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* REPLY BRIEF

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

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List of Parties

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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

Counterstatement of Troy-Protas "undisputed facts."

Troy's "Undisputed Facts" are disputed as are Protas' "facts." Troy Br. 7-13. FISC did not assign Troy FISC's exclusive "arbitration right." No record evidence exists proving FIFS sold a "Mr. Brown's account" to Crown as FIARC - Wells Fargo ('WF") are alleged to own said account and the "assignment" is between Crown and FIFS sans all documents referenced therein and an account of Mr. Brown. JA215, JA213. No assignment is alleged from FIARC to Troy. Mr. Brown withdrew his motion to add third-parties and the FISC "subsidiary" theory is irrelevant as there was no allegation that FISC assigned its "arbitration right" to FIFS/FIARC/Troy. JA6; Protas Br. at 3. The theory is rejected in Brown I. JA34, n.6. It is undisputed that FISC's exclusive "arbitration right" is not assigned to any relevant entity in this case. The invalid third-party "payment-extension-delegation/arbitration-agreements" containing the terms "waive" and "waived" and other markings written on both remain unauthenticated hearsay. JA216, JA220. The Willey affidavit cannot and does not authenticate the documents. Troy Br. at 7; Protas Br. at 7. There is no opt out as Troy-Protas concede the "date of transaction" is undefined and ambiguous precluding opt-out specially in the 10-day unconscionably

short time period and the snail mail requirement. JA101. As in Brown I, Troy is not assigned "Mr. Brown's account" by Crown. JA34, n.6.

Troy-Protas has no arbitration right even had it proven assignment of the RISC, the RISC has no arbitration clause and is not amended by FISC – a non-assignee of the RISC. Also, the Court's Brown I mandate to "address" is "to speak to" or "direct one's attention to" and is not do-over grant to Troy-Protas. Willey is not a qualified witness or keeper/custodian of the third-party documents Troy purports to authenticate. JA172-75.

> Documents provided by Crown the [RISC], ["Payment Extension"]. These documents were provided to Troy by Crown

Troy Br. at 10. The affiant knows nothing and cannot authenticate the documents. Crown's "warrant" of "full right to transfer and sell its rights therein" is also untrustworthy hearsay and disproven by the face of the RISC showing FIARC-WF the alleged owners not FIFS. JA215; Troy Br. at 9. The missing links in title are ignored in the "affidavit" skipping straight to the unauthenticated Crown-FIFS "assignment"– sans exhibits/evidence.

That the "payment-extension" states that "FISC...has authorization to enter into this Agreement" does not enable non-assignee FISC to "change" the RISC. Troy Br. at 11-12. Only the "assignee" can "change" the RISC. JA214. FIARC-WF are the last "assignees." Troy Br. at 12. Mr. Brown received no notice of an account number change as falsely averred in the

"affidavit." Troy Br. at n.3. No evidentiary basis exists proving FISC an agent of FIFS. Also, Mr. Brown separately challenged the delegation clause and the "arbitration agreement" – it is Troy-Protas that did not refute such challenges and submitted "delegable questions" to the court to resolve. JA166, JA169. Despite the prejudicial do-over Troy-Protas neither proves an assigned account nor assignment of FISC's exclusive "arbitration right."

Troy-Protas are junk debt dealers that prey on vulnerable communities of color converting meritless claims to default/consent judgments and using them to garnish wages/levy bank accounts draining life-funds from black and brown communities.[1] Garnishments like the thousands sought on the meritless claim here hits like a "bomb" setting families back for generations.

