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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. C 10-01177 JW

T-MOBILE USA, INC.'S REPLY 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

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I. INTRODUCTION

Plaintiff's opposition to T-Mobile's motion to compel arbitration reminds one of the adage of throwing everything except the kitchen sink. But every one of Plaintiff's arguments depends on disregarding the facts or the law – oftentimes both. More specifically:

- Plaintiff contends that T-Mobile cannot enforce its service contracts containing the arbitration clause because "it cannot demonstrate that the agreement was "provided to . . . Plaintiff at the time she purchased the . . . 'Google phone.'" Opp. at 1.[1] Of course, that is the point of T-Mobile's separate motion to dismiss[2] – Ms. McKinney did not purchase service or anything from T-Mobile when she bought the Google phone from Google, and therefore she has no standing to assert claims against T-Mobile. For purposes of the present motion, however, T-Mobile showed that Plaintiff entered into service agreements with T-Mobile at least 68 times, each calling for individual arbitration, and Plaintiff offers no contrary evidence – in fact, she offers no evidence at all.
- Plaintiff argues that the arbitration agreement imposes a "critical barrier" because of expenses and fees in arbitration, but Plaintiff ignores the terms of her actual agreement with T-Mobile, instead referring to an earlier, outdated version of the agreement. Under the actual agreement, Ms. McKinney and other consumers pay no arbitration fees or expenses for claims up to $75,000, can recover all attorneys fees, and can even opt out of arbitration altogether.
- Plaintiff maintains that California law should apply and renders the T-Mobile arbitration agreement unconscionable. Yet she cites no authority holding that an out-of-state plaintiff suing an out-of-state defendant concerning a transaction that occurred out-of-state and where the parties contractually agreed to apply the

[1] Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant T-Mobile USA, Inc.'s Motion to Compel Arbitration and to Stay Claims (Dkt. No. 49) will be referred to here as "Opp."

[2] T-Mobile's Memorandum in Support of Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Dkt. No. 38) is cited here as "Mot." The Supporting Declaration of Andrea Baca (Dkt. No. 33) is cited as "Baca Dec."

law of the plaintiff's home state (Pennsylvania) should instead be entitled to pick California law simply by filing suit here. Plaintiff does not address the numerous cases in the Ninth Circuit holding exactly the opposite.

- Plaintiff goes on to assert that her arbitration agreement with T-Mobile would be unconscionable under Pennsylvania law. Opp. at 12. But Plaintiff relies on one Pennsylvania Superior Court case that has been superseded and distinguished by no fewer than eight cases applying Pennsylvania law since, all enforcing arbitration agreements and class action waivers similar to Ms. McKinney's present agreement with T-Mobile. Plaintiff says nothing about the current, controlling authorities.
- Plaintiff alternatively argues that the arbitration agreement is unconscionable under "federal common law." Opp. at 19. Plaintiff premises this argument on cases applying California state law and that have nothing to do with any federal common law. But even assuming Plaintiff's argument is that an arbitral forum would "frustrate [her] ability to vindicate her statutory rights," *id.*, she ignores the fact that the T-Mobile arbitration agreement allows her to obtain recovery on any individual claim, to the same extent as in court.
- Finally, Plaintiff contends that her claims under the Magnuson-Moss Warranty Act (MMWA) are not arbitrable. Opp. at 23. Plaintiff fails to mention that every circuit court to consider this issue has held that MMWA claims are subject to arbitration. And Plaintiff cannot avoid arbitration on the basis of a MMWA claim against T-Mobile because she has no such claim (again, as shown in T-Mobile's motion to dismiss) – Plaintiff never purchased any consumer product from T-Mobile.

The Court should reject all of Plaintiff's strained arguments and compel arbitration in accordance with sections 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3, 4.

II. ARGUMENT

A. Plaintiff Offers No Evidence to Rebut the Fact that She Contractually Agreed to Arbitration at Least 68 Times.

T-Mobile demonstrated in its motion and supporting declarations that Plaintiff originally signed up for T-Mobile service over 8 years ago, activated and has maintained 5 lines of service on her account, and has renewed and extended her service at least 63 times. Mot. at 1-2; Baca Dec. ¶¶ 3-7, 10. Each time, Plaintiff received and accepted T-Mobile's Terms & Conditions, constituting her contract with T-Mobile and containing provisions calling for individual arbitration of all disputes. Baca Dec. ¶ 10, 20, 22. T-Mobile also showed that Ms. McKinney is currently a T-Mobile subscriber, subject to the June 28, 2008 version of the Terms & Conditions. *Id.* ¶ 25 & Ex. A.

