UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOSHUA REEL, *et al.*,	)	Case No. 5:07cv00080
Plaintiffs,	)	**REPORT**
v.	)	and
	)	**RECOMMENDATION**
ANDERSON FINANCIAL SERVICES, LLC,	)	
Defendant,	)	By: Hon. James G. Welsh U. S. Magistrate Judge

This matter is before the court on a motion to compel arbitration and to stay proceedings filed by the defendant, Anderson Financial Services, LLC ("Anderson"), pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, and section 3 of the Federal Arbitration Act (9 U.S.C. § 3) ("FAA"). After careful review and for the reasons set forth below, it is recommended that the motion to compel arbitration be granted.

I

For the purpose of ruling on the defendant's motion all factual allegations in the plaintiffs' Complaint are accepted as true and viewed in the light most favorable to them. *See Par-Knit Mills, Inc. V. Stockbridge Fabrics Co.*, 636 F.2^{d} 51, 54 (3th Cir.1980) ("when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, [the court] should give to the opposing party the benefit of all reasonable doubts and inferences that may arise); *Minter v. Freeway Food, Inc.*, 2004 U.S. Dist. LEXIS 5709 * (MDNC) (in the context

of motions pursuant to the FAA to compel arbitration, other federal circuits have uniformly held a standard similar to that applicable to a motion for summary judgment is to be applied on the issue of whether an arbitration agreement was formed).

On September 21, 2006 the plaintiffs, Messrs. Thomas Elliott and Joshua Reel, entered into a loan transaction with Anderson pursuant to a written instrument titled "Motor Vehicle Equity Line of Credit" (plaintiffs' exhibit A attached to their Complaint). The first three pages of this document set forth the terms of an open end credit plan, as defined by 15 U.S.C. § 1602(I), [1] and the fourth page set forth the terms of a broad arbitration provision. All four pages appear to contain the signatures of both plaintiffs, and the authenticity of their signatures is not contested.

In pertinent part, the broad scope of the loan agreement's arbitration provision and it explicit waiver of jury and other trial-related rights reads as follows:

> Arbitration Agreement Provision Including Waiver of Jury Trial and Exclusion from Class Action Participation. Arbitration is a method of deciding disputes outside the court system. This arbitration provision governs when and how any claims or disputes you and we may have will be arbitrated, instead of litigated in court. THIS ARBITRATION PROVISION MAY SUBSTANTIALLY LIMIT OR AFFECT YOUR RIGHTS. PLEASE READ IT CAREFULLY; KEEP THIS PROVISION OR A COPY FOR YOUR RECORDS.
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> * * *
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> Arbitration Administrator. This term means the organization which will administer an arbitration, which shall be the American Arbitration Association, the National Arbitration Forum, or another generally recognized arbitration association in the state where the arbitration will take place. You can choose the Arbitration Administrator if

[1] "The term "open end credit plan" means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan which is an open end credit plan within the meaning of the preceding sentence is an open end credit plan even if credit information is verified from time to time."

> you give us written notice that you have chosen to arbitrate any claim or within 20 days after we give you notice that we are electing to arbitrate any claim.
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> * * *
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> Arbitration Rules, Procedure and Applicable Law. An arbitration proceeding will be conducted under the rules chosen by the Arbitration Administrator that are in effect when the arbitration is begun, provided that there will be a single arbitrator who must be a lawyer with more than 10 years of experience or a retired judge. The arbitration hearing, if any, and any pre-hearing conference to be attended in person, rather than by telephone, will take place in the county in which the loan covered by this Agreement originated. The decision of the arbitrator will be final and binding on both you and us.
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> * * *
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> This arbitration agreement is made in a transaction which involves or affects interstate commerce, and shall be governed by the Federal Arbitration Act (FAA") 9 USC Section 1 et seq.
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> * * *
>
> Waiver of Right to Jury Trial and Other Rights in a Court Case. IF ARBITRATION IS CHOSEN BY EITHER OF US WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PROVIDED FOR IN THE APPLICABLE ARBITRATION RULES OR BY THIS ARBITRATION PROVISION. OTHER RIGHTS THAT YOU MAY HAVE IF A CLAIM WAS FILED IN COURT MAY NOT BE AVAILABLE IN ARBITRATION . . . .

At the time of this transaction, the plaintiffs received a check in the amount of $200.00 which they allege was needed "to pay for their daily living needs." They state in their Complaint that neither of them could read sufficiently to understand the loan documents and that the defendant's employee with whom they dealt represented the terms of the loan to be such that it could be fully repaid over five months in monthly installments of seventy to eighty dollars. At the time they made the loan, they allege that they believed they were getting a "regular loan for $200.00." They contend that they were never given a copy of the loan documents, never given any Truth in Lending Act disclosures, never told anything about giving up their rights to a jury trial, and never told about the various fees that could, or would, be charged in connection with an open end credit loan.

