IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-514

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC; STEVE A. MCKENZIE, and BRENDA G. LAWSON,

Petitioners,

WENDY BETTS, DONNA REUTER, et al.,

Respondents.
_____/

L.T. Case Nos.: 4D08-493, 4D08-494

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

I. RELEVANT PROCEDURAL HISTORY

On January 11, 2001, Plaintiffs filed a Class Action Complaint against McKenzie Check Advance of Florida, LLC, d/b/a National Cash Advance, Steve McKenzie, and Brenda McKenzie (collectively "MCA") in the Fifteenth Judicial Circuit in Palm Beach County. (R.70-90.) The Complaint alleged that MCA operated an illegal lending business in violation of: 1) Florida's Lending Practices Act, Chapter 687, Florida Statutes; 2) Florida's Consumer Finance Act, Chapter 516, Florida Statutes; 3) Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), Chapter 501, Consumer Protection Part II, Florida Statutes; and 4) Florida's Civil Remedies for Criminal Practices Act ("CRCPA"), Chapter 772, Florida Statutes. (R.71.)

On April 9, 2006, MCA filed a Motion to Stay Proceedings and to Compel Arbitration. (R.195-208.) Plaintiffs opposed that Motion by filing a Memorandum of Law in which they requested an evidentiary hearing to present evidence that MCA's class action ban was unconscionable under Florida law. (Supp. R.14-29.)

On May 31, 2007, Judge Maass ruled that Plaintiffs could challenge MCA's class action ban as unconscionable. (R.213.) A two-day evidentiary hearing followed. After weighing an extensive body of evidence that was presented at the hearing, Judge Maass concluded that although "the evidence was disputed, its greater weight supports the proposition that it would have been virtually

impossible for [Plaintiff] Kelly to obtain competent individual representation for the claims brought here, particularly in 2000." (R.63.) Judge Maass noted that the legal issues raised by Kelly's complaint "are sophisticated, requiring specialized knowledge," and "[e]ven now ... remain unsettled." (R.63.) Judge Maass further noted that the evidence demonstrated that "Kelly could not afford to pay an attorney by the hour, and no attorney would take the case for a fee contingent on the amount recovered." (R.63.) The court concluded that, if Kelly were prohibited from pursuing her claims against MCA on a class action basis, "[n]o other reasonable avenue for relief [would be] present." (R.67.)

Applying these factual findings to the law, Judge Maass ruled that "the class action waivers embedded in [MCA's] arbitration clauses violate public policy and are void ...." (R.59.) She noted that Florida residents such as MCA "should not be permitted to avoid the impact of Florida's consumer protection laws by incorporating terms into contracts that effectively abrogate any responsibility to follow them." (R.65.) In particular, the court held that enforcement of MCA's class action ban in this case "would defeat the implicated statutes' remedial purposes and undercut their deterrent value." (R.67.) Judge Maass noted that, "[t]his is particularly true where, as here, the party seeking to avoid class status has a policy of requiring confidentiality clauses as part of any settlement with an

individual consumer." (*Id*.)[1] At MCA's request, Judge Maass denied the motion to compel arbitration rather than ordering class arbitration. (R.68.)

The Fourth District Court of Appeal affirmed Judge Maass's decision, finding that "[t]he record below supports the trial court's conclusion that consumers would not be able to obtain competent counsel in their actions against [MCA] for allegedly usurious rates on its payday loans if the claims could not be brought in a class action." 55 So. 3d at 617. The court explained that, under generally-applicable principles of Florida contract law, a provision in a contract that "defeats the remedial and deterrent provisions of a statute is contrary to public policy and is unenforceable." *Id*. at 622. The court noted that Plaintiffs presented compelling expert testimony demonstrating that they would not be able to obtain competent representation to challenge MCA's lending practices absent the class action mechanism "because the issues were complex and time-consuming," and there was a "substantial risk" attorneys would be inadequately compensated. *Id*. at 623. The court concluded that MCA's class action ban would "eviscerate the remedial purposes" of the statutes at issue in this case, as the evidentiary record

[1] When asked whether MCA would settle with an individual customer, corporate counsel for MCA's parent company, Advance America Cash Advance Centers, Inc., Jonathan Monson, responded: "It depends on whether I could achieve the amount of the claim, was it a small claim, one that made economic sense to settle, could I get a settlement agreement that contained a confidentiality provision . . . ?" (Hr'g Tr. Vol. 3, 398:14-14) (R.954).

demonstrated that "[o]nly with the availability of class representation would consumers' rights in these payday loan transactions be vindicated." *Id*.

The Fourth District distinguished another case involving the enforceability of a class action ban, *Fonte v. AT & T Wireless Services, Inc*., 903 So. 2d 1019 (Fla. 4th DCA 2005), on its facts. The court rejected MCA's contention that *Fonte* "creat[ed] a categorical rule that class action waivers do not violate public policy," 55 So. 3d at 623, noting that *Fonte* lacked the compelling body of evidence Plaintiffs had presented to the circuit court in this case, *id*. at 622. In *Fonte*, the court below explained, "there was *no testimony* on whether the class action waiver affected the ability of consumers to obtain competent legal representation in pursuing their claims against [the defendant]." *Id*. (emphasis added). "Without such evidence," the *McKenzie* court concluded, "we could not say in *Fonte* that the class action waiver there violated public policy." *Id*. at 623.

II. FACTS RELATING TO THE ENFORCEABILITY OF MCA'S CLASS ACTION BAN

A. Plaintiffs Cannot Pursue Their Claims On An Individual Basis.

MCA's class action ban effectively exculpates MCA from liability for violating Florida's consumer protection statutes in this case because Plaintiffs cannot proceed with their claims on an individual basis. Indeed, since the time when Plaintiffs began transacting with MCA, not a single Florida consumer has

filed an arbitration against the company. (R.223.)[2]

Testimony from three prominent attorneys in Florida—Lynn Drysdale, Steven Fahlgren, and Richard Neill—established that, absent the class action mechanism in this case, legal representation for Plaintiffs to challenge the lending practices of MCA simply does not exist. (Drysdale Testimony, Hr'g Tr. Vol. 1, 38: 2-15; 39:13-17) (R.593-94) (it is "virtually impossible" for a consumer in Plaintiffs' position to find an attorney who would litigate an individual case against a payday lender; noting that she has unsuccessfully "tried to refer . . . payday lending cases to lawyers of all different types"); (Fahlgren Testimony, Hr'g Tr. Vol. 1, 91:22-25) (R.646) ("I know of no attorney in the State of Florida that would take the case filed by Ms. Betts and Tiffany Kelly against the various defendants in this case alleging the causes of action, or any of those causes of

[2] MCA attempted to diminish the significance of the fact that no arbitrations had been filed against the company by presenting to the circuit court a list of 649 cases from the U.S. District Court for the Southern District of Florida, Palm Beach County, and Orange County that—according to MCA—are similar to this case. (Hr'g Tr. Vol. 4, 477:1-9) (R.1033). The circuit court found this evidence insignificant, given that none of these cases involved a usury claim against a payday lender. (*Id*.) MCA now attaches to its brief a similar list of cases from the same courts involving cases where attorney-represented plaintiffs claim damages less than $15,000. (A.19-103.) Once again, there is no evidence to suggest that any of these cases involve the types of complex claims asserted here; challenge the usurious lending practices of a payday lender; or involve facts where the average consumer would be unaware that his or her rights have been violated without the aid of an attorney. The same can be said of the American Arbitration Association cases that MCA cites. MCA Br. 6.

action on an individual basis and on a contingency fee."); (Neill Testimony, Hr'g Tr. Vol. 2, 185:17-19) (R.741) ("I don't think an individual client could secure representation by a competent trial lawyer on an individual basis.").[3]

In explaining why this is so, a number of factors were cited by each of the experts. First, this case is not economically viable on an individual basis due to the small amount of damages at stake to each individual consumer, compared with the complexity and potential cost of litigating the particular claims involved:[4]

> [In] such a case you cannot be compensated adequately on a contingency basis because there's not enough money involved, you can't be compensated on an hourly basis because the client can't afford to pay you on an hourly basis. The issues on these cases, civil RICO, unfair and deceptive practices, whether or not the charges made by the defendants are usury, whether they are interest, whether it's a fee for a service, it makes the case difficult from a legal point of view. In general I would say that the opposition is going to be well-funded and represented by very good lawyers and that will make your case that much more difficult. And for those reasons I don't think an individual lawyer competent in civil trial practice would take on such a representation.

