Hearing. [JA144]. Mr. Brown requests the opportunity to file a sur-reply to Protas's Reply that is immediately denied. [JA145]. Mr. Brown also requests an evidentiary hearing relating to his unconscionability claim that is denied. [JA147]. Mr. Brown moves to reconsider that is denied the day after it is filed. [JA130, JA286]. Yet, though prior to Brown I, Troy-Protas waive any record supplementation stating:

> ...the court needs to draw a line and decide based on the documents that it has which Troy identified as the payment extension agreement and the language of the clause. *See* Opp'n to Mot. for Recon. at 4.
>
> and
>
> The Bill of Sale evidencing Troy Capital's ownership is sufficient proof and no further investigation or discovery is necessary on this point." See Troy's Opp'n to Mot. for Recon. at 3.

The trial court permits Troy-Protas to supplement the record when both should be judicially estopped from doing so after expressly stating the record sufficient and the court ruling in its favor denying Mr. Brown reconsider motion based thereon. This time also, the court improperly delegates the unconscionability issue to the arbitrator and again refuses Mr. Brown's request for an evidentiary hearing thereon and despite Troy-Protas' deficient and untimely invocation of the "delegation clause." [JA25].

The only arguments made by Troy as to unconscionability is the agreement contains an opt-out provision, allows Mr. Brown to seek judicial action, allow Mr. Brown to select an arbitrator of his choice. The only arguments made by Protas relating to unconscionability are that Mr. Brown signed two arbitration agreements, the alleged agreement is not a contract-of-adhesion because it contains an opt-out provision, the "agreement" allows for court intervention via small claims court and that the "agreement" allows Mr. Brown to choose from two arbitration providers or a different provider subject to FISC's approval (one of the identified providers is defunct and the other issued a moratorium on acceptance of collection actions). *See* Protas Reply Mem. at 4. Both Troy and Protas also argued that "[n]o discovery is necessary" and have not provided any discovery to this day. *See* Opp'n to Mot. for Recon. at 3; Protas Reply Mem. at 5. Neither Troy nor Protas provide any rebuttal evidence to 1) Mr. Brown's affidavit averring to his inability to pay for arbitration, his inability to obtain legal representation if compelled to arbitrate, his inability to pay attorney fees to Troy and Protas that may be awarded by the arbitrator and no opportunity to negotiate any of the terms of the arbitration agreement; or 2) evidence regarding the high cost of arbitration; and 3) the unavailability of both of the identified arbitration providers in the

alleged agreement. [JA105-108]. However, the trial court grants both arbitration motions a second time relying on the newly filed third-party hearsay documents and an unlabeled spreadsheet with the name "Andre Brown" that Troy admits to not creating. [JA283].

Without the benefit of any record evidence or proof of an assignment chain to FISC, the trial court erroneously holds:

"Yes. I found that there's a valid arbitration agreement here."

[JA21]. The trial court also held:

> my conclusions are as follows.
> one, that the arbitration clause is applicable. Number two, that because it is applicable, the counterclaims against Troy and Protas should be stayed; an consistent with the broad language of the clause, and the interpretation of what is governed under the Federal Arbitration Act, both by the D.C. Circuit and by the Supreme Court, that the arbitrator in this case will address the question of waiver. The arbitrator in this case will address the issue of unconscionability.

[JA24-25]. In doing so the trial court misapprehends precedent and the FAA. The irony is, though Troy sues Mr. Brown in this action for a deficiency amount of $12, 975.47stemming from a repossession, Troy argues that Mr. Brown's claims relating to unlawful *repossession* and a *deficiency* bar must be arbitrated. Mr. Brown appeals, again.

Pertinent Statutory Provisions

Federal Arbitration Act, 9 U.S.C.A. § 1 to 16 ; Revised Uniform Arbitration Act D.C.Code § 16-4401 *et seq.* (2012 Repl.) ("RUAA")

Standard of Review

The standard of review is de novo for orders appealed based on contract interpretation presenting questions of law. Bank of America, NA., et al v. District of Columbia, 80 A.3d 650, 667 (D.C. 2013). "Before compelling arbitration..., a court must find that the parties have an enforceable agreement to arbitrate and that 'the underlying dispute between the parties falls within the scope of the agreement.'" Jahanbein v. Ndidi Condo. Unit Owners Ass'n, 85 A.3d 824, 827 (D.C. 2014). "When the trial court sits as the trier of fact, we review its factual findings under the 'clearly erroneous' standard." Id. When denial of an agreement to arbitrate is asserted, the court "shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied." See 9 U.S.C. § 4 (1988); D.C.Code § 16-4302(a). Proceeding "summarily" means that the court initially determines whether material issues of fact are disputed. Haynes v. Kuder, 591 A.2d 1286, 1290 (D.C. 1991). "[T]he procedure to resolve 'deni[als] of the existence of the agreement to arbitrate' under the Arbitration Act mirrors

the familiar summary judgment procedure." Id (relying on summary judgment law to interpret procedure under 9 U.S.C. § 4). The movant must provide **admissible evidence** to support its argument that is viewed in the light **most favorable to the nonmoving party**. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)("the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.")

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Technologies, Inc. v. Communications Workers, 475 U. S. 643, 648 (1986). The agreement must be "clear and unmistakable." Id at 649. It is the moving parties' burden to prove with **admissible evidence** that an enforceable agreement to arbitrate exists. *See Jack Baker, Inc. v. Office Space Dev. Corp.,* 664 A.2d 1236, 1238 (D.C.1995)(the party asserting existence of an enforceable contract has the burden of proving the contract's existence). Summary judgment will be granted if a party demonstrates that 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wallace v. Eckert, Seamans, Cherin & Mellott, LLC., 57 A.3d 943 (D.C. 2012).

Affidavits must be made on personal knowledge and set forth facts admissible at trial that show that the affiant is competent to testify about the matters stated therein. Super. Ct. Civ. R. 56(e)). Hearsay is inadmissible – "an out-of-court assertion of fact offered into evidence to prove the truth of the matter asserted – and cannot satisfy the summary judgment burden. Wallace, 57 A.3d at 951. "[H]earsay declarations as to what others said [or documents of third-parties]....is inadmissible hearsay, which is insufficient to meet the requirement of Rule 56[]." Id. The trial court's determination of whether a particular claim comes within the scope of the arbitration clause is reviewed de novo. Giron v. Dodds,35 A.3d 433, 437 (D.C.2012). The judgment is set aside for errors of law or when it appears the judgment is plainly wrong or without evidence to support it. Id. The court reviews the court's legal conclusions de novo. Chibs v. Fisher, 960 A.2d 588, 589 (D.C.2008) (citing D.C.Code § 17-305 (2001));Bingham v. Goldberg, Marchesano, Kohlman, 637 A.2d 81, 89 (DC, 1994)(questions of law "...require independent appraisal of the record on appeal without deference to the trial court's findings.").

In cases like here where the party fails to meet its burden to prove an enforceable agreement the Court has reversed as a matter of course. In Jahanbein, cited in Brown I, the Court reversed and remanded the trial

court's finding of an enforceable arbitration agreement between unit owners. Jahanbein, 85 A.3d at 830. In Strauss v. NewMarket Global Consulting Group, LLC, the Court also reversed and remanded the lower court's finding of an enforceable agreement citing failure to meet burden. 5 A.3d 1027 (2010). In Garzon v. District of Columbia Com'n on Human Rights, the Court also reversed and remanded the trial court's finding of an enforceable agreement as no enforceable agreement proven. 578 A.2d 1134 (1990). In Brook v. Rosebar, the Court finding no enforceable settlement agreement reversed and remanded. 210 A.3d 747 (D.C. 2019). Here, Troy-Protas do not prove an arbitration agreement between either and Mr. Brown and like the cases cited the decision should be reversed.

This Court and the D.C. Circuit interpreting the FAA consistently decide waiver by litigation conduct questions as the Court should here. In TRG Customer Solutions, Inc. v. Smith, the Court decided and affirmed the court's finding of waiver when the movant waited five months to arbitrate. 226 A.3d 751 (D.C. 2020). The D.C. Circuit decided and reversed order compelling arbitration styled as an alternative to summary judgment holding the motion inconsistent with arbitration right. Kahn v. Parsons Global Services, Ltd., 521 F.3d 421, 425 (D.C. Cir. 2008). In Zuckerman Spaeder, LLP, v. Auffenberg, the D.C. Circuit decided and

affirmed a finding of waiver by litigation conduct holding, "failure to invoke arbitration at the first available opportunity will presumptively extinguish a client's ability later to opt for arbitration." 646 F.3d 919, 924 (D.C. Cir. 2011). In Overby v. Barnet, the Court decided, reversed, and remanded finding waiver by litigation conduct when the arbitration movant filed an answer and counterclaims. 262 A.2d 604 (D.C. 1970). Like the foregoing, Troy-Protas waive/forfeit/default on any purported arbitration right by filing this suit in Civil II and expressly consenting via signature to the authority of the court in addition the Troy-Protas' active litigation conduct.

Summary of Argument

Unfortunately, Mr. Brown is forced to appeal the same question for the second time to the Court. The trial court reversibly erred construing Brown I to permit Troy-Protas an unprecedented second opportunity to prove an enforceable arbitration agreement by introducing brand-new evidence in support of Troy-Protas' arbitration motion filed over four years earlier to the **great prejudice** of Mr. Brown. There is no basis for allowing a multi-million-dollar corporation and law firm a do-over while denying distressed debtor Mr. Brown even the reasonable request to file a sur-reply when Protas untimely files brand-new documents in its Reply to Mr. Brown's opposition, Troy waives any supplement to the record before

Brown I and Mr. Brown is forced to appeal the first time on that record and appeal again on an improper supplemented record. It forces a second-rate labored if-you-can-survive-two-appeals access that is different from the privileged access afforded to Troy-Protas. The Court already determined Troy-Protas did not prove an enforceable agreement in Brown I. The trial court gives no basis in law as to why Mr. Brown with zero resources must appeal the same question twice. This is how difficult it is for a black and brown folks to pursue their rights through the court system.

It cannot take two appeals on the same question for a black or brown person to obtain access to the judicial system. Folks like Mr. Brown cannot afford to appeal the same question twice and being required to do so is not access to justice but is instead oppressive and degenerative access which apparently does not command the basics of a drafted opinion. Mr. Brown is forced to piece together the decision below with a hearing transcript and the docket. The difference in access levels provided to Troy-Protas when Mr. Brown is denied even the basics of a fair hearing on his claims is stark.

