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# IN THE SUPREME COURT OF ILLINOIS

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| EDDIE LOPEZ and SANDY LOPEZ,<br>Plaintiffs/Appellees/Appellants Cross Appellees,<br><br>v.<br><br>AMERICAN LEGAL FUNDING, LLC and ALFUND LIMITED PREFERRED LLC<br>Defendants/Appellants/Appellees Cross Appellants. | Petition for Leave to Appeal from the Appellate Court of Illinois First Judicial District<br>**Nos: 12-0878 and 12-0763**<br>On appeal from the Circuit Court of Cook County, Illinois Chancery Division<br><br>Circuit No. 09 CH 01008<br><br>Honorable Peter Flynn |

## SUPPLEMENT TO PETITION FOR LEAVE TO APPEAL

**NOW COMES** the plaintiff **EDDIE LOPEZ** and supplements his Petition for Leave to Appeal as follows:

### III. ADDITIONAL POINT RELIED UPON FOR REVERSAL

In addition to the points raised in the plaintiff's petition for leave to appeal, the plaintiff supplements that petition with the June 10, 2013 decision of the United States Supreme Court in *Oxford Health Plans LLC, v. Sutter*, (June 10, 2013) 569 U. S. ____ which the plaintiff believes is dispositive of the primary issue in this case.

The Circuit Court in this case in its order of February 22, 2012 (R. C2685-2689) relying on *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, and without the benefit of the United States Supreme Court decision in *Oxford Health Plans*, concluded

that it could not enter a judgment confirming the American Arbitration Association clause construction award because "*Stolt-Nielsen* held that an arbitrator could not permit class arbitration where the underlying arbitration clause did not itself expressly do so." (R. C2687). As such the trial court neither confirmed, nor vacated the arbitrator's award.

The Appellate Court in its Rule 23 Opinion held that it lacked appellate jurisdiction to review a trial court order that neither confirmed, nor vacated or modified the award as is required by the Federal Arbitration Act §9. The court recognized that jurisdiction to review arbitration awards exists when an order would be considered a final order, in that such an order would dispose of "the rights of the parties, either on the entire case or on ***some definite and separate part of the controversy***." (Emphasis added, Rule 23 Order ¶66). A clause construction award is appealable under this standard. (See *Kinkel v. Cingular Wireless, LLC*, (Ill.App. 5 Dist. 2005) 828 N.E.2d 812 at 821, 357 Ill.App.3d 556, citing to *Bess v. DirecTV, Inc.*, (Ill.App. 5 Dist. 2004) 815 N.E.2d 455, 351 Ill.App.3d 1148, footnote 1).

The Federal Arbitration Act §9 (9 USC §9) states in part: "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."

Last month in *Oxford Health Plans* the United States Supreme Court upheld an arbitrator's decision entering a "clause construction award" for class arbitration where the contract neither expressly provided for nor prohibited class arbitration. "[T]he arbitrator focused on the text of the arbitration clause" (Slip op at 2) applying principles of contract interpretation "he concluded that 'on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained.'" (Slip op at 2). The Supreme Court explained that in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662 the parties "had

entered into an unusual stipulation that they had never reached an agreement on class arbitration." (*Oxford Health Plans LLC, v. Sutter*, slip op at 6). The Court further quoting *Stolt-Nielsen* stated "("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement." (slip op at 6).

In *Oxford Health Plans* the Court concluded:

> "The contrast with this case is stark. In *Stolt-Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But §10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly."

As in *Oxford Health Plans* the arbitrator in this case in his clause construction partial award expressly found that "whether a claim can proceed in arbitration as a class action is a matter of contract interpretation and state law." He found that Arizona state law governed the interpretation of the contract, and interpreting the contract and applying Arizona concluded that Arizona law permits class arbitrations where the arbitration clause does not prohibit class actions and is drafted broadly. (R. C 350-53)

## VI. CONCLUSION.

For the reasons stated above and in the Petition for Leave to Appeal, Plaintiff respectfully requests that this Supreme Court grant leave to appeal the decision of the Appellate Court and find that jurisdiction exists to review the decision of the trial court denying the plaintiff's motion to enter a judgment confirming the American Arbitration

Association Clause Construction Award and to direct the trial court to enter a judgment confirming the award.

Respectfully Submitted :

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## OXFORD HEALTH PLANS LLC *v.* SUTTER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12–135. Argued March 25, 2013—Decided June 10, 2013

Respondent Sutter, a pediatrician, provided medical services to petitioner Oxford Health Plans' insureds under a fee-for-services contract that required binding arbitration of contractual disputes. He nonetheless filed a proposed class action in New Jersey Superior Court, alleging that Oxford failed to fully and promptly pay him and other physicians with similar Oxford contracts. On Oxford's motion, the court compelled arbitration. The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he concluded that it did. Oxford filed a motion in federal court to vacate the arbitrator's decision, claiming that he had "exceeded [his] powers" under §10(a)(4) of the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et. seq.* The District Court denied the motion, and the Third Circuit affirmed.

After this Court decided *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662—holding that an arbitrator may employ class procedures only if the parties have authorized them—the arbitrator reaffirmed his conclusion that the contract approves class arbitration. Oxford renewed its motion to vacate that decision under §10(a)(4). The District Court denied the motion, and the Third Circuit affirmed.

*Held*: The arbitrator's decision survives the limited judicial review allowed by §10(a)(4). Pp. 4–9.

(a) A party seeking relief under §10(a)(4) bears a heavy burden. "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen*, 559 U. S., at 671. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62.

Syllabus

Thus, the sole question on judicial review is whether the arbitrator interpreted the parties' contract, not whether he construed it correctly. Here, the arbitrator twice did what the parties asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that he did not exceed his powers under §10(a)(4). Pp. 4–6.

(b) *Stolt-Neilsen* does not support Oxford's contrary view. There, the parties stipulated that they had not reached an agreement on class arbitration, so the arbitrators did not construe the contract, and did not identify any agreement authorizing class proceedings. This Court thus found not that they had misinterpreted the contract but that they had abandoned their interpretive role. Here, in stark contrast, the arbitrator did construe the contract, and did find an agreement to permit class arbitration. So to overturn his decision, this Court would have to find that he misapprehended the parties' intent. But §10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. Oxford's remaining arguments go to the merits of the arbitrator's contract interpretation and are thus irrelevant under §10(a)(4). Pp. 6–9.

675 F. 3d 215, affirmed.

KAGAN, J., delivered the opinion for a unanimous Court. ALITO, J., filed a concurring opinion, in which THOMAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press

# SUPREME COURT OF THE UNITED STATES

No. 12–135

OXFORD HEALTH PLANS LLC, PETITIONER *v.* JOHN IVAN SUTTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 10, 2013]

JUSTICE KAGAN delivered the opinion of the Court.

Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. See *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 684 (2010). In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under §10(a)(4) of the Federal Arbitration Act (FAA or Act), 9 U. S. C. §1 *et seq.* We conclude that the arbitrator's decision survives the limited judicial review §10(a)(4) allows.

I

Respondent John Sutter, a pediatrician, entered into a contract with petitioner Oxford Health Plans, a health insurance company. Sutter agreed to provide medical care to members of Oxford's network, and Oxford agreed to pay for those services at prescribed rates. Several years later, Sutter filed suit against Oxford in New Jersey Superior Court on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford. The complaint alleged that Oxford had failed to make full and

prompt payment to the doctors, in violation of their agreements and various state laws.

Oxford moved to compel arbitration of Sutter's claims, relying on the following clause in their contract:

> "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator." App. 15–16.

The state court granted Oxford's motion, thus referring the suit to arbitration.

The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did. Noting that the question turned on "construction of the parties' agreement," the arbitrator focused on the text of the arbitration clause quoted above. *Id.*, at 30. He reasoned that the clause sent to arbitration "the same universal class of disputes" that it barred the parties from bringing "as civil actions" in court: The "intent of the clause" was "to vest in the arbitration process everything that is prohibited from the court process." *Id.*, at 31. And a class action, the arbitrator continued, "is plainly one of the possible forms of civil action that could be brought in a court" absent the agreement. *Ibid.* Accordingly, he concluded that "on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained." *Id.*, at 32.

Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had "exceeded [his] powers" under §10(a)(4) of the FAA. The District Court denied the motion, and the Court of Appeals for the Third Circuit affirmed. See 05–CV–2198, 2005 WL 6795061 (D NJ, Oct. 31, 2005), aff'd, 227 Fed. Appx. 135 (2007).

While the arbitration proceeded, this Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U. S., at 684. The parties in *Stolt-Nielsen* had stipulated that they had never reached an agreement on class arbitration. Relying on §10(a)(4), we vacated the arbitrators' decision approving class proceedings because, in the absence of such an agreement, the arbitrators had "simply . . . imposed [their] own view of sound policy." *Id.*, at 672.

Oxford immediately asked the arbitrator to reconsider his decision on class arbitration in light of *Stolt-Nielsen*. The arbitrator issued a new opinion holding that *Stolt-Nielsen* had no effect on the case because this agreement authorized class arbitration. Unlike in *Stolt-Nielsen*, the arbitrator explained, the parties here disputed the meaning of their contract; he had therefore been required "to construe the arbitration clause in the ordinary way to glean the parties' intent." App. 72. And in performing that task, the arbitrator continued, he had "found that the arbitration clause unambiguously evinced an intention to allow class arbitration." *Id.*, at 70. The arbitrator concluded by reconfirming his reasons for so construing the clause.

Oxford then returned to federal court, renewing its effort to vacate the arbitrator's decision under §10(a)(4). Once again, the District Court denied the motion, and the Third Circuit affirmed. The Court of Appeals first underscored the limited scope of judicial review that §10(a)(4) allows: So long as an arbitrator "makes a good faith attempt" to interpret a contract, "even serious errors of law or fact will not subject his award to vacatur." 675 F. 3d 215, 220 (2012). Oxford could not prevail under that standard, the court held, because the arbitrator had "endeavored to give effect to the parties' intent" and "articu-

late[d] a contractual basis for his decision." *Id.*, at 223–224. Oxford's objections to the ruling were "simply dressed-up arguments that the arbitrator interpreted its agreement erroneously." *Id.*, at 224.

We granted certiorari, 568 U. S. ___ (2012), to address a circuit split on whether §10(a)(4) allows a court to vacate an arbitral award in similar circumstances.[1] Holding that it does not, we affirm the Court of Appeals.

II

Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995). That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 588 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Ibid.*

Here, Oxford invokes §10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator[] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen*, 559 U. S., at 671. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000) (quoting *Steelworkers* v. *Enterprise Wheel & Car*

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[1] Compare 675 F. 3d 215 (CA3 2012) (case below) (vacatur not proper), and *Jock* v. *Sterling Jewelers Inc.*, 646 F. 3d 113 (CA2 2011) (same), with *Reed* v. *Florida Metropolitan Univ., Inc.*, 681 F. 3d 630 (CA5 2012) (vacatur proper).

*Corp.*, 363 U. S. 593, 599 (1960); *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 38 (1987); internal quotation marks omitted). Only if "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination. *Eastern Associated Coal*, 531 U. S., at 62 (quoting *Misco*, 484 U. S., at 38). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.[2]

And we have already all but answered that question just by summarizing the arbitrator's decisions, see *supra*, at 2–3; they are, through and through, interpretations of the parties' agreement. The arbitrator's first ruling recited the "question of construction" the parties had submitted to him: "whether [their] Agreement allows for class action arbitration." App. 29–30. To resolve that matter, the arbitrator focused on the arbitration clause's text, analyz-

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[2] We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions—which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"—are presumptively for courts to decide. *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion). A court may therefore review an arbitrator's determination of such a matter *de novo* absent "clear[] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986). *Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. See 559 U. S., at 680. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. See Brief for Petitioner 38, n. 9 (conceding this point). Indeed, Oxford submitted that issue to the arbitrator not once, but twice—and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability.

ing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration. The arbitrator concluded, based on that textual exegesis, that the clause "on its face . . . expresses the parties' intent that class action arbitration can be maintained." *Id.*, at 32. When Oxford requested reconsideration in light of *Stolt-Nielsen*, the arbitrator explained that his prior decision was "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." App. 69. He then ran through his textual analysis again, and reiterated his conclusion: "[T]he text of the clause itself authorizes" class arbitration. *Id.*, at 73. Twice, then, the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not "exceed[ ] [his] powers." §10(a)(4).

Oxford's contrary view relies principally on *Stolt-Nielsen*. As noted earlier, we found there that an arbitration panel exceeded its powers under §10(a)(4) when it ordered a party to submit to class arbitration. See *supra*, at 3. Oxford takes that decision to mean that "even the 'high hurdle' of Section 10(a)(4) review is overcome when an arbitrator imposes class arbitration without a sufficient contractual basis." Reply Brief 5 (quoting *Stolt-Nielsen*, 559 U. S., at 671). Under *Stolt-Nielson*, Oxford asserts, a court may thus vacate "as *ultra vires*" an arbitral decision like this one for misconstruing a contract to approve class proceedings. Reply Brief 7.

But Oxford misreads *Stolt-Nielsen*: We overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a "sufficient" one. The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. See 559 U. S., at 668–669, 673. In that circumstance, we

noted, the panel's decision was not—indeed, could not have been—"based on a determination regarding the parties' intent." *Id.*, at 673, n. 4; see *id.*, at 676 ("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement. *Id.*, at 673. Instead, "the panel simply imposed its own conception of sound policy" when it ordered class proceedings. *Id.*, at 675. But "the task of an arbitrator," we stated, "is to interpret and enforce a contract, not to make public policy." *Id.*, at 672. In "impos[ing] its own policy choice," the panel "thus exceeded its powers." *Id.*, at 677.

The contrast with this case is stark. In *Stolt-Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But §10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. *Stolt-Nielsen* and this case thus fall on opposite sides of the line that §10(a)(4) draws to delimit judicial review of arbitral decisions.

The remainder of Oxford's argument addresses merely the merits: The arbitrator, Oxford contends at length, badly misunderstood the contract's arbitration clause. See Brief for Petitioner 21–28. The key text, again, goes as follows: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court,

and all such disputes shall be submitted to final and binding arbitration." App. 15–16. The arbitrator thought that clause sent to arbitration all "civil action[s]" barred from court, and viewed class actions as falling within that category. See *supra*, at 2. But Oxford points out that the provision submits to arbitration not any "civil action[s]," but instead any "dispute arising under" the agreement. And in any event, Oxford claims, a class action is not a form of "civil action," as the arbitrator thought, but merely a procedural device that may be available in a court. At bottom, Oxford maintains, this is a garden-variety arbitration clause, lacking any of the terms or features that would indicate an agreement to use class procedures.

We reject this argument because, and only because, it is not properly addressed to a court. Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under §10(a)(4). *Eastern Associated Coal*, 531 U. S., at 62 (internal quotation marks omitted). The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel*, 363 U. S. at 599. The arbitrator's construction holds, however good, bad, or ugly.

In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The

arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under §10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 12–135

OXFORD HEALTH PLANS LLC, PETITIONER *v.* JOHN IVAN SUTTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 10, 2013]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring.

As the Court explains, "[c]lass arbitration is a matter of consent," *ante*, at 1, and petitioner consented to the arbitrator's authority by conceding that he should decide in the first instance whether the contract authorizes class arbitration. The Court accordingly refuses to set aside the arbitrator's ruling because he was "'arguably construing . . . the contract'" when he allowed respondent to proceed on a classwide basis. *Ante*, at 8 (quoting *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000)). Today's result follows directly from petitioner's concession and the narrow judicial review that federal law allows in arbitration cases. See 9 U. S. C. §10(a).

But unlike petitioner, absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't. If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred "[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 685 (2010).

With no reason to think that the absent class members

ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute. Arbitration "is a matter of consent, not coercion," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989), and the absent members of the plaintiff class have not submitted themselves to this arbitrator's authority in any way. It is true that they signed contracts with arbitration clauses materially identical to those signed by the plaintiff who brought this suit. But an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination. As the Court explains, "[a]n arbitrator may employ class procedures only if the parties have authorized them." *Ante*, at 1.

The distribution of opt-out notices does not cure this fundamental flaw in the class arbitration proceeding in this case. "[A]rbitration is simply a matter of contract between the parties," *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943 (1995), and an offeree's silence does not normally modify the terms of a contract, 1 Restatement (Second) of Contracts §69(1) (1979). Accordingly, at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.

Class arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the "benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one," *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 546–547 (1974). In the absence of concessions like Oxford's, this possibility should give courts pause before concluding

that the availability of class arbitration is a question the arbitrator should decide. But because that argument was not available to petitioner in light of its concession below, I join the opinion of the Court.

**9 U.S.C. § 10**

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

# AMERICAN ARBITRATION ASSOCIATION
# CONSUMER ARBITRATION

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|---|---|
| AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,<br>Claimant, Counter Respondent<br>vs.<br>EDDIE LOPEZ,<br>Respondent Counter Claimant. | CASE NO. 76 148 00391 08 GLO |

**STIPULATION**

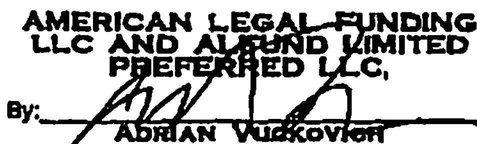
Respondent Counter Claimant **EDDIE LOPEZ** and Claimant, Counter Respondent **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC**, by their respective attorneys hereby make the following stipulations and represent that they are authorized to bind their clients to the same:

1. The parties stipulate to having this entire arbitration proceeding by a single arbitrator, including the disputed counterclaim seeking class action certification and remedies; and

2. The parties stipulate that Mr. Joel L. Chupack has advised them that although he is currently an American Arbitration Association Arbitrator he is not a member of its Class Action Arbitration Panel of Arbitrators. Having been so informed the parties stipulate to having this arbitration proceeding including the class action counter claim heard by Joel L. Chupack.

EDDIE LOPEZ

By: ______________________
MARK A. ROULEAU



AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,

By: ______________________
ADRIAN VUCKOVICH

Exhibit "F" - Motion to Confirm Clause Construction Award

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
JOEL L. CHUPACK, ARBITRATOR

| | | |
|---|---|---|
| AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED, | ) | |
| Claimants and Counter Respondents, | ) | No. 51 516 01586 08 |
| and | ) | |
| EDDIE LOPEZ, individually and as the representative of a class of similarly situated persons, | ) | |
| Respondent and Counter Claimants. | ) | |

**RULING ON ALF'S MOTION TO DISMISS OR, IN THE, ALTERNATIVE FOR A CLAUSE CONSTRUCTION AWARD**

This cause coming on to be heard on Claimants, AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED's (collectively, "ALF") motion to dismiss or, in the alternative, for a clause construction award, pursuant to Rule 3 of the Supplementary Rules for Class Arbitrations; the issues having been briefed and considered by the Arbitrator.

**With respect to the motion to dismiss, the Arbitrator finds as follows:**

1. The American Arbitration Association ("AAA") had instituted a moratorium on consumer debt collection arbitration subsequent to ALF's filing of its claim herein. In its letter dated December 23, 2009, AAA noted that because the moratorium came into effect after the filing of the claim, it will continue to administer this claim.

2. In a different arbitration action filed with AAA by ALF (the "Altman Arbitration"), the Case Manager, Julie Cappellano, issued a letter dated October 28, 2009, finding that ALF had not previously complied with AAA's policy regarding consumer claims and, therefore, AAA must "decline to administer this claim and any other claims between this business and its consumers."

3. After consultation with supervisors at AAA, this letter was explained to the Arbitrator to be prospective in nature only. At the time that the Cappellano letter was sent, ALF's claim herein was already pending, an arbitrator had been appointed and a preliminary hearing had been held. In any event, the determination in the Cappellano letter is limited to that case and did not serve to automatically terminate all pending administrations.

4. Further, after consultation with supervisors at AAA, its December 23rd letter also applied specifically to cases brought by ALF against consumers, which were initiated prior to the moratorium.

5. ALF is not prejudiced by AAA's moratorium on the administration of consumer debt collection arbitrations, in general, and on consumer debt collection arbitrations brought by ALF, in particular. AAA's moratorium will not bias the Arbitrator in this proceeding. Therefore, the motion to dismiss is denied.

**With respect to the clause construction award, the Arbitrator finds as follows:**

6. Respondent, Eddie Lopez ("Lopez"), individually, and as the representative of a class of similarly situated persons, filed a class counter-demand seeking an injunction barring enforcement and collection of funds advanced by ALF to consumers and for statutory fraud.

7. Rule 3 of the Supplementary Rules for Class Arbitrations requires that the Arbitrator make a partial clause construction determination as to whether a claim filed as a class action can proceed in arbitration.

8. That under AAA's policy on class arbitrations issued July 14, 2005, AAA will administer demands for class arbitrations if (1) the underlying agreement specifies that disputes arising out of the agreement will be resolved by arbitration and (2) the agreement is silent with

respect to class claims.

9. With respect to a partial clause construction detenuination, the Arbitrator makes the following specific findings:

a. That pursuant to the U.S. Supreme Court decision in Bazzle, the arbitrator must decide whether a claim can proceed in arbitration as a class action.

b. That Rule 3 was enacted in response to the Bazzle decision. Rule three provides that the Arbitrator as a threshold matter, in a reasoned, partial final award whether the applicable arbitration clause permits a claim can proceed as a class action.

c. That under Bazzle, whether a claim can proceed in arbitration as a class action is a matter of contract interpretation and state law.

d. That Arizona is the applicable state law in this case.

e. That the arbitration provision contained in Paragraph 17 of the Consensual Equity Lien and Security Agreement dated November 30, 2007, entered into between ALF and Lopez (the "Contract") states "that any and all disputes that may arise concerning the terms, conditions, interpretation or of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party."

f. That this provision is silent as to whether a claim brought in arbitration can proceed as a class action. This provision is also drafted very broadly.

g. That Arizona case law has found that Arizona's public policy favors

arbitrations.

h. That Arizona law permits class arbitrations where the arbitration clause does not prohibit class actions and is drafted broadly..

10. ALF took the position in state court proceedings that the claims which are the subject of the counter-demand should be arbitrated.

11. The Arbitrator rules that the arbitration clause in the Contract permits this arbitration to proceed on behalf of a class, subject to the provisions of Paragraph 12 below.

12. Pursuant to Rule 3, these proceedings shall be stayed 30 days from the date of this ruling to permit any party to either confirm or to vacate this partial award.

Dated: January 6, 2010

Entered:

*/s/ Joel L. Chupack*

Joel L. Chupack, Arbitrator

A D.H.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

| | | |
|---|---|---|
| EDDIE LOPEZ and SANDY LOPEZ, | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| v. | ) | **No. 09 CH 1008** |
| | ) | |
| AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED LLC, | ) | |
| | ) | |
| **Defendants.** | ) | |

## ORDER

Before the Court are plaintiffs' Motions (*i*) to Confirm the Arbitrator's Clause Construction Award; (*ii*) for Court To Exercise Its Gate-Keeping Function (which seeks a determination of whether the arbitration clause at issue is unconscionable if not construed to allow class arbitration); and (*iii*) to Confirm [AAA] Venue Determination.

### Background

Eddie and Sandy Lopez were plaintiffs in a personal injury lawsuit, *Lopez v. Clean Harbors Environmental Services, Inc., et al.*, in the U.S. District Court for the Northern District of Illinois (the "*Clean Harbors* suit"). In November 2007, during the course of that litigation, plaintiffs and defendant American Legal Funding LLC ("ALF") entered into a contract (the "Lien Agreement"), described by ALF as a "litigation funding agreement," whereby ALF "advanced" approximately $35,000 to plaintiffs ("to adequately pay for the necessities of life," the Agreement stated) as an "investment, and not a loan." In return, plaintiffs gave defendants an interest in and lien on the proceeds of the *Clean Harbors* suit. The interest, and the lien, ranged from $58,800, if the *Clean Harbors* suit led to a recovery and payment was made to defendants in April 2008, to $219,765 if the *Clean Harbors* suit led to a recovery and payment was made to defendants after June 2010. Had the transaction been a loan, the lowest interest rate represented by the foregoing would have been well over 100% *per annum.*

The Lien Agreement contained an arbitration clause that provides as follows:

> "17. TRANSFEROR [Lopez] agrees that any and all disputes that may arise concerning the terms, conditions, interpretation or enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party."

According to defendants, the *Clean Harbors* suit settled, but plaintiffs refused to pay ALF as required by the Lien Agreement. On December 12, 2008, ALF submitted a demand for arbitration to the American Arbitration Association ("AAA"). Subsequently, plaintiffs filed this action, asserting that the Lien Agreement is illegal, unenforceable, and contrary to public policy. Plaintiffs also filed a motion to stay the AAA arbitration proceedings pending resolution of their claim. For their part, defendants filed a motion to dismiss for lack of venue.

In August 2009, this Court denied plaintiffs' motion to stay the arbitration, transferred defendants' venue motion to the AAA for a hearing, and ordered the matter to proceed in arbitration. Plaintiffs then filed a "class action counterclaim" in the arbitration proceeding, again asserting that the Lien Agreement is illegal and unenforceable. Defendants sought dismissal of the counterclaim, or, alternatively, a "Clause Construction Award" finding that the Lien Agreement's arbitration provision does not allow class arbitration. *See* Rule 3 of the AAA's Supplementary Rules for Class Arbitrations, which provides, in pertinent part, that in such situations "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')."

In January 2010, the arbitrator, Joel L. Chupack, denied defendants' motion to dismiss and entered a Clause Construction Award determining "that the arbitration clause in the Contract permits this arbitration to proceed on behalf of a class." Arbitrator Chupack then stayed further proceedings, as directed by Rule 3 of the AAA's Supplementary Rules for Class Arbitrations: "The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award."

At that point, defendants opened yet another front, filing a Petition to Vacate Arbitration Award in the Superior Court for Maricopa County, Arizona. Plaintiffs, however, filed in this Court a Motion to Enter Judgment on Clause Construction Award in this Court. Countering defendants' Arizona *démarche* and also addressing a venue dispute within the arbitration itself (*see* page 5 *infra*), plaintiffs also filed in this Court a "Motion to Confirm American Arbitration Association Venue Determination," pointing out that the AAA had "fixed the venue for the arbitration in Chicago" and asserting that defendants had "stipulated" to that effect.[1]

That is the situation now presented, complicated (as will become clear) by intervening United States Supreme Court decisions which have drastically changed the relevant landscape.

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[1]*See Motion to Confirm American Arbitration Association Venue Determination*, Feb. 16, 2010, ¶ 8: "The defendant has stipulated to the arbitration proceeding before Joel Chupack as the sole arbitrator. Attorney Chupack's office is located in Chicago." As to this lawsuit, the Arizona Court decided to defer to this Court's proceeding.

## Discussion

Shortly after plaintiffs' Motion to Enter Judgment on Clause Construction Award was filed, the United States Supreme Court decided *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, ___ U.S. ___, 176 L.Ed.2d 605, 130 S.Ct. 1758 (2010). Dealing with an AAA class arbitration determination all but indistinguishable from Arbitrator Chupack's determination here, *Stolt-Nielsen* held that an arbitrator could not permit class arbitration where the underlying arbitration clause did not itself expressly do so.

This Court expressed the view that in light of *Stolt-Nielsen*, it did not appear that this Court could (as plaintiffs sought) confirm the arbitrator's partial clause construction award. In *Stolt-Nielsen* as here, the arbitration agreement itself was silent on the question of class arbitration. The *Stolt-Nielsen* majority held that (*i*) "a party may not be compelled under the FAA [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so," and (*ii*) "Here, where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Stolt-Nielsen, supra*, 130 S.Ct. at 1775, 1776. It should be emphasized that *Stolt-Nielsen* arrived at that conclusion even though, in that case, the parties themselves had expressly chosen to submit the class arbitration issue to the AAA.

Plaintiffs strenuously argued, however, that *Stolt-Nielsen* does not control this case. As plaintiffs see it, at the time of the arbitration agreement in this case the controlling law was not *Stolt-Nielsen*, but rather *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003), which (as plaintiffs read it) held that when an arbitration provision is silent as to class arbitration, the arbitrator – not the court – should determine whether class arbitration is permitted. It is truo that *Stolt-Nielsen* did not explicitly overrule *Bazzle*. It is also true that *Bazzle* post-dated "virtually every one of the arbitration clauses that were the subject of" *Stolt-Nielsen* (*Stolt-Nielsen, supra*, 130 S.Ct at 1768 n.4). But as *Stolt-Nielsen* observed at some length, *Bazzle* was a mere plurality decision; and given the express rationale of *Stolt-Nielsen*, summarized *supra*, the only way to apply *Bazzle* here in the manner plaintiffs wish would be to ignore *Stolt-Neilsen* outright. *Stolt-Nielsen* did not, as plaintiffs argue, create a "construct" only applicable to later cases. It expressed a binding interpretation of the Federal Arbitration Act which, like it or not, must be applied regardless of when the arbitration provision at issue was adopted.

It follows that the "silent" arbitration clause here can no more support class arbitration than could the "silent" clause in *Stolt-Nielsen*. At this point, then, a different question arises: Construed to (effectively) bar class-wide arbitration, is the arbitration clause in the Lien Agreement unconscionable? Both Arizona and Illinois have addressed unconscionability in similar contexts. *See, e.g., Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1, 28 (2006) (quoting with approval *Maxwell v. Fidelity Financial Services*, 184 Ariz. 82, 89, 907 P.2d 51 (1995)); *Cooper v. QC Financial Services, Inc.*, 503 F.Supp.2d 1266, 1290 (D. Ariz. 2006).

Again, however, the United States Supreme Court weighed in. Shortly after *Stolt-Nielsen,* and before the parties here had fully addressed the unconscionability question, the United States Supreme Court decided *Rent-A-Center West, Inc. v. Jackson,* ___ U.S. ___, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). *Rent-A-Center* held that at least under the circumstances presented in that case (in which the arbitration clause expressly gave the arbitrator "exclusive authority" to "resolve any dispute" relating to the agreement, including "any claim that all or any part of this Agreement is void or voidable"), the issue of unconscionability was for the arbitrator – not the courts – to decide.

One might conclude that *Rent-A-Center* would apply to the similarly broad language of the arbitration clause at issue in this case, meaning that Arbitrator Chupack, rather than this Court, should address any unconscionability question. But before the parties had fully addressed that issue, the United States Supreme Court rendered yet a third crucial decision. In *AT&T Mobility LLC v. Concepcion,* ___ U.S. ___, 179 L.Ed.2d 742, 131 S.Ct. 1740 (2011), the Court effectively held that the Federal Arbitration Act pre-empts, and thus renders unenforceable, *any* state-law rule which would hold barring class-wide arbitration unconscionable.

The end result is that this Court cannot, consistent with *Stolt-Nielsen, Rent-A-Center,* and *Concepcion,* (*i*) confirm or enforce the clause construction award in this case, or (*ii*) entertain an argument that the Lien Agreement arbitration provision, thus stripped of any class potential, becomes unconscionable under Illinois (or any other State) law.