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[3] Similarly, MCA's customers could not obtain representation from legal aid attorneys. *E.g.*, (Drysdale Testimony, Hr'g Tr. Vol. 1, 43:8-44:9) (R.598-99) (noting that the "very, very limited resources" of legal aid offices in Florida, especially now given the rise in mortgage foreclosure cases, means that consumers cannot secure representation from legal aid attorneys in cases like this).

[4] MCA asserts that Kelly's individual damages total $24,200 before attorney's fees. MCA Br. 5. It is unclear how MCA arrived at this figure, given that Kelly paid only $860 in improper fees. (R.61; A.5-7.) None of the statutes involved in this case provide for a damages multiplier of twenty-eight.

(Neill Testimony, Hr'g Tr. Vol. 2, 185:22-186:13) (R.741-42); *see also* (Drysdale Testimony, Hr'g Tr. Vol. 1, 39:20-25; 40:2-5) (R.594-95) (the law involved in this case "was in such a flux" at the time Plaintiffs sought legal representation, and "there really wasn't any sort of significant statutory guidance on what you could do and could not do in the context of this type of loan transaction"); (Fahlgren Testimony, Hr'g Tr. Vol. 1, 92:20-24) (R.647) (Plaintiffs would not have been able to find representation to litigate their claims on an individual basis because "the case is somewhat complex" and "involve[s] issues which have not been settled"). Drysdale testified that a plaintiff with a claim involving (for instance) a false statement on her credit report would have a much easier time finding representation because those types of claims are relatively straightforward. (Drysdale Testimony, Hr'g Tr. Vol. 1, 44:10-19) (R.599).

Judge Maass also recognized the complexity of the law in this case (R.63):

> The first reported case in Florida addressing whether a deferred presentment transaction was subject to the usury laws was issued August 30, 2002, two years after the transactions here, and held [that] deferred presentment transactions [were] permitted under the Money Transmitters' Code, Florida Statutes Chapter 560. The first reported Florida decision holding the transactions subject to the usury laws was that issued in this case August 11, 2004, four years after Kelly's first transaction with MCA. That decision reversed a summary judgment in [the Defendants'] favor based on then-existing case law. The Florida Supreme Court did not decide that the transactions were subject to the usury law until April 27,

> 2006, over six years after Kelly's first transaction with [the Defendants]. A review of the motion for summary judgment and Betts's response, as well as the opinions of the Fourth District and the Florida Supreme Court, evidence the legal sophistication of the arguments. Even now the legal issues remain unsettled: the Florida Supreme Court expressly declined to address whether a pay day loan company is entitled to Florida Statute § 560.107's safe harbor.

Second, expert testimony established that without the aid of an attorney, Plaintiffs would not have been aware that their rights had been violated. Lynne Drysdale testified that she has had constant contact with consumers as a legal aid attorney through presentations to community groups, public tenant associations, elderly groups, and church groups, and that in her experience, many payday loan customers "wouldn't realize that they had rights until I went out into the community and explained to them what these transactions were and what their rights might be under the law." (Drysdale Testimony, Hr'g Tr. Vol. 1, 36:1-13) (R.591). Consistent with this, Plaintiff Kelly testified that she had not understood that MCA had, in any way, violated the law: "If it was against the law, [MCA] wouldn't be allowed to operate. At least that's what I would assume." (Kelly Testimony, Hr'g Tr. Vol. 2, 226:2-4) (R.782). "Indeed it was not until oral argument before this court in 2005 that MCA ever conceded that it was in reality loaning money to its customers." *McKenzie Check Advance of Florida, LLC v. Betts*, 928 So. 2d 1204, 1211 n.4 (Fla. 2006).

Third, the experts agreed that the availability of statutory attorney's fees would not provide an adequate incentive for attorneys to represent Plaintiffs here on an individual basis. They explained that it would simply be too risky for consumer attorneys to represent individual consumers where the cost of the legal effort dwarfs the amount at stake because arbitrators and judges are often reluctant to award such fees. (Fahlgren Testimony, Hr'g Tr. Vol. 1, 93:5-6; 96:7-22) (R.648, 651) (noting that it would be an "exceptional risk" for an attorney to agree to represent an individual client against a payday lender in the hopes of receiving adequate attorney's fees; estimating that the cost of representing Plaintiffs here "could be 100, 200, $300,000"); (Neill Testimony, Hr'g Tr. Vol. 2, 187:14-19; 21-25) (R.743) (noting that it is "too risky" for a lawyer "to undertake to represent an individual plaintiff with a claim involving several thousand dollars on a matter that's going to cost hundreds of hours of time").

In short, the evidentiary record established that Plaintiffs could not effectively vindicate their statutory rights absent a class action in this case.

B. MCA's Class Action Ban Was Imposed On Plaintiffs As Part Of A Contract Of Adhesion.

MCA's loan contracts are standardized forms filled with numerous terms and conditions that have been drafted entirely by MCA, which do not afford borrowers the flexibility to alter the contract's terms. (R.202-05.) MCA required

each of its customers to sign the bottom of these loan contracts as a prerequisite to each loan transaction. (*Id*.). In short, these loan contracts were offered to Plaintiffs on a "take-it-or-leave-it" basis.

C. There Is A Vast Disparity Of Bargaining Power Between The Wealthy And Sophisticated MCA And The Economically Desperate Plaintiffs.

As a highly profitable and sophisticated corporation, MCA's bargaining power is far superior to that of Plaintiffs. Self-described as "one of the nation's leading payday advance companies," MCA operated over 200 locations in Florida alone at the time Plaintiffs obtained their payday loans, and MCA's parent company, Advance America, now operates nearly 3,000 stores nationwide. (Hr'g Tr. Vol. 4, 395:23-396:4) (R.63, 951-52).

Plaintiffs, by contrast, are far from economically powerful. Kelly testified that when she obtained payday loans from MCA, she was a single mother of two children "living paycheck to paycheck" on $6.50 an hour. (Kelly Testimony, Hr'g Tr. Vol. 2, 209:1-7; 289:7-14) (R.765, 845). She explained:

> [A]nything as simple as having to buy medication or pay an extra amount to have my car fixed or anything could throw my budget awry. For me to seek [the Defendants'] assistance, there had to be something going on where I was in a desperate situation, such as seeking to have my utility bill paid or my rent paid or having to make a choice between those two and basically taking care of my family for me to even seek that assistance out.

(Kelly Testimony, Hr'g Tr. Vol. 2, 210:10-18) (R.766). It is difficult to imagine a

set of circumstances that would produce a greater disparity of bargaining power than those in the instant case.

D. Payday Lenders In Florida Routinely Require Borrowers To Sign Class Action Bans As A Condition Of Obtaining A Loan.

Plaintiffs would not have been able to secure a payday loan from another lender in Florida without waiving the right to pursue class relief. The record demonstrates that five other payday lenders in Florida require arbitration of individual claims. (Supp.R.34-168.) When faced with a consumer complaint seeking class relief, each of these payday lenders moved to compel individual arbitration. One federal regulator noted that mandatory arbitration clauses restricting class relief are "standard operating procedure among payday lenders." Robert W. Snarr, Jr., *No Cash 'Til Payday: the Payday Lending Industry*, Federal Reserve Bank of Philadelphia Compliance Corner at CC2 (Spring 2002). In short, it would have been difficult—if not impossible—for Plaintiffs to have obtained a payday loan without signing a class action ban.

E. Plaintiffs Did Not Have A Reasonable Opportunity To Understand The Terms Of The Loan Contract.

Plaintiffs did not have a reasonable opportunity to understand the terms of MCA's loan contract and, more specifically, how the class action ban would affect their ability to seek redress against MCA in the future.

Plaintiffs' evidence established that the complicated language used in

MCA's loan contract, coupled with its dense layout of fine print and compact spacing, prevented them from comprehending the meaning of the arbitration clause and the class action ban. (Supp.R.174-242.)

Testimony from Kelly confirmed that MCA's business practices hindered her ability to fully understand the important rights she waived by signing the contract. Kelly testified that "[n]o one lingered" at MCA's stores: "You came in, did your business, and you left." (Kelly Testimony, Hr'g Tr. Vol. 2, 215:23-24) (R.771). Kelly's loan transactions, which were typical of payday loan borrowers, only lasted two to three minutes per visit. (Kelly Testimony, Hr'g Tr. Vol. 2, 287:15) (R.843). Kelly further noted the stigma that often attaches to payday lending: taking out a payday loan was "an admission that I had a problem and I don't feel that anyone wants to admit that they have a problem and I was having financial problems." (Kelly Testimony, Hr'g Tr. Vol. 2, 287:15) (R.843). In short, Kelly had little opportunity to understand the meaning of the terms of the arbitration clause and class action ban before obtaining a loan. (Drysdale Testimony, Hr'g Tr. Vol. 1, 69:5-8) (R.624) (noting that "even if a consumer reads [the class action ban in MCA's contract], they don't understand the impact that that's going to have on their ability to obtain counsel in the first place").