Summary of Argument

Mr. Brown should not continue to suffer prejudice based on Troy-Protas' deception about arbitration law and precedent. In Brown I no enforceable delegation/arbitration agreement is found. JA34. Whatever Troy-Protas argues about the prejudicial do-over below nether disputes that question of law decided in Brown I. Id. The decision below is reversible

[1] The Legal Aid Society et al, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers 1-2 (May 2010) https://takerootjustice.org/wpcontent/uploads/2019/06/Report DebtDeception 201005.pdf (69% of people debt buyers sue are black/Latino; 35% of debt buyer cases are clearly meritless; 66% of the clearly meritless cases are against Blacks/Latinos

error as no agreement exists. Whether FISC assigned the "payment-extension-delegation/arbitration-agreement" to Troy-Protas is undisputed and settled – FISC does not. The document cannot amend the RISC of which Troy deficiently claims ownership and Troy fails to prove chain of title to either document. Unconscionability and evidence as to all remains unchallenged. Such issues raised must be dispositively countered to find an enforceable arbitration contract. They are not. Troy-Protas have no arbitration right. No unbroken chain-of-title to ownership is proven.

Troy-Protas also cite no precedent where a sophisticated billion-dollar muti-state default-judgment-collecting alleged creditor and a sophisticated law firm moves to arbitrate against a distressed debtor using summary procedures, the arbitration motions are granted, the consumer successfully appeals arguing no arbitration agreement yet the sophisticated creditor and law firm is permitted to make the same argument again by adding documents and a sham affidavit to the summary judgment record that both failed to include in their initial motions. The FAA's purpose is to provide relatively speedy, private, and inexpensive alternative forum to the judicial process. How does such repetition accomplish that goal? No precedent is cited to support the unfair and deleterious practice – particularly to black and brown communities whose "access to justice" is already tortured.

Argument

A. Citing no authority Troy-Protas defectively argue prejudicial do-over permitted – the finding of a valid arbitration contract is plainly wrong and without evidentiary support

The FAA does not require parties to arbitrate a dispute unless they have agreed to do so. Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989). Arbitration is first and foremost a matter of **contract**. AT&T Tech., Inc. v. Commun. Workers, 475 U. S. 643, 648 (1986). There must be a contract where Mr. Brown agrees to arbitrate his claims against Troy-Protas. There is no **contract**. No proven unbroken chain of title/assignment exist and the decision is plainly wrong and without evidentiary support. Bank of Am., N.A. v. D.C., 80 A.3d 650, 667 (D.C. 2013). Mr. Brown does not agree to arbitrate his claims against Troy-Protas in the third-party, unauthenticated, waived, hearsay "arbitration agreement" and as in Brown I, the court reversibly errs. The RISC and the "delegation/arbitration-agreement" are separate, distinct contracts on different subjects alleged executed months apart. The RISC is not assigned to Troy and has no arbitration contract and no assignment of FISC's exclusive "delegation/arbitration-agreement" is argued or alleged.

FIFS cannot "convey all..'rights, title and interest in and to the Accounts' to Crown" because FIFS has none. FIARC-WF allegedly owns such rights:

> 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.**"

JA215; Protas Br. at 11. Troy's proffered documents attached to the "affidavit" prove FIFS conveyed nothing to Crown and Crown conveyed nothing to Troy. The court's finding otherwise is "clearly erroneous" and "plainly wrong" based on the clear evidentiary record. And, the rights of a "subsidiary" are not rights of the parent and there is no assignment or chain of title from FISC to Troy. The new sham affidavit attaching inadmissible hearsay filed four years later proves no delegation/arbitration agreement.

Brandenburger & Davis, Inc. v. Estate of Lewis, 771 A.2d 984 (D.C. 2001) is inapplicable as FISC does not assign anything to Troy/Protas/ FIFS/FIARC/Crown thus Troy cannot stand in the shoes of FISC because no assignment of the "delegation/arbitration-contract" exists making Brandenburger inapplicable. There is also no assignment the RISC to Crown from FIARC and WF – the owners. Troy's alleged chain of title proves neither FIFS nor Crown holds any "right, title and interest" in a "Mr. Brown's account." JA215. Protas is not an agent of FISC and the "agreement" plain language does not permit "agents" to invoke arbitration. Protas is not entitled to any benefit of the "arbitration clause" as an "agent" and has no independent right to arbitration. Protas Br. at 15-16. Troy-

Protas are also not agents of FISC. The evidence proves that no account or "agreement" identifying Mr. Brown is assigned to Crown/Troy.