Though Troy chose the judicial forum in the first instance, it now looks for an exit—and pursues it through a forfeited arbitration motion. Troy-Protas filed this action in Civil II, expressly consent via signature to the authority of the court and engaged in active litigation on self-proclaimed

arbitrable claims thus waive/forfeit/default on any alleged arbitration right under the FAA, federal and District law. Neither Troy nor Protas is assigned the alleged FISC "payment-extension-arbitration-clause. The fully integrated alleged RISC which Troy claims it was assigned contains no arbitration clause and one cannot assign an arbitration clause that does not exist. Neither Troy nor Protas submit any affidavits or a complete assignment chain linking the alleged FISC arbitration agreement to FIFS/FIARC/Wells Fargo/Crown /Troy/Protas. As such, neither proves an enforceable arbitration agreement with Mr. Brown and the trial court reversibly erred in holding otherwise.

Argument

The trial court relying on Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019), improperly delegates to the arbitrator whether an arbitration agreement exists in violation of all this Court's precedent and the FAA. Henry Schein involves a delegation clause and the "wholly groundless" exception. The Supreme Court held that the "wholly groundless" exception to arbitrability in inconsistent with the FAA and "arbitration is a matter of contract, and **courts must enforce arbitration contracts according to their terms**." Id at 526. The court attempts to follow Henry Schein relating to the "wholly groundless" exception but completely

ignored the case relating to "enforcing arbitration contracts according to their terms." The court's holding that the delegation clause is an enforceable contract between Mr. Brown and Troy-Protas when both fail to prove an assignment from FISC is reversible error.

The trial court failing to find that Troy-Protas forfeited/waived or are in default of the proceedings in relation to said delegation clause when neither raised the issue in either's opening motion, submitted the very questions the clause alleges to address to the trial court for resolution, initiated this action on a self-identified arbitrable claim in court, expressly consented by signature to the trial court's resolution of the claim, requested default on the claim, requested default judgment on the claim, filed a motion to dismiss Mr. Brown's counterclaims on the merits, issued discovery requests to Mr. Brown, responded to Mr. Brown's discovery request with merit-based objections before filing an arbitration motion seven (7) months after Troy-Protas initiated this action is reversible error.

As the movants, Troy-Protas must come forward with ***evidence***, which must be viewed in the light most favorable to Mr. Brown, to establish an enforceable agreement to arbitrate between Troy-Protas and Mr. Brown. Both failed to meet their burdens. A single third-party document containing an "arbitration clause" is filed in support of both motions but purports to

be an arbitration agreement between FISC and Mr. Brown. The document is not evidence and Troy-Protas fail to present *prima facia* evidence proving an arbitration agreement in their initial motion that triggered Mr. Brown's obligation to provide evidence in opposition. And, despite Troy's improper supplement of the record that it waived prior to Brown I, Troy-Protas fail a second time to prove an arbitration agreement between Troy and Mr. Brown and the trial court reversibly erred. [3]

A. The court reversibly erred by ordering the parties to arbitration after Troy-Protas waived/forfeited/defaulted on any alleged arbitration right.

i. The Court should decide waiver by litigation conduct based on strong precedent, the FAA and the long-tortured history of this litigation

"Under the FAA a litigant is entitled to a stay pending arbitration so long as the suit in which he is a party is "referable to arbitration" under a valid agreement and he "is not in default in proceeding with such arbitration." 9 U.S.C. § 3. Zuckerman Spaeder, 646 F.3d at 921. "We have held a party who has actively participated in litigation or otherwise acted in a manner inconsistent with an intent to arbitrate is 'necessarily 'in default,'" within the

[3] "The Bill of Sale evidencing Troy Capital's ownership is sufficient proof and no further investigation or discovery is necessary on this point." *See* Troy's Opp'n to Mot. for Recon. at 3.

meaning of this provision. Cornell & Co. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C.Cir.1966).

The FAA provides:

> If any suit or proceeding **be brought in any of the courts** of the United States upon any issue referable to arbitration..[].**the court in which such suit is pending,**... shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, **providing the applicant for the stay is not in default in proceeding with such arbitration.**

9 U.S.C. § 3. According to the FAA, and the D.C. Circuit interpreting the FAA the court decides whether an "applicant for the stay is not in default in proceeding with such arbitration" denying stay if the applicant is in "default in proceeding with such arbitration." A court must decide the issue of default prior to issuing a stay of the proceedings. The trial court misapprehends Wolff v. Westwood Management, 558 F.3d 517(D.C. Cir. 2009) as holding the arbitrator decides questions of waiver by litigation conduct. [JA25]. The arbitrator does not. ZuckermanSpaeder, decided after Wolff, confirms. Wolff references "allegation[s] of waiver, delay, or a like defense to arbitrability" in the context of "whether a condition precedent to arbitrability has been fulfilled" or "procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met."

Wolff, 558 F.3d at 520; Howsam v. Dean Witter Reynolds, Inc, 537 U.S. 79, 85 (2002). Wolff distinctly does not involve waiver by litigation conduct.

Further, "Default" is defined in Black's Law Dictionary as "[t]he omission or failure to perform a legal or contractual duty." Black's Law Dictionary (11th ed. 2019). The RISC filed by Troy defines default as "[y]ou do not pay any payment on time..... **[y]ou start a proceeding in bankruptcy** ...; or [y]ou break any agreements in this contract." The alleged agreement states "any claim, at your or our election, shall be resolved by neutral binding arbitration and not by court action." Troy filing its self-proclaimed arbitrable claim in court and/or attempting to elect arbitration on the same claim and/or expressly consenting to judicial resolution in violation of the "agreement" and/or submitting delegable issues to the court for resolution and/or actively litigating by requesting and filing for a default judgment, filing a motion to dismiss, issuing merit-based objections to discovery, etc each independently constitute default or material breach to be determined by the court per the FAA and precedent. The Court routinely decides such questions. In Hossain, the Court explains "[n]either Howsam, Woodland nor Menna...addresses the issue before us: who decides the question of 'waiver by litigation conduct'..." Hossain v. JMU Properties, LLC., et al., 147 A.3d 816, 821 (2016)

Both the Court and the D.C. Circuit conclude on multiple occasions that such waivers are correctly decided by the court. Hossain,147 A.3d at 821(trial court properly decided waiver by litigation conduct). Explaining it inefficient to send the question to the arbitrator only to have it sent back if waiver is found when the court, which is more familiar with the case, can make the determination in the first instance. Id at 822. The D.C. Circuit similarly holds, "[a] defendant seeking a stay pending arbitration...who has not invoked the right to arbitrate on the record at the first available opportunity, typically in filing his first responsive pleading or motion to dismiss, has presumptively forfeited that right." Zuckerman Spaeder, 646 F.3d at 922-23. In TRG, "[b]y the time that TRG finally filed its Motion to Compel Arbitration, **five months** had passed since the inception of the lawsuit, a period of time comparable to that in other cases **in which courts have found a waiver**." TRG, 226 A.3d at 758-59. The court decided waiver by litigation conduct in Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774 (D.C. Cir. 1987)(hereinafter "NFCR"). In Khan, the court decided a motion in the alternative inconsistent with arbitration right. 521 F.3d at 425. In 1966, the Court decided waiver by litigation conduct in Cornell, finding the defendant "in default of the proceedings." 360 F.2d at 514. In Overby the Court also decided the

waiver question in. 262 A.2d at 605(reversed and remanded holding litigation conduct inconsistent with arbitration right). The Court even decided the waiver question in the sole context of an arbitration proceedings. Lopata v. Coyne, 735 A.2d 931, 937(D.C. 1999)

As the D.C. Circuit and this Court has done since Overby in 1970, the Court should decide the waiver by litigation conduct question presented. Also, even if a choice exists where the Court or arbitrator may decide such waivers, the long-extended history of litigation in this Court surrounding the instant arbitration motions, the lower court's two orders compelling arbitration, and this being the second appeal on the same motions strongly counsel that the Court settle the waiver question here.

ii. Troy and Protas by filing suit in Civil II or expressly and implicitly consenting to the judicial process or by actively participating in the instant litigation or by engaging in all of the above prior to moving to compel arbitration forfeits, defaults on or waive any alleged arbitration right

"Whether a party has waived its right to arbitration constitutes a question of law that this court considers de novo." TRG, 226 A.3d at 755; NFCR, 821 F.2d at 774(The question of waiver is reviewed de novo). Like "any contract right, the right to arbitrate may be waived — either expressly or by implication." TRG, 226 A.3d at 755; see also NFCR, 821 F.2d at 774. A party can effect such a waiver by actively participating in the litigation **or** by

otherwise acting inconsistent with an arbitration right. Hossain, 147 A.3d at 823. The D.C. Circuit interpreting the FAA hold "[a] defendant seeking a stay pending arbitration under Section 3 who has not invoked the right to arbitrate on the record **at the first available opportunity**, typically in filing his first responsive pleading or motion to dismiss, **has presumptively forfeited that right.**" Zuckerman Spaeder, 646 F.3d at 922. Going further, "[b]y this opinion we alert the bar in this Circuit that failure to invoke arbitration at the first available opportunity will presumptively extinguish a client's ability later to opt for arbitration." Id at 924. "Forfeiture is the 'failure to make a timely assertion of a right' and...entails no element of intent.'" Id at 922. "A party who fails timely to invoke his right to arbitrate is 'necessarily '**in default' when he later attempts to proceed with arbitration under Section 3.**" Id; "A party waives his right to arbitrate when he actively participates in a lawsuit **or** takes other action inconsistent with that right. Once having waived the right to arbitrate, that party is necessarily "in default in proceeding with such arbitration." Cornell, 360 F.2d at 513.

The Supreme Court issues clear-eyed directives as to treatment of arbitration agreements by courts in its recent unanimous opinion Morgan v. Sundance, 142 S.Ct. 1708 (2022). Specifically, the Supreme Court holds "[t]he policy is to make 'arbitration agreements as enforceable as other

contracts, but not more so.' Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But **a court may not devise novel rules to favor arbitration over litigation.**" Id at 1710. (citations omitted). The Supreme Court further explains, "[o]utside the arbitration context, a federal court assessing waiver does not generally ask about prejudice. Waiver, [] 'is the **intentional relinquishment or abandonment** of a known right.' To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party. That analysis applies to the waiver of a contractual right, as of any other.....a contractual waiver 'normally is effective' without proof of 'detrimental reliance.'" Id at 1713. In direct conflict with Morgan, the court devised **unknown** and **unwritten** novel rules by compelling arbitration despite an express repudiation, relinquishment by signature and abandonment of any purported arbitration right and Mr. Brown's acquiescence thereto.

