

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WANDA GREENWOOD, LADELLE HATFIELD and  
DEBORAH MCCLEESE, on behalf of  
themselves and others similarly  
situated,

Plaintiffs,

v.

COMPUCREDIT CORPORATION; COLUMBUS  
BANK AND TRUST, jointly and  
individually,

Defendants.

No. C 08-04878 CW

ORDER DENYING  
DEFENDANTS' MOTION  
TO COMPEL  
ARBITRATION

Defendants Compucredit Corporation and Columbus Bank and Trust  
move to compel Plaintiffs Wanda Greenwood, Ladelle Hatfield and  
Deborah McCleese to arbitrate their claims brought pursuant to the  
Credit Repair Organization Act (CROA). Plaintiffs oppose the  
motion. The motion was heard on February 26, 2009. Having  
considered all of the parties' papers and oral argument on the  
motion, the Court denies Defendants' motion. The Court concludes  
that CROA prohibits consumers from waiving their right to sue.

BACKGROUND

The following facts are alleged in the complaint. Defendant  
Compucredit marketed a subprime credit card under the brand name

1 Aspire Visa to consumers with low or weak credit scores through  
2 massive direct-mail solicitations and the internet. Compucredit is  
3 the exclusive marketer and advertiser of Aspire Visa credit cards  
4 and the credit cards are issued by Columbus Bank and Trust.  
5 Compucredit marketed the card by representing to consumers that an  
6 Aspire Visa credit card could be used by the consumer to "rebuild  
7 your credit," "rebuild poor credit," and "improve your credit  
8 rating." The promotional materials also noted that there was "no  
9 deposit required," and that consumers would immediately receive  
10 \$300 in available credit when they received their credit card.  
11 However, once Columbus Bank and Trust issued the credit card,  
12 consumers were charged a \$29 finance charge, a monthly \$6.50  
13 account maintenance fee and a \$150 annual fee. These fees were  
14 immediately assessed against the \$300 credit limit before the  
15 consumer received the credit card. Although Compucredit's  
16 promotional materials mentioned these fees, it did so in small  
17 print, buried in other information in the advertisement, and not in  
18 proximity to its representations that no deposit was required.  
19 Plaintiffs allege that Defendants' actions constitute several  
20 violations of the CROA and of California's Unfair Competition Law.

21 Before receiving an Aspire Visa credit card, each Plaintiff  
22 received a mailing entitled, Pre-Approved Acceptance Certificate.  
23 The Acceptance Certificate includes the following paragraph:

24 By signing, I request an Aspire Visa card and ask that an  
25 account be opened for me. I certify that everything I  
26 have stated in the Acceptance Certificate is true and  
27 accurate to the best of my knowledge. I have read and  
28 agree to be bound by the "Summary of Credit Terms" and  
"Terms of Offer" printed on the enclosed insert, which  
insert includes a discussion of arbitration applicable to  
my account, and is incorporated here by reference.

1 (emphasis in original). Plaintiffs signed the Acceptance  
2 Certificate. The "Terms of the Offer" states, in very small bold  
3 print in all capitals,

4 IMPORTANT -- THE AGREEMENT YOU RECEIVE CONTAINS A BINDING  
5 ARBITRATION PROVISION. IF A DISPUTE IS RESOLVED BY  
6 BINDING ARBITRATION, YOU WILL NOT HAVE THE RIGHT TO GO TO  
7 COURT OR HAVE THE DISPUTE HEARD BY A JURY, TO ENGAGE IN  
8 PRE-ARBITRATION DISCOVERY EXCEPT AS PERMITTED UNDER THE  
9 CODE OF PROCEDURE OF THE NATIONAL ARBITRATION FORUM  
10 ("NAF"), OR TO PARTICIPATE AS PART OF A CLASS OF CLAIMANTS  
11 RELATING TO SUCH DISPUTE. OTHER RIGHTS AVAILABLE TO YOU  
12 IN COURT MAY BE UNAVAILABLE IN ARBITRATION.

