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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARY MCKINNEY, Individually and on behalf of all others similarly situated,

Plaintiff,

v.

GOOGLE INC., a Delaware corporation; HTC CORP., a Delaware corporation; and T-MOBILE USA, INC., a Delaware corporation,

Defendants.

Case No. 5:10-cv-01177-PVT

T-MOBILE USA, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO STAY CLAIMS

Date: November 1, 2010
Time: 9:00 a.m.
Dept.: 8

The Honorable James S. Ware

DAVIS WRIGHT TREMAINE LLP

I. INTRODUCTION

Although Plaintiff Mary McKinney is a resident of Pennsylvania, she filed suit here in California against Google Inc. ("Google"), HTC Corp. ("HTC") and T-Mobile USA, Inc. ("T-Mobile"), asserting that the Nexus One wireless phone – the "Google phone," as she calls it – does not "maintain connectivity" to T-Mobile's 3G wireless network and that Defendants offered poor customer service. Plaintiff seeks to represent a nationwide class of "all consumers who purchased the Nexus One [phone] sold in combination with T-Mobile's monthly service plan to its 3G wireless network . . . ." First Amended Complaint, ¶ 1 (Dkt. No. 26) ("FAC").[1]

Plaintiff's claims against T-Mobile do not belong in this Court, but instead should be referred to arbitration. When Plaintiff signed up for T-Mobile service in 2002 and when she added to, renewed and extended her service more than 60 times afterward, Ms. McKinney accepted contract terms providing that all disputes would be resolved by individual arbitration.

Under the Federal Arbitration Act ("FAA"), this Court's role is to move the parties out of court and into arbitration as quickly as possible. Under the FAA and Pennsylvania law – which also applies under the T-Mobile contract because that is Ms. McKinney's home state – the T-Mobile arbitration agreement and class action waiver are fully enforceable.

II. ISSUE TO BE DECIDED

Whether Plaintiff's claims should be compelled to individual arbitration and whether this action should be stayed in accordance with the terms of her T-Mobile contact, the FAA, 9 U.S.C. §§ 2, 4, and other applicable federal and Pennsylvania law.

III. FACTUAL BACKGROUND

A. Plaintiff Contractually Agreed to Arbitration More than Sixty Times.

Plaintiff originally signed up for T-Mobile service over eight years ago. In March 2002, she activated two lines of service through an Internet dealer, InPhonic. Declaration of

[1] Elsewhere in the FAC, Plaintiff proposes a different class definition that would encompass all persons in the country who purchased the Google phone and "who either (a) have a T-Mobile service

Andrea Baca ¶ 3 ("Baca Dec."). Plaintiff added three more lines on her account in December 2003, at a T-Mobile store in Deptford, New Jersey. *Id.* ¶ 4. Each of the five times she activated service on a new phone line, Plaintiff entered into contracts with T-Mobile and accepted T-Mobile's terms and conditions of service ("Terms & Conditions"). *Id.* ¶ 5.

In addition to entering into contracts with T-Mobile each time she activated service, Ms. McKinney agreed to accept T-Mobile's Terms & Conditions at least 63 more times, each time she accepted discount handset upgrade offers and agreed to extend her contract term. *Id.* ¶¶ 7, 10. Plaintiff usually took advantage of discount handset upgrades to obtain the newest, most technologically advanced phones T-Mobile offered at the time. *Id.* ¶ 6.[2]

T-Mobile's Terms & Conditions and customer contracts have included a provision calling for individual arbitration of disputes since 2001. *Id.* ¶ 20. Every time Ms. McKinney activated or renewed service and accepted the T-Mobile Terms & Conditions, she confirmed her agreement to arbitrate. *Id.* ¶ 10.

In addition, each time Plaintiff activated service or took a discount handset offer, she was allowed a trial period of at least 14 days to review the Terms & Conditions and try out the service and handset. *Id.* ¶ 16, & Ex. A, ¶ 4. If she was dissatisfied for any reason, Ms. McKinney could cancel her contract extension (or a line of service or the entire contract within 14 days of original activation), with no early termination fee or other obligation and could receive a full refund for any handset she purchased and returned in its original condition. *Id.* ¶ 17. Ms. McKinney was aware of the trial period, as she took advantage of it to return handsets for full refunds at least 10 times. *Id.* ¶ 18.[3]

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plan for access to its 3G wireless network, or (b) paid the full price for an 'unlocked' Google phone for use on another 3G network." FAC at ¶ 8.

[2] For example, Ms. McKinney upgraded the phones on her account 20 times in the 18-month period prior to January 5, 2010. *See* Baca Dec. ¶ 9.

