UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS MMS MARKETING AND SALES PRACTICES LITIGATION	MDL NO. 2116
	2:09-md-2116
THIS DOCUMENT RELATES TO:	SECTION: J
Aleman v. Apple Inc., No. 10-cv-00502 (No. 10-cv-00011 (S.D. Tex.))	JUDGE BARBIER
Baxter v. Apple Inc., No. 10-cv-00019 (No. 09-cv-13938 (E.D. Mich.))	MAGISTRATE JUDGE WILKINSON
Carbine v. Apple Inc., No. 09-cv-05470 (No. 09-cv-05470 (E.D. La.))	
Davis v. Apple Inc., No. 10-cv-00497 (No. 09-cv-01133 (M.D. Ala.))	
Franklin v. Apple Inc., No. 10-cv-00018 (No. 09-cv-00704 (S.D. Ala.))	
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Goette v. Apple Inc.,

No. 09-cv-07609

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Irving v. Apple Inc.,

No. 09-cv-07608

(No. 09-cv-02613 (D. Minn.))

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(No. 10-cv-00003 (S.D. Miss.))

Meeker v. Apple Inc.,

No. 09-cv-07607

(No. 09-cv-00607 (S.D. Ill.))

Mejia v. Apple Inc.,

No. 10-cv-00499

(No. 09-cv-02582 (M.D. Fla.))

Monticelli v. Apple Inc.,

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Sterker v. Apple Inc.,

No. 09-cv-07604

(No. 09-cv-04242 (N.D. Cal.))

Sullivan v. Apple Inc.,

No. 09-cv-07611

(No. 09-cv-01993 (N.D. Ohio))

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTIONS
TO COMPEL ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT

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INTRODUCTION

Defendant AT&T Mobility LLC ("ATTM") respectfully moves this Court to (i) compel the plaintiffs in this MDL to arbitrate their claims against ATTM and (ii) dismiss those claims. When the plaintiffs obtained wireless service from ATTM, they agreed to resolve their disputes in arbitration. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, requires them to honor those agreements.

The plaintiffs have indicated that they will argue that their arbitration agreements are unconscionable or otherwise invalid because they require arbitration on a bilateral basis (*i.e.*, between individual parties) rather than class-wide arbitration. This Court should reject any such arguments. The plaintiffs' challenges to their arbitration agreements are governed by the FAA and the laws of the states of their respective billing addresses—Alabama, California, Florida, Illinois, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New York, Ohio, and Texas. ATTM's arbitration provision is fully enforceable under the laws of every one of these states except California. In fact, courts in four of those states already have enforced either similar or earlier, less pro-consumer versions of ATTM's arbitration provision:

- **Florida**: *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005), *rev. denied*, 918 So. 2d 292 (Fla. 2005); *Cruz v. Cingular Wireless LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-CC (11th Cir.).

- **Illinois**: *Crandall v. AT&T Mobility, LLC*, 2008 WL 2796752 (S.D. Ill. July 18, 2008).

- **Louisiana**: *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004).

- **Michigan**: *Moffat v. Cingular Ameritech Mobile Commc'ns, Inc.*, 2010 WL 451033 (E.D. Mich. Feb. 5, 2010); *Francis v. AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009).

In addition, in at least five of the remaining eight states, courts have repeatedly enforced agreements to arbitrate on an individual basis that are not as favorable to consumers as ATTM's provision :

- **Alabama**: *Milligan v. Comcast Corp.*, 2007 WL 4885492 (N.D. Ala. Jan. 22, 2007); *Battels v. Sears Nat'l Bank*, 365 F. Supp. 2d 1205 (M.D. Ala. 2005); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101 (M.D. Ala. 2004); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304 (M.D. Ala. 2004); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265 (M.D. Ala. 2003); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251 (M.D. Ala. 2003); *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286 (M.D. Ala. 2003); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333 (M.D. Ala. 2003); *Stephens v. Wachovia Corp.*, 2008 WL 686214 (W.D.N.C. Mar. 7, 2008).

- **Mississippi**: *In re Jamster Mktg. Litig.*, 2008 WL 4858506 (S.D. Cal. Nov. 10, 2008); *Steed v. Sanderson Farms, Inc.*, 2006 WL 2844546 (S.D. Miss. Sept. 29, 2006).