Only the assignee can "change" the RISC, the document states:

> Upon assignment .... only this contract and the addenda to this contract comprise the entire agreement between you and the assignee.. (ii) any change to this contract must be in writing and the assignee must sign it."

[JA44]. Troy-Protas do not argue FISC is an assignee of the RISC. And, "only this contract and the addenda" comprises the assignment, which does not include the "arbitration/delegation contract." Non-assignee FISC cannot amend the RISC to include the "agreement" and FIFS holds no rights to the RISC or the "delegation/ arbitration contract." As no invocation rights are granted to FISC's parent, affiliates or agents. So, through the spectacles of privilege Troy asks the Court to ignore these dispositive facts and settled law and find in their favor anyway. No opposing arguments as to chain of title and the "agreement" plain language are made.

Troy argues that it can submit "clarifying documents" and Brown I

> permits [Troy] to introduce additional evidence in support of its argument, [otherwise this Court] would have simply ruled that Troy had not carried its burden and found for Mr. Brown. Troy Br. at 15-16.

First, this Court did rule Troy did not carry its burden and found for Mr. Brown. "[T]he portions that are in the record do not show the particular accounts that were transfer and thus do not establish that Troy held Mr.

Brown's account." JA33-34. Mr. Brown won. Also, "findings" are determinations based on the existing record and not invitations to begin the motion process anew which is what Troy-Protas did by submitting an "affidavit" and documents unfiled prior to the first appeal. Nowhere in Brown I does the Court instruct Troy-Protas be permitted to supplement the record after losing the appeal and no basis for the do-over is offered. Arbitration and summary judgment motions are treated similarly, rules/law do not permit do-overs of either by way of record "supplementing." Brown I contains no language /mandate ordering Troy's supplement.

Second, Troy submits new "evidence" not "clarifying documents," also improper. All "clarifying documents/evidence" are submitted in 2018 not after an appeal finding no arbitration contract. Third, permitting a do-over to a sophisticated billion-dollar company that routinely collects default /consent judgments thieving millions from black and brown communities on meritless claims as a vital part of its revenue model is abhorrent. In the reverse, Mr. Brown would have been denied by the trial court. That's the subjugated process black and brown folks must travail to "access justice."

Briggs v. Pennsylvania R.R. Co., 334 U.S. 304 (1948) cited by Troy supports Mr. Brown. In Briggs, the appellate court reversed "order[ing] judgment on the verdict." But, the court added interest, the Supreme Court

found it a "deviation" of the mandate authorizing judgment entry. Id at 306. Here, the court also deviated from Brown I's mandate as the Court does not order Troy's supplement but orders a "determination" or "findings" not the delayed "evidence" to Mr. Brown's prejudice– especially after Troy waived doing so.[2] Scott v. BSA, 43 A.3d 925, 935 (D.C. 2012). There is no mandate to reopen the record – doing so is deviation and reversible error.

A consumer reading the "delegation /arbitration-contract" cannot reasonably be expected to glean from its unequivocal language that he/she is giving up his/her right against any entity except FISC as "You or We" is exclusively defined as FISC. JA217. No other entities are included and it is extremely harsh to include when 1) FISC as a sophisticated financial entity that regular drafts such "contracts" clearly excluded such entities providing FISC with exclusive invocation rights, and 2) the "contract" is adhesive providing no notice of the expansive reading thus **unclear and mistakable**.

It is unequivocal, there is no assignment of an account attributed to Mr. Brown from FISC or FIARC-WF and no admissible evidence proves "Troy validly was assigned the rights and remedies initially held by FIFS and FISC" as Brown I require. JA34, n.5. The court reversibly erred.

