Donald M. Falk (CA Bar No. 150256)
dfalk@mayerbrown.com
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Telephone: (650) 331-2000
Facsimile: (650) 331-2060

John Nadolenco (CA Bar No. 181128)
jnadolenco@mayerbrown.com
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Attorneys for Defendant
AT&T Mobility LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PATRICK HENDRICKS, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

AT&T MOBILITY, LLC,

Defendant.

Case No. CV 11-00409-CRB

STATEMENT OF RECENT DECISION IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY CASE

Date: October 21, 2011
Time: 10:00 a.m.
Courtroom 8
Honorable Charles R. Breyer

Local Civil Rule 7-4(d)(2) provides that "[b]efore the noticed hearing date, counsel may bring to the Court's attention a relevant judicial opinion published after the date the opposition or reply was filed by serving and filing a Statement of Recent Decision, containing a citation to and providing a copy of the new opinion–without argument." In accordance with that rule, defendant AT&T Mobility LLC ("ATTM") respectfully submits three recent decisions as supplemental authority in support of its motion to compel arbitration and stay case (Dkt. No. 35):

- The order granting ATTM's motion to compel arbitration in *Kaltwasser v. AT&T Mobility LLC*, -- F. Supp. 2d --, 2011 WL 4381748 (N.D. Cal. Sept. 20, 2011) (Fogel, J.) (attached as Exhibit 1);
- The order granting ATTM's motion to compel arbitration in *Adams v. AT&T Mobility LLC*, No. C10-763RAJ (W.D. Wash. Sept. 20, 2011) (Jones, J.) (attached as Exhibit 2); and
- The order granting T-Mobile USA, Inc.'s motion to compel arbitration in *Meyer v. T-Mobile USA, Inc.*, 2011 WL 4434810 (N.D. Cal. Sept. 23, 2011) (Breyer, J.) (attached as Exhibit 3).

Each decision was issued after ATTM filed its reply brief on September 9, 2011 (Dkt. No. 42).

Dated: October 19, 2011

MAYER BROWN LLP

By: /s/ Donald M. Falk
Donald M. Falk

John Nadolenco (CA Bar No. 181128)
jnadolenco@mayerbrown.com
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Donald M. Falk (CA Bar No. 150256)
dfalk@mayerbrown.com
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Telephone: (650) 331-2000
Facsimile: (650) 331-2060

Attorneys for Defendant

AT&T Mobility LLC

Of Counsel:

Andrew J. Pincus (*pro hac vice*)
Evan M. Tager
Archis A. Parasharami (*pro hac vice*)
Kevin Ranlett (*pro hac vice*)
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

EXHIBIT 1

--- F.Supp.2d ----, 2011 WL 4381748 (N.D.Cal.)
(Cite as: 2011 WL 4381748 (N.D.Cal.))

H

Only the Westlaw citation is currently available.

United States District Court, N.D. California,
San Jose Division.
Jonathan C. KALTWASSER, Plaintiff,
v.
AT & T MOBILITY LLC, a Delaware Corporation, f/k/a Cingular Wireless LLC, Defendant.

No. C 07–00411.
Sept. 20, 2011.

Michael D. Braun, Braun Law Group, P.C., James Mark Moore, Robert Ira Spiro, Spiro Moss LLP, Janet Lindner Spielberg, Law Offices of Janet Lindner Spielberg, Los Angeles, CA, Joseph N. Kravec, Jr., Wyatt A. Lison, Stember Feinstein Doyle & Payne, LLC, Pittsburgh, PA, for Plaintiff.

Archis Ashok Parasharami, Mayer Brown LLP, Washington, DC, Jeffrey Ronald Baxter, David L. Balser, Nathan Lewis Garroway, McKenna Long & Aldridge, LLP, Atlanta, GA, Donald M. Falk, Mayer Brown LLP, Palo Alto, CA, Felicia Yi–Wen Feng, McKenna Long & Aldridge LLP, San Francisco, CA, for Defendant.

ORDER GRANTING MOTION TO COMPEL ARBITRATION AND TERMINATING MOTION TO STRIKE CLASS ALLEGATIONS

JEREMY FOGEL, District Judge.

***1** In January 2007, Plaintiff Jonathan C. Kaltwasser filed this putative class action alleging claims under California law against AT & T Mobility LLC, f/k/a Cingular Wireless LLC ("ATTM"). ATTM moved to compel arbitration of Kaltwasser's claims. Relying upon *Discover Bank v. Superior Court,* 36 Cal.4th 148 (Cal.2005), this Court found the contractual arbitration agreement unenforceable, and that determination was affirmed by the Court of Appeals. *See Kaltwasser v. Cingular Wireless LLC,* 350 F. App'x 108, 109 (9th Cir.2008). The Court subsequently deferred a decision on Kaltwasser's motion for class certification pending the United States Supreme Court's ruling in *AT & T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011). In a decision issued on April 27, 2011, the Supreme Court held that California's *Discover Bank* rule impermissibly conflicted with the Federal Arbitration Act. *See Concepcion,* 131 S.Ct. at 1748 (citing 9 U.S.C. §§ 2–4). ATTM therefore renewed its motion to compel arbitration and moved to strike Kaltwasser's class allegations. For the reasons discussed below, the motion to compel will be granted, and the motion to strike will be terminated as moot.

I. BACKGROUND

In July 2006, Kaltwasser, who then resided in California, renewed his wireless telephone contract with ATTM, a Delaware corporation with its principal place of business in Atlanta, Georgia. Kaltwasser claims that he decided to renew because ATTM advertised that it was the cellular service provider with the "fewest dropped calls." Kaltwasser's complaint in the present action alleges that ATTM's advertising was false, giving rise to claims for (1) unfair competition under Cal. Bus. & Prof.Code §§ 17200 *et seq.*, (2) false advertising under Cal. Bus. & Prof.Code §§ 17500 *et seq.*, (3) a violation of the Consumer Legal Remedies Act, Cal. Civ.Code §§ 1750 *et seq.*, and (4) breach of contract, or, alternatively, unjust enrichment. He asserts his claims on behalf of all customers who contracted for cell phone service with ATTM in California on or after March 1, 2006.

ATTM moved to compel Kaltwasser to arbitrate his claims on an individual basis, citing the terms of an arbitration agreement that it began including in its Terms of Service in December 2006 ("the 2006 agreement"). Kaltwasser argued that he never accepted the 2006 agreement and that ATTM's previous arbitration agreement, which ATTM used from 2003 to December 2006 ("the 2003 agreement"), applied to him. However, although the 2003 agreement and 2006 agreement

differ in some respects, both are take-it-or-leave-it form contracts that preclude ATTM's customers from bringing any "purported class or representative proceeding." FN1

FN1. The 2003 agreement states: "YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding." Dkt. 62 at 2.

The 2006 agreement states: "YOU AND CINGULAR AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING." Dkt. 28–1 at 31.

On April 11, 2008, this Court denied ATTM's motion to compel. It observed that under California law as articulated by the California Supreme Court in *Discover Bank*, consumer contracts binding parties to bilateral arbitration "are generally unconscionable." In particular, *Discover Bank* held that a class-action waiver is unconscionable when it appears "in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 36 Cal.4th at 162–63. The Court reasoned that because "damages in consumer cases are often small ... the class action is often the only effective way to halt and redress [consumer] exploitation." *Id.* at 161 (internal quotation marks and citation omitted). Conversely, bilateral arbitration agreements in consumer contracts typically "become[ ] in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another,' " making them "unconscionable under California law." *Id.* at 163 (quoting Cal. Civ.Code § 1668). In its order affirming this Court's decision, the Ninth Circuit explained that "it makes no difference" whether the 2003 agreement or the 2006 agreement applies to Kaltwasser because both "include a waiver of the right to bring a class action that is unconscionable as a matter of California law." *See Kaltwasser*, 350 F. App'x at 109 (citing *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 981 (9th Cir.2007); *Discover Bank*, 36 Cal.4th at 161).

***2** The parties proceeded with discovery, and Kaltwasser retained an expert to analyze the data that ATTM produced as support for its "fewest dropped calls" advertisements. On February 26, 2010, Kaltwasser filed a motion to certify the proposed plaintiff class.

II. LEGAL STANDARD

Section 4 of the FAA permits a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court ... for an order directing that ... arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. *Id.*

The FAA espouses a general policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *see also Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). Federal courts are required to rigorously enforce an agreement to arbitrate. *See Hall Street Assoc.*, 552 U.S. at 582. In determining whether to issue an order compelling arbitration, the court may not review the merits of the dispute but must limit its inquiry to (1) whether the contract containing the arbitration agreement evidences a transaction involving interstate commerce, (2) whether there exists a valid agreement to arbitrate, and (3) whether the dispute(s) fall within

the scope of the agreement to arbitrate. *See Republic of Nicaragua v. Standard Fruit Co.,* 937 F.2d 469, 477–78 (9th Cir.1991), *cert denied,* 503 U.S. 919 (1992). If the answer to each of these queries is affirmative, then the court must order the parties to arbitration in accordance with the terms of their agreement. 9 U.S.C. § 4.

The FAA provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" federal law. *Doctor's Assoc., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996). In interpreting the validity and scope of an arbitration agreement, the courts apply state law principles of contract formation and interpretation. *See id.* at 686–87; *see also Wolsey, Ltd. v. Foodmaker, Inc.,* 144 F.3d 1205, 1210 (9th Cir.1998). Accordingly, a court reviews a plaintiffs arbitration agreement in light of the "liberal federal policy favoring arbitration agreements," *Moses H. Cone,* 460 U.S. at 24, and considers the enforceability according to the laws of the state of contract formation, *see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995); *Ingle v. Circuit City Stores,* 328 F.3d 1165, 1170 (9th Cir.2003).

III. DISCUSSION

***3** In *Concepcion,* the Supreme Court considered whether the *Discover Bank* rule came within the "savings clause" of Section 2 of the FAA, which provides that a court may find an arbitration agreement unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." *See Concepcion,* 131 S.Ct. at 1745–48 (citing 9 U.S.C. § 2). The Court held that it did not. It concluded that although the *Discover Bank* rule was characterized as arising from the "generally applicable" contract law doctrine of unconscionability, it was "applied in a fashion that disfavors arbitration," as "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Id.* at 1747. The FAA "was designed to promote arbitration," which typically has the objective of "achiev[ing] 'streamlined proceedings and expeditious results.' " *Id.* at 1749 (quoting *Preston v. Ferrer,* 552 U.S. 346, 357–58 (2008)). The *Discover Bank* rule "interferes with arbitration": by enabling a consumer who has agreed to bilateral arbitration to "demand [classwide arbitration] *ex post,* " it subjects the parties to ' "fundamental" ' changes in the arbitration process. *Id.* at 1750 (quoting *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S.Ct. 1758, 1776 (2010)). The "switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Class arbitration, unlike bilateral arbitration, " *requires* procedural formality" and due process safeguards that might entail increased judicial intervention. *See id.* at 1751–52 (emphasis in the original). Class arbitration also "greatly increases risks to defendants" because it can impose "devastating loss[es]" with very limited judicial review. *Id.* at 1752. Concluding that class arbitration "is not arbitration as envisioned by the FAA," the Court held that "California's *Discover Bank* rule is preempted by the FAA." *Id.* at 1753.

Kaltwasser nonetheless argues that *Concepcion* does not require him to arbitrate his action against ATTM. First, he contends that *Concepcion* left intact a vindication-of-rights doctrine under federal common law, which allows him to avoid bilateral arbitration if he can show that the costs involved in proving his claims exceed the damages he can potentially recover. Second, he asserts that *Concepcion* did not affect public policy principles of contract law expressed in *Broughton v. Cigna Healthplans of Cal .,* 21 Cal.4th 1066 (Cal.1999), *Cruz v. PacifiCare Health Sys., Inc.,* 30 Cal.4th 303 (Cal.2003), and Cal. Civ.Code § 3513 (2011), which provides that "a law established for a public reason cannot be contravened by a private agree-

ment." [FN2] Third, he argues that ATTM has waived its right to bilateral arbitration. Each of these arguments is unavailing.

> FN2. Kaltwasser erroneously cites Cal. Civ.Code § 3515 for this proposition, but it is in fact stated at Cal. Civ.Code § 3513.