Under the circumstances of this case, that is not altogether an untoward result. This case is a far cry from Ms. Kinkel's $150 quarrel with Cingular. Here, plaintiffs directly received roughly $35,000 – itself a sum larger than the *ad damnum* in a good many lawsuits – and the overall stakes under the Lien Agreement may be many times that large. It would seem that plaintiffs have an adequate incentive to pursue this dispute whether or not it is treated as a class action (in litigation or in arbitration). In normal litigation, independent claims sufficiently large to be worth pursuing as individual suits are not ordinarily fodder for class treatment. *See, e.g., Wood River Development Corp. v. Germania Federal Savings & Loan Ass'n,* 198 Ill.App.3d 445, 452 (5th Dist. 1990).[2]

Having thus determined that this Court cannot confirm the clause construction award, nor address the unconscionability issue, it remains to determine what Order the Court should enter. The Court does not consider it appropriate to reverse or set aside the

[2] Also, it is not self-evident that plaintiffs' arguments on the merits are readily amenable to class treatment. If plaintiffs' position is that *any* agreement of the same type as the Lien Agreement is illegal or voidable *as a matter of law,* then individualizing factors may not be significant – but in that event, even a non-class-based ruling of that sort may get plaintiffs the broad vindication they seek, because final arbitration awards are usually given *res judicata* and/or collateral estoppel effect. See *Czarnik v. Wendover Financial Services,* 374 Ill.App.3d 113, 117 (1st Dist. 2007). On the other hand, if plaintiffs' position is more specific to the particular circumstances of the Lien Agreement in this case, class treatment may present practical difficulties. The point here is not to suggest that Arbitrator Chupack was mistaken in his Clause Construction Award. This Court takes no position on that question. Rather, the point is simply that declining to read the Lien Agreement as authorizing class-wide arbitration is not so obviously harmful to plaintiffs' position as to lead one to suspect unconscionability.

clause construction award, no proceeding seeking that relief having been initiated. The Court must also decline to "confirm [AAA] Venue Determination," as requested by plaintiffs, because the parties' *stipulation* to proceed before Arbitrator Chupack, located in Chicago (*Motion to Enter Judgment on Clause Construction Award,* Ex. F) – a resolution of a venue dispute within the arbitration proceeding, *see Motion to Confirm [AAA] Venue Determination,* ¶¶ 8, 15-19, and Exs. A, C, D, E – mooted that question. And the Court cannot, as plaintiffs request, "exercise its gate-keeping function" regarding unconscionability, because after *Rent-A-Center* and *Concepcion* the Court simply has no such function in this case.

Since those procedural issues are foreclosed for the reasons stated, and the underlying substance of this dispute will be determined in the arbitral forum, it might seem appropriate to dismiss this action. But this Court believes that the better course is to stay this proceeding pending the outcome of the arbitration, for three reasons. First, this Court's Order of August 28, 2009 directed the parties to pursue their arbitration. This Court should be available, if need be, with regard to any further issues which require judicial intervention. Second, formally staying this proceeding, in favor of arbitration, will provide defendants with a basis for appeal pursuant to Sup. Ct. Rule 307, if they wish to do so (*see Salsitz v. Kreiss,* 198 Ill.2d 1, 11-12 (2001)), and will better focus the issues on appeal than an order simply dismissing this suit. Third, if this case is simply dismissed, defendants may attempt to resuscitate their Arizona proceeding (*see* page 2 *supra*), which under the circumstances would be both improper and counterproductive.

Accordingly, and for the reasons stated, IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Motion for Court to Exercise its Gate-Keeping Function is DENIED. 5291Y

2. Plaintiffs' Motion to Confirm American Arbitration Association Venue Determination is DENIED.

3. Plaintiffs' Motion to Enter Judgment on Clause Construction Award is DENIED. 5001

4. This case is STAYED pending completion of the parties' arbitration proceeding. The parties shall report to the Court in writing within ten days of the termination of that proceeding, by award, judgment, settlement, or otherwise. 9203

5. The Court Coordinator will notify all counsel of the entry of this Order.

DATED: February 22, 2012

ENTERED: JUDGE PETER FLYNN-1784 FEB 22 2012 DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK

Circuit Judge

115947

# In The Supreme Court Of Illinois

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| EDDIE LOPEZ and SANDY LOPEZ,<br>Plaintiffs/Appellees/Appellants Cross Appellees,<br><br>v.<br><br>AMERICAN LEGAL FUNDING, LLC and ALFUND LIMITED PREFERRED LLC<br>Defendants/Appellants/Appellees Cross Appellants. | Petition for Leave to Appeal from the Appellate Court of Illinois First Judicial District<br>**Nos: 12-0878 and 12-0763**<br>On appeal from the Circuit Court of Cook County, Illinois Chancery Division<br><br>Circuit No. 09 CH 01008<br><br>Honorable Peter Flynn |

**PETITION OF PLAINTIFF, EDDIE LOPEZ, APPELLEE, APPELLANT CROSS APPELLEE TO APPEAL**

ORAL ARGUMENT REQUESTED

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FILED
APR 29 2013
SUPREME COURT
CLERK

# IN THE SUPREME COURT OF ILLINOIS

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| EDDIE LOPEZ and SANDY LOPEZ,<br>Plaintiffs/Appellees/Appellants Cross Appellees,<br><br>v.<br><br>AMERICAN LEGAL FUNDING, LLC and ALFUND LIMITED PREFERRED LLC<br>Defendants/Appellants/Appellees Cross Appellants. | Petition for Leave to Appeal from the Appellate Court of Illinois First Judicial District<br>**Nos: 12-0878 and 12-0763**<br>On appeal from the Circuit Court of Cook County, Illinois Chancery Division<br><br>Circuit No. 09 CH 01008<br><br>Honorable Peter Flynn |

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# In The Supreme Court Of Illinois

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**PETITION FOR LEAVE TO APPEAL TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF ILLINOIS**

## I. PRAYER FOR RELIEF

Plaintiffs, Appellees, Appellants Cross Appellees, Eddie Lopez, respectfully petitions this Honorable Court for Leave to Appeal from the judgment of the Appellate Court, First Appellate District, which denied jurisdiction to consider the trial court's refusal to confirm, the arbitration award in favor of Eddie Lopez.

## II. DATE OF APPELLATE COURT JUDGMENT

The Appellate Court, without oral argument, filed its Opinion on **March 25, 2013**, denying Appellate jurisdiction to consider the order of Circuit Court of February 22, 2012, denying the plaintiff's motion to enter a judgment confirming the clause construction award.

## III. POINTS RELIED UPON FOR REVERSAL

A. In its Rule 23 Opinion, the Appellate Court held that it lacked appellate jurisdiction to review a trial court order that neither confirmed, nor vacated or modified the award as is required by the Federal Arbitration Act §9. The court recognized that jurisdiction to review arbitration awards exists when an order would be considered a final order, in that such an order would dispose of "the rights of the parties, either on the entire case or on ***some definite and separate part of the controversy***". (Emphasis added, Rule 23 Order ¶66).

The Federal Arbitration Act §9 (9 USC §9) states:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, ***and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title***. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court." (Emphasis added)

The Supreme Court of the United States recently stated that "§9 carries no hint of flexibility in unequivocally telling courts that they ***"must" confirm an arbitral award, "unless" it is vacated or modified*** "as prescribed" by §§ 10 and 11." (Emphasis added *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 8 Cal. Daily Op. Serv. 3313, 21 Fla. L. Weekly

Fed. S 121, 76 USLW 4168, 128 S.Ct. 1396, 170 L.Ed.2d 254, 552 U.S. 576, 2008 A.M.C. 1058, 2008 Daily Journal D.A.R. 3997 (2008))

The parties agreement provided that "any and all disputes that may arise concerning the terms, conditions, interpretation, or enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party." (Rule 23 Opinion ¶4). "[T]he AAA Class Rules required [the arbitrator] to render a "partial final award" on the availability of class action arbitration and those same AAA rules also allowed any party to the arbitration to seek confirmation of that award before a "court of competent jurisdiction." (Rule 23 Opinion ¶21) A clause construction award disposes of a "definite and separate part of the controversy" expressly the availability of class action relief. (See *Kinkel v. Cingular Wireless, LLC*, (Ill.App. 5 Dist. 2005) 828 N.E.2d 812 at 821, 357 Ill.App.3d 556, citing to *Bess v. DirecTV, Inc.*, (Ill.App. 5 Dist. 2004) 815 N.E.2d 455, 351 Ill.App.3d 1148, footnote 1). "[T]he adoption of rules and procedures for class arbitration by the AAA indicates that class arbitration is entirely feasible." *Kinkel v. Cingular Wireless LLC*, (Ill. 2006) 857 N.E.2d 250 at 277, 223 Ill.2d 1.

Allowing a Circuit Court to ignore the mandate of the Federal Arbitration Act §9 (see also the Uniform Arbitration Act 710 ILCS 5/11) that "*the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the Federal Arbitration Act]"* will evicerate both the function and purpose of arbitration, the Federal Arbitration Act and the parties power to adopt the rules of the American Arbitration Association respecting class arbitration.

## IV. STATEMENT OF FACTS

The plaintiff's have been and still are residents of the State of Illinois and they signed the contract forming this action in Illinois. (R. C3 ¶1) The defendants, **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC**, acquired a contingent interest in the plaintiff's personal injury lawsuit that was pending in the Federal Court for the Northern District of Illinois Eastern Division located in the City of Chicago and State of Illinois Lopez v. Clean Harbors and had been removed by the defendant Clean Harbors from the Circuit Court of Cook County. (R. C3 ¶3). After the suit concluded the plaintiff's offered to do equity and to repay the sums advanced with a reasonable return. (R. C7 ¶21, C345) The defendant opted for filing an action in that American Arbitration Association. (R. C22-28). The plaintiff's filed the action in the Cook County Circuit Court chancery division seeking to stay the arbitration proceeding. (R. C3-11).

In June 2009, the plaintiff in this case, Mr. Lopez, filed a class action counterclaim in the American Arbitration Association case. (R. C1388). This was before the trial court referred the case to the American Arbitration Association for arbitration. On August 28, 2009 the trial court entered an order (R. C296) referring the case to arbitration with the American Arbitration Association. No appeal was taken from that order and the parties proceeded to arbitration. The arbitration clause requires the case to be arbitrated under the rules of the American Arbitration Association. (R. C00048 ¶17) The defendants stipulated to complying with the American Arbitration Association locale protocol for consumer arbitrations requiring the arbitration to proceed in Chicago. (R. C01155 Order of June 7, 2010 and C01237-8 Order of July 13, 2010) Both parties

stipulated to having the entire arbitration proceeding heard by a single arbitrator, including the disputed counterclaim seeking class action certification and remedies; (R. C366) Once in the American Arbitration Association the defendants sought to dismiss that action including the plaintiff's class action counterclaim. (R. C 456) While that motion was fully briefed and pending before the Arbitrator the defendants sought to circumvent the Arbitrator, the plaintiff and his attorneys**,** circuitously seeking a dismissal of the arbitration proceeding by corresponding with Ms, Geneva O'Day of the American Arbitration Association. (R. C372-73)

On January 6, 2010 the arbitrator entered an order denying the defendant's motion to dismiss and "Clause Construction Award" in favor of **EDDIE LOPEZ** and against **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC** finding that the contract requiring arbitration in the American Arbitration Association allowed for the arbitration of **EDDIE LOPEZ** counterclaim on a class action basis. (R. C 350-53) The Class Action Arbitration Rules of the American Arbitration Association provide for confirmation of a "Clause Construction Award." (R. C354-55, Rule 3, Supplementary Rules for Class ARBITRATIONS Effective October 8, 2003). The plaintiff filed a motion with the trial court to confirm the clause construction award. (R. C299-379). Although the arbitration was ordered to proceed in Illinois under the rules of the American Arbitration Association the defendant filed an action in the Arizona courts seeking to vacate the arbitrator's clause construction award. (R. C486) That proceeding was stayed and has subsequently been dismissed by the Arizona court. The defendant concurrent with these actions filed an action against plaintiff's attorneys in the Arizona courts, which was dismissed on the motion of ALF, and the District Court

entered an award for attorney fees to Lopez's attorneys Rouleau and Morton in that action. In that associated action against Rouleau and Morton ALF in its "Memorandum In Opposition To Motion For Attorneys Fees" stated: [a]n arbitrator issued a "clause construction award" on January 6,2010, finding that . . . Arizona law would permit a class action in arbitration." (R. C2579 ¶9).

The trial court in this case entered an order denying plaintiff's motion to confirm the "Clause Construction Award" from which the plaintiffs appeal.

The Appellate Court entered a Rule 23 Order finding that it lacked appellate jurisdiction upon the plaintiff's appeal to review the trial court's order of February 22, 2012 denying the plaintiff's motion for a judgment confirming the clause construction award. (Rule 23 Order ¶67 & 68).

## V. REVIEW IS WARRANTED AND THE DECSION OF THE APPELLATE COURT SHOULD BE REVERSED

### A. THE APPELLATE COURT STRIPPED THE FEDERAL ARBITRATION ACT, THE UNIFORM ARBITRATION ACT AND RULES OF THE AMERICAN ARBITRATION ASSOCIATION OF ANY MEANING BY REFUSING TO EXERCISE JURISDICTION TO REVIEW THE CIRCUIT COURT ORDER DENYING THE PLAINTIFF'S MOTION TO ENTER A JUDGMENT ON A CLAUSE CONSTRUCTION AWARD

Both the Federal Arbitration Act and the Uniform Arbitration Act require a court to enter a judgment upon an arbitration award unless there are grounds to vacate, modify or correct the award. (9 USC §9) The FAA states that the court "***must***" grant such an order and the Uniform Arbitration Act (710 ILCS 5/11) states ***"shall"*** confirm an award. The Supreme court has clearly stated that the FAA requires the court to confirm the award unless it vacates, modifies or corrects the award, in accord with §§ 10 and 11."

(Emphasis added *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 8 Cal. Daily Op. Serv. 3313, 21 Fla. L. Weekly Fed. S 121, 76 USLW 4168, 128 S.Ct. 1396, 170 L.Ed.2d 254, 552 U.S. 576, 2008 A.M.C. 1058, 2008 Daily Journal D.A.R. 3997 (2008)). The American Arbitration Association Rules for Class Arbitration, which were incorporated in the parties' agreement, requires that the arbitration be stayed while parties seek judicial review of the clause construction award. (Rule 23 Order ¶95).

Supplementary Rule 3, in part, provides:

> "Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court." (http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004129&_afrLoop=212518555633615&_afrWindowMode=0&_afrWindowId=9e6dzpuet_1#%40%3F_afrWindowId%3D9e6dzpuet_1%26_afrLoop%3D212518555633615%26doc%3DADRSTG_004129%26_afrWindowMode%3D0%26_adf.ctrl-state%3D9e6dzpuet_53)

**B. FAILURE TO FOLLOW THE AMERICAN ARBITRATION ASSOCIATION'S RULES ALLOWING FOR COURT REVIEW OF CLAUSE CONSTRUCTION AWARDS COULD NEEDLESSLY INCREASE THE EXPENSE OF ARBITRATION**

The purpose of the American Arbitration Association rule allowing for judicial review of "clause construction awards" is to prevent the parties from engaging in needless expense of litigating an action as a class action only to have a court later hold

that the contract between the parties did not allow for the arbitration forum to proceed on a class-wide basis.

**C. WHETHER THERE IS EXPANDED JUDICIAL REVIEW ALLOWING FOR INTERLOCUUTORY REVIEW OF ARBITRAL DECISIONS UNDER THE FEDERAL ARBITRATION ACT WHERE THE PARTIES CONTRACT ADOPTS ARBITRATION FORUM RULES ALLOWING FOR REVIEW OF CLAUSE CONSTRUCTION AWARDS IS AN ISSUE OF FIRST IMPRESSION IN ILLINOIS**

Illinois has found expanded de novo review of the arbitrability of claims under the Federal Arbitration Act to determine whether the parties agreement precluded the arbitration panel from awarding punitive damages, upholding the Appellate Court's decision vacating the arbitrators' award that the claimant's punitive damages claims were not arbitrable. *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, (Ill. 1998) 692 N.E.2d 1167, 181 Ill.2d 373. This court has not addressed the issue of the whether the parties by their agreement adopting the American Arbitration Association rules can agree to an interlocutory review of a Clause Construction Award.

In *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989), 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 the court held that "the `primary purpose' of the FAA is to `ensur[e] that private agreements to arbitrate are enforced according to their terms' in order to `give effect to the contractual rights and expectations of the parties.'" Numerous federal circuit courts have considered the precise issue whether private parties may contract for an expanded standard of judicial review of arbitral decisions under the FAA.

There exists a split among the federal courts whether they hear an interlocutory appeal from an arbitral tribunal. *Compare Dealer Computer Servs., Inc. v. Dub Herring Ford,* 547 F.3d 558 (6th Cir. 2008) (holding that an arbitration panel's partial ruling that

the contract did not bar class proceedings was not ripe for review because the arbitrators had not yet determined that class arbitration should proceed), and *Dealer Computer Servs. Inc. v. Ford*, 623 F.3d 348 (6th Cir., 2010) (holding that an arbitration panel's clause construction award denying class proceedings was not ripe for review), *with Hart Surgical, Inc. v. Ultracision, Inc.,* 244 F.3d 231, 234 (1st Cir. 2001) (holding that the Federal Arbitration Act permits a district court to confirm or vacate an arbitration panel's "partial award"). The Supreme Court has allowed such an appeal in certain limited circumstances. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758, 1767 n.2 (2010).

State Supreme Courts are split *Parham v. American Bankers Ins. Co.*, 24 So.3d 1102 (Ala., 2009) (the Alabama Supreme Court decided upon state law that the trial court lacked jurisdiction to enter an order purporting to grant a motion to vacate a Clause Construction Award and "direct[ing] the Arbitrator to enter a new Clause Construction Award consistent with Alabama substantive law"). In *Cable Connection, Inc. v. Directv, Inc.*, 44 Cal.4th 1334, 190 P.3d 586, 82 Cal.Rptr.3d 229 (Cal., 2008) the California Supreme Court reversed its Appellate Court which had held that the trial court exceeded its jurisdiction by reviewing the merits of an American Arbitration Association “clause construction award” entered in an arbitration proceeding under the Federal Arbitration Act. The Supreme Court of California held that contractual provisions may alter the usual scope of review of arbitration awards allowing for review of “clause construction awards.”

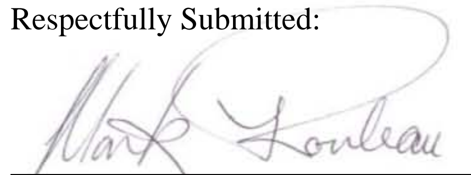
Other Courts have considered jurisdiction to hear a timely motion to vacate or confirm a clause construction award. *Underwood v. Palms Place, LLC* (D. Nev., 2011)

(clause construction award reviewable after class certification) *Cypress Communications, Inc. v. Zacharias*, 662 S.E.2d 857, 291 Ga. App. 790 (Ga. App., 2008) (order dismissing an untimely petition to vacate a clause construction award reviewable). *Cole v. Long John Silver's Restaurants, Inc.*, 388 F.Supp.2d 644 (D.S.C., 2005) and *Qwest Dex, Inc. v. Hearthside Restaurant, Inc.*, 376 F.Supp.2d 931 (D. Minn., 2005) both found a lack of federal subject matter jurisdiction to review clause construction awards.

## VI. CONCLUSION.

For the reasons stated above, Plaintiff respectfully requests that this Supreme Court grant leave to appeal the decision of the Appellate Court and find that jurisdiction exists to review the decision of the trial court denying the plaintiff's motion to enter a judgment confirming the American Arbitration Association Clause Construction Award.

Respectfully Submitted:

By: 

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**APPENDIX TO PETITION FOR LEAVE TO APPEAL**

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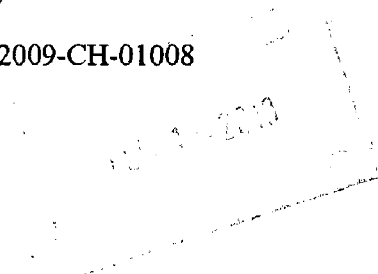
# STATE OF ILLINOIS
# IN THE CIRCUIT COURT OF COOK COUNTY

| | |
|---|---|
| **EDDIE LOPEZ & SANDY LOPEZ,**<br>Plaintiff,<br>vs.<br>**AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,**<br>Defendant. | *In Chancery*<br>CASE NO. 2009-CH-01008 |



**MOTION TO ENTER JUDGMENT ON CLAUSE CONSTRUCTION AWARD**

**NOW COMES** the Plaintiffs, **EDDIE LOPEZ** and **SANDY LOPEZ**, by and through the Law Offices of Mark Rouleau and the Law Offices of Steven J. Morton and Associates, Ltd., and complaining of the and alleges and states as follows:

1. On August 28, 2009 this court entered an order (attached hereto and marked as Exhibit "A") referring the case to arbitration with the American Arbitration Association.
2. The plaintiff in this case filed a class action counterclaim in the American Arbitration Association case. (Attached hereto and marked as Exhibit "B")
3. On January 6, 2010 the arbitrator entered a "Clause Construction Award" in favor of **EDDIE LOPEZ** and against **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC** finding that the contract requiring American Arbitration Association arbitration allowed for arbitration of **EDDIE LOPEZ** on a class action basis. (Attached hereto and marked as Exhibit "C")
4. The Class Action Arbitration Rules of the American Arbitration Association provide for confirmation of a "Clause Construction Award." (Attached hereto and marked as Exhibit "D" is a copy of the American Arbitration Association rules pertaining to Class Action Arbitrations.)
5. The applicable provision of the American Arbitration Association Supplementary Rules for Class Arbitrations states:

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

6. That at all times material hereto; the plaintiff's were residents of the State of Illinois.

7. That at all times material hereto; the plaintiff's had a case pending in the Federal Court for the Northern District of Illinois Eastern Division located in the City of Chicago and State of Illinois.

8. Said case was entitled Lopez v. Clean Harbors and had been removed by the defendant Clean Harbors from the Circuit Court of Cook County.

9. The defendants, **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,** filed a complaint with the American Arbitration Association against the plaintiff. They sought and received an order from this court requiring the parties to proceed within arbitration before the American Arbitration Association. (August 28, 2009 order Exhibit "A"). While in the American Arbitration Association the defendants, **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,** stipulated to proceeding before Joel Chupack as the sole arbitrator in this case. (Exhibit "F" & "G")

10. Once in the American Arbitration Association the defendants sought to dismiss that action including the plaintiff's class action counterclaim. (Exhibit "E" attached hereto). While the motion was fully briefed and pending before the Arbitrator in this case the defendants by and through their attorney Adrian Vuckovich sought to circumvent the Arbitrator, the plaintiff and his attorneys and in complete and utter disregard for the Arbitrator and in derogation of

the rights of Mr. **EDDIE LOPEZ**, the defendant **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC**, circuitously sought a dismissal of the arbitration proceeding by corresponding with Ms, Geneva O'Day of the American Arbitration Association (see attached Exhibit "H"). Neither Mr. LOPEZ nor his attorneys would have ever known of this ex parte attempt to obtain a dismissal of the arbitration action if the American Arbitration Association case manager had not forwarded the materials to Mr. Lopez's attorneys on December 9, 2009 (See Exhibit "J" email from Mari Corbett). Ms. O'Day forwarded the matter to the arbitrator for decision.

11. The American Arbitration Association Arbitrator in the order dated January 6, 2010 (Exhibit "C") denied, **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,** motion to dismiss.

12. A court may vacate an arbitration award only if (1) "procured by corruption, fraud, or undue means;" (2) "evident partiality" is present in one or more of the arbitrators; (3) "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or (4) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[1] Correspondingly, an arbitration award may be modified only (1) where there is an "evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award"; (2) "[w]here the arbitrators have awarded upon a matter not submitted to them"; or (3) "the award is imperfect in [a] . . . form not affecting the merits,"[2] and then, the court may only modify or correct the award "so as to effect the intent thereof and promote justice between the parties."[3] The FAA limits the scope of judicial review to those specific categories of extreme arbitral conduct and does not "authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error."[4]

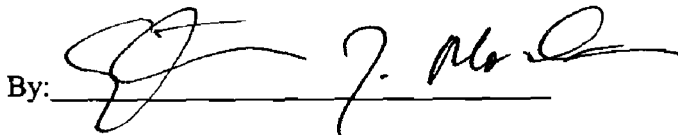
[1] 9 U.S.C. § 10.
[2] *Id.* § 11.
[3] *Id.* § 11.
[4] *L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, at 1403–04 (2008).

13. Although prevailing wisdom since *Wilko v. Swan*, 346 U.S. 427 (1953), had been that federal courts are empowered under the Federal Arbitration Act to vacate awards issued in "manifest disregard" of the law, the Supreme Court found that view erroneous in *Hall Street Assocs. LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008). *Hall Street* holds that the FAA "confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11," *id.* at 1408, and "manifest disregard" nowhere appears in those sections.

14. Thus unless the defendants can demonstrate that the "Clause Construction Award" was the result of "corruption, fraud, or undue means," "evident partiality;" or that "the arbitrator was guilty of misconduct [or] . . . other misbehavior" prejudicing the defendants; or that the arbitrator exceeded his power, the clause construction award must be confirmed by judgment of this court and the case should be referred back to the American Arbitration Association for further proceedings consistent with this ruling.

**WHEREFORE**, the plaintiffs pray that this court enter a judgment confirming the "Clause Construction Award" and referring this matter back to the American Arbitration Association for further proceedings consistent with this ruling.

**EDDIE LOPEZ & SANDY LOPEZ**

By: 

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Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Lopez

v.

American Legal Funding, LLC and Alliance Limited Preferred LLC

No. 09 CH 01008

**ORDER**

This cause coming to be heard for hearing on Defendants' motion to dismiss for lack of venue and Plaintiffs' motion to stay AAA Arbitration proceedings, counsel for the parties appearing, the court having considered the motions and briefs of the parties and having heard argument of counsel. It is hereby ordered that:

1) The motion to stay AAA arbitration proceedings is denied. The entire matter ~~may~~ shall proceed ~~to~~ at arbitration, including all claims in the complaint.
2) The motion to dismiss for lack of venue ~~[illegible]~~ is transferred to AAA for hearing. If AAA will not hear the motion, the court will hear the motion.
3) The parties shall advise the court of any resolution of AAA proceedings within 10 days of resolution.

Atty. No.: 91018

Name: Adrian Vuckovich

Atty. for: Def

Address: 1 N LaSalle #300

City/State/Zip: Chicago Il 60602

Telephone: 312 372 7813

ENTERED:

Dated: ENTERED JUDGE PETER FLYNN-1784 AUG 28 2009 DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK

Judge ______ Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

# AMERICAN ARBITRATION ASSOCIATION
# CONSUMER ARBITRATION

| | |
|---|---|
| **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,**<br>Claimant, Counter Respondent<br>vs.<br>**EDDIE LOPEZ,**<br>Respondent Counter Claimant. | CASE NO. 76 148 00391 08 GLO |

**COUNTER CLAIM**
**CLASS ACTION COMPLAINT**

Respondent Counter Claimant ("Plaintiff"), individually and as the representative of a class of similarly-situated persons, brings this action against **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED** LLC, and alleges the following upon information and belief, except for the allegations pertaining to Plaintiff or her attorneys, which are based upon personal knowledge:

**INTRODUCTION**

1. Counterclaimant EDDIE LOPEZ and a nationwide class of persons:

(1) Who had or has a pending personal injury or wrongful death claim or lawsuit; and either

(a) Resided in the States of Illinois or Arizona, or

(b) Who had a contract with ALF that contained a clause or language requiring the contract to be construed and interpreted in accordance with the laws of Arizona or Illinois;

(b) Who had claims or lawsuits venued in either the State of Illinois or Arizona; and

(2) Who, while said claim or lawsuit was pending, received funds from ALF under terms wherein ALF advanced funds to said person(s) as an investment in certain future proceeds which might arise from settlement, judgment or other conclusion resulting from the personal injury claim or lawsuit, where said

investment was contingent on the successful outcome of the personal injury claim or lawsuit.

Said class of persons is hereinafter referred to as "personal injury plaintiffs" or "class members."

2. That at all times material hereto, the class representative, EDDIE LOPEZ was a resident of the State of Illinois.

3. That at all times material hereto; the class representative had a case pending in the Federal Court for the Northern District of Illinois Eastern Division located in the City of Chicago and State of Illinois.

4. Said case was entitled Lopez v. Clean Harbors and had been removed by the defendant Clean Harbors from the Circuit Court of Cook County.

5. On or about the month of November 2007 the counter respondents **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC**, (hereinafter "ALF"), with intent to obtain an economic benefit, by and through their agents, employees and assigns, were in contact with the class representative EDDIE LOPEZ regarding providing him funds in exchange for the ALF obtaining a contingent interest in the aforesaid litigation.

6. Prior to the aforesaid contact with the Counter Claimant and Class Representative EDDIE LOPEZ the defendants, ALF, did not have any prior dealings with the Counter Claimant and Class Representative nor did they know the Counter Claimant and Class Representative.

7. Upon information and belief ALF made similar contacts with the other members of the class stated above.

8. Upon information and belief ALF is routinely in the business of providing money to persons, including, but not limited to Eddie Lopez, in the State of Illinois who have pending personal injury lawsuits or claims in the State of Illinois (hereinafter referred to as "personal injury plaintiffs").

9. Upon information and belief the aforesaid "personal injury plaintiffs" are not related to ALF or previously known to ALF.

10. Upon information and belief ALF advances said money to the aforesaid "personal injury plaintiffs", including but not limited to EDDIE LOPEZ, in exchange for interests in the pending lawsuits or claims repayment of which is contingent on the outcome of the aforesaid pending lawsuit or claim.

11. Upon information and belief at the time that said funds are advanced and prior thereto, ALF, has no lawful interest in the pending personal injury lawsuits or claims of the aforesaid "personal injury plaintiffs", but ALF, nevertheless sought to obtain a contingent interest in said litigation or claims.

12. The funds advanced by ALF, were made by ALF out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

13. Upon information and belief Jeff Huff is the presiding Member of ALF.

14. The ALF claims to be "leading provider of pre-settlement funding for Personal Injury, Medical Malpractice and Wrongful death cases."

15. On or about November 29 2007 the ALF by and through Jeff Huff sent the document attached hereto and marked as Exhibit "A" (Entitled "Schedule "A" – Funding Approval for Eddie Lopez).

16. Exhibit "A" on its face offers to advance $35,000 to the class representative EDDIE LOPEZ and to pay a referral fee (finders fee) to Bridgeview Legal Funding Inc. The exhibit states in part:

> "We have approved an advance for you of $35,000.00 plus a $1,750 fee that will be paid to Bridgeview Legal Funding Inc. who referred the case to our firm. The total advance offer is $36,750.00 with the following fee structure*: Additional advances may be available in the future subject to review of updated Information from your attorney.
>
> **$58,800.00** if full payment is made no later than April 04, 2008
> **$76,440.00** if full payment is made after April 04, 2008 but no later than August 04, 2008
> **$94,080.00** if full payment is made after August 04, 2008 but no later than December 04, 2008

**$122,745.00** if full payment is made after December 04, 2008 but no later than June 04, 2009
**$153,615.00** if full payment is made after June 04, 2009 but no later than December 04, 2009
**$186,690.00** if full payment is made after December 04, 2009 but no later than June 04, 2010
**$219,765.00** if full payment 15 made after June 04, 2010

*(includes principal of $36,750.00) . . ."

