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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-JW

CLASS ACTION

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT T-Mobile USA, INC'S MOTION TO COMPEL ARBITRATION AND TO STAY CLAIMS

Date: November 1, 2010
Time: 9:00 am (Dept. 8)

Judge: Hon. James S. Ware

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Plaintiff submits this memorandum in opposition to Defendant T-Mobile USA, Inc.'s ("T-Mobile" or "Defendant") motion to compel individual, non-class arbitration and to stay litigation.

I. ISSUE PRESENTED

Whether the arbitration provision contained in the T-Mobile service agreement is unconscionable and unenforceable under applicable state law, whether California law or the laws of the relevant states.

II. SUMMARY OF ARGUMENT

Defendant T-Mobile cannot enforce the terms and conditions of a service agreement that it cannot demonstrate it ever provided to or even made available to Plaintiff at the time she purchased the Nexus One mobile device (the "Google phone") or before the Google phone was activated with T-Mobile's cellular service. Where, as here, a court is asked to decide a motion to compel arbitration, a court will apply a standard similar to a motion for summary judgment. *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1141 (9th Cir. 1991). The party seeking to compel arbitration, therefore, bears the burden of proving the existence and validity of an agreement to arbitrate. At a minimum, based upon the facts presented to this Court by T-Mobile in support of its Motions to Compel, there are questions of fact as to whether a valid agreement even exists between T-Mobile and Plaintiff.

Contrary to T-Mobile's argument, courts routinely find arbitration clauses that simultaneously bar class actions to be unconscionable and, therefore, unenforceable under both federal and state law. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009). Plaintiff lacked any meaningful choice because T-Mobile was the exclusive service provider of cellular service for the Google phone for customers who did not want to pay the full fee for an "unlocked" device and, because of that great disparity in bargaining power, any purported agreement with T-Mobile is procedurally unconscionable. In addition, T-Mobile's attempts to shield itself from liability is substantively unconscionable, as it attempts to force Plaintiff into arbitration while simultaneously keeping T-Mobile's right to sue consumers in court for collections, preventing consumers from bringing such claims on a class-wide basis. T-Mobile really has no desire to arbitrate such claims, as its arbitration clause is void if the class action waiver clause is found void.

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Such a result would effectively operate as a complete exculpation of T-Mobile's wrongdoing. As best explained by Judge Posner, "[t]he realistic alternative to a class action is not 17 million individual suits, ***but zero individual suits***, 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 added). The true purpose behind T-Mobile's Arbitration Provisions is to avoid answering to all affected customers on a class-wide basis for its violations of law.

This Court has already consistently held enforcement of a class action waiver in an arbitration clause would be unconscionable, even under the laws T-Mobile asks this Court to apply. *In re Apple & AT&TM Antitr. Litig.*, 596 F. Supp. 2d 1288, 1299 (N.D. Cal. 2008); *Steiner v. Apple Computer, Inc.*, No. 07-04486-SBA, 2008 WL 691720 (N.D. Cal. Mar. 12, 2008); *Kaltwasser v. Cingular Wireless LLC*, 543 F. Supp. 2d 1124 (N.D. Cal. 2008).

Here, forcing Plaintiff's claims into individual arbitration will increase the likelihood that T-Mobile avoids answering for their share of the wrongdoing at issue in this litigation nationwide. Such a result is even more egregious here, where it agrees its motion must be denied for all California consumers. Thus, as this Court has already ruled, it should deny all of the pending motions to compel arbitration.

III. SUMMARY OF CLAIMS

At the time Plaintiff purchased the Google Phone, T-Mobile was the exclusive wireless carrier that allowed the Google Phone to be used on a 3G wireless network. Consolidated Complaint at ¶ 27 ("Compl." or "Complaint"). T-Mobile's arbitration provision contains a class action waiver that bars individuals from bringing representative actions: "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." Declaration of Andrea Baca In Support of T-Mobile's Motion to Compel Arbitration and Motion to Dismiss ("Baca Decl."), Ex. C.[1] However, that provision contains what has been called

[1] In documents filed along with this Memorandum, McKinney disputes the authenticity, validity, reliability, and admissibility of the Baca Declaration. *See* Evidentiary Objections to Declarations Provided in Support of T-Mobile's Motion to Compel Arbitration and Motion to Dismiss, at ¶¶ 1-2. As such, this Court should not consider the Baca Declaration for the proof of the truth of the matters asserted therein.

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by at least one court a "self destruction provision," providing that if "a court or arbitrator determines in an action between [subscriber] and [T-Mobile] that this waiver is unenforceable, the arbitration agreement will be void as to [subscriber]." *Id.* Thus, this is not really an arbitration clause at all, as it would yield the same result if the clause required all litigants to go to small claims court, or any court for that matter. It is an anti-class action waiver clause, which the Ninth Circuit has repeatedly refused to enforce. Thus, the law favoring arbitration has no real applicability under these circumstances.

T-Mobile creatively drafted this clause to appear to be somewhat "consumer friendly." Indeed, the mandatory arbitration clause provides that "for Claims less than $25.00, [T-Mobile] will pay all Fees and Expenses" and "for Claims between $25.00 and $1,000.00, [subscriber] will pay only $25.00 in Fees and Expenses, or any lesser amount as provided under [the American Arbitration Association]'s Supplemental Procedures for Consumer-Related Disputes." *Id.* However, T-Mobile's arbitration provision does nothing to assist a claimant with his or her expenses in retaining qualified experts in the field of mobile phone design, wireless network design, and the operation of wireless networks. *Id.* ("[Subscriber] and [T-Mobile] each agree to pay [their] own other fees, costs, and expenses, including those for any attorneys, experts, and witnesses). This is a critical barrier to entry. *See In re American Express Merchants Litig.*, 554 F.3d 300, 316 (2d Cir. 2009).

Finally, while the consumer may not pursue any claim outside of arbitration, T-Mobile excludes from arbitration claims relating solely to the collection of any debts customers owe to T-Mobile. *See* Baca Decl., Ex. C. Thus, when T-Mobile wants to sue consumers for money it claims consumers owe T-Mobile, it uses the court system to its advantage. But, if T-Mobile has any liability to consumers, it primarily forces them into individual arbitration. It is this lack of mutuality that further shows why this clause is substantively unconscionable, operating as a "get out of jail free" card while compromising important consumer rights. *See Discover Bank v. Sup. Ct.*, 36 Cal.4th 148 (2005); *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1101 (2002).