- **New York**: *Hayes v. County Bank*, 811 N.Y.S.2d 741 (App. Div. 2006); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478 (App. Div. 2004); *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448 (App. Div. 2003); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998); *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70 (App. Div. 1981), *aff'd*, 435 N.E.2d 1097 (N.Y. 1982); *Douglas v. U.S. Dist. Ct.*, 495 F.3d 1062 (9th Cir. 2007); *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566 (S.D.N.Y. 2009).

- **Ohio**: *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 2009 WL 2963770 (Ohio Ct. App. Sept. 17, 2009); *Hawkins v. O'Brien*, 2009 WL 50616 (Ohio Ct. App. Jan. 9, 2009); *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758 (N.D. Ohio 2009); *Price v. Taylor*, 575 F. Supp. 2d 845 (N.D. Ohio 2008); *Howard v. Wells Fargo Minn., N.A.*, 2007 WL 2778664 (N.D. Ohio Sept. 21, 2007).

- **Texas**: *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190 (Tex. Ct. App. 2003); *Iberia*, 379 F.3d 159; *Adler v. Dell*, 2008 WL 5351042 (E.D. Mich. Dec. 18, 2008); *Davis v. Dell, Inc.*, 2007 WL 4623030 (D.N.J. Dec. 28, 2007); *Brazil v. Dell Inc.*, 2007 WL 2255296 (N.D. Cal. Aug. 3, 2007); *Sherr v. Dell, Inc.*, 2006 WL 2109436 (S.D.N.Y. July 27, 2006); *Stenzel v. Dell, Inc.*, 870 A.2d 133 (Me. 2005); *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005).

ATTM's arbitration provision also is enforceable under Missouri and Minnesota law. Courts in Missouri have been divided on the enforceability of agreements to arbitrate on an individual basis: In five federal cases—including two decisions by the Eighth Circuit—such clauses have been upheld, but in three decisions by state intermediate appellate courts, clauses

requiring arbitration on an individual basis have not been enforced, although those clauses were not nearly as favorable to customers as ATTM's provision. Courts applying Minnesota law have not directly confronted this issue. But challenges to contract terms under Minnesota law are subject to extraordinarily stringent standards that cannot be satisfied here—given the consumer-friendly nature of ATTM's provision.

Moreover, the FAA would preempt the law of any state (like California) that would declare ATTM's arbitration provision unenforceable. Indeed, the U.S. Supreme Court recently granted certiorari in *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010), to decide whether the FAA preempts California law and instead mandates the enforcement of ATTM's arbitration provision. If this Court concludes that the law of any particular state would deny enforcement to ATTM's provision, it should stay its decision as to plaintiffs from that state—including those from California—pending the Supreme Court's decision in *Concepcion*.

BACKGROUND

A. The Plaintiffs Agree To Arbitrate Their Disputes With ATTM.

ATTM provides wireless service to its customers pursuant to wireless service agreements. Under the terms of those agreements, ATTM and its customers agree to resolve their disputes by arbitration on an individual basis. According to ATTM and Apple records, some of the plaintiffs in this MDL accepted ATTM's Terms and Conditions when they became ATTM customers or entered into a new contract with the purchase of new equipment. *See* Decl. of Caroline Mahone-Gonzalez ¶¶ 4-5, 9, 11, 20, 26, 34, 37, 41, 50 & Exs. 1-2, 9-11, 15-17, 33-35, 42-44, 57-59, 62-64, 71, 83-85; Decl. of Darcy Pantano ¶¶ 4-5, 7, 9, 11-12 & Exs. 2-3, 5, 7, 9-10; Decl. of Ramon L. Menendez ¶¶ 3-4; Decl. of Harry Bennett ¶¶ 7-8 & Exs. 5-6; Decl. of Scott Williamson ¶ 3. Other plaintiffs obtain their service through the account of another person (likely a family member) who similarly agreed to those Terms and Conditions. *See* Mahone-

Gonzalez Decl. ¶¶ 13-14, 17-18, 22, 28-29, 43, 46-47 & Exs. 21-23, 27-29, 22-23, 48-50, 78-80; Pantano Decl. ¶¶ 6, 10 & Exs. 4, 8; *see also* Decl. of Richard J. Rives Ex. 4 at 15 (ATTM's arbitration provision extends to "all authorized or unauthorized users or beneficiaries of services or Devices under this or prior Agreements").