17. Exhibit "A" was signed by EDDIE LOPEZ in Illinois.

18. Attached hereto and marked as Exhibit "B" is a true and accurate copy of a document entitled "CONSENSUAL EQUITY LIEN AND SECURITY AGREEMENT" by which the defendants assert a claim in or interest in EDDIE LOPEZ's cause of action against Clean Harbors and in the proceeds of that cause of action.

19. Exhibit "B" was signed by EDDIE LOPEZ while in Illinois as is evidenced by the notary jurat on said document.

20. That said document was faxed to counter-claimant's counsel Mark Rouleau on December 4, 2008 and up to that time and date the defendant had never signed the agreement.

21. In said agreement ALF is referred to as "TRANSFEREE" and Eddie Lopez as "TRANSFEROR." That among other things Exhibit "B" states

> "Whereas, in order to afford TRANSFEROR sufficient funds to adequately ***pay for the necessities of life*** during pendency of the Proceedings and/or necessary legal and medical costs attendant to the Proceedings, TRANSFEREE has agreed to make an advancement of funds to TRANSFEROR and to a LIEN on certain future proceeds which may arise from settlement, judgment or other conclusion resulting from the Proceedings. * * *" (Emphasis added.)

> "TRANSFEROR understands the above-mentioned advance of funds by the TRANSFEREE to be ***an investment***, and not a loan. TRANSFEREE acknowledges it is making an INVESTMENT in certain future proceeds which may arise from settlement, judgment or other conclusion resulting from the Proceedings and as such, the TRANSFEREE understand that if there if no payment or recovery of Proceeds, by the TRANSFEROR of the proceedings against the Defendant or others arising out of this or related to this Proceedings, TRANSFEROR will owe the TRANSFEREE no money. * * *" (Emphasis added.)

Said document further states:

> "TRANSFEROR agrees NOT to accept a Structured Settlement as satisfaction to said Proceedings, unless Proceeds, as defined in this agreement are equal to or greater than, including the amount owed to the TRANSFEREE, and the TRANSFEREE is paid all monies from the initial disbursement by the Defendant or the Defendant's Insurance provider named herein. In addition, if TRANSFEROR is involved in a bankruptcy proceeding prior to the payoff of all funds owned and due to TRANSFEREE to satisfy this Lien and Security Agreement the TRANSFEROR agrees to notify the bankruptcy court that the -TRANSFEREE is owed a portion of any recovery from

said Proceedings according to this agreement and all attachments. The TRANSFEREE has made an ***investment*** and not a loan, and the TRANSFEROR'S obligation will not be discharged or reduced as a result of the bankruptcy proceeding." * * * (Emphasis added.)

"TRANSFEROR acknowledges that they were ***contacted by TRANSFEREE***, or by its affiliate on or about 10/05/2007 and that TRANSFEREE advised TRANSFEROR to take no fewer than (10) DAYS to consider the terms contained in this agreement before signing it." * * * (Emphasis added.)

22. Said contract (Exhibit "B" page 2 of 3 ¶16) states in part: "[Personal injury plaintiff] has been Informed and agrees that the [ALF] Is an Arizona limited liability company engaged In the business of making investments in certain future proceed which may arise from settlement, judgment or other conclusion resulting from the proceedings [personal injury claim or lawsuit]. Both Parties agree that this Agreement shall be construed and interpreted in accordance with the laws of Arizona . . . "

23. Said contract (Exhibit "B" page 3 of 3 ¶17) states in part: "[personal injury plaintiff] agrees that any and all disputes that may arise concerning the terms, conditions, Interpretation or enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association In Arizona at the election or either party. . . . The prevailing party in the dispute shall be entitled to recover all attorney fees, filling fees and costs associated with the efforts to collect."

24. The agreement between the parties is an illegal and unenforceable contract. It is well established that a cause of action for personal injuries is not assignable (*North Chicago Street R.R. Co. v. Ackley* (1897), 171 Ill. 100, 105, 49 N.E. 222, 225; *Town & Country Bank of Springfield v. Country Mutual Insurance Co.* (1984), 121 Ill.App.3d 216, 218, 76 Ill.Dec. 724, 725, 459 N.E.2d 639, 640); and the reasons usually given for the rule are that: "(1) [a] litigious person could harass and annoy others if allowed to purchase claims for pain and suffering and pursue the claims in court as assignees; and (2) all assignments are void unless the assignor has either actually or potentially the thing which he attempts to assign." *720 *Town & Country Bank,* 121 Ill.App.3d at 218, 76 Ill.Dec. at 725, 459 N.E.2d at 640, citing *Ackley,* 171 Ill. at 111, 49 N.E. at 226. In Illinois the laws against champerty, maintenance and barratry are aimed at the prevention of multitudinous and useless lawsuits and at the

prevention of speculation in lawsuits. *Berlin v. Nathan*, 64 Ill. App. 3d 940, 956 (1st Dist. 1978), *Milk Dealers Bottle Exchange v. Schaffer*, 224 Ill. App. 411 (1st Dist. 1992). An agreement to share any insurance benefits relating to motorist's death violated rule against assignment of personal injury claims and was thus unenforceable. Lingel v Olbin, 198 Ariz. 249, 8 P.3d 1163, 329 Ariz. Adv. Rep. 23. Telephone Consumer Protection Act "TCPA" violations are invasion of privacy torts which cannot be assigned. Martinez v. Green, 131 P.3d 492 (Ariz. App., 2006); A personal injury claim cannot be assigned before judgment. *Harleysville Mut. Ins. Co. v. Lea,* 2 Ariz. App. 538, 540, 410 P.2d 495 at 497, 498 (1966)).

25. One cannot rely on foreign law to enforce a contract that is illegal in the forum, and Illinois has the stronger interest in the outcome of the controversy. See Maher & Associates, Inc. v. Quality Cabinets, 267 Ill.App.3d 69, 203 Ill.Dec. 850, 640 N.E.2d 1000 (1994).

26. Attached hereto and marked as Exhibit "C" is a true and accurate copy of all of the documents faxed to EDDIE LOPEZ's attorney Mark Rouleau, by ALF, on or about December 4, 2008.

27. Attached hereto and marked as Exhibit "D" is a true and accurate copy of a letter from attorney Mark Rouleau, on behalf of EDDIE LOPEZ, to ALF seeking to do equity by offering to repay the amount provided by ALF with a reasonable rate of return.

28. Attached hereto and marked as Exhibit "E" is a true and accurate copy of a letter from ALF written in response to Exhibit "D."

29. ALF claim to have created a proprietary interest in the aforesaid litigation. Such agreements harm the administration of justice and society at large.

30. Agreements to advance funds for living expenses during the pendency of lawsuits are contrary to the public policy of the State of Illinois and the State of Arizona.

31. Agreements by strangers to obtain or procure an interest in personal injury actions of individuals are contrary to the public policy of the State of Illinois and the State of Arizona.

32. Agreements to advance funds for living expenses during the pendency of lawsuits are illegal and or unenforceable as being contrary to the public policy of the State of Illinois and the State of Arizona.

33. Agreements by strangers to obtain or procure an interest in personal injury actions of individuals are illegal and or unenforceable as contrary to the public policy of the State of Illinois and the State of Arizona.

34. The agreement of ALF with "personal injury plaintiffs" states in part "TRANSFEROR understands that he will not receive any proceeds from any source until TRANSFEREE is paid in full" thereby potentially restricting "personal injury plaintiffs" settlement of their claims suits and causes of action.

35. Upon information and belief ALF has previously filed demands for arbitration against consumers who had materially similar transactions.

36. Upon information and belief ALF has previously threatened litigation or arbitration against consumers who had materially similar transactions.

37. Upon information and belief ALF by and through its agents and/or employees knew or reasonably should have known that all materially similar transactions to the one (1) stated herein are illegal and contrary to the law of the State of Illinois and the State of Arizona.

**CLASS ALLEGATIONS**

38. Pursuant to 735 ILCS 5/2-801, Counter-claimant brings this action on behalf of the following nationwide class of persons (the "Class"):

All persons:

(1) Who had pending personal injury claims or lawsuits; and either

(c) Resided in the States of Illinois or Arizona, or

(d) Who had a contract with ALF that contained a clause or language requiring the contract to be construed and interpreted in accordance with the laws of Arizona or Illinois;

(b) Who had claims or lawsuits venued in either the State of Illinois or Arizona; and

(2) Who, while said claim or lawsuit was pending, received funds from ALF under terms wherein ALF advanced funds to said person(s) as an investment in certain future proceeds which might arise from settlement, judgment or other conclusion resulting from the personal injury claim or lawsuit, where said investment was contingent on the successful outcome of the personal injury claim or lawsuit.

39. A class action is proper in that:

A. On information and belief, the Class consists of hundreds of persons residing throughout the nation, thus, is so numerous that joinder of all members is impracticable;

B. There are questions of fact or law common to the Class predominating over questions affecting only individual Class members, including whether AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC funding contracts were a violation of the public policy of Illinois or Arizona and therefore unenforceable;

C. Whether AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC is liable for statutory and common law fraud for its misrepresentations as to the enforceability and legality of the aforesaid contracts, and whether Counter-claimant and the other members of the Class were damaged;

D. Counter-claimant will fairly and adequately protect the interests of the Class. He does not have any interests adverse to the Class. He has retained counsel to represent him in this action; and

E. A class action is an appropriate method for the fair and efficient resolution of this controversy.

**COUNT I – INJUNCTION BARRING ENFORCEMENT AND COLLECTION OF FUNDS ADVANCED AS AN INVESTMENT IN PERSONAL INJURY CLAIMS OR LITIGATION**

40. Counter-claimant repeats and re-alleges the preceding paragraphs as if alleged herein.

41. Counter-claimant and the other Class members entered into the Agreements with AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED LLC wherein ALF created or attempted to create a contingent investment in said personal injury litigation or claim, in favor of ALF and contingent on the outcome of personal injury litigation.

42. The aforesaid contracts are illegal and unenforceable.

**WHEREFORE**, the counter-claimant prays that this tribunal enter an order:

A. Barring the respondent ALF from Collecting on or enforcing any said agreements
B. Requiring ALF to notify all persons with whom it still has or claims to have contingent interests in their personal injury claims or litigation of this order and proceeding;
C. Requiring ALF to notify all persons with whom it still has or claims to have contingent interests in their personal injury claims that said interest is unenforceable and illegal;
D. Barring the respondent ALF from entering into any contingent interests or "investments" in personal injury claims or litigation in the States of Illinois and Arizona;
E. Ordering the release to the any "personal injury plaintiffs" class members, of any funds held in escrow subject to a lien claimed by ALF its agents successors or assigns;
F. Entering an award for court costs and attorney fees; and,
G. Any other remedies as this tribunal may deem just and fair.

## COUNT II-STATUTORY FRAUD

43. Counter-claimant repeats and re-alleges the preceding paragraphs as if alleged herein.

44. Counter-claimant brings Count II on behalf of the Class of "personal injury plaintiffs" pursuant to the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 50511 et seq., and the substantially similar consumer protection statutes of the other States where ALF entered into such transactions.[1]

45. ALF regularly and systematically enters into agreements wherein they advance funds to "personal injury plaintiffs" in return for a contingent interest in their claims or lawsuits.

46. ALF regularly and systematically informs "personal injury plaintiffs" who enter into such agreements that they are legal and enforceable.

47. ALF knows that said contracts are illegal as contrary to the public of the States of Illinois and Arizona.

48. ALF misrepresented to Counter-claimant and the other "personal injury plaintiffs" Class members that they owed the funds which were a return on ALF's contingent

[1]The claims of Illinois citizens (such as plaintiff) are brought under the Illinois Consumer Fraud Act. The claims of non-Illinois citizens are brought under the consumer protection statute(s) of their respective states. *See* Ala. Code §8-19-1 *et seq.* (Alabama); Alaska Stat. §45.50.471 *et seq.* (Alaska); Ariz. Rev. Stat. Ann. §44-1521 *et seq,* (Arizona); Ark. Code Ann. §4-88-101 *et seq.* (Arkansas); Cal. Bus. & Prof. Code §17200 *et seq.,* and Cal. Bus. & Prof. Code §17500 *et seq.* (California); Colo. Rev. Stat. §6-1-105 *et seq.* (Colorado); Conn. Gen. Stat. §42-110a (Connecticut); Del. Code Ann. Tit. 6, §2511 *et seq.* (Delaware); D.C. Code Ann. §28-3901 *et seq.* (District of Columbia); Fla. Stat. Ann. §501.201 *et seq.* (Florida); Ga. Code Ann. §10-1-390 *et seq.* (Georgia); Haw. Rev. Stat. §481A-1 et *seq.,* and Haw. Rev. Stat. §480-1 *et seq.* (Hawaii); Idaho Code §48-601 *et seq.* (Idaho); Kan. Stat. Ann §50-623 *et seq.* (Kansas); Ky. Rev. Stat. §367.110 *et seq.* (Kentucky); La. Rev. Stat. Ann. §51:1401 *et seq.* (Louisiana); Me. Rev. Stat. Ann. Tit. 5, §205-A *et seq.* (Maine); Md. Com. Law Code Ann. §13-408 *et seq.,* Md. Com. Law Code Ann. §13-301 et *seq.,* Md. Com. Law Code Ann. §13-408 *et seq,* (Maryland); Mass. Gen, L. ch, 93A, §1 *et seq.* (Massachusetts); Mich. Stat. Ann §445.901 *et seq.,* Mich. Stat. Ann. §19.418(1) *et seq.* (Michigan); Minn. Stat. §325F.68 *et seq.,* Minn, Stat. §8.31 (Minnesota); Miss. Code Ann, §75-24-3 *et seq.* (Mississippi); Mo. Rev. Stat. §407.010 *et seq.* (Missouri); Mont. Code Ann. §30-14-101 et *seq.* (Montana); Neb. Rev. Stat. §§87-301-306 *et seq.* (Nebraska); Nev. Rev. Stat. §41.600 and Nev. Rev. Stat. §*598.0903 et seq.* (Nevada); N.H. Rev. Stat. Ann. §358-A:1 et *seq.* (New Hampshire); N.J. Rev. Stat. §*56:8-1 et seq.,* N.J. Rev, Stat. §56:12-1 *et seq,* (New Jersey); N.M. Stat. Ann. §57-12-1 *et seq.* (New Mexico); N.Y. Gen. Bus. Law. §349 *et seq.* (New York); N.C. Gen, Stat. §75-1 *et seq.* (North Carolina); N. D. Cent. Code §51-15-01 *et seq,* (North Dakota); Ohio Rev. Code Ann. §1345.01 *et seq.* (Ohio); Okla. Stat. Tit. 15, §751 *et seq.* (Oklahoma); Ore. Rev. Stat. § 646.605 *et seq.* (Oregon); Penn. Stat. §201-1 *et seq.* (Pennsylvania); R.I. Gen. Laws §6-13.1-1 *et seq.* (Rhode Island); S.C. Code Ann. §39-5-10 *et seq.* (South Carolina); S.D. Codified Laws Ann. §37-24-1 *et seq.* (South Dakota); Tenn. Code Ann. §47-18-101 *et seq.* (Tennessee); Tex. Bus. & Com. Code Ann. §17.*41 et seq.* (Texas); Vt. Stat. Ann. Tit. 9, §2451 *et seq.* (Vermont); Va. Code Ann. § 59,1-196 *et seq.* (Virginia); Wash, Rev, Code § 19,86,0 I0 *et seq.* (Washington); W. Va. Code §46A-6-101 *et seq.* (West Virginia); and Wyo. Stat. §40-12-101 *et seq.* (Wyoming).

investment in their personal injury claims and lawsuits although ALF knew that the contract was illegal and they did not owe any funds to ALF.

49. ALF regularly and systematically misrepresented to the attorneys for the Counter-claimant and the other "personal injury plaintiffs" class members that such agreements are legal and enforceable.

50. ALF regularly and systematically used forms which required the counter-claimant to create a fiduciary relationship between the attorney for the "personal injury plaintiffs" attorney and ALF to protect the illegal and unenforceable interests of ALF in the proceeds of the counter-claimant's personal injury claim, judgment or settlement.

51. ALF regularly and systematically made and makes allegations, threats (implied and direct) to the attorneys for the Counter-claimant and the other "personal injury plaintiffs" class members that their failure to protect the illegal and unenforceable interests of ALF in the proceeds of the counter-claimant's personal injury claim, judgment or settlement may or could lead to suit against said attorneys or disciplinary action.

52. ALF regularly and systematically attempts to disqualify the attorneys for "personal injury plaintiffs" from contesting the illegal transaction by attempting to make them a party to said illegal contract.

53. ALF regularly and systematically engaged in deceptive acts and practices by misrepresenting on its Agreements that the "Agreement is "Mature", "Legal" and "Enforceable" under basic contract law."

54. ALF regularly and systematically engaged in deceptive acts and practices by misrepresenting on its Agreements that it has a legal and enforceable contingent lien in the funds generated by any settlement or judgment obtained as a result of the conclusion of the "personal injury plaintiffs" claim or lawsuit.

55. ALF regularly and systematically engaged in deceptive acts and practices by failing to inform "personal injury plaintiffs" that the contracts by which ALF attempted to

obtain an interest in the outcome of their personal injury claims and lawsuits were illegal and unenforceable.

56. ALF regularly and systematically engaged in deceptive acts and practices by failing to inform the attorneys and personal representatives for "personal injury plaintiffs" that the contracts by which ALF attempted to obtain an interest in the outcome of their personal injury claims and lawsuits were illegal and unenforceable.

57. ALF regularly and systematically engaged in deceptive acts and practices by failing to inform "personal injury plaintiffs" that the liens claimed by ALF under the aforesaid contracts were illegal and unenforceable.

58. ALF regularly and systematically engaged in deceptive acts and practices by failing to inform attorneys and personal representatives for "personal injury plaintiffs" that the liens claimed by ALF under the aforesaid contracts were illegal and unenforceable.

59. ALF regularly and systematically engaged in deceptive acts and practices by asserting or implying in its correspondence and communications with third persons (other than the "personal injury plaintiffs") that the liens claimed by ALF under the aforesaid contracts were illegal and unenforceable.

60. ALF regularly and systematically engaged in deceptive acts and practices by asserting or implying in its correspondence and communications with attorneys that failure to honor the liens allegedly created by the aforesaid agreements would constitute a violation of "Arizona Ethics Opinion 91-22."

61. ALF regularly and systematically engaged in deceptive acts and practices by asserting or implying in its correspondence and communications with attorneys that failure to honor the liens allegedly created by the aforesaid agreements would be a matter subject to professional disciplinary action. (i.e., "Virtually every state Bar association has a disciplinary opinion that addresses the obligations of a lawyer to honor lien documents that he has signed."

62. ALF regularly and systematically engaged in deceptive acts and practices by filing or threatening to file demands for arbitration to enforce the liens and claims allegedly created by the illegal and unenforceable transactions.

63. ALF's misrepresentations and omissions were material because, Counter-claimant and the other Class members would have refused to pay or transfer any funds to ALF as a result of the successful conclusion of their personal injury suits and claims if they had known ALF's claims were illegal and unenforceable.

64. ALF's misrepresentations and omissions were material because, third persons would have refused to pay or transfer any funds to ALF as a result of the successful conclusion of the "personal injury plaintiffs" class members personal injury suits and claims if they had known said liens were illegal and unenforceable.

65. ALF misrepresentations and omissions deceived and injured Counter-claimant and the other Class members by causing them to pay money they otherwise would not have paid.

66. ALF misrepresentations and omissions deceived third persons and injured Counter-claimant and the other Class members by causing said third persons to pay money or respect liens which they otherwise would not have paid or respected said lien claims.

67. Any AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC customer who refused to pay the amount claimed by ALF was subsequently harassed for payment by AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC and its collection agencies or attorneys, and AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC and asserted liens for said amounts under the illegal and unenforceable contracts.

68. AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC's misrepresentations and omissions occurred in the course of conduct involving trade or commerce.

**WHEREFORE**, counter-claimant EDDIE LOPEZ, individually and as the representative of a class of similarly situated persons, prays for judgment in his favor as counter-claimant and for the Class and against AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC as follows:

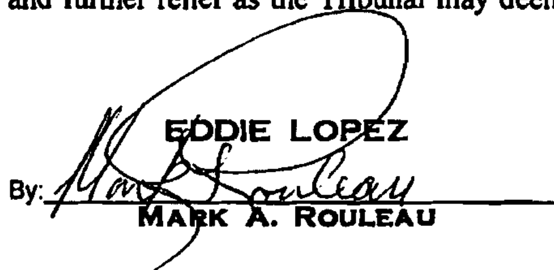
A. That the Court find this case may be properly maintained as a class action, that the Tribunal appoint EDDIE LOPEZ as the Class representative, and that the Tribunal appoint the Law Office of Mark Rouleau, and Law Office of Steven J. Morton & Associates as Class counsel;

B. That the Tribunal award damages to EDDIE LOPEZ and the other members of the Class;

C. That the Tribunal declare that ALF contracts wherein ALF obtains a contingent interest in the outcome of the "personal injury plaintiffs" personal injury, or wrongful death claim, lawsuit, unenforceable and unlawful, and enjoin AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC from further charging and collecting any claim or interest that is contingent in the outcome of any such claim or lawsuit;

D. That the Tribunal award EDDIE LOPEZ and the other members of the Class damages, attorney fees and costs; and

E. That the Tribunal award such other and further relief as the Tribunal may deem just and appropriate.



EDDIE LOPEZ

By: ______________________
MARK A. ROULEAU

**MARK A. ROULEAU**
5301 E. State St., Suite 215D
Rockford, Illinois 61108
(815) 229-7246

**STEVEN J. MORTON**
Steven J. Morton & Assoc. LLC
212 W Washington - 1008
Chicago, IL 60608
312-372-4435

# American Legal Funding LLC / ALFund Limited Preferred, LLC

Date: 11/29/2007

To: Eddie Lopez
Phone: 815-935-2898 Fax: 815-932-6616

From: American Legal Funding LLC / ALFund Limited Preferred, LLC
Jeff Huff, Partner
Phone: 480-515-3698 Fax: 480-522-1199

**Subject: Schedule "A"- Funding Approval for Eddie Lopez**

We have approved an advance for you of $35,000.00 plus a $1,750 fee that will be paid to Bridgeview Legal Funding Inc. who referred the case to our firm. The total advance offer is $36,750.00 with the following fee structure*: Additional advances may be available in the future subject to review of updated information from your attorney.

**$58,800.00 if full payment is made no later than April 04, 2008**
**$76,440.00 if full payment is made after April 04, 2008 but no later than August 04, 2008**
**$94,080.00 if full payment is made after August 04, 2008 but no later than December 04, 2008**
**$122,745.00 if full payment is made after December 04, 2008 but no later than June 04, 2009**
**$153,615.00 if full payment is made after June 04, 2009 but no later than December 04, 2009**
**$186,690.00 if full payment is made after December 04, 2009 but no later than June 04, 2010**
**$219,765.00 if full payment is made after June 04, 2010**

*(includes principal of $36,750.00)

This offer will be available until 5:00 pm MST on 12-05-07. **If the above meets with your approval, sign and date below and Fed EX this and all other lien documents back to us.**

A date will be set to execute these documents and a check for $35,000.00 will be distributed from our company upon completion of all documents and requirements. Checks may be sent overnight for a $25.00 fee and a cashier's check may be issued for a $25.00 fee. All fees will be deducted from the $35,000.00 advance.

Respectfully,

Jeff Huff
Presiding Member

By: Eddie Lopez _______________ 11/30/2007
Eddie Lopez (Transferor) Date

By: Sandy Lopez _______________ 11/30/2007
Sandy Lopez (Transferor's Wife) Date

**American Legal Funding LLC/ALFund Limited Preferred LLC**
17700 N. Pacesetter Way Ste 104 * Scottsdale, AZ 85255 * Phone: 480-515-3698 * Fax: 480-522-1199
www.Americanlegalfunding.com * info@Americanlegalfunding.com

**WARNING: CONFIDENTIAL INFORMATION - The information contained in this facsimile is privileged, confidential, and/or exempt from disclosure under applicable law and is intended solely for the use of the individual or entity named above. If the reader of this message is not the intended recipient, employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution, copying or unauthorized use of this communication is hereby prohibited. If you have received this facsimile in error, please notify sender immediately by telephone so that arrangements can be made to retrieve the facsimile at no cost to you.**

contract law and that the attorney will br tructed to disburse the Proceeds as set for trein above and in the attached Irrevocable Letter of Instructions, Schedu

7. The Parties to this agreement acknowledge that by execution hereof, TRANSFEROR'S attorney is solely and merely following TRANSFEROR'S instructions. TRANSFEROR'S attorney is making neither representation nor guarantee, inferred, expressed or implied, concerning either merits or value of the claims(s) or Proceedings matter(s) referred to herein to any Party. Further, all Parties to this agreement acknowledge that TRANSFEROR'S attorney assumes no affirmative duties herein other than the ministerial obligations of disbursement, and conveying information conveyed herein.

8. TRANSFEROR understands and agrees that if the Law Firm of Record, Law Offices of Mark Rouleau, is discharged or otherwise relieved of its responsibilities to TRANSFEROR in these Proceedings, the TRANSFEREE'S obligations under this Agreement shall remain in full force and effect. Upon the Law Firm of Record being relieved of its responsibilities, the engagement of other attorneys or other parties (including the TRANSFEROR) to pursue the TRANSFEROR'S claims, TRANSFEROR shall be required to provide written notice including name, address, phone, fax and email, by certified mail, to TRANSFEREE within three (3) business days. TRANSFEROR agrees that TRANSFEREE has the right to protect its interest in this Agreement though all legal remedies including but not ALFund Limited to notifying any parties involved in the TRANSFEROR'S claims, further perfecting the liens under the Agreement.

9. TRANSFEROR hereby authorizes his/her attorney to release to TRANSFEREE any/all information, files, records and documents for the duration of this agreement regarding the Proceedings requested by TRANSFEREE within 48 hours, who agrees to treat such information as confidential and who shall receive and review these materials solely in the ALFund Limited capacity necessary for the initial review and underwriting process as well as the ongoing execution and maintenance of this Agreement. Furthermore, TRANSFEROR instructs his/her attorney to notify TRANSFEREE by both fax 480-522-1199 and phone 480-515-3698 of any settlement (including the final settlement of accounting/global settlement worksheet), judgment, appeal or verdict of said Proceedings within 48 hours of said occurrence.

10. TRANSFEROR hereby authorizes TRANSFEREE to send to the applicable insurance Provider or Defendant,' Schedule E Notice of Lien' and or right to submit a 'UCC Filing' so that TRANSFEREE may perfect its lien against subject claim/settlement/ judgment. TRANSFEROR understands that Schedules A, B, C, D, E, F and G (if applicable) are hereby made a part of this contract and lien. TRANSFEREE reserves the right to provide the lien notification to Clean Harbors Environmental Services, Inc., CHW CTD Landfill, and Laraway Recycling & Disposal.

11. TRANSFEROR agrees NOT to accept a Structured Settlement as satisfaction to said Proceedings, unless Proceeds, as defined in this agreement are equal to or greater than, including the amount owed to the TRANSFEREE, and the TRANSFEREE is paid all monies from the initial disbursement by the Defendant or the Defendant's insurance provider named herein. In addition, if the TRANSFEROR is involved in a bankruptcy proceeding prior to the payoff of all funds owned and due to TRANSFEREE to satisfy this Lien and Security Agreement the TRANSFEROR agrees to notify the bankruptcy court that the TRANSFEREE is owed a portion of any recovery from said Proceedings according to this agreement and all attachments. The TRANSFEREE has made an investment and not a loan, and the TRANSFEROR'S obligation will not be discharged or reduced as a result of the bankruptcy proceeding.

12. TRANSFEROR acknowledges and agrees TRANSFEREE authored this Lien and Security Agreement, all supporting schedules including all fee schedules, intake forms and cover letters (the "Documents"). No part of the Documents may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, faxing and recording or any information storage or retrieval system. Any unauthorized use, reproduction, or transmittal of the Documents whatsoever will constitute copyright infringement and will render the infringer liable to prosecution under the law. Attorneys, their firms and all employees of the firm as well as the plaintiffs who are party to this Agreement are issued a 'ALFund Limited Use Permit' to use the Documents to complete the process of a pre-settlement funding advance from the initial gathering of client information to the final execution of this Lien Document and Security Agreement. All documents will be considered, confidential by all parties involved in this Agreement and the process approving the plaintiff for an advancement of funds on their case/lawsuit.

13. This Agreement constitutes the entire agreement between the Parties. There are no representations, warranties, covenants, or obligation except as set forth herein. This Agreement supersedes all prior agreements, understandings, negotiations and discussions, written or oral, of the Parties, relating to any transaction contemplated by this Agreement. This Agreement shall be binding on and inure to the benefit of the Parties, their heirs, trustees, executors or any other successor-in-interest who may obtain or assert control over the TRANSFEROR'S assets for any reason including but not ALFund Limited to disability (physical or mental), a decline in health or death. Also by executing this agreement, TRANSFEROR intends to exercise any Power of Appointment with which TRANSFEROR is empowered to the extent necessary to complete the Transfer that is the subject of this agreement. In the event one or more of the covenants, terms or conditions of this Agreement shall for any reason be held to be invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect the validity, liability, or enforceability of any other covenant, term or condition in this Agreement.

14. TRANSFEROR represents and warrants unto TRANSFEREE that as of the date of this Agreement that (a) TRANSFEROR believes the Proceedings to be meritorious and filed in good faith; (b) TRANSFEROR has complete right, title and interest in and to the Proceedings and full power and authority to make and execute this Agreement; (c) TRANSFEROR has not and will not assign or encumber the Proceeds from the Proceeding, except as provided herein; (d) TRANSFEROR stipulates that all Proceeds due TRANSFEREE, as described in this agreement, shall not be subordinated to any other liens of record with exception to attorney's fees, attorney's case preparation costs, and statutory / prior properly perfected liens and that all current liens, assignments, encumbrances or security interest of any kind or nature in or relating to the Proceeds are listed on Schedule B attached which is considered part of this agreement; (e) (TRANSFEROR), hereby waives any defenses to payment of this amount, and hereby agree(s) not to seek to avoid payment of this agreement. TRANSFEROR further agree to cooperate in procuring payment of the amount due TRANSFEREE.

15. In the event that TRANSFEROR terminates or otherwise breaches the covenants, conditions or terms of this Agreement, TRANSFEROR shall pay liquidated damages to TRANSFEREE in the amount of two times the total amount due as set forth in section two. TRANSFEROR expressly acknowledges that in the event of termination or other breach of the covenants, conditions and terms of this Agreement, the anticipated loss to TRANSFEREE in such an event will be estimated to be the amount set forth in the foregoing liquidated damages provision and such estimated value is reasonable and not imposed as a penalty.