13 In even smaller print, the "Summary of Credit Terms" contains the  
14 following:

15 ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS)

16 Any claim, dispute or controversy (whether in  
17 contract, tort, or otherwise) at any time arising from or  
18 relating to your Account, any transferred balances or this  
19 Agreement (collectively, "Claims"), upon the election of  
20 you or us, will be resolved by binding arbitration  
21 pursuant to this Arbitration Provision and the Code of  
22 Procedure ("NAF Rules") of the National Arbitration Forum  
23 ("NAF") in effect when the Claim is filed. If for any  
24 reason the NAF cannot, will not or ceases to serve as  
25 arbitration administrator, we will substitute another  
26 nationally recognized arbitration organization utilizing a  
27 similar code of procedure.

28 Upon such an election, neither you nor we will have  
the right to litigate in court the claim being arbitrated,  
including a jury trial, or to engage in pre-arbitration  
discovery except as provided under NAF Rules. In  
addition, you will not have the right to participate as  
representative or member of any class of claimants  
relating to any claim subject to arbitration. Except as  
set forth below, the arbitrator's decision will be final  
and binding. Other rights available to you in court might  
not be available in arbitration.

The agreement also provides, "This Agreement, and your  
Account, and any claim, dispute or controversy (whether in  
contract, tort or otherwise) . . . are governed by and construed in

1 accordance with applicable federal law and the laws of Georgia.<sup>1</sup>

2 LEGAL STANDARD

3 I. Motion to Compel Arbitration

4 Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq.,  
5 written agreements that controversies between the parties shall be  
6 settled by arbitration are valid, irrevocable, and enforceable.

7 9 U.S.C. § 2. A party aggrieved by the refusal of another to  
8 arbitrate under a written arbitration agreement may petition the  
9 district court which would, save for the arbitration agreement,  
10 have jurisdiction over that action, for an order directing that  
11 arbitration proceed as provided for in the agreement. 9 U.S.C.

12 § 4. The FAA further provides that:

13 If any suit or proceeding be brought in any of the courts  
14 of the United States upon any issue referable to  
15 arbitration under an agreement in writing for such  
16 arbitration, the court in which such suit is pending,  
17 upon being satisfied that the issue involved in such suit  
18 or proceeding is referable to arbitration under such an  
19 agreement, shall on application of one of the parties  
20 stay the trial of the action until such arbitration has  
21 been had in accordance with the terms of the  
22 agreement . . . .

23 9 U.S.C. § 3.

24 If the court is satisfied "that the making of the arbitration  
25 agreement or the failure to comply with the agreement is not in  
26 issue, the court shall make an order directing the parties to  
27 proceed to arbitration in accordance with the terms of the  
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<sup>1</sup>The Court takes judicial notice of Compucredit's most recent annual registration with the Georgia Secretary of State and its most recent notice of annual meeting of shareholders, although not of the truth of the facts stated therein. See Intri-Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9th Cir. 2007) (court may take judicial notice of facts not reasonably subject to dispute, either because they are generally known, are matters of public record or are capable of accurate and ready determination).

1 agreement." Id. The FAA reflects a "liberal federal policy  
2 favoring arbitration agreements." Gilmer v. Interstate/Johnson  
3 Lane Corp., 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Mem.  
4 Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). A district  
5 court must compel arbitration under the FAA if it determines that:  
6 1) there exists a valid agreement to arbitrate; and 2) the dispute  
7 falls within its terms. Stern v. Cingular Wireless Corp., 453 F.  
8 Supp. 2d 1138, 1143 (C.D. Cal. 2006) (citing Chiron Corp. v. Ortho  
9 Diagnostic Sys., 207 F.3d 1126, 1130 (9th Cir. 2000)).