ATTM's arbitration provision was revised in early 2009. Pursuant to the change-in-terms provisions of its contracts, ATTM provided its existing direct paper-billed customers with a copy of the revised provision in the envelopes containing their March 2009 bills. Decl. of Larry B. White ¶ 3 & Ex. 1. ATTM provided further notice of the revised arbitration provision by including a message on the March, April, and May 2009 statements of direct-billed customers and inviting them to view information about arbitration on ATTM's web site (at http://www.att.com/disputeresolution). *See, e.g.*, Mahone-Gonzalez Decl. Exs. 3-5. That provision, like earlier ones, requires both ATTM and the plaintiffs "to arbitrate all disputes and claims between" them. Rives Decl. Ex. 1 at 15; White Decl. Ex. 1 at 2.

B. The Consumer-Friendly Features Of ATTM's Arbitration Provision.

ATTM's arbitration provision includes several features designed to make arbitration a realistic and effective means of dispute resolution for customers (Rives Decl. Ex. 4 at 15-19):

- **Cost-free arbitration:** for consumer claims of $75,000 or less, "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration, and arbitrator fees" unless the arbitrator determines that the claim is "frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))";

- **$10,000 minimum award if arbitral award exceeds ATTM's settlement offer**: If the arbitrator awards a customer an amount that is greater than ATTM's last "written settlement offer made before an arbitrator was selected," ATTM will pay the customer the greater of $10,000 or the amount of the arbitral award.

- **Double attorneys' fees available:** If the arbitrator awards the customer more than ATTM's last settlement offer, then "[ATTM] will * * * pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing

[the] claim in arbitration";[1]

- **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in arbitration, [ATTM] agrees that it will not seek such an award [from the customer]";

- **Small claims court option:** Either party may bring a claim in small claims court;

- **No confidentiality requirement:** The customer need not keep the arbitration confidential;

- **Full remedies available:** The arbitrator may award the claimant any form of individual relief (including statutory attorneys' fees, statutory damages, punitive damages, and injunctions) that a court could award;

- **Flexible consumer procedures:** Arbitration will be conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;

- **Conveniently located hearing:** Arbitration will take place "in the county or parish * * * of [the customer's] billing address";

- **Choice of in-person, telephonic, or no hearing:** For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator"; and

- **Right to a written decision:** "Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based."[2]

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[1] The attorney premium "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." Rives Decl. Ex. 4 at 18. Thus, even if an arbitrator were to award a customer less than ATTM's last settlement offer, the customer would be entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

[2] The current version of ATTM's arbitration provision is substantially similar to the previous version used between December 2006 and early 2009—the time frame when the iPhone 3G was introduced. The chief difference between the two versions is that, under the earlier one, the amount ATTM was required to pay customers who bested ATTM's settlement offer in arbitration was equal to the greater of $5,000 or the jurisdictional maximum of the customer's local small claims court. *See* Rives Decl. Ex. 1 at 16. The current version makes this minimum payment a uniform $10,000 for all customers across the country. *Id.*, Ex. 4 at 17. In addition, the prior version did not require arbitrators to provide a reasoned written decision.

C. Dispute Resolution Under ATTM's Arbitration Provision.

ATTM has tailored its dispute-resolution process to the needs of its customers. A formal arbitration proceeding between ATTM and one of its customers is the last step of the dispute-resolution process—one that is rarely necessary because the overwhelming majority of disputes are resolved through less formal means. Like most large service providers, ATTM has a customer care department whose job it is to handle customer complaints. *See* Decl. of Harry Bennett Ex. 1 at 1. But unlike most companies, ATTM's arbitration provision makes resolving complaints to customers' satisfaction particularly imperative. Because the provision requires ATTM to pay the full cost of any arbitration in which the customer seeks $75,000 or less and could result in ATTM's paying the customer $10,000, plus double attorneys' fees, it is almost always in ATTM's interest for its customer care employees to resolve complaints to the customer's full satisfaction by offering bill credits.

It is only if a customer cannot resolve his or her dispute informally through ATTM's customer care department that the arbitration provision comes directly into play. The first step of the formal dispute-resolution process is for the customer to notify ATTM of the dispute in writing. Rives Decl. Ex. 4 at 15-16. That is as simple as mailing a letter to ATTM or submitting a one-page Notice of Dispute form that ATTM has made available on its web site (at http://www.att.com/arbitration-forms). Bennett Decl. Ex. 3. If ATTM and the customer cannot resolve the dispute within 30 days, the customer may begin the formal arbitration process. To do so, the customer need only fill out a one-page Demand for Arbitration form and send copies to the AAA and to ATTM. Customers may either obtain a copy of the demand form from the AAA's web site (at http://www.adr.org) or use the simplified form that ATTM has posted on its web site (at http://www.att.com/arbitration-forms). *Id.* Ex. 4; Decl. of Richard Pianka Ex. 3. To

further assist its customers, ATTM has posted on its web site a layperson's guide on how to arbitrate a claim. Bennett Decl. Ex. 2 (http://www.att.com/arbitration-information).