SUMMARY OF ARGUMENT

This appeal involves the enforceability of a class action ban that MCA

included in its standardized loan contracts. The Fourth District Court of Appeal properly held that enforcement of MCA's class action ban in this case would effectively exculpate the company from liability to Plaintiffs Wendy Betts, Donna Reuter, and Tiffany Kelly ("Plaintiffs") for violating Florida's consumer protection statutes. *McKenzie v. Betts*, 55 So. 3d 615 (Fla. 4th DCA), *review granted*, 60 So. 3d 1055 (Fla. 2011).

MCA now offers three reasons why it believes the court below erred. First, MCA argues that under *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Federal Arbitration Act ("FAA") now mandates enforcement of its class action ban (if not all class action bans) in *every* case, no matter how the state law at issue analyzes the enforceability of such terms; no matter what kinds of claims are raised; and no matter what factual findings are made by the court. MCA Br. 1-2. That argument cannot be squared with U.S. Supreme Court precedent.

In no less than five separate decisions, the U.S. Supreme Court has held that arbitration clauses are to be enforced *only* where they allow individuals to effectively vindicate their statutory rights in the arbitral forum. Florida law—and the decision below—are entirely consistent with these decisions, which were not in any way called in to question by *Concepcion*. Moreover, *Concepcion* does not warrant reversal here because the features of California law that *Concepcion* found repugnant to the FAA are nowhere to be seen in Florida law, and the facts of

Concepcion—which supported the Court's findings that the plaintiffs there *would* be able to effectively vindicate their rights in individual arbitration—are distinguishable from this case, where Plaintiffs have conclusively demonstrated the opposite. Finally, *Concepcion* has no application here because *Concepcion*—unlike this case—arose in federal court, and is limited in its application to federal cases. Accordingly, *Concepcion* does not warrant reversal of the decision below.

Second, MCA argues that the court below erred in concluding that its class action ban violated Florida public policy. This argument fails. It is well-established in Florida that contract provisions that exculpate a company from violating the State's remedial statutes are void as contrary to public policy. *E.g.*, *Jersey Palm-Gross, Inc. v. Paper*, 658 So. 2d 531, 535 (Fla. 1995). The extensive evidentiary record in this case demonstrates that enforcing MCA's class action ban here *would*, as a matter of fact, enable MCA to escape liability for violating Plaintiffs' statutory rights. Moreover, the decision below should be affirmed on the additional ground that MCA's class action ban is unconscionable under Florida law because it was imposed on Plaintiffs in a procedurally unconscionable manner, and its exculpatory effects render the ban substantively unconscionable.

Third, MCA's *amicus*, the U.S. Chamber of Commerce ("Chamber"), asserts that the decision below should be reversed because, according to the Chamber, class actions are unnecessary or undesirable here. This argument is meritless, has

no basis for support under Florida law, and is disproven by the compelling evidentiary record in this case.

For all of these reasons, the decision below should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The decision below holding unenforceable the class action ban embedded in MCA's arbitration clause was based on factual findings and conclusions of law. Accordingly, this case presents a mixed question of law and fact. The standard of review applicable to the lower court's findings of fact is whether those findings "are supported by competent, substantial evidence." *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d 263, 266 (Fla. 4th DCA 2006). The standard of review applicable to the court's conclusions of law is *de novo*. *Gainesville Health Care Ctr. v. Weston*, 857 So.2d 278, 283 (Fla. 1st DCA 2003).

II. *CONCEPCION* DOES NOT REQUIRE ENFORCEMENT OF A CLASS ACTION BAN WHEN, AS HERE, AN EXTENSIVE FACTUAL RECORD DEMONSTRATES THAT ENFORCING THE BAN WOULD PREVENT PLAINTIFFS FROM VINDICATING THEIR STATUTORY RIGHTS.

In *Concepcion*, the Supreme Court held 5-4 that the FAA preempts California's "*Discover Bank* rule." 131 S. Ct. at 1746. According to *Concepcion*, the *Discover Bank* rule would mechanically invalidate a class action ban in an arbitration clause—and force the parties into non-consensual class arbitration—whenever three common factors are present: (1) a consumer contract of adhesion;

(2) predictably small damages; and (3) an allegation that the defendant engaged in a scheme to cheat consumers. *Id.* The Court reasoned that the rule would effectively prohibit arbitration of a broad category of claims and would impose procedures—namely, classwide arbitration—against the parties' consent, which would be inconsistent with and preempted by the FAA. *Id*.

MCA contends that *Concepcion* applies with equal force to the decision below and renders the application of general principles of Florida contract law in this case preempted by the FAA. MCA is wrong. *Concepcion* does not hold that *every* class action ban in an arbitration clause is *always* enforceable in *every* case.

First, *Concepcion* does not disturb longstanding U.S. Supreme Court precedent—applicable to federal and state-law claims alike—that statutory claims are arbitrable *only* if "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628, 637 (1985). The only way to harmonize *Concepcion* with the rule of law set forth in *Mitsubishi* and its progeny is to hold that a class action ban—like any other term in an arbitration clause—cannot be enforced if it would prevent parties from vindicating their statutory rights.

Second, Florida public policy and unconscionability challenges to the enforceability of class action bans are entirely consistent with the *Mitsubishi* line of cases, and are therefore undisturbed by *Concepcion*. For a class action ban to be

held unenforceable under either of these defenses, this Court should hold that Florida law requires plaintiffs to prove that the ban would, in fact, effectively prevent them from vindicating their statutory rights. This limitation was not present in the preempted *Discover Bank* rule, which is a crucial difference between this case and *Concepcion*.

Finally, *Concepcion* has no application here because *Concepcion*—unlike this case—arose in federal court, and is therefore limited in its application to federal cases. Thus, *Concepcion* does not warrant reversal of the decision below.

A. *Concepcion* does not disturb the rule that, under the FAA, parties must be able to effectively vindicate their rights in arbitration.

The U.S. Supreme Court has long held that statutory claims are arbitrable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"—and that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628, 637; *quoted in Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *see also EEOC v. Waffle House, Inc*., 534 U.S. 279, 295 n.10 (2002) (statutory claims may be arbitrated as long as a party can vindicate her substantive rights) (citation omitted); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) ("[C]laims arising under a statute designed to further important

social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum'") (citation omitted); *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (holding that, if an arbitration provision were to operate "as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy").[5]

In order for the FAA to require enforcement of class action bans even where enforcement would prevent the parties from effectively vindicating their statutory rights, the Supreme Court would have had to overrule this prior precedent. That did not happen. Indeed, there is no question that the *Mitsubishi* line of cases remains good law after *Concepcion*, as both *Mitsubishi* and *Gilmer* are cited as authority in the majority decision. *Concepcion*, 131 S. Ct. at 1748 (citing

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[5] As explained below, Florida courts have faithfully adhered to the principles of law articulated in the *Mitsubishi* line of cases when analyzing the enforceability of terms in arbitration clauses. *E.g., Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 578 (Fla. 1st DCA 2007) ("An arbitration clause is . . . unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations."); *Alterra Healthcare Corp. v. Bryant*, 937 So. 2d at 266 ("Parties may agree to arbitrate statutory claims, provided the arbitration offers an effective way for vindicating the claimant's statutory rights."). The decision below plainly applied these principles when it held that MCA's "class action waiver in this case, which prohibits both class arbitration and litigation, prevents individual plaintiffs from vindicating their statutory rights." *McKenzie*, 55 So. 3d at 628.

Mitsubishi Motors); *id*. at 1749 n.5 (citing *Gilmer*). Consequently, the principle that parties must be able to effectively vindicate their statutory rights in arbitration was not overruled by *Concepcion* and remains intact for purposes of this Court's analysis here. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts may not "conclude our more recent cases have, by implication, overruled an earlier precedent" and must "leav[e] to this Court the prerogative of overruling its own decisions"); *Rodriquez de Quijas v. Shearson/American Exp., Inc*., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[6]

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[6] MCA notes that, shortly after *Concepcion* was decided, the Supreme Court granted *certiorari*, vacated, and remanded *Sonic Auto v. Watts*, 2011 WL 1631040 (S.C. May 2, 2011), which held a class action ban unenforceable on public policy grounds. MCA Br. 16. This Court should attach no significance to these types of "GVR" orders because such orders are not intended to overrule prior precedent. *E.g., Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (GVR order is not a "final determination on the merits"). Rather, the Supreme Court uses GVR orders when it issues a new opinion that it believes might have affected a lower court decision if the opinion had been available prior to the lower court's decision. *See Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (GVR order appropriate when it is "not certain that the case [is] free from all obstacles to reversal on an intervening precedent"). In contrast, when the Court wishes to overrule a lower court opinion without full briefing and oral argument, it issues a "summary reversal," not a GVR order. *E.g., Felkner v. Jackson*, 131 S. Ct. 1305 (2011). Consistent with the fact that GVR orders do not overrule prior decisions, courts frequently reinstate their

Moreover, there is no doubt that the principles promulgated in *Mitsubishi* and its progeny apply equally to cases involving state statutory rights. In *Booker v. Robert Half Int'l, Inc*., 413 F.3d 77 (D.C. Cir. 2005), then-Judge Roberts, in a case involving state law, authored an opinion for the D.C. Circuit striking down a provision in an arbitration clause that stripped a party of state statutory rights. The opinion cited *Randolph* in holding that a party may "resist[] arbitration on the ground that the terms of any arbitration agreement interfere with the effective vindication of statutory rights." *Id.* at 82.