10 DISCUSSION

11 I. Motion to Compel Arbitration

12 Plaintiffs argue that the Court should not compel arbitration  
13 because the arbitration agreement is void under the CROA as to the  
14 national class, and it is void and unconscionable under California  
15 law as to the California class. Defendants clarify in their reply  
16 brief that they move to compel arbitration of the CROA claims as to  
17 the national class only, not of the claims pursued by the  
18 California class under California law. Therefore, the Court need  
19 not address whether the arbitration provision is void and  
20 unconscionable under California law.

21 Plaintiffs argue that the arbitration agreement is void as to  
22 the national class because the CROA contains specific provisions  
23 disallowing any waiver of a consumer's right to sue in court for  
24 CROA violations.<sup>2</sup> Each credit repair organization is required to

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26 <sup>2</sup>Defendants do not dispute that they are a "credit repair  
27 organization" as defined by 15 U.S.C. § 1679a(3)(A). That section  
28 provides,

The term "credit repair organization"

(continued...)

1 (1) inform the consumer of his or her right to sue, (2) provide  
2 such information to the consumer in a separate document containing  
3 a verbatim copy of an eight-paragraph text specified by Congress,  
4 which enumerates the "right to sue," (3) obtain from the consumer a  
5 signature confirming receipt of such information and (4) keep such  
6 signed confirmations on file for two years from the date of  
7 signing. 15 U.S.C. § 1679c(a)-(c). The written disclosure  
8 specifically states that consumers "have a right to sue a credit  
9 repair organization that violates the Credit Repair Organization  
10 Act." 15 U.S.C. § 1679c (emphasis added). This disclosure  
11 document must be provided to every consumer "before any contract or  
12 agreement between the consumer and the credit repair organization  
13 is executed." Id. § 1679c(a). The CROA contains a non-waiver  
14 provision, which states:

15 Any waiver by any consumer of any protection provided by  
16 or any right of the consumer under this subchapter --  
17 (1) shall be treated as void; and (2) may not be  
enforced by any Federal or State court or any other  
person.

18 15 U.S.C. § 1679f(a) (emphasis added). Based on these sections,  
19 Plaintiffs argue that they have a right to sue under CROA that  
20 cannot be waived. The issue of arbitration under CROA appears to be  
21 one of first impression in the Ninth Circuit.

22 \_\_\_\_\_  
23 <sup>2</sup>(...continued)

24 (A) means any person who uses any instrumentality of  
25 interstate commerce or the mails to sell, provide, or perform  
26 (or represent that such person can or will sell, provide, or  
27 perform) any service, in return for the payment of money or  
28 other valuable consideration, for the express or implied  
purpose of (i) improving any consumer's credit record, credit  
history, or credit rating; or (ii) providing advice or  
assistance to any consumer with regard to any activity or  
service described in clause (i).

1 In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,  
2 473 U.S. 624, 628 (1985), the Supreme Court held, "Having made the  
3 bargain to arbitrate, the party should be held to it unless Congress  
4 itself has evinced an intention to preclude a waiver of judicial  
5 remedies for the statutory rights at issue." The Court continued,  
6 "If Congress intended the substantive protection afforded by a given  
7 statute to include protection against waiver of the right to a  
8 judicial forum, that intention would be deducible from text or  
9 legislative history." Id. The party seeking to avoid arbitration  
10 of a statutory claim has the burden of establishing Congressional  
11 intent to preclude arbitration of the claim. Shearson/Am. Express,  
12 Inc. v. McMahon, 482 U.S. 220, 227 (1987).