D. Plaintiffs File Their Lawsuits Against ATTM Notwithstanding Their Agreements to Arbitrate.

Despite agreeing to arbitrate their disputes, the plaintiffs in this MDL filed some 24 actions in courts in 13 different states, alleging that ATTM and co-defendant Apple, Inc. misrepresented the ability of the iPhone 3G and 3G-S to support Multimedia Messaging Service on ATTM's network. The plaintiffs brought claims under state consumer protection statutes and common law, and seek to represent nationwide and statewide classes of iPhone 3G and 3G-S purchasers. After the actions were consolidated into this MDL proceeding by the Judicial Panel on Multidistrict Litigation, plaintiffs from 12 states filed amended complaints in 16 of the actions on June 4, 2010. Dkt. Nos. 67-82. Plaintiffs in four of the original underlying actions voluntarily dismissed their complaints on June 18, 2010. Dkt. Nos. 86-89.[3] (For the Court's convenience, we have attached as Exhibit A a chart listing the plaintiffs in the underlying actions, the court in which their original complaint was filed, and the state of their billing address.)

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[3] A number of individuals who were named plaintiffs in the original complaints have been omitted from the respective amended complaints, although they have not formally filed dismissals of their claims: Greg L. Davis (original *Davis* complaint); Christopher Carbine and Lisa Maurer (original *Carbine* complaint); Allison Friloux (original *Friloux* complaint); Meredith Goette and Raymond Bolourtchi (original *Goette* complaint); Mark E. Clark and William T. Joyner (original *Jackson* complaint); and Rick Pineda (original *Pineda* complaint). Accordingly, it is ATTM's understanding that these individuals are no longer parties to any of the actions consolidated before this Court. Even if they were to remain as parties, these motions to compel arbitration would apply with equal force to those parties' arbitration agreements with ATTM.

ARGUMENT

I. THE FAA MANDATES ENFORCEMENT OF THE PLAINTIFFS' ARBITRATION AGREEMENTS.

Section 2 of the FAA mandates that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 4 of the FAA emphasizes the duty of courts to compel arbitration "in accordance with the terms of the [arbitration] agreement." *Id.* § 4. And Section 3 of the FAA requires courts to stay litigation pending arbitration of claims subject to an arbitration agreement "in accordance with the terms of the [arbitration] agreement." *Id.* § 3. Together, these provisions of the FAA embody an overarching federal policy "to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (quoting *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)); *see also*, *e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution").

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements * * *[,] to place [these] agreements upon the same footing as other contracts[,] * * * [and to] manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted). Accordingly, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The FAA applies if the arbitration agreement is "written" and in a contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. Both criteria are met here because (i) ATTM's arbitration provision is in writing (*see* Rives Decl. Ex. 4 at 15) and (ii) contracts for wireless service involve interstate commerce, as telephones, even "during intrastate use," are "interstate

commerce facilities." *United States v. Marek*, 238 F.3d 310, 318 (5th Cir. 2001). Indeed, the arbitration provision itself specifies that the service contract "evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision." Rives Decl. Ex. 4 at 15.

Moreover, the plaintiffs' claims fall squarely within the scope of their arbitration agreements, which provide that the parties must arbitrate "all disputes and claims between us." Rives Decl. Ex. 4 at 15. When, as here, the FAA governs an arbitration provision that covers a plaintiff's claims against a defendant, the Court should compel arbitration and dismiss those claims. *See* 9 U.S.C. § 3; *see also*, *e.g.*, *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.") (emphasis omitted).

II. THE LAW OF EACH PLAINTIFF'S HOME STATE GOVERNS THE ENFORCEABILITY OF HIS OR HER ARBITRATION AGREEMENT.

Plaintiffs have indicated that they will attempt to challenge the enforceability of their arbitration agreements. As an initial matter, any state-law challenge to ATTM's arbitration provision would be governed by the law of the state of a particular plaintiff's billing address. That is because each plaintiff's service agreement includes a choice-of-law clause specifying that "[t]he law of the state of [the customer's] billing address shall govern this Agreement except to the extent that such law is preempted by or inconsistent with applicable federal law." Rives Decl. Ex. 4 at 19.