A. Vindication–of–Rights Doctrine

***4** As Kaltwasser reads it, *Concepcion* invalidated the *Discover Bank* rule because the rule operated too broadly, invalidating most consumer arbitration agreements and having no real limiting principles. *See* 131 S.Ct. at 1750 ("The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past. The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat customers. The former requirement, however, is toothless and malleable ..., and the latter has no limiting effect, as all that is required is an allegation.") (internal citations omitted). He suggests that *Concepcion* leaves room for a court to perform an "individualized case-by-case" analysis of whether binding a particular plaintiff to bilateral arbitration would preclude that plaintiff from vindicating his rights, and that in such a case the plaintiff should not be bound by the arbitration agreement. Kaltwasser's Response Br. at 9. Kaltwasser asserts that the costs of proving his claims in this case make it impossible for him to vindicate his claims through individual arbitration. He represents that he has spent $65,000 on expert fees and that his expert estimates that a full statistical analysis will cost at least $165,000. In contrast, Kaltwasser's actual damages will not exceed $2,000, which represents the total of his contract payments to ATTM.

Kaltwasser bases his vindication-of-rights argument on *Green Tree Financial Corporation–Alabama v. Randolph,* 531 U.S. 79 (2000). In that case, the plaintiff brought federal statutory claims against a financing company and its subsidiary (collectively, "Green Tree"). *Id.* at 82–83. Green Tree moved to compel arbitration pursuant to a contract between the parties, but the plaintiff sought to invalidate the arbitration provision on the ground that the "arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against" Green Tree. *Id.* at 90. The Supreme Court held that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. It concluded that the plaintiff in *Green Tree* fell far short of meeting that burden. She made conclusory statements about filing and arbitrator's fees, but she offered nothing to show that she herself would "bear such costs if she [went] to arbitration." *See id.* at 90–91 & n. 6. Without more, the plaintiff's concern about the expense of arbitrating was "too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

Kaltwasser seizes on the Court's statement in *Green Tree* that "[i]t may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. He asserts that if a litigant *can* prove that the cost of arbitrating would prevent him from vindicating his rights, the arbitration agreement may be held invalid. He points out that in *In re American Express Merchants' Litigation,* 634 F.3d 187, 197–99 (2d Cir.2011), the Second Circuit recently applied *Green Tree* to invalidate a class-action waiver in an arbitration agreement on these very grounds. The plaintiffs in *American Express* submitted an affidavit from an economist who estimated that the cost of analyzing their Sherman Act claims would cost "in the middle of the typical range for an antitrust case, $300,000 to $2 million. *Id.* at 198. The largest amount that any of the named plaintiffs could expect to win was approximately $39,000. *Id.* Based upon this showing, the Second Circuit concluded that "the cost of plaintiffs' individually ar-

bitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* at 197–98. Finding that the plaintiffs' "only economically feasible means for enforcing their statutory rights is via a class action," the Second Circuit refused to enforce the class-action waiver. *Id.* at 198.

***5** There are several problems with Kaltwasser's reliance on *Green Tree*. First, it is not clear that *Green Tree's* solicitude for the vindication of rights applies to rights arising under state law, which are the only rights that Kalwasser seeks to vindicate here. *Green Tree* refers expressly to the possibility that arbitration costs could "preclude a litigant ... from effectively vindicating her *federal* statutory rights," 531 U.S. at 90 (emphasis added), and it states that "the party seeking to avoid arbitration bears the burden of establishing that *Congress* intended to preclude arbitration of the statutory claims at issue," *id.* at 92 (emphasis added). *But compare Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir.2006) (stating that vindication-of-rights principle based on *Green Tree* applies only "where federal statutorily provided rights are affected") *with Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir.2006) (finding "provisions of ... arbitration agreements ... invalid because they prevent the vindication of statutory rights under state and federal law"). Because *American Express* involved only federal claims, it does not help Kaltwasser in this regard.

Second, even assuming that *Green Tree* applies to state law claims, the notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with *Concepcion.* In striking down the *Discover Bank* rule, the Supreme Court recognized the possibility that "small-dollar claims ... might ... slip through the system" because of the cost of proving a claim. 131 S.Ct. at 1753. The *Concepcion* dissent found this consequence greatly troubling. *See id.* at 1760 ("[A]greements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate."); *id.* at 1761 ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for $30." (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir.2004)) (emphasis in the original)). If the *Concepcion* majority had intended to allow for the plaintiffs to avoid class-action waivers by offering evidence about particular costs of proof they would face—essentially applying the underlying rationale of *Discover Bank* without relying on *Discover Bank* as a "rule"—one would expect it to have drawn attention to such a significant point in response to the dissent. *American Express* was decided prior to *Concepcion,* and in fact, the Second Circuit has stayed proceedings in that case while it "sua sponte consider[s] rehearing" in light of Concepcion. *See* Order, *In re American Express Merchants' Litigation,* No. 06–1871–cv (2d Cir. Aug. 1, 2011); *see also D'Antuono v. Service Road Corp,* No. 3:11cv33 (MRK), —— F.Supp.2d ——, 2011 WL 2175932, at *29 (D. Conn May 25, 2011) (expressing "some doubt about *American Express* ... in light of *AT & T Mobility* [*v. Concepcion*]" although concluding that district courts in the Second Circuit "remain[ ] obligated to apply *American Express.*").

***6** Third, Kaltwasser's position is unworkable as a practical matter of judicial administration. Under his approach, every court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiffs case. Defendants predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's costs of proof. It is highly doubtful that in striking down the *Discover Bank* rule, the Supreme Court intended to open the door to such proceedings as a means for plaintiffs to avoid arbitration agreements.

For these reasons, it is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs

and benefits at stake. *Concepcion* not only rejected the *Discover Bank* rule but also upheld the 2006 agreement at issue in that case. *Cf. Cruz v. Cingular Wireless, LLC,* No. 08–16080, —- F.3d ——-, 2011 WL 3505016, at *8 (11th Cir. Aug. 11, 2011) (interpreting *Concepcion* to validate the 2006 agreement, although without "reach[ing] the question of whether *Concepcion* leaves open the possibility that in [other] cases, an arbitration agreement may be invalidated ... where it effectively prevents the claimant from vindicating her statutory cause of action"). And if the 2006 agreement is valid, then so is the 2003 agreement, which does not differ materially from the former.[FN3]

FN3. Admittedly, the 2003 agreement is less favorable to the consumer. It provides that if "the arbitrator grants relief to [the consumer] that is equal to or greater than the value of [his] Demand"—the specific amount of relief he must request when initiating a claim against ATTM—ATTM will reimburse him for "reasonable attorneys' fees and expenses incurred for the arbitration." Dkt. 41–1 at 17. The 2006 agreement replaces this provision with one that obliges ATTM to pay at least the greater of $5000 or the maximum available in the local small claims court, along with twice the amount of attorney's fees and expenses, whenever a consumer obtains an arbitration award greater than ATTM's last settlement offer before selection of an arbitrator. *See* Dkt. 41–2 at 4–5; *Concepcion,* 131 S.Ct. at 1753.

However, Kaltwasser's objections to the 2003 agreement apply equally to the 2006 agreement. Kaltwasser argues that the expenses-and-fees guarantee in the 2003 agreement is "illusory" because there is information asymmetry between the consumer and ATTM. Kaltwasser Response Br. at 21. He claims that the consumer, without any discovery, has little means of identifying the appropriate amount for his demand. If he guesses too low, ATTM can simply pay the demand, undervaluing the claim. If he guesses too high, ATTM can refuse to pay the demand, wait for the arbitrator to award a lower amount, and avoid paying fees and expenses. To the extent that this situation poses a real difficulty for plaintiffs, it does not get any better with the 2006 agreement, under which the recovery of expenses and fees also depends on the parties' pre-arbitration estimates of the value of the claim. Kaltwasser agrees. *See id.* at 23–24 (arguing that recovery of expenses and fees under the 2006 agreement "remains dependent upon a consumer's ability to determine *prior to discovery* what is the actual value of his or her claim.... While more artfully crafted, this provision is still substantively illusory." (emphasis in original)). *Concepcion* did not find the conditions for obtaining expenses and fees in the 2006 agreement problematic, *see* 131 S.Ct. at 1753, so they also fail to provide a basis for avoiding the 2003 agreement.

To be sure, *Concepcion* does not explicitly overrule *Green Tree*, but it does make it untenable to read *Green Tree* for a vindication-of-rights principle as robust as Kaltwasser asserts here. If *Green Tree* has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. *See Green Tree,* 531 U.S. at 90–91 & n. 6. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.

B. *Broughton, Cruz,* and California Civil Code §

3513

Kaltwasser's next objection to the arbitration agreement is based upon the fact that he seeks injunctive relief for his claims under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code § 17200 *et seq.;* False Advertising Law ("FAL"), Cal. Bus. & Prof.Code § 17500 *et seq.;* and Consumer Legal Remedies Act ("CLRA"), Cal. Civ.Code § 1750 *et seq.* The California Supreme Court has held that claims for injunctive relief under these laws are not arbitrable. In *Broughton v. Cigna Healthplans,* 21 Cal.4th 1066 (Cal.1999), it held that claims for injunctive relief under the CLRA may not be arbitrated because the purpose of such relief is to "remedy a public wrong," *id.* at 1080, and "the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators," *id.* at 1082. In *Cruz v. PacifiCare Health Sys., Inc.,* 30 Cal.4th 303, 307 (Cal.2003), the California Supreme Court reaffirmed *Broughton* and extended its holding to encompass claims for injunctive relief under the UCL and FAL.

***7** Since *Concepcion,* numerous courts have concluded that the FAA preempts the holdings of *Cruz* and *Broughton* because they amount to "state law[s] prohibit[ing] outright the arbitration of a particular type of claim." *See, e.g., Nelson v. AT & T Mobility LLC,* No. C10–4802 TEH, 2011 WL 3651153, at *2 (N.D.Cal. Aug. 18, 2011); *In re Apple and AT & T iPad Unlimited Data Plan Litigation,* No. C–10–02553 RMW, 2011 WL 2886407, at *4 (N.D.Cal. July 19, 2011); *Arellano v. T–Mobile USA, Inc.,* No. C 10–05663 WHA, 2011 WL 1842712, at *2 (N.D.Cal. May 16, 2011) (all quoting *Concepcion,* 131 S.Ct. at 1747). Kaltwasser nonetheless contends that *Cruz* and *Broughton* are not preempted because the statutes that they examine, the UCL, FAL, and CLRA, do not prohibit arbitration on their face. He asserts that *Cruz* and *Broughton* both rest upon a public interest analysis akin to that expressed in Cal. Civ.Code § 3513, which states that "a law established for a public reason cannot be contravened by a private agreement." According to Kaltwasser, Cal. Civ.Code § 3513 and the similar public interest rationales expressed in *Cruz* and *Broughton,* are "generally applicable" contract law principles that come within the savings clause of Section 2 of the FAA and remain valid after *Concepcion.*

This argument is unpersuasive. *Discover Bank* itself was based upon public policy rationales intertwined with the generally applicable doctrine of unconscionability. It invoked Cal. Civ.Code § 1668, which provides that "All contracts which have for their object ... to exempt anyone from responsibility for his own ... violation of law, whether willful or negligent, are against the policy of the law." *See Discover Bank,* 36 Cal.4th at 161, 163. The Supreme Court, however, found that *Discover Bank* applied the unconscionability doctrine "in a fashion that disfavors arbitration." *Concepcion,* 131 S.Ct. at 1747. *Cruz* and *Broughton,* even more patently than *Discover Bank,* apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims.

C. Waiver of Rights

"The right to arbitration, like any other contract right, can be waived." *United States v. Park Place Assocs.,* 563 F.3d 907, 921 (9th Cir.2009). The Ninth Circuit has emphasized, however, that "waiver of the right to arbitration is disfavored because it is a contractual right, and thus any party arguing waiver of arbitration bears a heavy burden of proof." *Id.* (internal quotation marks and citations omitted). To demonstrate that ATTM has waived its right to arbitrate, Kaltwasser must show: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Id.* (internal quotation marks and citation omitted).