16. TRANSFEROR has been informed and agrees that the TRANSFEREE is an Arizona limited liability company engaged in the business of making investments in certain future proceeds which may arise from settlement, judgment or other conclusion resulting from the Proceedings. Both Parties agree that this Agreement shall be construed and interpreted in accordance with the laws of Arizona and venue for any dispute arising

Transferor E.G.

Transferee

hereunder (including any interpleading action [illegible] file in the Judicial District Court for Maricopa C[illegible], Arizona. TRANSFEROR agrees that any and all Federal lawsuits related to or arising from [illegible] agreement shall be filed and maintained in the [illegible]ederal Courthouse located in Phoenix, Arizona. TRANSFEROR understands that the "choice of laws", "forum", and "venue" clauses are critical in nature, and are essential to this Contract, and that they have not been placed in this Contract as mere "form" insertions and recitals.

17. TRANSFEROR agrees that any and all disputes that may arise concerning the terms, conditions, interpretation or enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party. In case of any dispute, TRANSFEROR agrees to have their attorney recover all Proceeds (as defined in Section 2 of the Agreement) placed into the attorney's Trust Account until the dispute is resolved. The prevailing party in the dispute shall be entitled to recover all attorney fees, filing fees and costs associated with the efforts to collect.

18. TRANSFEROR acknowledges that they were contacted by TRANSFEREE, or by its affiliate on or about 10/05/2007 and that TRANSFEREE **advised TRANSFEROR to take no fewer than (10) DAYS to consider the terms contained in this agreement before signing it.**

IN WITNESS WHEREOF, the parties hereto affix their signatures on the above written date.

On behalf of ALFund Limited Preferred, LLC (TRANSFEREE)

____________________ Date: [illegible]/2007
Signature of Terri Grub, Office Administration

On behalf of TRANSFEROR

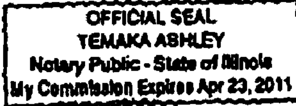
____________________ Date: 11/30/2007
Signature of Eddie Lopez (Transferor)

STATE OF Illinois
COUNTY OF Kankakee )ss

On this 30 day of 11, 2007, before me personally came, the person (Transferor) who signed the foregoing Lien and Security Agreement known to me personally to be such, and acknowledged that the above is his/her act and deed and that the facts stated herein are true.

____________________
Notary Public

My Commission Expires: 4/23/11


OFFICIAL SEAL
TEMAKA ASHLEY
Notary Public - State of Illinois
My Commission Expires Apr 23, 2011

On behalf of TRANSFEROR

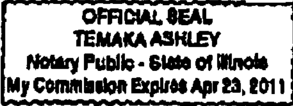
____________________ Date: 11/30/2007
Signature of Sandy Lopez (Transferor's Wife)

STATE OF Illinois
COUNTY OF Kankakee )ss

On this 30 day of 11, 2007, before me personally came, the person (Transferor's wife) who signed the foregoing Lien and Security Agreement known to me personally to be such, and acknowledged that the above is his/her act and deed and that the facts stated herein are true.

____________________
Notary Public

My Commission Expires: 4/23/11


OFFICIAL SEAL
TEMAKA ASHLEY
Notary Public - State of Illinois
My Commission Expires Apr 23, 2011

Transferor ____
Transferee ____

# American Legal Funding, LLC Fax

Date: 12/4/08

To: Mark Rouleau, Esq.
ATTN: Bob, Paralegal
Phone: 815-229-7646 Fax: 815-229-7251

From: American Legal Funding LLC/ALFund Limited Preferred, LLC
Christine A. Sanborn, Paralegal/Sr. Lien Administrator (Ext. 14)
Phone:480-515-3698 Fax: 480-585-3756

Pages: 24, Including Cover

**Subject: Client: EDDIE LOPEZ - NOTICE OF LIEN - PAYOFF**

Dear Mr. Rouleau:

I am in receipt of your letter dated December 3, 2008. Enclosed please find a copy of the Consensual Equity Lien and Security Agreement executed November 30, 2007 by the client, Steven Morton, Esq., and American Legal Funding, LLC/ALFund Ltd. Preferred Preferred, LLC , as well as a copy of the check and/or transmittal, for the cash advance in the amount of $36,750 made to Mr. Lopez. A copy of the executed documents were mailed to Mr. Lopez and Mr. Morton via Certified Mail on January 24, 2008. See attached copy of our letter and Certified Return Receipt.

Be advised that our company provides pre-settlement cash advances, not loans, to clients. We are not required to register with Secretary of State of Illinois.

Should you have any further questions, please call. We look forward to the successful conclusion of this matter.

Sincerely,

Christine A. Sanborn

Attachment - Consensual Equity Lien and Security Agreement, Schedules A-F, transmittal
cc: Steven J. Morton, Esq. (Transmitted via fax only - 312-372-4479)

**WARNING: CONFIDENTIAL INFORMATION** – The information contained in this transmittal is privileged, confidential, and/or exempt from disclosure under applicable law and is intended solely for the use of the individual or entity named above. If the reader of this message is not the intended recipient, employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution, copying or unauthorized use of this communication is hereby prohibited. If you have received this transmittal in error, please notify sender immediately by telephone so that arrangements can be made to retrieve the transmittal at no cost to you.

**American Legal Funding, LLC**
**17700 N. Pacesetter Way #104, Scottsdale AZ 85255**
**Ph: 480-515-3698 Fax: 480-585-3756**

**CONSENSUAL EQUITY LIEN AND SECURITY AGREEMENT**

**LIEN AND SECURITY AGREEMENT** is made and entered into this date, 11/30/2007 by and between **American Legal Funding, LLC/ALFund Limited Preferred, LLC (hereafter named TRANSFEREE), 17700 North Pacesetter Way, Suite 104, Scottsdale, Arizona 85255, an Arizona limited liability company and Eddie Lopez, SS#322-74-9862, hereafter referred to as (TRANSFEROR).**

**WITNESSETH**

Whereas, TRANSFEROR has a claim against and / or is the plaintiff in an action(s) or law suit(s) or case(s) (hereafter referred to as "Proceedings") in the **State of IL, County of Cook**, against defendant(s) Clean Harbors Environmental Services, Inc., CMW CID Landfill, and Laraway Recycling & Disposal.

Whereas, the Defendant's insurance provider is defending and / or settling such Proceedings, arising out of acts of negligence, accident or other incident on our about 01-08-2007 in which the Defendant caused TRANSFEROR to suffer serious damages, physical injuries, or aggravation of pre-existing conditions; and,

Whereas, TRANSFEROR does not have sufficient funds to adequately pay for the necessities of life during the pendency of the Proceedings and/or pay the necessary legal or medical costs attendant to the Proceedings, has no assets against which they can or desires to borrow, and is under economic pressure to resolve their Proceedings for less than what TRANSFEROR believes to be the Proceeding's full/fair value, and by entering into this Lien and Security Agreement to obtain a cash advance, such actions may assist the TRANSFEROR in mitigating their damages to protect the value of their claims, and;

Whereas, the Defendant(s) in the TRANSFEROR'S Proceedings have at this time, failed to make a reasonable offer or declined payment of an amount of compensation that TRANSFEROR considers fair or adequate, and that it will take an undetermined amount of time through continued legal actions to negotiate, persuade or otherwise prevail upon the Defendants and/or their insurance representatives to pay the TRANSFEROR the amount appropriate and necessary to compensate TRANSFEROR for the injuries/damages suffered, and;

Whereas, in order to afford TRANSFEROR sufficient funds to adequately pay for the necessities of life during pendency of the Proceedings and/or necessary legal and medical costs attendant to the Proceedings, TRANSFEREE has agreed to make an advancement of funds to TRANSFEROR and take a LIEN on certain future proceeds which may arise from settlement, judgment or other conclusion resulting from the Proceedings. TRANSFEREE acknowledges that the outcome of a future settlement, judgment or other conclusion resulting from the Proceedings is uncertain **and involves risks beyond the parties' control which could result in no payment or recovery of Proceeds by the TRANSFEROR of the Proceedings against the Defendant(s) or others arising out of this or related to this Proceedings.**

Now, THEREFORE, in consideration of the sum $35,000.00 cash in hand paid and other good and valuable consideration, the receipt and acceptability of which is hereby acknowledged, TRANSFEREE and TRANSFEROR do hereby agree as follows:

1. TRANSFEROR acknowledge that he/she has been informed by TRANSFEREE that alternative methods of obtaining financial assistance which provides more favorable rates, fees or payment schedules may be available elsewhere from other than from TRANSFEREE including, among others, credit card advances, bank loans or personal loans from family or friends. TRANSFEROR agrees that securing an advance of funds from TRANSFEREE is in their best interests and will greatly assist them in mitigating damages and protecting their assets.

2. TRANSFEROR unconditionally and irrevocably transfers and conveys to TRANSFEREE all of TRANSFEROR'S control, right, title and interest up to **$219,765.00** paid to TRANSFEROR from future Proceeds (hereinafter defined as the gross amount of recovery from the Proceedings, less any attorney's fees of 40.0% of the settlement or 40.0% at trial and actual case preparation costs and any other liens previously disclosed in Schedule B as attached which have also been perfected prior to TRANSFEREE'S liens) or other recovery derived from the Proceedings.

3. TRANSFEROR hereby grants to TRANSFEREE a security interest in the **future Proceeds of the Proceedings in the minimum sum of $58,800.00 and a maximum sum of $219,765.00 (see offer letter/Schedule A dated 11-28-2007 and to be considered a part of this agreement) to secure the conveyance, subject to the terms and conditions of the Agreement.**

4. TRANSFEROR understands the above-mentioned advance of funds by the TRANSFEREE to be an investment, and not a loan. TRANSFEREE acknowledges it is making an INVESTMENT in certain future proceeds which may arise from settlement, judgment or other conclusion resulting from the Proceedings and as such, the TRANSFEREE understand that **if there is no payment or recovery of Proceeds by the TRANSFEROR of the Proceedings against the Defendant or others arising out of this or related to this Proceedings, TRANSFEROR will owe the TRANSFEREE no money.** When the Proceedings referred to herein is settled or concluded, and all Proceeds and lien amounts agreed upon are paid to TRANSFEREE in full, TRANSFEROR will owe no additional money to TRANSFEREE. TRANSFEROR understands and agrees that, in the event TRANSFEROR is paid settlement proceeds from one of potential multiples sources (whether there are multiple defendants, claims or lawsuits, or insurers) TRANSFEREE will be paid all amounts owed it from the Proceeds first received until TRANSFEREE is paid in full. In the event that the proceeds first received are not sufficient to satisfy TRANSFEREE's lien, after TRANSFEREE is paid the full amount of the Proceeds (after payment of attorney fees and costs), a new Schedule will be prepared reflecting the balance owed TRANSFEREE at the same fee structure in place at the time of the first payment. TRANSFEROR understands that he will not receive any proceeds from any source until TRANSFEREE is paid in full.

5. The Parties acknowledge that this Agreement is expressly intended to transfer, convey and relinquish control over only a specified portion of the Proceeds which may flow from, and as a result of the Proceedings referred to above. This agreement is not an assignment of case, nor a purchase of any right, chose in action, cause of action, or claim which TRANSFEROR may have or possess as against any responsible party, respondent or defendant referred to herein. No control, input, influence, right of involvement of any kind as concerns claim, right, or interest of TRANSFEROR in the Proceedings is contemplated by any party to this Agreement.

**6. TRANSFEROR confirms he/she has sought and obtained the advice of legal counsel with respect to the Agreement. TRANSFEROR agrees to direct their attorney to execute Schedules B & C of the Agreement. By the attorney's execution and/or prior knowledge of Schedules B & C of the Agreement, TRANSFEROR acknowledges that this lien becomes a mature, equity lien enforceable under basic**

Transferor ____

Transferee ____

contract law and that the attorney will br     tructed to disburse the Proceeds as set for     rein above and in the attached Irrevocable Letter of Instructions, Schedu

7. The Parties to this agreement acknowledge that by execution hereof, TRANSFEROR'S attorney is solely and merely following TRANSFEROR'S instructions. TRANSFEROR'S attorney is making neither representation nor guarantee, inferred, expressed or implied, concerning either merits or value of the claims(s) or Proceedings matter(s) referred to herein to any Party. Further, all Parties to this agreement acknowledge that TRANSFEROR'S attorney assumes no affirmative duties herein other than the ministerial obligations of disbursement, and conveying information conveyed herein.

8. TRANSFEROR understands and agrees that if the Law Firm of Record, Law Offices of Mark Rouleau, is discharged or otherwise relieved of its responsibilities to TRANSFEROR in these Proceedings, the TRANSFEREE'S obligations under this Agreement shall remain in full force and effect. Upon the Law Firm of Record being relieved of its responsibilities, the engagement of other attorneys or other parties (including the TRANSFEROR) to pursue the TRANSFEROR'S claims, TRANSFEROR shall be required to provide written notice including name, address, phone, fax and email, by certified mail, to TRANSFEREE within three (3) business days. TRANSFEROR agrees that TRANSFEREE has the right to protect its interest in this Agreement though all legal remedies including but not ALFund Limited to notifying any parties involved in the TRANSFEROR'S claims, further perfecting the liens under the Agreement.

9. TRANSFEROR hereby authorizes his/her attorney to release to TRANSFEREE any/all information, files, records and documents for the duration of this agreement regarding the Proceedings requested by TRANSFEREE within 48 hours, who agrees to treat such information as confidential and who shall receive and review these materials solely in the ALFund Limited capacity necessary for the initial review and underwriting process as well as the ongoing execution and maintenance of this Agreement. Furthermore, TRANSFEROR instructs his/her attorney to notify TRANSFEREE by both fax 480-522-1199 and phone 480-515-3698 of any settlement (including the final settlement of accounting/global settlement worksheet), judgment, appeal or verdict of said Proceedings within 48 hours of said occurrence.

10. TRANSFEROR hereby authorizes TRANSFEREE to send to the applicable insurance Provider or Defendant,' Schedule E Notice of Lien' and or right to submit a 'UCC Filing' so that TRANSFEREE may perfect its lien against subject claim/settlement/ judgment. TRANSFEROR understands that Schedules A, B, C, D, E, F and G (if applicable) are hereby made a part of this contract and lien. TRANSFEREE reserves the right to provide the lien notification to Clean Harbors Environmental Services, Inc., CMW CID Landfill, and Laraway Recycling & Disposal.

11. TRANSFEROR agrees NOT to accept a Structured Settlement as satisfaction to said Proceedings, unless Proceeds, as defined in this agreement are equal to or greater than, including the amount owed to the TRANSFEREE, and the TRANSFEREE is paid all monies from the initial disbursement by the Defendant or the Defendant's insurance provider named herein. In addition, if the TRANSFEROR is involved in a bankruptcy proceeding prior to the payoff of all funds owned and due to TRANSFEREE to satisfy this Lien and Security Agreement the TRANSFEROR agrees to notify the bankruptcy court that the TRANSFEREE is owed a portion of any recovery from said Proceedings according to this agreement and all attachments. The TRANSFEREE has made an investment and not a loan, and the TRANSFEROR'S obligation will not be discharged or reduced as a result of the bankruptcy proceeding.

12. TRANSFEROR acknowledges and agrees TRANSFEREE authored this Lien and Security Agreement, all supporting schedules including all fee schedules, intake forms and cover letters (the "Documents"). No part of the Documents may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, faxing and recording or any information storage or retrieval system. Any unauthorized use, reproduction, or transmittal of the Documents whatsoever will constitute copyright infringement and will render the infringer liable to prosecution under the law. Attorneys, their firms and all employees of the firm as well as the plaintiffs who are party to this Agreement are issued a 'ALFund Limited Use Permit' to use the Documents to complete the process of a pre-settlement funding advance from the initial gathering of client information to the final execution of this Lien Document and Security Agreement. All documents will be considered, confidential by all parties involved in this Agreement and the process approving the plaintiff for an advancement of funds on their case/lawsuit.

13. This Agreement constitutes the entire agreement between the Parties. There are no representations, warranties, covenants, or obligation except as set forth herein. This Agreement supersedes all prior agreements, understandings, negotiations and discussions, written or oral, of the Parties, relating to any transaction contemplated by this Agreement. This Agreement shall be binding on and inure to the benefit of the Parties, their heirs, trustees, executors or any other successor-in-interest who may obtain or assert control over the TRANSFEROR'S assets for any reason including but not ALFund Limited to disability (physical or mental), a decline in health or death. Also by executing this agreement, TRANSFEROR intends to exercise any Power of Appointment with which TRANSFEROR is empowered to the extent necessary to complete the Transfer that is the subject of this agreement. In the event one or more of the covenants, terms or conditions of this Agreement shall for any reason be held to be invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect the validity, liability, or enforceability of any other covenant, term or condition in this Agreement.

14. TRANSFEROR represents and warrants unto TRANSFEREE that as of the date of this Agreement that (a) TRANSFEROR believes the Proceedings to be meritorious and filed in good faith; (b) TRANSFEROR has complete right, title and interest in and to the Proceedings and full power and authority to make and execute this Agreement; (c) TRANSFEROR has not and will not assign or encumber the Proceeds from the Proceeding, except as provided herein; (d) TRANSFEROR stipulates that all Proceeds due TRANSFEREE, as described in this agreement, shall not be subordinated to any other liens of record with exception to attorney's fees, attorney's case preparation costs, and statutory / prior properly perfected liens and that all current liens, assignments, encumbrances or security interest of any kind or nature in or relating to the Proceeds are listed on Schedule B attached which is considered part of this agreement; (e) (TRANSFEROR), hereby waives any defenses to payment of this amount, and hereby agree(s) not to seek to avoid payment of this agreement. TRANSFEROR further agree to cooperate in procuring payment of the amount due TRANSFEREE.

15. In the event that TRANSFEROR terminates or otherwise breaches the covenants, conditions or terms of this Agreement, TRANSFEROR shall pay liquidated damages to TRANSFEREE in the amount of two times the total amount due as set forth in section two. TRANSFEROR expressly acknowledges that in the event of termination or other breach of the covenants, conditions and terms of this Agreement, the anticipated loss to TRANSFEREE in such an event will be estimated to be the amount set forth in the foregoing liquidated damages provision and such estimated value is reasonable and not imposed as a penalty.

16. TRANSFEROR has been informed and agrees that the TRANSFEREE is an Arizona limited liability company engaged in the business of making investments in certain future proceeds which may arise from settlement, judgment or other conclusion resulting from the Proceedings. Both Parties agree that this Agreement shall be construed and interpreted in accordance with the laws of Arizona and venue for any dispute arising

Transferor E.G.

Transferee

hereunder (including any interpleading action 1 ile in the Judicial District Court for Maricopa C y, Arizona. TRANSFEROR agrees that any and all Federal lawsuits related to or arising from ... agreement shall be filed and maintained in the Federal Courthouse located in Phoenix, Arizona. TRANSFEROR understands that the "choice of laws", "forum", and "venue" clauses are critical in nature, and are essential to this Contract, and that they have not been placed in this Contract as mere "form" insertions and recitals.

17. TRANSFEROR agrees that any and all disputes that may arise concerning the terms, conditions, interpretation or enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party. In case of any dispute, TRANSFEROR agrees to have their attorney recover all Proceeds (as defined in Section 2 of the Agreement) placed into the attorney's Trust Account until the dispute is resolved. The prevailing party in the dispute shall be entitled to recover all attorney fees, filing fees and costs associated with the efforts to collect.

18. TRANSFEROR acknowledges that they were contacted by TRANSFEREE, or by its affiliate on or about 10/05/2007 and that TRANSFEREE **advised TRANSFEROR to take no fewer than (10) DAYS to consider the terms contained in this agreement before signing it.**

IN WITNESS WHEREOF, the parties hereto affix their signatures on the above written date.

On behalf of ALFund Limited Preferred, LLC (TRANSFEREE)

______________________________ Date: ___/___/200__
Signature of Terri Grub, Office Administration

On behalf of TRANSFEROR

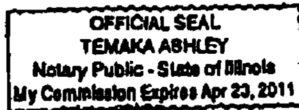
______________________________ Date: 11/30/2007
Signature of Eddie Lopez (Transferor)

STATE OF ILLINOIS
COUNTY OF Kankakee )ss

On this 30 day of 11, 2007, before me personally came, the person (Transferor) who signed the foregoing Lien and Security Agreement known to me personally to be such, and acknowledged that the above is his/her act and deed and that the facts stated herein are true.

______________________________
Notary Public

My Commission Expires: 4/23/11


OFFICIAL SEAL
TEMAKA ASHLEY
Notary Public - State of Illinois
My Commission Expires Apr 23, 2011

On behalf of TRANSFEROR

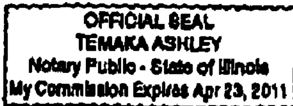
______________________________ Date: 11/30/2007
Signature of Sandy Lopez (Transferor's Wife)

STATE OF ILLINOIS
COUNTY OF KANKAKEE )ss

On this 30 day of 11, 2007, before me personally came, the person (Transferor's wife) who signed the foregoing Lien and Security Agreement known to me personally to be such, and acknowledged that the above is his/her act and deed and that the facts stated herein are true.

______________________________
Notary Public

My Commission Expires: 4/23/11


OFFICIAL SEAL
TEMAKA ASHLEY
Notary Public - State of Illinois
My Commission Expires Apr 23, 2011

Transferor ____
Transferee ____

**American Legal Funding℠ LLC**
Pre-Settlement & Specialty Financing

# NOTICE OF LIEN DOCUMENT COPIES

**SENT VIA CERTIFIED MAIL #7007 1490 0000 7504 9254**

January 24, 2008

Steven J. Morton, Esq.
Steven J. Morton & Associates, Ltd.
212 W. Washington, Suite 1008
Chicago IL 60606

**Re: Client: EDDIE LOPEZ**

Dear Mr. Morton:

We appreciate the opportunity to work with you and your staff to assist the above joint client with a Pre-Settlement Funding advance in the amount of **$36,750** on December 14, 2007. Enclosed please find a copy of the Consensual Equity Lien and Security Agreement executed by the client, yourself, and **ALFund Ltd. Preferred, LLC** , and a copy of the check and/or transmittal, for the advance.

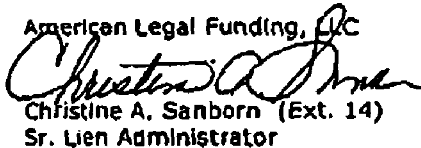
**Consider this letter as Notice of our Lien.** Please place this letter in a conspicuous place in your client's case file and make a note in your case management/tracking system to protect our lien interests at the time of settlement.

Periodically we will follow-up with your office to check on the status of this case. Please return our written status requests promptly. Also, please notify us immediately of any change of representation, change of address of attorney or client, and upon settlement of this case. Also, pursuant to Schedule C of the Lien and Security Agreement, no settlement proceeds are to be distributed to the client until our lien has been satisfied.

Thank you again for your cooperation in this matter. It was a pleasure working with you and your staff. We look forward to the successful conclusion of this case. Should you have any questions, please call.

Sincerely,

American Legal Funding, LLC



Christine A. Sanborn (Ext. 14)
Sr. Lien Administrator

Enclosure
cc: Eddie Lopez

| SENDER: COMPLETE THIS SECTION | COMPLETE THIS SECTION ON DELIVERY |
|---|---|
| ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.<br>■ Print your name and address on the reverse so that we can return the card to you.<br>■ Attach this card to the back of the mailpiece, or on the front if space permits. | A. Signature<br>X [signature] ☑ Agent ☐ Addressee<br>B. Received by (Printed Name) [signature] C. Date of Delivery |
| 1. Article Addressed to:<br><br>Steven J. Morton, Esq.<br>Steven J. Morton & Associates, Ltd.<br>212 W. Washington, Suite 1008<br>Chicago IL 60606 | D. Is delivery address different from item 1? ☐ Yes<br>If YES, enter delivery address below: ☐ No<br>[handwritten] 1-29-08<br><br>3. Service Type<br>☑ Certified Mail ☐ Express Mail<br>☐ Registered ☑ Return Receipt for Merchandise<br>☐ Insured Mail ☐ C.O.D.<br>4. Restricted Delivery? (Extra Fee) ☐ Yes |
| 2. Article Number<br>(Transfer from service label) | 7007 1490 0000 7504 9254 |

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

**MARK ROULEAU** *attorney at law*

5301 E. State Street, Suite 215D
Rockford, IL 61108

(815) 229-7246
FAX (815) 229-7251

December 9, 2008

American Legal Funding, LLC
Attention Christine A. Sanborn
17700 N. Pacesetter Way #104
Scottsdale AZ 85255

***VIA FAX ONLY 480-585-3756***

Re: ***Eddie Lopez***

Dear Ms. Sanborn,

Thank you for having forwarded the additional documents. It seems to me that these alleged contracts form contracts of champerty and maintenance, which are illegal contracts and have been held to be a violation of public policy in Illinois. See for example ***Topps v. Pratt & Callis, P.C.***, (Ill.App. 4 Dist. 1990) 564 N.E.2d 196, 206 Ill.App.3d 298. Illinois has a long-standing public policy adopting the common law against contracts of champerty and maintenance. Similarly, other states have held such contracts illegal. See, ***Rancman v. Interim Settlement Funding Corporation***, 99 Ohio St.3d 121, 789 N.E.2d 217. The attempt to set a choice of law and venue provisions in an attempt to avoid the public policy of the State of Illinois with respect to its legal proceedings is likewise void. ***First Nat. Bank of Springfield v. Malpractice Research,* Inc.**, (Ill. 1997) 688 N.E.2d 1179, 179 Ill.2d 353.

Although it is my opinion that the contracts by which your company asserts a claim are illegal and therefore unenforceable my client has authorized me to extend an offer of settlement whereby he would pay $35,000.00 with 10% per annum simple interest. This offer will automatically be withdrawn if not accepted in writing on or before 5:00 PM CST December 16, 2008.

Very truly yours,

Mark A. Rouleau

MR/

**American Legal Funding™ LLC**
Pre-Settlement & Specialty Financial Services

December 15, 2008

Sent Via Facsimile (815) 229-7251
and
Federal Express Tracking #7961 8714 2753

Mark Rouleau, Esq.
**LAW OFFICES OF MARK ROULEAU**
5301 East State Street, Suite 215-D
Rockford, IL 61108

RE: Eddie Lopez

Dear Mr. Rouleau:

Congratulations on obtaining an outstanding settlement for Eddie Lopez. I would also like to clear up a number of misstatements made in your correspondence.

American Legal Funding and its affiliates (ALF) has been in the business of providing contingent advances on personal injury cases for 8 years. ALF does not loan money. It advances a portion of the anticipated recovery secured by taking an equitable lien on the proceeds of the case. As such, ALF is not subject to banking regulations nor does it need to register with the Department of Financial Institutions.

Moreover, your client sought us out. He employed a broker in Arizona with whom we have a separate contract. We did not solicit Mr. Lopez's business. Under these circumstances, we are not required to register with the Illinois Secretary of State.

As stated, ALF takes an equitable lien. While you argue that Illinois law is applicable, we believe that Arizona law will govern this transaction as per our Agreement. However, Illinois law does not change the effectiveness of the Agreement. Under Illinois law, equitable liens are recognized. Like common law liens, "equitable liens" are also liens created by courts, but they differ markedly from common law liens in most other respects. Common law liens are always possessory liens, but the equitable lien is not. An equitable lien has been defined as:

> a charge or encumbrance upon property in possession of another [that is, someone other than the lien claimant], whereby the lien claimant may have the property involved used to satisfy the lienor's claims. It may arise from express or implied agreement, or may be granted by the court for general reasons of equity to prevent an unjust enrichment by the owner of the property charged.

The Law of Personal Property, §107 at 508.

An equitable lien is not really a "lien" at all. Instead, it is one of many remedies developed over the years by courts of equity as a remedy for a debt. **Paine/Wetzel Associates, Inc. v. Gitles**, 174 Ill. App. 3d 389, 393, 528 N.E.2d 358,360 (1988).1 DAN B. DOBBS, LAW OF REMEDIES §4.3(1) at 586-87 (Ed. 1993) (grouping the remedies of constructive trust, equitable lien, subrogation, and accounting for profits as equitable remedies designed to effect restitution. Equity courts developed a series of remedies allowing courts to ignore legal title to property and direct the owner of title to either convey the property to another or to hold the property subject to a claim of another. In order to have an equitable lien there must be:

(1) a debt, duty, or obligation owing by one person to another,
(2) a "res" or specific property to which the debt, duty or obligation attaches, and
(3) an intent, express or implied, that the property serve as security for the payment of the debt, duty, or obligation.
(4) lack of an adequate or complete remedy by an action at law.

**Achs v. Maddox**, 175 Ill.App.3d 989, 993, 530 N.E.2d 612,614 (2d Dist. 1988).

The two principal equitable remedies of this type are the constructive trust and the equitable lien. Although an equitable lien is similar to a constructive trust, there is one major difference. A constructive trust gives the plaintiff formal legal title to property by declaring the defendant to be a constructive trustee of the property for the plaintiff's benefit, whereas an equitable lien merely gives the plaintiff a lien on the property which can be realized upon by a judicially ordered sale of the property. Dobbs, §4.3(3) at 601.

An equitable lien arises in one of two distinct circumstances. First, a lien may result from the express or implied-in-fact agreement of the parties that a certain fund or property will stand as security for one party's debt to another. **In re Brass Kettle Restaurant, Inc.**, 790 F.2d 574, 575 (7th Cir. 1986). Second, a lien may arise, not from some agreement of the parties, but to prevent unjust enrichment. **Agribank, FCB v. Whitlock**, 251 Ill. App. 3d 299, 310, 621 N.E.2d 967, 975 (1993), citing **Paine/Wetzel**, 174 Ill. App. 3d at 393, 528 N.E.2d at 360.

Illinois courts have recognized an equitable lien as an appropriate remedy in a wide variety of situations. See, **Pope v. Speiser**, 130 N.E.2d 507 (Ill. 1955) (plaintiff made valuable improvements on defendant's farm with defendant's knowledge and consent and defendant made repeated statements that farm would belong to plaintiff after defendant's death; plaintiff entitled to equitable lien on property for the value of the improvements); **Robinson v. Robinson**, 429 N.E.2d 183 (Ill. App. Ct. 2d Dist. 1981) (married couple built house on land belonging to husband's parents; when marriage dissolved, wife held entitled to equitable lien on property); **Econ. Fire & Cas. Co. v. Warren,** 390 N.E.2d 361 (Ill. App. Ct. 1st Dist. 1979) (fire insurer paid loss due to fire subsequently discovered to have been intentionally caused by joint owner of property; equitable lien imposed on property to recover portion of wrongfully obtained payment); **Meppen v. Meppen**, 53 N.E.2d 462 (Ill. App. Ct. 2d Dist. 1944) (executor of decedent's estate had an equitable lien on devisee's share of real property devised under the will in amount of claim estate had against devisee).

The classic consensual "lien" on an injury recovery is based on the signed agreement of the injured client (and often his/her attorney) as to some type of client financial obligation which promises payment from the anticipated but uncertain accident recovery. Consensual "lien" assignments can be used for medical treatment and a variety of other purposes, such as an agreement to repay a lender who loans money to the financially troubled accident victim, or even an agreement with the claimant's landlord to pay rent owed by the injured claimant from the accident recovery, etc.