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IV. LEGAL ARGUMENT

A. T-MOBILE HAS FAILED TO MEET ITS BURDEN OF PROOF THAT ANY AGREEMENT WAS PROVIDED TO PLAINTIFF AT TIME OF PURCHASE

As a threshold matter, T-Mobile has failed to meet its burden of showing the existence of its purported service agreement and the embedded individual arbitration clause, and that the formation of the contract with Plaintiff and other Google phone users is valid. Absent such a showing, this Court need not proceed any further.

It is well-established that the "first principle" of arbitration is that "a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *Three Valleys Mun. Water Dist.*, 925 F.2d at 1142 (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 648 (1986)). The Court's initial role in the arbitration motion process is to determine "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719-20 (9th Cir. 1999).

In determining a motion to compel arbitration, a court will apply a standard similar to that of a motion for summary judgment, and will compel arbitration "[o]nly when there is no genuine issue of fact concerning the formation of the agreement." *Three Valleys Mun. Water Dist.*, 925 F.2d at 1141 (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980)). Moreover, "[t]he district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." *Id.*

While the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, *et seq.*, reflects "a liberal federal policy favoring arbitration agreements," (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)), this presumption in favor of arbitration "does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006) (quoting *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) and *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994)).

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The FAA creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This body of federal law also requires that federal courts apply state law, "whether of legislative or judicial origin [] if that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 493 fn. 9 (1987); *see also Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 941 (9th Cir. 2001).

Under both state contract law and federal common law principles a "prerequisite of any contract is mutual assent or a meeting of the minds." *United Steelworkers of Am. v. Bell Foundry Co.*, 626 F.2d 139, 141 (9th Cir. 1980). T-Mobile has failed to carry its burden of proof that Plaintiffs were ever presented with or given a chance to review the non-class action waiver arbitration agreement set forth in T-Mobile's Terms of Service, let alone that they ever assented to the terms thereof.[2]

In support of its Motion to Compel, T-Mobile improperly relies upon the declaration of Andrea Baca, a paralegal in T-Mobile's Legal Affairs Department who has no personal knowledge of Plaintiff's purchase or activation of the Google phone. *See* Evidentiary Objection to Declaration of Andrea Baca filed herewith. Baca's declaration suggests T-Mobile's arbitration/class action waiver clause was available in hardcopy in T-Mobile stores and on the Internet in January 2010, and a copy of the arbitration agreement and related forms (as they appeared in January 2010) is attached to the declaration. However, the declaration never states whether T-Mobile's website directed potential subscribers to the arbitration and class action waiver clause before activiation, whether in the sign-up process T-Mobile *actually* provided the Terms and Conditions to consumers or pointed out the anti-class action waiver, *see* Baca Decl. at ¶ 12 ("When Ms. McKinney activated three lines

[2] In *Nova Corp. v. Joseph Stadelmann Elec. Contractors, Inc.*, No. 07-cv-1104, 2008 U.S. Dist. LEXIS 21040 (D.N.J. Mar. 17, 2008), the court held that "[t[he doctrine of incorporation by reference dictates that [w]here a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing ." (quotation omitted). Unlike the present case, *Nova Corp.*, involved a dispute between two commercial parties of relatively equal bargaining power and the incorporation by reference of outside documents was being enforced against the drafting party. *Id.* at *10. Here, T-Mobile seeks to incorporate by reference into a classic adhesion contract the terms of an arbitration agreement not a part of or attached to any document or electronic device ever signed by Plaintiffs.

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of service ... on December 6, 2003, she would have signed a Service Agreement."), and whether Plaintiff in fact had any knowledge or opportunity to review these provisions prior to purchasing and activating her Google Phone—especially when the allegedly agreed-to terms and conditions would have been entered into approximately six years before she acquired the Google Phone.

In short, no competent, admissible evidence has been submitted that Plaintiff or any other Google phone purchaser had the opportunity to read or review T-Mobile's service agreement before signing up for service – or that the chance to do so was even presented or offered to T-Mobile's customers.

B. UNDER SECTION 187 OF THE RESTATEMENT, FOLLOWED BY ALL THE RELEVANT STATES, THE DETERMINATION WHETHER T-MOBILE'S ARBITRATION PROVISION IS ENFORCEABLE IS ANALYZED UNDER CALIFORNIA LAW

T-Mobile concedes in its motion to compel that if California law governs the claims of all Plaintiff in terms of the arbitration clause, its arbitration clause and class action ban are unenforceable, as the Ninth Circuit, this Court and a number of other courts have held. Instead, T-Mobile argues that California law does not apply nationwide to the enforceability of its arbitration clause and class action ban, because its contract has a choice-of-law provision selecting the law of the state of Plaintiff's billing address, Pennsylvania, that would enforce the arbitration clause and class action ban.

As T-Mobile points out in its Motion to Compel, California follows the *Restatement (Second) of Conflict of Laws* §187 (1971) in determining whether a choice-of-law clause is enforceable. Under Section 187, the Court must first determine "whether the chosen state has a substantial relationship to the parties or their transaction, or . . . whether there is any other reasonable basis for the parties' choice of law." *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 466 (1992). If either of these requirements is satisfied, the second inquiry is whether the "chosen state's law is contrary to a *fundamental* policy" of the state which has a "materially greater interest" than the chosen state in the determination of a particular issue. *Id.*

Notably absent from T-Mobile's Motion to Compel is any discussion of whether its choice of law clause is contrary to a California fundamental policy that it has consistently recognized. As Plaintiff explains below, if Pennsylvania law would result in the enforcement of T-Mobile's

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arbitration clause and class action ban as T-Mobile contends, then such law would be contrary to the fundamental policies of California, which as detailed below has a materially greater interest in the determination of these issues than any other State.

1. T-Mobile Concedes if California Law Applies, These Motions Must be Denied in Their Entirety

In *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), the California Supreme Court held that under California law, a class action waiver clause is unconscionable and unenforceable if it: (1) is in a contract of adhesion, written by a party with superior bargaining power; (2) occurs in a setting in which disputes between the contracting parties involve small amounts of damages; and (3) it is alleged that the party with superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money. *Id.* at 160. Here, T-Mobile's class action waiver and Arbitration Provision is a contract of adhesion written by T-Mobile, which has superior bargaining power. This case involves a small amount of damages on a per person basis, and Plaintiff alleges T-Mobile was aware that its network infrastructure could not support the anticipated influx of bandwidth demand from Google phone users, yet profited handsomely from its failure to provide a fully supported network. Compl. at ¶ 20-21, 24-25.