Kaltwasser fails to meet the first requirement. The Ninth Circuit has held that "there was no exist-

ing right to arbitrate" if it would have been "futile" to pursue arbitration "under the then-prevailing law in this circuit." *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 (9th Cir.1986). Before *Concepcion,* adhesive consumer contracts requiring bilateral agreement were generally invalid under *Discover Bank,* so it was "futile" for ATTM to pursue arbitration against Kaltwasser. *See Fisher v. A.G. Becker Paribas Inc.,* 791 F.2d 691, 695 (9th Cir.1986) (finding that it was "futile [for defendant] to file a motion to compel arbitration until ... the Supreme Court rejected" a Ninth Circuit ruling that had been applicable to the defendant's case); *see also, e.g., Morse v. ServiceMaster Global Holdings Inc.*, No. C 10–00628 SI, 2011 WL 3203919, at *3 (N.D.Cal. July 27, 2011) (finding that defendants who did not move to compel arbitration prior to *Concepcion* "did not act inconsistently with a known existing right to compel arbitration"); *Bryant v. Service Corp. Int'l,* No. C 08–1190 SI, 2011 WL 2709643, at *5 (N.D .Cal. July 12, 2011) ("The arbitration agreement that plaintiffs are seeking to enforce in this case appears not to permit class action arbitration, and therefore until [*Concepcion*] would not have been enforceable according to its terms."); *In re Cal. Title Ins. Antitrust Litigation,* No. 08–01341 JSW, 2011 WL 2566449, at *3 (N.D. Cal. June 27, 2011) (finding that it would have "been futile for Defendants ... to compel arbitration prior to the decision in *Concepcion* ").

***8** Because ATTM did not have a right to compel arbitration before *Concepcion,* and it promptly moved to compel arbitration after the Supreme Court decided *Concepcion,* it did not waive or abandon its right to arbitration.

IV. ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED that ATTM's motion to compel arbitration is GRANTED. ATTM's motion to strike Kaltwasser's class allegations is terminated without prejudice as moot.

IT IS SO ORDERED.

N.D.Cal.,2011.
Kaltwasser v. AT & T Mobility LLC
--- F.Supp.2d ----, 2011 WL 4381748 (N.D.Cal.)

END OF DOCUMENT

EXHIBIT 2

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BONNIE ADAMS, et al.,

Plaintiffs,

v.

AT&T MOBILITY, LLC,

Defendant.

CASE NO. C10-763RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on motions to compel arbitration pending in this case and in *Stoican v. Cellco P'ship*, No. C10-1017RAJ. In each case, the Defendant is a wireless phone service provider invoking § 4 of the Federal Arbitration Act ("FAA") (9 U.S.C. § 4) to force arbitration of a claim from a consumer who prefers to litigate the dispute in court. AT&T Mobility, LLC ("ATTM") is the Defendant in this case, and Cellco Partnership, doing business as Verizon Wireless ("Verizon"), is the Defendant in the *Stoican* case. The only party to request oral argument on either motion was ATTM. The court finds both motions suitable for disposition without oral argument. For the reasons stated below, the court GRANTS ATTM's motion to compel arbitration (Dkt. # 37) as well as Verizon's motion. The court DENIES ATTM's motion to seal (Dkt. # 60) and GRANTS its motion for leave to file an additional brief (Dkt. # 67). Because

no party has requested a stay pending arbitration, the court directs the clerk to DISMISS both actions without prejudice to Plaintiffs raising their claims in arbitration. The clerk shall enter judgments for Verizon and ATTM. The court will issue a separate order in the *Stoican* case memorializing its decision.

II. BACKGROUND

A. Plaintiffs and Their Claims

Ms. Stoican is a Washington resident and a longtime Verizon customer. She does not dispute that she is a party to Verizon's wireless service agreement. She claims that she declined an offer from Verizon in 2009 for a free trial of its "Navigator" data service. Nonetheless, beginning in May 2009, Verizon charged her $9.99 each month for the service. It continued to do so for nine months despite Ms. Stoican's efforts to cancel the service and obtain a refund. Ms. Stoican asserts that Verizon's conduct violated the Communications Act of 1934 ("FCA"), specifically its prohibition on unjust and unreasonable charges and practices. 47 U.S.C. § 201(b). She also claims that Verizon breached its wireless service agreement and violated the Washington Consumer Protection Act ("CPA"). She hopes to represent a class of all Washington customers whom Verizon charged for Navigator service without their consent.

Unlike Ms. Stoican, Plaintiffs Bonnie Adams, Melissa Meece, and Alexandra Severance (collectively the "Adams Plaintiffs") did not enter a service agreement with the cellular phone company they are now suing. Each of them is a resident of Vermont, and each of them entered a service agreement with Unicel, Inc. ("Unicel"). Verizon (by coincidence) sought to purchase Unicel, a transaction that drew scrutiny from federal antitrust regulators. To win federal approval for the transaction, Verizon agreed to divest itself of Unicel customers in certain regions, including virtually all of Vermont. Verizon arranged to sell its Vermont service agreements to ATTM in December 2008. ATTM itself did not acquire the service agreements, it instead used its subsidiary New Cingular

Wireless PCS, LLC ("New Cingular") to make the acquisition.[1] No one disputes that New Cingular acquired the Adams Plaintiffs' Unicel agreements in December 2008. Carroll Decl. (Dkt. # 38) ¶ 3; McGee Decl. (Dkt. # 39) ¶ 4. No one disputes that at all relevant times, New Cingular was an ATTM subsidiary that held the Adams Plaintiffs' Unicel agreements. McGee Decl. ¶ 5.

ATTM hoped to convince the Unicel customers whose service agreements it had acquired to enter new agreements with ATTM. To that end, it sent text messages in 2009 to Unicel customers, including the Adams Plaintiffs. The text messages touted ATTM's services. Each Plaintiff contacted either ATTM or Unicel to request that they receive no more messages, but they received additional messages nonetheless.

The Adams Plaintiffs sued, contending that ATTM's unsolicited text messages violated the FCA's ban on certain automated messages. 47 U.S.C. § 227(b).[2] They seek to pursue not only their own claims, but the claims of a nationwide class of Unicel customers who received similar unsolicited text messages from ATTM.

B. Terms of Plaintiffs' Wireless Service Agreements

Each of the Plaintiffs entered a wireless service agreement that contains an arbitration clause that includes a prohibition on class arbitration. Ms. Stoican's Verizon service agreement includes a clause entitled "Dispute Resolution and Mandatory Arbitration." Verizon Agr. (Diaz Decl. (Dkt. # 6), Ex. B) at original pp. 12-13 (cited

---

[1] ATTM has moved to seal a single exhibit to the declaration of an ATTM paralegal. Wilder Decl. (Dkt. # 59), Ex. 1. The exhibit is a 2008 contract evidencing an asset transfer from a Verizon subsidiary to an ATTM subsidiary. Dkt. # 62. Although ATTM's counsel has declared that the contract is subject to a confidentiality agreement, he does not provide that agreement for the court's review, reveal who the confidentiality agreement binds, or explain why it is still necessary to enforce the confidentiality agreement three years later. Bateman Decl. (Dkt. # 61). ATTM has accordingly not met its obligation to establish, at a minimum, good cause to file a document under seal. Local Rules W.D. Wash. CR 5(g)(2).

[2] The statute on which the Adams Plaintiffs rely initially became part of the FCA via the Telephone Consumer Protection Act of 1991. Congress has amended it several times since.

hereinafter as Verizon Arb. Cl.).[3] In relevant part, it mandates arbitration for disputes arising out of the service agreement or arising out of products or services furnished in accordance with the agreement. Verizon Arb. Cl., preamble & ¶ 1. The only claims exempt from the arbitration clause are "qualifying small claims court cases." *Id.* ¶ 1. For claims over $10,000, the clause specifies the use of the Wireless Industry Arbitration ("WIA") Rules developed by the American Arbitration Association ("AAA"). *Id.* ¶ 2. For smaller claims, the clause specifies the use of AAA consumer arbitration rules or the arbitration rules of the Better Business Bureau ("BBB"). *Id.* ¶ 2. Critically, the clause "doesn't permit class arbitrations even if [the applicable arbitration rules] would." *Id.* ¶ 3. Verizon agrees to pay for the consumer's arbitration filing fees, administrative fees, arbitration appeal fees, and the cost of the arbitrator, so long as the consumer first participates in at least one telephonic session of a non-binding mediation program that Verizon provides. *Id.* ¶¶ 3-4. Verizon employees may serve as mediators in the program. *Id.* ¶ 3. In the event, however, that an arbitrator finds the consumer's claim to be "frivolous or brought for improper purposes" within the meaning of Federal Rule of Civil Procedure 11, Verizon reserves the right to seek payment of arbitration fees and costs in accordance with the applicable arbitration rules. *Id.* ¶ 4. If the consumer recovers more than any Verizon pre-arbitration offer (or recovers any amount in the event that Verizon makes no offer), Verizon agrees to pay not only the consumer's attorney fees, but an award of $5000 if the arbitration award is less than $5000. *Id.* ¶ 5. The Verizon arbitration clause specifies that an arbitrator "can award the same damages and relief, and must honor the same limitations in this agreement, as a court would." *Id.* (preamble). In a separate clause entitled "Waivers and Limitations of Liability," the agreement declares

---

[3] The wireless service agreements at issue have evolved over time. Except as noted, no one disputes that the versions included in the record are materially identical to the ones that Plaintiffs entered. Because the agreements often contain no useful numbering or other means of citation, the court endeavors to be explicit about which portions it cites. Moreover, the court generally will not reproduce the capitalization and other formatting in the agreements.

that "unless the law forbids it in any particular case," neither Verizon nor the consumer may claim "indirect, special, consequential, treble, or punitive damages."

The Unicel Agreement that the Adams Plaintiffs entered contains an arbitration clause that is less friendly to consumers than Verizon's. Unicel Agr. (Sargent Decl. (Dkt. # 40), Ex. 1) ¶ 2 (cited hereinafter as Unicel Arb. Cl.). It permits either Unicel or the consumer to force the arbitration of any claim. *Id.* ¶ 2(a). WIA Rules apply. *Id.* ¶ 2(b). Unicel agrees to "pay the initial filing fee and the costs of the arbitration proceeding," except that it requires a consumer who initiates arbitration to pay the first $75 of the initial filing fee. *Id.* ¶ 2(d). Each party is responsible for its own "attorney, witness, and expert fees and costs." *Id.* A consumer has no "right to have any claim arbitrated as a class action under the [applicable] Rules or under any other rules of civil procedure." *Id.* ¶ 2(e). Like the Verizon agreement, the Unicel agreement contains a clause separate from the arbitration clause that excludes "punitive, indirect, special or consequential damages," but that waiver applies only "to the furthest extent allowed by the law." *Id.* ¶ 15. The Unicel agreement also includes a waiver of "any claim for equitable relief," but only "to the fullest extent allowed by the law." *Id.*

ATTM has offered the Adams Plaintiffs the opportunity to avoid the relatively unfriendly terms of the Unicel agreement and arbitrate their claims in accordance with the arbitration agreement in ATTM's arbitration clause.[4] ATTM agrees to pay all of a consumer's arbitration costs for any claim under $75,000. Only in the event that an arbitrator finds the consumer filed a claim for an improper purpose or filed a frivolous claim (with the meaning of Rule 11) can ATTM seek reimbursement of its arbitration costs. If a consumer wins an arbitration award larger than ATTM's last settlement offer,

[4] ATTM's wireless service agreement is not part of the record. The court relies instead on the summary of arbitration rights that ATTM offers on its website. Weiman Decl. (Dkt. # 41), Ex. 5. No one disputes that the summary accurately describes the ATTM arbitration clause.

ATTM will pay the consumer the larger of $10,000 or the amount of the award. In that event, ATTM will also pay double the consumer's attorney fees, and reimburse any expenses, including expert witness fees and costs. Like the Unicel and Verizon arbitration clauses, however, the ATTM clause prohibits class arbitration. Unlike Unicel and Verizon, ATTM does not attempt to limit the types of damages a consumer can recover in arbitration.