Alleging violations of the Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*), violations of the Virginia Consumer Protection Act (Va. Code §§ 59.1-196 *et seq.*), violation of Virginia's usury laws, and fraud in the inducement, the plaintiffs filed suit on August 6, 2007. In response, on October 5, 2007 the defendant filed a timely Motion to Stay or Dismiss and Alternative Motion to Compel Arbitration, on the grounds that the issues raised in the plaintiffs' pleading were subject to the terms of a contractually binding arbitration provision. The plaintiffs oppose this motion on the grounds that they were "tricked" into signing it, did not knowingly and voluntarily waive their right to a jury trial, and were never furnished a copy of the loan documents containing the arbitration provision. These actions, the plaintiffs contend, constitute "a fraud specific to the . . . arbitration clause . . . ."

II

As each party acknowledges, congressional passage of the FAA, "reverse[d] the longstanding judicial hostility to arbitration agreements." *Gilmer v. Intestate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Brown v. TWA*, 127 F.3d 337, 340 (4th Cir. 1993) ("we are bound to enforce any legally negotiated arbitration clause"). As a central component of this strong national policy favoring arbitration, Section 2 of the FAA requires arbitration unless the agreement to arbitrate is revocable "upon such grounds as exist at law or in equity for the revocation of any contact." 9 U.S.C. § 2. Thus, where a party seeks to avoid arbitration, or the stay of a federal court proceeding pending the outcome of arbitration, the grounds upon which the party relies "must relate specifically to the arbitration clause and not just to the contract as a whole." *Snowden v. Checkpoint Check Cashing*, 290 .3d 631, 636 (4th Cir. 2002) (quoting *Hooters of Am. Inc., v. Phillips*, 173 F.3rd 71, 75) (4th Cir. 1989).

Arbitration is a "matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit;" however, if the contract contains an arbitration provision, there is a presumption of arbitrability. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960). And under sections 3 and 4 of the FAA (9 U.S.C. §§ 3-4), when an action brought in federal court 'upon any issue referable to arbitration," the court is obligated to "stay the . . . action pending arbitration once it is satisfied that the issue is arbitrable under the agreement." *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 488 (6th Cir. 2001) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. at 400); *see also Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 634 (4th Cir 2002).

III

Contending that their signatures on the arbitration provision page were the product of fraud in the inducement making the provision "unenforceable," the plaintiffs argue that the are entitled to an evidentiary hearing to determine whether their claim of fraud relates specifically to the arbitration clause,[2] as they contend. As authority for this position, they rely on the Fourth Circuit's decision in *Sydnor v. Conseco Fin. Svcs. Corp.* 253 F.3d 302 (4th Cir. 2001).

[2] The rule that a party seeking to avoid arbitration or a stay of federal court proceedings pending the outcome of arbitration, either or both, by challenging the validity or enforceability of an arbitration provision must establish cognizable grounds that relate to the arbitration provision and not to the contract as a whole, is derived from the Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967). This rule is generally known as the "severability doctrine," and it presumes an underlying, existent, agreement, even if one of the parties seeks to rescind it on the basis of fraud in the inducement. *See e.g., Sandvil AB v. Advent Int'l. Corp.*,. 220 F.3d 99, 105-106 (3d Cir. 2000); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002).

This reliance is misplaced. Although the Fourth Circuit in *Sydnor* remanded the case for an evidentiary hearing, the remand was necessitated only because "it [was] unclear from the record how [plaintiffs'] allegations of fraud appl[ied] specifically to the making of the arbitration agreement, as opposed to the whole contract." *Id.* at 307. Such lack of clarity does not exist in the case now before the court.

It is "well-settled" in the Fourth Circuit that a party seeking to avoid arbitration by challenging the validity or enforceability of the arbitration provision, must state the grounds which "relate specifically to the arbitration clause . . . ." *Snowden v. Checkpoint Check Cashing*, 290 F.3d at 636 (*citations omitted*). Pursuant to this severability doctrine, a claim of fraud in the inducement relating to the entire contract and, pursuant to a broad arbitration provision, properly to be considered by the arbitrator. *Prima Paint Corp.* 388 U.S. at 403-404. Similarly, claims attacking the validity of the agreement on the grounds that it is void *ab initio* under applicable state law are equally subject to a broad arbitration provision. *Snowden* 20 F. 3rd at 636-637 (citing with approval *Burden v. Check Into Cash of Ky. LLC, supra*). Likewise, in the absence of specific misrepresentation allegations "particular to" the arbitration provision and "separate from" the loan agreement, under *Prima Paint* claims that the arbitration provision was used to further or otherwise facilitate a fraudulent scheme are also arbitratable. *Burden v. Check Into Cash of Ky. LLC*, 267 F. 3rd at 491; *Sandvil AB v. Advent Int'l. Corp.*, 220 F.3d 99, 106 (3d Cir. 2000); *see also Snowden*, 290 F. 3rd at 638-639.