Under relevant conflicts-of-laws principles, that contractual choice of law is valid. When, as here, "'a transferee court presides over [a] diversity action * * * under the multidistrict rules,'" the applicable conflicts-of-law rules come "from the 'jurisdiction in which the transferred' case originated.'" *Smith v. Waste Mgmt., Inc.*, 407 F.3d 381, 384 n.1 (5th Cir. 2005) (quoting *In re Air Disaster*, 81 F.3d 580, 576 (5th Cir. 1996)). As noted above, the plaintiffs

against whom ATTM is currently moving to compel originally filed their lawsuits in 12 states.[4] Those states routinely enforce contractual choice-of-law clauses, particularly when (as here) the parties' contract selects the law where a consumer lives and where he or she chose to file suit.[5]

III. ATTM'S ARBITRATION AGREEMENT IS ENFORCEABLE UNDER THE LAWS OF THE RELEVANT STATES.

ATTM's arbitration provision is extraordinarily favorable to consumers. As one veteran federal judge has remarked in considering an earlier version of ATTM's provision: "ATTM's arbitration agreement contains perhaps the most fair and consumer-friendly provisions this Court has ever seen." *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009) (describing ATTM arbitration provision used from December 2006 through early 2009); *see also Cherny v. AT&T, Inc.*, 2010 WL 2572929, at *1 (C.D. Cal. Feb. 8, 2010) (ATTM's provision includes "unique, pro-consumer measures"); *Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 900 n.6 (S.D. W. Va. 2009) (ATTM's provision is "unusually customer-centered"). Plaintiffs nonetheless have suggested that they will contend that their arbitration agreements violate state law because those agreements require individual rather than class-wide

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[4] All but one of the underlying actions was filed in the home state of all of the named plaintiff(s) in that action. The exception is the Eastern District of Missouri *Goette* action, which included as a named plaintiff Sabrina Storner, an ATTM customer from Illinois. *Goette* Compl. ¶ 13 (Dkt. No. 75).

[5] *See, e.g.*, *Stovall v. Universal Constr. Co.,* 893 So. 2d 1090, 1102 (Ala. 2004); *Resurgence Fin., LLC v. Chambers*, 92 Cal. Rptr. 3d 844, 848 (Ct. App. 2009); *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000); *Hall v. Sprint Spectrum L.P.*, 876 N.E.2d 1036, 1041 (Ill. App. Ct. 2007); *Clark v. Legion Ins. Co.*, 947 So. 2d 110, 115 (La. Ct. App. 2006); *Turcheck v. Amerifund Fin., Inc.*, 725 N.W.2d 684, 688 (Mich. Ct. App. 2006); *Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 48 (Minn. Ct. App. 1994); *United States v. Biloxi Mun. Sch. Dist.*, 219 F. Supp. 691, 695 (D. Miss. 1963) (citing *Castleman v. Canal Bank & Trust Co.*, 156 So. 648 (Miss. 1934)); *Tri-County Retreading, Inc. v. Bandag Inc.*, 851 S.W.2d 780, 784 (Mo. Ct. App. 1993); *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124, 133 (N.J. 1992); *Boss v. Am. Express Fin. Advisors, Inc.*, 791 N.Y.S.2d 12, 14 (N.Y. App. Div. 2005), *aff'd,* 844 N.E.2d 1142 (N.Y. 2006); *Sekeres v. Arbaugh*, 508 N.E.2d 941, 942-43 (Ohio 1987); *SAVA Gumarska in Kemijska Industria D.D. v. Advanced Polymer Scis., Inc.*, 128 S.W.3d 304, 314 (Tex. Ct. App. 2004).

arbitration. They are wrong with a single exception: ATTM's arbitration provision is enforceable under the laws of all of the relevant states except California, which refuses to honor agreements to arbitrate bilaterally no matter how fair such agreements are to individual consumers.