Under the general lien law discussed above, the lien documents specify the obligation owing from Lopez to ALF, the specific "res" (the proceeds from **Lopez V. Clear** ) to which the obligation attaches, and the specific intent that the "res" serve as security for the obligation.

The reference to **Topps v Pratt & Callis**, 564 N.E. 2d 196 (Ill App. 4 Dist 1990) seems misplaced. In **Topps**, an attorney advanced living expenses to a client while a worker's compensation case was pending. The conduct was held to violate MRPC 1.8. As you're probably aware, Champerty and Maintenance were designed in medieval times to keep attorneys from profiting from their client's lawsuits. (e). **Rancman v Interim Settlement**, 769 N.E. 2d 217. has been overruled by the Ohio legislature in a unanimous vote. Since May 2008, pre-settlement funding has been permitted in Ohio. We are aware of a few other cases that have challenged litigation funding on the ground of champerty and maintenance, but none that have been successful.

For example, **In Saladini v. Righellis**, 687 N,E, 2d 1222 (MA. 1997), involved a contract in which "Saladini agreed to advance funds to Righellis to allow him to pursue potential legal claims." Id. at 1224-25. In return, Saladini was to receive, from the first amount recovered, his advance and fifty percent of any amount after the payment of expenses. Id. The lender was uninterested except for the potential of profit. The contract called for the lender to make a profit in the case of a successful suit. The court decided to invalidate the laws of maintenance and champerty on the grounds that the bases of the doctrine were ancient and a doubt as to whether they continue to serve any useful purpose. Id. At 1226. The court also noted that today's society views litigation as a "socially useful way to resolve disputes" as opposed to the medieval view of litigation as an evil. Id. Furthermore, the preference courts have for non-judicial resolution of disputes may be fostered by allowing people to purchase an interest in an action. Further buttressing its decision the court recognized, with respect to the harms the laws of champerty were designed to protect against, that "[t]here are now other devices that more effectively accomplish these ends." Id. at 1227.

Similarly, in **TMJ Bank v. Nippon Trust**, the Hawaii Supreme Court, in response to a question certified from the federal district Court regarding assignment of tort claims, ruled that common law doctrines of champerty and maintenance were not impediments to the assignability of the claims at issue:

> However, this court has repeatedly rejected blind adherence to rules crafted to meet anachronistic societal demands and has expressed skepticism about the continued potency of the doctrines of champerty and maintenance. See Henrique v. Paris, 10 Haw. 408, 413 (1896) ("The old rule is a provision of the feudal law, and grew out of a state of society which does not exist in these Islands. There is not now and here the necessity that there was in England in the Middle Ages for laws against champerty and maintenance to prevent the stirring up of suits for purposes of oppression[.]"); Van Gieson, 20 Haw. at 149 ("The conditions of society under which the law of maintenance and champerty originated no longer exist.").

Moreover, a lawyer cannot sign lien documents and then fail to follow the terms of the document. Virtually every state Bar association has a disciplinary opinion that addresses the obligations of a lawyer to honor lien documents that he has signed. See Arizona Ethics Opinion 91-22. As you know, your co-counsel signed the ALF documents and participated in a conference call in which all the material terms were highlighted with Mr. Lopez. There was no objection or concern expressed about any term.

We are hopeful that you will reconsider your position in light of the above. We would prefer to resolve this matter amicably. Please forward to us payment as per Schedule A. If you do not intend to honor the contract that both your client and your co-counsel signed, please send us the closing statement that you have prepared in the Lopez matter. After receipt of that statement, we can make an adjustment, if appropriate, to the amount that Lopez is obligated to pay. In the interim, please hold the full amount of ALF's per Schedule A in your trust account, pending our discussions, again as set forth in the documents signed by your co-counsel. I look forward to hearing from you.

Regards,

Jeff Huff
President

JH/tg

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
JOEL L. CHUPACK, ARBITRATOR

| | | |
|---|---|---|
| AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED, | ) | |
| Claimants and Counter Respondents, | ) | No. 51 516 01586 08 |
| and | ) | |
| EDDIE LOPEZ, individually and as the representative of a class of similarly situated persons, | ) | |
| Respondent and Counter Claimants. | ) | |

**RULING ON ALF'S MOTION TO DISMISS OR, IN THE, ALTERNATIVE FOR A CLAUSE CONSTRUCTION AWARD**

This cause coming on to be heard on Claimants, AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED's (collectively, "ALF") motion to dismiss or, in the alternative, for a clause construction award, pursuant to Rule 3 of the Supplementary Rules for Class Arbitrations; the issues having been briefed and considered by the Arbitrator.

**With respect to the motion to dismiss, the Arbitrator finds as follows:**

1. The American Arbitration Association ("AAA") had instituted a moratorium on consumer debt collection arbitration subsequent to ALF's filing of its claim herein. In its letter dated December 23, 2009, AAA noted that because the moratorium came into effect after the filing of the claim, it will continue to administer this claim.

2. In a different arbitration action filed with AAA by ALF (the "Altman Arbitration"), the Case Manager, Julie Cappellano, issued a letter dated October 28, 2009, finding that ALF had not previously complied with AAA's policy regarding consumer claims and, therefore, AAA must "decline to administer this claim and any other claims between this business and its consumers."

3. After consultation with supervisors at AAA, this letter was explained to the Arbitrator to be prospective in nature only. At the time that the Cappellano letter was sent, ALF's claim herein was already pending, an arbitrator had been appointed and a preliminary hearing had been held. In any event, the determination in the Cappellano letter is limited to that case and did not serve to automatically terminate all pending administrations.

4. Further, after consultation with supervisors at AAA, its December 23rd letter also applied specifically to cases brought by ALF against consumers, which were initiated prior to the moratorium.

5. ALF is not prejudiced by AAA's moratorium on the administration of consumer debt collection arbitrations, in general, and on consumer debt collection arbitrations brought by ALF, in particular. AAA's moratorium will not bias the Arbitrator in this proceeding. Therefore, the motion to dismiss is denied.

**With respect to the clause construction award, the Arbitrator finds as follows:**

6. Respondent, Eddie Lopez ("Lopez"), individually, and as the representative of a class of similarly situated persons, filed a class counter-demand seeking an injunction barring enforcement and collection of funds advanced by ALF to consumers and for statutory fraud.

7. Rule 3 of the Supplementary Rules for Class Arbitrations requires that the Arbitrator make a partial clause construction determination as to whether a claim filed as a class action can proceed in arbitration.

8. That under AAA's policy on class arbitrations issued July 14, 2005, AAA will administer demands for class arbitrations if (1) the underlying agreement specifies that disputes arising out of the agreement will be resolved by arbitration and (2) the agreement is silent with

respect to class claims.

9. With respect to a partial clause construction determination, the Arbitrator makes the following specific findings:

a. That pursuant to the U.S. Supreme Court decision in Bazzle, the arbitrator must decide whether a claim can proceed in arbitration as a class action.

b. That Rule 3 was enacted in response to the Bazzle decision. Rule three provides that the Arbitrator as a threshold matter, in a reasoned, partial final award whether the applicable arbitration clause permits a claim can proceed as a class action.

c. That under Bazzle, whether a claim can proceed in arbitration as a class action is a matter of contract interpretation and state law.

d. That Arizona is the applicable state law in this case.

e. That the arbitration provision contained in Paragraph 17 of the Consensual Equity Lien and Security Agreement dated November 30, 2007, entered into between ALF and Lopez (the "Contract") states "that any and all disputes that may arise concerning the terms, conditions, interpretation or of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party."

f. That this provision is silent as to whether a claim brought in arbitration can proceed as a class action. This provision is also drafted very broadly.

g. That Arizona case law has found that Arizona's public policy favors

arbitrations.

h. That Arizona law permits class arbitrations where the arbitration clause does not prohibit class actions and is drafted broadly..

10. ALF took the position in state court proceedings that the claims which are the subject of the counter-demand should be arbitrated.

11. The Arbitrator rules that the arbitration clause in the Contract permits this arbitration to proceed on behalf of a class, subject to the provisions of Paragraph 12 below.

12. Pursuant to Rule 3, these proceedings shall be stayed 30 days from the date of this ruling to permit any party to either confirm or to vacate this partial award.

Dated: January 6, 2010

Entered:

*/s/ Joel L. Chupack*

Joel L. Chupack, Arbitrator

American Arbitration Association

*Dispute Resolution Services Worldwide*

Supplementary Rules for Class ARBITRATIONS
Rules Effective October 8, 2003
Fees Effective January 1, 2010

1. Applicability
2. Class Arbitration Roster and Number of Arbitrators
3. Construction of the Arbitration Clause
4. Class Certification
5. Class Determination Award
6. Notice of Class Determination
7. Final Award
8. Settlement, Voluntary Dismissal, or Compromise
9. Confidentiality; Class Arbitration Docket
10. Form and Publication of Awards
11. Administrative Fees and Suspension for Nonpayment
12. Applications to Court and Exclusion of Liablility

1. Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

2. Class Arbitration Roster and Number of Arbitrators

(a) In any arbitration conducted pursuant to these Supplementary Rules, at least one of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators.

(b) If the parties cannot agree upon the number of arbitrators to be appointed, the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed. As used in these Supplementary Rules, the term "arbitrator" includes both one and three arbitrators.

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings

following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class;

(5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

(6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

(b) Class Arbitrations Maintainable

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

(2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

(b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.

(c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

6. Notice of Class Determination

(a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the "Notice of Class Determination"). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.

(b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language:

(1) the nature of the action;

(2) the definition of the class certified;

(3) the class claims, issues, or defenses;

(4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;

(5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;

(6) the binding effect of a class judgment on class members;

(7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and

(8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

7. Final Award

The final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity. The final award shall also specify or describe those to whom the notice provided in Rule 6 was directed, those the arbitrator finds to be members of the class, and those who have elected to opt out of the class.

8. Settlement, Voluntary Dismissal, or Compromise

(a) (1) Any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of an arbitration filed as a class arbitration shall not be effective unless approved by the arbitrator.

(2) The arbitrator must direct that notice be provided in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(3) The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(b) The parties seeking approval of a settlement, voluntary dismissal, or compromise under this Rule must submit to the arbitrator any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(c) The arbitrator may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(d) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires approval under this Rule. Such an objection may be withdrawn only with the approval of the arbitrator.

9. Confidentiality; Class Arbitration Docket

(a) The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.

(b) The AAA shall maintain on its Web site a Class Arbitration Docket of arbitrations filed as class arbitrations. The Class Arbitration Docket will provide certain information about the arbitration to the extent known to the AAA, including:

(1) a copy of the demand for arbitration;

(2) the identities of the parties;

(3) the names and contact information of counsel for each party;

(4) a list of awards made in the arbitration by the arbitrator; and

(5) the date, time and place of any scheduled hearings.

10. Form and Publication of Awards

(a) Any award rendered under these Supplementary Rules shall be in writing, shall be signed by the arbitrator or a majority of the arbitrators, and shall provide reasons for the award.

(b) All awards rendered under these Supplementary Rules shall be publicly available, on a cost basis.

11. Administrative Fees and Suspension for Nonpayment

(a) A preliminary filing fee of $3,350 is payable in full by a party making a demand for treatment of a claim, counterclaim, or additional claim as a class arbitration. The preliminary filing fee shall cover all AAA administrative fees through the rendering of the Clause Construction Award. If the arbitrator determines that the arbitration shall proceed beyond the Clause Construction Award, a supplemental filing fee shall be paid by the requesting party. The supplemental filing fee shall be calculated based on the amount claimed in the class arbitration and in accordance with the fee schedule contained in the AAA's Commercial Arbitration Rules.

(b) Disputes regarding the parties' obligation to pay administrative fees or arbitrator's compensation pursuant to applicable law or the parties' agreement may be determined by the arbitrator. Upon the joint application of the parties, however, an arbitrator other than the arbitrator appointed to decide the merits of the arbitration, shall be appointed by the AAA to render a partial final award solely related to any disputes regarding the parties' obligations to pay administrative fees or arbitrator's compensation.

(c) If an invoice for arbitrator compensation or administrative charges has not been paid in full, the AAA may so inform the parties in order that one of them may advance the required deposit. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(d) If an arbitration conducted pursuant to these Supplementary Rules is suspended for nonpayment, a notice that the case has been suspended shall be published on the AAA's Class Arbitration Docket.

12. Applications to Court and Exclusion of Liability

(a) No judicial proceeding initiated by a party relating to a class arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a class arbitration or potential class arbitration under these Supplementary Rules is a necessary or proper party in or to judicial proceedings relating to the arbitration. It is the policy of the AAA to comply with any order of a court directed to the parties to an arbitration or with respect to the conduct of an arbitration, whether or not the AAA is named as a party to the judicial proceeding in which the order is issued.

(c) Parties to a class arbitration under these Supplementary Rules shall be deemed to have consented that judgment upon each of the awards rendered in the arbitration may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Supplementary Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action seeking damages or injunctive relief for any act or omission in connection with any arbitration under these Supplementary Rules.

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AMERICAN ARBITRATION ASSOCIATION
CONSUMER ARBITRATION

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| AMERICAN LEGAL FUNDING, LLC AND ALFUND LIMITED PREFERRED LLC. | ) | |
| Claimants, Counter Respondents | ) | |
| vs. | ) | CASE NO. 76 148 00391 08 GLO |
| EDDIE LOPEZ, | ) | |
| Respondent, Counter Claimant. | ) | |

## CLAIMANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A CLAUSE CONSTRUCTION AWARD FINDING THAT THE ARBITRATION CLAUSE DOES NOT PERMIT THIS ARBITRATION TO PROCEED AS A CLASS ARBITRATION

COME the Claimants/Counter Respondents, AMERICAN LEGAL FUNDING, LLC and ALFUND LIMITED PREFERRED, LLC (together, "ALF/Alfund"), by their attorneys COLLINS BARGIONE & VUCKOVICH, and for their Motion to Dismiss this Arbitration Proceeding, or in the alternative, for a Clause Construction Award Finding that the Arbitration Clause Does Not Permit this Arbitration to Proceed as a Class Arbitration, state as follows:

1. This Arbitration proceeding is based upon a transaction in which Eddie Lopez ("Lopez") was advanced funds of approximately $35,000 from ALF/Alfund in connection with a personal injury case in which Lopez was the Plaintiff. In that transaction, Lopez and ALF/Alfund entered into a Consensual Equity Lien and Security Agreement (the "Agreement") which contains an arbitration clause which states that "any and all disputes that may arise concerning the terms, conditions, interpretation or enforcement" of the Agreement be determined through arbitration pursuant to the Rules and Methods outlined in the American Arbitration

Association (the "AAA"). A copy of the Agreement is attached hereto as Exhibit 1.

2. After consultation with legal counsel who approved the transaction and accepting the advance of funds from ALF/Alfund, Lopez settled his personal injury matter but has refused to provide ALF/Alfund with information concerning the settlement. Lopez has further refused to repay ALF/Alfund in accordance with the terms of the Agreement.

3. As a result of Lopez's refusal to provide information concerning the settlement and his refusal to repay ALF/Alfund as required by the Agreement, ALF/Alfund submitted a demand for arbitration to the AAA on December 12, 2008. See Exhibit 2.

4. On January 9, 2009, after the filing of the demand for arbitration with the AAA, Lopez filed an action for Declaratory Judgment in the Circuit Court of Cook County, Illinois arguing that the Agreement is illegal and unenforceable. Lopez also filed a motion seeking to stay the arbitration pending the adjudication of the declaratory action.

5. On June 22, 2009, Lopez filed a Counter Claim in this Arbitration proceeding on behalf of himself individually and as the representative of an alleged class of similarly-situated persons (the "Class Action Counter Claim").

6. Subsequently, ALF/Alfund received a letter from the AAA dated October 28, 2009 relating to a Demand for Arbitration of a dispute arising out of a similar contract between ALF/Alfund and Alexandria Altman. See Exhibit 3. The October 28, 2009 letter states that the AAA declines to administer the Altman claim and "any other claims between this business and its consumers." Further, the October 28, 2009 letter states that "based on recent public discourse and evaluation of our case experience, the American Arbitration Association has determined not to accept new consumer debt collection arbitration filings."

7. In light of the AAA's newly stated policy not to administer claims between ALF/Alfund and its consumers, as expressed in its October 28, 2009 letter to ALF/Alfund, ALF/Alfund respectfully requests that this Arbitration proceeding be dismissed in its entirety, including the dismissal of Lopez's Counter Claim Class Action Complaint. The continued administration of the claims brought in this Arbitration proceeding is contrary to the AAA's newly stated policy of declining to administer claims between ALF/Alfund and its consumers, and also its general policy not to accept new consumer debt collection arbitration proceedings. ALF and Alfund should not be required to litigate claims before a tribunal which has a stated policy against such claims and against ALF and Alfund. The parties may litigate their respective claims in court which is permitted by the contractual documents (see Exhibit 1).

CLAUSE CONSTRUCTION AWARD

8. In the alternative, if the Arbitrator determines that the AAA will administer this dispute between Lopez and ALF/Alfund notwithstanding the October 28, 2009 letter, then ALF/Alfund respectfully requests that the Arbitrator enter a Partial Final Clause Construction Award pursuant to the American Arbitration Association's Supplementary Rules for Class Arbitrations (the "Supplementary Rules"), Rule 3, finding that the arbitration clause contained in the Agreement does not permit this arbitration to proceed as a class arbitration.

9. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the United States Supreme Court held that where, as here, an arbitration provision is silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted.

10. In response to the *Bazzle* decision, the AAA issued its Supplementary Rules to

govern proceedings brought as class arbitrations on October 8, 2003. See *AAA Policy on Class Arbitrations*. Pursuant to the Supplementary Rules, the AAA will administer a demand for class arbitration if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the AAA's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims. *Id.*

11. Rule 3 of the Supplementary Rules for Class Arbitrations provides that "Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class. See *Supplementary Rules for Class Arbitrations, Rule 3.* As *Green Tree* teaches, the relevant question here is "what kind of arbitration proceeding the parties agreed to." *Id.* at 452.

12. Issues of contract interpretation are governed by state law. See *Green Tree*, 539 U.S. at 451. Section 16 of the Agreement provides that "Both Parties agree that this Agreement shall be construed and interpreted in accordance with the laws of Arizona." See Exhibit 1, Agreement, ¶ 16.

13. In this case, the arbitration clause provides that "[Lopez] agrees that any and all disputes that may arise concerning the terms, conditions, interpretation or enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party." See Exhibit 1, Agreement, ¶ 17. The relevant question, therefore, is whether under Arizona contract law the parties agreed to class-wide arbitration by the Agreement. See *Green Tree*, 539 U.S. at 452.

14. ALF/Alfund's research did not disclose a single appellate decision in Arizona

which has considered the issue of whether class arbitration is permitted under Arizona law where the arbitration agreement is silent on the issue.

15. Under Arizona principles of contract interpretation, "[a] contract should be read in light of the parties' intentions as reflected by their language and in view of all the circumstances." *Smith v. Melson*, 135 Ariz. 119, 121 (Ariz. 1983). The primary and ultimate purpose is to ascertain the intent of the parties and to enforce the contract according to that intent. *Taylor v. State Farm Mutual Automobile Insurance Company*, 175 Ariz. 148, 152 (Ariz. 1993).

16. In this case, the issue then is whether the parties intended to allow class arbitration by the Agreement. The arbitration clause is silent on the issue, and there is no indication that the parties intended to permit class arbitration in this case.

17. Federal courts have considered similar issues in the context of the Federal Arbitration Act (the "FAA"). In *Champ v. Siegel Trading Company, Inc.*, 55 F.3d 269 (7th Cir. 1995), the court held that under the FAA class arbitration is forbidden where the parties' arbitration agreement is silent on the matter. See *Champ*, 55 F.3d at 275. In so holding, the court reasoned that:

> The Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have held that absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements "in accordance with the terms thereof" as set forth in section 4 of the FAA bars district courts from applying Rule 42(a) to require consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims.

*Id.* at 274 (citing *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *American Centennial Ins. V. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln*

*Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. V. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Wayerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984)).

The *Champ* Court found that there is no "meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Champ*, 55 F.3d at 275.

18. Similarly, in *Green Tree*, then Chief Justice Rhenquist, with whom Justice O'Connor and Justice Kennedy joined, opined that the FAA requires that private agreements to arbitrate must be enforced in accordance with their terms, and that permitting a class arbitration to proceed where the agreement was silent on the issue, and where, as here, the parties had agreed to submit to arbitration all "disputes...arising from...*this* contract" and further agreed that the arbitrator was to be selected by the parties, would impose a regime that was contrary to the express agreement of the parties. *Green Tree*, 539 U.S. at 458-459.

19. The federal cases are persuasive on the issue of whether the arbitration clause in this case permits class arbitration. In a Partial Final Construction Award entered in *In the Matter of Arbitration between Leslie Hightower, MD and Medical Advantage Company v. United Health Care of Louisiana, Inc.*, Case No. 11 193 02565 06, May 6, 2009, the Honorable George Bundy Smith, Esq., Arbitrator, found the 7th Circuit's reasoning in *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274-75 (1995), to be persuasive and held that class arbitration was not permitted where the arbitration clause was silent on the issue. See Exhibit 4, Partial Final Clause Construction Award, p. 6.

20. In this case, the parties agreed to arbitrate "any and all disputes that may arise concerning the terms, conditions, interpretation or enforcement of *this agreement*...at the election

of *either party*." See Exhibit 1, Agreement, ¶ 17. Like the arbitration provisions at issue in *Champ v. Siegel Trading Co.* and *In the Matter of the Arbitration between Leslie Hightower v. United Health Care of Louisiana, Inc.*, the Arbitration clause at issue in this case is silent on the issue of whether class arbitration is permitted. There is no indication whatsoever that the parties intended to permit class arbitration. For the Arbitrator to read such a term into the parties' agreement in this case would "disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration" than what they agreed to. See *Champ*, 55 F.2d at 275.

WHEREFORE, ALF/Alfund respectfully requests that an Order be entered dismissing this Arbitration proceeding in its entirety, or in the alternative, for a Final Partial Clause Construction Award finding that the arbitration clause does not permit this arbitration to proceed on behalf of a class.

Respectfully submitted:

BY: /s/ Adrian Vuckovich
ATTORNEY FOR ALFUND AND
AMERICAN LEGAL FUNDING

ADRIAN VUCKOVICH
COLLINS, BARGIONE & VUCKOVICH
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SUITE 300
CHICAGO, ILLINOIS 60602
312-372-7813

# AMERICAN ARBITRATION ASSOCIATION
# CONSUMER ARBITRATION

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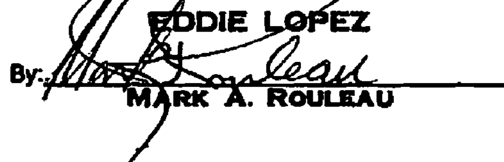
| **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,**<br>Claimant, Counter Respondent<br>vs.<br>**EDDIE LOPEZ,**<br>Respondent Counter Claimant. | CASE NO. 76 148 00391 08 GLO |

**STIPULATION**

Respondent Counter Claimant **EDDIE LOPEZ** and Claimant, Counter Respondent **AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,** by their respective attorneys hereby make the following stipulations and represent that they are authorized to bind their clients to the same:

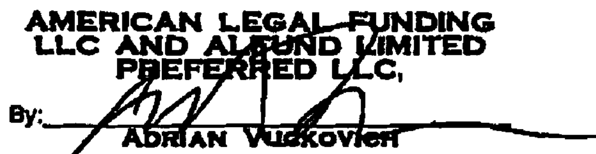
1. The parties stipulate to having this entire arbitration proceeding by a single arbitrator, including the disputed counterclaim seeking class action certification and remedies; and

2. The parties stipulate that Mr. Joel L. Chupack has advised them that although he is currently an American Arbitration Association Arbitrator he is not a member of its Class Action Arbitration Panel of Arbitrators. Having been so informed the parties stipulate to having this arbitration proceeding including the class action counter claim heard by Joel L. Chupack.



EDDIE LOPEZ

By: ______________________
MARK A. ROULEAU



AMERICAN LEGAL FUNDING LLC AND ALFUND LIMITED PREFERRED LLC,

By: ______________________
ADRIAN VUCKOVICH

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
JOEL L. CHUPACK, ARBITRATOR

| | | |
|---|---|---|
| AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED,<br><br>Claimants,<br><br>and<br><br>EDDIE LOPEZ, individually and as the representative of a class of similarly situated persons,<br><br>Respondent. | ) | No. 51 516 01586 08 |

**SCHEDULING ORDER**

A preliminary hearing was held via telephone conference on October 20, 2009, which was attended by Adrian Vukovich, attorney for Claimants ("ALF"), Steve Morton and Mark Rouleau, attorneys for Respondent ("Lopez"), Mari Corbett ("Case Manager") and Joel L. Chupack ("Arbitrator"). At said hearing, the parties agreed that this matter shall be heard by Joel L. Chupack, as the sole arbitrator and the following briefing schedules were entered:

1. ALF shall have to October 27, 2009, in which to file their Response to Lopez' Motion to Bar Filing of Answering Statement;

2. Lopez shall have to November 4, 2009, in which to file his Reply supporting his motion;

3. Arbitrator shall have to November 18, 2009, in which to render his ruling on said motion;

4. ALF shall have to November 13, 2009, in which to file their Motion Objecting to Class Certification;

5. Lopez shall have to November 30, 2009, in which to file his Response to said motion;

6. A subsequent preliminary hearing for status is scheduled for November 20, 2009 at 11:00 a.m. CST.

7. This order shall continue in effect unless and until amended by subsequent order of the Arbitrator.

Entered:

***/s/ Joel L. Chupack***

Joel L. Chupack, Arbitrator

# American Arbitration Association

## Central Case Management Center

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Scanning Cover Sheet

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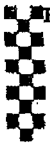
**Case Number: 51-516-01586-08**

**Case Caption:**

**and ALFund Limited Preferred**
**American Legal Funding**
**and**
**- Chicago, Illinois**
**and**
**Eddie Lopez**

**Case Manager: Kirk Windahl**

***512008001586***





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OF COUNSEL
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TO: Ms. Geneva O'Day 559-490-1919

FROM: ADRIAN VUCKOVICH

DATE: November 24, 2009 TIME:________

NO. OF PAGES________________

COMMENTS______________________________

We are transmitting from a *FaxCentre F116/F116L*. If you do not receive all pages, please call: Judy at 312/372-7813.

Thank you.

Received Time Nov. 24. 1:13PM

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November 24, 2009

BY FACSIMILE & EMAIL
559-490-1919
Genevaoday@adr.org
Ms. Geneva O'Day
American Arbitration Association

Re: American Legal Funding v. Lopez
CASE NO. 76 148 00391 08 GLO

Dear Mr. O'Day:

We represent ALF and American Legal Funding, LLC. in the above matter.

I am writing to you regarding AAA's recent decisions in which AAA has declined to hear disputes between American Legal Funding and its customers. AAA declined to hear a case involving Alexandria Altma in Case No. 30 513 E 0084209 and in another matter involving Kolleen Paredes, Case No. 73148 E 0323809 GLO.

When American Legal Funding sought an explanation for AAA's decision to decline these matters, a reason which was given was that AAA established a new policy in which it has determined not to accept new disputes involving consumer debt collection matters.

Apparently, AAA has a concern that it must establish acceptable due process protocols for such cases and it has placed a moratorium on handling such matters. (See Exhibit "1".)

In a recent letter of October 28th, 2009, Julie Cappellano also expressed a concern about the arbitration agreement which AAA uses in its business. (See Exhibit "2".)

Given that, we respectfully request that AAA decline to hear the Lopez matter and all other pending cases in which American Legal Funding/ALF is a party and which are currently before the American Arbitration Association.

It appears that AAA has due process concerns about the adequacy of its procedures and the American Legal Funding Contract.

COLLINS BARGIONE & VUCKOVICH
COUNSELLORS AT LAW

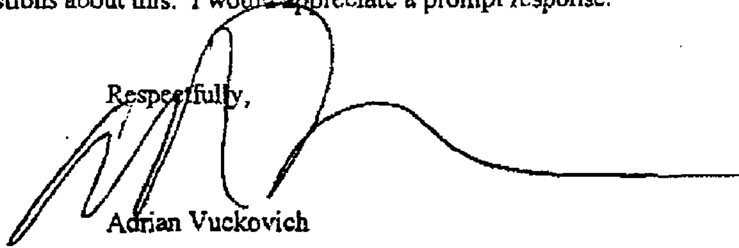
Ms. O'Day
November 24, 2009
Page -2-

Given that, it only makes sense that AAA decline to hear any matter in which concern there is a due process issue. In the Lopez matter, ALF initiated the arbitration proceedings pursuant to its contract, and the Respondent has now filed a Counterclaim on behalf of himself and in which he seeks to have a class action heard before AAA concerning the fairness and adequacy of the American Legal Funding contract and other consumer based claims. In substance, the Counterclaim, which is currently a proposed class action, would amount to a large scale consumer debt based action which would appear to involve precisely the same due process concerns which AAA has expressed.

Given that, it would only make sense for AAA to decline to hear the entire matter and in truth, all other matters involving my client until such time as AAA has established procedures and protocols which it considers to be fair, reasonable and which comport with due process. We do not believe it is in the best interest of any litigant to litigate in a forum in which there are due process concerns.

Please contact me with questions about this. I would appreciate a prompt response.

Respectfully,



Adrian Vuckovich

AV/js

Received Time Nov. 24. 1:13PM

American Arbitration Association
*Dispute Resolution Services Worldwide*

Western Case Management Center

→ **ATTN: Adrian Vuckovich** ←

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704
telephone: 877-528-0880 facsimile: 559-490-1919
internet: http://www.adr.org/

October 21, 2009

**VIA FACSIMILE AND REGULAR MAIL**

Jesse Keiser
American Legal Funding, LLC/ALFund AZ1, LLC
17700 N. Pacesetter Way, Suite 104
Scottsdale, AZ 85255

file 10/26/09

Nicholas Cimmarrusti, Esq.
Law Offices of Nicholas Cimmarrusti
P.O. Box 22894
San Diego, CA 92192

Re: 73 148 E 03238 09 GLO
American Legal Funding, LLC/ALFund AZ1, LLC
and
Kolleen Paredes

Dear Parties:

This will confirm a telephone conversation with Mr. Cimmarrusti on October 20, 2009, advising the Association he did not receive our Initial Letter dated September 3, 2009, or our Letter dated September 22, 2009. These items were sent via electronic mail only.

This will also confirm a conversation with Mr. Keiser on October 14, 2009, wherein Mr. Keiser advised he did not receive our Initial Letter dated September 3, 2009, or our Letter dated September 22, 2009. These items were sent via electronic mail only. Mr. Keiser was sent all information on October 14, 2009 via electronic mail. Mr. Keiser has submitted his list for selection of arbitrator and his conflict checklist.

Mr. Cimmarrusti advised he is out of town in a trial and will be returning November 9, 2009. At this time the Association is granting Mr. Cimmarrusti an extension until November 9, 2009 to submit his answer to the demand, any jurisdiction or arbitrability issues and his selection of arbitrators.