[2]"The Bill of Sale evidencing Troy Capital's ownership is sufficient proof and no further investigation or discovery is necessary on this point" and "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. Troy 2018 OPP-Recon 3-4

i. Troy-documents are inadmissible hearsay

Troy claiming authentication of the documents attached to the sham affidavit is meritless. Also, Willey did not testify but submitted a self-serving "affidavit" upon which Willey is not cross-examined. Troy. Br. at 19. Willey is unqualified to make claims of truth, accuracy or authentication of the third-party documents and attempts fraud on the court by doing so. Meaders v. United States, 519 A.2d 1248, 1255-1256 (D.C. 1986). No account of Mr. Brown is assigned to Crown. JA215.

It is also not the "regular course of [Troy's] business to make such [documents including the third-party "delegation/arbitration-contract"] or record the time of such acts, transactions, occurrence, or event or within a reasonable time thereafter." In re D.M.C., 503 A.2d 1280, 1282 (D.C.1986). The "delegation/arbitration-contracts" are "waived" and not assigned to Troy which Willey does not and cannot refute/explain.

The "affidavit" does not explain how Crown is assigned an "account" by FIFS that is alleged owned by FIARC-WF. JA215. Also, Troy's attempt to relieve its burden to prove a contract to arbitrate by relying on Crown's "warrant" is meritless. § 28-3814(s)(a debt "assigned more than once, each assignment..evidencing transfer of ownership must be attached to establish an unbroken chain of ownership.");D.C. Code § 28-3814(r)("[t]he only

evidence sufficient to establish the amount and nature of the debt shall be **authenticated business records**."); Troy Br. at 9. Crown's "warrant" is worthless as the face of the RISC clearly shows Crown is not the "owner," has no "full right" to "transfer" or "sale" any rights to Troy. JA215. Even if No **admissible record evidence** proving a "delegation/arbitration contract" with Mr. Brown and Troy exists. "Since there was no admissible evidence before the trial court, its order....is entirely without factual support. The order must therefore be Reversed." In re D.M.C., 503 A.2d at 1284.

ii. Law of the case supports Mr. Brown not Troy-Protas

Whether an enforceable arbitration agreement exists between Troy-Protas and Mr. Brown is before the trial court. "The law-of-the-case doctrine turns 'on whether a court previously decided upon a rule of law.'" Does I through III v. D.C., 593 F. Supp. 2d 115, 122 (D.D.C. 2009). And, "questions that merely could have been decided do not become law of the case." Women's Equity Action League v. Cavazos, 906 F.2d 742, 751 n. 14 (D.C.Cir.1990). The **rule of law** decided in Brown I – no arbitration **contract** between the parties. Jahanbein v. Ndidi Condo. Unit Owners Ass'n, 85 A.3d 824, 831(D.C. 2014)("We disagree...with the trial court's determination that the Bylaws constitute an enforceable agreement to arbitrate..We therefore. . reverse and remand for further proceedings with

respect to the claim..”). Brown I determined no arbitration **contract** – so law of the case precludes Troy-Protas from a second apple bite through record supplements on the same question. [JA33-34]. Law of the case supports Mr. Brown. All Mr. Brown’s briefed arguments (merger, no amendment, chain-if-title, etc.) proves why no arbitration contract exists and are made on remand. [3] For argument apply Troy-Protas’ skewed reading of Brown I, *the remand intended to bind Mr. Brown’s hands and allow Troy-Protas’ supplement in an unprecedented do-over to prove a valid contract.* Proving a valid contract requires rebuttal of each of the issues briefed.

Protas argues “[a]s a matter of fairness and judicial economy, Mr. Brown should be estopped from raising arguments…not within the scope” of the remand. The arguments are squarely within the scope of the remand - whether an enforceable arbitration contract exists between the parties. The answer – no. The arguments are dispositively relevant to the unsupported finding of a valid arbitration contract and to ignore them is to ignore the obvious and decide on a basis unfounded in law, facts or evidence as the trial court did below. The irony of the position is palpable. Without a remnant of self-reflect, Troy-Protas argues a brand-new “affidavit” and new

[3] See Explanation of Path Forward as Fixed by the Court of Appeals, pgs. 1-11; Response to Troy and PSC’s Proposed Remand Path, pgs. 2-5, 7-9, 14-16, 20-27.