Plaintiff attempts to sweep away these facts. She contends: "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 . . . is valid." Opp. at 4. It is frankly difficult to fathom what Plaintiff means or what more T-Mobile could possibly show.

On one hand, Plaintiff argues that "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')." Opp. at 1. But this is the point of T-Mobile's separate motion to dismiss – Plaintiff has no standing to assert ***any*** claims against T-Mobile because she did not buy service or anything else from T-Mobile when she bought the Google phone, and T-Mobile did not manufacture, sell, warrant, or say anything about the phone.

Nonetheless, Ms. McKinney was still bound to the contractual agreements she already had with T-Mobile in January 2010, when she bought the Google phone, and she remains bound today. Her agreement provides that "**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" are subject to mandatory arbitration. Baca Dec. Ex. A, ¶ 2 (emphasis in original). Plaintiff's claims in this case concerning the Google phone and alleged inadequate "3G connectivity" on T-Mobile's network concern T-Mobile's service and devices to be used with T-Mobile service. That is the gravamen of Plaintiff's complaint. Ms. McKinney's claims thus plainly fall within the scope of her agreement to arbitrate, and she does not contend otherwise.

Separately, Plaintiff challenges the evidentiary support T-Mobile offered in support of its motion, apparently contending that a T-Mobile employee cannot attest to the contents of Ms. McKinney's account records. Plaintiff's objections to the declaration of Ms. Baca are baseless. Ms. Baca is fully knowledgeable about T-Mobile's customer account records, which are competent business records. *See* T-Mobile's Response to Evidentiary Objections of Plaintiff filed concurrently herewith. But, aside from that, Plaintiff's opposition mischaracterizes the facts stated in the declaration. As shown in Ms. Baca's declaration, Plaintiff received copies of the Terms & Conditions every time she renewed or extended her service; she was not merely directed to a website. *Compare* Opp. at 5, *with* Baca Dec. ¶ 22. Also, Ms. McKinney accepted the T-Mobile Terms & Conditions (in several of her numerous handset upgrades) mere months before she purchased the Google phone, not six years before, as Plaintiff asserts. *Compare* Opp. at 6, *with* Baca Dec. ¶ 25. And Ms. McKinney had ample "opportunity to read or review T-Mobile's service agreement," Opp. at 6, during the 14-day trial period, which she took advantage of at least 10 times in the 18-month period before she bought the Google phone. Baca Dec. ¶¶ 16, 18 & Ex. Z, ¶ 4.

Plaintiff's objective seems to be to create "questions of fact as to whether a valid agreement even exists between T-Mobile and Plaintiff." Opp. at 1. But Plaintiff offered no evidence to rebut T-Mobile's showing that Ms. McKinney accepted the Terms & Conditions and the arbitration agreement at least 68 times, that she is currently bound to an agreement with T-Mobile or that she had an opportunity to opt out of the arbitration agreement (actually 10 different opportunities), but never did so. Even accepting Plaintiff's contention that a

standard akin to summary judgment should apply here, she has failed to meet her burden to come forward with competent evidence to show any genuine issue of fact.

B. Plaintiff Cannot Avoid Her Contractual Choice of Law and Dictate Application of California Law Simply By Filing Suit Here.

The bulk of Plaintiff's opposition attempts to convince the Court to apply California law and on that basis to conclude that Plaintiff's arbitration agreement with T-Mobile is unconscionable. *See* Opp. at 6-12. Plaintiff's opposition goes on at length about how "California has a fundamental policy against unconscionable class arbitration clause waivers," Opp. at 9, but fails to address the fact that in this case, an out-of-state plaintiff (Ms, McKinney, from Pennsylvania) is asserting claims against an out-of-state defendant[3] and attempting to avoid a contractual choice-of-law provision designating that Pennsylvania law controls. Plaintiff apparently believes she can dictate the choice of California law by coming here to sue, but she ignores all of the authority in the Ninth Circuit holding precisely the opposite.[4]

Plaintiff contends that section 187 of the Restatement (Second) of Conflict of Laws dictates that California law should apply in this case and chides T-Mobile for failing to discuss whether the contractual choice-of-law clause "is contrary to a California fundamental policy." Opp. at 6. That is because Plaintiff fundamentally misreads section 187, under which any policy of California is irrelevant.