In short, *Concepcion* stands for the proposition that only those categorical rules of state law that permit uniform invalidation of arbitration clauses pose a conflict with the FAA: "When state law prohibits outright the arbitration of *a particular type of claim*, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747 (emphasis added). This conflict is no less evident when a state law accomplishes the same goal—prohibiting arbitration of a particular type of claim—indirectly, and any such law would also be preempted. *Id*.

A principle of state law that holds an arbitration clause unenforceable *only when the particular facts and circumstances of the case prove that the term*

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prior judgments after these orders. *E.g.*, *In re Am. Express Merchants' Litig*., 634 F.3d 187, 193–94 (2011).

prevents the parties from vindicating their statutory rights is entirely consistent with the FAA. *See Green Tree Fin. Corp*, 531 U.S. at 92 ("[A] party seek[ing] to invalidate an arbitration agreement . . . bears the burden of showing" that the clause would prevent her from vindicating her statutory rights.); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1462-63 (2009) (declining to rule on enforceability of arbitration clause when issue of whether plaintiffs could vindicate their rights had not been fully briefed below, and the Court would not "invalidate arbitration agreements on the basis of speculation"). Such a state-law rule clearly would not "stand[] as an obstacle to the accomplishment" of any Congressional purpose. *Concepcion*, 131 S. Ct. at 1753.

It should be noted that, after MCA filed its Initial Brief, the Eleventh Circuit issued a decision addressing *Concepcion* in *Cruz v. Cingular Wireless, LLC*, 2011 WL 3505016 (11th Cir. Aug. 11, 2011). MCA will likely attempt to rely on *Cruz*—which involved the enforceability under Florida law of the *identical* class action ban at issue in *Concepcion*—to argue that the decision below should be reversed. However, *Cruz* does not control the outcome of this case.

First, to the extent that *Cruz* can be read as interpreting *Concepcion* as overturning the *Mitsubishi* line of cases, such a conclusion is plainly wrong and should be rejected by this Court. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, [citation], there is no

similar obligation with respect to decisions of the lower federal courts." *Abela v. Gen. Motors Corp*., 469 Mich. 603, 677 N.W.2d 325, 327 (2004), *cert. denied*, 543 U.S. 870, 125 S.Ct. 98, 160 L.Ed.2d 117 (2004); *quoted in Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007); *Pignato v. Great Western Bank*, 664 So. 2d 1011, 1015 (Fla. 4th DCA 1995) ("Only decisions of the United States Supreme Court [not federal courts of appeal] are binding on the state courts of Florida.").

Second, in this case—unlike in *Cruz*, which involved claims alleging improperly-added mobile phone charges—no one at all (not even the named Plaintiffs) would be able to vindicate their rights absent a class action because of the complexity of the law involved to prove that MCA's lending practices are illegal. *See* Statement of Facts, *supra*; Part II, *infra*. The plaintiffs in *Cruz*, by contrast, would have likely realized they had been wronged by the defendant's conduct, and the claims involved were significantly more straightforward. Moreover, *Cruz* leaves open the possibility that its outcome might have been different had the arbitration clause at issue there not contained all of the "'pro-consumer' features" that *Concepcion* held would enable consumers to vindicate their rights in individual arbitration. 2011 WL 3505016, at *3 n.9.[7] Accordingly, *Cruz*'s analysis of *Concepcion* does not warrant reversal of the decision below.

[7] As explained below, MCA's clause contains none of these features.

B. *Concepcion* does not require reversal of the decision below because Florida law—unlike the *Discover Bank* rule—invalidates class action bans only if the particular facts of a case demonstrate that the parties cannot effectively vindicate their statutory rights on an individual basis.

Where an exculpatory contract term is at issue—regardless of whether the term is embedded within an arbitration clause—Florida courts analyze whether the term is unenforceable under two different contract defense frameworks: public policy and unconscionability. *E.g.*, *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 297 (Fla. 4th DCA 2005) ("[H]olding a contractual provision void as contrary to public policy is distinct from holding that a contract is unenforceable because it is unconscionable.").[8] As explained below, these two generally-applicable contract defenses are entirely consistent with the *Mitsubishi* line of cases because, to prove either defense, plaintiffs must demonstrate that *given the*

[8] As one court noted, "[p]ublic policy and unconscionability concerns, albeit based on similar facts, are distinct issues." *Bland, ex rel. Coker v. Health Care & Ret. Corp. of Am.*, 927 So. 2d 252, 257 (Fla. 2d DCA 2006). To prove that a contract term is unenforceable on the ground that it violates public policy, the plaintiff must demonstrate that enforcing the term would defeat the remedial provisions of a statute by preventing the plaintiff from effectively vindicating his or her statutory rights. *McKenzie*, 55 So. 3d 629; *Blankfeld*, 902 So. 2d at 298–99. To prove that a contract term is unenforceable on the ground that it is unconscionable, the plaintiff must prove that the term is both procedurally unconscionable and substantively unconscionable. *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003). Procedural unconscionability refers to the individualized circumstances under which the contract is entered, while substantive unconscionability deals with the unreasonableness and unfairness of the contractual terms themselves given the particular facts of the case. *Id.* Parts II and III of this brief will examine these frameworks in greater detail.

particular facts of their case they would be deprived of any significant means of redress against the defendant if the contract term was enforced.

With respect to the defense of public policy, as proof positive that Florida law unequivocally adheres to the principles established by the *Mitsubishi* line of cases—and thus remains undisturbed by *Concepcion*—this Court need only compare the decision below to *Fonte*. *Fonte* held that an arbitration clause's class action ban was *not* void as contrary to Florida public policy because there was no evidence in that case to suggest that the plaintiff there would be unable to vindicate her rights individually. 903 So. 2d at 1024.

The plaintiff in *Fonte* failed to meet her evidentiary burden because she neglected to demonstrate—through expert testimony, statistical evidence, or otherwise—that the defendant AT&T's class action ban would, as a matter of fact, exculpate the company from liability for violating Florida's consumer protection statutes. Indeed, the record in *Fonte* was *so* devoid of evidence regarding the real-world practical effects of enforcing AT&T's class action ban that the Court of Appeal was forced to fill the evidentiary gap with information from a secondary source: a 2003 article co-authored by a corporate defense lawyer. *Id.* at 1025. Without any factual record to demonstrate that the class action ban would be exculpatory given the particular circumstances of the plaintiff and claims at issue in *Fonte*, the Court of Appeal had no choice but to conclude that the ban did not

violate public policy on the ground that it did "not defeat any of the remedial purposes of FDUTPA." *Id*. at 1024.

Here, by contrast, the same court concluded that "[c]ompetent, substantial evidence supports the trial court's finding that no other reasonable avenue for relief would be available if it enforced the class action waiver." 55 So. 3d at 623.[9] For that reason, the court below held that MCA's class action ban "would eviscerate the remedial purposes" of FDUTPA and FCRCPA and therefore violate Florida public policy. *Id.* To hold otherwise, "*given the facts of this case*," the court noted, "would mean the plaintiffs would be deprived of the substantive rights the legislature has given them in the remedial statutes." *Id.* at 625. The court thus concluded that *Fonte* was "factually distinguishable," noting that—unlike in this case—"no attorney testified at the hearing [in *Fonte*], [so] there was no testimony on whether the class action waiver affected the ability of consumers to obtain competent legal representation in pursuing their claims against AT&T." *Id.* at 622.