Morgan further directs, **"[i]f an ordinary procedural rule—**whether of waiver or forfeiture or what-have-you—would **counsel against enforcement of an arbitration contract, then so be it.** The federal policy is about treating arbitration contracts like all others, **not about fostering arbitration.** [NFCR, 821 F. 2d at 774]('The Supreme Court has made clear' that the FAA's

policy 'is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism')." Id at 1713-14. "And indeed, the text of the FAA makes clear that **courts are not to create arbitration-specific procedural rules like the one we address here.** Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—'shall be **made and heard in the manner provided by law for the making and hearing of motions**' (unless the statute says otherwise). A directive to a federal court to treat arbitration applications 'in the manner provided by law' for all other motions is simply a command to **apply the usual federal procedural rules, including any rules relating to a motion's timeliness**." Id at 1714. Or, "a **bar** on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." Id. The trial court applied an arbitration-specific rule, allowing it to ignore Troy-Protas' abject failure to invoke the alleged delegation clause and other untimely arguments and purported evidence (and other deficiencies identified herein), to compel arbitration based solely on Troy-Protas filing a document containing the word arbitration.

The purpose of the FAA is to provide relatively speedy, private, and inexpensive alternative forum outside the judicial process. Troy-Protas furthering and extending delays by filing suit in court in the first instance is

contrary to that purpose. The FAA authorizes a stay and enforcement of an arbitration agreement only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement" and "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. §3. The right is forfeited if not invoked in the first pleading and/or motion. Zuckerman Spaeder, 646 F.3d at 922. "In evaluating whether such a waiver has occurred, "[t]he essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right." TRG, 226 A.3d at 755. Troy-Protas took other actions each of which are independently inconsistent with a right to arbitrate AND engaged in the level of litigation necessary to be inconsistent with an arbitration right.

Troy's "other action" inconsistent with an arbitration right is its single act of knowingly filing this action in Civil II for resolution of a self-proclaimed arbitrable claim independently constitutes waiver. "[A] party's filing of a lawsuit without invoking arbitration ... would nearly always indicate a clear repudiation of the right to arbitrate...." Sears Roebuck & Co. v. Avery, 163 N.C.App. 207, 593 S.E.2d 424, 426-27 (2004). Troy's second independent act that on its face is inconsistent with an arbitration right is Troy's express "CONSENT TO HAVE PROCEEDINGS CONDUCTED BY

HEARING COMMISSIONER" filed by Protas with a self-identified arbitrable claim. There are not two more independent manifestations of abandonment or relinquishment of a contractual right than an express signature repudiating the right or knowingly doing an act directly contrary to the existence of the right. In doing either act, Troy-Protas does not passively participate defensively but intentionally and expressly relinquishes or abandons any purported right to arbitrate and are in default. Id.

The Court already holds in Overby that filing a counterclaim and an answer waives an arbitration right. 262 A.2d at 605(A "right to arbitration of a dispute may be and is waived by answering the complaint on the merits and counterclaiming for damages."). Here, Troy-Protas initiate the suit in the first instance which is more of a repudiation than filing a counterclaim in a suit filed by the opposing party. Troy intentionally filed the suit in Civil II banking on a quick, muss-no-fuss default judgment. [JA53, JA54]. When Mr. Brown showed up with lawyer in tow to competently defend resulting in the default being vacated, Troy changed its strategy. "Arbitration may not be used as a strategy to manipulate the legal process." NFCR., 821 F.2d at 775. Troy-Protas engaged in significantly more litigation conduct than in Overby. Troy-Protas also waited seven (7) months as oppose to the four and five months where waiver by litigation conduct has been found by the

court. Cornell, 360 F.2d at 513 (four months); TRG, 226 A.3d at 758(5 months); Zuckerman Spaeder, 646 F.3d at 924 (eight months). Also, Lopata holds, "a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result." Lopata, 735 A.2d at 937(citing with approval Nghiem v. NEC Electronic, Inc., 25 F.3d 1437, 1440 (9th Cir.1994)("[o]nce a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority."). The principle equally applies to the courts per Morgan. A party cannot submit a self-identified arbitrable claim to the court then challenge the authority of the court to act when the Defendant vacates a default and defends. Troy-Protas submitted to the court's authority by filing suit in Civil II, Troy cannot now change its mind and assert lack of authority. Holding otherwise contradict the Lopata principle and improperly elevates arbitration as a preferred outcome in waiver by litigation questions as distinctly and unanimously rejected in Morgan, 142 S.Ct. at 1714("a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration.").

Troy-Protas also actively participated in this litigation at a level inconsistent with a right to arbitrate. Unlike in Hercules & Co. v. Beltway Carpet Servs. Inc., 592 A.2d 1069 (D.C. 1991), Troy does not raise the

issue in its initial pleading, Troy-Protas submits to the authority of the court in Troy's first pleading. Troy then requests via praecipe that default be entered against Mr. Brown after falsely claiming to have effected service. Troy then moves for a default judgment. TRG Customer Solutions, 226 A.3d at 758 ("a party's attempt to use a judicial forum to obtain a favorable ruling before demanding arbitration often represents the type of active participation in litigation that waives that right."). Mr. Brown then notified and shows up with counsel to defend who moved to vacate the default for lack of service. Relying on Troy's decision to file in court, Mr. Brown filed an answer, counterclaims and third-party claims against Troy-Protas. Troy also entered into a scheduling order. Troy then filed a motion to dismiss Mr. Brown's counterclaims on the merits without making any claim for arbitration. Troy also responded to Mr. Brown's discovery requests with merit-based objections. It is after all that Troy files its arbitration motion. Overby, 262 A.2d at 605; Zuckerman Spaeder, 646 F.3d at 922.

In the adhesive agreement "our" and "we" is FISC exclusively.[4] As explicitly directed in Morgan, the court interprets terms of an arbitration

[4] The plain language specifically and clearly states that "[a]ny claim shall, at your or our election, be resolved by neutral, binding arbitration" and "EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION." "We" and "our" being clearly defined as First Investors Servicing Corporation. [JA93]

agreement as it would any other agreement, by its plain language. Fields v. McPherson, 756 A.2d 420, 426 (D.C.2000). No language extends an **invocation right** to FISC's parent, agents, affiliates, subsidiaries, assigns, etc. Thus an "agent" cannot invoke arbitration on its own behalf as Protas improperly attempts to do. [JA89]. Protas as an "agent" of Troy – a purported assign of FIFS not FISC – is also bound by Troy's waiver or forfeiture. Id. Where Troy forfeits any alleged arbitration right, Protas cannot claim a right that is forfeited by the entity Protas purports to claim under as an "agent." Also, Protas too waived arbitration by moving for dismissal of Mr. Brown's claims on the merits. ("this Court should dismiss all individual and class action claims against Protas for failure to state claims for which relief may be granted"). Protas Mot. at 5. Protas made the litigation decision not to arbitrate opting instead for a quick default judgment through lawsuit against a pro se defendant ninety-nine percent likely to be black or brown with no knowledge of the judicial process. Troy-Protas also filed multiple lawsuits in court using a similar RISC. Troy-Protas are estopped from now claiming lack of court authority.

Thus, under both the FAA, federal and District law Troy-Protas are "in default in proceeding with such arbitration" and/or "acted inconsistently with the arbitration right" and/or "waived" and/or "forfeited" any alleged

arbitration right. Overby, 262 A.2d at 605; Zuckerman Spaeder, 646 F.3d at 922; Kahn v. Parsons Global Services, Ltd., 521 F.3d 421, 424-425 (D.C. Cir. 2008)("consistent with arbitration's contractual basis, a party may waive its right to arbitration by acting 'inconsistently with the arbitration right.'"). Lastly, the court construed none of the facts alleged in Mr. Brown's favor but improperly construed all facts in the extreme favor of Troy-Protas. As such, based on all the forgoing, the decision is reversible error.

iii. Defendants waive, forfeit and/or default on invocation of any delegation clause by submission of self-described "delegable issues" to the court for resolution

Per the FAA, the court decides whether "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. §3. The Court held in Brown I that '[b]ecause the delegation question was not sufficiently briefed in this court, the trial court should decide it on remand." Brown I, n. 9. Mr. Brown fully briefed the delegation question to the trial court in 2018. [JA166]. It is unopposed and conceded. Clifton Power Corp. v. FERC, 88 F.3d 1258, 1267 (D.C. Cir. Feb. 12, 1996)(taking as conceded an unopposed sound argument); Rose v. US, 629 A.2d 526 (D.C. 1993) ("Courts generally decline to consider arguments thus waived....where counsel has made no attempt to address the issue, we will not remedy the defect"). Per the Morgan directive, arbitration applications are treated per

"usual federal procedural rules, **including any rules relating to a motion's timeliness.**" Morgan, 142 S.Ct. at 1714. Troy-Protas do not invoke the alleged delegation clause in each's opening motion but instead submits the alleged delegable questions to the trial court for resolution. As such, according usual procedural rules "relating to motion timeliness" that apply to Mr. Brown (default entered against Mr. Brown on 1/5/18), but the trial court does not apply to Troy-Protas, Troy-Protas waive/forfeit/default on invocation of the delegation clause. Troy-Protas effects a default-waiver by 1) failing to invoke the delegation clause in each's opening motion; and/or 2) filing this action in court; and/or 3) expressly consenting to this Court's jurisdiction to decide all issues in this case; and/or 4) submitting the alleged delegated question to the court for resolution, and/or 5) failing to oppose Mr. Brown's argument in 2018. [JA166]. The Court holds such failures provide independent bases for reversal. Fields, 756 A.2d at 424-425 (D.C. 2000) (trial court reversed as no adequate basis for the decision); Greene v. Gibraltar Mortgage Inv. Corp., 488 F.Supp. 177, 179 (D.D. C.1980)(same).

"The only issue before us is whether [movant is] "in default" of his right to arbitrate, a question of law we address de novo." Khan, 521 F.3d at425, 428("filing a motion for summary judgment based on matters outside the pleadings is inconsistent with preserving the right to compel arbitration.").