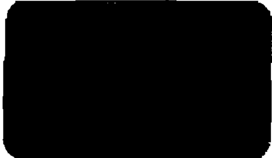
There will be no further extensions on this deadline. We apologize for the delay our electronic transmissions have caused. The Association will be sending this letter out via facsimile to both parties. In addition we will be sending via regular mail our original letters noted above with all attachments to Mr. Cimmarrusti.

Should the parties have any questions or concerns please call me directly. Thank you.

Sincerely,

/s/
Geneva L. O'Day
Manager of ADR Services
559 490 1882 direct dial 212 484 4177 facsimile
GenevaOday@adr.org

Enclosure: Letters dated 9/3 and 9/22 with attachments (via regular mail only)



Received Time Nov. 24. 1:13PM

Exhibit "H" - Motion to Confirm Clause Construction Award

American Arbitration Association
*Dispute Resolution Services Worldwide*

Southeast Case Management Center

2200 Century Parkway, Suite 300, Atlanta, GA 30345
telephone: 404-325-0101 facsimile: 404-325-8034
internet: http://www.adr.org/

October 28, 2009

VIA FACSIMILE AND CERTIFIED MAIL

Jesse Keiser
American Legal Funding, LLC/ALFund AZ1, LLC
17700 N. Pacesetter Way, Suite 104
Scottsdale, AZ 85255

VIA FACSIMILE ONLY

Stanley A. Davis
Law Offices of Stanley A. Davis
501 Union Street
Suite 401
Nashville, TN 37219

Re: 30 513 E 00842 09
American Legal Funding, LLC/ALFund AZ1, LLC/
Alfund Limited Preferred , LLC
and
Alexandria Altman

Dear Parties:

The claimant has filed with us a Demand for Arbitration of a dispute arising out of a contract between the above parties. We note that the arbitration clause provides for arbitration by the American Arbitration Association. The American Arbitration Association applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The *Supplementary Procedures for Consumer-Related Disputes* ("Consumer Rules") of the *Commercial Arbitration Rules* and the *Consumer Due Process Protocol* may be found on our web site at www.adr.org. You may also obtain a printed copy from the undersigned.

In order to determine if the arbitration agreement substantially and materially complies with the due process standards of the Consumer Due Process Protocol, the AAA reviews the parties' arbitration clause only, and not the entire contract. The AAA's review of the arbitration clause is only an administrative review to determine whether the clause complies with the AAA's minimum due process standards in consumer arbitrations. However, the AAA's review is not an opinion on whether the arbitration agreement, the contract, or any part of the contract is legally enforceable.

As the business has previously not complied with our request to adhere to our policy regarding consumer claims, we must decline to administer this claim and any other claims between this business and its consumers. We request that the business remove the AAA name from its arbitration clause so that there is no confusion to the public regarding our decision.

In addition, based on recent public discourse and evaluation of our case experience, the American Arbitration Association has determined not to accept new consumer debt collection arbitration filings. This policy will be in effect until such time as the AAA determines that adequate and broadly acceptable due process protocols specific to these cases are in place. It is our intention to engage in earnest dialogue with a diversity of interest groups on what constitutes a proper protocol framework for these matters. For more detailed information about the AAA's position on debt collection arbitration please see http://www.adr.org/si.asp?id=5770.

Accordingly, we are returning the filing materials to the claimant, along with check # 2864 in the amount of $712.50 and check # 2703 in the amount of $237.50.

Sincerely,

/s/

Julie Cappellano
Case Manager
800 218 5524
CappellanoJ@adr.org

Encl: Checks enclosed to Claimant and sent via certified mail

One Center Plaza, Third Floor, Boston, MA 02108
telephone: 617-451-6600 facsimile: 617-451-0763
internet: http://www.adr.org/

...9255

...American Legal Funding's Consumer Arbitration Clause

Dear Sir or Madam,

It is the policy of the American Arbitration Association ("AAA") to administer all consumer disputes in accordance with the *Supplementary Procedures for Consumer-Related Disputes* of the Commercial Arbitration Rules and the *Consumer Due Process Protocol*. These documents may be found on our web site at www.adr.org.

In order to determine if the arbitration agreement substantially and materially complies with the due process standards of the *Consumer Due Process Protocol*, **the AAA reviews the parties' arbitration clause only**, and not the entire contract. The AAA's review of the arbitration clause is only an administrative review to determine whether the clause complies with the AAA's minimum due process standards in consumer arbitrations. However, the AAA's review is not an opinion on whether the arbitration agreement, the contract, or any part of the contract is legally enforceable.

Based upon the administrative review of the American Legal Funding arbitration agreement, the AAA has determined that American Legal Funding's clause substantially and/or materially deviates from the due process standards of the protocol. Specifically, the clause:

> Designates a potentially inconvenient hearing locale (Principle 7: Reasonably Convenient Location)

In order for the AAA to accept any additional consumer-related disputes involving American Legal Funding, the Association requests written confirmation by April 9, 2009, of your willingness to have all present and future consumer-related disputes involving all of American Legal Funding's consumer arbitration agreements that name the AAA heard in accordance with the *Supplementary Procedures for Consumer-Related Disputes* and the *Consumer Due Process Protocol*. In addition, we request that you submit to us for review by May 8, 2009, an updated clause that substantially and materially complies with the Protocol.

Upon receipt, we will provide your letter to our Case Management Centers so that they can proceed with the administration on these cases, no matter what clause they are filed under.

...re contacting you about the use of this clause generally for consumer disputes ...y one specific claim that may have been filed with us, although we may have ...ware of your use of an ADR clause in consumer contracts as the result of a case

...happy to answer any questions regarding the AAA and our position on administering ...umer disputes. However, I ask that you visit the "Consumer" focus section of our web site ...read the Consumer Supplement and Protocol prior to contacting me.

...ank you for your consideration.
...ery truly yours,

Gerry Strathmann
Vice President
Case Management Department
Direct Line: 617-695-6064
E-mail: StrathmannG@adr.org

Received Time Nov.24. 1:13PM

...n Arbitration Association
...on Services Worldwide

One Center Plaza, Third Floor, Boston, MA 02108
telephone: 617-451-6600 facsimile: 617-451-0763
internet: http://www.adr.org/

...2009

...am Downey
...erican Legal Funding
...700 N. Pacesetter Way
Scottsdale, AZ 85255

Re: American Legal Funding's Consumer Arbitration Clause

Dear Mr. Downey,

The American Arbitration Association (AAA) is in receipt of your March 31, 2009, letter.

While we appreciate your explanation of how American Legal Funding ("ALF") contracts and resulting disputes may differ from a typical consumer-to-business relationship, the AAA's position remains that the *Supplementary Procedures for Consumer-Related Disputes* of the Commercial Arbitration Rules and the *Consumer Due Process Protocol* apply to disputes arising out of these contracts. Many of the points you make in your letter have no bearing on the AAA's determination as to whether the consumer rules and protocol apply. We base that determination on whether the clauses exist in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must also be for personal or household use. Based on our administrative review, all these conditions are met.

In your letter you state that ALF conducts a conference call with its customers to highlight the terms and ensure that the customer understands the documents. While this may support an argument that the customer is aware of the clause, it does not indicate that the terms are negotiable.

With regard to ALF's updated arbitration provision, it still contains language that requires hearings to take place in Phoenix, Arizona. This language is clearly intended to benefit the business without regard for the convenience of the consumer, and therefore imposes an inconvenient locale on any of ALF's customers outside of the Phoenix area. While in your letter you indicate that ALF would cover the cost for attendance by videoconference should a party find Phoenix to be inconvenient, that offer does not appear in the arbitration clause and attendance by videoconference is not necessarily equivalent to appearing in person. The same videoconference arrangements could be made if the locale were convenient to the consumer yet inconvenient to ALF, with ALF attending by video.

While ALF's arbitration clause may be legally enforceable, as a private provider of dispute resolution services the AAA can determine the conditions under which we are willing to

**Mark Rouleau**

**From:** "AAA Kirk Windahl" <KirkWindahl@adr.org>
**To:** <email@cb-law.com>; <rouleau-law@comcast.net>
**Cc:** <sjm@sjmlaw.com>; <jchupack@h-and-k.com>
**Sent:** Wednesday, December 09, 2009 4:47 PM
**Attach:** Vuckovich Corr 11 24 09.pdf
**Subject:** AAA Case # 51 516 1586 08 ALF/Lopez

Gentlemen:

Please see attached enclosure (Vuckovich's letter dated November 24, 2009) to our letter dated December 9, 2009, just sent.

I apologize for the inconvenience, I forgot to attach it.

Best Regards,

Mari

American Arbitration Association
*Dispute Resolution Services Worldwide*

**Kirk Windahl - Manager of ADR Services**
1750 Two Galleria Tower
13455 Noel Road
Dallas, TX 75240
Tel: 866 285 4801
Fax: 972 490 9008
E-mail: KirkWindahl@adr.org
www.adr.org

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

| | | |
|---|---|---|
| **EDDIE LOPEZ and SANDY LOPEZ,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | **No. 09 CH 1008** |
| | ) | |
| **AMERICAN LEGAL FUNDING LLC and ALFUND LIMITED PREFERRED LLC,** | ) | |
| | ) | |
| **Defendants.** | ) | |

## ORDER

Before the Court are plaintiffs' Motions (*i*) to Confirm the Arbitrator's Clause Construction Award; (*ii*) for Court To Exercise Its Gate-Keeping Function (which seeks a determination of whether the arbitration clause at issue is unconscionable if not construed to allow class arbitration); and (*iii*) to Confirm [AAA] Venue Determination.

### Background

Eddie and Sandy Lopez were plaintiffs in a personal injury lawsuit, *Lopez v. Clean Harbors Environmental Services, Inc., et al.*, in the U.S. District Court for the Northern District of Illinois (the "*Clean Harbors* suit"). In November 2007, during the course of that litigation, plaintiffs and defendant American Legal Funding LLC ("ALF") entered into a contract (the "Lien Agreement"), described by ALF as a "litigation funding agreement," whereby ALF "advanced" approximately $35,000 to plaintiffs ("to adequately pay for the necessities of life," the Agreement stated) as an "investment, and not a loan." In return, plaintiffs gave defendants an interest in and lien on the proceeds of the *Clean Harbors* suit. The interest, and the lien, ranged from $58,800, if the *Clean Harbors* suit led to a recovery and payment was made to defendants in April 2008, to $219,765 if the *Clean Harbors* suit led to a recovery and payment was made to defendants after June 2010. Had the transaction been a loan, the lowest interest rate represented by the foregoing would have been well over 100% *per annum.*

The Lien Agreement contained an arbitration clause that provides as follows:

> "17. TRANSFEROR [Lopez] agrees that any and all disputes that may arise concerning the terms, conditions, interpretation or enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party."

According to defendants, the *Clean Harbors* suit settled, but plaintiffs refused to pay ALF as required by the Lien Agreement. On December 12, 2008, ALF submitted a demand for arbitration to the American Arbitration Association ("AAA"). Subsequently, plaintiffs filed this action, asserting that the Lien Agreement is illegal, unenforceable, and contrary to public policy. Plaintiffs also filed a motion to stay the AAA arbitration proceedings pending resolution of their claim. For their part, defendants filed a motion to dismiss for lack of venue.

In August 2009, this Court denied plaintiffs' motion to stay the arbitration, transferred defendants' venue motion to the AAA for a hearing, and ordered the matter to proceed in arbitration. Plaintiffs then filed a "class action counterclaim" in the arbitration proceeding, again asserting that the Lien Agreement is illegal and unenforceable. Defendants sought dismissal of the counterclaim, or, alternatively, a "Clause Construction Award" finding that the Lien Agreement's arbitration provision does not allow class arbitration. *See* Rule 3 of the AAA's Supplementary Rules for Class Arbitrations, which provides, in pertinent part, that in such situations "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')."

In January 2010, the arbitrator, Joel L. Chupack, denied defendants' motion to dismiss and entered a Clause Construction Award determining "that the arbitration clause in the Contract permits this arbitration to proceed on behalf of a class." Arbitrator Chupack then stayed further proceedings, as directed by Rule 3 of the AAA's Supplementary Rules for Class Arbitrations: "The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award."

At that point, defendants opened yet another front, filing a Petition to Vacate Arbitration Award in the Superior Court for Maricopa County, Arizona. Plaintiffs, however, filed in this Court a Motion to Enter Judgment on Clause Construction Award in this Court. Countering defendants' Arizona *démarche* and also addressing a venue dispute within the arbitration itself (*see* page 5 *infra*), plaintiffs also filed in this Court a "Motion to Confirm American Arbitration Association Venue Determination," pointing out that the AAA had "fixed the venue for the arbitration in Chicago" and asserting that defendants had "stipulated" to that effect.[1]

That is the situation now presented, complicated (as will become clear) by intervening United States Supreme Court decisions which have drastically changed the relevant landscape.

[1]*See Motion to Confirm American Arbitration Association Venue Determination,* Feb. 16, 2010, ¶ 8: "The defendant has stipulated to the arbitration proceeding before Joel Chupack as the sole arbitrator. Attorney Chupack's office is located in Chicago." As to this lawsuit, the Arizona Court decided to defer to this Court's proceeding.

**Discussion**

Shortly after plaintiffs' Motion to Enter Judgment on Clause Construction Award was filed, the United States Supreme Court decided *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, ___ U.S. ___, 176 L.Ed.2d 605, 130 S.Ct. 1758 (2010). Dealing with an AAA class arbitration determination all but indistinguishable from Arbitrator Chupack's determination here, *Stolt-Nielsen* held that an arbitrator could not permit class arbitration where the underlying arbitration clause did not itself expressly do so.

This Court expressed the view that in light of *Stolt-Nielsen,* it did not appear that this Court could (as plaintiffs sought) confirm the arbitrator's partial clause construction award. In *Stolt-Nielsen* as here, the arbitration agreement itself was silent on the question of class arbitration. The *Stolt-Nielsen* majority held that (*i*) "a party may not be compelled under the FAA [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so," and (*ii*) "Here, where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Stolt-Nielsen, supra,* 130 S.Ct. at 1775, 1776. It should be emphasized that *Stolt-Nielsen* arrived at that conclusion even though, in that case, the parties themselves had expressly chosen to submit the class arbitration issue to the AAA.

Plaintiffs strenuously argued, however, that *Stolt-Nielsen* does not control this case. As plaintiffs see it, at the time of the arbitration agreement in this case the controlling law was not *Stolt-Nielsen,* but rather *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452-53 (2003), which (as plaintiffs read it) held that when an arbitration provision is silent as to class arbitration, the arbitrator – not the court – should determine whether class arbitration is permitted. It is true that *Stolt-Nielsen* did not explicitly overrule *Bazzle*. It is also true that *Bazzle* post-dated "virtually every one of the arbitration clauses that were the subject of" *Stolt-Nielsen* (*Stolt-Nielsen, supra,* 130 S.Ct at 1768 n.4). But as *Stolt-Nielsen* observed at some length, *Bazzle* was a mere plurality decision; and given the express rationale of *Stolt-Nielsen,* summarized *supra,* the only way to apply *Bazzle* here in the manner plaintiffs wish would be to ignore *Stolt-Neilsen* outright. *Stolt-Nielsen* did not, as plaintiffs argue, create a "construct" only applicable to later cases. It expressed a binding interpretation of the Federal Arbitration Act which, like it or not, must be applied regardless of when the arbitration provision at issue was adopted.

It follows that the "silent" arbitration clause here can no more support class arbitration than could the "silent" clause in *Stolt-Nielsen.* At this point, then, a different question arises: Construed to (effectively) bar class-wide arbitration, is the arbitration clause in the Lien Agreement unconscionable? Both Arizona and Illinois have addressed unconscionability in similar contexts. *See, e.g., Kinkel v. Cingular Wireless LLC,* 223 Ill.2d 1, 28 (2006) (quoting with approval *Maxwell v. Fidelity Financial Services,* 184 Ariz. 82, 89, 907 P.2d 51 (1995)); *Cooper v. QC Financial Services, Inc.*, 503 F.Supp.2d 1266, 1290 (D. Ariz. 2006).

Again, however, the United States Supreme Court weighed in. Shortly after *Stolt-Nielsen,* and before the parties here had fully addressed the unconscionability question, the United States Supreme Court decided *Rent-A-Center West, Inc. v. Jackson,* ___ U.S. ___, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). *Rent-A-Center* held that at least under the circumstances presented in that case (in which the arbitration clause expressly gave the arbitrator "exclusive authority" to "resolve any dispute" relating to the agreement, including "any claim that all or any part of this Agreement is void or voidable"), the issue of unconscionability was for the arbitrator – not the courts – to decide.

One might conclude that *Rent-A-Center* would apply to the similarly broad language of the arbitration clause at issue in this case, meaning that Arbitrator Chupack, rather than this Court, should address any unconscionability question. But before the parties had fully addressed that issue, the United States Supreme Court rendered yet a third crucial decision. In *AT&T Mobility LLC v. Concepcion,* ___ U.S. ___, 179 L.Ed.2d 742, 131 S.Ct. 1740 (2011), the Court effectively held that the Federal Arbitration Act pre-empts, and thus renders unenforceable, *any* state-law rule which would hold barring class-wide arbitration unconscionable.

The end result is that this Court cannot, consistent with *Stolt-Nielsen, Rent-A-Center,* and *Concepcion,* (*i*) confirm or enforce the clause construction award in this case, or (*ii*) entertain an argument that the Lien Agreement arbitration provision, thus stripped of any class potential, becomes unconscionable under Illinois (or any other State) law.

Under the circumstances of this case, that is not altogether an untoward result. This case is a far cry from Ms. Kinkel's $150 quarrel with Cingular. Here, plaintiffs directly received roughly $35,000 – itself a sum larger than the *ad damnum* in a good many lawsuits – and the overall stakes under the Lien Agreement may be many times that large. It would seem that plaintiffs have an adequate incentive to pursue this dispute whether or not it is treated as a class action (in litigation or in arbitration). In normal litigation, independent claims sufficiently large to be worth pursuing as individual suits are not ordinarily fodder for class treatment. *See, e.g., Wood River Development Corp. v. Germania Federal Savings & Loan Ass'n,* 198 Ill.App.3d 445, 452 (5th Dist. 1990).[2]

Having thus determined that this Court cannot confirm the clause construction award, nor address the unconscionability issue, it remains to determine what Order the Court should enter. The Court does not consider it appropriate to reverse or set aside the

[2] Also, it is not self-evident that plaintiffs' arguments on the merits are readily amenable to class treatment. If plaintiffs' position is that *any* agreement of the same type as the Lien Agreement is illegal or voidable *as a matter of law*, then individualizing factors may not be significant – but in that event, even a non-class-based ruling of that sort may get plaintiffs the broad vindication they seek, because final arbitration awards are usually given *res judicata* and/or collateral estoppel effect. See *Czarnik v. Wendover Financial Services*, 374 Ill.App.3d 113, 117 (1st Dist. 2007). On the other hand, if plaintiffs' position is more specific to the particular circumstances of the Lien Agreement in this case, class treatment may present practical difficulties. The point here is not to suggest that Arbitrator Chupack was mistaken in his Clause Construction Award. This Court takes no position on that question. Rather, the point is simply that declining to read the Lien Agreement as authorizing class-wide arbitration is not so obviously harmful to plaintiffs' position as to lead one to suspect unconscionability.

clause construction award, no proceeding seeking that relief having been initiated. The Court must also decline to "confirm [AAA] Venue Determination," as requested by plaintiffs, because the parties' *stipulation* to proceed before Arbitrator Chupack, located in Chicago (*Motion to Enter Judgment on Clause Construction Award,* Ex. F) – a resolution of a venue dispute within the arbitration proceeding, *see Motion to Confirm [AAA] Venue Determination,* ¶¶ 8, 15-19, and Exs. A, C, D, E – mooted that question. And the Court cannot, as plaintiffs request, "exercise its gate-keeping function" regarding unconscionability, because after *Rent-A-Center* and *Concepcion* the Court simply has no such function in this case.

Since those procedural issues are foreclosed for the reasons stated, and the underlying substance of this dispute will be determined in the arbitral forum, it might seem appropriate to dismiss this action. But this Court believes that the better course is to stay this proceeding pending the outcome of the arbitration, for three reasons. First, this Court's Order of August 28, 2009 directed the parties to pursue their arbitration. This Court should be available, if need be, with regard to any further issues which require judicial intervention. Second, formally staying this proceeding, in favor of arbitration, will provide defendants with a basis for appeal pursuant to Sup. Ct. Rule 307, if they wish to do so (*see Salsitz v. Kreiss,* 198 Ill.2d 1, 11-12 (2001)), and will better focus the issues on appeal than an order simply dismissing this suit. Third, if this case is simply dismissed, defendants may attempt to resuscitate their Arizona proceeding (*see* page 2 *supra*), which under the circumstances would be both improper and counterproductive.

Accordingly, and for the reasons stated, **IT IS HEREBY ORDERED** as follows:

1. Plaintiffs' Motion for Court to Exercise its Gate-Keeping Function is DENIED.

2. Plaintiffs' Motion to Confirm American Arbitration Association Venue Determination is DENIED.

3. Plaintiffs' Motion to Enter Judgment on Clause Construction Award is DENIED.

4. This case is STAYED pending completion of the parties' arbitration proceeding. The parties shall report to the Court in writing within ten days of the termination of that proceeding, by award, judgment, settlement, or otherwise.

5. The Court Coordinator will notify all counsel of the entry of this Order.

5299Y

5001

9203

**DATED:** February 22, 2012

ENTERED:

ENTERED
JUDGE PETER FLYNN-1784
FEB 22 2012
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Circuit Judge

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (1st) 120763-U

FIRST DIVISION
March 25, 2013

Nos. 1-12-0763, 1-12-0878 and 1-12-2393 (Consolidated)

**NOTICE**: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| EDDIE LOPEZ and SANDY LOPEZ, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiffs-Appellees, Appellants, and | ) | Cook County. |
| Cross-Appellees, | ) | |
| | ) | |
| v. | ) | No. 09 CH 1008 |
| | ) | |
| AMERICAN LEGAL FUNDING LLC, and | ) | |
| ALFUND LIMITED PREFERRED LLC, | ) | |
| | ) | Honorable |
| Defendants-Appellants, Appellees, and | ) | Peter Flynn, |
| Cross-Appellants. | ) | Judge Presiding. |

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**ORDER**

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

¶ 1 *Held*: In these consolidated appeals, we conclude that: (1) this court is without appellate jurisdiction to consider the majority of the issues raised by the parties; (2) the circuit court had subject matter jurisdiction to consider plaintiffs' motion to confirm a partial arbitration award; and (3) the circuit court improperly enjoined defendants from prosecuting related litigation.

¶ 2 These consolidated appeals arise out of a dispute between plaintiffs-appellees, appellants, and cross-appellees, Eddie Lopez and Sandy Lopez, and defendants-appellants, appellees, and cross-appellants, American Legal Funding LLC and Alfund Limited Preferred LLC. The dispute involved

an agreement between the parties whereby defendants provided plaintiffs with $35,000 in "pre-settlement funding" in exchange for the repayment of that amount, plus fees, from any proceeds plaintiffs might recover in a separate personal injury lawsuit. On appeal, we are presented with challenges to a host of orders entered by the circuit court involving: (1) the subject matter jurisdiction of the circuit court over a portion of this litigation, as well as the circuit court's status as the proper venue for this matter; (2) the propriety of a partial arbitration award entered pursuant to an arbitration clause contained in the parties' agreement; and (3) a motion to enjoin defendants from prosecuting a related suit in Arizona.

¶ 3 For the following reasons, we find: (1) this court is without appellate jurisdiction to consider the majority of the issues raised by the parties, and two of the appeals before this court must, therefore, be dismissed; (2) the circuit court had subject matter jurisdiction to consider the partial arbitration award; and (3) the circuit court improperly enjoined defendants from prosecuting related litigation.

¶ 4 I. BACKGROUND

¶ 5 Plaintiffs are both residents of Illinois, while defendants are both Arizona limited liability companies. The record reflects that some time prior to November of 2007, plaintiffs initiated a separate lawsuit to recover damages resulting from injuries to Mr. Lopez. On November 30, 2007, and while that personal injury suit was still pending, plaintiffs entered into a "CONSENSUAL EQUITY LIEN AND SECURITY AGREEMENT" (lien agreement) with defendants.[1] Pursuant to

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[1] The parties generally refer to the lien agreement as an agreement between both plaintiffs and both defendants. In actuality, the lien agreement's language begins by explicitly indicating that it is "by and between" defendants as the "TRANSFEREE" and Mr. Lopez as the "TRANSFEROR." However, the agreement and various attached schedules were actually signed

that agreement, defendants paid plaintiffs $35,000 "in order to afford TRANSFEROR sufficient funds to adequately pay for the necessities of life during the pendency of the [personal injury suit]." In exchange, the lien agreement provided that "TRANSFEROR hereby grants to TRANSFEREE a security interest in the future Proceeds of the [personal injury suit]." That security interest in future proceeds would range from a minimum of $58,800, if the defendants were paid by April 4, 2008, to a maximum of $219,765, if payment was made after June 4, 2010. The lien agreement further indicated that the funds advanced to plaintiffs were "an investment, not a loan," and that no repayment of that investment would be required if plaintiffs were not successful in the personal injury lawsuit.

¶ 6 In addition, the lien agreement contained a number of other relevant terms. Of particular relevance, paragraph 16 of the lien agreement stated that "[b]oth Parties agree that this Agreement shall be construed and interpreted in accordance with the laws of Arizona and venue for any dispute arising hereunder (including any interpleading action) shall lie in the Judicial District Court for Maricopa County, Arizona. TRANSFEROR agrees that any and all Federal lawsuits related to or arising from this agreement shall be filed and maintained in the Federal Courthouse located in Phoenix, Arizona." Paragraph 17 of the lien agreement also provided that "TRANSFEROR agrees that any and all disputes that may arise concerning the terms, conditions, interpretation, or

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by both plaintiffs. Moreover, the lien agreement and the attached schedules alternately refer to the rights and responsibilities of each defendant–sometimes individually and sometimes collectively–either specifically by name or as "TRANSFEREE." Additionally, there is no indication in the record that the lien agreement was ever signed by defendants, a point noted by plaintiffs in various pleadings and motions below. As none of the issues we address on appeal require us to resolve any possible ambiguity in this language, or the significance of defendants' apparent failure to sign the lien agreement, we will similarly refer to the lien agreement as being an agreement between both plaintiffs and both defendants.

enforcement of this agreement shall be determined through arbitration pursuant to the Rules and Methods outlined by the American Arbitration Association in Arizona at the election of either party."

¶ 7 Pursuant to the arbitration clause in the lien agreement, defendants filed a demand for arbitration with the American Arbitration Association (AAA) on December 12, 2008. In describing the nature of the dispute, defendants' arbitration demand stated that defendants had "made a pre-settlement advance to Lopez. Lopez settled the litigation and is refusing to honor his contract."

¶ 8 On December 18, 2008, the AAA sent a letter to the parties which noted that the lien agreement provided for arbitration by the AAA and acknowledged defendants' arbitration demand. The letter further noted that the AAA would apply its "Supplementary Procedures for Consumer-Related Disputes" (Consumer Rules) and its "Consumer Due Process Protocol" (Consumer Protocol) to any such arbitration. However, the AAA also indicated that the provision in the lien agreement specifying Arizona as the proper venue for any disputes was "a material or substantial deviation" from the AAA's Consumer Rules and/or Consumer Protocol. As such, the AAA's letter further indicated that it might decline to administer the arbitration unless defendants would waive this provision and "agree to have this matter administered under the Consumer Rules and Protocol." Defendants were instructed that they could "confirm [their] agreement by signing and returning a copy of this letter no later than December 29, 2008."

¶ 9 It does not appear that defendants responded to this waiver request in December of 2008. The record contains a number of emails exchanged between defendants and the AAA in January of 2009, indicating that the AAA had not yet received such a waiver. On January 13, 2009, defendants sent the AAA an email in which they stated that "[i]f you forward the protocol waiver, we will sign

it so the case can move forward." The AAA responded with an email that apparently included such a waiver as an attachment, but there is no indication in the record that this attachment was ever executed.

¶ 10 What the record does contain is a copy of the AAA's December 18, 2008, letter that was signed by a representative of defendants–Mr. William Downey–in a manner consistent with the AAA's original instructions on how defendants might indicate their waiver of the offending venue provision of the lien agreement. In correspondence between counsel for plaintiffs and defendants regarding this issue, defendants' counsel indicated his understanding that "Mr. Downey signed the letter agreeing to the locale of the arbitration on June 13, 2009. Because he didn't receive and/or couldn't pull up the Stipulation so that the signature functioned as the Stipulation."

¶ 11 Any issues as to when and for what reason the AAA ultimately agreed to proceed with the arbitration aside, on January 22, 2009, the AAA sent the parties another letter indicating that defendants had requested that the arbitration hearing be held in Phoenix, Arizona, and further indicating that this request would be automatically honored unless plaintiffs objected. Plaintiffs thereafter filed a "special and limited appearance" in the arbitration proceedings objecting to the jurisdiction of the AAA to arbitrate defendants' claim in Arizona. Plaintiffs specifically argued: (1) there was no enforceable contract containing an arbitration clause because defendants had never signed the lien agreement; (2) the lien agreement was "void and unenforceable as against public policy as a contract of champerty and maintenance;" and (3) arbitration in Illinois was required pursuant to the Fair Debt Collections Practices Act (Fair Debt Act) (15 U.S.C. § 1692, *et seq.* (2008)). Defendants filed a written response to plaintiffs' arguments on February 20, 2009. On March 9, 2009, the AAA sent the parties a letter stating that "[a]fter careful consideration of the

parties' contentions, the Association has determined the administration of this matter shall be conducted by the Central Case Management Center and hearings will be held in Chicago, IL."

¶ 12 In June of 2009, plaintiffs filed a class action counterclaim against defendants in the arbitration proceeding. In that counterclaim, plaintiffs asked the AAA to declare the lien agreement illegal and unenforceable, enjoin defendants from enforcing that agreement, award plaintiffs damages for defendants' purported violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2008)), and to do the same on behalf of a class of similarly situated individuals that had entered into similar agreements with defendants. On October 29, 2009, an AAA arbitrator based in Chicago, Illinois–Mr. Joel Chupack–conducted a preliminary hearing with the parties via telephone and thereafter entered a scheduling order. That order indicated that the parties had agreed that the arbitration would be heard by Mr. Chupack as the sole arbitrator,[2] and further provided the parties with the opportunity to file briefs with respect to plaintiffs' class action counterclaim.