C. Consumer Arbitration Agreements and the Federal Arbitration Act

As the court will now discuss, a substantially similar version of the ATTM arbitration agreement features prominently in new legal authority that bears on the arbitrability of these Plaintiffs' disputes. Last year, Verizon and ATTM filed motions to compel arbitration of the disputes Ms. Stoican and the Adams Plaintiffs raised. At the time it filed its motion, Verizon conceded that Washington law and Ninth Circuit precedent spelled doom for its motion to compel arbitration. In *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), the Washington Supreme Court held that the arbitration clause in the wireless service agreement before it was unenforceable because it was unconscionable under Washington law. Like the agreements at issue here, the agreement in *Scott* prohibited class arbitration. The *Scott* court explained that the bar on all classwide proceedings effectively exculpated the wireless provider from liability, because consumers would virtually never pursue individual arbitration of small claims like the ones likely to arise from their wireless service agreements. 161 P.3d at 1008.[5] The court further held that the FAA did not preempt its application of Washington law. In *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008), the Ninth Circuit followed *Scott* in its application of Washington law, and agreed that the FAA did not

[5] It has become all but obligatory, when discussing the potentially exculpatory effect of a class action waiver for consumer disputes, to cite Judge Posner's pithy explanation: "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual disputes, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original).

preempt that application. The *Scott* court employed much of the same unconscionability and preemption analysis that the California Supreme Court had applied in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). *Discover Bank* concerned a challenge to the enforceability of ATTM's arbitration clause. The court held that an arbitration agreement in a consumer contract of adhesion is unconscionable under California law where the agreement permits neither class actions nor class arbitration. *Id.* at 1110. It also held that the FAA did not preempt the application of this aspect of California law. *Id.* The Ninth Circuit reiterated that holding in several cases, including *Laster v. ATTM*, 584 F.3d 849 (9th Cir. 2009). ATTM successfully petitioned the United States Supreme Court to review *Laster*. *ATTM v. Concepcion*. 130 S. Ct. 3322 (May 24, 2010) (granting writ of certiorari).

When they moved to compel arbitration last year, both Verizon and ATTM included requests to stay these litigations pending the Supreme Court's resolution of *Concepcion*. The court granted those requests. The Supreme Court issued its opinion in *Concepcion* in April. 131 S. Ct. 1740 (2011). In a 5-4 ruling, the Court overruled the FAA preemption rulings in *Discover Bank* and *Laster*. The Court held that the application of state unconscionability law to invalidate an arbitration clause's class action waiver interfered with the FAA's fundamental purpose – enforcing arbitration clauses according to their terms. This court lifted the stay in these litigations and permitted the parties to file supplemental briefs addressing *Concepcion*. The court now considers whether to grant either Verizon's or ATTM's motion to compel arbitration of Plaintiffs' claims.[6]

---

[6] Ms. Stoican requests that the court again stay her case because Congress is considering amendments to the FAA that would overcome the ruling in *Concepcion*. Stoican Supp. Br. at 10 (pointing to draft Arbitration Fairness Act of 2011). The court denies her request. There is no evidence that Congress is likely to pass these amendments, much less that Congress would do so quickly enough to make a stay in these cases a reasonable option.

III. ANALYSIS

Before determining whether the Unicel and Verizon arbitration agreements are enforceable in light of *Concepcion*, the court must resolve Plaintiffs' arguments that they did not agree to arbitrate these particular disputes with their wireless providers. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."). The Adams Plaintiffs contend that the arbitration clause to which they agreed does not give ATTM the right to request arbitration. They and Ms. Stoican also argue that the claims they raise are beyond the scope of the arbitration clauses at issue. Resolving these arguments requires the court to apply "federal substantive law of arbitrability." *Id.* (citation omitted). That law respects the "liberal federal policy favoring arbitration agreements" embodied in the FAA. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That law requires the court to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration," including any doubts about contract interpretation. *Id.* at 24-25.

A. The Adams Plaintiffs Entered Contracts that Permit ATTM to Demand Arbitration.

First, the court considers the Adams Plaintiffs' threshold contention that the Unicel arbitration clause does not permit ATTM to invoke it. The key sentence is the first sentence of the arbitration clause:

> We (including our assignees, agents, employees, officers, directors, shareholders, parent companies, subsidiaries, affiliates, predecessors and successors) or you may elect to have any claim, dispute, or controversy ("Claim") of any kind (whether in contract, tort or otherwise) arising out of or relating to your Service or this agreement (including any renewals or extensions), any goods or services provided to you, any billing disputes between you and us, or any prior or future dealings between you and us resolved by binding arbitration.

Unicel Arb. Cl. ¶ 2(a). The first sentence of the Unicel agreement, which comes two sentences before the arbitration clause, declares that it will use the terms "Unicel," "we," or "us" to refer to Unicel. The parenthetical expansion of "we" in the first sentence of the

arbitration clause, however, unambiguously overrides that prior definition, at least within that sentence. Thus, as long as ATTM is an assignee, parent company, affiliate, or successor of Unicel, it is entitled to make an arbitration demand. The Adams Plaintiffs point out that ATTM is not an assignee of or successor to Unicel, because it was not ATTM who acquired their Unicel agreements, but rather ATTM's subsidiary New Cingular. Similarly, ATTM was not Unicel's parent company. Plaintiffs thus contend that ATTM cannot invoke the arbitration clause.

The court disagrees with the Adams Plaintiffs; it finds that ATTM can invoke their Unicel arbitration clauses. When New Cingular acquired the Unicel service agreements, it replaced Unicel as the contracting party in those agreements. No one argues otherwise. Once New Cingular did so, the first sentence of the arbitration clause effectively read as follows: "We, meaning New Cingular (including our assignees, agents, . . . parent companies, . . .) or you may elect . . . ." There is no dispute that ATTM was New Cingular's parent company. It therefore became entitled to invoke the arbitration clause once New Cingular acquired the Unicel agreements. Any other reading leads to absurd results. For example, under the Adams Plaintiffs' interpretation, not even New Cingular could invoke the arbitration clause, because New Cingular was not the assignee of the agreements, but rather the assignee of the original assignee, Verizon. That interpretation is untenable, because it makes the agreement assignable once, and only once. Plaintiffs' suggestion that the parent company of a first assignee cannot invoke the clause fares no better.

B. Plaintiffs' Claims are Within the Scope of the Applicable Arbitration Clauses.

The Adams Plaintiffs and Ms. Stoican both contend that their disputes are beyond the scope of the arbitration clause that applies to them. The court disagrees.

The Adams Plaintiffs' argument again turns on the first sentence of the Unicel arbitration clause. It extends to "any claim . . . of any kind . . . arising out of" a host of circumstances, including "any prior or future dealings between you and us." Unicel Arb.

Cl. ¶ 2(a). The Adams Plaintiffs' unsolicited-text-messaging claims against ATTM arise out of "future dealings" with ATTM. They do not argue otherwise, they argue instead that the word "us" in the key sentence refers *only* to Unicel (or its successor). They base this interpretation on the first sentence of the Unicel agreement, which explains that the agreement will use "Unicel," "we," or "us" to refer to Unicel. Plaintiffs acknowledge that the first sentence of the arbitration clause parenthetically expands the meaning of "we," but they contend that the sentence did not similarly redefine "us," and thus the court should not interpret "us" as expansively. Defendants deride this interpretation as a grammatical flight of fancy, but the court does not share that view.

The court finds the meaning of "us" within the Unicel arbitration clause to be ambiguous. Even within the same sentence, "we" and "us" do not necessarily refer to the same set of people. For example, consider the second of the following two sentences: "I met Janet at noon. We (along with our friends) went to the courthouse because the judge wanted to speak with us." It is possible that the judge wanted to speak with Janet and the author, with their friends serving merely as moral support; it is also possible that the judge wanted to speak with Janet, the author, and their friends. Without more context, no one can say. In this case, the additional context of the Unicel agreement provides no answers. It is reasonable to conclude that Unicel meant the agreement to apply broadly to essentially any claim arising between a customer and Unicel or any person or entity with a relationship with Unicel. It is also reasonable, however, to conclude that Unicel did not intend such an expansive interpretation. A consumer's dispute with a parent company might have nothing to do with wireless service, and Unicel might not have wished to submit those disputes to arbitration.

Despite the ambiguity in the arbitration clause, federal arbitrability law dictates that the dispute between the Adams Plaintiffs and ATTM is arbitrable. When courts consider two reasonable interpretations of an arbitration clause, one that requires arbitration of a particular dispute and one that does not, they must send the dispute to

arbitration. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) ("[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.") (internal quotation omitted). In this case, the Unicel arbitration clause is reasonably susceptible to an interpretation in which the Adams Plaintiffs' claims against ATTM are arbitrable. Accordingly, the court finds that the dispute they raise is within the scope of the arbitration clause.[7]

The Adams Plaintiffs contend that the court should not independently determine the scope of the Unicel arbitration clause, arguing instead that collateral estoppel requires this court to follow the ruling in *Porter v. ATTM*, a case pending in Chittenden County Superior Court in Vermont. In *Porter*, pro se plaintiff Pike Porter, like the Adams Plaintiffs, sued ATTM contending that it violated the FCA and Vermont law by sending him unsolicited text messages. Like the Adams Plaintiffs, Mr. Porter was a Unicel customer. Unlike the Adams Plaintiffs, Mr. Porter did not seek to represent a class. On March 18, 2010, the *Porter* court concluded that "[b]ased on the undisputed fact that Porter did not become a customer of AT&T until 11/6/09, the court denies [ATTM's] motion [to compel arbitration]." Andrews Decl. (Dkt. # 47), Ex. G. In a one-page order, the court explained that although the Unicel arbitration clause "could bind Porter and Unicel as to prior events between them as of the date it was agreed to, it cannot bind Porter with regard to events between him and AT&T that took place at a time when his only contract was with Unicel, not AT&T." *Id.* (emphasis in original). ATTM moved

---

[7] The court notes that the Unicel arbitration clause gives the parties the option to submit the question of whether a particular claim is arbitrable to an arbitrator. Unicel Agr. ¶ 2(a) ("A Claim may include . . . the issue of whether any particular Claim must be submitted to arbitration . . . ." No party has invoked this portion of the clause with respect to their dispute over whether the Adams Plaintiffs' claims are arbitrable.

for reconsideration, arguing that although Mr. Porter might not have been an ATTM customer, ATTM owned his Unicel agreement during the time he received the unsolicited text messages. *Id.*, Exs. H & J (ATTM motion & reply). ATTM attached various documents to prove this point. *Id.*, Ex. H. The court denied the motion for reconsideration, explaining that while ATTM had proven that it acquired between 100,000 and 150,000 of Unicel's Vermont service agreements, it had not "establish[ed] that the acquisition included all Vermont Unicel contracts, or Mr. Porter's in particular." *Id.*, Ex. K (Jul. 9, 2010 order denying reconsideration) (emphasis in original).

A court considering the preclusive effect of a prior ruling applies the law of the jurisdiction that issued it. In Vermont, a party can invoke issue preclusion only if it meets five conditions. It must assert preclusion against a party to the prior litigation or the party's privy; the issue must be one resolved in a final judgment on the merits; the issue must be identical to the one the asserting party raises in the subsequent action; the party to the prior litigation must have had a full and fair opportunity to litigate the issue; and the application of issue preclusion must be fair. *Trepanier v. Getting Organized*, 583 A.2d 583, 587 (Vt. 1990). Moreover, when a party not present in a prior litigation asserts issue preclusion offensively against a party to the prior litigation, courts must be particularly mindful of fairness concerns. *Id.* at 587 n.2.

Here, the court cannot be confident that the *Porter* court resolved any issue essential to this litigation. It is at least arguable that the court's first ruling was that Mr. Porter's dispute with ATTM was beyond the scope of the Unicel arbitration clause, thus agreeing with the same argument the Adams Plaintiffs make here. But in light of the court's ruling on reconsideration, it is arguable, even likely, that the court merely held that ATTM had failed to prove that it ever acquired Mr. Porter's Unicel contract. The Adams Plaintiffs cannot take refuge in that ruling, because they do not dispute ATTM's evidence that it acquired their Unicel agreements in December 2008.

The court declines to apply issue preclusion where it cannot be certain that the *Porter* court resolved the issue now before this court.[8] The court notes, moreover, that ATTM had a lesser incentive to litigate the *Porter* case because Mr. Porter was not attempting to represent a class of all of ATTM's former Unicel customers in Vermont. Under these circumstances, it would not be fair to apply issue preclusion against ATTM.