To allow Troy to untimely invoke the clause after an appeal and four years after filing its motion directly confronts the policy established by NFCR that "arbitration may not be used as a strategy to manipulate the legal process." NFCR, 821 F.2d at 776. And, is extremely unfair to Mr. Brown. Like in Kahn, Troy-Protas' act of not invoking the delegation clause and/or submitting the alleged delegable question to this court for resolution are "signifier[s]" of a "conscious decision to have the substance of [it's] claims decided by the Court." Khan, 521 F.3d at 427. Troy-Protas submitted the "validity, enforceability, interpretation and scope of this clause, and the arbitrability of the claim or dispute" question to the trial court in 2018 for resolution among other things.

Troy argued in 2018 "it is clear that there is an arbitration agreement governing the parties in this case" and "[w]hen making the determination of whether a particular dispute is arbitrable, 'the court must inquire merely whether the arbitration clause is 'susceptible of an interpretation' that covers the dispute" and "arbitration agreements requiring individualized arbitration proceedings are enforceable" and "[a]n arbitration agreement governed by the FAA, like the one in this case, is presumed to be valid and enforceable." Troy's MTCA, pgs. 4-8 (2018). And Protas argues "[b]efore the trial court can rule on a motion to compel arbitration, it must

determine whether there is an actual 'dispute' within the meaning of the arbitration clause," "Protas has not acted inconsistently with the right to arbitration," "Protas is entitled to arbitration under the arbitration agreement executed between Mr. Brown and FISC" and "Protas is a proper assignee of Troy," "Mr. Brown expressly agreed to a "broad" arbitration clause covering "any claim or dispute" arising out of the collection of the debt," "Protas has a right to elect arbitration." The arguments go directly to the "validity, enforceability, interpretation and scope of this clause, and the arbitrability of the claim or dispute."

The Court has also found waiver on much less litigation activity than here, involving less time before invocation and no express repudiation of an alleged right as is the case here. Overby, 262 A.2d at 605; Zuckerman Spaeder, 646 F.3d at 924. In neither of the foregoing did the movant file the action in court in the first instance or expressly consent to judicial action through signature. Troy-Protas untimely invoke the delegation clause four-years after filing its initial motion and submitting the alleged delegated questions to the trial court for resolution in addition to filing this suit in the first place. The court improperly construed all facts in the extreme disfavor of Mr. Brown. Despite the foregoing and clear, unambiguous precedent showing that Troy-Protas waive, forfeit and/or are in default on invocation

of any delegation clause the court compelled arbitration a second time thus reversibly erred in both sending the waiver by litigation conduct question to the arbitrator and compelling arbitration.

B. The trial court reversibly erred by allowing Troy-Protas a do-over to prove an enforceable arbitration agreement between either and Mr. Brown based on Brown I.

Troy and Protas failed to meet their initial burden of establishing an enforceable arbitration agreement between both and Mr. Brown in each's opening motion filed in 2018. This Court agreed in Brown I [JA34, n.5] (Troy failed to prove "that Troy validly was assigned the rights and remedies initially held by FIFS and FISC."). However, the trial court construed the decision, without citing any legal support for the extraordinary act and to the great prejudice of Mr. Brown, as permitting Defendants a do-over to supplement the record and make an unprecedented second attempt to prove a contract that both failed to prove over four years ago. Defendants again fail. But the Supreme Court recently admonished against this very notion in Morgan. The High Court's directives about a perceived policy "favoring arbitration" relied on by Troy, Protas and the trial court as a substitute for meeting Troy-Protas' initial burdens to prove an enforceable arbitration agreement is uniquely relevant.

Morgan specifically directs that Troy and Protas do not get a do-over. Morgan specifically bars the use of "arbitration-specific procedural rules" or "custom-made rules," employed by the lower court here "to tilt the playing field in favor of arbitration." Morgan, 142 S.Ct. at 1714. The Court specifically notes the invalidity of such rules in the context of a motion timeliness – the issues at bar. Id Under ordinary procedural rules, Troy-Protas must prove the existence of an enforceable arbitration agreement and/or invoke an alleged delegation clause in the initial arbitration motion. Troy-Protas must also oppose arguments or concedes said arguments. Both fail to do so and expressly waive any new request by Troy to supplement the record.[5] Ordinary procedural rules do not support Troy-Protas receiving a second opportunity after appeal to take another shot at proving an enforceable arbitration agreement. Scott v. BSA, 43 A.3d 925 (D.C. 2012)("we see no need to reopen the hearing, thereby giving the employer a second bite at the proverbial apple; rather, the agency on remand shall make the necessary finding[s] based on the existing record).[6] 9 U.S.C. §6.

[5] "The Bill of Sale evidencing Troy Capital's ownership is sufficient proof and no further investigation or discovery is necessary on this point." *See* Troy's Opp'n to Mot. for Recon. at 3 (filed in 2018)

[6] Protas filed no new documents but improperly relied on Troy's filings.

i. Despite the improper second bite at the same apple the trial court reversibly erred in compelling arbitration as Troy-Protas do not prove with admissible evidence an enforceable arbitration agreement with Mr. Brown.

Troy-Protas submit the question of enforceability and existence of an arbitration agreement to the trial court and the court decided the question. [JA21]("I found that there's a valid arbitration agreement here."). Troy-Protas again fail to prove an enforceable agreement between both and Mr. Brown. The Court holds in Brown I "the arbitration clause could cover Mr. Brown's counterclaims...as long as sufficient evidence demonstrated that Troy validly was assigned the rights and remedies initially held by FIFS and FISC." Brown I, n. 5. Troy-Protas submit no evidence below and the court's reliance on the documents in the record, including the "payment-extension-arbitration-agreement," is reversible error. Troy-Protas do not prove with evidence that either is an assignee of FISC, FIFS, FIARC or Wells Fargo. Super.Ct.Civ.R. 43-I(a) requires the party seeking admission of a business record to establish its authenticity through a competent witness. Meaders v. United States, 519 A.2d 1248, 1255-1256 (D.C. 1986). The only document filed in support of Troy-Protas' initial arbitration motions are two third-party documents that includes the words "waived" and "waive" written on both containing an arbitration clause. [JA89,91,97,99]. No competent witness authenticates the documents but

Troy-Protas solely rely on the documents as "proof" of the existence of an arbitration right. Neither Troy nor Protas created the third-party documents, i.e., the alleged payment-extension-arbitration-agreement that is "waived." Thus, Troy-Protas nor the self-serving sham affidavit of Troy's CEO, Rance Willey, can authenticate the multiple levels of hearsay contained in the documents filed below to prove ownership of an account attributed to Mr. Brown or an arbitration right. The court improperly relied on the untrustworthy hearsay documents. Id at 1255.

The Willey affidavit attaches incomplete third-party documents that are hearsay upon hearsay and inadmissible as evidence including the purported arbitration agreement relied on by Troy-Protas. Troy also claims that at the time of closing the alleged sale Crown provided the following documents to Troy "a copy of Mr. Brown's Retail Installment Sale Contract, the Application for Payment Extension signed by Mr. Brown on February 7, 2012, the Application for Payment Extension signed by Mr. Brown on October 29, 2012 and a letter to Mr. Brown dated November 4, 2013." [JA173-74]. Each of the foregoing is hearsay that cannot be authenticated by Troy as all are other people's records. The alleged account numbers attributed to Mr. Brown differ in the reference documents and the rules of evidence bar Troy from verifying the records of FISC, FIFS, FIARC, Wells

Fargo and Crown. One of the "payment extensions" also appears incomplete (missing page) and there are unexplained signatures and other markings on both documents including the word "waived." The account numbers do not match the number in the unlabeled and admitted third-party hearsay spreadsheet which cannot be resolved by Troy's affidavit as the documents were not made by Troy. D.C. Rule 805.1. Mere assertions of ownership or assignment, without evidentiary support, are insufficient to prove the existence of an agreement to compel arbitration. In re D.M.C., 503 A.2d 1280, 1283-84 (D.C. 1986).

The Willey affidavit improperly and falsely under oath attempts to authenticate 1) the alleged "payment extension arbitration agreement," that is "waived" 2) an "Asset Schedule" stated in the affidavit to have been given to Troy by a third-party, 3) "a copy of the Bill of Sale and Assignment" allegedly from a "May 15, 2014 Account Purchase Agreement between Crown and FIFS" sans that actual agreement, the "Accounts," the "Account Schedule" or "Exhibit I" all of which are referenced in the "Bill of Sale and Assignment" upon which Defendants rely and all of which Defendants claims proof of the matters asserted within the absent documents, 4) a "Retail Installment Sale Contract" to which Troy is not a party, 5) two "Application[s] for Payment Extension" averring both as "true

and accurate" and averring as fact that both are "signed by Mr. Brown" when neither Troy, Protas, Crown, FIFS or FIARC are parties to either, and 6) averring that a letter containing a November 4, 2013 date is a "true and accurate copy of the letter" and averring that said letter "advised Mr. Brown" about an "account number change" despite the "letter" not having been drafted by Troy and facially appearing to be that of a third-party. Troy did not have anything to do with the creation of any of the foregoing documents nor is Troy a custodian of records for any of the entities that Troy purports created said documents. Meaders, 519 A.2d at 1255; U.S. v. Borrasi, 639 F.3d 774, 780 (7th Cir. 2011)(hearsay within hearsay is prohibited unless each layer is properly admitted under an exception).

The documents also do not qualify as business records as Willey is not competent to testify as to whether (1) the record was made in the regular course of business, (2) it was the regular course of business to make such a record, and (3) the record was made at, or within a reasonable time after, the act, transaction, occurrence, or event which it reports. Id. Willey also cannot testify based on personal knowledge or that the maker of the record had personal knowledge of the alleged facts contained in the alleged records or that such facts were communicated to the maker of the record. To make such documents admissible "a knowledgeable witness" must also

"testify about the record-keeping practices" of the organizations that created the records. Id at 1255-56. The documents are also facially untrustworthy as both "payment-extension-arbitration-agreements" contain the word "waive" on both documents indicating that there is no intention of enforcing the alleged agreements. "The requisite foundation for admission ..., 'must be laid through the testimony of someone who is sufficiently familiar with the practices of the business involved to testify that the records were made in the regular course of business, and thus to verify their authenticity." Id at 1256. Troy-Protas can do neither. Also, no record evidence exists linking the "FISC-signed-agreement" to Troy/Protas.

As such, Troy-Protas present no competent evidence as to the existence, enforceability, accuracy, truth or authenticity of any of the documents attached to the Willey affidavit including the "payment-extension-arbitration-agreement." Nor does either present any **admissible evidence** that a "payment-extension" was ever approved, granted or "waived." Troy-Protas do not meet their burdens as neither has any personal knowledge as to any on the documents and cannot testify to the authenticity, accuracy or truth of any. Thus, the court's holding that Troy-Protas' **four years later** prove ownership of an account attributed to Mr. Brown and an arbitration right is clear and reversible error.

ii. The court finding an enforceable arbitration agreement where no chain-of-title is proven or argued is reversible error.