[3] Plaintiff returned handsets within the trial period at least 10 times in the 18 months before January 5, 2010, receiving full refunds each time. Baca Dec. ¶ 18. Ms. McKinney repeatedly claimed that the handsets she received were defective. *Id.* ¶¶ 18, 19.

B. The Arbitration Agreement is Disclosed Repeatedly.

The arbitration agreement was disclosed to Plaintiff (as it is to all T-Mobile customers) in several places. Customers activating service in T-Mobile retail stores must sign a Service Agreement that expressly mentions the arbitration provision. For example, the 2003 version of the Service Agreement (applicable when Plaintiff activated three lines of service in a T-Mobile store in December 2003), stated immediately above the line for customer signature: "Disputes are subject to mandatory arbitration in accordance with paragraph 3 on the reverse." *Id.*, Ex. B, at 1. The second page of the Service Agreement set forth the arbitration agreement in full, beginning in capitalized type:

> 3. Mandatory Arbitration; Dispute Resolution. . . . INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM [defined as ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS] MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION . . . .

Id., Ex. B, at 2 (emphasis in original).

The arbitration agreement is also set forth in the Terms & Conditions, which are included in the box with every wireless phone sold by T-Mobile. *Id.* ¶ 22, Ex. C.[4]

Customers also have been alerted about the Terms & Conditions and the arbitration agreement by a sticker sealing the boxes containing handsets sold by T-Mobile. *Id.* ¶ 24. The sticker, which had to be broken to open the box, stated: "**IMPORTANT** Read the enclosed T-Mobile Terms & Conditions. By using T-Mobile service, you agree to be bound by the Terms & Conditions, including the mandatory arbitration and early termination fee provisions." *Id.*

C. The June 2008 Terms & Conditions Applicable to Plaintiff's Service.

For present purposes, the June 28, 2008, version of the Terms & Conditions is the contract applicable to Ms. McKinney and all lines of service on her account. This is because

[4] The Service Agreement signed in stores incorporates the Terms & Conditions and reflects customers' acknowledgment that they have received and agree to be bound by them. Immediately above the signature line, the agreement stated: "You also acknowledge you have received and reviewed the T-Mobile Terms and Conditions, and agree to be bound by them.'' Baca Dec., Ex. B, at 2.

Ms. McKinney accepted handset upgrade offers from T-Mobile and agreed to contract extensions on all five lines of service on her account after June 28, 2008. *Id.* ¶ 25.

1. The Arbitration Agreement Appears Prominently.

The arbitration agreement is prominently set forth in the Terms & Conditions. *See id.*, Ex. A, ¶ 2. They mention arbitration at the outset, in bold and capitalized type:

> **Please read these T&Cs carefully**. They cover important information about all T-Mobile services provided to you ("Service") and your T-Mobile phone, handset, device, SIM card, data card, or other equipment ("Device"). These T&Cs include **fees for early termination** and late payments, limitations of liability, privacy and **resolution of disputes by arbitration instead of in court**.

Id. ¶ 27 & Ex. A, at 1 (emphasis in original). The arbitration provision itself appears prominently in the second paragraph, again in emphasized type:

> **2. * Dispute Resolution and Arbitration. WE EACH AGREE THAT, EXCEPT AS PROVIDED BELOW . . . ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU AND US 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.** This includes any claims against other parties relating to Services or Devices provided or billed to you (such as our suppliers or retail dealers) whenever you also assert claims against us in the same proceeding.

Id. ¶ 28 & Ex. A, ¶ 2 (emphasis in original). Under the agreement, customers may also pursue claims in small claims court. *Id.*, Ex. A, ¶ 2. The agreement goes on to explain the arbitration process and procedure. [5]

2. The Arbitration Agreement Allows Full Remedies at Minimal Costs.

Arbitration under the T-Mobile agreement is inexpensive to subscribers. The Terms & Conditions provide that T-Mobile pays all fees and expenses of arbitration for all claims up to $75,000. *Id.*

Arbitration is also designed to be convenient and efficient. For example, a consumer may choose to arbitrate based on written submissions only or in a telephonic hearing.[6] All

[5] *See, e.g.,* Baca Dec., Ex. A,. ¶ 2 ("THERE IS NO JUDGE OR JURY IN ARBITRATION, AND COURT REVIEW OF AN ARBITRATION AWARD IS LIMITED." (emphasis in original)).

arbitrations are to be conducted by the American Arbitration Association, pursuant to its rules, including procedures specific to consumer disputes.[7] *Id.*

The arbitration provision allows subscribers to obtain any relief on their individual claims that would be available in court, including statutory damages, attorneys' fees and costs, and injunctive relief. *Id.*[8] And, the provision goes even further, giving subscribers a one-way right to recover attorneys' fees if they prevail in arbitration, while T-Mobile foregoes rights to recover fees.[9]

The agreement also makes clear that the parties may not pursue claims by way of a class or representative action:

> **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).