The court next rejects Ms. Stoican's argument that her claim is beyond the scope of the Verizon arbitration clause because she could have brought it in a small claims court. The Verizon arbitration clause twice mentions small claims actions. Ms. Stoican cites only the first, which states as follows:

> The Federal Arbitration Act applies to this agreement, except for qualifying small claims court cases, any controversy or claim arising out of or relating to this agreement, . . . or any product or service provided under or in connection with this agreement . . . will be settled by one or more neutral arbitrators . . . .

Verizon Arb. Cl. ¶ 1. She contends that the "plain reading" of this sentence is that "only claims that are in excess of the jurisdictional limit of the small claims court will be arbitrated." Stoican Supp. Br. (Dkt. # 19) at 8. The court does not agree. Moreover, Ms. Stoican's interpretation ignores the second paragraph of the Verizon clause, which states that the "complaining party can choose either the AAA's [arbitration procedures], an individual action in small claims court or the BBB's rules for binding arbitration." Verizon Arb. Cl. ¶ 2. This paragraph, coupled with the first paragraph of the clause, shows unequivocally that Verizon merely agreed to permit its customers to bring their disputes to small claims court rather than arbitrate them. Verizon did not agree to permit a customer to bring a claim in whatever court the customer prefers as long as the claim could be the subject of a small claims suit.

---

[8] ATTM appealed the Porter ruling to the Vermont Supreme Court, which heard oral argument in March of this year. Although the Vermont Supreme Court's ruling will perhaps clarify the basis on which ATTM's arbitration demand succeeds or fails, no one has asked this court to delay its ruling pending the Vermont Supreme Court's decision.

C. Concepcion Dictates that the Court Must Enforce the Arbitration Clauses to Which Plaintiffs Are Bound.

Having established that the disputes that Plaintiffs raise are within the scope of the arbitration clauses and that their wireless providers are entitled to invoke those clauses, it remains to decide whether Plaintiffs may avoid the enforcement of the clauses. The FAA explains that arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. State law may supply grounds for declaring a contract unenforceable, including state unconscionability law. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). Federal law may also provide grounds for avoiding enforcement of an arbitration clause. For example, Congress may declare explicitly or implicitly that certain statutory claims are not subject to arbitration. *See*, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (considering whether federal Age Discrimination in Employment Act claims are arbitrable). Courts addressing this question often consider whether arbitration is "inconsistent with the . . . framework and purposes" of the statute at issue. *Id.* at 27. The court now considers whether either state or federal law provides a basis for declaring the Verizon or Unicel arbitration clauses unenforceable.

1. Concepcion Disposes of Plaintiffs' Contention that State Law Provides a Ground For Declaring Their Arbitration Agreements Unenforceable.

The decisions in *Discover Bank*, *Scott*, *Laster*, and *Lowden* embody the view that the FAA does not preempt state unconscionability law so long as that law applies to all contracts, not just arbitration contracts. Even before *Concepcion*, states could not explicitly single out arbitration contracts. For example, in *Perry v. Thomas*, 482 U.S. 483, 491 (1987), the Court held that the FAA preempted a California statute declaring that suits to recover unpaid wages could not be arbitrated. In *Discover Bank* and cases like it, courts held that because *any* consumer contract that barred class resolution of a dispute would be unenforceable under state law whether it was an arbitration agreement or not, the FAA did not preempt this application of state law.

Concepcion is, at a minimum, the death knell for any application of state law that declares arbitration agreements unenforceable because they bar class actions and class arbitrations. The Court observed that even if the unconscionability rule in *Discover Bank* applied to all contracts, it had a "disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. The Court explained that while § 2 of the FAA "preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748. What the Court called the "*Discover Bank* rule" ran afoul of this prohibition because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* One of the fundamental attributes of arbitration is that it allows the parties to "design[] . . . efficient, streamlined procedures tailored to the type of dispute" that is likely to arise from a contract. *Id.* at 1749. To mandate class arbitration, in the court's view, was to mandate a "slower, more costly" process, one that was "more likely to generate procedural morass than final judgment." *Id.* at 1751. It would also mandate "procedural formality," even where the parties had agreed otherwise. *Id.* Moreover, the court found that the risks to a corporate defendant inherent in class arbitration of consumer disputes greatly exceeded the risk of the individual arbitrations it had bargained for. *Id.* at 1752.

The court further observes that the decision in *Concepcion* did not depend on the relatively consumer-friendly terms of the ATTM arbitration agreement. In a final note, the *Concepcion* majority responded to a concern that the dissent raised: that "class proceedings are necessary to prosecute small-dollar legal claims that might otherwise slip through the legal system." 131 S. Ct. at 1753. As the court has noted, this concern animated the holdings in both *Scott* and *Discover Bank*. *Scott*, 161 P.3d at 1007 (contending that class actions are "often the only meaningful redress available for small but widespread injuries"); *Discover Bank*, 113 P.3d at 1108-09. The *Concepcion*

majority dismissed this concern with a single sentence: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for other reasons." 131 S. Ct. at 1753. Thereafter, in what this court can only characterize as dicta, the majority remarked that the ATTM arbitration agreement was unlikely to exculpate ATTM from liability:

> Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7500 and twice their attorney fees if they obtain an arbitration award greater than AT&T's last settlement offer.

Id. The court finds nothing in *Concepcion* to support the notion that Court would have decided the case differently had it confronted a less consumer-friendly arbitration agreement.

Neither Ms. Stoican nor the Adams Plaintiffs articulate a state-law ground for declaring their arbitration agreements unenforceable that passes muster under *Concepcion*. The parties concede that they cannot avoid the agreements on state law grounds merely because they bar class actions. Ms. Stoican does not attempt to construct an alternate argument that Washington law bars enforcement of her arbitration agreement. The Adams Plaintiffs, by contrast, insist that despite *Concepcion*, Vermont law mandates the conclusion that the Unicel arbitration agreement is unconscionable.

Putting aside the preemptive sweep of the FAA, the court is skeptical that Vermont's courts would declare the Unicel Agreement to be unconscionable. Before *Concepcion*, Vermont's Supreme Court had not joined the chorus of states that declared class arbitration waivers to be unconscionable. *Fleming v. Kruziffer Motors, Inc.*, No. 440-9-06 Wmcv, 2007 Vt. Super. LEXIS 61, at *10 (Vt. Super. Ct. Jul. 20, 2007) (declining to consider whether class action prohibition is unconscionable in Vermont). Now that *Concepcion* prohibits state law that invalidates arbitration agreements because they contain class action waivers, Plaintiffs are effectively forced to argue that Vermont would invalidate the Unicel arbitration agreement even without the waiver. They have

little support for that argument. Plaintiffs point to no authority from any state declaring unconscionable an arbitration agreement in a wireless service contract that does not contain a class action waiver. Vermont, like Washington and California, considers both the procedural and substantive unconscionability of a contract. *Maglin v. Tschannerl*, 800 A.2d 486, 491 (Vt. 2002). A Vermont court will not invalidate a contract merely because of the parties' unequal bargaining power. *Id.* at 490. Instead, it looks for evidence that the party with greater power forced substantively unreasonable terms on a party who had no meaningful choice but to accept them. *Id.* at 491. Even if the court accepts that the Adams Plaintiffs had no meaningful choice but to enter the Unicel agreement, it finds no substantively unconscionable terms in that agreement.[9] The agreement purports to waive any right to special or punitive damages, but it explicitly does so only to the extent the law allows such a waiver.[10] Unicel Arb. Cl. ¶ 15. The same is true of the agreement's waiver of the right to seek injunctive relief. *Id.* The agreement requires the consumer to bear up to $75 in arbitration costs, but this hardly seems an unconscionable burden. The agreement mandates the use of WIA Rules, rules which, so far as the court is aware, no court has ever held to be unconscionable. Moreover, ATTM has agreed to waive the terms of the Unicel Arbitration agreement and permit Plaintiffs to take advantage of the friendlier terms of the ATTM Agreement. Plaintiffs insist that ATTM cannot force them to arbitration in accordance with the Unicel agreement but then offer the more generous terms of the ATTM agreement for conducting that arbitration. The court sincerely doubts that any Vermont court would

---

[9] Plaintiffs argue that the Unicel agreement requires the consumer, not the wireless provider, to waive the right to a jury trial, full discovery, and other elements of a civil action. They are mistaken. The agreement permits either party to demand arbitration, and in that event, no party will have the right to a jury trial, discovery, or other aspects of a civil action.

[10] ATTM contends that the arbitrator, not the court, should decide whether the agreement's limitation on special and punitive damages is enforceable. The court need not reach that argument in light of its disposition today.

adopt their position. *See Ragone v. Atlantic Video*, 595 F.3d 115, 124 (2d Cir. 2010) (noting that New York law permits courts to accept waiver of portions of arbitration agreement before considering its unconscionability). In short, the court finds it unlikely, at best, that the Unicel arbitration agreement is unconscionable in Vermont, especially in light of ATTM's agreement not to enforce much of it.

Rather than rule on an issue of Vermont law, however, the court finds that Plaintiffs have not articulated any application of Vermont law that would survive the preemptive sweep of the FAA in light of *Concepcion*. Even before *Concepcion*, at least one Vermont court noted that the FAA constrained the application of Vermont law to invalidate an arbitration clause. In *Fleming*, the court observed that "almost any arbitration agreement in any consumer contract would seem to be logically suspect" under Vermont law, because the agreement will be a "contract[] of adhesion . . . characterized by a disparity of power and a lack of meaningful choice on the part of the consumer." *Fleming*, 2007 Vt. Super. LEXIS 61, at *6-7. The court recognized, however, that it could not reach that conclusion where the "federal policy [expressed in the FAA] trumps any desires state legislatures and courts may have to protect their citizens from compelled arbitration." *Id.* at *7. Even if the Adams Plaintiffs had articulated an application of Vermont law that invalidated the Unicel agreement, that application would invalidate virtually any consumer arbitration agreement. The FAA, as the *Concepcion* Court interpreted it, does not permit that result.

2. Federal Law Does Not Invalidate These Arbitration Agreements.

Federal law, like state law, can also supply a ground for declaring an arbitration agreement unenforceable. Congress can declare explicitly or implicitly that a federal statute creates a right to a judicial forum. *See Mitsubishi*, 473 U.S. at 628; *see also Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1209 (9th Cir. 2010) (holding that "right to sue" for violations of federal Credit Repair Organization Act prohibits mandatory arbitration), *cert. granted*, 131 S. Ct. 2874 (2011).

Ms. Stoican argues that the FCA guarantees access to a judicial forum. She is mistaken. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 727 (9th Cir. 2007) ("We . . . hold that FCA claims may be subject to agreements to arbitrate."). For reasons she does not explain, Ms. Stoican does not cite *Lozano*, and urges the court to apply the *Greenwood* court's analysis to the FCA. Even if the court believed that the *Greenwood* analysis would lead to the conclusion that the FCA guarantees a judicial forum, the court could not ignore *Lozano*, whose holding is squarely to the contrary. 504 F.3d at 725-27.

Federal courts also recognize another federal ground for declaring an arbitration clause unenforceable: that the clause deprives the plaintiff of the ability to effectively vindicate a statutory right. The *Mitsubishi* Court provided the seeds of this vindication-of-statutory-rights defense. It considered an American manufacturer's attempt to avoid a clause mandating arbitration of virtually any dispute in Japan. *Mitsubishi*, 473 U.S. at 617. The manufacturer asserted, among other counterclaims, a claim for violation of the Sherman Antitrust Act. *Id.* at 619-20. It argued that public policy in favor of antitrust enforcement demanded that it not be forced into international arbitration. The Court disagreed, declining to assume that an international arbitration would not vindicate the manufacturer's antitrust claims. *Id.* at 636. The Court noted that an arbitrator might well apply United States antitrust law. *Id.* at 636-37. It explained that "so long as the prospective litigant effectively may vindicate its statutory cause of action, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. It further explained that if the arbitrator construed the arbitration agreement in a way that "operated . . . as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. *Id.* at 637 n.19. Rather than speculate about the outcome of Japanese arbitration, it observed that a court could invalidate any award that violated public policy. *Id.* ("Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award."); *see also* 9 U.S.C. §§ 9-10 (stating procedures for challenging an arbitral award in court).