Plaintiff contends that section 187 directs the Court to consider "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 determination of the particular issue." Opp. at 6 (partially

[3] T-Mobile is a Delaware corporation with its principal place of business in Washington State.

[4] Plaintiff repeatedly asserts in her opposition that "T-Mobile concedes . . . that if California law governs the claims of all Plaintiff [sic] in terms of the arbitration clause, its arbitration clause and class action ban are unenforceable . . . ." Opp. at 6. T-Mobile has made no such concession. Quite the contrary, T-Mobile noted in its motion that the United States Supreme Court has granted certiorari to address whether California's minority view of unconscionability directed toward arbitration agreements is preempted by the FAA. *See* Mot. at 10-11, n.14. The motion also noted that T-Mobile agrees with the pending challenge in the Supreme Court and believes that the California rule, which has been adopted by the Ninth Circuit, should be overturned. *See id.* at 14-15, n. 19.

quoting RESTATEMENT (SECOND) CONFLICTS OF LAWS § 187; emphasis in Plaintiff's brief). In fact, section 187 directs that the Court should consider the interests of the law of the state that is contractually chosen as compared to the law of the state that would apply "in the absence of an effective choice of law by the parties." RESTATEMENT (SECOND) CONFLICTS OF LAWS § 187(b). In this case, there is no comparison to make, because even if the parties had not chosen Pennsylvania law, that law would still apply. *See* Mot. at 12. Ms. McKinney is a Pennsylvania resident, her primary place of use of T-Mobile service is in Pennsylvania, and she entered into agreements with T-Mobile in Pennsylvania. *Id*. So far as the record shows, Ms. McKinney has never even been in California, and California has no connection whatsoever to her dealings with T-Mobile, except that she filed suit here.[5] Applying section 187, California policy disfavoring arbitration is irrelevant.

T-Mobile cited in its motion several cases from the Ninth Circuit and district courts in the circuit holding that out-of-state plaintiffs suing out-of-state defendants may not avoid contractual choice of law provisions. *See In re Detwiler*, 2008 WL 5213704, **2-3 (9th Cir. Dec. 12, 2008); *In re Jamster Mktg. Litig., 2*008 WL 4858506, *3 (S.D. Cal. Nov. 10, 2008); *In re DirecTV*, 2009 WL 2912656, (C.D. Cal. Sept. 9, 2009) at **4-6; *McMillan v. Wells Fargo Bank, N.A.*, 2009 WL 1035969, **3-4 (N.D. Cal. Apr. 17, 2009), *see generally* Mot. at 11-12. Plaintiff ignores these cases and instead cites only cases involving California plaintiffs or defendants (though Plaintiff's opposition fails to mention this).[6] Regardless of California's antipathy toward arbitration, the overwhelming majority of other states – Pennsylvania included – do enforce agreements calling for individual arbitration and precluding class actions.

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[5] Plaintiff contends that "California has the most significant contacts with this dispute," but then argues that this is so because ***Google*** is headquartered in California and ***Google's*** design, promotion and marketing "of the Google phone emanated from California." Opp. at 11. Of course, none of this has anything to do with plaintiff's claims against T-Mobile. Concerning T-Mobile, plaintiff can only say that T-Mobile operates its 3G network in California, *id.*, but, of course, as a nationwide wireless carrier, T-Mobile operates its network in every state.

[6] Plaintiff even devotes an entire section of her opposition to an argument that T-Mobile's arbitration clause violates a fundamental policy embodied in the California Consumer Legal Remedies Act, Cal. Civ. Code § 1770, Opp. at 9-10, but she asserts no such claim in this case.

Plaintiff proposes a remarkable proposition – *i.e.,* that she may travel around the country to find state law that she likes most, and by filing suit in that state, thereby avoid her contractually-agreed choice-of-law by invoking "public policy" of her chosen state. There is, of course, no authority to support this proposition, and Plaintiff cites none.

C. Plaintiff Ignores Pennsylvania Authorities Holding That Agreements Calling for Individual Arbitration Are Enforceable.