A similarly-stringent evidentiary burden is required of plaintiffs to demonstrate that a contract term is unconscionable under Florida law. As is the case under Florida's public policy contract defense framework, a plaintiff must prove that the contract term at issue would exculpate its drafter from liability for

[9] The specifics of this body of evidence will be discussed in the next section.

wrongdoing for a court to hold that term substantively unconscionable. *E.g.*, *Prieto v. Healthcare and Retirement Corp. of Am.*, 919 So. 2d 531, 533 (Fla. 3d DCA 2006) (arbitration clause substantively unconscionable because it "deprive[d] the nursing home residents of significant remedies provided for by the statutes"). To the extent there is any doubt about whether Florida law on unconscionability is in accord with the *Mitsubishi* line of cases, this Court now has the opportunity to clarify that a class action ban will be held unenforceable as unconscionable in Florida *only where the particular facts of the case demonstrate* that the parties would be unable to vindicate their rights on an individual basis in arbitration.

Given that the public policy and unconscionability contract defenses under Florida law are entirely consistent with the *Mitsubishi* line of cases—which remains good law in the wake of *Concepcion*—*Concepcion* simply does not pose any obstacle to affirming the decision below. *Concepcion* was concerned with mechanical state-law rules that would categorically invalidate certain types of arbitration terms regardless of whether the particular facts of the case demonstrated that the parties could effectively vindicate their rights in arbitration. Florida law could not be more different, as demonstrated by comparing the decision below to *Concepcion* on the key factors at issue in both cases:

California's "*Discover Bank* rule"	**Florida's *McKenzie v. Betts* analysis**
Class action bans are invalid whenever three factors are present: (1) a consumer contract of adhesion; (2) predictably small damages; and (3) an allegation that the defendant corporation has engaged in a scheme to cheat consumers. 131 S. Ct. at 1746.	"*Given the facts of this case*," Plaintiffs would be deprived of their substantive rights absent a class action. 55 So. 3d at 623 (emphasis added).
"California's rule classif[ies] most collective-action waivers in consumer contracts as unconscionable." *Id.*	"[H]olding that a class action waiver does not apply to this case's claims against a payday lender does not create a blanket right to class action in the relevant statutes." *Id*. at 624.
"[T]he claim here was most unlikely to go unresolved." *Id.* at 1753. "[A]ggrieved customers who filed claims would be 'essentially guaranteed' to be made whole." *Id.*	"Competent, substantial evidence supports the trial court's finding that no other reasonable avenue for relief would be available if it enforced the class action waiver." *Id*. at 623.
No evidence concerning whether the plaintiffs would, as a factual matter, be able to bring their particular claims against the defendant on an individual basis.	"Lynn Drysdale, who had practiced consumer litigation in a legal aid office for almost twenty years . . . testified it was 'virtually impossible' for an individual consumer to find an attorney for a payday loan case. She did not know of any attorneys in Florida who represented individual consumers in such cases because of the resources required and the small amounts involved." 55 So. 3d at 619. Steve Fahlgren "knew of no lawyer in Florida who would take on such a case for a contingency fee; he implied that individual plaintiffs could not afford to pay by the hour .

	. . . He suggested that costs to bring the claim could exceed $100,000." *Id*. Richard Neill testified that "[p]ayday loan cases implicated complex issues, such as FDUTPA, usury, and civil RICO. These issues would take a substantial amount of time." *Id*. at 619-20. "[MCA] did not present the testimony of any lawyer who had seen a represented plaintiff prevail in a payday loan case." *Id.* at 620.
No factual findings as to whether plaintiffs with the claims at issue would be able to obtain legal counsel.	"The record below supports the trial court's conclusion that consumers would not be able to obtain competent counsel in their actions against [MCA] for allegedly usurious rates in its payday loans if the claims could not be brought as a class action." 55 So. 3d at 617. Plaintiffs' experts "testified that Florida customers who wanted to challenge the practice of payday loan businesses would not be able to obtain competent representation absence the class action mechanism. This was because the issues were complex and time-consuming—and there was a substantial risk that a circuit court would award inadequate compensation at the end of a successful case. In our view, this evidence established that individuals could not secure competent representation to pursue small claims actions against [MCA]." *Id.* at 623.
No data about the practical impact of AT&T's arbitration clause.	"[N]o payday loan arbitration claims had been filed against [MCA] from the beginning of its business through October 2001." *Id.* at 620.

Additionally, *Concepcion* was concerned that even though AT&T had a "blow up" clause (a provision providing that its entire arbitration clause should be

stricken if its class action ban is held unenforceable), California law might nonetheless require AT&T to arbitrate on a class action basis. 131 S. Ct. at 1750-53. *Concepcion* therefore stands for the proposition that requiring *class arbitration* would be particularly unfair to non-consenting parties and would violate the FAA because of features *unique to class arbitration*. There is nothing about Florida law that would impose class arbitration on parties without their consent; as this case demonstrates, parties may choose to proceed in arbitration or in court in the event that the class action ban at issue in the particular case is held unenforceable. *McKenzie*, 55 So. 3d at 623.[10] Accordingly, *Concepcion*'s preemption holding should be limited to state laws that would mechanically invalidate class action bans—without any regard to the exculpatory effects of those bans—and force the parties into non-consensual class arbitration, which are two features of the *Discover Bank* rule that are nowhere to be seen in Florida law.

Nonetheless, MCA and the Chamber make a number of arguments as to why *Concepcion* requires reversal of the decision below. These arguments fail.

First, MCA argues that, if the decision below is affirmed, "the public policy determination" in Florida would be determined on an "ad hoc, case-by-case basis"

[10] Moreover, to the extent there is any question regarding whether Florida law would impose class arbitration on parties without their consent, this Court now has the opportunity to clarify that it would not.

and would "create an unworkable patchwork of policy." MCA Br. 32. MCA is wrong. Florida public policy is what it is: it holds that contract provisions that prevent parties from effectively vindicating their statutory rights in arbitration or in court are unenforceable. This body of law, described in detail in Part II, will not change on a case-by-case basis. The only "case-by-case" determination courts will have to make is whether, under the particular facts of the case, the plaintiffs can prove that the contract term at issue in their case effectively prevents them from vindicating their statutory rights. Thus, there is no "patchwork of policy" here, just specific facts that are bound to vary among different cases.

Second, MCA and the Chamber argue that *Concepcion* "considered and rejected the argument that classwide proceedings are necessary to vindicate small claims." MCA Br. 14 (citing *Concepcion*, 131 S. Ct. at 1753); Chamber Br. 4-5 (same). However, the *Concepcion* Court's assumption that the class action ban in that case was not necessary to vindicate the plaintiffs' statutory rights was understandable, given that there was no factual record to the contrary.[11] Indeed, AT&T itself had argued that the rule it sought would *not* "mandate enforcement of

[11] Even the Question Presented in *Concepcion* – whether the FAA would preempt state law that would invalidate a class action ban where classwide treatment is "*not necessary* to ensure that the parties to the arbitration agreement are able to vindicate their claims"—reflected this assumption. Petition for Writ of Certiorari, *AT&T Mobility, LLC v. Concepcion*, No. 09-893 (U.S. Jan. 25, 2010), 2009 U.S. Briefs 893, at *i (emphasis added).

every [class action ban]," and urged that, under its view of the FAA, courts *should* be able to "invalidate agreements requiring bilateral arbitration upon finding that a customer is unable to vindicate her rights on an individual basis." *Concepcion*, Reply Br. for Petitioner, 2010 WL 4312794. In the absence of evidence to demonstrate that AT&T's class action ban would be exculpatory, the Court accepted AT&T's argument that its arbitration clause had beneficial features that made it possible for consumers to vindicate their rights on an individual basis. In other words, the only "fact" on which the Court could rely was the language of the arbitration clause itself. On its face, AT&T's clause seemed eminently fair: as Justice Scalia noted in the majority opinion, the clause "specifies that AT&T must pay all costs for nonfrivolous claims;" "denies AT&T any ability to seek reimbursement of its attorney's fees" from consumers; and, "in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees." *Concepcion*, 131 S. Ct. at 1744. Indeed, the district court in *Concepcion* had opined that the incentives for individual arbitration in AT&T's clause would leave the plaintiffs "better off . . . than they would have been as participants in a class action," and the Ninth Circuit "admitted that aggrieved customers who filed claims would be 'essentially guaranteed' to be made whole." *Id*. at 1753 (citation omitted). The Court thus concluded that the

claim at issue in *Concepcion* was "most unlikely to go unresolved." *Id*. at 1753.

MCA's arbitration clause, in contrast, lacks the special incentives that the courts found significant in *Concepcion*. And as explained in greater detail in Parts II and III below, the factual question of whether Plaintiffs in this case would be able to effectively vindicate their rights on an individual basis here has been answered in the negative as a matter of fact. Thus, *Concepcion*'s conclusion that class-wide proceedings were not necessary in that case for the plaintiffs to effectively vindicate their rights does not compel the same conclusion here.