Indeed, the Ninth Circuit and a number of district courts, including this Court, have repeatedly held that, under California law, arbitration provisions containing a class action waiver are unconscionable and unenforceable. *See e.g., Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009); *Bradberry v. T-Mobile USA, Inc.*, No. 06-6567, 2007 WL 1241936, 2007 U.S. Dist. LEXIS 34826 (N.D. Cal. Apr. 27, 2007) (Wilken, J.); *In re Apple & AT&TM Antitrust Litigation*, 596 F.Supp.2d 1288 (N.D. Cal. 2008); *Steiner v. Apple Computer, Inc.*, 556 F.Supp.2d 1016, 1026 (N.D. Cal. 2008). This is the same conclusion that a number of other district courts here have reached involving other cellular phone companies with class action waiver and Arbitration Provisions.[3]

[3] *See In re Apple & AT&TM Antitrust Litigation*, 596 F.Supp.2d 1288 (N.D. Cal. 2008); *Winig v. Cingular Wireless, LLC*, No. 06-4297, 2006 WL 2766007, 2006 U.S. Dist. LEXIS 73137 (N.D.Cal. Sept. 27, 2006) (Chesney, J.); *Hoffman v. Cingular Wireless*, LLC, No. 06-1021, 2006 U.S. Dist. LEXIS 79067 (S.D.Cal. Oct. 26, 2006) (Whelan, J.); *Stern v. Cingular Wireless Corp.*, 453 F.Supp.2d 1138 (C.D.Cal.2006) (Snyder, J.); *Janda v. T-Mobile, USA, Inc.*, No. 05-3729, 2006 WL 708936, 2006 U.S. Dist. LEXIS

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Courts nationwide have reached a similar conclusion.[4] The rationale behind these decisions is that class arbitration bans are patently unfair to potential plaintiffs who may only be owed a relatively small amount in recovery, while, on the other hand, providing security for the companies protected by the provisions to avoid litigation or responsibility for their wrongful conduct while protecting their own right to sue. *See, e.g., Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1170 (N.D. Cal. 2002) (determining that arbitration clauses banning class treatment are harsh and unfair to customers who might be owed a relatively small sum of money, and also serve as a disincentive for companies to avoid the type of conduct that might lead to class action litigation); *Shroyer v. New Cingular Wireless Serv., Inc.*, 498 F.3d at 984; *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (2002). The Court of Appeal's decision in *Szetela* reasoned that a nominally mutual prohibition on class actions is a substantively unconscionable as the bar: (i) is meant to prevent customers from seeking redress for wrongs involving small amounts of money; (ii) serves as a disincentive for the defendant to avoid conduct that might lead to class action litigation; and (iii) jeopardizes consumer rights by prohibiting any effective means of litigating challenged business practices. *Szetela*, 97 Cal.App.4th at 1094. In light of this significant precedent, T-Mobile's motion to compel must be denied.

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15748 (N.D.Cal. Mar. 17, 2006) (White, J.); *Ford v. Verisign, Inc.*, No. 05-0819, 2006 U.S. Dist. LEXIS 88856 (Mar. 8, 2006) (Miller, J.); *Cervantes v. Pacific Bell Wireless*, No. 05-1469, 2006 U.S. Dist. LEXIS 89198 (S.D.Cal. Mar. 8, 2006) (Miller, J.).

[4] *See, e.g., Dale v. Comcast Corp.*, 498 F.3d 1216, 1219-22 (11th Cir. 2007); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006); *Skirchak v. Dynamics Research Corp.*, 432 F.Supp.2d 175, 181 (D.Mass. 2006); *Edwards v. Blockbuster Inc.*, 400 F.Supp.2d 1305, 1309 (E.D. Okla. 2005); *Losada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000); *Leonard v. Terminix Int'l Co., L.P.*, 854 So.2d 529, 538 (Ala. 2002); *Discover Bank v. Superior Court of Los Angeles*, 36 Cal.4th 148 (2005); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999); *Kinkel v. Cingular Wireless, l.l.c.*, 223 Ill.2d 1, 857 N.E.2d 250, 306 Ill. Dec. 157 (2006); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005); *Schwartz v. Alltel Corp.*, 2006 WL 2243649 (Ohio Ct. App.); *Vasquez-Lopez v. Beneficial or., Inc.*, 210 Or. App. 553, 152 P.3d 940, 950-51 (2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. 2006); *Scott v. Cingular Wireless*, 160 Wash.2d 843, 161 P.3d 1000, 1004 (2007).

2. Compelling Arbitration Under Pennsylvania law would Conflict with Fundamental Policies of California Law

(a) T-Mobile's Arbitration Clause and Class Action Ban Violate California's Fundamental Policy Ensuring the Availability of Consumer Class Actions

California has a fundamental policy against unconscionable class arbitration clause waivers particularly where they attempt to waive unwaivable statutory rights. *Hoffman v. Citibank (South Dakota), N.A.,* 546 F.3d 1078 (9th Cir. 2008); *Gentry v. Superior Court*, 42 Cal.4th 443, 462-63 (2007). California courts have explained that this policy is necessary, otherwise a defendant could "essentially grant[] itself a license to push the boundaries of good business practice to their furthest limits, fully aware that relatively few, if any, consumers will seek legal remedies" and that "[t]he potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored." *Discover Bank v. Sup. Ct.,* 36 Cal.4th 148, 159-161 (2005). Given this precedent, California courts have invalidated choice-of-law and forum selection clauses that would deprive a consumer of the ability to bring a class action. *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1298 (2005) (applying California law prohibiting waivers of class-wide arbitration, rather than Delaware law, which would allow such waivers); *Aral v. Earthlink, Inc.*, 134 Cal.App.4th 544, 562-64 (2005) (refusing to enforce Georgia forum selection clause in Arbitration Provision with class action waiver); *America Online, Inc. v. Sup. Ct.*, 90 Cal.App.4th 1, 18, 713 (2001) (holding that a forum selection clause impairing the availability of class actions and remedies such as punitive damages to consumers violates important California public policies). This Court should decline to apply T-Mobile's choice of law clause to the claims of the Plaintiff if it would result in enforcement of T-Mobile's Arbitration Provision, as T-Mobile contends it does.