"[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U.S.C. § 2." Henry Schein, 139 S. Ct. at 530. The Court reviews interpretation of contracts *de novo.* Unfoldment, Inc. v. District of Columbia Contract Appeals Bd., 909 A.2d 204, 209 (D.C.2006). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T, 475 U. S. at 648. The party asserting the existence of an enforceable agreement has the burden of proving there has been agreement through a meeting of the minds — as to all material terms. Jack Baker, 664 A.2d at 1238; Bailey v. Fed. Nat'l Mortg. Ass'n, 209 F.3d 740, 746 (D.C.Cir.2000). The Supreme Court directs that in deciding the existence of an arbitration agreement courts "should apply ordinary state law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). **Only if** the court concludes a binding arbitration agreement exists does a presumption in favor of arbitrability come into effect. Id.

Any ambiguity is construed strongly against the drafter. Vaulx v. Cumis Ins. Soc'y, Inc., 407 A.2d 262, 265 (D.C.1979). FISC as offeror and drafter

of the terms of the "payment-extension-arbitration-agreement bears the risk of using ambiguous language and format. Id; Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) (addressing the doctrine within the context of federal arbitration law); see also Arthur L. Corbin, et. al., Corbin on Contracts § 559, supp. at 337 (1960 & Supp.1996) (the cannon is "imposed as a matter of public policy as a penalty for bad draftsmanship"); 11 Williston on Contracts 32:12 "Contra proferentum: Ambiguities Interpreted Against Drafter" (4th ed.). Especially in "contracts of adhesion," defined as "consumer signed standardized contracts with set terms and conditions...automatically accepted by consumer upon signing contract, and consumer could not have negotiated any terms in contract." Andrew v. American Import Center, 110 A.3d 626, 637 (D.C. 2015).

Under District law, the contract at issue is one of adhesion as it is a standardized contract with set terms and conditions purported to be accepted upon signature and Mr. Brown is not given an opportunity to negotiate its terms. Mr. Brown also does not agree to submit his claims against Troy/Protas to arbitration and neither Troy/Protas come close to satisfying each's burden of proving the existence of an arbitration agreement between either and Mr. Brown. The plain language of the tendered agreement proves the nonexistence of an arbitration right. The

language of the "arbitration agreement" provides three dispositive passages to Troy or Protas' claim of an arbitration right providing:

> "In this Arbitration Clause, 'you' refers to the consumer(s) signing below; 'we,' 'us' and 'our' refer to First Investors Servicing Corporation." (emphasis added).
>
> "Any claim shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action," (emphasis added).
>
> PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS - EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.(emphasis added).

[JA68-69]. Troy-Protas are plainly excluded from the definitions of "our," "you," or "we" who "may choose to have any dispute...decided by arbitration." Per the plain language of the agreement FISC is the sole entity capable of invoking arbitration. "[D]ocuments should be strictly construed as they are written, giving the language its clear, simple, and unambiguous meaning." Johnson v. Fairfax Village Condo. IV, 548 A.2d 87, 91(1988); Morgan, 142 S.Ct. at 1713(arbitration agreements are not more enforceable than other contracts). Like most reasonable consumers, Mr. Brown is not a lawyer and will reasonably interpret the above language to mean that only FISC or Mr. Brown can invoke arbitration under the agreement. Not FISC's parent or any other entity that may be alleged to be affiliated with FISC, but **FISC only**. Because "[a]rbitration under the [FAA] is a matter of

consent, not coercion,...the FAA does not require parties to arbitrate when they have not agreed to do so." Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478-79 (1989).

Troy/Protas make no claim to be assignee and are not assignees of FISC, the only party purportedly holding an arbitration right. Thus the trial court's reliance on the "payment-extension-arbitration-agreement" is reversible error. Further, nothing in the "payment-extension-arbitration-agreement" contemplates transfer of FISC's purported rights that may alert the consumer of loss of a constitutional right as to disputes with other entities. [7] Interpreted by a reasonable consumer, the alleged agreement contains no language expressing intent to provide invocation rights to any entity other than FISC. And unless parties are prevented by law from excluding future assignees from invocation rights (through the standing in the shoes doctrine), the plain language of the agreement does not provide invocation rights to future assignees or anyone but FISC and the consumer. Troy-Protas' proffered interpretation deprives Mr. Brown of any notice of loss of his constitutional rights in future disputes with other entities relating

[7] Troy's claim that Mr. Brown's undocketed "Counterclaim establishes that FIFS conducted its loan servicing and collection activities through its wholly owned subsidiary FISC" that was ordered withdrawn by the trial court in 2018 was already rejected by this Court in Brown I. [JA34, n.6]. Besides, nowhere in the counterclaims does Mr. Brown allege that FISC assigned an alleged arbitration right to any entity.

to matters not involving the "payment extension." Mr. Brown did not knowingly and intentionally give up such rights. Had FISC intended invocation rights for future assignees, parents, or agents FISC attorneys must clearly and explicitly say so in the adhesive agreement by including assignees, parents, or agents in the definitions of "we," "our," and "us" as is done in numerous agreements as a matter of course. It is incredibly harsh and unfair to credit a consumer with knowledge of which most lawyers are not aware – that the standing in the shoes doctrine can override FISC's clearly expressed intent in a private contract FISC drafted. Further, waiver by the consumer must be knowing, clear and unmistakable." AT & T, 475 U.S. at 649. Under the foregoing circumstances there is no waiver by Mr. Brown of his right to file an action in court against Troy or Protas. The consumer is not on notice of a waiver of a constitutional right as to future disputes with assignees, parents, agents, etc.

Second, Troy-Protas claim to be assignee and agent of assignee of FIFS, sans evidence, three to potentially five times removed from the containing-no-arbitration-clause RISC. Troy-Protas fail to prove assignment of even the RISC to Troy and certainly do not prove assignment of the "payment-extension-arbitration-agreement." The instant dispute also does not qualify as a "claim" within the meaning of the alleged agreement as Troy/Protas are

not an employee, agent, successor or assign of FISC, the signatory to the alleged agreement. Only with the agents, successors, employees and assigns of FISC can a "claim" arise which neither Troy/Protas claim to be. Under ordinary state law principles requiring adherence to the plainly written and unambiguous language identifying the entity holding the invocation right, neither Troy nor Protas prove an arbitration right. Or, there is no mutual assent as to a material term – invocation rights, which is construed strongly against Troy and Protas' the entities claiming under the "agreement." The claims are also statutory and can be brought against Troy by any consumer in no way connected to FISC.

Third, the RISC contains the following:

> "First Investors Financial Services, Inc. has sold and assigned all right, title and interest in this contract to First Investors Auto Receivables Corporation which has granted a security interest in this contract to Wells Fargo Bank, National Association as collateral agent for Wachovia Bank, N.A. and other lenders." (emphasis added)

Thus, according to the face of the RISC to which Troy claims ownership, FIFS "sold and assigned all right, title and interest in this contract" to "First Investors Auto Receivables Corporation." FISC, Crown, Troy and Protas are nowhere in the RISC nor is the alleged arbitration clause. Similar to FISC's absence, FIARC is also absent the purported chain of title despite clear undisputed facial evidence of assignment to FIARC. Troy-Protas fail

to offer any evidence satisfying the dispositive factually predicate link of FIFS to FISC or more pertinent, FIARC/Wells Fargo to FISC. No *evidence* exists in the record proving what "rights, title and interest" were allegedly purchased by Troy as a result of the purported purchase of unproven and unknown "Accounts" from Crown.

FIFS, FIARC and FISC are also separate entities. A subsidiary is a separate legal entity with independent rights to contract like the alleged assignment between FIFS and FIARC. Ahlstrom v. DHI Mortgage Company, LTD.,LP, No. 20-15114 (9th Cir. Dec. 29, 2021)(parents and subsidiaries do not "share the same rights, liabilities, or employees"); Dole Food Co. v. Patrickson, 538 U.S. 468, 474-475 (2003)(Courts adhere to the fundamental principle that corporations, including parent companies and their subsidiaries, are treated as distinct entities.. "A corporate parent which owns the shares of a subsidiary does not,...own or have legal title to the assets of the subsidiary."). "We," "us" and "our" are defined as FISC *only* and does not include parents, assigns or agents of assigns. The terms do not include assignees of FIFS' rights or the respective agents of such assignees in the definition. The face of the document and the limiting language of invocation proves FISC intended the adhesion contract to be between FISC and the consumer only. Troy nor Protas prove that FISC assigned an

arbitration right to either as both purports to be an assignee of Crown and FIFS or agent of sans evidence, not assignees of FISC.

Troy-Protas' claim to derive an arbitration right through the "Claim" definition also fails as both ignore the critical distinction of who can invoke the alleged arbitration clause versus what claims can be arbitrated. The distinction makes the difference. As the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, **like other contracts, in accordance with their terms**." Volt Info., 489 U.S. at 478. The "payment-extension-arbitration-agreement" is unequivocal, expressly permitting **only** FISC or the consumer to compel arbitration, but permits either to include other "claims" in arbitration. "Parent" and "affiliates" are absent from both the invocation and "claim" definitions. The "Claim" section's coverage of employees, agents, successor or assign of FISC does not expand the scope of the "we," "us" or "our" in the invocation clause. "[O]bjective law of contracts,...the written language embodying the terms of an agreement will govern the rights and liabilities of the parties. Bank of Am., 80 A.3d at 678. To accept Troy-Protas' interpretation that the language allows employees, successors or assigns to invoke/compel arbitration would be to render superfluous, extraneous, or ignore, the clause's express provision of "YOU OR WE" may elect arbitration or "at your or our election" language in the

invocation clause when FISC clearly omitted entities like the one Troy claims to be (assignees) from the invocation clause but explicitly includes the same group in the definition of "claim" or coverage section.