The Supreme Court has recognized the *Mitsubishi* dicta as a potential basis for avoiding an arbitration agreement. In *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000), the Court considered a consumer's argument that it should not enforce an arbitration agreement because the cost of arbitration would leave her unable to effectively vindicate her claims invoking the federal Truth in Lending Act and Equal Credit Opportunity Act. The court recognized the viability of her argument, but held she had not carried her burden to prove that the costs of arbitration were prohibitive:

> It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that [the consumer in this case] will bear such costs if she goes to arbitration. . . . The "risk" that [the consumer] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

Id. at 90-91.

From *Mitsubishi* and *Green Tree* sprang numerous lower court decisions considering the vindication-of-statutory-rights defense to an arbitration agreement. In most instances, courts find that the party invoking the defense has not carried its burden to prove that the arbitration agreement effectively prevents the vindication of statutory rights. *See, e.g., In re Am. Express Merchants' Litig.*, 634 F.3d 187, 196-97 (2011) (citing cases from Fourth and Seventh Circuits). The Ninth Circuit has applied the defense to invalidate an arbitration clause that was inconsistent with the federal Petroleum Marketing Practices Act. *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (invalidating limits on exemplary damages, attorney fees and witness expenses, and statute of limitations); *id.* at 1249 (finding remainder of arbitration clause not severable from invalid portions). It has also acknowledged similar federal policy in concluding that the FAA does not preempt a state-law-based vindication-of-statutory-rights defense. *Ting v. AT&T Corp.*, 319 F.3d 1126, 1151 (9th Cir. 2003) ("[P]arties that agree to arbitrate statutory claims still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights.").

Plaintiffs hope to find refuge in *Am. Express*, where the Second Circuit found that the plaintiffs, a collection of merchants who accepted American Express charge cards, had proven that requiring individual arbitration of their antitrust claims would deny them the ability to vindicate their statutory rights. The merchants invoked the Sherman Act, claiming that American Express's requirement that those who accept its charge cards must also accept its credit and debit cards was an illegal tying arrangement. *Id.* at 191-92. The plaintiffs provided a "detailed affidavit" from an economist who opined that even a merchant with yearly charge-card revenue of as much as $1.7 million per year could expect damages of only about $40,000. *Id.* at 198. The economist believed that the costs of obtaining that award would be prohibitive where the expert economic studies necessary to prove the antitrust claims would cost much more. *Id.* ("[I]t would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million."). Finding that American Express had "brought no serious challenge" to the economist's opinion, the court found that the merchants had carried their burden of proving that the arbitration agreement's class action waiver effectively deprived them of the protection of federal antitrust law. *Id.* at 199. The court was careful to explain that class action waivers were not "per se unenforceable," but rather that courts must evaluate them on a case-by-case basis. *Id.*

Even assuming that the Ninth Circuit would apply the vindication-of-statutory-rights defense just as the *American Express* court did,[11] it would be of no benefit to either the Adams Plaintiffs or Ms. Stoican. No Plaintiff has shown that their arbitration agreement deprives them of the opportunity to vindicate their statutory claims.

---

[11] Some courts have questioned whether *Concepcion* implicitly limits the vindication-of-statutory-rights defense. *E.g.*, *D'Antuono v. Serv. Road Corp.*, No. 3:11cv33 (MRK), 2011 U.S. Dist. LEXIS 57367, at *82 (D. Conn. May 25, 2011) ("[T]he Court knows of no principled reason why federal law rules that have essentially the same purpose and effect as the *Discover* Bank rule would continue to be permissible after [*Concepcion*].").

The Adams plaintiffs contend that the Unicel arbitration agreement's limitation on discovery, damages, and injunctive relief make them unable to vindicate their FCA claims. They fall well short of proving as much. As the court has noted, the Unicel Agreement dictates that an arbitrator cannot enforce the damages limitation or bar on injunctive relief if doing so would be contrary to law. The Adams Plaintiffs make no attempt to prove that an arbitrator would not follow the law. As to the agreement's limitation on discovery, Plaintiffs do not explain why they need more than limited discovery to prove the crux of their claim – that they received unsolicited text messages from ATTM. Nothing in the record suggests that any of the Adams Plaintiffs would be unable to obtain evidence necessary to support their claims in an individual arbitration. Indeed, given that ATTM has offered to substitute the terms of its arbitration agreement, which contains none of the limitations identified above, the Adams Plaintiffs will be hard-pressed to prove that they cannot vindicate their statutory rights in arbitration.

Ms. Stoican similarly fails to prove that the Verizon arbitration agreement deprives her of the ability to vindicate her FCA rights.[12] Like the Adams Plaintiffs, she points to the Verizon agreement's limits on damages. Like the Adams Plaintiffs, she fails to recognize that the agreement provides for enforcement of those limits only if the law allows. She also attempts to follow the path that the *American Express* merchants charted, providing an affidavit from an expert witness who opines that arbitration would be prohibitively expensive. Telecommunications industry expert Charles Clapsaddle opines that the cost of proving that Verizon's charges to Ms. Stoican for its Navigator services were a "systematic problem" would be "tens of thousands of dollars."

---

[12] Ms. Stoican does not argue that the arbitration agreement effectively deprives her of the ability to vindicate her Washington law claims, including her CPA claim. *But see In re DirecTV Early Cancellation Fee Litig.*, No. ML 09-2093 AG (ANx), 2011 U.S. Dist. LEXIS 102027, at *35-39 (C.D. Cal. Sept. 6, 2011) (holding that arbitration agreement effectively prevented plaintiffs from vindicating right to act as "private attorney general" to enforce two California statutes).

Clapsaddle Decl. ¶¶ 11-13. What neither Mr. Clapsaddle nor Ms. Stoican acknowledges is that she has no need to prove that Verizon's overcharging was a "systematic problem." Nothing in the FCA requires her to prove that Verizon systematically charges customers for Navigator service that they did not request. It merely requires her to prove that *she* was charged for a service that she did not request. There is no evidence in the record that she cannot effectively prove this in arbitration.

IV. CONCLUSION

For the reasons stated above, the court GRANTS ATTM's motion to compel arbitration (Dkt. # 37) and DENIES its motion to seal (Dkt. # 60). The court directs the clerk to UNSEAL the document at Docket No. 62. The court GRANTS ATTM's motion (Dkt. # 67) for leave to file an additional brief, because the court's consideration of that unsolicited brief (and Plaintiffs' unsolicited brief in response) prejudiced no party.

No party has requested that the court stay this proceeding pending arbitration. *See* 9 U.S.C. § 3. The court accordingly directs the clerk to DISMISS this action, without prejudice to the resolution of Plaintiffs' claims in arbitration.

The court will enter a separate order memorializing its decision to compel arbitration in Ms. Stoican's case against Verizon, No. C10-1017RAJ.

DATED this 20th day of September, 2011.

The Honorable Richard A. Jones
United States District Court Judge

EXHIBIT 3

Slip Copy, 2011 WL 4434810 (N.D.Cal.)
(Cite as: 2011 WL 4434810 (N.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
Genevieve **MEYER**, Plaintiff,
v.
T– MOBILE USA INC., Defendant.

No. C 10–05858 CRB.
Sept. 23, 2011.

Rosemary M. Rivas, Mark Punzalan, Finkelstein Thompson LLP, San Francisco, CA, Gordon M. Fauth, Jr., Litigation Law Group, Alameda, CA, for Plaintiff.

Joseph Edward Addiego, III, Davis Wright Tremaine LLP, San Francisco, CA, James Condon Grant, Davis Wright Tremaine LLP, Seattle, WA, for Defendant.

MEMORANDUM AND ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAYING CASE

CHARLES R. BREYER, District Judge.

***1** Plaintiff Genevieve Meyer has brought a putative class action against T–Mobile USA, Inc. ("T–Mobile"), alleging four causes of action relating to T–Mobile's assessment of state and federal surcharges on its bills to subscribers for mobile telephone services. *See generally* Rivas Decl. (dkt.20–1) Ex. A ("Complaint").

Now pending is T–Mobile's Motion to Compel Arbitration and Stay the Case. *See generally* Mot. (dkt.16). T–Mobile argues that Plaintiff is bound to an arbitration agreement, including class action waiver, included in the Terms and Conditions ("T & C") of the Service Agreement Plaintiff signed when she purchased and renewed her T–Mobile phone service. *See* Mot. (dkt.16) at 2.

Because Plaintiff's claims are covered by the arbitration agreement and the arbitration agreement is valid and enforceable, the Motion to Compel Arbitration is GRANTED, and the case is STAYED.

I. BACKGROUND

In 1996, Congress passed the Telecommunications Act, requiring telecommunications companies such as T–Mobile to contribute to a federal Universal Service Fund ("Fed–USF") to facilitate universal telecommunications service. Rivas Decl. (dkt.20–1) Ex. A ("Complaint") ¶ 3. A company's required contribution to Fed–USF is calculated according to the company's interstate and international telecommunications revenues, and the company may lawfully pass along to its subscribers the costs of fulfilling its required contribution. *Id.* ¶ 3.

California also has a Universal Service program ("Cal–USF") to which telecommunications companies must contribute. *Id.* ¶ 5. A company's required contribution to Cal–USF is calculated according to the company's intrastate revenues. *Id.* A company may lawfully pass along to its subscribers the costs of fulfilling its required contribution, but the company's calculation of its state contribution cannot be based on its interstate or international telecommunications revenues. *Id.*

Plaintiff Genevieve Meyer purchased two lines of service and phones from T–Mobile on June 27, 2004. *See generally* Baca Decl. (dkt.17) Ex. A ("2004 Service Agreement"). Thereafter, Plaintiff renewed and extended her T–Mobile service three times: on June 28, 2007, January 5, 2008, and, most recently, August 1, 2008. Baca Decl. (dkt.17) ¶ 5.

Plaintiff claims that, during her service contract, T–Mobile assessed "Cal–USF fees based on the aggregate calculation of intrastate, interstate, and international telecommunications services, rather than on intrastate services alone. T–Mobile's practice of including interstate and international revenues in the calculation of Cal–USF fees artificially and unlawfully inflates the five Cal–USF

charges on its subscribers' phone bills." Rivas Decl. (dkt.20–1) Ex. A ("Complaint") ¶ 6. Based on T–Mobile's alleged misconduct, Plaintiff has brought a putative class action on behalf of herself and those similarly situated. *Id.* ¶ 1. Plaintiff alleges four causes of action: (1) violation of the Federal Communications Act ("FCA"); (2) violation of California's Unfair Competition Law ("UCL"); (3) fraudulent concealment; and (4) violation of the Consumers Legal Remedies Act ("CLRA"). *See generally id.*

***2** T–Mobile argues that Plaintiff is bound to the arbitration agreement, including class action waiver, contained in the T & C of the Service Agreement Plaintiff signed when she purchased and renewed her T–Mobile phone service. *See* Mot. (dkt.16) at 2. Plaintiff argues that the arbitration agreement is unenforceable for the following reasons:

> (1) T–Mobile agreed that anyrovision in the Service Agreement rendered invalid under California law would be unenforceable, and the class action waiver was invalid under California law at the time Plaintiff entered the agreement in August 2008;
>
> (2) the arbitration agreement is unconscionable; and
>
> (3) the arbitration agreement would prevent Plaintiff from vindicating her statutory rights. *See generally* Opp'n (dkt.20).

If the Court does not find the arbitration agreement unenforceable based on Plaintiff's arguments and available evidence, Plaintiff requests to conduct limited discovery on the issue of whether the arbitration agreement is valid. [FN1] *Id.* at 17.

> FN1. On the eve of the hearing, Plaintiff filed a Request for Judicial Notice of cases brought by TMobile alleging trade infringement and/or computer hacking. *See generally* Request. Local Civil Procedure Rule 7–3(d), however, prohibits "additional memoranda, papers, or letters" to be filed after a reply has been filed, unless (1) new evidence has been submitted in the reply and the additional memoranda, paper or letter states a party's objections to the new evidence, or (2) the additional memoranda, paper or letter is "a relevant judicial opinion [that was] published after the date the opposition or reply was filed." Civ. L.R. 7–3(d). As neither of the exceptions to Local Rule 7–3(d) apply, Plaintiff's Request is improperly filed. Even if Plaintiff's Request were properly filed, the materials Plaintiff submits regarding alleged trade infringement and computer hacking by parties who were not legitimate T–Mobile customers are irrelevant to the disposition of the pending Motion.