Third, the Chamber suggests that, if the decision below is affirmed, any arbitration clause "could be struck down whenever counsel for a plaintiff enlists a few compatriots" to build a factual record. Chamber Br. 9-10. This argument insults the role of courts as neutral fact-finders. There have been myriad courts, including those listed in Plaintiffs' Answer Brief below, which have found testimony by experts that a class action ban would be exculpatory not only compelling, but dispositive. Pls.' Answer Br. 23, 36-39; *e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (class action ban unenforceable where the evidentiary record, which included attorney expert declarations, demonstrated that the ban would shield the defendant from antitrust enforcement liability). In this case alone, Judge Maass heard testimony from a number of expert witnesses from *both* sides, and made her factual findings based on the totality of this evidence.

(R.67) (finding that the "greater weight of the expert testimony establishes that [Kelly] would not have attracted competent counsel had she not been able to pursue the matter as a class action"); *see also McKenzie*, 55 So. 3d at 623 ("The facts were disputed. The trial court chose to rely on the plaintiffs' evidence, and it was privileged to do so. We will not disturb the court's resolution of the disputed evidence on appeal."). The Chamber's argument is therefore wholly without merit.

C. *Concepcion* Does Not Apply to Cases in State Court.

Another reason why the 5-4 holding of *Concepcion* does not warrant reversal of the decision below is that *Concepcion* is limited to cases which arose in federal court. Had the issue in *Concepcion* reached the U.S. Supreme Court from a state court, there could not have been five votes for preemption because Justice Thomas—who provided the crucial fifth vote for the *Concepcion* majority—has consistently maintained that the FAA does not apply to cases in state court.

Since the 1995 case of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 285 (1995), Justice Thomas has been adamant that the FAA in general, and § 2 in particular, "does not apply in state courts." *Id.* at 285 (Thomas, J., dissenting). As he explained, at the time of the FAA's passage in 1925, "laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance," and as such it "would have been extraordinary for Congress to attempt to prescribe procedural rules for

state courts." *Id.* at 286, 288–29 (emphasis in original); *see also Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) (dissenting from Court's holding that FAA preempted a California law on the ground that, "in state-court proceedings, the FAA cannot displace a state law that delays arbitration until administrative proceedings are completed"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting) (because the FAA does not apply in state courts, "in state-court proceedings, the FAA cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting) (because FAA does not apply in state courts, FAA cannot preempt state court's interpretation of arbitration agreement); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting) (dissenting from Court's holding that FAA preempted a Montana law on the ground that "§ 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to proceedings in state courts"). In short, if the FAA preemption issue had reached the U.S. Supreme Court in *this* case, and not *Concepcion*, the only way the Court could have held preempted the decision below would have been if Justice Thomas completely abandoned the position to which he steadfastly adhered in five different cases. *E.g. Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (repeatedly noting that

Concepcion's preemption holding is the rule "*at least for actions in federal court*") (emphasis added).[12]

III. MCA'S CLASS ACTION BAN VIOLATES FLORIDA PUBLIC POLICY AND IS THEREFORE VOID.

The court below properly held that, given the substantial and compelling evidentiary record in this case, Plaintiffs would be unable to vindicate their statutory rights absent the class action mechanism in this case and, for that reason, MCA's class action ban was void as contrary to Florida public policy. *McKenzie*, 55 So. 3d at 629. As explained below, the decision below should be affirmed because: (a) the Court of Appeal reached the correct legal conclusion that Florida public policy prohibits the enforcement of exculpatory contract provisions that

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[12] *Concepcion* had no occasion to consider the extent to which its rule would apply in a state-court proceeding. When the Court makes a "judicial pronouncement," that pronouncement's value comes from "the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Put another way, *Concepcion* should be understood as a pronouncement that extends only to the context of that case—a case litigated in federal court. As a result, Justice Thomas's concurrence in *Concepcion*, which arose in federal court, that the "*Discover Bank* rule is pre-empted" by the FAA, can properly be understood to mean only that the *Discover Bank* rule is preempted by the FAA in federal courts. So long as one takes Justice Thomas at his consistent word, it follows that he would not have voted the way he did had *Concepcion*, like this case, arisen in a state court. *Cf. United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam) (examining Supreme Court plurality opinion to predict outcomes based on likely vote of Justice Kennedy); *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 664 n.2 (9th Cir. 1992) (counting votes to consider whether "the Supreme Court would have five votes for holding a post office is a nonpublic forum"). Thus, *Concepcion* has no application here.

defeat the remedial purposes of Florida's consumer protection statutes; and (b) the court's factual findings that MCA's class action ban would—in fact—exculpate the company here are well-supported by the evidentiary record in this case.

To begin, it is well-established that Florida public policy forbids the enforcement of contract provisions that exculpate a defendant from liability for violating Florida's consumer protection statutes regardless of whether the provision is embedded within an arbitration clause. For example, in *America Online, Inc. v. Pasieka*, 870 So. 2d 170, 171 (Fla. 1st DCA 2004), the defendant sought to enforce a forum selection clause in its contract that required consumer lawsuits to be brought in Virginia, which did not permit class actions for certain types of consumer claims. The plaintiffs filed a class action in Florida alleging violations of FDUTPA. *Id.* at 170. The court found that "most of the individual plaintiffs likely would not pursue their claims in Virginia," and thus refused to enforce the forum selection clause on public policy grounds, noting that "the purpose and effectiveness of the FDUTPA would be seriously undermined if the claims here were required to be brought in Virginia." *Id*. at 171-72.

Likewise, in *Rollins v. Heller*, 454 So. 2d 580, 583 (Fla. 3d DCA 1984), a defendant alarm company sought to limit its customer's ability to recover under the FDUTPA for losses sustained from the defendant's alarm failing to protect the customer's home from burglary. The defendant cited a "limitation of damages"

provision in its sales contract that, if enforced, would have limited the customer's FDUTPA damages to only $250.00. *Id*. The court refused to enforce this provision on the ground that "any attempt to limit one's liability for deceptive or unfair trade practices would be contrary to public policy." *Id*. at 585.[13]

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[13] MCA suggests that it is only in the rarest of circumstances that Florida courts strike contract terms as violating public policy. MCA Br. 19-20. However, when the facts of a case demonstrate that a defendant has contracted to improperly exculpate itself from liability for its wrongdoing, Florida courts have a long and well-established history of holding such contracts void as contrary to public policy in a wide variety of contexts. *See, e.g., In re Twenty Grand Offshore, Inc.*, 328 F. Supp. 1385, 1386-87 (S.D. Fla. 1971) (benefit-of-insurance provision, which would have allowed a party to indirectly absolve itself of liability for its own negligence, violated public policy and was therefore unenforceable); *Jersey Palm-Gross*, 658 So. 2d at 535 (usury savings clause would not bar plaintiff's usury claim because enforcing the clause "would undermine public policy as set by the legislature and defeat the purpose of Florida's usury statute"); *Tatman v. Space Coast Kennel Club, Inc*., 27 So. 3d 108, 110 (Fla. 5th DCA 2009) (exculpatory clauses "are by public policy disfavored in the law because they relieve one party of the obligation to use due care, and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss"); *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008) (exculpatory clause in a home purchase and construction contract unenforceable); *City of Hialeah Gardens v. John L. Adams & Co., Inc*., 599 So. 2d 1322, 1324 (Fla. 3d DCA 1992) ("A contract that contravenes an established interest of society can be found void as against public policy."); *First Pacific Corp. v. Sociedade de Empreendimentos e Construcoes, Ltda*., 566 So. 2d 3, 4 (Fla. 3d DCA 1990) (forum selection clause unenforceable where it "would allow Florida residents to avoid the impact of [Florida's RICO statute]"); *Coastal Caisson Drill Co., Inc. v. Am. Cas. Co. of Reading, Pa.*, 523 So. 2d 791, 793 (Fla. 2d DCA 1988) ("The right to contract is limited by public policy, and where a private agreement contravenes an established interest of society or has a tendency to be injurious to public welfare, it is void as against public policy."); *Tandy Corp. v. Eisenberg*, 488 So. 2d 927, 928 (Fla. 3d DCA 1986) (exculpatory clause in sales agreement unenforceable where defendant knowingly deceived plaintiff and violated Florida's

Notably, none of the cases cited above involved arbitration. However, there is an equally compelling body of Florida case law holding that exculpatory contract terms that are embedded within arbitration clauses to prevent a plaintiff from effectively vindicating his or her statutory rights violate Florida public policy as well. For example, in *Alterra*, 937 So. 2d at 266, the court found that "[a]n arbitration agreement that contains provisions which defeat the remedial portions of a statute is not enforceable." The arbitration clause at issue in *Alterra* prohibited the plaintiff from recovering punitive damages under the Nursing Home Resident's Rights Act ("NHRA"), and capped non-economic damages at $250,000. *Id*. The court struck the defendant's arbitration clause as unenforceable because it "defeat[ed] the remedial purpose of the NHRA and [was] therefore, void as against public policy." *Id.; see also S.D.S. Autos, Inc. v. Chrzanowski,* 976 So. 2d 600, 611 (Fla. 1st DCA 2007) (contractual provisions "which purport to prohibit consumers from pursuing class relief for small but numerous claims against motor vehicle dealers based upon alleged violations of [Florida's consumer protection statutes], are irreconcilably at odds with the remedial purposed of FDUTPA, contrary to the public policy of this state, and unenforceable for that reason");

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consumer protection laws); *John's Pass Seafood Co. v. Weber*, 369 So. 2d 616, 618 (Fla. 2d DCA 1979) (provision in commercial lease agreement that exonerated defendant from liability for failure to provide fire safety equipment, which was required by the city fire code, unenforceable).