13 Only a few courts around the country have confronted this  
14 issue. A district court in Texas concluded that "CROA's non-waiver  
15 of rights provisions, combined with its proclamation of a consumer's  
16 right to sue, represent precisely the expression of congressional  
17 intent required by" the Supreme Court to find that a waiver of  
18 judicial remedies is precluded. Alexander v. U.S. Credit  
19 Management, Inc., 384 F. Supp. 2d 1003, 1011 (N.D. Tx. 2005). That  
20 court also stated that "Congress did not intend to void all waivers  
21 of rights under the Act, and require consumers to sign a  
22 congressionally mandated enumeration of their rights under the Act,  
23 only to permit those very same rights to be waived mere moments  
24 later upon the signing an agreement such as the one in question  
25 here." Id. at 1012. A district court in Alabama recently noted,  
26 "The striking congruence of the language used in the disclosure  
27 provision, § 1679c, and the non-waiver provision, § 1679f, convinces  
28 the court that Congress intended to create a right to go to court

1 under CROA that cannot be waived." Reynolds v. Credit Solutions,  
2 Inc., 541 F. Supp. 2d 1248, 1258 (N.D. Ala. 2008). That court  
3 continued, "To recognize that CROA voids all waivers of 'any right  
4 of the consumer' and mandates that any waiver of the right to sue is  
5 void strikes the court as embracing an unhealthy regard for the  
6 federal policy favoring arbitration." Id. (emphasis in original).

7 However, a district court in Michigan noted that "besides  
8 entitling consumers to the actual disclosure statement, § 1679c does  
9 not afford consumers any rights or protections." Rex v. CSA-Credit  
10 Solutions of America, Inc., 507 F. Supp. 2d 788, 798 (W.D. Mich.  
11 2007). The court concluded that a different section of the statute,  
12 § 1679g(a), provides consumers with the actual right to bring a  
13 claim, and that section "does not contain any language indicating  
14 that claims under the CROA are nonarbitrable." Id. at 799.

15 The Third Circuit addressed this issue and similarly held that  
16 CROA's "anti-waiver provision as a matter of legislative intent  
17 would not apply to a right to assert claims in a judicial forum or  
18 on a class action basis, and a consumer asserting claims pursuant to  
19 the CROA may therefore waive such rights." Gay v. Creditinform, 511  
20 F.3d 369, 383 (3d Cir. 2007).

21 The Third Circuit analogized the issue to one that the Supreme  
22 Court considered in Shearson/Am. Express, Inc. v. McMahon when it  
23 determined whether section 29(a) of the Exchange Act prohibited  
24 arbitration agreements. Section 27 of the Act provides, "The  
25 district courts of the United States . . . shall have exclusive  
26 jurisdiction of violations of this chapter or the rules and  
27 regulations thereunder, and of all suits in equity and actions at  
28 law brought to enforce any liability or duty created by this chapter

1 or the rules and regulations thereunder." 15 U.S.C. § 78aa. And  
2 section 29(a) of the Act declares void "any condition, stipulation,  
3 or provision binding any person to waive compliance with any  
4 provision of [the Act]." Id. § 78cc(a). The plaintiffs in McMahon  
5 argued that section 29(a) prohibited waiver of the section 27 right  
6 to bring suit in a federal district court.

7 The Third Circuit took particular note of the following  
8 analysis in McMahon: "What the anti-waiver provision of § 29 forbids  
9 is enforcement of agreements to waive 'compliance' with the  
10 provisions of the statute," and "§ 27 itself does not impose any  
11 duty with which persons trading in securities must 'comply.'" McMahon,  
12 482 U.S. at 228. The Supreme Court distinguished between  
13 the procedural right that section 27 provides, the right to file an  
14 action in a federal district court, and the substantive rights that  
15 section 29(a) provides. The Court continued, "By its terms, § 29(a)  
16 only prohibits waiver of the substantive obligations imposed by the  
17 Exchange Act," and "[b]ecause § 27 does not impose any statutory  
18 duties, its waiver does not constitute a waiver of 'compliance with  
19 any provision' of the Exchange Act under § 29(a)." Id.