II. LEGAL STANDARD

The Federal Arbitration Act (FAA) provides that an agreement to submit commercial disputes to arbitration shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congress's purpose in passing the Act was to put arbitration agreements "upon the same footing as other contracts," thereby "reversing centuries of judicial hostility to arbitration agreements" and allowing the parties to avoid "the costliness and delays of litigation." *Scherk v. AlbertoCulver Co.*, 417 U.S. 506, 510–11, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

In applying the Act, courts have developed a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The Supreme Court has emphasized that courts should refer a matter for arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of

an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). "In the absence of any express provision excluding a particular grievance from arbitration ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 584–85. Thus, any doubt about the applicability of an arbitration clause must be "resolved in favor of arbitration." *Id.* at 589.

At the same time, however, the Supreme Court has repeatedly emphasized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Tech. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *United Steelworkers*, 363 U.S. at 582). Thus, a federal court's task in reviewing the arbitrability of a particular dispute is to determine whether the parties have agreed to submit that dispute to arbitration.

***3** "The standard for demonstrating arbitrability is not high." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 717, 719 (9th Cir.1999). "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (citing §§ 3 and 4 of the FAA) (emphasis in original).

The final phrase of § 2 of the FAA provides that arbitration agreements are to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U .S.C. § 2. Thus, in addition to determining the arbitrability of a dispute, courts should determine the enforceability of the arbitration agreement. Grounds for declaring an arbitration agreement unenforceable are determined by "ordinary state-law principles that govern the formation of contracts." *Circuit City, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir.2002) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

III. DISCUSSION

A. Plaintiff's Claims Are Covered By the Arbitration Agreement

Plaintiff's claims are covered by the arbitration agreement.[FN2]

> FN2. Indeed, Plaintiff does not even contest this issue. *See generally* Opp'n (dkt.20).

The **arbitration agreement** contained in the T & C states in relevant part:

> **WE EACH AGREE THAT, EXCEPT AS PROVIDED BELOW ... ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU AND U.S. IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT.**

See Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 2 (emphasis in original).

The arbitration agreement also contains a **class action waiver,** which states in part:

> **WE EACH AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS, WHETHER IN ARBITRATION OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A MEMBER IN A CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION.**

Id. (emphasis in original).[FN3] All of Plaintiff's causes of action—(1) violation of the FCA; (2) violation of the UCL; (3) fraudulent concealment; and (4) violation of the CLRA—arise from T–Mobile's alleged misconduct in assessing surcharges on its bills, and thus are billing disputes covered by the arbitration agreement. Because the class action waiver broadly covers "any dispute resolution proceedings, whether in arbitration or court," it applies to all of Plaintiff's claims in this case. Thus, Plaintiff's claims are subject to arbitration unless the arbitration agreement is unenforceable.

FN3. T–Mobile has attached as exhibits its 2004 Service Agreement, T & C and arbitration agreement with Plaintiff, as well as their 2008 Service Agreement, T & C and arbitration agreement. *See generally* Baca Decl. (dkt.17). "T–Mobile's Terms and Conditions have changed somewhat over the years, but all of the versions in effect during Ms. Meyer's tenure as a T–Mobile subscriber have contained an arbitration agreement and class action waiver." *Id.* ¶ 8

> Notwithstanding the modifications over the years, T–Mobile states that, "[b]ased on the most recent renewal of Ms. Meyer's T–Mobile service and contract, the June 28, 2008 version of the Terms & Conditions applies to her account." *Id.* Plaintiff also relies exclusively on the 2008 Service Agreement, T & C and arbitration agreement in challenging the validity of the arbitration agreement. *See generally* Opp'n. As the only arbitration agreement at issue is the 2008 agreement, this order is based on the 2008 Service Agreement, T & C and arbitration agreement, unless otherwise specified.

B. The Arbitration Agreement Is Valid and Enforceable

1. The Arbitration Agreement Is Not Governed Only By California Law

***4** Plaintiff argues that "T–Mobile voluntarily and privately agreed to limit the application of the Agreement's terms, including the arbitration clause, if any of the terms were invalid under the law of a particular jurisdiction." Opp'n (dkt.20) at 6 (citing Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 25). Citing the CLRA[FN4] and *Discover Bank v. Superior Court*[FN5], Plaintiff argues that the class action waiver in the arbitration agreement was invalid under California law in August 2008 and thus is unenforceable now. *Id.*

FN4. Section 1751 of the CLRA renders as "unenforceable and void" any waiver of statutory rights, including the right to bring class actions, provided for under the CLRA. *See* Cal. Civ.Code § 1751, 1781(a).

FN5. *Discover Bank* held that a class action waiver is unconscionable where "the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank v. Superior Court*, 36 Cal.4th 148, 162–63, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005).

Plaintiff's argument is flawed both factually and legally. First, the arbitration agreement is not governed *only* by California law. *See* Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 25 ("This Agreement is governed by the Federal Arbitration Act, applicable federal law, and the laws of the state in which your billing address in our records is located."). Second, Plaintiff's citations to the CLRA and *Discover Bank* are misplaced, as the FAA preempts both. *See Ting v. AT & T*, 319 F.3d 1126, 1147 (9th Cir.2003) (holding that the FAA pree-

mpts section 1751 of the CLRA prohibiting class action waivers); *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, ——, 131 S.Ct. 1740, 1753, 179 L.Ed.2d 742 (2011) (holding that the FAA preempts the *Discover Bank* rule). Although the Supreme Court decided *Concepcion* after Plaintiff entered the 2008 Service Agreement, this Court must nonetheless apply *Concepcion* to its review of the agreement. *See Ditto v. McCurdy*, 510 F.3d 1070, 1076–77 (9th Cir.2007) (holding that an intervening Supreme Court decision "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate ... announcement of the rule"). Considering the language of the Service Agreement and the federal and state law governing it, the arbitration agreement's class action waiver is valid.

2. The Arbitration Agreement Is Not Unconscionable

Under California law, an arbitration agreement is unenforceable if it is both procedurally and substantively unconscionable. *See Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1072 (9th Cir.2007). Courts use a sliding scale under which the more procedural unconscionability there is, the less substantive unconscionability is required, and vice versa. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000).

I. The Arbitration Agreement Is Not Procedurally Unconscionable

The analysis for procedural unconscionability focuses on oppression or surprise. *See id.* "Procedural unconscionability addresses the manner in which agreement to the disputed term was sought or obtained, such as unequal bargaining power between the parties and hidden terms included in contracts of adhesion." *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1099, 118 Cal.Rptr.2d 862 (2002). A contract of adhesion is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it" and with no opportunity to negotiate. *Armendariz*, 24 Cal.4th at 113–15, 99 Cal.Rptr.2d 745, 6 P.3d 669. There is no contract of adhesion, however, if the contract provides a meaningful opportunity to opt-out of arbitration. *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir.2002) (finding no procedural unconscionability where plaintiff was given thirty days to decide whether to participate in the arbitration program and mail a simple form to opt-out, and the arbitration agreement did not contain any other indicia of procedural unconscionability).

***5** The Service Agreement contains some characteristics of a contract of adhesion: it is a standardized contract drafted by T–Mobile, the party with superior bargaining strength. *See* Opp'n (dkt.20) at 8. However, the Service Agreement did not relegate Plaintiff only to the opportunity to accept the arbitration agreement or reject T–Mobile's phone service. Instead, the agreement contains an **opt-out provision,** which states in relevant part:

> **YOU MAY CHOOSE TO PURSUE YOUR CLAIM IN COURT AND NOT BY ARBITRATION** if: (a) your claim qualifies, you may initiate proceedings in small claims court; or (b) **YOU OPT OUT OF THESE ARBITRATION PROCEDURES *WITHIN 30 DAYS FROM* THE DATE YOU ACTIVATED THAT PARTICULAR LINE OF SERVICE (the "Opt Out Deadline") .** You may opt out of these arbitration procedures by calling 1–866–323–4405 or via the internet by completing the opt-out form located on **www.t-mobiledisputeresolution.com. Any opt-out received after the Opt Out Deadline will not be valid and you must pursue your claim in arbitration or small claims court.**

Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 2 (emphasis in original).[FN6] Plaintiff thus had thirty days to decide whether to opt out of the arbitration agreement and had the option to do so either by phone or internet. Further, the opt-out provision does not describe any adverse consequences of opt-

ing out of arbitration, and Plaintiff does not allege that she would have suffered any. *See* Opp'n (dkt.20) at 10. Moreover, Plaintiff was informed of the legal consequences of failing to opt out.[FN7] *See* Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 2.

FN6. Although the 2008 T & C contains an opt-out provision, there is no opt-out provision in the 2004 Service Agreement or T & C. *See* Baca Decl. (dkt.17) Ex. A ("2004 Service Agreement") ¶ 3; *id.* Ex. B ("2004 T & C") ¶ 3.

FN7. The arbitration agreement states in pertinent part:

> THERE IS NO JUDGE OR JURY IN ARBITRATION, AND COURT REVIEW OF AN ARBITRATION AWARD IS LIMITED. THE ARBITRATOR MUST FOLLOW THIS AGREEMENT AND CAN AWARD THE SAME DAMAGES AND RELIEF AS A COURT (INCLUDING ATTORNEYS' FEES). Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 2.

Neither the opt-out provision nor the arbitration agreement was a hidden term. The arbitration agreement is located in the second numbered paragraph of the T & C of the Service Agreement and is written in capitalized and bolded letters. *See id.* The opt-out provision immediately follows the arbitration agreement in the second numbered paragraph of the T & C and is also written in capitalized and bolded letters. *Id.* Finally, the class action waiver is also located in the second numbered paragraph of the T & C, written in capitalized and bolded letters, and contains the heading ***"CLASS ACTION WAIVER."*** *Id.* ¶ 3 (emphasis in original). T–Mobile's T & C are also included in a pamphlet packaged in the boxes of all phones sold by T–Mobile, *see* Baca Decl. (dkt.17) ¶ 9, and although Plaintiff does not recall a pamphlet being included in her phone box, *see* Meyer Decl. (dkt.20–17) ¶ 7, she does not provide any information countering T–Mobile's showing. Because the arbitration agreement contains an opt-out provision and is presented in a clear format, the arbitration agreement is not procedurally unconscionable. *See Arellano v. T–Mobile USA, Inc.*, No. C 10–05663 WHA, 2011 WL 1362165, at * 1–2 (N.D.Cal. Apr.11, 2011) (finding no procedural unconscionability for a T–Mobile arbitration agreement that very closely resembles the one in this case).

ii. The Arbitration Agreement Contains Some Elements of Substantive Unconscionability

***6** The analysis for substantive unconscionability focuses on an arbitration agreement's overly harsh or one-sided results. *See Armendariz* 24 Cal.4th at 114, 99 Cal.Rptr.2d 745, 6 P.3d 669. Courts require arbitration agreements to contain a "modicum of bilaterality." *Id.* at 117, 99 Cal.Rptr.2d 745, 6 P.3d 669. There is no bilaterality if the arbitration agreement "compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party." *Fitz v. NCR Corp.*, 118 Cal.App.4th 702, 724, 13 Cal.Rptr.3d 88 (2004) (citing *Armendariz*, 24 Cal.4th at 119, 99 Cal.Rptr.2d 745, 6 P.3d 669). Arbitration agreements limiting the amount of damages that would otherwise be available in court are also substantively unconscionable. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir.2003). To determine whether the arbitration agreement is sufficiently bilateral, courts should "look beyond facial neutrality and examine the actual effects of the challenged provision." *Ting*, 319 F.3d at 1149.

The arbitration agreement provides for neutral arbitration. *See* Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 2 ("The American Arbitration Association (AAA) will arbitrate all disputes."). Parties in arbitration can receive the same damages that would otherwise be available in court. *Id.* ("An arbitrator may award on an individual basis any relief that would be available in a court, including injunctive or declaratory relief and attorneys' fees."). Plaintiff

also does not have to pay arbitrators' fees for claims under $75,000. *Id.* ("We [T–Mobile] will pay upon filing of the arbitration demand, all filing, administration and arbitrator fees for claims that total less than $75,000."). Plaintiff argues that T–Mobile's unilateral power to modify the agreement is unconscionable, *see* Opp'n (dkt.20) at 13, but Plaintiff has not shown how the modification clause has been applied to her. Plaintiff thus lacks standing to challenge the provision. *See Lee v. Am. Express Travel Related Servs., Inc.*, 348 Fed. Appx. 205, 207 (9th Cir.2009) ("Plaintiffs cannot satisfy the requirements of Article III because they have not yet been injured by the mere inclusion of these provisions, nor is the threat of future harm from such provisions sufficiently imminent to confer standing.").