3. Plaintiff Never Exercised Her Rights to Opt Out of Arbitration.

In addition to allowing actions in small claims court instead of arbitration, the Terms & Conditions also allow subscribers to opt out of the arbitration agreement altogether:

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[6] *See* AAA Supplementary Procedures for Consumer-Related Disputes, available at www.adr.org/sp.asp?id=22014, which are incorporated as a part of the T-Mobile arbitration agreement. *See* Baca Dec., Ex. A, ¶ 2.

[7] *See* www.adr.org/sp.asp?id=28752.

[8] The agreement states this in two places. *See* Baca Dec., Ex. A, ¶ 2 (an arbitrator "CAN AWARD THE SAME DAMAGES AND RELIEF AS A COURT (INCLUDING ATTORNEYS' FEES)" (emphasis in original)); *see also id.* ("An arbitration may award on an individual basis any relief that would be available in a court, including injunctive or declaratory relief and attorneys' fees.").

[9] The agreement provides:

> [F]or claims under $75,000 as to which you provided notice and negotiated in good faith as required above before initiating arbitration, if the arbitrator finds that you are the prevailing party in the arbitration, you will be entitled to a recovery of reasonable attorneys' fees and costs. Except for claims determined to be frivolous, T-Mobile agrees not to seek an award of attorneys' fees in arbitration even if an award is otherwise available under applicable law.

Id.

> **YOU MAY CHOOSE TO PURSUE YOUR CLAIM IN COURT AND NOT BE ARBITRATION** if . . . **YOU OPT OUT OF THESE ARBITRATION PROCEDURES WITHIN 30 DAYS FROM THE DATE YOU ACTIVATED THAT PARTICULAR LINE OF SERVICE** . . . .

Id. T-Mobile provides easy mechanisms to opt out, either by calling a toll free number or completing a simple form available online. *See* Baca Dec. ¶ 29 & Ex. A, ¶ 2; *see also* www.t-mobiledisputeresolution.com.

Ms. McKinney did not exercise her rights to opt out of arbitration. Declaration of Rebekah Casner, ¶¶ 3, 4.

4. Plaintiff's Contract with T-Mobile Is Governed by Federal and Pennsylvania Law.

Finally, and also relevant to the present motion, the Terms & Conditions provide that the governing law for each subscriber is the law of the subscriber's home state:

> 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, without regard to conflicts of laws rules of that state. . . .

Baca Dec. ¶ 30 & Ex. A, ¶ 25. Ms. McKinney's billing address is and always has been in Philadelphia, Pennsylvania. *Id.* ¶ 31. Pursuant to her T-Mobile contract and federal law, this is the "place of primary use" for service on her account. *See id.*, Ex. A, ¶ 11; 4 U.S.C. §§ 122(a); 124(8).

D. Plaintiff's Use of the Google Phone.

1. Unique Marketing of the Google Phone.

Google introduced the Nexus One handset on January 5, 2010, with a unique marketing approach. As Plaintiff admits, the Nexus One is not sold by T-Mobile or any other wireless carrier; it is sold exclusively by Google and is available only through Google's online web store. *See* FAC at ¶¶ 34, 45. Google offered the phone by itself at a price of $529, so that it could be used on any GSM wireless carrier's network (such as AT&T's network in the U.S.), or, alternatively, in conjunction with activation of a new line of service through T-Mobile, with prices starting at $179 for the handset. *See id.* at ¶ 33; *see also* Declaration of James Grant, Ex. A (WIRED online article, "Google Debuts Android-Powered Nexus One

'Superphone'," (Jan. 5, 2010), *available at* http://www.wired.com/gadgetlab/2010/01google-debuts-android-powered-nexus-one-superphone (last visited July 5, 2010)).