"evidence" to prove an arbitration contract found nonexistent in Brown I. JA33-34. As a "matter of fairness and judicial economy" Mr. Brown should not be forced to appeal the same question twice. In conflict of Morgan v. Sundance the trial court created an arbitration-specific procedural rule allowing Troy-Protas a do-over in the summary proceeding after a successful appeal. 142 S.Ct. 1708, 1710, 1714 (2022). Troy-Protas cannot avoid inconvenient and dispositive arguments by arguing limited appeal and remand scope to questions both erroneously believe they have satisfied.

B. The court reversibly erred by referring unconscionability and waiver by litigation conduct to arbitration

Troy-Protas submits delegable issues to the court to resolve in 2018. Mr. Brown unopposed specifically challenges the "delegation" in 2018 arguing it unconscionable, ambiguous, unclear and mistakable. JA166-170. It is settled law that unconscionability disputes validity of an arbitration agreement and is for the court, not the arbitrator to decide. 9 U.S.C. § 2 (arbitration contracts "shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.); Keeton v. Wells Fargo Corp, 987 A.2d 1118, 1122(D.C.2010); Andrew v. American Import Center, 110 A.3d 626 (D.C. 2015). "Under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges

specifically the enforceability of that particular agreement, **the district court considers the challenge**[.]" Rent-A-Center, Inc. v. Jackson, 130 S.Ct. 2772, 2774 (2010)(also, untimely challenge to delegation raised for the first time on appeal rejected as too late). The same waiver applies to the untimely invocation here. Presumably Troy read Rent-A-Center as Troy cites the case so the only purpose for making the argument that unconscionability is properly delegated to arbitration is to deceive the Court. The court also ruled "[a]s far as whether or not the delegation clause is unconscionable ,...[]..There was a bargain for exchange here." JA160-62; Br. 40-50.

The trial court cannot delegate unconscionability to the arbitrator when Mr. Brown argues unconscionability of the delegation provision. Also, Troy-Protas do not deny that both submit the delegable issues to the court to resolve thus no basis exists to delegate any threshold issues to the arbitrator. Brown Br. at 22-24. Troy also submits waiver by litigation conduct to the court for resolution as found in Brown I. [4] JA149-150. Troy-Protas do not dispute arguments that waiver by litigation conduct is decided by the court. Brown Br.14-17. In 2018 and after, Mr. Brown makes multiple arguments unopposed that the delegation provision and the

[4] "We also note that while the arbitration clause identifies the FAA as the governing law, Troy's counsel invoked the District's "totality of the circumstances" test in arguing the waiver question to the trial court." JA36

"arbitration agreement" are unconscionable. Br. 40-50. FAA and federal law require courts to decide if movant "is not in default in proceeding with arbitration." 9 U.S.C. § 3; Zuckerman, 646 F.3d 919, 921 (D.C. Cir. 2011).

Troy confusingly relies on Woodland Ltd. P'ship v. Wulff, 868 A.2d 860 (D.C. 2005) in support of the arbitrator deciding litigation waivers while also arguing that federal law and the FAA applies. Hossain v. JMU Properties, LLC., distinguish the Woodland waiver from litigation waivers, "'waiver by litigation conduct' is of a different nature than other waiver inquiries exclusively allocated to the arbitrator."147 A.3d 816, 821 (2016).