Blankfeld, 902 So. 2d at 297 (holding that the defendant's "arbitration procedure substantially limit[ed] the remedies created by the Nursing Home Residents Act, and [was] void as contrary to public policy"); *Lacey v. Healthcare & Ret. Corp. of Am.*, 918 So. 2d 333, 334 (Fla. 4th DCA 2005) (arbitration clause violates public policy by defeating the purposes of Florida's remedial Nursing Home Resident's Act by capping non-economic damages at $250,000 and waiving punitive damages); *Holt v. O'Brien Imports of Fort Meyers, Inc*., 862 So. 2d 87, 88-89 (Fla. 2d DCA 2003) (arbitration clause was void as contrary to public policy because the clause prohibited the arbitrator from awarding injunctive relief, which was expressly authorized by the FDUTPA); *cf. Alterra*, 953 So. 2d at 578 ("An arbitration clause is . . . unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations."). The decision in this case that an exculpatory contract term embedded within an arbitration clause that effectively prevents plaintiffs from vindicating their rights is void as contrary to public policy is entirely consistent with this body of Florida law.

MCA challenges the Court of Appeal's analysis on the ground that—according to MCA—the decision below would provide Florida consumers with a "non-waivable" or "blanket" right to a class action, which would be contrary to legislative intent. MCA Br. 19, 21. But that statement is belied by the language of the court itself: "[our] holding that a class action waiver does not apply to this

case's claims against a payday lender *does not create a blanket right to class action* in the relevant statutes." 55 So. 3d at 624 (emphasis added).[14]

The court below also properly found that "[c]ompetent, substantial evidence" contained in the record below demonstrates that MCA's class action ban would, in fact, exculpate the company from liability for violating Florida's consumer protection statutes if enforced against Plaintiffs in this case. *McKenzie*, 55 So. 3d at 623. As explained in greater detail in the Statement of Facts, Lynne Drysdale testified that it would be "virtually impossible" for Plaintiffs to find legal representation in this case, and that she has "tried to refer . . . payday lending cases to lawyers of all different types" to no avail. (Drysdale Testimony , Hr'g Tr. Vol.

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[14] Nor does FDUTPA's legislative history (which is silent as to why the Legislature may have rejected provisions explicitly providing for class actions) support MCA's argument. *See Knowles v. Beverly Enterprises-Florida, Inc*., 898 So. 2d 1, 6 n.1 (Fla. 2004) (where legislative history was silent as to why a particular revision of statutory provisions occurred, the revisions were "of no moment" to the meaning of the statute); *Duer v. Moore*, 765 So. 2d 743, 745 (Fla. 1st DCA 2000) ("Silence is an unreliable source of legislative intent.") (citation omitted). Moreover, as the trial court noted, "[i]t is not surprising that the Legislature would not address whether a procedural right, such as the right to seek class certification, may be waived as opposed to whether a substantive right, such as the right to recover non-economic damages, may be waived, given the division of procedural and substantive authority between the Florida Supreme Court and the Florida Legislature." (R.62) (citing Art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all court . . .")); *Hanzelik v. Grottoli & Hudon Inv. of Am., Inc.*, 687 So. 2d 1363, 1365 (Fla. 4th DCA 1997) ("[U]nder the doctrine of separation of powers, the legislature is not permitted to set forth any enactment which would govern procedure in the courts of this state.").

1, 38:2-15; 39:13-17); *see also* (Neill Testimony, Hr'g Tr. Vol. 2, 185:17-19) (same). Expert testimony also established that one of the factors that would render MCA's class action ban exculpatory in this particular case is the novel and complex legal claims involved. *See, e.g.*, (Drysdale Testimony, Hr'g Tr. Vol. 1, 39:20-25; 40:2-5) (the law was in a "state of flux," thus diminishing the likelihood that a consumer could obtain individual representation to challenge the Defendants' lending practices); (Fahlgren Testimony, Hr'g Tr. Vol. 1, 92:20-24) (Plaintiffs could not find individual representation because this case "involve[s] issues which have not yet been settled"). Moreover, as the court below noted, MCA stipulated to the fact that "no payday loan arbitration claims had been filed against [MCA] from the beginning of its business through October 2001." 55 So. 3d at 620. In short, the court below properly affirmed Judge Maass' factual findings that MCA's class action ban would indeed exculpate the company from liability to Plaintiffs for violating their statutory rights in this case.

MCA, however, argues that the potential availability of attorney's fees under FDUTPA and CRCPA guarantees that Plaintiffs will obtain justice through individual arbitration.[15] This is demonstrably false. Although FDUTPA provides for the availability of attorney's fees, this award is discretionary. Fla. Stat. §

[15] The other two statutes at issue here, Florida's Lending Practices Act and Consumer Finance Act, do not provide for the availability of attorney's fees.

501.211(2); *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 264 (Fla. 2d DCA 2004) (a prevailing party "*may* seek an award of such fees from the circuit court) (emphasis added). Likewise, CRCPA does not guarantee an award of attorney's fees to prevailing plaintiffs, Fla. Stat. § 772.104(1), and also provides that consumers may be liable for a defendant's attorney's fees if the court finds their claims are "without substantial fact or legal support." Fla. Stat. § 772.104(3). As Plaintiffs' experts explained, there is an "exceptional risk" involved in bringing a case against a payday lender on an individual basis in the hopes of receiving adequate attorney's fees. (Fahlgren Testimony, Hr'g Tr. Vol. 1, 96:7-22); (Neill Testimony, Hr'g Tr. Vol 2, 187:14-19; 21-25) (same). The court below was therefore well-supported in concluding that "[t]he evidence in this case established that, even if an individual plaintiff prevailed, he may be able to recover only an inadequate amount in fees." 55 So. 3d at 628.[16]

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[16] The trial court's factual findings are consistent with those made by a number of other courts that have addressed this very issue in factually similar settings. In *S.D.S. Autos*, 976 So. 2d at 606, the court found a class action ban to be exculpatory even though prevailing parties were entitled to statutory attorney's fees because the fees were only available to the extent that they were "reasonable in light of the amount of the individual's actual damages." The court explained that where "the amount of an individual consumer's actual damages is small and attorney's fees are limited as a result, FDUTPA's private enforcement scheme cannot effectively deter violations of [Florida law] if consumers are prevented from seeking relief as a class." *Id.*; *see also Kristian*, 446 F.3d at 59 n.21 (rejecting argument that attorney's fees are an adequate substitute for class actions; "the attorney's fees incurred to prevail on the claim would be so enormous that it is

MCA further argues that its class action ban would not be exculpatory in this case because it offers its customers "several low-cost alternatives to class litigation to pursue their claims," including the option to proceed in small claims court. MCA Br. 23-24. The court below properly rejected this argument, noting again that the record in this case demonstrates that "individual plaintiffs could not obtain counsel for small claims suits" any more than they could obtain counsel for individual arbitration. 55 So. 3d at 623. The court also found that the fact that "no arbitration claims had been filed against [the company] from the start of its business through October 2001" corroborated Plaintiffs' evidence. *Id*.

In short, Florida public policy prohibits the enforcement of exculpatory contract terms that prevent plaintiffs from effectively vindicating their statutory rights. The substantial evidence presented in this case shows that MCA's class action ban would, in fact, exculpate the company in this case. Accordingly, the decision below should be affirmed.