Lastly, Protas invoked arbitration in its own separate motion four years ago when the plain unambiguous language of the purported "payment-extension-arbitration-agreement" provides no right to invoke on the part of any agent of FISC. Protas also provides no additional documents relating to Protas's separate arbitration motion so the record relating to Protas is the same as it was in Brown I. The decision can be reversed on that basis as the record remains that the same as in Brown I. Second, Troy has no idea whether Troy purchased any of the accounts Troy claims to have purchased from Crown and offers no evidence that the "Bill of Sale and Assignment" purportedly between Crown and FIFS is legitimate or that any account regarding Mr. Brown was ever transferred to Troy. Troy also provides none of the documents referenced in the purported "Bill of Sale and Assignment" and Troy-Protas new documents filed suffer from the same deficiency identified by the Court in Brown I. Troy-Protas do not prove that "Troy validly was assigned the rights and remedies initially held by FIFS and FISC." Brown I, at n.5 [JA34]. Troy alleges that Crown assigned some accounts to Troy. But Troy provides no accounts

purportedly transferred from FIFS/FIARC/Wells Fargo to Crown and Troy-Protas fail to prove ownership of any accounts by Crown let alone an account relating to Mr. Brown or any rights under the FISC-signed "payment-extension-arbitration-agreement." And, the purported list alleged to transfer accounts from Crown to Troy was not created by Troy but appears to have been modified by Troy.

Based on all the forgoing, Troy-Protas fail to meet its burden of proving and enforceable agreement as no chain-of-title to any account identifying Mr. Brown is established even facially based on the untrustworthy third-party documents. Further, the court improperly construed all the third-party documents to the extreme favor of Troy-Protas and against Mr. Brown dispositively ignoring the other alleged assignees in the alleged RISC chain of title– FIFS/FIARC/Wells Fargo. The decision is reversible error.

iii. The RISC is not amended to include the "arbitration clause" based on the merger clause requiring signature of the "assignee," FISC is not the "assignee" of the RISC making the decision below reversible error

Contracts are construed according to the plain written language of the agreement. Volt Info., 489 U.S. at 478. Troy-Protas claim, sans evidence, that Troy is assigned the RISC. But the RISC has no arbitration agreement so Troy-Protas untimely argue, again sans admissible evidence, that the

"Application for Payment Extension" "amended" the RISC. *See* Troy's Mot. at 3; Protas Mot. at 5.[8] Troy-Protas again fail. FISC is not authorized to amend the RISC per its plain language. The RISC merger clause states:

> HOW THIS CONTRACT CAN BE CHANGED. This contract, along with all other documents signed by you in connection with the purchase of this vehicle, comprise the entire agreement between you and us affecting this purchase. No oral agreements or understandings are binding. Upon assignment of this contract: (i) only this contract and the addenda to this contract comprise the entire agreement between you and the assignee relating to this contract; (ii) any change to this contract must be in writing and the assignee must sign it; and (iii) no oral changes are binding.

[JA-80]. Per the plain language, the alleged RISC comprise the entire agreement between Monster Auto/FIFS/FIARC/Wells Fargo and Mr. Brown. There is also no mutual assent between any assignee and mr. Brown as to any amendment of the RISC. The plain language prevents amendment of the RISC except by signature of the "assignee" which has never been FISC. The purported "payment-extension-arbitration-agreement" alleged signatory is FISC only, not FIFS/FIARC/Wells Fargo thus does not amend the RISC as a matter of law and the court reversibly erred in holding an enforceable arbitration agreement exists based thereon.

[8] The only exhibit attached to Troy's motion was the "Application for Payment Extension" containing the arbitration clause at issue. Troy did not attach the purported assignments asserting a chain of title that Protas untimely attached to its Reply nor did Troy attach the RISC. Nor were any of the new documents attached to either's arbitration motions four years ago.

Second, nowhere in the merger clause does it permit the assignee to *add*, as oppose to change, a brand-new material term that denies a constitutional right. The unilateral ability to do so is not within the consumer's reasonable expectation/contemplation as to the RISC. There is no intention that the change of terms provision permits FISC to add new contract terms differing in kind from the existing terms and conditions in the RISC. Third, allowing one party the unfettered unilateral right to add brand-new material terms after-the-fact that deny constitutional rights through an arbitration agreement or altering the existence of an arbitration agreement without notice to or consent of the consumer lacks mutuality and is illusory making the RISC unenforceable. Brooks v. Federal Surety, Co., 24 F.2d 884, 885 (D.C. 1928). Presumably that is why the language is "change" or modifying existing terms as oppose to adding new material terms. The definition of "change" does not mean "add brand new material terms." The lopsided agreement still shows illusoriness as it purports to allow FIFS/FIARC/Wells Fargo to unilaterally change existing terms at any time without notice to or consent of the borrower thus lacking definiteness. Troy's interpretation of the FIFS' discretion makes any promises in the RISC illusory. As a form contract written without Mr. Brown's input or negotiation the ambiguities are construed strongly against Troy-Protas. Vaulx, 407 A.2d at 265.

Fourth, the alleged application for payment extension 1) does not state it is amending/changing the Contract but simply states "customer further agrees to the terms and conditions of the arbitration clause below;" 2) does not say the RISC is amended to include the arbitration clause; 3) does state "all other terms and conditions of the Contract remain unchanged." It then specifically enumerates the seven (7) ways the Contract will be changed that **excludes** the alleged arbitration clause in the list of changes. [JA92]. The clause is identified outside the list. It then concludes "I/we understand, acknowledge and agree to items (i) – (vii) listed in the Agreement Section above." The word "amended" is used once in the entire document:

> FISC hereby agrees to amend the Contract and grant a payment extension for the above referenced account as follows: The due date for the Contract shall be advanced by 2 month(s). The full payment(s) in the amounts of $488.86 originally due on 9/15/2012 will be moved to the end of the term of the Contract and, if applicable, only one partial payment will be due as indicated below for the extended month(s). By signing the Application for Payment Extension, You acknowledge and agree that:

[JA92]. That's it. The purported amendment is stated in full and only amends the payment schedule. It then lists seven items to agree to, NOT AMEND, that also do not include the purported arbitration clause. Also, the alleged arbitration agreement contains no language that it is amending the RISC to include said clause nor does the RISC allow the FISC-signed amendment. As such, any purported amendment to the RISC to include

the delegation or the arbitration clauses is not "clear" and "unmistakable" as required by law. AT & T, 475 U.S. at 649. As FISC, a non-assignee, did not amend the RISC and the denial of a constitutional right is not clear and unmistakable but ambiguous each provide independent bases for reversal.

iv. As argued unopposed four years ago, the delegation clause is not "clear and unmistakable," and unconscionable [JA166].

The question whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. First Options, 514 U.S. 938, 944. As argued uncontested four years ago, the alleged delegation clause is not a clear and unmistakable delegation due to ambiguous, competing and conflicting language with and in the arbitration agreement. Id ("[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."). OPP to MTCA at 11-12 (2018). The alleged delegation clause does not authorize enforcement by third parties and certainly cannot be deemed to "clearly and unmistakably" delegate to an arbitrator the question of whether a non-party to the agreement can enforce any part of it. The delegation

provision is a contract-of-adhesion as it is a standardized form contract were the terms and conditions were prepared in advance and Mr. Brown was not given any opportunity to negotiate such terms and conditions thereof.

As argued four years ago and remain unopposed even today despite Troy-Protas' second attempt improperly granted below, "the arbitration providers identified in the alleged arbitration agreement are unavailable," a "conflict exist in that the court can determine the enforceability of the entire arbitration agreement by determining the enforceability of the "class action waiver" which is inconsistent and not "clearly and unmistakably" reserved to the arbitrator as the delegation clause purports to do," the reservation of the rights to "file suit" and "to seek remedies in small claims court" while also providing that "[a]ny claim shall....be resolved by neutral, binding arbitration" is inconsistent and in tension with the delegation clause and "agreement," "[b]ased on the delegation clause, Mr. Brown will have to pay between $3,500 and $8,500 just to determine the "validity, enforceability, interpretation and scope of this clause, and the arbitrability of the claim or dispute" or simply to find out if he is required to arbitrate the instant action," and "the clause presents a catch-22 in that Mr. Brown cannot afford to go to arbitration to decide whether he can afford to go to

arbitration." [JA166]. Troy-Protas did not respond to any of the arguments and under regular procedural rules opposition is waived.

The language of the delegation provision is inconsistent and ambiguous thus should be construed against the drafter, FISC. The provision is also procedurally and substantively unconscionable because to raise a challenge to the validity of the arbitration agreement pursuant to the provision is cost-prohibitive and unfairly and one-sidedly preventing Mr. Brown from vindicating his rights under the FDCPA and the CPPA. The third-party hearsay document with no mention of Troy/Protas is not evidence of clear and unmistakable agreement to arbitrate arbitrability with Troy-Protas.

v. Troy-Protas also breached any purported arbitration agreement by filing in Civil II and attempting to un-elect Troy's election of judicial process

Troy and Protas materially breached the alleged "arbitration clause" excusing any alleged performance by Mr. Brown. Rosenthal v. Sonnenschein Nath & Rosenthal, 985 A.2d 443, 452 (D.C. 2009)("It is well established that a material breach by one party excuses the other party from further performance under the contract"). Nowhere in the clause does it permit FISC to elect court and un-elect court on the same claim. As such, Troy-Protas materially breached the alleged arbitration agreement both claim under relieving Mr. Brown of any performance.

C. The trial court reversibly erred in finding the "waiver of class action rights" enforceable

As argued unopposed four years ago and remain unopposed today, the purported ban/waiver is not clearly and unmistakably written, serves as an exculpatory clause for corporations violating statutory rights with modest damages and impermissibly prevents already distressed consumer debtors from vindicating their rights, is inconsistent with the attorney fee mandates of the FDCPA, etc. as attorney fees are discretionary thwarting enforcement mechanisms of the FDCPA and the CPPA, is cost-prohibitive to arbitrate single small dollar claims without the pooled resources of other class members and the ban is one-sided as there is no mutual prohibition to FISC's rights in exchange for the ban on class actions in arbitration. Opp'n Troy's MTCA at 19–24; Opp'n Protas' MTCA at 18–21. The court ruled *sua sponte* that the class action waiver is clear and not unconscionable. [JA161 57:13-15](" Number four, the existence of a class action waiver. It's there, it's clear. It's not unconscionable")

> The alleged arbitration agreement contains the following.
> If a waiver of class action rights is deemed or found to be unenforceable for any reason, the remainder of this Arbitration Clause shall be unenforceable.