20 Applying McMahon, the Third Circuit observed that "the section  
21 [of the CROA] in which this anti-waiver provision appears is  
22 entitled 'Noncompliance with this subchapter.'" Gay, 511 F.3d at  
23 385. The Third Circuit reasoned that CROA's anti-waiver provision  
24 only "extend[s] to rights premised on the imposition of statutory  
25 duties." Id. Because the right to sue in a judicial forum is not a  
26 statutory duty under the CROA, the court concluded that the anti-  
27 waiver provision did not apply to it. Id.

28 The Court finds the reasoning of Alexander and Reynolds more

1 persuasive than that in Rex and Gay. In making this decision, the  
2 Court is mindful that "questions of arbitrability must be addressed  
3 with a healthy regard for the federal policy favoring arbitration."  
4 Gilmer, 500 U.S. at 26. The Court also notes that the Supreme Court  
5 has regularly concluded that statutory claims in a variety of  
6 contexts are arbitrable. See, e.g., Green Tree Financial Corp.-  
7 Alabama v. Randolph, 531 U.S. 79, 88-92 (2000) (Truth in Lending  
8 Act); Gilmer, 500 U.S. at 35 (Age Discrimination in Employment Act);  
9 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477,  
10 479-86 (1989) (Securities Act of 1933); McMahon, 482 U.S. at 227-40  
11 (Securities Exchange Act of 1934, Racketeer Influenced and Corrupt  
12 Organization Act); Mitsubishi Motors, 473 U.S. at 628-40 (Sherman  
13 Anti-Trust Act).

14 However, the "right to sue" and non-waiver language used in  
15 CROA is different in important respects from other statutory  
16 language that the Supreme Court found not to preclude a waiver of  
17 judicial remedies. For instance, in Mitsubishi Motors, the Court  
18 considered whether language in 15 U.S.C. § 15(a) rendered antitrust  
19 claims non-arbitrable. In relevant part, § 15(a) provides that "any  
20 person who shall be injured in his business or property by reason of  
21 anything forbidden in antitrust laws may sue therefor in any  
22 district court of the United States." The Court held that this  
23 section did not evidence a congressional intent to preclude Sherman  
24 Act claims from being arbitrable. Further, the Court noted that the  
25 Federal Arbitration Act and the Convention on the Recognition and  
26 Enforcement of Foreign Arbitral Awards favor arbitration for  
27 disputes in international commerce. The Court concluded that it was  
28 important "to subordinate domestic notions of arbitrability to the

1 international policy favoring commercial arbitration." Mitsubishi,  
2 473 U.S. at 639. The present case differs from Mitsubishi in that  
3 it does not contain an international component. Further, CROA  
4 contains express language which precludes waiving "any right of the  
5 consumer." 15 U.S.C. § 1679f(a). A plain reading of the statute  
6 dictates that one of those rights is the "right to sue a credit  
7 repair organization that violates" CROA. Id. § 1679c. The Sherman  
8 Act does not contain similar non-waiver language.

9 In Rodriguez de Quijas, the Court held that the Securities Act  
10 of 1933 does not preclude arbitration. 490 U.S. 481-83. There, the  
11 Court considered jurisdictional and non-waiver language virtually  
12 identical to the language considered in McMahon. The main  
13 difference between the two is that the Securities Act allows for  
14 concurrent jurisdiction in state and federal courts whereas the  
15 Exchange Act provides for exclusive federal jurisdiction. Id. The  
16 Court relied on the same distinction between procedural and  
17 substantive provisions and held that waiving the jurisdictional  
18 provision does not fall under the prohibition against waiving  
19 "compliance" with the Act. Id.