2. Plaintiff Did Not Purchase T-Mobile Service.

Plaintiff alleges that she purchased a Nexus One phone through Google's web store on January 9, 2010. FAC at ¶ 2.[10] In fact, Plaintiff contacted T-Mobile Customer Care on January 5, 2010 (the day the Nexus One handset was introduced), asking why she could not order the phone from Google at the $179 discounted price, with a two-year contract extension. *Id.* ¶ 33. She was told that she did not qualify for this discount pricing because she had used the upgrade process too recently in the past. *Id.*

Ms. McKinney did not activate any new line of service when she purchased the Nexus One phone from Google, nor did she extend her T-Mobile contract for any of her lines of service. *Id.* ¶ 32. Plaintiff did not purchase the Google phone "in combination with T-Mobile's monthly service plan for access to its 3G wireless network," as she alleges that others did. *See* FAC at ¶ 1; *see also id.* at ¶ 9 (referring to putative "Class members who bought a Google Phone and purchased T-Mobile 3G service"). Plaintiff had been a T-Mobile subscriber for eight years when she bought her Nexus One handset, and she had purchased and used several 3G handsets on the T-Mobile network before then. Baca Dec. ¶ 32.

3. Plaintiff's Claims in this Action.

Plaintiff filed her original complaint in California state court on January 29, 2010, and served Google and T-Mobile on February 18, 2010. *See* Dkt. No. 2-1. Google and T-Mobile removed that complaint to this Court. Dkt. No. 1. After the Court dismissed the complaint in the *In re Apple iPhone 3G Products Liability Litigation*, No. C09-02045 JW, filed by the same counsel representing Plaintiff in this case, Plaintiff filed an amended complaint. Dkt. No. 26. Plaintiff's FAC alleges claims (1) under section 201(b) of the Federal Communications Act, 47 U.S.C. § 201(b), FAC ¶¶ 56-59; (2) for breach of express and implied warranties under

[10] T-Mobile's records reflect that Plaintiff first used a Nexus One handset on the T-Mobile network on January 6, 2010, Baca Dec. at ¶ 35, but the exact date when Ms. McKinney purchased and began using the phone is not relevant for present purposes.

state law, *id.* ¶¶ 60-67; and (3) under the Magnuson Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, FAC ¶¶ 68-76. In addition to T-Mobile, Plaintiff asserts claims against Google (which marketed and sold the Nexus One phone) and HTC (which manufactured the phone). The gist of Plaintiff's claims is that the Google phone did not "maintain connectivity to T-Mobile's 3G wireless network" and Defendants failed to provide adequate customer service. *See* FAC ¶ 1.

Because Plaintiff's claims against T-Mobile fall squarely within the arbitration agreement set forth in the T-Mobile Terms & Conditions, which Plaintiff accepted scores of times, T-Mobile brings the present motion to compel arbitration and stay this litigation. T-Mobile is simultaneously filing a motion to dismiss Plaintiff's claims outright under Fed. R. Civ. P.12(b)(1) and 12(b)(6). Google and HTC additionally have moved to dismiss under Rule 12(b)(6), and T-Mobile joins that motion, as well.[11]

IV. ARGUMENT

A. The FAA Reflects a Strong National Policy Favoring Arbitration

Congress enacted the FAA more than 80 years ago "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). The FAA provides that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA "declare[s] a national policy favoring arbitration." *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). In light of the FAA's purpose, a court must "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," because a "prime objective" of arbitration "is to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 986 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985); other internal quotes and citations omitted). "[Q]uestions of arbitrability must be addressed with a

[11] In bringing and joining in the alternate motions to dismiss, T-Mobile does not waive its arguments or rights to compel arbitration, including all appellate rights under the FAA. *See* 9 U.S.C. § 16.

healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

As the Supreme Court recently reinforced in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1774 (2010), a court must "give effect to the contractual rights and expectations of the parties" (quoting *Volt v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), and agreements to arbitrate must be enforced according to their terms, *id.* at 1773 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)); *see also id.* at 1775 ("it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" (emphasis in original)).

The Court must grant a motion to compel arbitration if (1) a valid agreement to arbitrate exists, and (2) the dispute falls within the scope of that agreement. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Where both conditions are satisfied, the FAA "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." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original); 9 U.S.C. § 4 ("upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement"). Both conditions are met here.

B. Plaintiff's Claims Fall Within The Scope of the Arbitration Agreement.

Plaintiff's claims against T-Mobile in this action are well within the scope of the arbitration agreement, which is an "all disputes" clause, encompassing:

> **ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES . . .**

Baca Dec. Ex. A, ¶ 2. The Ninth Circuit has recognized that "all disputes" clauses of this sort are "broad and far reaching" in scope, *Chiron Corp.*, 207 F.3d at 1131, and are "routinely used . . . to secure the broadest possible arbitration coverage." *Britton v. Co-op Banking Group,*

4 F.3d 742, 745 (9th Cir. 1993). Such clauses require arbitration of all disputes that "touch matters" covered by the contract defining the parties' relationship. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999).[12]

Plaintiff's claims against T-Mobile directly challenge "services, devices or products." To the extent Plaintiff's FAC concerns alleged defects of the Nexus One, such claims concern devices that may be used on T-Mobile's network and therefore fall within the broad scope of the arbitration provision. To the extent Plaintiff's FAC challenges the adequacy of T-Mobile's 3G network and the quality of service, that amounts to a challenge concerning "services" under the terms of the arbitration agreement.