Neither in their pleadings nor in their argument have the plaintiffs challenged the *prima facie* validity of the underlying loan agreement; instead they allege that certain misrepresentations, fraud,

and/or other improper conduct associated with the agreement's formation permit them to disavow it at their election.[3] To the extent, therefore, that these claims of misconduct such claims do not specifically implicate the making of the arbitration provision itself, the FAA requires the court to enforce the embedded arbitration agreement.

For purposes of determining the enforceability of the arbitration provision under the severability doctrine in the instant case, the court is required conceptually to sever this provision from the remainder of the loan agreement and analyze it as an individual agreement. At least theoretically, this analysis suggests that an embedded arbitration provision is subject to a threshold challenge on two bases. It can be challenged on the grounds that the entire arbitration provision, as opposed to the underlying contract, is void *ab initio*,[4] and it can be challenged on the grounds the arbitration provision is voidable for reasons related specifically to it.

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[3] A claim that a contract is voidable does not challenge the existence or *prima facie* validity of the underlying agreement, but charges that inequitable conduct associated with the formation or performance of the agreement renders it unenforceable at the election of the aggrieved party. "Typical instances of voidable contracts are those where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

[4] Such a void *ab initio* challenge solely to an arbitration provision, however, necessarily creates a potential decisional conundrum. Consideration of the possible *ab initio* voidness of only one part of a contract implicitly threatens the existence of all provisions of the contract, including any embedded arbitration provision, particularly to the extent that it appears the contract would not have been made without the arbitration provision. *See generallyA tl. Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 274, 292-293 (4th Cir. 2007); *Totten v. Emople Benefits Mgmt.*, 61 Va. Cir 77, 2003 Va. Cir. 8, *2 (2003); *see also Nida v. Business Advisory Sys., Inc.*, 44 Va. Cir. 487, 1998 WL 972125 *5 (1998); *Pais v. Automotive Products, Inc.* 36 Va. Cir.230 (1995). To the extent that it does, resolution outside arbitration is not proper under the FAA. *See* 9 U.S.C. § 2-4; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006) ("as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract [and] . . . unless the challenge is to the arbitration clause itself, the issue of the contract's validity is [to be] considered by the arbitrator in the first instance.").

In making the determinations required by either or both of these challenges, "ordinary state law principles governing the formation of contracts" are applicable. *See e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Accordingly, the substantive law of Virginia regarding contract formation, interpretation and defenses is applicable.

A
The Arbitration Provision
Is Facially Valid

In the instant case, under Virginia law a facially valid arbitration provision between the parties exists. No claim is asserted that the parties' signatures, or any of them, were forgeries or that their names were affixed to the provision as the result of acts by a purported agent acting wholly without authority. *See generally Williams v. Given*, 47 Va. 268, 273, 1849 Va. LEXIS 44(1849); *Anthony v. County of Jasper*, 101 U.S. 693, 698-699 (1880). The provision is in no respects an *ultra vires* agreement which would be void *ab initio* under Virginia law. *See e.g., Richard L. Deal & Associates, Inc. v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 356, 348 (1983). Likewise, the provision offends no established public policy or statutory requirement. *See e.g., Harris v. Harris' Ex'r*, 64 Va. 737, 755, 1873 Va. LEXIS 66, *31 (1873) (contracts which are "void *ab initio* [include] as contracts against public policy, or contracts against public morals, or some positive law, common law or statute law"); *see also Heubusch v. Boone*, 213 Va. 414, 418, 192 S.E.2d 783, 787 (1972); *Downer v. CSX Transportation, Inc.*, 256 Va. 590, 595, 507 S.E.2d 612, 615 (1998); *Layne v. Henderson*, 232 Va. 332, 336, 351 S.E.2d 18, 21 (1986).