Also, unlike Woodland, here there is no dispute – Troy files this action in court seeking resolution of self-admitted arbitrable claims and FISC did not assign its exclusive "arbitration right" to Troy-Protas. Id at 864; Br. 4-5, 31. Thus a clear undisputed, unambiguous court record of Troy-Protas' litigation conduct exists. Also, "considerations of efficiency...favor[s] resolution by the trial court." Woodland Ltd. P'ship, 868 A.2d at 865. This is the second appeal on a motion – **filed nearly five years ago**. Efficiency favors court resolution – especially given that federal and this Court black letter precedent (or Troy's express repudiation) confirms Troy-Protas forfeit any "arbitration right." Zuckerman Spaeder, LLP. v. Auffenberg, 646 F.3d 919, 924 (D.C. Cir. 2011); Overby v. Barnet, 262 A.2d 604 (D.C.

1970)(answer and counterclaim inconsistent with arbitration). Troy also wrongly relies on TD Auto Fin., LLC v. Bedrosian, 609 S.W. 3d 763 (Mo. Ct. App. 2020) where the party "did not specifically challenge the delegation." Id at 768. Mr. Brown does. [JA166]. Instead, Troy-Protas does not invoke delegation nor refute the arguments. The provision does not "clearly and unmistakable" delegate the two issues reference herein to the arbitrator as baselessly claimed by Troy. Troy Br. at 24.[5]

Brown I is a mandate...**to determine** whether the arbitration agreement applies [and], **whether the agreement is unconscionable**. Brown I at 2;JA30. Troy-Protas' misread Brown I as permission to disregard the FAA, Morgan, federal, and this Court's established precedent choosing whether to decide unconscionability/waiver on a whim regardless of fact/law. Protas Br. at 7(the Court provided "the option.."). The rulings contradict established law and precedent. The trial court reversibly erred.

C. Despite being erroneously denied an evidentiary hearing unconscionability of the delegation clause, the arbitration agreement and the class action waiver is established

Twelve – that is how many full and fair opportunities Troy-Protas received to challenge Mr. Brown's unconscionability arguments and

[5] Troy's reliance on Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) also fails as it involves "'procedural' questions" "bear[ing] on a dispute's final disposition" not litigation waivers..e.g. whether prerequisites to arbitration such as time limits, laches are met or "whether a condition precedent to arbitrability has been fulfilled." Id at 84

evidence but makes deliberate and considered decisions not to do so. Brown Br. 40-50; Supp. App. 189; Supp. App. 301; Brown I Briefing; Brown's 2018 OPP's, etc. Unconscionability of the delegation clause, the "arbitration agreement," and the class action waiver is established through uncontradicted reasonable arguments and evidence and despite wrongful denial of the evidentiary hearing. Keeton, 987 A2d at 1123. These issues are implicitly/explicitly decided in finding an enforceable arbitration contract and ordering arbitration. JA20, JA21, JA24("I do find, based on this information...suffices to show that **there is an arbitration agreement** that is biding [sic] between the parties here"…" there's **a valid arbitration agreement here**".... "**Having considered the written arguments of counsel with their oral supplements**, my conclusions are as follows:").

Mr. Brown challenges unopposed with arguments and uncontradicted evidence –the validity and enforceability of the "delegation" clause. JA166, JA105-108. No rebuttal makes the arguments uncontested similar to the failure in RAC. RAC., 130 S.Ct. at 2779. The delegation is cost-prohibitive and requires a second cost-prohibitive merits arbitration, the provision "one-sidedly interferes with Mr. Brown vindicating his rights under the FDCPA and the CPPA," the "loser pays" provision, requiring 5-10K up front to determine "agreement" existence blocks every forum [to pursue

his] small-dollar claims, the provision is not "clear and unmistakable," etc. JA169; Br. at 42, 45, 48, 49-50. Mr. Brown also presents uncontroverted evidence of inability to pay. JA105-06. Here, the vehicle was repossessed due to financial distress. So, paying $450-$800 per hour to an arbitrator is not possible. Gray v. Rent-A-Center W., Inc., 314 Fed. Appx. 15 (9th Cir. 2008)(fee-splitting unconscionable in light of plaintiff's uncontradicted testimony that he cannot afford $7500 expenses).[6] Equal cost sharing is "sufficiently onerous" to deter consumer from vindicating his claim. Id at 16; JA106. All three provisions including delegation means the consumer bears the cost of his/her own attorney fees and discretionarily FISC's merely to determine the existence of an agreement which is thousands of dollars. Nesbitt v. FCNH, Inc., 811 F.3d 371, 380 (10th Cir. 2016). Granting a prevailing creditor's attorney fees is not in line with statutory framework of the FDCPA, the CPPA or the DCL.