Accordingly, under the FAA, the Court is required to compel arbitration of Plaintiff's claims unless she can establish that her agreement to arbitrate is invalid.

C. Pennsylvania Law Governs Any Challenges by Plaintiff to the Validity of the Arbitration Agreement.

Under the FAA, a court can declare an arbitration agreement invalid only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Federal courts look to applicable state law in determining the validity of an arbitration agreement. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002).[13]

Plaintiff may argue that her arbitration agreement is unconscionable because it requires individual arbitration and precludes class actions – an argument that has been advanced many times in California cases. But California's minority view of the law regarding arbitration agreements and class action waivers is irrelevant here.[14] Plaintiff's arbitration agreement with

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[12] Giving broad effect to "all disputes" clauses such as this is consistent too with the clear federal policy of the FAA that "[a]ny doubts concerning arbitrable issues should be resolved in favor of arbitration." *Simula*, 175 F.3d at 719; *see also AT&T Tech. Inc. v. Commc'ns Workers of America*, 475 U.S. 643, 650 (1986) (because there is a "presumption of arbitrability," an order to arbitrate "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" (citations omitted)).

[13] Under the FAA, "the underlying issue of arbitrability [is] a question of substantive federal law," *Southland Corp. v. Keating*, 465 U.S. at 12, although state law contract defenses such as fraud, duress or unconscionability may invalidate arbitration agreements. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[14] Indeed, the Supreme Court has accepted certiorari of a case challenging California's rule that

T-Mobile is governed by the laws of her home state, Pennsylvania, and the agreement is fully enforceable under Pennsylvania law.[15]

In determining whether to enforce contractual choice-of-law provisions, California courts[16] apply the principles set forth in section 187 of the Restatement (Second) of Conflict of Laws.[17] *See In re DirecTV Early Cancellation Fee Litig.*, 2009 WL 2912656, *4 (C.D. Cal. Sept. 9, 2009); *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464-65, 834 P.3d 1148, 1151-52 (1992). California courts recognize that section 187 reflects a strong policy favoring enforcement of contractual choice-of-law provisions and that policy applies equally to standardized consumer contracts. *In re DirecTV*, 2009 WL 2912656, *4; *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 917-18, 15 P.3d 1071, 1079 (2001).

As numerous courts have recently held, Restatement Section 187 dictates that contractual choice-of-law provisions should be enforced in the circumstances present here. *See, e.g., In re Detwiler*, 2008 WL 5213704, **2-3 (9th Cir. Dec. 12, 2008) (enforcing the same choice-of-law provision in T-Mobile's contract, compelling arbitration of claims by a Florida plaintiff who brought suit in Washington, and finding that there was nothing unconscionable about designating the law of the consumer's home state as the governing law); *In re Jamster Marketing Litigation*, 2008 WL 4858506, *3 (S.D. Cal. Nov. 10, 2008)

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arbitration agreements containing class action waivers are invalid. *AT&T Mobility LLC v. Concepcion*, 2010 WL 303962 (S.Ct. May 24, 2010).

[15] Plaintiff's agreement with T-Mobile specifies that, in addition to the FAA and applicable federal law, it is governed by the "laws of the state in which [the subscriber's] billing address . . . is located." Baca Dec., ¶ 30 & Ex. A, ¶ 11. From the inception of her service with T-Mobile to the present, Ms. McKinney's billing address has always been located in Philadelphia, Pennsylvania. *Id.* ¶ 31.

[16] This Court, sitting in diversity, looks to the forum state's choice-of-law rules to determine the controlling substantive law. *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002).

[17] Section 187 states that contractual choice-of-law provisions are to be enforced unless:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

(enforcing the same choice-of-law provision in T-Mobile's contract and compelling arbitration of claims brought in California by plaintiffs from Maryland, Mississippi and Illinois); *In re DirecTV*, 2009 WL 2912656, at **4-6 (enforcing contractual choice-of-law provision in satellite television contracts and compelling arbitration of claims of plaintiffs from Virginia and Florida under those states' laws); *McMillan v. Wells Fargo Bank, N.A.*, 2009 WL 1035969, **3-4 (N.D. Cal. Apr. 17, 2009) (enforcing contractual choice-of-law provision in bank consumer account agreement and dismissing on the basis of improper venue the claims of six plaintiffs from Minnesota, Texas, Colorado, and Oregon).