(b) T-Mobile's Arbitration Clause Class Action Ban Violate the Fundamental Policy Embodied in California's Consumers Legal Remedies Act

In *America Online, supra*, the court refused to enforce the forum selection clause at issue on the independent ground that application of Virginia law would be "the functional equivalent of a contractual waiver of consumer protections under the CLRA." *America Online*, 90 Cal. App. 4th at 5. Here, if application of Pennsylvania law would be the "functional equivalent" of a waiver of

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Plaintiff's right to bring a class action under the CLRA, a result precluded by *America Online*, then T-Mobile's choice of law clause should not be enforced.

(c) T-Mobile's Arbitration Clause and Class Action Ban Violate California's Policy of Redressing Oppressive Use of Superior Bargaining Strength

California courts refuse to enforce choice-of-law clauses where a substantial injustice would result or where the contract was unfairly imposed. *See Washington Mut. Bank v. Sup. Ct.*, 24 Cal.4th 906, 918 (2001) ("evidence of unfair use of bargaining power may defeat enforcement of a forum selection clause contained in an adhesion contract") (citing *Cal-State Bus. Prods. & Servs. v. Ricoh*, 12 Cal. App. 4th 1666, 1679-80 (1993)).[5] As discussed in detail in Section IV, below, T-Mobile's arbitration and class action waiver clauses are contained in a contract of adhesion drafted by a party of superior bargaining power and imposed to achieve unfair, one-sided results, with no mutuality in terms of actual use, with T-Mobile using the courts to go against consumers, but demanding consumers use individual arbitrations against it.

The doctrine of unconscionability is designed to avoid the oppressive use of superior bargaining power. *See, e.g., Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006). This doctrine, which is codified in Cal. Civ. Code §1670.5, constitutes a fundamental policy under Restatement §187, cmt. g ("A fundamental policy may be embodied in a statute which makes one or more contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power."). If application of Pennsylvania law would result in enforcement of T-Mobile's arbitration clause and class action ban, then such would be contrary to California's fundamental policy against oppressive contracts. T-Mobile's choice of law clause should be disregarded.

3. California Has a Materially Greater Interest in the Validity of T-Mobile's Arbitration Clause and Class Action Ban Than Any Other State

[5] The comment to the Restatement notes that section 187 contains safeguards against enforcing choice-of-law provisions obtained through "impropriety or mistake." *Restatement (Second) Conflict of Laws* § 187 cmt. b. One such "impropriety" is the unfair imposition of a choice-of-law clause through an adhesion contract. As stated by the California Supreme Court "the weaker party to an adhesion contract may seek to avoid enforcement of a choice-of-law provision therein by establishing that 'substantial injustice' would result from its enforcement *or* that superior power was unfairly used in imposing the contract." *Washington Mut. Bank, supra*, 24 Cal.4th at 917 (emphasis added and citations omitted).

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The next step under the Section 187(2)(b) test is to determine whether California has a materially greater interest than Pennsylvania. California has a materially greater interest in the determination of whether Plaintiff's claims should be compelled to arbitration. In analyzing this prong, a court should "first examine the respective 'governmental interests' of the chosen and forum states and then determine the extent to which those interests would be impaired by application of the other state's laws." *Application Group, Inc. v. Hunter Group, Inc.,* 61 Cal.App.4th 881, 898 (1998). In its analysis, the Court should examine the relevant contacts of the parties with the respective states. *Id.* at 903.

California has the most significant contacts with this dispute. Google, Inc., one of three defendants, has its principal place of business in Mountain View, California (Compl. ¶ 3); T-Mobile owns, operates and maintains a 3G network in California (*id. at* ¶ 5) and the design, promotion, marketing, provision and/or sale of the Google phone emanated from California. *Id.* Finally, Plaintiff seeks to represent a nationwide class under California law.

Pennsylvania admittedly has an interest in preventing the employment of unfair and deceptive practices in their state. California, however, has the additional interest of protecting citizens nationwide from unfair business practices emanating from California. *See Diamond Multimedia Sys., Inc. v. Superior Court,* 19 Cal.4th 1036, 1064 (1999). California's interest trumps the interest of other states where consumers face the choice of pursuing their claims as a class action or not at all. *See Klussman,* 134 Cal.App.4th at 1298-1300; *see also Mazza v. Am. Honda Motor, Co.,* 254 F.R.D. 610, 623 (C.D. Cal. 2008) ("California's more favorable laws 'may properly apply to [the] benefit of nonresident Plaintiff when their home states have no identifiable interests in denying such persons full recovery.'"); *Wershba v. Apple Computer, Inc.,* 91 Cal.App.4th 224, 241 (2001) (same).

Accordingly, California's interest is materially greater than the interest of Pennsylvania, such that California law should apply. *Masters v. DirecTV, Inc.*, No. 08-55825, 2009 WL 4885132 *1 (9th Cir. Nov. 19, 2009) (California has a materially greater interest than the states of the named plaintiff's residents since California is home to the defendant and the Plaintiff asserted claims under California law and seek a nationwide class); *Coneff v. AT&T Corp.*, 620 F.Supp.2d at 1254 (state

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where alleged misconduct emanated had the materially greater interest than the states where the individual Plaintiff resided). Thus, the Court should decline to enforce T-Mobile's choice-of-law clause.

C. EVEN IF THE COURT APPLIES PENNSYLVANIA LAW, THE MOTION TO COMPEL SHOULD BE DENIED

Under Pennsylvania law, unconscionability is a "defensive contractual remedy which serves to relieve a party from an unfair contract or from an unfair portion of a contract." *Harris v. Green Tree Fin. Corp.,* 183 F.3d 173, 181 (3d Cir.1999) (quoting *Germantown Mfg. Co. V. Rawlinson,* 491 A.2d 138, 145 (Pa.Super.Ct.1985)). The test for unconscionability is "whether one of the parties lacked a meaningful choice about whether to accept the provision in question and the challenged provision or contract unreasonably favors the other party to the contract." *Hopkins v. New Day Fin.,* 643 F. Supp. 2d. 704, 716 (E.D. Pa. 2009).