Implicitly recognizing how thin are her arguments to invoke California law, Plaintiff goes on to argue that "even if the Court applies Pennsylvania law, the motion to compel should be denied." Opp. at 12. Here again, Plaintiff ignores the actual law of Pennsylvania and misrepresents the facts.

Plaintiff's argument begins by referencing Pennsylvania cases generally concerning unconscionability, and she does correctly note that under Pennsylvania law, it is her burden (as the party challenging the arbitration agreement) to show that the agreement is ***both*** procedurally and substantively unconscionable. Opp. at 12; *see Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 230 (3d Cir. 2008). From this point onward, however, Plaintiff's analysis of Pennsylvania law goes astray.

Concerning procedural unconscionability, Plaintiff asserts that "[h]ere, the agreement was provided to Plaintiff pre-written, and Plaintiff was not allowed to opt out of the Arbitration Provision – a classic take-it-of-leave-it adhesion contract." Opp. at 13. But that is simply wrong. First, Ms. McKinney accepted not just one agreement, but at least 68, and it is incredible for her to assert that she was compelled to do so or did not read the contract any of the times she accepted it. Moreover, Ms. McKinney expressly did have a right to opt out of arbitration, although she never exercised that right despite having had 10 opportunities to do so. *See* Mot. at 5-6, 17; Baca Dec. ¶¶ 3, 4, 29 & Ex. A, ¶ 2. As noted in T-Mobile's opening brief, several Pennsylvania cases hold that a provision allowing customers to opt out of arbitration defeats a claim of procedural unconscionability. *See* Mot. at 16-17; *Fluke v. CashCall, Inc.*, 2009 WL 1437593, *8 (E.D. Pa. May 21, 2009); *Martin v. Delaware Title Loans, Inc.*, 2008 WL 4443021, *4 (E.D. Pa. Oct. 1, 2008); *Clerk v. Ace Cash Express, Inc.*,

2010 WL 364450, *9 (E.D. Pa. Jan. 29, 2010). Here too, Plaintiff says nothing about these cases or her repeated choices not to opt out of arbitration.

Plaintiff's opposition continues to misstate facts by contending that the arbitration agreement is "disguised from consumers" and is "tucked away in a maze of fine print." Opp. at 13. In fact, the arbitration provision is set forth at the outset of T-Mobile's Terms & Conditions in bold and capitalized type; it is contained in in-store service agreements customers sign, and customers are reminded of the importance of the Terms & Conditions and the arbitration agreement in several ways. *See* Baca Dec. ¶¶ 22, 24, 27 & Ex. A, at 1, ¶ 2; Ex. B, at 1-2; Ex. C. As for Plaintiff's contention that the arbitration agreement is not provided to consumers until "*after* he or she signs up for service," Opp. at 13, again she ignores the facts, *i.e.,* that the Terms & Conditions are contained in service agreements signed when customers first activate service, they are provided with every phone T-Mobile sells, and every customer is given at least a 14-day trial period (30 days in California) to review the Terms & Conditions, try out the service and the phones they have purchased, and cancel service or their purchases with a full refund if they are dissatisfied for any reason. *See* Mot. at 2; Baca Dec. ¶¶ 16-17, 22 & Ex. A, ¶ 4.

Plaintiff's argument about procedural unconscionability under Pennsylvania law is most tellingly rejected by *Weinstein v. AT&T Mobility Corp.*, 2008 WL 1914754 (E.D. Pa. Apr. 30, 2008), in which the court upheld an arbitration agreement and class action waiver in a wireless carrier's subscriber agreement, presented and provided to customers in essentially the same way as the T-Mobile agreement. The court in *Weinstein* held that AT&T's agreement was not procedurally unconscionable because the plaintiff was not compelled to purchase service from AT&T, but rather had numerous choices of wireless service providers. *Id.* at *4. Likewise, Ms. McKinney was not compelled to buy service from T-Mobile – and certainly not 68 times. Under Pennsylvania law, when a consumer has available alternatives and can buy a product or service elsewhere, there can be no procedural unconscionability. *Id.* As is true of Plaintiff's brief throughout, she says nothing about *Weinstein*.