A. ATTM's Arbitration Agreement Is Enforceable Under Alabama Law.

The Alabama plaintiffs cannot avoid their arbitration agreements on the ground of unconscionability under Alabama law unless they can "show ***both*** procedural and substantive unconscionability." *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So. 2d 1077, 1087 (Ala. 2005) (emphasis added). To establish procedural unconscionability, they must show that they had no "meaningful choice about whether and how to enter into the transaction." *Id.* (internal quotation marks omitted). To prove substantive unconscionability, they must show that their arbitration agreement is a contract that "no man in his sense[s] and not under delusion would make on the one hand, and [that] no honest and fair man would accept on the other." *Id.* at 1086 (internal quotation marks omitted). The Alabama plaintiffs cannot prove either element—much less both.

1. ATTM's arbitration agreement is not substantively unconscionable under Alabama law.

The arbitration agreements between the Alabama plaintiffs and ATTM are not substantively unconscionable under Alabama law. Five different federal district court judges, in a total of nine separate decisions, have expressly held that a provision requiring arbitration on an individual basis is ***not*** substantively unconscionable under Alabama law so long as it does not (i) impose unreasonable costs on the consumer or (ii) limit the remedies available to the consumer. *See Milligan v. Comcast Corp.*, 2007 WL 4885492, at *2 (N.D. Ala. Jan. 22, 2007); *Battels v. Sears Nat'l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1276-

77 (M.D. Ala. 2003); *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1263-64 (M.D. Ala. 2003); *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1345 (M.D. Ala. 2003); *accord Stephens v. Wachovia Corp.*, 2008 WL 686214, at *5 (W.D.N.C. Mar. 7, 2008) (applying Alabama law). ***No federal court*** applying Alabama law has held otherwise.

Plaintiffs may invoke the Alabama Supreme Court's decision in *Leonard v. Terminix International Co.*, 854 So. 2d 529 (Ala. 2002). The *Leonard* court invalidated a provision requiring arbitration on an individual basis because the provision "restrict[ed] the [plaintiffs] to a forum where the expense of pursuing their claim far exceed[ed] the amount in controversy." *Id.* at 535-39. In *Leonard*, however, the arbitration provision required a consumer to pay over $1,000 to arbitrate a claim that was worth only $500. *Id.* at 535. Moreover, the provision barred "recovery of 'indirect, special, and consequential damages or loss of anticipated profits'" which, in conjunction with the prohibition of class actions, "deprive[d] the [plaintiffs] of a meaningful remedy." *Id.* at 538.

Leonard is inapplicable here. As the federal courts in Alabama have repeatedly explained, "[t]he Alabama Supreme Court's concerns in [*Leonard*] addressed a situation where the plaintiffs could not vindicate their rights because the costs of arbitration would exceed the potential recovery"—concerns that are inapplicable when arbitration is inexpensive (or free) and the plaintiff may recover fees and costs if he or she prevails. *Pitchford*, 285 F. Supp. 2d at 1296.[6] The Alabama Supreme Court has twice characterized *Leonard*'s holding in similar terms.

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[6] *See also Battels*, 365 F. Supp. 2d at 1217; *Lawrence*, 343 F. Supp. 2d at 1112; *Taylor*, 325 F. Supp. 2d at 1319; *Billups*, 294 F. Supp. 2d at 1276-77; *Gipson*, 294 F. Supp. 2d at 1263-64; *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1345; *Stephens,* 2008 WL 686214, at *5.

Leeman v. Cook's Pest Control, Inc., 902 So. 2d 641, 649 (Ala. 2004); *Serv. Corp. Int'l v. Fulmer*, 883 So. 2d 621, 632 (Ala. 2003).

ATTM's arbitration provision far exceeds Alabama's standards for enforceability under both *Leonard* and the unbroken line of federal cases. ATTM's provision not only ensures that the plaintiffs can arbitrate their claims for free and pursue all substantive remedies in arbitration that would be available in court, but also provides affirmative incentives to make arbitration on an individual basis particularly attractive for consumers. Under ATTM's arbitration provision, the plaintiffs would be entitled to a payment of $10,000, plus double attorneys' fees, if the arbitral award exceeds ATTM's last settlement offer. As a federal court in West Virginia recently explained, under ATTM's provision the customer "has [an] incentive to bring his or her claim, regardless of whether classified as 'high' or 'small' dollar. This incentive is provided by several provisions of the ATTM arbitration clause[,]" including the potential availability of the $10,000 minimum payment plus double attorneys' fees. *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 685 & n.4 (N.D. W. Va. 2010). Especially because the Alabama plaintiffs would not enjoy these expanded remedies in court, they cannot legitimately contend that they would have had to be "under delusion" (*Rigas*, 923 So. 2d at 1086) to agree to ATTM's provision. Accordingly, ATTM's arbitration agreement is not substantively unconscionable under Alabama law, and any unconscionability challenge must fail.