In evaluating claims of unconscionability, courts generally recognize two categories: (1) procedural unconscionability, and (2) substantive unconscionability. *Id.* (citing *Ferguson v. Lakeland Mut. Ins. Co.,* 596 A.2d 883, 885 (Pa. Super. Ct.1991); *Bishop v. Washington,* 480 A.2d 1088, 1095 (Pa. Super. Ct.1984); *Germantown,* 491 A.2d at 145-46)). "Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language." *Martin v. Delaware Title Loans, Inc.*, No. 08-3322, 2008 WL 4443021, at *3 (E.D. Pa. 2008) (quoting *Alexander v. Anthony Intern., L.P.*, 341 F.3d 256, 265 (3d Cir. 2003)). Substantive unconscionability refers to terms that unreasonably favor one party to which the disfavored party does not truly assent. *Id.* (citing *Alexander,* 341 F.3d at 265).

The party challenging a contract provision as unconscionable generally bears the burden of proving unconscionability. *Id.* (citing *Bishop,* 480 A.2d at 1094). Specifically, a party challenging an arbitration provision must prove that the arbitration clause is *both* procedurally and substantively unconscionable in order for it to be found unenforceable. *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 Provision has the burden to demonstrate that the agreement is *both*

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procedurally and substantively unconscionable." (emphasis in original)); *Hopkins,* 643 F.Supp.2d. at 716 ("Under Pennsylvania law, there must be both procedural and substantive unconscionability in order to void an arbitration provision."). In the present case, Plaintiff argues that T-Mobile's Arbitration Provision ("Arbitration Provision") is both procedurally and substantively unconscionable under Pennsylvania law, and, thus, should be found unenforceable.

1. Procedural Unconscionability

The Court begins by determining whether the Arbitration Provision is procedurally unconscionable. Procedural unconscionability concerns the *process* by which the parties entered into the contract. *Hopkins,* 643 F. Supp. 2d. at 717-18. Procedural unconscionability is typically found where there is a "contract of adhesion" – meaning, a contract prepared by a party with excessive bargaining power and presented to the other party on a "take it or leave it" basis. *Id.* (citing *Denlinger, Inc. v. Dendler*, 608 A.2d 1061, 1068 (Pa. Super. Ct.1992)). The general test is whether the party challenging the agreement had any meaningful choice regarding the acceptance of its provisions. *Id.* (citing *Thibodeau v. Comcast Corp.,* 912 A.2d 874, 886 (Pa. Super. Ct. 2006)).

Here, the agreement was provided to Plaintiff pre-written, and Plaintiff was not allowed to opt out of the Arbitration Provision— a classic take-it-or-leave-it adhesion contract. Further, Plaintiff was undeniably in a substantially weaker bargaining position than T-Mobile, one of the leaders in cellular telephone services in the United States. There was absolutely no opportunity for negotiation, modification, or waiver, and, accordingly, the Arbitration Provision is clearly a contract of adhesion.

The manner in which the Arbitration Provision is disguised from consumers also supports a finding of procedural unconscionability. *Martin*, 2008 WL 4443021, at *3. Indeed, the agreement appears in a booklet that comes in the box with the consumer's cellular phone, titled "Welcome Guide," which appears to be dealing with the operation of the phone. The arbitration clause, which is tucked away in a maze of fine print, is not signed by the subscriber. Moreover, the subject Arbitration Provision is not even provided to the consumer until *after* he or she signs up for service and receives the phone. As such, the Arbitration Provision is clearly procedurally unconscionable, and no evidence exists that a knowledgeable choice is made by consumers generally, or Plaintiff in

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particular, between a provider offering service without an arbitration provision and T-Mobile's arbitration provision.

2. Substantive Unconscionability

Substantive unconscionability focuses on the unfairness or one-sidedness of the contract terms. A contract is substantively unconscionable when the terms of a contract or arbitration provision unreasonably favor the party with the greater bargaining power. *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 543 (E.D. Pa. 2006). "Numerous factors may make an arbitration provision substantively unconscionable, including severe restrictions on discovery, high arbitration costs borne by one party, limitations on remedies, and curtailed judicial review." *Id.* (internal citations omitted).

In determining whether a contract is substantively unconscionable, Pennsylvania law requires the court to look beyond any apparent facial neutrality and examine the actual effects of the contractual terms. *See Zak vs. Prudential Property & Casualty Insurance Co*, 713 A.2d 681, 684 (Pa. Super. Ct. 1998) (the court rejected the assertion that a provision limiting the right to appeal an arbitration award was fair even though it ostensibly applied to both parties because it "ignores the reality of the *effect* of the clause") (emphasis in original); *see also McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273 (Pa. Super. Ct. 2004) (the court found the arbitration provisions unconscionable as applied, even though they otherwise appeared facially neutral).

T-Mobile's agreement is substantively unconscionable because: (1) it precludes class relief; (2) it is one-sided (T-Mobile has reserved for itself the right to use the court system); and (3) it effectively prevents consumers from pursuing their statutory rights, by placing limits on damages, prohibiting statutory attorneys' fees, limiting injunctive relief, compelling use of the AAA rules, and restricting discovery.

(a) The Arbitration Provision is unconscionable because it precludes class relief

The Arbitration Provision contains a waiver of class actions, a provision which is undeniably unconscionable under Pennsylvania law. To this end, Pennsylvania has a strong public policy that favors class actions in consumer cases. *Baldassari v. Suburban Cable TV Co.*, Inc., 808 A.2d 184, 189 (Pa. Super. Ct. 2002). Pennsylvania courts have often reiterated this important principle,

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emphasizing that class actions enable the assertion of meritorious claims that might not otherwise be litigated and that decisions in favor of maintaining a class action should be liberally made. *Cambanis vs. Nationwide Ins. Co.*, 501 A.2d 635, 637 (Pa. Super. Ct. 1985); *Janicik vs. Prudential Ins. Co. of Am.*, 451 A.2d 451 (Pa. Super. Ct. 1982).

In *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006), a Pennsylvania Superior Court considered whether a waiver of a right to class action contained in an Arbitration Provision was unconscionable. The *Thibodeau* court described the reasons for encouraging class actions:

> Class action lawsuits are and remain the essential vehicle by which consumers may vindicate their lawful rights. The average consumer, having limited financial resources and time, cannot individually present minor claims in court or in an arbitration. Our justice system resolves this inherent inequality by creating the procedural device which allows consumers to join together and seek redress for claims which would otherwise be impossible to pursue. Both the Federal and Pennsylvania Rules of Civil Procedure delineate specific rules for publicly selected trial court judges to actively manage class action lawsuits through the public judicial system.