Concerning the issue of substantive unconscionability, Plaintiff again ignores all of the recent and relevant Pennsylvania authorities. Plaintiff asserts that because her arbitration agreement with T-Mobile "contains a waiver of class actions, [it] is undeniably unconscionable under Pennsylvania law." Opp. at 14. But Plaintiff says nothing about the eight cases from Pennsylvania that have enforced arbitration clauses containing class waivers.[7]

Plaintiff relies exclusively on *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. 2006), in which a Pennsylvania Superior Court held that an arbitration agreement containing a class action waiver was unconscionable in the context of small class claims for no more than $9.60/month for cable converter boxes and remote controls. The Superior Court in *Thibodeau* simply repeated the opinion of the trial court, without further analysis, finding that Comcast's arbitration agreement and class action waiver were unconscionable. However, in *Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007), the Third Circuit concluded that if *Thibodeau* was interpreted to mean that inclusion of a class action waiver invalidated arbitration agreements, such a rule would be preempted under the FAA. Later, in *Cronin v. CitiFinancial Servs., Inc.*, 352 Fed. Appx. 630 (3d Cir. 2009), the Third Circuit held that *Thibodeau* "made clear that Pennsylvania does not deem all arbitration waivers *per se* unconscionable," but rather invalidates such class action waivers only when they "effectively ensure[] that a defendant will never face liability for wrongdoing." *Id.* at 635. When a plaintiff may seek actual and punitive damages, costs, and attorneys' fees on his individual claims, a defendant is not "completely insulated from liability" and a "class action waiver is not unconscionable under the public policy of Pennsylvania." *Id.* at 636; *see also Fluke*, 2009 WL 1437593, at *8 (E.D. Pa. May 21, 2009) (distinguishing *Thibodeau* on the basis that an agreement allowing customers to opt out of arbitration is not unconscionable under Pennsylvania law).

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[7] The eight cases applying Pennsylvania law that have upheld individual arbitration agreements (*i.e.,* precluding class actions or arbitratons) are *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 188 (3d Cir. 2010); *Cronin v. CitiFinancial Servs., Inc.*, 2009 WL 2873252, *4 (3d Cir. Sept. 9, 2009); *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624-25 (3d Cir. 2009); *Clerk*, 2010 WL 364450, at **9-10; *Martin*, 2008 WL 4443021, at *4; *Weinstein,* 2008 WL 1914754, at **4-5; *Fluke*, 2009 WL 1437593, at *8; and *O'Shea v. Direct Financial Solutions, LLC*, 2007 WL 4373038, **4-5 (E.D. Pa. Dec. 5, 2007), all discussed in Mot. at 13-17.

Plaintiff contends that the "practical effect [of Plaintiff's agreement with T-Mobile] is to limit the ability and rights of customers to obtain full relief and remedies on their claims." Opp. at 15-16. Yet, in fact, the arbitration provision allows Ms. McKinney and every T-Mobile subscriber all the same rights and remedies available in court, including statutory damages, attorneys' fees and costs, and injunctive relief. *See* Baca Dec., Ex. A, ¶ 2. Similar to the arbitration provision and class waiver the Third Circuit upheld in *Cronin*, T-Mobile is not insulated from liability and therefore the arbitration agreement Ms. McKinney repeatedly accepted is not unconscionable under Pennsylvania law.

Plaintiff argues that her agreements to arbitrate with T-Mobile are unconscionable because her "costs associated with arbitration of a single claim operate to preclude [her] from pursuing a remedy." Opp. at 16. But, in making this argument, Plaintiff ignores her actual, current agreement with T-Mobile and instead cites to an outdated version. *Id.* at 17 (citing Baca Dec., Ex. C, the original service agreement accepted by Ms. McKinney); *compare* Baca Dec. ¶ 25 & Ex. A (the June 28, 2008 version of the Terms & Conditions now applicable to Plaintiff). Under the current arbitration provision, Ms. McKinney would pay no costs of arbitration for any claim up to $75,000 and may recover all attorneys' fees and costs if she prevails on her claims. Baca Dec. Ex. A, ¶ 2 (allowing prevailing customers to recover costs and fees under any applicable statute or under the contract itself, while T-Mobile foregoes rights to recover for costs and fees for all claims up to $75,000). Under Pennsylvania law, there is nothing "prohibitively expensive," Opp. at 16, or unconscionable about this provision effectively excusing her from all costs while allowing her to recover on her claims for the $529 price she paid for the Google phone, along with any other applicable compensatory, statutory or punitive damages, and attorneys' fees. *See Cronin*, 352 Fed. Appx. at 635 (plaintiff's ability to seek actual and punitive damages, costs, and attorneys' fees defeated claim of substantive unconscionability); *see also O'Shea*, 2007 WL 4373038, at *5 ($300 is not a nominal amount of damages so as to preclude her from pursuing recovery, particularly when she would pay no arbitration fees or costs).