Here, the chosen state's law – Pennsylvania law – has an obvious substantial relationship to the parties and the transaction. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(a). Plaintiff resides in Pennsylvania. The place of primary use of her service has always been in Pennsylvania. Plaintiff engaged in numerous transactions purchasing and extending service and upgrading handsets from Pennsylvania. Under the circumstances, it is not only reasonable to select Pennsylvania law to govern the parties' dealings, one would think that would be far preferable to the consumer. *See McMillan*, 2009 WL 1035969, at *4 ("[T]he fact remains that [the consumers' home states] have a greater interest in the treatment of their own residents than does California.").

Alternatively, application of Pennsylvania law cannot offend the public policy of the state whose law would otherwise apply under traditional principles, absent the choice-of-law clause. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(b). Because Pennsylvania is the place of contracting, the place of negotiation, the place of performance, and the residence of one of the parties, Pennsylvania law would apply even if the parties had not chosen it. *See id.* § 188. *See In re Detwiler*, 2008 WL 5213704, at *1. So, giving effect to the parties' contractual choice of law (Pennsylvania law) cannot offend the public policy of the law that would otherwise apply (Pennsylvania law).

The only connection that California has to this case or the relationship between Ms. McKinney and T-Mobile is that Plaintiff chose to file suit here. But Plaintiff cannot dictate choice-of-law rules simply by picking a forum to her liking. As concerns Plaintiff's claims

against T-Mobile in this action, California law is irrelevant. The contractual choice of law should be enforced.

D. The Arbitration Agreement Is Fully Enforceable Under Pennsylvania Law.

Like federal law, Pennsylvania law favors the enforcement of arbitration agreements. *Salley v. Option One Mortgage Corp.*, 592 Pa. 323, 925 A.2d 115, 119 n.2 (2007). "Both require that arbitration agreements be enforced as written and allow an arbitration provision to be set aside only for generally recognized contract defenses, such as unconscionability." *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009).

Pennsylvania recognizes that an arbitration agreement may be avoided on grounds of unconscionability, but the party challenging the agreement must show *both* procedural and substantive unconscionability. *See Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 230 (3d Cir. 2008) ("[The Pennsylvania Supreme Court] recently confirm[ed] that the party challenging an arbitration agreement has the burden to demonstrate that the agreement is *both* procedurally and substantively unconscionable." (emphasis in original)); *accord Clerk v. ACE Cash Express, Inc.*, 2010 WL 364450, *8 (E.D. Pa. Jan. 29, 2010); *Martin v. Delaware Title Loans, Inc.*, 2008 WL 4443021, at *3 (E.D. Pa. Oct. 1, 2008); *Hopkins v. New Day Financial,* 643 F.Supp.2d. 704, 716 (E.D. Pa. 2009) ("Under Pennsylvania law, there must be both procedural and substantive unconscionability in order to void an arbitration provision.").

Procedural unconscionability concerns the *process* by which the parties entered into a contract and has been defined in Pennsylvania as the "absence of meaningful choice on the part of one of the parties." *Hopkins,* 643 F.Supp.2d. at 717-18 (quoting *Witmer v. Exxon Corp.,* 495 Pa. 540, 434 A.2d 1222, 1228 (1981)); *see also Martin*, 2008 WL 4443021, at *3. Substantive unconscionability refers to terms that unreasonably favor one party to which the disfavored party does not truly assent. *Clerk*, 2010 WL 364450, at *8.

Several recent cases applying Pennsylvania law have held that consumer agreements requiring individual arbitration and precluding class actions are enforceable and not unconscionable. In *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009), the plaintiff challenged an arbitration clause in a short-term car title loan as unconscionable on a

number of grounds, including that (1) it was a one-way provision because it allowed the defendant to use judicial processes to repossess borrowers' vehicles; (2) the agreement contained a class action waiver; (3) plaintiff/borrowers were denied recovery of statutory attorneys' fees; and (4) the agreement required borrowers to pay a $125 filing fee for arbitration. *Id.* at 624. Applying Pennsylvania law, the Third Circuit concluded that, with one exception, "those challenges are wanting." *Id.* The exception was that the provision disallowing recovery of attorneys' fees was "likely unconscionable," but the court severed this provision and otherwise affirmed the district court's order compelling arbitration. *Id.* at 625.