Id. at 884-85. The court proceeded to discuss the federal and state rules providing for class actions, and continued:

> It is only the class action vehicle which makes small consumer litigation possible. Consumers joining together as a class pool their resources, share the costs and efforts of litigation and make redress possible. Should the law require consumers to litigate or arbitrate individually, defendant corporations are effectively immunized from redress of grievances.

Id. at 885. The *Thibodeau* court ultimately affirmed the trial court's ruling that the waiver of the right to a class action was unconscionable. *Id.* at 886. Similarly, this Court should refuse to enforce the Arbitration Provision, a contract provision that clearly violates a strong public policy. *American Ass'n of Meat Processors v. Casualty Reciprocal Exchange*, 588 A.2d 491, 496 (Pa. 1991).

(b) <u>The Arbitration Provision lacks mutuality because it only imposes arbitration on subscribers</u>

Although the Arbitration Provision appears to apply to both T-Mobile and its customers, yet its practical effect is to limit the ability and rights of customers to obtain full relief and remedies on

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their claims while allowing T-Mobile to fully pursue its claims against its customers. For example, the consumer may not pursue any claim outside of arbitration, but T-Mobile excludes from arbitration claims relating solely to the collection of any debts customers owe to T-Mobile. Baca Decl., Ex. C ("[I]f you fail to timely pay amounts due, we may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement."). This provision is completely one-sided and lacks mutuality since debt collection actions are the only type of case T-Mobile might ever seek to pursue against its customers. In effect, arbitration is only required of subscribers, not of T-Mobile. Such one-sidedness is unconscionable.

(c) The Arbitration Provision effectively prevents the pursuit of consumers' statutory rights

The bar on arbitration class actions, combined with the excessive costs and financial risks of arbitrating an individual claim, prevent plaintiff from pursuing his claim.

When the costs associated with arbitration of a single claim operate to preclude a claimant from pursuing a remedy, as they do here, then the enforcement of arbitration is unconscionable. *McNulty*, 843 A.2d at 1274. Corporations may not be deterred by filing fees and costs in the hundreds of dollars. However, such fees are enough to shut the door on arbitration for consumers. When such high costs are coupled with a class action bar, unconscionability is unmistakable. An arbitration clause is substantively unconscionable where the costs of arbitrating a single claim would preclude the claimant from pursuing a remedy. *Id.* at 1274.

In assessing the high costs of bringing an individual claim in arbitration, the court should not only look at the filing fees, but it should consider all of the reasonable related costs that the plaintiff is likely to incur. Indeed, in *Green Tree Financial Corp. -- Alabama v. Randolph*, 531 U.S. 79 (2000), the Supreme Court's standard was whether arbitration would be "prohibitively expensive". *Id.* at 91-92. The Supreme Court did not limit consideration to filing fees. *Id.* In considering the cost factor, the costs of legal representation should also be considered. *See Parilla v. IAP Worldwide Services VI, Inc.*, 368 F.3d 269, 279 (3rd Cir. 2004) (all costs, including fees, considered in determining unconscionability). Where the cost of arbitration is excessive in relationship to the

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amount in dispute, such costs are unconscionable because they effectively deny the injured party access to justice. *McNulty.* 843 A.2d at 1274.

T-Mobile's arbitration provision is substantively unconscionable because it improperly imposes substantial arbitration costs on subscribers seeking to bring a claim in arbitration. For claims over $1,000, the expenses of an arbitration will be divided equally between T-Mobile and the consumer. Baca Decl., Ex. C ("You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1,000, you will pay $25 for the arbitrator's fee."). Indeed, T-Mobile subscribers who file a claim in arbitration for more than $1,000 may be responsible for filing fees, administrative fees, room rental fees as well as arbitrator fees, which can be hundreds of dollars per hour. *Id.* Virtually all of these fees are not fees that consumers would incur if they were permitted to file an action in court and such fees would impose a significant burden on many consumers. Accordingly, T-Mobile's fee-splitting provision is substantively unconscionable.

D. FEDERAL LAW ALTERNATIVELY APPLIES TO VOID THE ARBITRATION CLAUSE

The arbitration provision T-Mobile is attempting to impose upon Plaintiff states that "the Agreement affects interstate commerce so that the Federal Arbitration Act and federal arbitration law apply." *Id.* "In enacting the Federal Arbitration Act, Congress created national substantive law governing the questions of the validity and the enforceability of Arbitration Provisions under its coverage." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 845 (2d Cir. 1987).

Under the FAA, an arbitration provision is invalid and unenforceable when grounds exist at law or in equity for invalidation of the arbitration provision. 9 U.S.C. § 2. The FAA thus sanctions the practice of invalidating arbitration provisions that are found by a court to be oppressive or unconscionable. The Ninth Circuit has acknowledged that "unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable." *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007) (quoting *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006)); *see also Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009).

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1. The Choice of Law Provision Does Not Apply to the Arbitration Provision

While T-Mobile claims its Service Agreements contain a choice-of-law provision that mandates application of law applying in the state of "[the customer's] billing address," T-Mobile fails to point out that the Service Agreement operates separate and apart from the arbitration provision T-Mobile is attempting to impose. That arbitration provision, as noted above, expressly states that the "Federal Arbitration Act and federal arbitration law govern arbitrations." Baca Decl., Ex. C. T-Mobile is thus attempting to construe the service agreement it drafted in a way that is contrary to its plain meaning, and contradicts federal precedent and the Federal Arbitration Act.

In an analogous context, the U.S. Supreme Court harmonized potentially conflicting choice of law provisions in a similarly "ambiguous document" against the drafter thereof, holding "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 64 (1995). This Court should alternatively apply federal substantive law to determine the enforceability of the arbitration clause in this action.

2. A Transferee Court Applies Its Own Understanding of Federal Law

Ordinarily, unconscionability of an arbitration clause is an issue of state law. *See, e.g., Shroyer*, 498 F.3d at 981 (applying California law to determine unconscionability). In this instance, however, T-Mobile inserted a choice-of-law provision stating that the arbitration clause is subject to federal, not state law. *See* Bennett Decl., Ex. 1 at 3; *Mastrobuono*, 514 U.S. at 63 (any ambiguity as to the choice of law selection in an arbitration clause should be construed against the drafter).[6] Therefore, this Court, as the transferee court, should apply its own understanding of federal law to issues concerning the "validity" or "enforceability" of an arbitration provision in cases transferred pursuant to 28 U.S.C. § 1407. *See Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993) (stating, "a transferee federal court should apply its interpretations of federal law, not the constructions of

[6] T-Mobile cannot argue that application of federal common law to the arbitration clause is inconsistent with California conflicts of law principles since it has conceded that there is a reasonable basis – or indeed an obligation – to apply federal law in the form of the FAA to promote a strong federal policy favoring arbitration.