IV. MCA'S CLASS ACTION BAN IS UNCONSCIONABLE

This Court could also affirm the decision below on an alternative basis: MCA's class action ban is unconscionable. As this Court has recognized, a decision that "reaches the right result" will be affirmed "if there is any basis which

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highly unlikely that an attorney could ever begin to justify being made whole by the court").

would support the judgment in the record." *Dade County Sch. Bd. v. Radio Station WQBA*, 831 So. 2d 638, 644-45 (Fla. 1999). Accordingly, because "holding a contractual provision void as contrary to public policy is distinct from holding that a contract is unenforceable because it is unconscionable," *Blankfeld*, 902 So. 2d at 297, MCA's class action ban may be held unenforceable on unconscionability grounds, irrespective of this Court's public policy holding. As explained below, MCA's class action ban is both substantively and procedurally unconscionable in this case because the ban is exculpatory and was imposed on Plaintiffs under conditions that deprived them of a meaningful opportunity to accept or reject the contract's terms.[17]

A. MCA's Class Action Ban Is Substantively Unconscionable Because It Is Exculpatory.

Florida courts have long held that a contract provision that exculpates its drafter from liability for wrongdoing is substantively unconscionable. *E.g.*, *Prieto*, 919 So. 2d at 533 (arbitration clause unconscionable in part because it "deprive[d]

[17] This Court is currently considering the issue of whether a plaintiff must demonstrate both substantive and procedural unconscionability to prove that a contract term is unconscionable, or whether a showing of one type (substantive *or* procedural) will suffice. *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010), *certified questions accepted by* No. SC-10-19 (Fla. Jan. 10, 2010). Plaintiffs agree with the position of the plaintiff-appellant in *Pendergast* that a showing of *either* substantive *or* procedural unconscionability will render a contract term unconscionable, but regardless, in this case, Plaintiffs can demonstrate both types of unconscionability.

the nursing home resident of significant remedies provided for by the statutes"); *Bellsouth Mobility LLC v. Christopher*, 819 So. 2d 171, 173 (Fla. 4th DCA 2002) (arbitration clause substantively unconscionable because it "expressly remove[d] Bellsouth's exposure to a class action suit"); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. 1st DCA 1999) (arbitration clause that removed defendant's exposure to any remedy that could be pursued on behalf of a class was substantively unconscionable). Accordingly, when the facts of a particular case demonstrate that a contract term is exculpatory, the term may be challenged as either contrary to public policy or substantively unconscionable. *Bland*, 927 So. 2d at 257 ("Public policy and unconscionability concerns, albeit based on similar facts, are distinct issues.").

In this case, the same facts that prove that MCA's class action ban violates Florida public policy in this case also prove that the class action ban is substantively unconscionable. *See* Part II.

B. MCA's Class Action Ban Was Promulgated In A Procedurally Unconscionable Manner.

MCA's class action ban is also procedurally unconscionable because Plaintiffs lacked a meaningful choice when they obtained the payday loans at issue in this case. *See Steinhardt v. Rudolph*, 422 So. 2d 884, 889 (Fla. 3d DCA 1982) (noting that procedural unconscionability focuses on whether one of the parties

lacked a meaningful choice when the contract was entered).

There are a number of factors in this case that compel a finding of procedural unconscionability. First, MCA's class action ban was part of a contract of adhesion, which is a "strong indicator that the contract is procedurally unconscionable." *Gainesville*, 857 So. 2d at 284. A contract of adhesion is a "standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract." *Id*. (citation omitted). For example, *Powertel*, 743 So. 2d at 574-75, found an arbitration clause procedurally unconscionable when the "customers did not bargain for the arbitration clause, nor did they have the power to reject it."

Similarly, Plaintiffs here had no choice but to sign an adhesive contract in order to receive a payday loan. As explained in the Statement of Facts, the loan contracts are standard form documents that afford no opportunity for Plaintiffs to bargain for specific terms. Rather, they are offered on a take-it-or-leave-it basis as a condition of obtaining a loan. As such, MCA's loan contracts are adhesive, which is a factor that strongly supports a finding of procedural unconscionability.

Second, there was a gross inequality of bargaining power between Plaintiffs and MCA. *See Kohl v. Bay Colony Club Condominium*, 398 So. 2d 865, 868 (Fla.

4th DCA 1981) (courts should "analyz[e] the respective bargaining powers of the contracting parties" to determine procedural unconscionability) (citation omitted). In *Harris v. P.S. Mortgage and Inv. Corp.*, 558 So. 2d 430, 430-31 (Fla. 3d DCA 1990), the court found this factor met when the defendant mortgage company "took advantage of a poor, distraught, uneducated homeowner who had lost her home in a mortgage foreclosure action."

As in *Harris*, the class action ban here is the product of extreme inequalities in bargaining power and commercial sophistication between MCA and Plaintiffs. MCA describes itself as "one of the nation's leading payday advance companies" and operates over 200 locations in Florida alone. Plaintiffs, by contrast, are financially-pressed consumers who were forced by limited credit options into seeking out high-interest payday loans to meet basic living expenses.

Third, the industry-wide pervasiveness of arbitration clauses prohibiting class-wide relief, which was detailed in the Statement of Facts, is an additional factor weighing in favor of holding MCA's class action ban procedurally unconscionable. *E.g., Steinhardt*, 422 So. 2d at 892 (noting that the "scarcity of[] housing units" in Florida minimizes the meaningfulness of the choice to accept or reject a lease agreement); *American Gen. Fin., Inc. v. Branch*, 793 So. 2d 738, 750-51 (Ala. 2000) (finding home lender's arbitration clause unconscionable where most local lenders used similar clauses).

Fourth, MCA failed to provide Plaintiffs with a reasonable opportunity to understand the meaning of this important waiver of rights. *See Prieto*, 919 So. 2d at 532 (the lack of a "reasonable opportunity to understand the terms of the contract" supports a finding of procedural unconscionability). *Kohl* found this factor met when important contract terms were "hidden in a maze of fine print." 398 So. 2d at 868. Other courts found procedural unconscionability when the arbitration agreement "appear[ed] in the smallest type on the page and [was] barely readable," *Palm Beach Motor Cars Ltd., Inc. v. Jeffries*, 885 So. 2d 990, 992 (Fla. 4th DCA 2004), or when the consumer was rushed into signing the agreement without having important terms explained, *Prieto*, 919 So. 2d at 533.

Here, the significance of MCA's class action ban is minimized by small print and spacing, and the arbitration clause in which it is embedded lacks any semblance of organizational form. The fact that none of MCA's borrowers (outside of Plaintiffs) complained that MCA's loans were usurious confirms that MCA drafted its contract in a way that guaranteed few would understand its terms.

In sum, although Plaintiffs need not establish all of the foregoing factors to prove procedural unconscionability, *Powertel*, 743 So. 2d at 575, the record in this case demonstrates that each of these factors has been established. This Court should therefore affirm the decision below on grounds that MCA's class action ban is substantively and procedurally unconscionable.

V. THE CHAMBER'S POLICY ARGUMENTS FAIL.

Finally, the Chamber makes a number of policy arguments as to why class relief is not necessary or desirable in this case. Chamber Br. 17-19. Regardless of any conclusory statements that the Chamber may make about class actions in the abstract, in *this* case, the substantial and compelling evidentiary record demonstrates that the class action mechanism is absolutely *crucial* for Plaintiffs to be able to vindicate their statutory rights.

In fact, the evidentiary record in this case confirms what has long been recognized as true by the U.S. Supreme Court: that the class action mechanism in certain cases will be the only viable means for consumers to obtain a complete remedy. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974), explained:

> A critical fact in this litigation is that petitioner's individual stake in the damages award is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class actions or not at all.

See also AmChem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (stating that "[a] class action solves [the incentive problem created by small damages] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor").

Florida courts have similarly recognized the value of class actions in cases like this one:

> Class litigation provides the most economically feasible remedy for the kind of claim that has been asserted here. The potential claims are too small to litigate individually, but collectively they might amount to a large sum of money. The prospect of class litigation ordinarily has some deterrent effect on a manufacturer or service provider, but that is absent here. By requiring arbitration of all claims, Powertel has precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone.

Powertel, 743 So.2d at 576. Indeed, just last month in *Sosa v. Safeway Premium Finance Company*, this Court (in a decision involving a motion for class certification) held that, given the particular facts of the case, class certification would be the "superior form of adjudication" because "[t]here are potentially thousands of prospective class members and their small individual economic claims involving a $20 overcharge are not so large as to economically justify each individual filing a separate action." 2011 WL 2659854, at *20 (Fla. July 7, 2011); *see also* *6 (noting that class actions have "a real and meaningful position in the administration of justice to address the ever-increasing caseload burden placed upon our trial courts").

In short, the Chamber's attack on class actions in this case is wholly unwarranted. Plaintiffs have demonstrated that the class action mechanism here is the only way in which they will be able to vindicate their statutory rights.

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Dated: September 12, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule

of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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