Notwithstanding some of the bilateral terms in the arbitration agreement, the agreement contains some elements of substantive unconscionability. The arbitration agreement allows T–Mobile to assign outstanding bills to collection agencies that can then pursue the claims against customers in court, but the agreement does not provide customers with the same unequivocal power (customers must opt out of arbitration).[FN8] Assuming T–Mobile invoked this right in the face of a claim by a customer that the past due amount was wrongly charged, the agreement would compel the customer, the weaker party, to arbitration while exempting T–Mobile, the stronger party, from arbitration. This provision makes the arbitration agreement substantively unconscionable as to this aspect of the agreement, but as there is no procedural unconscionability, the arbitration agreement is not unconscionable on the whole. *See Gatton v. T–Mobile, USA, Inc.*, 152 Cal.App.4th 571, 599, 61 Cal.Rptr.3d 344 (2007) ("Because there is an absence on this record of both the surprise and oppression factors of procedural unconscionability, the service agreement is not unconscionable, and T–Mobile's motion to compel arbitration should be granted.").

FN8. The arbitration agreement states in relevant part:

> **We each agree that** if you fail to timely pay amounts due, we may assign your account for collection, and the collection agency may pursue in court claims limited strictly to the collection of the past due amounts and any interest or cost of collection permitted by law or the Agreement.
>
> Baca Decl. (dkt.17) Ex. D ("2008 T & C") ¶ 2 (emphasis in original).

3. Plaintiff's Statutory Claims Are Arbitrable

I. Plaintiff's Federal Statutory Claim Is Arbitrable

***7** "Contractual arbitration agreements are equally applicable to statutory claims as to other types of common law claims." *Lozano v. AT & T Wireless Services, Inc.*, 504 F.3d 718, 725 (9th Cir.2007). Indeed, absent "fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,' " the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (internal citation omitted).

Agreements subjecting federal statutory claims to arbitration must be enforced "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.*, 473 U.S. at 628. "If such an intention exists, it will be discoverable in the text of the ... [statute], its legislative history, or an 'inherent conflict' between arbitration and the ... [statute's] underlying purposes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (internal citation omitted). The burden to show such Congressional intent is on the party opposing arbitration. *See Loz-*

ano 504 F.3d at 725–26 (internal citation omitted).

Plaintiff has not shown how the text of the FCA or its legislative history evinces a Congressional intent to preclude arbitration of Plaintiff's FCA claim. To the extent Plaintiff argues that there is an inherent conflict between arbitration and the FCA's underlying purpose, her argument has been foreclosed by *Lozano*, in which the Ninth Circuit ruled that claims under the FCA may be subject to mandatory arbitration. *See Lozano* 504 F.3d at 726–27 ("Neither the public policy considerations in the FCA, nor the inequality of bargaining power between the parties, is sufficient to show congressional intent to preclude arbitration."). Thus, Plaintiff's claim under the FCA is arbitrable.

ii. Plaintiff's State Statutory Claims Are Arbitrable

Plaintiff argues that the arbitration agreement is unenforceable because it would deny her from exercising her statutory right to seek injunctive relief under the UCL and CLRA, rights affirmed by the California Supreme Court. *See* Opp'n (dkt.20) at 16 (citing *Broughton v. Cigna Healthplans of Cal.*, 21 Cal.4th 1066, 90 Cal.Rptr.2d 334, 988 P.2d 67 (1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal.4th 303, 133 Cal.Rptr.2d 58, 66 P.3d 1157 (2003)). FN9 *Broughton* held that public injunctive relief claims under the CLRA are inarbitrable, *see Broughton*, 21 Cal.4th at 1080, 1082, 90 Cal.Rptr.2d 334, 988 P.2d 67 (holding such claims inarbitrable because the purpose of such relief is to "remedy a public wrong," and "the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators"). *Cruz* held that public injunctive relief claims brought under the UCL and FAL are also inarbitrable, *see Cruz*, 30 Cal.4th at 316, 133 Cal.Rptr.2d 58, 66 P.3d 1157.

FN9. Plaintiff has filed a statement of recent decision pursuant to L.R. 7–3(d) as well. The Court has considered these authorities, but finds they do not alter its conclusions, for the reasons discussed in more detail below.

***8** *Concepcion* holds that the FAA preempts state law to the extent the state law would preclude "enforcement of arbitration agreements according to their terms so as to create streamlined proceedings," even if the state law is based on public policy. *Concepcion*, 131 S.Ct. at 1748. The effect of *Concepcion* on California's law prohibiting arbitration of public injunctive relief claims was recently addressed by a court in this district, which concluded the FAA preempts California's law. *See Arellano v. T–Mobile USA, Inc.*, No. C 10–05663 WHA, 2011 WL 1842712, at *1 (N.D.Cal. May 16, 2011).

Arellano involved facts and issues very similar to this case: plaintiff brought a class action against T–Mobile, seeking injunctive relief, among other remedies, for claims brought under the CLRA and UCL. *See Arellano*, 2011 WL 1842712, at *1. T–Mobile argued that the claims should be arbitrated based on the parties' arbitration agreement, which very closely resembled the one in this case. *See Arellano*, 2011 WL 1362165, at *1. Plaintiff made several public policy arguments for why the CLRA and UCL claims were inarbitrable. *See Arellano*, 2011 WL 1842712, at *2. Judge Alsup, however, ruled that the FAA "preempts California's preclusion of public injunctive relief claims from arbitration, at least for actions in federal court." *Id.*, at *1 ("The recent Concepcion decision compels preemption: 'When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.' " (citing *Concepcion*, 131 S.Ct. at 1747)).

Plaintiff in this case makes the same public policy arguments as plaintiff in *Arellano* for why her CLRA and UCL claims are inarbitrable. *See* Opp'n (dkt.20) at 13–17 ("if arbitration is compelled, the claims of Plaintiff and other T–Mobile customers are almost certain to go unresolved.").

However, both *Arellano* and *Concepcion* rejected this argument. *See Concepcion*, 131 S.Ct. at 1753 ("The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system ... But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

Several other courts have also held that the FAA preempts *Broughton* and *Cruz* because they amount to "state law[s] prohibit[ing] outright the arbitration of a particular type of claim ." *See Nelson v. AT & T Mobility LLC*, No. 10–4802, 2011 WL 3651153, at *2 (N.D.Cal. Aug.18, 2011); *In re Apple and AT & T iPad Unlimited Data Plan Litigation*, No. 10–2553, 2011 WL 2886407, at *4 (N.D.Cal. July 19, 2011); *Kaltwasser v. AT & T Mobility LLC*, No. 07–411, (N.D.Cal. Sept. 20, 2011) (all quoting *Concepcion*, 131 S.Ct. at 1747).

The Court is aware that one district court came to the opposite conclusion. In *In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litigation*, the Court held *Concepcion* did not overrule *Cruz* and *Broughton*. —— F.Supp.2d ——, No. 09–2093, 2011 WL 4090774, at *9–10 (C.D.Cal. Sept.6, 2011). There, the Court found that *Cruz* and *Broughton* were not an "outright" prohibition of certain claims, but rather, that arbitration was improper for only certain categories of injunctive claims—namely, those brought when a plaintiff is acting as a private attorney general and seeking an injunction to vindicate a public right. *Id.* at * 10, 90 Cal.Rptr.2d 334, 988 P.2d 67. While the Court does raise compelling policy arguments to support this conclusion, *see id.* (discussing the benefits of a judicial forum for such actions in comparison to an arbitral forum), this Court finds this no longer tenable post-*Concepcion*.

***9** *Concepcion* held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S.Ct. 1747. The Central District is correct that *Cruz* and *Broughton* do not prohibit outright the arbitration of *all* injunctive relief claims under the CLRA and UCL, but they do prohibit outright the arbitration of all injunctive relief claims brought in the capacity of a private attorney general that seek a public injunction. While this is a more narrow "particular type of claim," it is still a state court application of public policy to prohibit an entire category of claims. This Court does not disagree with the Central District that public policy supporting such a prohibition may be compelling, but such a prohibition does not survive *Concepcion*. Thus, Plaintiff's claims under the CLRA and UCL are arbitrable.

C. Plaintiff Is Not Entitled to Arbitration–Related Discovery

If the Court does not find the arbitration agreement unenforceable based on the present record, Plaintiff requests to conduct limited discovery on the issue of whether the arbitration agreement is valid. Opp'n (dkt.20) at 17. For reasons discussed below, Plaintiff's proposed discovery requests are beyond the scope allowed by the FAA and are denied.

The FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 29. "It was 'Congress's clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.' " *Bell v. Koch Foods of Miss.*, LLC, 358 Fed. Appx. 498, 500–01 (5th Cir.2009) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22). As part of the FAA's strong policy favoring arbitration, the statute "provides for discovery and a full trial in connection with a motion to compel arbitration only if 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.' " *Simula, Inc.*, 175 F.3d at 726 (quoting 9 U.S.C. § 4). Courts may only consider "issues relating to the making and performance of the agreement to arbitrate." *Id.* at 726. District courts in the Ninth Circuit and the Ninth Circuit itself have allowed a party opposing a motion

to compel arbitration to conduct discovery relevant to the issue of unconscionability. *See Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1085 (9th Cir.2008) (remanding case to district court to expand the record on the issue of procedural unconscionability); *see also Coneff v. AT & T Corp.*, No. C06–0944RSM, 2007 U.S. Dist. LEXIS 20502, at *8–10,2007 WL 738612 (W.D.Wash. Mar. 9, 2007) (allowing discovery requests related to the issue of unconscionability but not the merits of the parties' underlying dispute); *Hamby v. Power Toyota Irvine*, No. 11cv544–BTM (BGS), 2011 WL 2852279, at *1 (S.D.Cal. July 18, 2011) (citing *Coneff* in granting plaintiff's ex parte application for arbitration-related discovery).

***10** Most of Plaintiff's discovery requests do not relate to the validity of *Plaintiff's* arbitration agreement with T–Mobile. Instead, they concern all agreements, disputes, arbitrations and lawsuits relating to T–Mobile customers in California *other than Plaintiff* for the entire seven-year "relevant time period." *See id.* Ex. G ("First Set of Requests to Produce Documents") ¶ 9 (requesting "DOCUMENTS showing the highest, median, and mean monetary awards in arbitrations involving T–MOBILE and CUSTOMERS during the RELEVANT TIME PERIOD."); *id.* ¶ 11 (requesting "DOCUMENTS showing the amounts paid to CUSTOMERS or the outcomes of all lawsuits filed against T–MOBILE in any small claims, state or federal court during the RELEVANT TIME PERIOD."). Plaintiff's remaining discovery requests concern T–Mobile's past T & C and arbitration procedures. *See id.* ¶ 2 ("All DOCUMENTS RELATING TO ARBITRATION PROCEDURES, including without limitation all originals and revisions that were in effect during the RELEVANT TIME PERIOD."); *id.* ¶ 3 ("The TERMS AND CONDITIONS used by T–MOBILE, including all originals and revisions that were in effect during the RELEVANT TIME PERIOD."). However, the only arbitration agreement at issue is the 2008 agreement, and the documents relevant to determining the validity of that arbitration agreement-the 2008 Service Agreement, T & C and arbitration agreement—are already accessible by the parties and the Court. *See* Baca Decl. (dkt.17) Ex. C ("2008 Service Agreement"); *id.* Ex. D ("2008 T & C"); Rivas Decl. (dkt.20–1) Ex. J ("AAA Supplementary Procedures for ConsumerRelated Disputes"). Because Plaintiff's proposed discovery requests are either overly broad or irrelevant to the disposition of the pending Motion, Plaintiff is not entitled to discovery.

III. CONCLUSION

For the foregoing reasons, T–Mobile's Motion to Compel Arbitration is GRANTED, and the case is STAYED.

IT IS SO ORDERED.

N.D.Cal.,2011.
Meyer v. T-Mobile USA Inc.
Slip Copy, 2011 WL 4434810 (N.D.Cal.)

END OF DOCUMENT