The "loser pays" provision risks Mr. Brown being forced to pay thousands before a second merits arbitration on his small-dollar claims or being denied mandatory attorney fees under the CPPA, the FDCPA, DCL. JA106. FISC merely advances a $1500 max that Mr. Brown cannot afford

[6] MS. DENNIS: And Your Honor, you're, you're, you're aware that the arbitration will -- under JAMS, they quoted somewhere between -- yeah -- the, the arbitrators are $450 per -- to $800 an hour? THE COURT: Right. JA163; JA105-106.

to pay back. JA105. There is no second advance for a merits arbitration. An indeterminable "opt-out period" that is only 10-days also is unconscionable. Brown Br. at 44. Delegation and arbitration are cost-prohibitive without the ability to pool resources with other consumers in a class action. Appeal of an adverse decision by Mr. Brown is also cost-prohibitive or barred outright under the one-sided appeal provision. Br. at 47. The cost of a three-arbitrator panel amounts to no appeal rights and an exclusive FISC right. FISC's veto ability to arbitrators is not Mr. Brown's choice as FISC can veto all arbitrators or allow only biased industry insiders like National Arbitration Forum ("NAF") named first in the "agreement." [7]

The trial court ruled the "class action waiver" not unconscionable and clear. [JA161]. The "waiver" is unconscionable, unclear, mistakable, and unenforceable as argued unopposed. Br. 40-50. The "waiver" is a scheme to deliberately cheat large numbers of consumers individually out of small sums of money, and in practice exempts Troy-Protas from responsibility for clear fraud and willful injury to consumers and their property. The "waiver" is ambiguous. Br. 48-50. The "agreement" is executed under clear financial duress where the borrower has no other options but to accept the

[7] Consent Decree, State v. NAF, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. Hennepin County filed July 14, 2009)(barred from administering, processing, or partaking in consumer arbitrations due to suspect ties with loan and debt collection industries.).

draconian provision to even be considered for a one-month payment extension from the only alleged entity that can grant the extension. FISC's, as a non-assignee, unilateral ability to "change" the RISC to deceptively add a provision denying a constitutional right without notice to the consumer is unconscionable. The three provisions at issue are exculpatory and impair Mr. Brown's rights under the CPPA, the DCL and the FDCPA which grant him the remedy of bringing representative actions. D.C. Code § 28 3904(k)(1)(B); § 28–3814(u)(4)(B); 15 USC 1692k. For the unrefuted reasons and evidence all three "agreements" are unconscionable and not clear and unmistakable. Br. 40-50; 9 U.S.C. § 2.

Mr. Brown should not continue to be punished for Troy-Protas' deliberate misapprehension of the law. That's not Mr. Brown's fault. Troy-Protas repeatedly and consciously ignores Mr. Brown's dispositive arguments and evidence. A party cannot ignore arguments below so as to claim a limited appeal based on arguments of its choosing. Usually, choices not to oppose means concession, especially after 12 times. Through this tactic Troy-Protas has stagnated this case for almost five years.

Conclusion

No enforceable contract with Mr. Brown to arbitrate the claims alleged exists and the Court should reverse and remand.

February 1, 2023

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Certificate of Service

I, Radi Dennis, certify that on this 1st day of February 2023, a true and accurate copy of the foregoing 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.

Signature

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22-CV-0524

Case Number(s)

2/1/2023 Date