The waiver of class action rights is unenforceable making the alleged arbitration clause" unenforceable. The "class action waiver" language is

contradictory thus unenforceable. [JA93-94]. Mr. Brown argued unopposed below that the class action ban is unenforceable because it is unconscionable, does not bar judicial class actions by its plain bolded, language stating "[y]ou expressly waive any right you may have to arbitrate a class action (this is referred to in this Arbitration Clause as the 'class action waiver')" and "If A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER..." thus on its face the alleged class action ban applies to "arbitration of class actions" as oppose to judicial class actions. Or, the language conflicts with the broader claim of "a waiver of class action rights" and "any claim that the class action waiver [right to arbitrate a class action] is unenforceable" referred to in the language regarding unenforceability thus is ambiguous and confusing to the average consumer as a "class action waiver" to be strongly construed against FISC.

The class action ban on class arbitrations operates as an exculpatory clause for FISC as no distressed debtor suffering from a car repossession can afford to shoulder the 5 to 10K it will cost simply to find out whether the dispute must be arbitrated pursuant to the "delegation clause." The alleged individual debtor is then required to pay astronomical arbitration costs if he/she wants to appeal an adverse decision to a panel of three

arbitrators to the tune of at least 30K. Mr. Brown also risks liability individually for FISC's attorney fees under the agreement should the arbitrator so find. Mr. Brown's claims permit small dollar statutory damages and Mr. Brown cannot afford nor can shoulder the risk of being saddled with the costs associated with an appeal or the costs associated with a second arbitration should he not appeal or the substantial risk of being forced to pay FISC's attorney fees that can be discretionary awarded by the arbitrator. [JA105-06]. Arbitrating such a small dollar claims individually without the pooled resources of other class members in not only impracticable financially but impossible for distressed debtors already suffering a financial crisis to the point of vehicle repossession. "Statutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

There is also no mandatory language in relation to attorney fees thus again creating ambiguity as to whether the FDCPA statutory mandate will be enforced or whether such language constitute a waiver of such right. The language "is internally inconsistent and thus ambiguous regarding the availability of a fee award" for Mr. Brown. Nesbitt v. FCNH, Inc., 811 F.3d 371, 380 (2016)(arbitration contract and class action ban unconscionable).

Consumer rights under the FDCPA and the CPPA are unwaivable due to their public importance and by banning class arbitrations FISC has in effect immunized itself from Mr. Brown's, and the consumers he seeks to represent, claims by imposing a de facto waiver that impermissibly interferes with their ability to vindicate their unwaivable rights through effective enforcement via private attorneys general. The individual terms of the arbitration relating to attorney fees and injunctive relief make the class arbitration ban onerous and unfair. A consumer is unlikely to be able to hire a competent attorney in this area of the law to arbitrate his/her claims. Only through class action arbitration and pooling of resources can Mr. Brown seek relief from alleged misconduct of FISC. As the alleged class action ban is ambiguous, unclear, against public policy, unconscionable and works as an oppression against Mr. Brown based on its one-sidedness and effective removal of any remedy that only consumers would ever use and such arguments are unopposed the "class action waiver" is unenforceable making the "arbitration agreement" also unenforceable and the trial court decision reversible error. Troy-Protas also have no rights under either.

D. Though Mr. Brown presents several independent bases for reversal above the final basis for reversal is the court's again refusal to grant Mr. Brown an evidentiary hearing and

ordering arbitration despite Mr. Brown's establishment of uncontested procedural and substantive unconscionability.

The FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Such agreements can be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. Here, as argued unopposed four years ago, the "delegation clause," the "arbitration clause" and the "class action waiver" are all procedurally and substantively unconscionable. In Williams v. Walker-Thomas Furniture Co., the Court holds that a consumer sales contract not representing a bargained-for exchange or grossly unfair or both and "where the element of unconscionability is present at the time a contract is made,...should not be enforced." 350 F.2d 445, 449 (D.C. Cir. 1965). In Andrew v. American Auto Center, the Court notes that the proliferation of arbitration clauses in consumer contracts of adhesion are "being used to the detriment of consumers." Andrew, 110 A.3d at 634. The Court also calls into question the policy favoring arbitration. Id at 634-635 citing Keeton v. Wells Fargo Corp., 987 A.2d 1118, 1122 n. 13 (D.C.2010).

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT & T Techs., 475 U.S. at 648. Arbitration is also a matter of

consent. Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662 (2010). The "effective vindication" exception to the FAA makes unenforceable, arbitration agreements that "operat[e] ... as a prospective waiver of a party's right to pursue statutory remedies." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, n.19 (1985). In essence, enforcing the arbitration provision would bar effective vindication of the person's federal or statutory rights because no economic incentive to bring the claim exists as the cost of arbitration far exceeds the maximum recovery. This occurs when arbitration administrative and filing fees are so high as to make access to the forum impracticable. Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000)("It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights").

In both Keeton and Andrew, the Court holds that a contract of adhesion is a "standardized-form contract with terms prepared in advance by [the commercial entity]" and lacks any evidence "that any of the terms were open to negotiation or were, in fact, negotiated." Andrew, 110 A.3d at 637; Keeton, 987 A.2d at 1121 n. 2. "Contracts of adhesion are not...negotiable, such that consumers are often forced into agreeing to arbitrate any claims arising out of the consumer transaction, thus forfeiting the option to resort

to the courts. A contract-of-adhesion exist upon a showing that "the parties were greatly disparate in bargaining power, that there was no opportunity for negotiation and that the services could not be obtained elsewhere." Moore v. Waller, 930 A.2d 176, 182 (D.C.2007). "Bargaining power and consent must be assessed in terms of the real options open to people living in poverty, and their actual understanding of contractual boilerplate." Williams, 350 F.2d at 449-450.

If "the element of unconscionability exists at the time of contract formation, the contract should not be enforced. Id. at 449. The Court has determined that the issue of unconscionability "calls for a strongly fact-dependent inquiry" and "an expedited evidentiary hearing." Keeton, 987 A.2d at 1123. The following factors are important in determining unconscionability: 1) "the significance of the imbalance of power in arbitrator selection given [commercial entity's] status as a 'repeat player' in the arbitration system;" 2) "the fact that the clause reserv[ed] some litigation avenues to [the commercial entity] while entirely barring [the consumer] from seeking judicial action"; 3) "the costs imposed on [the consumer] by the arbitration procedure and their impact on her ability to seek redress;" and 4) the existence of a class action waiver. Id.

The only arguments made by Troy and Protas to Mr. Brown's unconscionability claims are that because the alleged agreement provides Mr. Brown the opportunity to seek judicial action in small claims court, allows Mr. Brown to opt out, permits Mr. Brown to select the arbitrator from the two identified in the agreement or another subject to FISC's approval and the alleged payment extension request was a "request[] to modify the terms of [Mr. Brown's] car loan to avoid defaulting in payments and Protas's claim that Mr. Brown signed the alleged agreement twice, the agreement is not unconscionable. *See* Troy's Opp'n to Mot. for Recon. at 4.; Protas's Reply at 4. Both Troy and Protas also argued that no discovery is needed and the trial court must draw a line and consider the evidence in front of it thus waiving any supplementation of the record by either. *See* Id; [JA 150-151, 42:19 – 43:10].

i. The alleged agreement is procedurally unconscionable

The trial court erroneously denied Mr. Brown an evidentiary hearing where Mr. Brown argued unopposed four years ago that the delegation clause, the "class action waiver" and the "arbitration agreement" are unconscionable. The Court holds that "the use of a standardized form contract ... is a fact substantially bearing on th[e] question" of procedural unconscionability, and "where one is employed [ ] it is important for the

court to consider whether the seller identified and explained the terms of the contract, particularly those which might be viewed as unusual or unfair." Bennett v. Fun & Fitness, Inc., 434 A.2d 476, 481 (D.C.1981). The alleged contracts are standardized-form contracts as the RISC contains the following language "[y]ou confirm that you received a completely filled-in copy when you signed it." [JA44]; and the "Application for Payment Extension" contains: "[t]he following must be completed or FISC will not consider this Application for Payment Extension for Approval." [JA93]. The part required to be filled in is a signature agreeing to the arbitration clause at issue. As such, the distressed debtor must agree to a draconian arbitration clause waiving their right to a jury trial before FISC will merely *consider*, as oppose to granting, a one-month payment extension. FISC can still deny the payment extension and retain the arbitration clause because the signature line for the arbitration clause is separate.

The scheme was clearly designed to dupe unsuspecting alleged debtors into agreeing to FISC's one-sided arbitration clause. The terms of the alleged agreements were prepared in advance by FISC or Monster Auto Credit and lack any evidence that such terms were open to negotiation or were, in fact, negotiated. Such terms were offered as a take it or leave it option. Mr. Brown also provides unrefuted evidence that he was not given

any opportunity to negotiate terms and conditions of the alleged agreement. [JA106]. The alleged "agreement" provides no notice that it is amending the RISC to include an arbitration clause by signature of a whole other entity than identified as assignee in the RISC. And no notice is required to the consumer. An oppressively short ten [10] days is given to opt out. [JA94]. And, the opt-out provision is buried in a block of text and must be written and snail-mailed within 10 days of the "date of this transaction." There is no definition as to the "date of this transaction" as the signatures in the alleged agreement show two different dates and there is also an "approval process." [JA93]. Thus, the consumer is flummoxed as to the actual "date of this transaction." The small claims carve out is illusory as FISC can still compel arbitration in small claims if initiated by Mr. Brown.[9]

Also, as a distressed debtor the entity alleged to hold the loan is offering the alleged "payment extension" and is the only entity that can offer the payment extension thus has superior bargaining power as the stronger party. Distressed debtors like Mr. Brown in the context of a "payment extension" on an alleged debt have no bargaining power and is undisputedly the weaker party at the mercy of the stronger party creditor.

[9] "You and we retain the right to seek remedies in small claims court for individual (as opposed to class action) disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court."

FISC exerts its immense power by forcing alleged debtors to agree to the "arbitration clause" as a condition precedent to mere consideration for a payment extension. [JA99]. As a sophisticated financial institution, FISC has all the power and imposed onerous terms as it saw fit on cash-strapped consumer borrowers facing financial hardship. As FISC purports to be servicing the loan, is without options to seek a payment extension from somewhere else. An already distressed debtor like Mr. Brown cannot and do not negotiate any terms of the "payment-extension-arbitration-agreement" but are forced to agree under significant financial duress. [JA106]. The language in the "agreement" requiring completion before consideration further confirms. The circumstances surrounding the alleged signing of the alleged agreement that appear within the document itself proves it both a contract-of-adhesion and oppressive.

The class action waiver, the delegation and the arbitration clause are procedurally unconscionable imposed by FISC on distressed debtors relegating them only the opportunity to adhere to its oppressive terms of waiving a constitutional right for a one-month payment extension in a take-it-or-leave-it situation. Troy-Protas' interpretation of the clause as providing Troy with an arbitration right is also hidden and not explained to the consumer. A waiver of a constitutional right must be clear and intentional.