¶ 13 Defendants responded with a motion seeking either the dismissal of the arbitration proceeding or, in the alternative, a "clause construction award." With respect to the request for dismissal, defendants asserted that the AAA had recently determined that it would no longer accept or administer any new consumer debt collection arbitration proceedings between defendants and its consumers. As such, defendants argued that they should not be required to litigate claims "before

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[2] The record also includes a written stipulation signed by the parties stating that "the parties stipulate to having this arbitration proceeding including the class action counter claim [*sic*] heard by Joel L. Chupack." While it is not exactly clear when this stipulation was signed, it was obviously executed after plaintiffs filed their class action counterclaim in June of 2009 and it appears to have been executed around the time of this preliminary hearing.

a tribunal which has a stated policy against such claims and against [defendants]." In the alternative, defendants asked that a partial final clause construction award be entered–pursuant to the AAA's "Supplementary Rules for Class Arbitrations" (Class Rules)–finding that the arbitration clause of the lien agreement did not permit class action arbitrations. In making their arguments in favor of such an award, defendants took the position that the lien agreement was itself "silent" on the availability of class-wide relief. Plaintiffs responded to defendants' motion for a partial final clause construction award, and in that response plaintiffs also stated that "[a]ny fair reading of the [lien agreement] indicates that it is silent on whether class arbitration is permitted." Plaintiffs requested that a clause construction award be entered finding that the arbitration could proceed as a class action.

¶ 14 While these arbitration proceedings were ongoing, plaintiffs filed the instant lawsuit in the circuit court of Cook County. Thus, shortly after defendants initially filed their arbitration demand in December of 2008, plaintiffs filed a three-count complaint on January 9, 2009. The complaint sought: (1) a declaration that the lien agreement was an illegal and unenforceable contract in that it represented an improper assignment of plaintiffs' personal injury cause of action; (2) damages for "slander of title" with respect to defendants' claim on the proceeds from plaintiffs' settlement of the personal injury suit; and (3) damages resulting from defendants' purported violations of the Fair Debt Act. On February 9, 2009, plaintiffs filed a motion asserting that the arbitration proceeding should be stayed pending the circuit court's "determination of the enforceability of the contract upon which the arbitration action is based."

¶ 15 Two days later, defendants filed a motion to dismiss plaintiffs' instant lawsuit "for lack of venue." Defendants contended that the lien agreement contained a valid forum selection clause

providing that any dispute between the parties should be heard by a court in Arizona. Thus, defendants contended that the plaintiffs' instant Illinois suit should be dismissed, and any claim plaintiffs wished to make–including any claim regarding the validity and enforceability of the lien agreement itself–should be made before a court in Arizona.

¶ 16 On August 28, 2009, the circuit court entered an order denying plaintiffs' motion to stay the arbitration proceedings. The circuit court ordered that "[t]he entire matter shall proceed at arbitration; including all claims in the complaint." The circuit court further ordered that defendants' motion to dismiss on the grounds of improper venue should be transferred to the AAA for arbitration, to be returned to the circuit court only if the AAA would not hear the motion. Finally, the circuit court ordered the parties to timely advise the court of any resolution reached in the arbitration proceedings. Neither plaintiffs nor defendants filed an appeal from this order.

¶ 17 Thereafter, on January 6, 2010, Mr. Chupack entered an order in the arbitration proceeding which: (1) denied defendants' motion to dismiss the arbitration on the basis of the AAA's purported bias and prejudice; and (2) entered a partial clause construction award finding that the arbitration clause of the lien agreement did in fact permit arbitration on behalf of a class. With respect to the clause construction award, Mr. Chupack found: (1) the lien agreement was silent on the issue of class action arbitration; (2) the AAA's Class Rules required him to issue a partial award on the availability of class action arbitration in such a situation; (3) pursuant to the lien agreement, Arizona state law was applicable to this issue; (4) Arizona state law favored arbitration and, therefore; (5) the arbitration clause in the lien agreement allowed for class arbitration. Mr. Chupack also stayed the arbitration proceedings to provide plaintiffs or defendants an opportunity to "either confirm or

to vacate this partial award."[3]

¶ 18 Plaintiffs and defendants responded to Mr. Chupack's order in different forums. Defendants initially responded on February 5, 2010, by filing a petition to vacate the clause construction award in the superior court of Maricopa County, Arizona. In that petition, defendants contended Arizona was the proper forum in light of the forum selection clause in the lien agreement. Defendants further contended that Mr. Chupack's clause construction award should be vacated because: (1) federal, Arizona, and Illinois law all provided that class arbitration should not be allowed where the underlying agreement is silent on the issue; and (2) Mr. Chupack's decision resulted from the AAA's "evident partiality" in light of its refusal to accept or administer any other new consumer debt collection arbitration proceedings involving defendants.

¶ 19 In response to defendants' petition to vacate, plaintiffs filed a motion to stay in the Arizona state court proceeding on June 2, 2010. Plaintiffs' motion noted that the instant litigation was still pending in Illinois, argued that the circuit court of Cook County retained jurisdiction to confirm or vacate any arbitration award, and asserted that Illinois was, therefore, "the logical and appropriate venue to address the Clause Construction Award." On August 16, 2010, the Arizona court granted plaintiffs' motion to stay, specifically indicating that its decision was based upon the fact that the

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[3]Mr. Chupack's order was entered pursuant to Rule 3 of the AAA's Supplemental Rules for Class Arbitration, which in relevant part provides: "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award'). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award." AAA Supplemental Rules for Class Arbitration, Rule 3 (Oct. 8, 2003), http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf.

instant litigation was ongoing in Illinois. The Arizona court's order also indicated that if a court of "competent jurisdiction *** holds that venue is proper in Arizona, then any party may move to lift the stay."

¶ 20 Meanwhile, plaintiffs' initial response to Mr. Chupack's January 6, 2010, order was made on February 16, 2010, when they filed two motions in the circuit court of Cook County: (1) a motion to confirm the AAA's determination as to the proper venue for the arbitration proceedings; and (2) a motion to enter a judgment confirming the clause construction award. With respect to the first motion, plaintiffs contended that the lien agreement provided for arbitration by the AAA, and the AAA had clearly indicated that it would not arbitrate this dispute unless defendants waived the lien agreement provision requiring arbitration in Arizona. Thereafter, defendants did in fact waive this provision, and after considering the parties' arguments as to the proper locale, the AAA determined that it would hold arbitration hearings in Chicago, Illinois. Defendants even stipulated to having the arbitration heard by Mr. Chupack, an arbitrator based in Chicago. For all these reasons, and in light of federal law, state law, and notions of due process, plaintiffs asked the circuit court to "enter an order confirming the [AAA's] determination as to venue in Illinois." On June 7, 2010, the circuit court entered an order denying plaintiffs' motion, "finding that the defendants herein stipulated to venue of the AAA arbitration in Chicago."

¶ 21 With respect to their motion to enter a judgment confirming the clause construction award, plaintiffs argued that the AAA Class Rules required Mr. Chupack to render a "partial final award" on the availability of class action arbitration and those same AAA rules also allowed any party to the arbitration to seek confirmation of that award before a "court of competent jurisdiction." Plaintiffs, therefore, asked the circuit court to confirm Mr. Chupack's clause construction award and

to refer the matter back to the AAA for further proceedings.

¶ 22 Defendants responded by filing a motion to either dismiss plaintiffs' motion for confirmation of the clause construction award or to have it transferred to the Arizona state court proceeding. In their motion, defendants argued that the lien agreement included both a "locale provision" with respect to any related arbitration proceedings and a "venue provision" with respect to any related litigation. Defendants asserted that both provisions indicated that Arizona was the proper forum. Furthermore, defendants asserted that because they had waived the locale provision only as to arbitration, the circuit court of Cook County should either: (1) dismiss plaintiffs' motion to confirm the clause construction award because it lacked subject matter jurisdiction over this issue and/or did not represent the proper venue for this dispute; or (2) transfer the motion to the Arizona court for the same reasons.

¶ 23 On July 13, 2010, the circuit court entered an order that denied defendants' motion to dismiss or transfer, and also denied a motion filed by plaintiffs seeking reconsideration of the prior denial of their motion to confirm the AAA's venue determination. In that order, the circuit court specifically found that it had subject matter jurisdiction, jurisdiction over the parties, and that Illinois was the proper venue for resolution of this matter. The circuit court further concluded that the "effect of the Defendant's [*sic*] stipulation to AAA was to prevent the Court from independently assessing challenges to the arbitration venue in this Court." While defendants filed an unsuccessful motion to reconsider this order, neither plaintiffs nor defendants filed an appeal.

¶ 24 On August 2, 2010, in part based upon the circuit court's conclusions regarding jurisdiction and venue, plaintiffs filed a motion in the circuit court seeking to enjoin defendants from pursuing their petition to vacate the clause construction award in Arizona. That motion was "denied as moot"

on September 7, 2010, likely due to the fact that the Arizona court had–as discussed above–already stayed those very proceedings in favor of the instant litigation.[4]

¶ 25 Defendants then filed a motion asking the circuit court to certify for interlocutory appeal, pursuant to Supreme Court Rule 308 (Ill. S. Ct. R. 308 (eff. Feb. 26, 2010)), the questions of the circuit court's subject matter jurisdiction, the status of Illinois as the proper venue for this dispute, and what significance defendants' stipulation in the arbitration proceeding might have on the circuit court's authority to address the venue issue. This motion was withdrawn by defendants, without prejudice, shortly after it was filed.

¶ 26 Thereafter, the parties engaged in a flurry of activity in the circuit court. In the course of this activity, the circuit court asked the parties to address the significance of a recent United States Supreme Court decision, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130 S. Ct. 1758 (2010), that involved the Federal Arbitration Act (9 U.S.C. §1, *et seq.* (2008). This decision was filed after Mr. Chupack's arbitration award was entered and was cited by defendants in response to plaintiffs' motion to confirm that award. In *Stolt-Nielsen*, the court determined that where the parties to an arbitration agreement governed by the Federal Arbitration Act stipulated that there was "no agreement" on the question of class arbitration, the parties cannot be compelled to submit their dispute to class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1776. The circuit court expressed doubt that it could confirm Mr. Chupack's clause construction award in light of this decision and the fact that the arbitration clause at issue in this matter was indisputably "silent" on the issue of class arbitration.

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[4] The Arizona case was subsequently dismissed on December 7, 2011, without prejudice, for a lack of prosecution.

¶ 27 Plaintiffs responded by contending that, to the extent the *Stolt-Nielsen* decision effectively precludes class arbitration under the arbitration clause contained in the lien agreement, the arbitration clause is unconscionable. The plaintiffs, therefore, filed a motion asking the circuit court to exercise its "gate-keeping" function to determine whether any possible "silent" waiver of class arbitration contained in the lien agreement was unconscionable under state law, and to do so in the first instance rather than leave any such determination to the arbitration proceeding. Plaintiffs also appear to have again asked the circuit court to reconsider its prior refusal to confirm the AAA's venue determination.

¶ 28 In briefing this motion, the parties also addressed another recent United States Supreme Court decision, *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___, 130 S. Ct. 2772 (2010). In that case, the Supreme Court held that–at least in certain circumstances–issues of unconscionability in contracts containing arbitration agreements are to be decided by an arbitrator and not a court. *Rent-A-Center*, 130 S. Ct. at 2779.

¶ 29 On February 22, 2012, the circuit court entered the order that forms the basis for many of the arguments the parties raise on appeal. That order initially indicated that the circuit court was then considering three of plaintiffs' pending motions, including motions to: (1) confirm Mr. Chupack's clause construction award; (2) have the court exercise its "gate-keeping" function; and (3) confirm the AAA's venue determination. In ruling upon these motions, the circuit court first outlined the long history of the parties' dispute, including their dispute over the import of the recent *Stolt-Nielsen* and *Rent-A-Center* decisions. However, the circuit court also recognized that the United States Supreme Court had issued yet another relevant opinion, *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011). In that case, the court concluded that an

arbitration clause barring class arbitrations could not be invalidated on the basis of a state law rule of unconscionability, as such a result was preempted by the Federal Arbitration Act. *Concepcion*, 131 S. Ct. at 1756. As the circuit court read this decision, "the Court effectively held that the Federal Arbitration Act pre-empts and, thus, renders unenforceable, *any* state-law rule which would hold barring class-wide arbitration unconscionable." (Emphasis in original.)

¶ 30 The circuit court, therefore, concluded:

> "The end result is that this Court cannot, consistent with *Stolt-Nielsen*, *Rent-A-Center*, and *Concepcion*, (*i*) confirm or enforce the clause construction award in this case, or (*ii*) entertain an argument that the Lien Agreement arbitration provision, thus stripped of any class potential, becomes unconscionable under Illinois (or any other State) law."

The circuit court went on to say:

> "[I]t remains to determine what Order the Court should enter. The Court does not consider it appropriate to reverse or set aside the clause construction award, no proceeding seeking that relief having been initiated. The Court must also decline to 'confirm [AAA] Venue Determination,' as requested by plaintiffs, because the parties *stipulation* to proceed before Arbitrator Chupack, located in Chicago *** mooted that question. And the Court cannot, as plaintiffs request, 'exercise its gate-keeping function' regarding unconscionability, because after *Rent-A-Center* and *Concepcion* the Court simply has no such function in this case.
>
> Since those procedural issues are foreclosed for the reasons stated, and the underlying substance of this dispute will be determined in the arbitral forum, it might seem appropriate to dismiss this action. But the Court believes that the better course is to stay this proceeding pending outcome of the arbitration, for three reasons. First, this Court's Order

of August 29, 2009 directed the parties to pursue their arbitration. This Court should be available, if need be with regard to any further issues which require judicial intervention. Second, formally staying this proceeding, in favor of arbitration, will provide defendants with a basis for appeal pursuant to Sup. Ct. Rule 307, if they wish to do so [citation], and will better focus the issues on appeal than an order simply dismissing this suit. Third, if this case is simply dismissed, defendants may attempt to resuscitate their Arizona proceeding ***, which under the circumstances would be both improper and counterproductive."

Thus, the circuit court denied all three of plaintiffs' motions and stayed this litigation "pending completion of the parties' arbitration proceeding."

¶ 31 Defendants filed a motion to reconsider on March 7, 2012, explaining that it had indeed previously asked the circuit court to enter an order vacating the clause construction award and also requesting that such an order now be entered. The circuit court denied that motion on the same day, and defendants filed a notice of interlocutory appeal on March 13, 2012 (appeal no. 1-12-0763). Defendants' appeal was brought pursuant to Supreme Court Rule 307 (Ill. S. Ct. R. 307 (eff. Feb. 26, 2010)), and sought reversal of the orders entered by the circuit court on July 13, 2010, February 22, 2012, and March 7, 2012.

¶ 32 On March 21, 2012, plaintiffs also filed a notice of appeal challenging the circuit court's February 22, 2012, order (appeal no. 1-12-0878), specifically asking for reversal of that portion of the order denying their motion to enter a judgment confirming the clause construction award. On March 29, 2012, defendants filed a notice of cross-appeal which again sought reversal of the orders entered by the circuit court on July 13, 2010, February 22, 2012, and March 7, 2012.

¶ 33 While these appeals were pending, and after defendants' initial Arizona petition to vacate was

dismissed for lack of prosecution, defendants initiated a second proceeding in Arizona state court. Specifically, on May 25, 2012, defendants re-filed their petition to vacate Mr. Chupack's partial arbitration award in the superior court of Maricopa County, Arizona. Plaintiffs responded by filing a motion in the circuit court which sought to enjoin defendants from prosecuting this new action in Arizona. Plaintiffs also sought a finding of contempt and the imposition of sanctions. That motion was granted in an order entered on July 3, 2012, which directed defendants "to cease the prosecution of their old or new Arizona suits, and to refrain from filing any further suits regarding the same transaction between plaintiffs and defendants which is the subject of this action." The circuit court declined to find defendants in contempt or to impose sanctions. As detailed in that order, the circuit court's reasoning was based in part on its understanding that defendants' first Arizona petition to vacate was still pending, albeit stayed, and that defendants had filed yet another suit. Defendants filed a motion to vacate the July 3, 2012, order, which in part noted that its original Arizona petition had actually been previously dismissed.

¶ 34 On August 8, 2012, the circuit court entered an order denying defendants' petition to vacate, which the circuit court described as a motion to reconsider. In that order, the circuit court acknowledged that its prior order incorrectly indicated that defendants' original Arizona petition to vacate the arbitration award was still pending. The circuit court thus, indicated that its July 3, 2012, order should be corrected to reflect the fact that the original Arizona proceeding had been previously dismissed. However, the circuit court declined to vacate its prior order because "that correction [did] not in any way affect the substance, nor significantly undercut the reasoning" of that order. A corrected July 3, 2012, order correcting this factual error was attached as an appendix to the August 8, 2012, order. In addition, the circuit court also entered a "CORRECTED JULY 3, 2012

ORDER" on August 8, 2012.

¶ 35 On August 13, 2012, defendants filed a notice of appeal from the July 3, 2012, and August 8, 2012, orders (appeal no. 1-12-2393). All of the appeals filed in this matter, including defendants' cross-appeal, have been consolidated by this court. Thereafter, on November 21, 2012, defendants filed a motion in this court seeking temporary relief from the circuit court's order enjoining them from prosecuting their suit in Arizona. Defendants sought permission to take such action as was necessary to ensure that its suit in Arizona was not dismissed for want of prosecution while the instant appeals were pending. That motion was denied in December of 2012, as was a subsequent motion for reconsideration.

¶ 36 II. ANALYSIS

¶ 37 As outlined above, the parties have raised a host of challenges to a number of the circuit court's orders in these consolidated appeals. However, after thoroughly reviewing the record, we find that we are without appellate jurisdiction to address the majority of the issues raised on appeal. Thus, we first address the extent of our jurisdiction before considering those matters properly before this court on the merits.

¶ 38 A. Appellate Jurisdiction

¶ 39 While none of the parties have questioned this court's appellate jurisdiction, we have a duty to *sua sponte* determine whether we have jurisdiction to decide the issues presented. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 453 (2006).

¶ 40 Except as specifically provided by the Illinois Supreme Court Rules, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994), *et seq.*; *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). "A

judgment or order is final for purposes of appeal if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment." *Brentine v. DaimlerChrysler Corp.*, 356 Ill. App. 3d 760, 765 (2005).

¶ 41 However, even a final judgment or order is not necessarily immediately appealable. Illinois Supreme Court Rule 304(a) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. *** In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." Ill. S. Ct. Rule 304(a) (eff. Feb. 26, 2010).

¶ 42 Finally, while the Illinois Supreme Court Rules confer jurisdiction upon this court to consider some interlocutory appeals not involving final orders, that authority only arises in certain specific circumstances. See Ill. S. Ct. R. 306 (eff. Feb.16, 2011) (interlocutory appeals of certain orders by permission); Ill. S. Ct. R. 307 (eff. Feb. 26, 2010) (interlocutory appeals of certain orders as of right); and Ill. S. Ct. R. 308 (eff. Feb. 26, 2010) (permissive interlocutory appeals involving certified questions).

¶ 43 With this background in mind, we now consider our appellate jurisdiction over the specific issues raised in each of these consolidated appeals.

¶ 44 1. Appeal No. 1-12-0763

¶ 45 We begin by addressing our jurisdiction over the issues raised in the first appeal filed in this matter, defendants' appeal no. 1-12-073. As noted above, defendants filed an initial notice of interlocutory appeal on March 13, 2012. That notice of appeal indicated that it was brought pursuant to Rule 307, and it further indicated that defendants generally sought reversal of the orders entered by the circuit court on July 13, 2010, February 22, 2012, and March 7, 2012.

¶ 46 In the statement of jurisdiction contained in their opening brief on appeal, defendants contend that this court "has jurisdiction over this appeal pursuant to Supreme Court Rule 307(a) as this is an interlocutory appeal from an Order of the Circuit Court of Cook County entered on February 22, 2012, which order effectively enjoins [defendants] from seeking to vacate the Arbitration Award in any forum." The jurisdictional statement also notes that the circuit court's February 22, 2012, order itself referenced defendants' right to appeal pursuant to Rule 307. Finally, the jurisdictional statement indicated that defendants also sought–in the context of this interlocutory appeal–review of the March 7, 2012, order denying defendants' motion to reconsider the February 22, 2012, order, as well as the prior July 13, 2010, order "finding that the Illinois court has subject matter jurisdiction and proper venue over this action."

¶ 47 Turning to the argument section of defendants' appellate briefs, we observe that defendants have formulated three specific arguments with respect to their initial interlocutory appeal. First, defendants assert that we should "reverse the portion of the trial court's February 22, 2012 Order in which the court declined to vacate the Arbitration Award." Second, they contend that the July 13, 2010, order denying their motion to dismiss or transfer should be reversed, and plaintiffs' motion to confirm the clause construction award should be dismissed, because the circuit court erred in

finding it had subject matter jurisdiction over this matter. Third, they argue the same order should be reversed, and plaintiffs' declaratory judgment action and their motion to confirm the clause construction award should be dismissed, because Arizona is the proper venue for this litigation pursuant to the forum selection clause in the lien agreement.

¶ 48 After careful consideration, we conclude that this court is without jurisdiction to review any of these arguments. We again note that, except as specifically provided by the Illinois Supreme Court Rules (Ill. S. Ct. R. 301 (eff. Feb. 1, 1994), *et seq.*), this court only has jurisdiction to review final judgments, orders, or decrees. None of the orders defendants ask us to review are final orders, as none finally "disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy." *Brentine*, 356 Ill. App. 3d at 765. Even if the orders challenged on appeal were final, they would not be appealable because they did not resolve the entire dispute between the parties, the circuit court retained jurisdiction to consider any issues arising out of the arbitration proceeding, and the circuit court did not make "an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. Rule 304(a) (eff. Feb. 26, 2010). Nor have defendants sought and been granted permission to appeal from these orders pursuant to Rule 306 or Rule 308.

¶ 49 What defendants have done is seek review pursuant to Illinois Supreme Court Rule 307 (Ill. S. Ct. R. 307 (eff. Feb. 26, 2010)), which we again note grants appellants the right to appeal–and provides this court with the authority to review–only certain, specified interlocutory orders entered by a circuit court. Of these, the only type of interlocutory order that could possibly be implicated in this matter is one "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010). Indeed, it is apparent that the circuit court

itself was referring to Rule 307(a)(1) when, in its February 22, 2012, order, it indicated that "formally staying this proceeding, in favor of arbitration, will provide defendants with a basis for appeal pursuant to Sup. Ct. Rule 307." See *Hastings Mutual Insurance Co. v. Ultimate Backyard, LLC*, 2012 IL App (1st) 101751, ¶ 28 (noting that an order granting or denying a stay is generally considered injunctive in nature, which is appealable under Rule 307(a)(1)); *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001) ("An order of the circuit court to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal under paragraph (a)(1) of the rule.").

¶ 50 However, it is also evident that defendants have not challenged the portion of the February 22, 2012, order which "stay[ed] this proceeding, in favor of arbitration," as they have not provided this court with any argument that this portion of the circuit court's order was improper. Indeed, defendants' position throughout the long history of this matter has been: (1) Illinois courts should not play any role in this dispute whatsoever; and (2) this dispute should be resolved via arbitration. Nothing about *this portion* of the circuit court's order negatively impacts those stated positions, and perhaps that is why defendants have not asked for review of this aspect of the order.

¶ 51 Instead, defendants have specifically contended that we should "reverse the portion of the trial court's February 22, 2012 Order in which the court declined to vacate the Arbitration Award." We fail to see how the circuit court's order declining to vacate the clause construction award was one "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction," (Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010)), where an injunction is a " 'judicial process operating *in personam* and requiring [a] person to whom it is directed to do or refrain from doing a particular thing' " (*In re A Minor*, 127 Ill. 2d 247, 261 (1989) (quoting *Black's Law Dictionary* 705 (5th ed. 1979))). Thus, this portion of the circuit court's order was not appealable pursuant to Rule 307(a)(1),

and we lack jurisdiction to review defendants' contentions on this issue. See *Santella v. Kolton*, 393 Ill. App.3d 889, 901 (2009) (appellate court "must determine whether each aspect of the circuit court's order appealed by defendant is subject to review under Rule 307(a)(1)").

¶ 52 Indeed, defendants' challenge to this portion of the order clearly concerns the merits of the parties' dispute regarding the nature of the arbitration clause contained in the lien agreement. However, "[t]he flaw in this strategy is that it overlooks the limited scope of review on a Rule 307(a)(1) appeal." *Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 399 (1993). It is well recognized that "[w]here an interlocutory appeal is brought pursuant to Rule 307(a)(1), controverted facts or the merits of the case are not decided." *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1189 (2000). Thus, Rule 307(a)(1) does not provide us with jurisdiction to review that portion of the circuit court's order declining to vacate the clause construction award, as "the rule may not be used as a vehicle to determine the merits of a plaintiff's case." *Postma*, 157 Ill. 2d at 399.

¶ 53 We also find defendants' effort to have this court review the jurisdictional and venue findings contained in the circuit courts' prior July 13, 2010, order to be improper in the context of this appeal. Defendants did not appeal from the July 13, 2010, order at the time it was entered. Indeed, the record reflects that defendants filed a motion asking the circuit court to certify these issues for interlocutory appeal pursuant to Rule 308, but that motion was withdrawn shortly after it was filed.

¶ 54 Moreover, defendants again overlook the "limited scope of review on a Rule 307(a)(1) appeal." *Id.* Typically, courts recognize that " 'Rule 307 allows only the review of the order from which a party takes an appeal, and such an appeal does not open the door to a general review of all orders entered by the trial court up to the date of the order that is appealed.' " *Kalbfleisch ex rel.*

*Kalbfleisch v. Columbia Community Unit School No. 4*, 396 Ill. App. 3d 1105, 1114 (2009) (quoting *In re Petition of Filippelli*, 207 Ill. App. 3d 813, 818 (1990)). Thus, any consideration of the findings contained in the July 13, 2010, order is well beyond the scope of defendants' Rule 307 appeal from the February 22, 2012, order.

¶ 55 However, we do note that some courts have concluded that "Rule 307 allows this court to review any prior error that bears directly upon the question of whether an order on appeal was proper." *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 420 (2007) (citing *In re Marriage of Ignatius*, 338 Ill. App. 3d 652 (2003) and *Sarah Bush Lincoln Health Center v. Berlin*, 268 Ill. App. 3d 184 (1994)). We are not entirely convinced that such a broad reading of the scope of Rule 307 review is proper. See *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 970 (2004) (expressing doubt as to the validity of the holding in *Berlin*, 268 Ill. App. 3d 184).

¶ 56 Nevertheless, we need not further consider that issue here. Implicit in this broader reading is a requirement that some interlocutory order be properly before this court for review pursuant to Rule 307. As explained above, defendants' initial interlocutory appeal presents this court with no such order. We obviously cannot review any prior error, supposedly bearing directly upon the propriety of an order under review pursuant to Rule 307, when there is in fact no interlocutory order properly before this court in the first instance. We, therefore, conclude that we are without jurisdiction to consider *any* of the arguments defendants raise in the context of their initial interlocutory appeal.

¶ 57 In so ruling, we must make two additional points. First, we note again that defendants' briefs contend that this court "has jurisdiction over this appeal pursuant to Supreme Court Rule 307(a) as

this is an interlocutory appeal from an Order of the Circuit Court of Cook County entered on February 22, 2012, which order effectively enjoins [defendants] from seeking to vacate the Arbitration Award in any forum." In apparent support for this position, defendants note that in this order the circuit court retained jurisdiction over this matter, while at the same time declining to vacate the clause construction award and further indicating that any attempt to "resuscitate their Arizona proceeding" would be "improper and counterproductive."

¶ 58 Defendants also express a concern that because–as they understand the law–a decision to confirm an arbitration award is so very closely related to a decision to vacate such an award, "the Court's judgment confirming or vacating an award has the effect of collateral estoppel as to the validity of the arbitrator's award." Defendants, therefore, contend that "if the trial court's February 22 ruling stands, the doctrine of collateral estoppel could, arguably, preclude further litigation as to the validity of the Arbitration Award." While not entirely clear from defendants' briefs, they thus appear to argue that the February 22, 2012, order "effectively" operated as an injunction against any effort by defendants to challenge the clause construction award in any court, and that such a *de facto* injunction is subject to appeal pursuant to Rule 307.

¶ 59 We disagree. Regardless of whether or not defendants are correct about the relationship between a decision to confirm and a decision to vacate an arbitration award, it is apparent that the circuit court took neither action in its February 22, 2012, order. The order specifically *denied* plaintiffs' motion to confirm the clause construction award and specifically *declined* to "reverse or set aside the clause construction award." Thus, the circuit court neither confirmed nor vacated the clause construction award, and any concern about the possible collateral effect of this order is

unfounded.[5]

¶ 60 Furthermore, while the circuit court's order did indicate that any attempt by defendants to "resuscitate their Arizona proceeding" would be "improper and counterproductive," to be considered an injunction the order should have–but did not–*require* defendants to refrain from doing so. *In re A Minor*, 127 Ill. 2d at 261. As the circuit court's subsequent July 3, 2012, order indicated in the context of denying plaintiffs' request for a finding of contempt, both defendants and the circuit court recognized and agreed that the February 22, 2012, order "did not explicitly forbid defendants from doing so [*i.e.*, litigating in Arizona]." We, therefore, reject defendants' contention that the February 22, 2012, order can be read as some form of *de facto* injunction that supports our jurisdiction over this appeal pursuant to Rule 307(a)(1).

¶ 61 Second, we are cognizant of the fact that defendants' initial interlocutory appeal presents an argument that the circuit court lacked subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award. We are also aware that if a court lacks subject matter jurisdiction, any order entered in the matter is void *ab initio* and may be attacked at any time. *In re M.W.*, 232 Ill. 2d 408, 414 (2009). However, "[a]lthough a void order may be attacked at any time, the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts." *People v. Flowers*, 208 Ill. 2d 291, 308 (2003). As such, this court has previously recognized:

" ' "If a court lacks jurisdiction, it cannot confer any relief, even from prior judgments that

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[5] Additionally, collateral estoppel may only be applied when there was a *final judgment on the merits* in the prior adjudication. *Aurora Manor, Inc. v. Department of Public Health*, 2012 IL App (1st) 112775, ¶ 19. Whatever else the circuit court's February 22, 2012, order may represent, it is not a final judgment on the merits.

> are void. The reason is obvious. Absent jurisdiction, an order directed at the void judgment would itself be void and of no effect." ' [Citation.] Compliance with the rules governing appeals is necessary before a reviewing court may properly consider an appeal from a judgment or order that is, or is asserted to be, void. [Citation.] Thus, the appellate court is not vested with authority to consider the merits of a case merely because the dispute involves an allegedly void order or judgment. [Citation.]" *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 383-84 (2007).

Thus, even though defendants challenge the jurisdiction of the circuit court to confirm the clause construction award, we may not consider this argument in the context of their initial interlocutory appeal because we do not otherwise have appellate jurisdiction.

¶ 62 For the foregoing reasons, we dismiss defendants' appeal no. 1-12-0763 for a lack of jurisdiction.

¶ 63 2. Appeal No. 1-12-0878

¶ 64 We next consider our jurisdiction to review the issues presented in appeal no. 1-12-0878. Plaintiffs initiated this appeal on March 21, 2012, when they filed a notice of appeal from the circuit court's "February 22, 2012 Order denying Plaintiffs' Motion to Enter Judgment on [the] Clause Construction Award." The notice of appeal specifically indicated that plaintiffs sought "Reversal of the Court's Order of February 22, 2012 denying Plaintiffs' Motion to Enter Judgment on [the] Clause Construction Award." In response, defendants filed a notice of cross-appeal on March 29, 2012, which again sought reversal of the orders entered by the circuit court on July 13, 2010, February 22, 2012, and March 7, 2012.