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federal law of the transferor circuit"); *see also Arandell Corp. v. Xcel Energy, Inc.*, MDL 1566, 2009 U.S. Dist. LEXIS 75766, at *46 (D. Nev. Mar. 9, 2009) (same).[7]

"Federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than that of another determine his case." *Id.* (quotation omitted). In the present case, since T-Mobile drafted the choice-of-law provision such that federal substantive law applies, it cannot now object to the application of Ninth Circuit common law with respect to the enforceability of its own arbitration clause. Thus, this Court should apply its own law, which counsels that such an arbitration provision is unconscionable.

3. T-Mobile'S Arbitration Provision is Unconscionable under Federal Common Law and Should Not be Enforced

The hallmark of unconscionability with respect to arbitration clauses under federal common law is a plaintiff "cannot be forced to arbitration when that forum would frustrate the claimant's ability to vindicate her statutory rights." *Miyasaki v. Real Mex Rests., Inc.*, No C 05-5331, 2006 U.S. Dist. LEXIS 62787, at *15-16 (N.D. Cal. Aug. 17, 2006), citing *Gilmer v Interstate/Johnson Lane Corp*, 500 U.S. 20, 31 (1991). In conducting such an analysis, federal courts applying federal common law have recognized both procedural and substantive elements that may render an arbitration clause unconscionable, and therefore unenforceable. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 627 (1985) ("courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract," on the basis if procedural unconscionability) (quotation omitted); *Randolph*, 531 U.S. at 90 (recognizing that the "existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum," rendering such an arbitration clause substantively unconscionable).

[7] *See also In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (concluding that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit"); *Tires Prods. Liab. Litig. v. Bridgestone/Firestone, Inc.*, 256 F.Supp.2d 884, 888 (S.D. Ind. 2003) (stating, "the law of the circuit where the transferee court sits governs questions of federal law in MDL proceedings.").

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Federal courts across the country have found arbitration clauses unenforceable where the clause is both procedurally and substantively unconscionable. *See, e.g., Shroyer*, 498 F.3d at 981 (class action "waiver is both procedurally and substantively unconscionable and, therefore, unenforceable."); *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) ("contract of adhesion" which required plaintiff to arbitrate a "predictably . . . small amount of damages" was unconscionable). The two types of unconscionability, however, "need not both be present to the same degree." *Shroyer*, 498 F.3d at 981, quoting *Nagrampa*, 469 F.3d at 1280.

T-Mobile's arbitration provision contains a class action waiver that bars individuals from bringing representative claims. Baca Decl., Ex. C. The significance of this class action waiver is underscored by the fact that T-Mobile also provided that if the waiver "is unenforceable, the Arbitration Provision will be void." *Id.* Thus, this actually is not an arbitration clause at all, as it would yield the same result if the clause required all litigants to go to small claims court. It is an anti-class action waiver clause, which the Ninth Circuit has repeatedly refused to enforce. Thus, the law favoring arbitration has no real applicability.

(a) T-Mobile's Arbitration Provision is Procedurally Unconscionable Under Federal Common Law

The Supreme Court of the United States has expressly instructed courts to "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi Motors*, 473 U.S. at 627 (quoting 9 U.S.C. § 2). The Ninth Circuit has noted that a "contract of adhesion, that is, a contract drafted by the party of superior bargaining strength and imposed on the other, without the opportunity to negotiate the terms," bears the indicia of such overwhelming economic power to render an arbitration provision procedurally unconscionable. *See Laster*, 584 F.3d at 853; *Shroyer*, 498 F.3d at 981; *Nagrampa*, 469 F.3d at 1281.

T-Mobile's contract is a classic consumer contract of adhesion, in that it is a "standardized contract imposed upon the subscribing party without an opportunity to negotiate the terms." *Nagrampa*, 469 F.3d at 1281. Plaintiff are given no opportunity to negotiate the terms of either the standardized wireless services agreement or, more importantly, the arbitration provision within this

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agreement, which is also standardized to deny all customers the opportunity for class relief. As discussed above, T-Mobile has been unable to show that Plaintiff was given an opportunity to review either the contract or the arbitration provision before signing up for wireless service for the Google phone. Further, as a large, sophisticated corporation, T-Mobile had outsized bargaining power in its dealings with Plaintiff. While the fact that Plaintiff was presented with T-Mobile's contract on a "take-it-or-leave-it" basis alone is not sufficient to render the arbitration clause unenforceable *per se*, it shows that Plaintiff could not negotiate the terms of this clause even if they had been made aware of, and given the opportunity to review, the clause before activating service for their Google phone.

(b) T-Mobile's Arbitration Provision is Substantively Unconscionable Under Federal Common Law

Under federal common law, a plaintiff "cannot be forced to arbitration when that forum would frustrate the claimant's ability to vindicate her statutory rights." *Miyasaki*, 2006 U.S. Dist. LEXIS 62787, at *15-16 (borrowing principles from California law to determine unconscionability of arbitration clause as it applied to federal claims under Title VII); *see also Mitsubishi Motors*, 473 U.S. at 637 (Arbitration Provision will be enforced "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"). The Supreme Court has further recognized that the financial implications of arbitration may "preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Randolph*, 531 U.S. at 90. The Supreme Court has also recognized that the class action mechanism is essential to the vindication of litigants' rights "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quotation omitted). *See also In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989) ("[T]he effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure.").

As alleged in the Complaint, Plaintiff's claims for damages would certainly be considered relatively small and, absent a right to bring this action on a class-wide basis, few (if any) Google

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phone users would undertake the effort to bring a claim despite the consistent complaints on T-Mobile's lack of actual 3G coverage. Compl. ¶ 40. Moreover, even assuming that a plaintiff could find a suitable attorney willing to represent him in an individual arbitration proceeding, the potential costs associated with the retention of experts will act as an additional basis to prevent a plaintiff from pursuing an individual claim. A consumer's action typically will require expert testimony that can include, for instance, an assessment of the defective product or service, the widespread impact of the alleged defect, and the financial value of the alleged defect on consumers. This litigation, just by way of example, could call for an expert in the field of mobile networking, an expert to scrutinize the software associated with the Google phone, an expert to inspect T-Mobile's High Speed Downlink Packet Access/Universal Mobile Telephone System (HSDPA/UMTS) technology, and/or an expert to value or assess the damages to Google Phone users. By precluding class proceedings, T-Mobile effectively denies any prospective plaintiff from pooling his resources with other Plaintiff and sharing the onus and costs associated with proving the claims against T-Mobile.