Plaintiff also asserts that the T-Mobile arbitration agreement "lacks mutuality because it only imposes arbitration on subscribers." Opp. at 15-16. Plaintiff bases this argument, again, on the eight-year-old version of the arbitration agreement that is no longer in effect. *Id.* at 16. In fact, as noted, the June 2008 agreement applicable to Ms. McKinney's account today does not "impose arbitration" at all, because it allows her to pursue claims in small claims court or in any court of applicable jurisdiction if she had chosen to opt out of arbitration. Baca Dec. Ex. A, ¶ 2. Moreover, T-Mobile is not excused from arbitrating claims it might assert against Plaintiff; the only exception stated is that collection agencies may pursue claims in court for past due amounts. *Id.* But, under Pennsylvania law, strict mutuality of remedies "is not a requirement of a valid arbitration clause," so long as a contract is supported by consideration. *O'Shea*, 2007 WL 4373038, at *4 (citing *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999)) (arbitration agreement allowing borrower to pursue civil case for default of loan while borrower's claims were limited to arbitration was not unconscionable).

In sum, Plaintiff has provided nothing to rebut the showing in T-Mobile's motion that Plaintiff's agreements to arbitrate are fully valid and enforceable under Pennsylvania law.

D. Nothing in Federal Common Law Voids the T-Mobile Arbitration Agreement.

After improperly seeking to invoke California law and then misstating Pennsylvania law, Plaintiff contends her several agreements with T-Mobile requiring arbitration are not governed by state law at all, but instead should be struck down under some notion of "federal common law" unconscionability. Opp. at 18-22. There is no such thing.

Plaintiff's argument in this regard is obtuse, at best. She argues, first, that the choice-of-law provision in her T-Mobile agreements does not apply and conflicts with the arbitration agreement. But nothing is ambiguous or contradictory about choice-of-law clause. It states that the parties' 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. The arbitration clause

is consistent; it confirms that the "Federal Arbitration Act and federal arbitration law apply." *Id.* ¶ 2. Under the FAA and the Supreme Court's precedents, "the underlying issue of arbitrability [is] a question of substantive federal law," *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984), although courts must look to state law to determine if an arbitration agreement is valid in the face of defense such as fraud, duress, or unconscionability, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Thus, the T-Mobile arbitration agreement calls for application of federal and state law in accordance with the FAA and these precedents.

Plaintiff next argues that "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." Opp. at 18. Plaintiff's counsel must have lifted an argument from their briefing in the *In re Apple iPhone 3G Litigation*, because this makes no sense. This Court is not acting as a transferee court under section 1407 in this case.

At bottom, Plaintiff's argument seems to be that there is a "federal common law" doctrine of unconscionability of arbitration agreements, and on this basis the Court should hold that the T-Mobile agreement is unconscionable because it contains a waiver of class proceedings. Opp. at 19-22. The cases Plaintiff cites, however, do not invoke or even refer to any "federal common law" doctrine of unconscionability, but instead are cases applying ***state law*** – most often California state law. *See* Opp. at 17-22 (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir. 2007) (applying California law); *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1280-81 (9th Cir. 2006) (California law); *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853 (9th Cir. 2009) (California law); *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (New Jersey law); *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (Washington law)).[8] Plaintiff's attempt to create "federal common law" unconscionability is unfounded, because no such law exists. Plaintiff's

[8] Other cases cited by Plaintiff have nothing to do with enforceability of arbitration agreements or claims of unconscionability at all. *See, e.g.,* Opp. at 21 (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997); *In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989), both of which merely discuss class actions generally).

argument is just a rehash of her attempt to invoke California's minority position disfavoring arbitration.

To the extent Plaintiff's argument is that the FAA or federal law applying the Act renders an arbitration agreement precluding class proceedings unconscionable, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), defeats that argument. In *Gilmer*, the plaintiff argued that the purposes of the ADEA were undermined by an arbitration agreement that would preclude class actions. The Court held that ADEA claims are arbitrable because Congress had not "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). "So long as the prospective litigant effectively may vindicate [his or her] [individual] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637)). More to the point, the Court held that the arbitration agreement was enforceable "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Id.* at 32 (internal quotation omitted).