B
The Arbitration Provision
Was Not Fraudulently Induced

The plaintiffs' basic attack on the enforceability of the arbitration provision in this case is made on the grounds that their illiteracy, in combination with miscellaneous oral misrepresentations and a failure to provide them with a copy of the four-page loan agreement, resulted in the intentional denial any opportunity for them to know that the loan agreement contained a broad mandatory arbitration provision which included *inter alia* a waiver of their jury trial rights. In response, the defendant argues that this contention fails to demonstrate a cognizable diversion by the defendant of the plaintiffs' affirmative duty to inform themselves of the terms of the written arbitration agreement. Additionally, the defendant contends that this challenge addresses in fact the entire agreement, rather than merely the arbitration provision, and is an issue properly to be addressed by an arbitrator. [5]

"As a general principle, one who accepts a written agreement or contract is presumed to know and assent to its contents. In addition, it is hornbook law that one who [signs] a written contract will normally be bound by its terms and [that] ignorance . . . of the terms will not ordinarily affect the liability of such person under the contract." *Dillow v. Household Int'l. Inc.*, 2004 U.S.Dist LEXIS 30503 *6-7 (WDVa) (citations omitted). Claims of illiteracy and misleading information do not overcome this basis principle applicable to written contracts. *Id.*; *Lawler v. Schumacher Filters Am.*, 832 F. Supp. 1044, 1051 (EDVa 1993). "It is a fundamental principle of contract law that a person who

[5] The overall validity of the loan agreement is expressly not addressed in this report. See *Prima Paint* , 388 U.S. at 402-404. and *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 444-447 (2006).

signs a contract is presumed to know its terms and consents to be bound by them . . . . In fact, a blind or illiterate party . . . who signs the contract without learning of its contents would be bound" by its terms. *Id.*); *see also Jones v. Jim Walter Homes, Inc.*, 1991 U.S. App. LEXIS 5712 *8 (4th Cir.) ("the failure to read a written contract [is] usually . . . fatal to a claim of justifiable reliance upon an oral misrepresentation").

Moreover, the mischaracterizations and misleading statements alleged by the plaintiffs relate to significantly more than the arbitration provision. As such, the plaintiffs contention goes to the nature of the entire contract and should be properly determined by the arbitrator. *Dillow* , 2004 U.S.Dist LEXIS 30503 at 8 (*citing Sydnor v. Conseco Fin. Svcs.*, 252 F.2d at 307).

As part of this contention by the plaintiffs, they also assert the violation of a duty by the defendant to inform them orally of the scope and content of the arbitration provision. However, they suggest no authority or precedent to support the existence of such a legal duty. Moreover, this argument ignores completely their settled duty to inform themselves of the content of the agreement they signed.

Also, as part of this contention the plaintiffs contend that the failure to be given a copy of the contract effectively denied them the opportunity to inform themselves of the arbitration provision and further evidence of the defendant's fraud. This argument is, likewise, made without citation of any supporting authority. And there is no suggestion, either in their pleadings or in their argument, that on request the defendant ever denied or discouraged them from obtaining a copy.

C
The Arbitration Provision
Is Not Unconscionable

Inter alia. The plaintiffs' argue that the loan agreement's arbitration provision constitutes an adhesion contract [6] and is, therefore, unenforceable. This provision, they contend, is so unbalanced in favor of the defendant that it demonstrates clearly it was not freely bargained and is, on its face, unconscionable. [7] In response, the defendant argues that the arbitration provision fails to meet the "narrow" doctrine of unconscionability applicable under the FAA. In the defendant's view, the arbitration provision evidences no "inequality" sufficient to "shock the conscience," evidences no unfair arbitration advantage for the defendant, and properly provides for a neutral decision-making process. [8]

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[6] "A standard-form contract prepared by one party, to be signed by the party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms." Black's Law Dictionary 8th ed. 2004).

[7] "Under Virginia common law, a plaintiff bears the burden of proving [unconscionability] by clear and convincing evidence. *Pelfrey v. Pelfrey,* 25 Va. App. 239, 244, 487 S.E.2d 281 (1997). An unconscionable bargain is one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other. *Smyth Bros.-McCleary-McClellan Co. v. Beresford,* 128 Va. 137, 170, 104 S.E. 371 (1920). A court may void a contract on the grounds that it is unconscionable if 'the inequality [is] so gross as to shock the conscience. *Id.*. In order to determine whether an agreement is unconscionable, a court must examine the adequacy of price or quality of value. *Pelfrey,* 25 Va. App. at 244. In a case in which inadequacy of price or inequality of value are the only indicia of unconscionability, the case must be extreme to justify equitable relief. *Id.* However, in a case in which gross disparity in value exchanged' exists ... the court should consider whether oppressive influences affected the agreement to the extent that the process was unfair and the terms of the resulting agreement unconscionable. *Id.* at 244-45." *Howie v. Atl. Home Inspection, Inc.*, 62 Va. Cir. 164, 170, 2003 Va. Cir. LEXIS 298. *13 (2003) (all internal quote marks omitted).