Because of the small individual damage amounts at issue, the class action waiver in T-Mobile's arbitration provision, if upheld, will effectively operate as an exculpatory clause. *See Shroyer,* 498 F.3d at 986 (". . . when the potential for individual gain is small, very few Plaintiff, if any will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers."); *see also Amchem*, 521 U.S. at 617 (". . . small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

T-Mobile tries to portray the provisions of its arbitration clause as very favorable to consumers. In fact, however, federal courts within this circuit have repeatedly rejected this argument, finding that the class action waiver provisions, no mater how "pro consumer" they are claimed to be, effectively prevented claimants from vindicating their rights. *See Laster*, 584 F.3d at 857; *Coneff,* 620 F.Supp.2d at 1258. This Court should likewise find the exculpatory effect of T-Mobile's class action waiver in this action substantively unconscionable, and therefore unenforceable under federal common law.

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E. PLAINTIFF'S CLAIMS UNDER THE MAGNUSSON-MOSS WARRANTY ACT ARE NOT SUBJECT TO ARBITRATION

The Magnuson-Moss Warranty Act ("MMWA") "creates a federal private cause of action for a warrantor's failure to comply with the terms of a written warranty." *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F. 3d 912, 917 (9th Cir. 2005); 15 U.S. C. §2310(d)(1)(B) ("[A] consumer who is damaged by the failure of a . . . warrantor . . . to comply with any obligation . . . under a written warranty . . . may bring suit for damages and other legal and equitable relief . . . in an appropriate district court of the United States[.]"). Although the MMWA expressly provides a private right of action to file suit in a United States District Court, it also expresses a Congressional policy of encouraging warrantors to establish dispute resolution procedures to more expeditiously settle consumer disputes. 15 U.S.C. §2310(a)(1). The statute further provides that if a warrantor establishes an informal dispute settlement procedure which meets requirements established by the Federal Trade Commission ("FTC"), the consumer may not commence a civil action unless the consumer initially proceeds through the informal procedure. 15 U.S.C. §2310(a)(3)(C)(i).

The text of the MMWA contains no language explicitly indicating whether Congress intended to preclude application of the FAA to breach of written warranty claims brought under the MMWA. While the statute makes clear that the "informal dispute settlement procedures" governed by §2310 of the MMWA cannot be binding in nature, *see* 15 U.S.C. § 2310 (a)(3)(c) (clarifying that a warrantor can require a consumer to resort to an informal dispute settlement procedure "*before pursuing any legal remedy under this section*") (emphasis added), the Act does not define the term "informal dispute settlement procedure" or clarify whether such proceedings are intended to be the exclusive alternative to litigation available under the Act.

The FTC is the federal agency tasked with implementing the MMWA. *See* 15 U.S.C. §2312(c). The FTC is specifically authorized to prescribe rules setting forth minimum requirements for any "informal dispute settlement procedure" incorporated into the terms of a written warranty." 15 U.S.C. §2310(a)(2). Under this congressional delegation of rulemaking authority, the FTC has established detailed regulations governing the "mechanisms" that warrantors can require customers to utilize prior to "exercising rights or seeking remedies created by Title I of the Act." 16 C.F.R.

§703.2(b)(3). These regulations explicitly announce that "decisions of the Mechanism shall not be legally binding on any person." *Id.* §703.5(j). From that, the FTC concludes that "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act." 40 Fed. Reg. 60168, 60211 (Dec. 31, 1975). If the arbitration is intended to be binding, by definition it does not comply with the MMWA.

Under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), courts are bound to defer to an agency's interpretation of an Act unless (1) Congress has directly spoken to the precise question at issue, or (2) the agency's construction of the statute is unreasonable. Since Congress has not spoken to this precise issue, but instead has "delegated authority to the agency generally to make rules carrying the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), courts are required to defer to the FTC's construction of the statute unless that interpretation is unreasonable. *Chevron*, 467 U.S. at 843 n.25. Not only is the FTC's construction of the MMWA reasonable, but it also promotes the pro-consumer policy embodied in the MMWA. Any contrary holding would only "deprive the plaintiff of her right to judicial resolution of the dispute, and thus, of meaningful opportunity for redress." *Samaritan Hospital v. Shelala*, 508 U.S. 402, 417 (1993).

Although the Ninth Circuit has not addressed this issue, courts within the Ninth Circuit, as well as numerous other courts, have held that the dispute resolution procedure offered by a warrantor under the MMWA cannot require binding arbitration. *Breniser*, 2008 U.S. Dist. LEXIS 100807, at *12; *Browne v. Kline Tysons Imports, Inc.*, 190 F.Supp.2d 827, 831 (E. D. Va. 2002) ("A clear reading of the statute evinces Congress' intent to encourage informal dispute settlement mechanisms, yet not deprive any party of their right to have their written warranty dispute adjudicated in a judicial forum."); *Rickard*, 279 F. Supp. 2d at 921; *Yeomans v. Homes of Legend, Inc.*, No. 00-D-824-N, 2001 U.S. Dist. LEXIS 2528 (M.D. Ala. Mar. 5, 2001) (Congress intended to preclude binding arbitration of express and written warranty claims under the MMWA); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958, 962-65 (W.D. Va. 2000) (relying on the FTC's regulations finding binding arbitration to be impermissible and on the MMWA's grant of access to a judicial forum to find that the MMWA precludes binding arbitration of disputes over written warranties); *Raesly v.*

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Grand Hous., Inc., 105 F.Supp.2d 562, 573 (S.D. Miss. 2000) (finding that MMWA precludes binding arbitration of written warranty claims); *Wilson v. Waverlee Homes, Inc.*, 954 F.Supp. 1530, 1532 (M.D. Ala. 1997) (MMWA precludes binding arbitration of MMWA claims, in part because it provides access to a judicial forum and because the FTC regulations have so interpreted it). As T-Mobile's anti-class action waiver clause attempts to do so, it is also not enforceable under the MMWA.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny T-Mobile's motion to compel.

DATED: August 25, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of August 2010, served via the Court's electronic filing system, a true and correct copy of the above and foregoing on counsel as follows:

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