To the extent Plaintiff's argument is that "financial implications of arbitration" mean that she is precluded from "effectively vindicating her federal statutory rights," Opp. at 21, this is again merely a rehash of her arguments under state law (discussed above), and also is rejected by Supreme Court precedent. In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), the Supreme Court held that claims under TILA are arbitrable and held that if a party contends that arbitration would be prohibitively expensive, she must come forward with specific evidence of why that is so and the costs she would bear. *Id.* at 91-92. Mere speculation or unsupported allegations about costs is not enough, because "[t]o invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.'" *Id.* at 91 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Plaintiff has offered nothing but allegations and speculation about supposedly prohibitive costs, *see* Opp. at 22, and such a claim is implausible in any event, because, under her T-Mobile agreements she would pay no arbitration costs or fees, and

yet could still recover all available damages, attorneys' fees and any other costs on her individual claims.

E. Claims under the Magnuson-Moss Warranty Act Are Arbitrable, Although Plaintiff Has No Such Claim Against T-Mobile.

The last of Plaintiff's myriad arguments seeking to avoid her arbitration agreements is that claims under the MMWA are not subject to arbitration. Opp.at 23-25. While a few district courts have so concluded, the two circuit courts that have considered the issue have held that MMWA claims are arbitrable. But the Court need not delve into this case law. Plaintiff cannot assert a MMWA claim against T-Mobile, because she did not buy the Google phone from T-Mobile (or anything else), and T-Mobile gave no warranty on the phone.

The Supreme Court has said, "[I]t is by now clear that [federal] statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26 (noting that claims under the Sherman Act, section 10(b) of the SEC Act, RICO, and section 12 of the Securities Act had all been held to be arbitrable, and going on to find that claims under the ADEA are also arbitrable); *see also Randolph*, 531 U.S. at 79 (holding that TILA claims are arbitrable).[9] As noted above, when considering whether federal statutory claims are subject to arbitration, the central issue is whether the plaintiff can show that Congress evinced an intent to preclude arbitration for the federal statutory right she seeks to enforce. *Gilmer*, 500 U.S. at 26.

Plaintiff admits that the "MMWA contains no language explicitly indicating whether Congress intended to preclude [arbitration of MMWA claims.]" Opp. at 23. Still, Plaintiff contends that because the MMWA encourages warrantors to establish dispute resolution procedures, the FTC has said such procedures should be non-binding, and therefore arbitration should be precluded. Opp. at 23-24 (citing 15 U.S.C. § 2310 and 40 Fed. Reg. 60168, 60211 (Dec. 3, 1975). Plaintiff cites several district court cases supporting this view, *id.* at 24, but

[9] "In these cases we recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits their resolution in an arbitral, rather than a judicial forum.'" *Gilmer*, 500 U.S. at 27 (quoting *Mitsubishi*, 473 U.S. 614 at 628).

fails to mention that the only two circuit court decisions addressing the issue, both of which held that MMWA claims are arbitrable.

In *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002), the Fifth Circuit examined the language, legislative history and purpose of the MMWA and held that the Act "does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement, which the courts must enforce pursuant to the FAA." *Id.* at 479. The Eleventh Circuit did the same in *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), and held that MMWA claims may be the subject of binding arbitration, concluding that the FTC's interpretation to the contrary was unreasonable and not entitled to deference. *Id.* at 1281.

It is unnecessary, however, for the Court to delve into the different views of a handful of district courts and the Fifth and Eleventh Circuits about the issue of the arbitrability of MMWA claims, for the simple reason that Plaintiff can assert no warranty claims against T-Mobile. As shown in T-Mobile's separate motion to dismiss (Dkt. No. 38), and in T-Mobile's reply on that motion (filed concurrently with this brief), Plaintiff has no MMWA claim against T-Mobile, because she admits she purchased the Google phone from Google and bought nothing from T-Mobile in that transaction, and T-Mobile did not provide any warranty or make any representations about the Google phone. Plaintiff cannot avoid her agreements to arbitrate on the basis of a MMWA claim against T-Mobile, when she has no such claim.

III. 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 22nd day of September, 2010.

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