¶ 65 Plaintiffs' notice of appeal does not indicate which Supreme Court Rule purportedly confers

jurisdiction upon this court, while their docketing statement generally indicates–without further explanation–that jurisdiction is proper pursuant to Rules 301, 303, and 307. The jurisdictional statement contained in plaintiffs' opening brief likewise does not provide a clear explanation of our jurisdiction. The statement merely cites to cases purportedly standing for the proposition that orders confirming or vacating arbitration awards are appealable, with a Rule 304(a) finding if need be, and concludes with a statement that this court "has jurisdiction to hear the appeal."

¶ 66 In the appropriate situation, an order actually confirming or vacating an arbitration award would be considered a final order, in that such an order would dispose of "the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment." *Brentine*, 356 Ill. App. 3d at 765. However, as plaintiffs themselves recognize, "[t]his case presents an unusual situation where the Circuit Court neither entered judgment upon the [AAA] 'clause construction award' nor vacated it." That is absolutely correct.

¶ 67 Furthermore, this fact necessarily precludes us from reviewing "the order denying the plaintiff's [*sic*] motion to enter a judgment upon the 'clause construction award,' " as it is not a final order pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. June 4, 2008). Furthermore, even if it were a final order, the circuit court's order also concluded that it was most reasonable to refrain from dismissing this suit, stay the circuit proceedings, refer the matter back to Mr. Chupack for further arbitration, and have the circuit court remain "available, if need be, with regard to any further issues which require judicial intervention." The circuit court, thus, did not resolve all the claims between the parties, and no "express written finding" permitting an appeal was obtained from the circuit court pursuant to Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

Nor have plaintiffs been granted permission to appeal from this order pursuant to Illinois Supreme Court Rule 306 or Rule 308.

¶ 68 This again leaves us to consider our authority under Rule 307. Again, the only type of interlocutory order specified therein that could possibly be applicable in this matter is one "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010). However, in no sense can the denial of plaintiffs' motion to enter judgment on the clause construction award be considered such an injunctive order, and we are, therefore, without jurisdiction to consider the arguments plaintiffs raise on appeal. Their appeal must, therefore, be dismissed.[6]

¶ 69 We must now consider the issues raised by defendants in their cross-appeal. As an initial matter, we note that while plaintiffs' direct appeal must be dismissed, this fact does not itself affect our jurisdiction over defendants' timely cross-appeal. *City of Chicago v. Human Rights Comm'n*, 264 Ill. App. 3d 982, 985-87 (1994) (concluding that where a direct appeal and cross-appeal are both timely filed, subsequent dismissal of direct appeal "has no bearing on this court's jurisdiction to hear the cross-appeal."). However, defendants' notice of cross-appeal, and the arguments defendants present on appeal with respect thereto, challenge the *exact* same orders, raise the *exact* same issues, and seek the *exact* same relief as defendants' own initial appeal. As our supreme court has recognized, "a reviewing court acquires no greater jurisdiction on cross-appeal than it could on

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[6] Because plaintiffs' notice of appeal specifically sought review of only the circuit court's "February 22, 2012 Order denying Plaintiffs' Motion to Enter Judgment on [the] Clause Construction Award," the notice of appeal did not confer jurisdiction upon this court to consider any other aspect of that order. See *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011) ("A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal.").

appeal." *People v. Farmer*, 165 Ill. 2d 194, 200 (1995). We have already concluded that this court lacks jurisdiction to consider any of these arguments, and this conclusion is not altered because defendants also pursue these arguments via their cross-appeal.

¶ 70 For the foregoing reasons, we dismiss appeal no. 1-12-0878, including defendants' cross-appeal, for a lack of jurisdiction.

¶ 71 3. Appeal No. 1-12-2393

¶ 72 Lastly, we address our jurisdiction with respect to the issues presented in defendants' appeal no. 1-12-2393. Defendants initiated this appeal on August 13, 2012, when they filed a notice of appeal from: (1) the circuit court's July 3, 2012, order granting plaintiffs' motion to enjoin defendants from prosecuting their second action in Arizona; and (2) the circuit court's August 8, 2012, order denying defendants' motion to vacate the July 3, 2012, order.

¶ 73 Defendants' notice of appeal does not specify a Supreme Court Rule conferring jurisdiction upon this court with respect to these orders, nor does the statement of jurisdiction contained in defendants' opening brief on appeal. Defendants' docketing statement contends that we have jurisdiction pursuant to Rules 301 and 303, apparently indicating defendants' understanding that these orders represent final judgments. They do not.

¶ 74 These orders clearly involve injunctions. It is certainly true that a *permanent* injunction can be considered a final judgment. *Sola v. Roselle Police Pension Board*, 2012 IL App (2d) 100608, ¶ 13. However, it is also quite apparent that the circuit court did not intend to enjoin defendants from pursuing any action in Arizona permanently. The trial court's July 3, 2012 order (both the original and the subsequent corrected order) noted that defendants' litigation in Arizona involved "the same parties and subject matter as this action, and the same 'clause construction award' already

on review–pursuant to defendants' own pending appeals–in the Illinois Appellate Court, First District." The circuit court also reasoned that defendants' second suit in Arizona "contravenes and undercuts their own appeals in the Illinois Appellate Court," and that the circuit court had to "preserve its own jurisdiction, and the proper and efficient operation of the civil judicial system."

¶ 75 Thus, defendants were directed to cease the prosecution of their Arizona suit, and to refrain from filing any other suits regarding the matters at issue in this litigation. However, the circuit court also ordered:

> "Unless otherwise explicitly directed or permitted by the Illinois Appellate Court, First District, if defendants wish to pursue a petition to vacate the arbitrator's 'clause construction award" herein, they must do so in this Court (with due regard for this Court's prior Orders and defendants' pending appeals from those Orders) or the Illinois Appellate Court, First District, and not otherwise."

We conclude that this language clearly indicates that the circuit court merely intended to preserve the *status quo,* at least while defendants' appeals to this court where pending. As such, the circuit court did not enter a permanent injunction and, therefore, did not enter an order appealable pursuant to Rules 301 and 303.[7]

¶ 76 What the trial court did enter was, first, an interlocutory order granting an injunction, and second, an interlocutory order denying defendants' motion to vacate that injunction. These are exactly the type of orders appealable under Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26,

[7] And, again, even if the injunction was a final order, it was not an order resolving all the claims between the parties, and no "express written finding" permitting an appeal was obtained from the circuit court pursuant to Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

2010)), as they are orders "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Defendants' appeal from these orders is, therefore, proper under Rule 307(a)(1).

¶ 77 However, Rule 307(a) (Ill. S. Ct. R. 307(a) (eff. Feb. 26, 2010)) provides that an interlocutory appeal from such orders "must be perfected within 30 days from the entry of the interlocutory order." Here, the trial court initially entered its injunctive order on July 3, 2012, and defendants did not file their notice of appeal from that order until more than 30 days later on August 13, 2012. While defendants did file a motion to vacate the circuit court's initial injunctive order on July 11, 2012, such a motion (which the trial court treated as a motion to reconsider) "cannot extend the deadline for filing civil interlocutory appeals." *People v. Marker*, 233 Ill. 2d 158, 174 (2009) (citing *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1025-29 (2005) and *Trophytime, Inc. v. Graham*, 73 Ill. App. 3d 335, 335-37 (1979)). We, therefore, have no jurisdiction to review that initial order.

¶ 78 Nevertheless, defendants' motion to vacate was effectively a motion to dissolve the injunction granted by the circuit court's initial injunctive order, "the denial of which was appealable under Rule 307(a)(1)." *Doe v. Illinois Department of Professional Regulation*, 341 Ill. App. 3d 1053, 1059 (2003). Moreover, in addition to denying defendants' motion to vacate on August 8, 2012, the circuit court also entered a "CORRECTED JULY 3, 2012 ORDER" correcting a factual misunderstanding reflected in its initial order. To the extent that this order was intended to be entered *nunc pro tunc*, it was improper. *People v. Melchor*, 226 Ill. 2d 24, 32 (2007) ("[T]he use of *nunc pro tunc* orders or judgments is limited to incorporating into the record something which was actually previously done by the court but inadvertently omitted by clerical error. It may not be

used for supplying omitted judicial action, or correcting judicial errors ***."). Thus, on August 8, 2012, the trial court effectively reentered its initial injunctive order, with some corrections, and also denied defendants' motion to vacate that injunction. Because defendants' August 13, 2012, notice of appeal was filed within 30 days from the entry of these orders, Rule 307(a)(1) confers appellate jurisdiction upon this court to review each of those orders.

¶ 79 4. Appellate Jurisdiction Over Other Matters

¶ 80 Of all the issues raised by the parties on appeal thus far, we have concluded that this court has jurisdiction to review only the propriety of the two orders entered by the circuit court on August 8, 2012. However, that does not end the matter. We perceive two ways in which our appellate jurisdiction over these two orders might also allow this court to review other matters disputed by the parties.

¶ 81 First, we again note that defendants have raised a challenge to the circuit court's subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award. As discussed above, we could not consider this argument in the context of defendants' initial appeal, because we did not otherwise have appellate jurisdiction. *Universal Underwriters Insurance Co.*, 372 Ill. App. 3d at 383-84. However, we *do* have appellate jurisdiction over defendants' appeal from the circuit court's August 8, 2012, orders, and *any* order entered in the absence of subject matter jurisdiction is void *ab initio* and may be attacked at *any* time (*In re M.W.*, 232 Ill. 2d at 414).[8]

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[8] The same is *not* true for defendants' *venue-based* challenge to the circuit court's denial of their motion to dismiss plaintiffs' motion to confirm the clause construction award, pursuant to the forum selection clause contained in the lien agreement. In general, no order or judgment is void for having been rendered in an improper venue. See 735 ILCS 5/2-104(a) (West 2010); *Holston v. Sisters of Third Order of St. Francis*, 165 Ill. 2d 150, 173 (1995). Moreover, it has been recognized that the denial of a motion to dismiss for improper venue–based upon a forum

Therefore, we will address defendants' contentions regarding the circuit court's subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award.

¶ 82 Second, we reiterate that this matter is *only* before this court pursuant to defendants' Rule 307(a)(1) appeal from the circuit court's two August 8, 2012, orders, and courts have typically recognized that such an interlocutory appeal " 'does not open the door to a general review of all orders entered by the trial court up to the date of the order that is appealed.' " *Kalbfleisch*, 396 Ill. App. 3d at 1114 (quoting *Filippelli*, 207 Ill. App. 3d at 818). However, we additionally note (again) that some courts have concluded that "Rule 307 allows this court to review any prior error that bears directly upon the question of whether an order on appeal was proper." *Glazer's Distributors of Illinois, Inc.*, 376 Ill. App. 3d at 420 (citing cases). While our lack of appellate jurisdiction spared us from having to further address this conflict in the context of either defendants' initial appeal or their cross-appeal, our jurisdiction to review the August 8, 2012, orders under Rule 307(a)(1) would seem to force us to address the scope of that review now.

¶ 83 However, even if we generally ascribed to a broad understanding of the scope of our review under Rule 307, such review would not be required here. Again, this understanding "*allows* this court to review any prior error that bears directly upon the question of whether an order on appeal was proper." *Glazer's Distributors of Illinois, Inc.*, 376 Ill. App. 3d at 420. (Emphasis added.) However, it does not *require* us to do so. As we discuss below, the circuit court's August 8, 2012, orders were improper, and we reach that conclusion without the need to consider the impact any prior error might have on the propriety of those orders. Thus, we will not review the circuit court's

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selection clause–is not an interlocutory order subject to appellate review. *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (2008).

prior orders in the context of defendants' Rule 307 appeal from the August 8, 2012, orders, given that the parties have not otherwise properly appealed from those prior orders–indeed, the Illinois Supreme Court Rules may not even provide this court with authority to review them–and any such review ultimately proves unnecessary given our resolution of the matter. See *Estate of Bass v. Katten*, 375 Ill. App. 3d 62, 72-73 (2007) (refusing to consider validity of prior orders under similar circumstances).

¶ 84 Thus, we conclude that the only issues now before this court for consideration are: (1) the circuit court's subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award; and (2) the propriety of the circuit court's August 8, 2012, orders enjoining defendants from seeking to vacate the clause construction award in another forum. We now turn to a consideration of those issues.

¶ 85 B. Subject Matter Jurisdiction

¶ 86 Defendants contend that the circuit court lacked subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award, with that contention primarily relying upon: (1) the fact that the lien agreement provides for arbitration and litigation in Arizona; and (2) our supreme court's decision in *Chicago Southshore and South Bend R.R. v. Northern Indiana Commuter Transportation District*, 184 Ill. 2d 151 (1998). Plaintiffs counter that defendants' argument is improperly based upon our supreme court's interpretation of the Illinois version of the Uniform Arbitration Act (710 ILCS 5/1, *et seq.* (West 2008)), while this dispute is actually governed by the Federal Arbitration Act. Challenges to the subject matter jurisdiction of the circuit court, including any related issues of statutory construction, present questions of law that this court reviews *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 294 (2010).

¶ 87 Our supreme court has recognized that subject matter jurisdiction:

> "[R]efers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs. [Citations.] With the exception of the circuit court's power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution. [Citation.] Under section 9 of article VI, that jurisdiction extends to all 'justiciable matters.' [Citation.] Thus, in order to invoke the subject matter jurisdiction of the circuit court, a plaintiff's case, as framed by the complaint or petition, must present a justiciable matter." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334-35 (2002).

A justiciable matter is "a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Id.* at 335.

¶ 88 With respect to which arbitration act applies here, we note that both plaintiffs and defendants have *repeatedly* indicated their understanding that the Federal Arbitration Act applies to the parties' dispute generally, and the lien agreement in particular. We agree, as the lien agreement contains an arbitration agreement, it represents an agreement between the Illinois plaintiffs and the Arizona defendants, and it involves the transfer of money between those two states. It is well recognized that the Federal Arbitration Act creates a body of substantive federal arbitration law governing written arbitration agreements related to contracts evidencing a transaction involving interstate commerce. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1099 (2009) (quoting *Prudential Securities Inc. v. Hornsby*, 865 F. Supp. 447, 449 (N.D. Ill. 1994).

¶ 89 Moreover, the substantive federal law created by the Federal Arbitration Act is applicable

in both federal and state courts. *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 905 (2009) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); see also *Grotemyer v. Lake Shore Petro Corp.*, 235 Ill. App. 3d 314, 316 (1992) (state courts have concurrent jurisdiction under Federal Arbitration Act). In fact, under the Federal Arbitration Act "state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate." *Vaden v. Discover Bank*, 556 U.S. 49, 71 (2009). Finally, the Federal Arbitration Act specifically provides for judicial confirmation of arbitration awards. 9 U.S.C. § 9 (2008).

¶ 90 In light of the above discussion, it is clear that the circuit court had subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award under the Federal Arbitration Act. Clearly, that motion presented a justiciable matter in that it presented an issue that is "definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville*, 199 Ill. 2d at 325 at 335. Moreover, because the lien agreement implicated the provisions of the Federal Arbitration Act, the circuit court had both the concurrent jurisdiction and the obligation to ensure that the arbitration provision in the lien agreement–including an arbitration award resulting therefrom–was enforced. See *Grotemyer*, 235 Ill. App. 3d at 316; *Vaden*, 556 U.S. at 71.[9]

¶ 91 Even if this matter was governed by the Illinois version of the Uniform Arbitration Act, we

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[9] Defendants make the argument that certain portions of section 9 of the Federal Arbitration Act specify exactly where a motion for confirmation is to be brought, are jurisdictional, and would indicate that Illinois is not the proper jurisdiction for plaintiffs' motion. See 9 U.S.C. § 9 (2008). However, the United States Supreme Court has determined that these provisions relate to venue and not jurisdiction, are permissive and not mandatory, and are, thus, to be read as "permitting, not limiting" the choice of venue for a motion to confirm an arbitration award. *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 203-04 (2000).

would still find that the circuit court had subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award. Defendants' arguments to the contrary are based upon *Southshore*, 184 Ill. 2d at 152-53, in which our supreme court considered this issue in a situation somewhat similar to the one presented here. There, the parties entered into a contract calling for arbitration of any disputes in Indiana, for the application of Indiana law, and for any "legal issue" with respect to an arbitration decision to be judicially resolved by filing suit in Indiana within 30 days. *Id.* at 153. Despite this fact, the parties agreed to arbitrate their dispute in Illinois "as a matter of convenience." *Id.* Thereafter, the plaintiffs filed a motion in the circuit court of Cook County to confirm the arbitration award. The defendant challenged the Illinois court's subject matter jurisdiction to confirm the award under the Uniform Arbitration Act. *Id.* at 155. That issue was ultimately addressed by our supreme court, and the court agreed with defendant. *Id.*

¶ 92 First, our supreme court noted that section 1 of the Uniform Arbitration Act indicates that it applies to "a *written* agreement to submit any existing or future controversy to arbitration." (Emphasis in original.) *Id.* (citing 710 ILCS5/1 (West 1996)). It then noted that under section 16 of the Uniform Arbitration Act, " '[t]he making of an agreement described in Section 1 providing for arbitration in this State confers jurisdiction on the [circuit] court to enforce the agreement under this Act and to enter judgment on an award thereunder.' " *Id.* (quoting 710 ILCS 5/16 (West 1996)). Our supreme court then concluded that "under the plain language of the statute, the parties' written agreement must provide for arbitration in Illinois in order for Illinois courts to exercise jurisdiction to confirm an arbitration award." *Id.* at 155-56.

¶ 93 In coming to this conclusion, our supreme court also considered the fact that the defendant had consented to arbitration in Illinois, despite the parties' written agreement calling for arbitration

in Indiana and for any legal disputes regarding arbitration decisions to be filed in Indiana. *Id.* at 158. Our supreme court reasoned that although the defendant "consented to arbitration in Illinois, the written arbitration agreement was never formally modified in this regard, and [the defendant] could reasonably assume that its acquiescence to arbitration in Illinois would not have the effect of transferring jurisdiction to Illinois in contravention of the original arbitration agreement." *Id.* The court also noted that the defendant's conduct had been consistent with the understanding that jurisdiction would remain in Indiana, as it had "initiated legal proceedings in Indiana pursuant to the written arbitration agreement, and [had] steadfastly opposed the exercise of subject matter jurisdiction by the Illinois trial court. Under these circumstances, the parties' deviation from the contractual provision regarding the place of arbitration did not give rise to subject matter jurisdiction in Illinois." *Id.*

¶ 94 While the circuit court's subject matter jurisdiction to confirm the clause construction award at issue here might seem to be foreclosed by the *Southshore* decision, if the Uniform Arbitration Act applied, we conclude otherwise. First, we note that the *Southshore* decision was based upon "all the circumstances of [that] factually unusual case." *Id.* Those circumstances included the fact that the parties' agreement in *Southshore* included provisions calling for arbitration of any disputes in Indiana, for the application of Indiana law, and for any "legal issue" with respect an arbitration decision to be judicially resolved by filing suit in Indiana within 30 days. *Id.* at 153.

¶ 95 While the lien agreement at issue here does contain *general* provisions allowing for elective arbitration in Arizona, and requiring the application of Arizona law and that any lawsuits be filed in Arizona, there is *no specific* provision requiring that legal issues arising out of arbitration also be resolved in Arizona. Indeed, the arbitration provision specifically indicates that arbitration will

proceed pursuant to the AAA's rules, and Rule 3 of the Class Rules generally allow a party to ask a "court of competent jurisdiction" to confirm or to vacate a clause construction award. AAA Supplemental Rules for Class Arbitration, Rule 3 (Oct. 8, 2003), http://ww.adr.org/aaa/Show PDF?\url=/cs/groups/commercial/documents/document /dgdf/mda0/~edisp/adrstg_004129.pdf.

¶ 96 In *Southshore*, our supreme court also stressed that the Uniform Arbitration Act applies to written agreements, and that while the defendant "consented to arbitration in Illinois, the *written* arbitration agreement was never formally modified in this regard." (Emphasis added.) *Id.* In contrast, the arbitration provision of the lien agreement at issue here–specifically that portion requiring arbitration in Arizona–was modified in writing on two occasions. First, in the face of the AAA's potential refusal to administer the arbitration without a waiver of that portion of the lien agreement requiring disputes to be resolved in Arizona, defendants signed the AAA's December 18, 2008, letter in a manner indicating it was waiving that provision. Second, plaintiffs and defendants also executed a stipulation agreeing to have their arbitration proceeding heard by Mr. Chupack, an arbitrator located in Chicago.

¶ 97 In addition, we conclude that the parties' stipulation is more than simply a "formal" modification of their original lien agreement. It also constitutes an independent basis for the circuit court's authority to consider plaintiffs' motion to confirm the clause construction award. Again, section 16 of the Uniform Arbitration Act provides that "[t]he making of an agreement described in Section 1 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this Act and to enter judgment on an award thereunder." 710 ILCS 5/16 (West 2008). In turn, section 1 specifically indicates that not only is a "provision in a written contract to submit to arbitration any controversy thereafter arising between the parties" enforceable, so too is

a "written agreement to submit any existing controversy to arbitration." 710 ILCS 5/1 (West 2008). The parties' stipulation agreeing to arbitrate their existing controversy before an arbitrator located in Chicago is, therefore, independent of the original lien agreement, "an agreement described in Section 1 providing for arbitration in this State" and it thus granted the circuit court authority to both enforce the agreement under the Uniform Arbitration Act and to "enter a judgment on an award thereunder." 710 ILCS 5/16 (West 2008).

¶ 98 Perhaps more important than the above discussion is the way in which the *Southshore* decision has been subsequently interpreted. Specifically, while our supreme court's decision in *Southshore* spoke in terms of "subject matter jurisdiction," many appellate court decisions have reasoned that the court may actually have intended to refer merely to the "authority" of Illinois courts to confirm arbitration awards.

¶ 99 A number of decisions have concluded that, while the requirements of the Uniform Arbitration Act and the *Southshore* decision may have something to say about the circuit court's *authority* to confirm an arbitration award, they do not affect a circuit court's constitutionally-based *subject matter jurisdiction* over all justiciable matters. *Valent BioSciences Corp. v. Kim-C1, LLC*, 2011 IL App (1st) 102073, ¶ 35 (finding that "Illinois was not the proper tribunal to adjudicate the disputes regarding the arbitration award, not on the basis of lack of subject matter jurisdiction, but because the parties agreed to conduct the arbitration in California"); *DHR International, Inc. v. Winston and Strawn*, 347 Ill. App. 3d 642, 649 (2004) (finding that the *Southshore* decision suggests our supreme court "views the Uniform Arbitration Act as creating 'justiciable matter' over which the circuit court has original jurisdiction under the Illinois Constitution of 1970 and that a failure to comply with a jurisdictional limit may be the subject of an objection, but does not by itself divest

the circuit court of that jurisdiction"); *CPM Productions, Inc. v. Mobb Deep, Inc.*, 318 Ill. App. 3d 369, 378-79 (2000) (where contract provided for arbitration in New York, "the circuit court, while having the original power over the case generally, lacked the authority to act on the award").

¶ 100 While our supreme court itself has not revisited the *Southshore* decision, several of its recent decisions cast serious doubt upon any contention that the failure to comply with the provisions of the Uniform Arbitration Act would divest the circuit court of subject matter jurisdiction over a motion to confirm an arbitration award. In each case, and with the notable exception of actions for administrative review, our supreme court reiterated its position that: (1) a circuit court's subject matter jurisdiction over justiciable matters is conferred exclusively by the Illinois constitution; and (2) any failure to comply with relevant statutory provisions does not, and cannot, affect a circuit court's underlying subject matter jurisdiction in any way. See *In re Luis R.*, 239 Ill. 2d 295, 301-03 (2010); *In re M.W.*, 232 Ill. 2d 408, 423-26 (2009); *Belleville*, 199 Ill. 2d at 325 at 335-40.

¶ 101 In light of the above discussion, we conclude that the circuit court had subject matter jurisdiction to consider plaintiffs' motion to confirm the clause construction award. However, in so ruling, we do not express any opinion on the propriety of any order the circuit court entered in the context of that consideration. As we have explained at length, we do not have appellate jurisdiction to review such matters. We merely conclude that none of the circuit court's orders with respect thereto are void *ab initio* for a lack of subject matter jurisdiction.

¶ 102 C. Injunctive Orders

¶ 103 Finally, we address the circuit court's August 8, 2012, orders which: (1) enjoined defendants from seeking to vacate the clause construction award in another forum; and (2) denied defendants' motion to vacate that injunction. As we have already intimated, we find these orders to be improper.

¶ 104 Illinois has long recognized that " '[a] party has the legal right to bring his action in any court which has jurisdiction of the subject matter and which can obtain jurisdiction of the parties.' " *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 60 (1992) (quoting *Illinois Life Insurance Co. v. Prentiss*, 277 Ill. 383, 387 (1917)). Indeed, "a party possesses a general right 'to press his action in any jurisdiction which he may see fit and in as many of them as he chooses.' " *Pfaff*, 155 Ill. 2d at 65 (quoting *Prentiss*, 277 Ill. at 387.

¶ 105 Nevertheless, it has also "long been established in Illinois that a court of equity has the power to restrain a person over whom it has jurisdiction from instituting a suit [citation] or proceeding with suit in a foreign State [citation]." *Id.* at 43. "The exercise of such power by equity courts in Illinois is considered to be a matter of great delicacy, to be 'invoked with great restraint to avoid distressing conflicts and reciprocal interference with jurisdiction.' " *Id.* (quoting *James v. Grand Trunk Western R.R. Co.*, 14 Ill. 2d 356, 363 (1958). Thus, a circuit court:

> "[H]as the authority to restrain the prosecution of a foreign action which will result in fraud or gross wrong or oppression; a clear equity must be presented requiring the interposition of the court to prevent manifest wrong and injustice. [Citation.] What constitutes a wrong and injustice requiring the court's interposition must necessarily depend upon the particular facts of the case. [Citation.] There is no general rule as to what circumstance constitutes a proper case for the exercise of the trial court's discretion. [Citation.] The granting of an injunction will depend on specific circumstances as to whether equitable considerations in favor of granting the injunction outweigh the legal right of the party who instituted the foreign action. [Citation.]" *Pfaff*, 155 Ill. 2d at 58.

We review a circuit court's decision to enjoin a party from engaging in foreign litigation for an abuse

of discretion. *John Crane Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 700 (2009).

¶ 106 Here, plaintiffs' motion to enjoin defendants from litigating their second petition to vacate the clause construction award in Arizona relied upon their arguments that defendants: (1) filed their second Arizona petition while the instant litigation was still pending, even though it "involves the exact same parties as this cause of action and it also involves the very same 'clause construction award' already on review before the Illinois Appellate Court;" (2) were, therefore, "attempting to circumvent this state's appellate process;" (3) were, thus, also attempting to "game" the circuit court's jurisdiction and orders, including that portion of the February 22, 2012, order finding that any attempt by defendants to "resuscitate their Arizona proceeding *** would be both improper and counterproductive;" and (4) had "sought to harass and needlessly increase the expenses to Mr. Lopez and his attorneys of efficiently and orderly litigating this dispute."

¶ 107 In granting plaintiffs' motion, the circuit court relied upon its conclusions that: (1) defendants' second petition to vacate in Arizona involved the same parties, subject matter, and clause construction award as the instant litigation; (2) the second Arizona petition was, therefore, contrary to the language contained in its prior order regarding the impropriety and counterproductiveness of any further Arizona litigation, as well as being "contrary to and inconsistent with [defendants'] own pending appeals;" and (3) the circuit court must "act to preserve its own jurisdiction, and the proper and efficient operation of the civil judicial system." In light of these considerations, the circuit court granted plaintiffs' motion because defendants "cannot be permitted to litter the landscape willy-nilly with duplicative proceedings."

¶ 108 While we recognize that whether or not to enjoin a party from proceeding with suit in a foreign jurisdiction "must necessarily depend upon the particular facts of the case" and "[t]here is

no general rule as to what circumstance constitutes a proper case for the exercise of the trial court's discretion" (*Pfaff*, 155 Ill. 2d at 58), we must conclude that the injunction entered in this matter was an abuse of discretion. Here, there was no effort on the part of plaintiffs or the circuit court to identify why such an injunction was necessary so as to avoid fraud, gross wrong, oppression, or injustice, or why the "equitable considerations in favor of granting the injunction outweigh the legal right" of defendants to litigate in Arizona. *Id.* Rather, defendants appear to have been enjoined from prosecuting their petition in Arizona because that litigation was related to or similar to the instant litigation, it involved the same parties, and it would result in duplicative and inefficient proceedings that might be expensive for plaintiffs to defend. Our supreme court has held that these reasons are insufficient to justify such an injunction, however, specifically indicating:

> "* * * The bare fact that a suit [***] has been begun and is now pending in this State, in the absence of equitable considerations, furnishes no ground to enjoin [a party] from suing his claim in a foreign jurisdiction, although the cause of action is the same * * *. * * * That it may be inconvenient for [a party] to go to a foreign State to try [an action], or that the maintenance of two suits will cause double litigation and added expense, is insufficient cause for an injunction * * *.' " *Id.* at 60 (quoting *Prentiss*, 277 Ill. at 387-88).

As our supreme court further recognized, its precedents "demonstrate a strong policy against enjoining the prosecution of a foreign action merely because of inconvenience or simultaneous, duplicative litigation, or where a litigant simply wishes to avail himself of more favorable law." *Id.* at 58.

¶ 109 Moreover, any concern regarding the circuit court's own jurisdiction was also unfounded, as such concern fails to recognize that the "mere pendency" of the Arizona proceeding "did not

threaten the jurisdiction of the Illinois trial court; jurisdiction merely became concurrent." *Id.* at 65. Finally, we find that any concern regarding "any possible inconsistency in rulings or judgments may be rectified by resort to principles of *collateral estoppel* and *res judicata*." (Emphasis in original.) *Id.* at 74. Plaintiffs could also seek to have the Arizona proceeding stayed pending the outcome of the instant litigation, a stay they successfully obtained with respect to defendants' first petition to vacate.

¶ 110 We, therefore, conclude that, based upon analysis and policy considerations contained in our supreme court's *Pfaff* and *Prentiss* decisions, the circuit court abused its discretion in granting plaintiffs' motion to enjoin defendants from prosecuting their second petition in Arizona, and in denying defendants' motion to vacate that injunction. The circuit court's August 8, 2012, orders are, therefore, reversed, and the injunction entered against defendants is vacated.

¶ 111 III. CONCLUSION

¶ 112 For the foregoing reasons, we dismiss appeal nos. 1-12-763 and 1-12-0878 for a lack of appellate jurisdiction. With respect to appeal no. 1-12-2393, we reverse the August 8, 2012, orders of the circuit court enjoining defendants' from pursuing their litigation in Arizona (or elsewhere) and denying defendants' motion to vacate that injunction. We, therefore, vacate the injunction entered against defendants. This matter is remanded to the circuit court for further proceedings consistent with this order.

¶ 113 Appeal No. 1-12-0763, Appeal dismissed.

¶ 114 Appeal No. 1-12-0878, Appeal dismissed.

¶ 115 Appeal No. 1-12-2393, Reversed; injunction vacated; cause remanded.