Johnson v. Zerbst, 304 U.S. 458, 464(1938)(a valid waiver must be "an intentional relinquishment or abandonment of a known right or privilege,"). There is no clear, unmistakable and intentional relinquishment or abandonment of Mr. Brown's right to pursue class-wide relief in court against Troy-Protas or in relation to arbitrability. The delegation clause, the "arbitration agreement" and the class action waiver are all contracts-of-adhesion and procedurally unconscionable and the trial court decision is reversible error.

ii. The alleged agreement is substantively unconscionable

Notwithstanding the huge disparity of bargaining positions between a distressed debtor allegedly seeking a payment extension from the institution purporting to be servicing the debt, FISC, the terms alleged are also unreasonably favorable to FISC, overly harsh, unduly oppressive, and unfairly one-sided. Keeton, 987 A.2d at 1123. There is a "loser pays" provision, the delegation clause requires Mr. Brown to pay 5-10K up front just to determine the existence of an arbitration agreement. Or, the arbitration clause effectively blocks every forum for the redress of Mr. Brown's small-dollar claims, including arbitration itself. The following terms are one-sided and unreasonably favorable to FISC: 1) misleadingly drafted as mutual, FISC retains its right to use "self-help remedies or filing

suit" in the event of default. The alleged debtor has no self-help remedies so prefacing the non-waiver as "neither you nor we" deceives the consumer into believing that he/she has self-help remedies when he/she does not. Also, the lender's chief remedies in the event of default are both judicial and ***self-help*** **repossession** which are preserved in the RISC that contains no arbitration clause and both are employed against Mr. Brown here. But Mr. Brown must obtain his only meaningful remedies — ***unlawful*** **repossession (defense against deficiency sought)**, monetary compensation and/or injunctive relief for the alleged violation of consumer laws — through expensive individual arbitration. Troy filed this suit on a deficiency claim procured through self-help repossession that Mr. Brown must arbitrate his claim for unlawful repossession is extremely one-sided, oppressive, unfair, and not bilateral.

And, 2) allows appeals from grants of injunctive relief **only** [for a consumer] but not for denials [against consumer]; and 3) no informal consumer complaint resolution process exists as arbitration is required for any dispute. Here, FISC can simply repossess the collateral rather than utilize arbitration. Troy filing in the Civil II instead of small claims then attempting to un-elect court action breaches the alleged agreement; and 4) the mutual small-claims court option is illusory as FISC includes language

that gives it an escape route. Should the consumer file in small claims court FISC can still remove the case from small claims and compel arbitration based on it not being "transferred, removed or appealed to a different court." FISC, thus reserves the right to compel arbitration even in small claims. [JA94]; and 5) FISC's collection claim of over 15K exceeds the jurisdictional limitation of small claims thus eliminating the option in this case as compelling Mr. Brown to arbitrate his claims while allowing Troy to remain in Civil II risk inconsistent judgments as Mr. Brown argues that the deficiency amount Troy seeks is barred; and 6) FISC limits its payment to mere advancement of $1,500 in costs when cost will be from 5K to 30K or higher when appeal costs are calculated in. [JA105]. Mr. Brown also risk being required to pay Troy's arbitration fees on the12K collection claim.

And 7) not defining "your" leaving it up to future interpretation making it unclear/uncertain whether Mr. Brown can even invoke arbitration while FISC's right to invoke is clearly defined [JA93]; and 8) as a matter of black letter contract law is where a contract permits unilateral change of terms by the assignee destroys the alleged promise making it illusory; and 9) the alleged agreement contains a "class action waiver" that only applies to the consumer with no corresponding waiver of a creditor's remedy. The ban is unduly harsh to the consumer and unduly favorable to FISC. Finance

companies do not sue their customers in class action lawsuits. The provision is clearly meant to prevent debtors from seeking redress for relatively small amounts of money. The "waiver" prevents Mr. Brown from pooling resources with other consumers to pay the thousands in arbitration costs and attorney fees to pursue Mr. Brown's small dollar claims under the FDCPA and CPPA. Individualized arbitration for distressed debtors in Mr. Brown's position is impracticable and a financial impossibility.

And, 10) the appeal rights under the agreement are unduly favorable to FISC as based on the plain language permitting appeal only when an award of the arbitrator is "$0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel." [JA94]. First, it is unrefuted that as a distressed debtor Mr. Brown cannot afford to pay the thousands required to appeal an adverse ruling to a three-arbitrator panel as required under the alleged agreement. [JA105]. Second, each of the condition-precedents for appeal unduly favor FISC and disadvantages the consumer. For example, a look at the Superior Court docket shows that most **deficiency** actions or breach of contract claims that Troy is likely to bring, range between 5K to 20K –

there are none over 100K. Thus, FISC is not likely to receive a deficiency judgment against a consumer for over 100K allowing a consumer to appeal.

However, FISC is likely to be awarded a deficiency judgment between 5K and 20K or lower than 100K and more than zero that the consumer can never appeal. But, if the arbitrator rules the deficiency is barred and FISC gets zero on its claim, FISC can appeal the zero judgment. The only party's claim that can possibly be over 100K if statutorily required attorney fees are added or may include "an award of injunctive relief" is the consumer's claim. In both instances FISC can appeal. Thus, in all likely scenarios where FISC will be on the losing end, FISC can appeal. Mr. Brown cannot. The consumer cannot appeal any of the likely judgments against him/her like the deficiency judgment here totaling $14,921.79 which is over $0 and below 100K, a denial of injunctive relief, a grant of less statutorily required damages or damages under a different claim in a multi-claim action or a denial of statutory attorney fees altogether or an unreasonable reduction (creditor deficiency claims result in total relief or no relief so no chance of unreasonable reduction); and 11) the agreement violates public policy as awards of attorney fees are discretionary when such fees are mandatory under the FDCPA. The discretionary standard undermines the enforcement scheme of both statutes;

And, 12) Mr. Brown also cannot risk the loser pays "prevailing party" provision thus liable for the exorbitant arbitration costs associated with FISC's collection action and his counterclaims and cross-claims and the attorney fees of both.[10] The attorney fee provision presents a much greater financial risk for a distressed debtor to arbitrate his/her claims than either would face in court; and 13) being required to shell out thousands to determine whether an arbitration agreement exists without reaching the merits of the claims is not feasible for distressed debtors. This results in a chilling effect on Mr. Brown enforcing his rights as it also exposes him to possible of attorney's fees to Troy-Protas if Mr. Brown lost at arbitration, including fees related to the threshold issue of arbitrability. Mr. Brown faces no such risks in court; and 14) the word "waive" and "waived" is written on both of the alleged arbitration agreements. [JA92]; and 15) the opt-out provision provides a harshly short turn-around time of 10 days but does not clearly state when the clock begins to run. The purported option is also illusory as an "option" to opt out; the short and unrealistic 10-day timeframe in impractical for the average debtor in distress with multiple demands, like survival, on their time.

[10] "If you are the prevailing party in the arbitration proceeding, the arbitrator may award you your reasonable attorneys fees even if you are not entitled to them by law. Each party shall be responsible for its own attorney expert and other fees, unless awarded by the arbitrator under applicable." [JA94].

The disparity of bargaining power along with the disparity of remedial options coupled with the facade of mutuality establishes strong evidence of unconscionability. Though FISC requires Mr. Brown to arbitrate all of his claims in the interest of efficient, streamlined dispute resolution, when FISC's interests are at stake FISC is free to discard such efficiencies, under all circumstances, in favor of litigating its claim against Mr. Brown. Such ramifications cannot be comprehended by the average consumer or comport with his/her reasonable expectations as an average member of the public. The cumulative real-world effect of this arbitration agreement is that Mr. Brown's minimum and maximum recovery from FISC are identical — $0.00 — as like Mr. Brown, and the consumers he seeks to represent, no consumer will file an individual claim for arbitration against FISC because it makes little sense financially considering the exorbitant cost and infinitesimal chance of success without an attorney. It is unlikely that any consumer has ever arbitrated a claim against FISC. The fact that no consumer can utilized the arbitration clause far from fulfills the purpose of the FAA of providing a prompt and informal method of resolving disputes. The terms of this arbitration clause are constructed to keep Mr. Brown away from the court house while at the same time providing FISC with access. Commercial arbitration agreements were intended to provide an

alternative forum for sophisticated parties to resolve disputes before panels with industry expertise. However, the arbitration clause here is designed to prevent consumers like Mr. Brown from seeking redress and is a contract that no person "in his senses and not under delusion would make."

Therefore, as the alleged arbitration agreement is a contract of adhesion that is unreasonably favorable to FISC by reserving multiple litigation avenues to itself and barring all access to the courts to Mr. Brown, FISC's superior knowledge and resources, as a commercial entity, about and in the arbitral system, the exorbitant and cost-prohibitive costs of arbitration to Mr. Brown to pursue his small dollar FDCPA and CPPA claims and the class action waiver makes pursuit of Mr. Brown's claims through individualized arbitration unfeasible. Though a hearing and discovery would allow Mr. Brown to further develop the record in support of his unconscionability claims, sufficient evidence exists to find procedural and substantive unconscionability even without an evidentiary hearing. The trial court erred in granting Troy and Protas's motions and the decision should be reversed.

Conclusion

The Court has a simple decision to make here. It can either follow the

evidence and the law which prove Troy-Protas waive/forfeit/default on any purported arbitration right and do not meet their burden of proving an enforceable arbitration agreement between either and Mr. Brown or it can throw the rules of evidence, the FAA and District contract law out the window and justify the trial court's clearly erroneous and unquestionably contrary to settled law conclusions. Of course, the Court should follow the law, and doing so here means that the court's grant of Troy-Protas' arbitration motions is error and should be reversed and remanded so that Mr. Brown, **after almost five years of trying**, may finally receive discovery and proceed to litigating the merits of his claims.

WHEREFORE, Mr. Brown respectfully request that the trial court's June 22, 2018 order be reversed.

October 18, 2022

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Certificate of Service

I, Radi Dennis, certify that on this 18th day of October 2022, a true and accurate copy of Appellant's Opening Brief will be served electronically through the Court of Appeals C-Track electronic filing system upon:

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

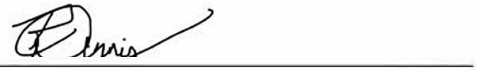
2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.



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22-CV-0524

Case Number(s)

10/18/2022 Date