20 Again, the non-waiver provision in CROA differs from the non-  
21 waiver provisions at issue in McMahon and Rodriguez. CROA's non-  
22 waiver provision is not limited to the waiver of compliance with the  
23 Act. Though the section of the CROA in which the non-waiver  
24 provision appears is entitled "Noncompliance with this subchapter,"  
25 the following text of the statute specifically voids the waiver of  
26 any rights of the consumer. 15 U.S.C. § 1679f(a). The Supreme  
27 Court has noted that "the title of a statute . . . cannot limit the  
28 plain meaning of the text. For interpretive purposes, it is of use

1 only when it sheds light of some ambiguous word or phrase."  
2 Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212  
3 (1998). Here, because the text of § 1679f(a) is not ambiguous, the  
4 Court need not turn to the title of section to clarify its meaning.  
5 Further, the substantive-procedural distinction has no application  
6 to CROA. Unlike the Exchange Act and the Securities Act, CROA  
7 grants consumers the "right to sue." Vesting jurisdiction to hear a  
8 claim in a particular court is qualitatively different from a  
9 statute that expressly provides for a right to sue.

10 In Gilmer, the Court considered whether an arbitration  
11 agreement in a securities registration application could be avoided  
12 on the theory that arbitration "deprives claimants of the judicial  
13 forum provided for by the [Age Discrimination in Employment Act  
14 (ADEA)]." 500 U.S. at 29. The ADEA contains the following non-  
15 waiver provision: "any individual may not waive any right or claim  
16 under this Act unless the waiver is knowing and voluntary."  
17 However, the ADEA does not explicitly provide for a "right to sue."  
18 Rather, the ADEA takes a "flexible approach to resolution of claims.  
19 The EEOC, for example, is directed to pursue 'informal methods of  
20 conciliation, conference, and persuasion,' 29 U.S.C. § 626(b), which  
21 suggests that out-of-court dispute resolution, such as arbitration,  
22 is consistent with the statutory scheme established by Congress."  
23 Gilmer, 500 U.S. at 29.

24 Contrary to the ADEA, CROA specifically grants access to a  
25 judicial forum as a right and reveals no such "flexibility" toward  
26 alternative methods of dispute resolution. Moreover, in contrast to  
27 language in the ADEA that permits "knowing and voluntary" waiver of  
28 statutory rights, CROA proscribes any "waiver by any consumer of any

1 protection provided by or any right of the consumer under this  
2 title" irrespective of a consumer's knowledge or intent. 15 U.S.C.  
3 § 1679f(a).

4 In Green Tree, the Supreme Court considered whether claims  
5 under the Truth in Lending Act (TILA) were arbitrable. The party  
6 challenging arbitration did not "contend that the TILA evinces an  
7 intention to preclude a waiver of judicial remedies." 531 U.S. at  
8 90. Instead, arbitration was challenged because the costs and fees  
9 would be prohibitive. Id. The Court held that the party seeking to  
10 avoid arbitration on such grounds "bears the burden of showing the  
11 likelihood of incurring such costs." Id. at 92. The Court  
12 concluded that "neither during discovery nor when the case was  
13 presented on the merits was there any timely showing at all on the  
14 point." Id. Therefore, the Court rejected the argument that  
15 prohibitive costs made it impossible to vindicate statutory rights  
16 in arbitration. Id. Unlike Green Tree, in the present case,  
17 arbitration is directly challenged on the ground that CROA evinces  
18 an intention to preclude a waiver of judicial remedies.

19 In sum, the Court concludes that Congress intended claims under  
20 the CROA to be non-arbitrable. Requiring a dispute to be resolved  
21 through arbitration is incompatible with CROA's non-waivable right  
22 to sue. Therefore, the Court finds that the arbitration clause is  
23 void.<sup>3</sup>

24 CONCLUSION

25 For the foregoing reasons, the Court denies Defendants' motion

26 \_\_\_\_\_  
27 <sup>3</sup>To the extent the Court relied upon evidence to which  
28 Defendants objected, the objections are overruled. To the extent  
the Court did not rely on such evidence, Defendants' objections are  
overruled as moot.

1 to compel arbitration of Plaintiffs' CROA claims as they pertain to  
2 the national class (Docket Nos. 17 and 27).

3 IT IS SO ORDERED.

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5 Dated: 4/1/09



6 CLAUDIA WILKEN  
7 United States District Judge  
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