[8] Addressing the issue of unconscionability in the context of a challenge to arbitrability, the Fourth Circuit has noted that the existence of "terms unreasonably to one party" can be an important fairness consideration. *Carlson v. General Motors Corp.*, 883 F.2d 287, 292-293 (4th Cir. 1989) (*quoting Williams v. Walker-Thomas Furniture Co.*, 121 U.S. App. D.C. 315, 350 F.2d 445, 449 (D.C. Cir. 1965)). Similarly, Fourth Circuit precedent also direct that procedural fairness and the neutrality of the decision-making process are important fairness considerations. *See Hooters of Amer., Inc. v. Phillips*, 173 F.3d 933, 938-939 (4th Cir. 1999); *Int'l. Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH.*, 206 F. 3rd 411, 419 (4th Cir. 2000).

It is obvious in this case that the defendant is seeking to enforce an arbitration provision which is part of a particular type of pre-printed small loan agreement unilaterally prepared by it. It is obvious in this case that the plaintiffs were without significant bargaining power. And it is equally obvious that the terms of the agreement, including the arbitration provision, were basically imposed on them.

Nevertheless, on review the arbitration provision is procedurally fair. It allows for an unbiased decision by a neutral decision-maker. It permits the plaintiffs to select the arbitrator from multiple recognized rosters of neutrals. It requires the neutral to be an experienced member of the Bar who is presumably familiar with the applicable state law. *See Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation, Communications Int'l. Union*, 973 F.2d 281 (4th Cir. 1992) (holding that an arbitrator is obligated to apply the law as he perceives it). It directs the use of dispute resolution procedures which are widely accepted to as fair and reasonable. *See e.g., Rainwater v. National Home Ins. Co.*, 944 F. 2nd 190, 193 (4th Cir. 1991) ("other courts also have held that reference to [the American Arbitration Association] rules and regulations is enough to make arbitration binding'). And contrary to the plaintiffs' energetic contention to the contrary, the "streamlined procedures for arbitration do not entail a consequential restriction on [their] substantive rights." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 201-202 (4th Cir. 1990) (*quoting Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987)).

IV
(Proposed Findings of Fact)

After a careful consideration of the pleadings and papers filed herein, after hearing the views of counsel and as supplemented by the above summary and analysis, the following formal findings, conclusions and recommendations are submitted:

1. The parties executed a four-page written Equity Line Credit Agreement, dated September 21, 2006;

2. Each page of the Agreement contains the signatures of both plaintiffs and the defendant's representative;

3. The terms of a broad arbitration provision are set forth on page four of the Agreement;

4. The Agreement evidences a transaction involving interstate commerce;

5. The dispute between the parties set forth in the pleadings is fully within the parameters of the arbitration provision;

6. The plaintiffs have declined, or otherwise refused, to arbitrate;

7. The plaintiffs are not entitled to an evidentiary hearing;

8. The arbitration provision meets or exceeds minimum standards of procedural fairness;

9. The arbitration provision allows for an unbiased decision by a neutral decision-maker;

10. The arbitration provision is neither procedurally nor substantively unconscionable;

11. The arbitration provision is valid and enforceable; and

12. Arbitration in this case is mandated by the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*).

V
(Recommended Disposition)

For the foregoing reasons, it is RECOMMENDED that an order be entered COMPELLING the plaintiffs, Joshua Reel and Thomas Elliott, and the defendant Anderson Financial Services, LLC, to submit to ARBITRATION of the claims raised in this civil action, in accordance with the terms of the arbitration agreement executed on September 21, 2006, that this civil action be STRICKEN from the docket of the court, and that the court RETAIN JURISDICTION to reinstate this matter in the event that it is necessary to effectuate the courts opinion and order.

The clerk is directed to transmit the record in this case immediately to the presiding United States district judge and to transmit a copy of this Report and Recommendation to all counsel of record.

VI
(Notice to the Parties)

All parties are reminded that, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, they are entitled to note objections, if any they may have, to this Report and Recommendation within ten (10) days hereof. **Any adjudication of fact or conclusion of law rendered herein by the undersigned to which an objection is not specifically made within the period prescribed by law may become conclusive upon the parties.** Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1) as to factual recitals or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objections.

DATED: this 2nd day of January 2008.

s/ James G. Welsh
United States Magistrate Judge