The Third Circuit also upheld an arbitration clause and class action waiver under Pennsylvania law in *Cronin v. CitiFinancial Servs., Inc.*, 2009 WL 2873252 (3d Cir. Sept. 9, 2009).[18] The plaintiff in that case brought a putative class action alleging that CitiFinancial provided inaccurate loan information to credit reporting agencies. *Id.* at *1. The district court granted CitiFinancial's motion to compel arbitration, rejecting plaintiff's arguments that the agreement was unconscionable because it precluded class actions. The Third Circuit noted that earlier Pennsylvania Superior Court cases had held that contracts mandating individual arbitration could be held unconscionable but were not *per se* unconscionable. *Id.* at *3.[19]

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[18] *Cronin* is an unpublished disposition, but may be cited pursuant to Fed. R. App. P. 32.1.

[19] The Third Circuit referred to *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643 (Pa. Super. 2002), and *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super 2006). In *Lytle*, the Pennsylvania Superior Court held that CitiFinancial's arbitration agreement, requiring borrowers to arbitrate all claims but allowing CitiFinancial to pursue judicial mortgage foreclosure rights, was unconscionable. *Id.* at 665. However, that holding was subsequently overruled by the Pennsylvania Supreme Court. *See Salley v. Optio One Mortg. Corp.*, 246 Fed. Appx. 87, 91 (3d Cir. 2007). The *Lytle* court also addressed, in dicta, the class action waiver in CitiFinancial's arbitration agreement and noted that the record was devoid of evidence to show whether the damages claimed by the plaintiffs were "insufficient to permit the Lytles to seek legal redress for their injuries in the absence of a class action." 810 A.2d at 666. In *Thibodeau*, the Superior Court held that precluding class action remedies for the plaintiff and class members who alleged small claims of $9.60/month overcharges effectively immunized Comcast from liability. 912 A.2d at 886.

In *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), the Third Circuit examined these two cases and concluded that, to the extent they held that inclusion of a class action waiver invalidated arbitration agreements, these rulings were preempted under the FAA because that would mean "that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate," a result that is foreclosed by section 2 of the FAA. *Id.* at 395; *see also* 9 U.S.C. § 2. Although T-Mobile believes that the Third Circuit was correct in *Gay*, this Court need not reach the issue of FAA preemption

"Rather, the critical issue is whether the particular class action waiver effectively ensures that a defendant will never face liability for wrongdoing." *Id.* The Third Circuit held that because the plaintiff could obtain in arbitration actual damages, punitive damages, costs and attorneys' fees, he had meaningful remedies and CitiFinancial was not insulated from liability, notwithstanding the class action wavier. *Id.* at *4. The court concluded: "As a result, the class action waiver is not unconscionable under the public policy of Pennsylvania." *Id.*

Several other cases are in accord. In *O'Shea v. Direct Financial Solutions, LLC*, 2007 WL 4373038 (E.D. Pa. Dec. 5, 2007), the court held that a payday lender's arbitration agreement and class action waiver were not unconscionable. The court noted that "[p]laintiff's argument that approximately $300 is a 'nominal' amount of damages and would not be pursued by individual borrowers, is questionable." *Id.* at *5.[20] Coupled with the fact that the lender committed to pay all arbitration fees, the court concluded:

> Plaintiff's argument that the Agreements' ban on class action suits is contrary to public policy is also unpersuasive. Where the Arbitration Agreements expressly waive Plaintiff's right to proceed as a class, the Court should enforce the parties' arbitration [agreement] as they wrote it. . . . A party who agrees to arbitrate, but then asserts that his or her statutory claim cannot be vindicated in an arbitral forum, faces a heavy burden. . . . Plaintiff has failed to meet that burden.

Id. at **4-5 (internal quotations and citations omitted).

Weinstein v. AT&T Mobility Corp., 2008 WL 1914754 (E.D. Pa. Apr. 30, 2008), upheld an arbitration agreement and class action waiver in a wireless carrier's subscriber agreement. The court rejected plaintiff's argument that the agreement was procedurally unconscionable, noting that the plaintiff had numerous choices of wireless service providers and so was not compelled to contract with AT&T. *Id.* at *4. The court went on to conclude that there was no support for the plaintiff's argument that the arbitration agreement was substantively unconscionable. *Id.* at *5.

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because, as shown above, Pennsylvania law now is clear that more recent arbitration agreements such as the T-Mobile agreement involved in this case are not unconscionable.

[20] Notably, Plaintiff's FAC here alleges that putative class member's individual damages are upwards of $1,000 per person. *See* FAC at ¶ 15.

More recently, courts interpreting Pennsylvania law have held that where arbitration agreements contain class action waivers but allow opt-out rights to consumers, they are fully enforceable and not unconscionable. In *Fluke v. CashCall, Inc.*, 2009 WL 1437593 (E.D. Pa. May 21, 2009), the court held that a payday lender's arbitration agreement and class action waiver were not unconscionable because the agreement contained a provision allowing consumers to opt out within 60 days of executing the agreement. *Id.* at *8 ("An opt-out provision . . . seriously undermines a consumer's contention that the arbitration agreement is unconscionable."). The agreement also provided that the lender would pay arbitration fees and Pennsylvania law permitted borrowers to recover attorneys' fees, two additional factors the court found supported enforceability of the arbitration agreement. *Id.* (availability of attorneys' fees "should alleviate any concern regarding the availability of counsel to represent [the borrower].").

In *Martin v. Delaware Title Loans, Inc.*, 2008 WL 4443021 (E.D. Pa. Oct. 1, 2008), the court rejected the plaintiff's claim that Delaware Title's arbitration agreement containing a class action waiver was unconscionable, because the plaintiff had a right to reject the arbitration provision within 15 days after the date of the agreement, but he chose not to do so. *Id.* at *4.

More recently, *Clerk v. Ace Cash Express, Inc.*, 2010 WL 364450 (E.D. Pa. Jan. 29, 2010), also upheld an arbitration agreement and class action waiver that contained a 30-day opt-out right. The court concluded:

> [B]ecause Plaintiff was given the express opportunity to reject the Arbitration Agreement and failed to do so, Plaintiff's argument that the Arbitration agreement was presented on a take-it-or-leave-it basis fails.

Id. at *9. For this reason, the arbitration agreement was not procedurally unconscionable, and that defeated plaintiff's challenge to the agreement without more. *Id.* at *10 ("Because Plaintiff has failed to meet her burden of proving procedural unconscionability, the Court need not delve into [an] inquiry regarding substantive unconscionability." (citing *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 230 (3d. Cir. 2008)).

Finally, and most recently, a recent Third Circuit *en banc* decision affirmed a district court's order compelling arbitration on an individual basis and enforcing a class arbitration waiver in *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172 (3d Cir. 2010). In that case, the plaintiff contended that the enforceability of the class waiver should have been referred to the arbitrator for decision, but the Third Circuit rejected that argument, holding that this was a threshold issue of arbitrability for the district court to decide. *Id.* at 181-88. The Third Circuit affirmed the district court's decision compelling individual arbitration. *Id.* at 188.

Plaintiff's arbitration agreement with T-Mobile is enforceable for numerous reasons under these precedents. Under the agreement she accepted, Plaintiff can recover any and all damages or other remedies that would be available in court on her individual claims. *See* Baca Dec., Ex. A, ¶ 2; *Cronin*, 2009 WL 2873252, at *4. T-Mobile pays all arbitration costs and fees, and Plaintiff may recover not only statutory attorneys' fees but may recover fees on a contractual basis if she is the prevailing party. *See* Baca Dec., Ex. A, ¶ 2; *compare Kaneff*, 587 F.3d at 624; *O'Shea*, 2007 WL 4373038, at *5. Plaintiff admits that her claims and those of putative class members are upwards of $1,000 each, FAC at ¶ 15, which are not "nominal" damages that would dissuade a consumer from pursuing an individual claim. *See O'Shea*, 2007 WL 4373038, at *4. Plaintiff also had numerous choices of phones and wireless carriers; she was not forced in any way to contract with T-Mobile. *See Weinstein*, 2008 WL 1914754, at *4. Perhaps most important, Ms. McKinney had an absolute right to opt out of the arbitration agreement at least ten times but she never did so. *See Fluke*, 2009 WL 1437593, at *8; *Martin*, 2008 WL 4443021, at *4; *Clerk*, 2010 WL 364450, at *9.

Arbitration under the T-Mobile agreement is a simple, efficient and cost-effective way for Plaintiff to resolve any dispute she has. Given the terms of the arbitration agreement, Plaintiff cannot plausibly satisfy her heavy burden to establish that her agreements with T-Mobile are unconscionable in any sense. *See O'Shea*, 2007 WL 4373038, at *5; *Zimmer*, 523 F.3d at 230; *Clerk*, 2010 WL 364450, at *8.

V. CONCLUSION

For the foregoing reasons, the Court should grant T-Mobile's motion to compel arbitration and should stay this litigation. 9 U.S.C. § 4.

Dated this 12th day of July, 2010.

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