2. ATTM's arbitration agreement is not procedurally unconscionable under Alabama law.

Even if the Alabama plaintiffs could prove the existence of some measure of substantive unconscionability, they cannot demonstrate that the manner in which they accepted their arbitration agreements was procedurally unconscionable. To establish the requisite absence of "meaningful choice" under Alabama law, the party asserting procedural unconscionability must prove that he or she could not have obtained wireless phone service "without signing an

arbitration agreement." *Rigas*, 923 So. 2d at 1087. The Alabama Supreme Court has repeatedly held that, to meet this burden, a party must have "actually 'shop[ped] around' for a[n] * * * agreement that lacked an arbitration provision." *Leeman*, 902 So. 2d at 647.[7]

The Alabama plaintiffs will not be able to prove that they "shopped around" for—and were unable to find—a cellular service provider that did not require arbitration on an individual basis. At the time that they accepted their contracts, at least one major nationwide cellular phone provider did not include an arbitration clause in its customer agreements, and at least one other permitted customers to opt out of arbitration. Pianka Decl. ¶¶ 6-8, Exs. 4-8. Indeed, as the FCC has recognized, most consumers are able to choose from a host of wireless carriers offering services in a given market.[8] Accordingly, the plaintiffs cannot establish procedural unconscionability—furnishing an independent basis for rejecting any unconscionability argument they might raise. *See Rigas*, 923 So. 2d at 1090.

B. ATTM's Arbitration Agreement Is Enforceable Under Florida Law.

"Under Florida law, arbitration is a favored means of dispute resolution" (*Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470, 473 (Fla. 1995)), and Florida courts have

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[7] *See also Potts v. Baptist Health Sys., Inc.*, 853 So. 2d 194, 205-06 (Ala. 2002); *Conseco Fin. Corp.-Ala. v. Boone*, 838 So. 2d 370, 373 (Ala. 2002); *Green Tree Fin. Corp. v. Lewis*, 813 So. 2d 820, 825 (Ala. 2001); *Mitchell Nissan, Inc. v. Foster*, 775 So. 2d 138, 141 (Ala. 2000); *Green Tree Fin. Corp. v. Vintson*, 753 So. 2d 497, 504 (Ala. 1999); *Pitchford*, 285 F. Supp. 2d at 1295 ("Alabama Courts * * * require that a party 'shop around' in order to show that there was no meaningful alternative.").

[8] *See* FCC, *Eleventh Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services* ¶ 41 (Sept. 29, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-142A1.pdf; *see also id.* ¶ 4 (finding that consumers are able "to pressure carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service"); *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 705 (S.D. Ill. 2005) ("even though Chandler could not negotiate the terms of the contract, she was free to make other choices, such as choosing a cellular service other than AWS"); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1027 (Fla. Dist. Ct. App. 2005) ("Fonte * * * did not have to sign the contract. * * * Fonte was free to choose any wireless service provider without limitation.").

"consistently acknowledged the important public policy in favor of arbitration" (*Waterhouse Constr. Group, Inc. v. 5891 SW 64th St., LLC*, 949 So. 2d 1095, 1099 (Fla. Dist. Ct. App. 2007)). Florida "[p]ublic policy * * * favors arbitration because it is efficient and avoids the time[,] delay and expense associated with litigation." *Regency Group, Inc. v. McDaniels*, 647 So. 2d 192, 193 (Fla. Dist. Ct. App. 1994); *see also, e.g.*, *Lee v. Stevens of Fla., Inc.*, 578 So. 2d 867, 868 (Fla. Dist. Ct. App. 1991) (both Florida courts and the Florida legislature "favor" and "encourage arbitration of disputes" for this reason).

ATTM's extraordinarily consumer-friendly arbitration agreement is fully enforceable under Florida law. In fact, courts in Florida have twice upheld the arbitration agreements of ATTM or its predecessor. In *Fonte v. AT&T Wireless Services, Inc.*, 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005), *rev. denied*, 918 So. 2d 292 (Fla. 2005), Florida's intermediate appellate court expressly rejected unconscionability and public policy challenges to a much earlier arbitration provision used by one of ATTM's predecessors that did not contain as many pro-consumer features as ATTM's current arbitration provision. More recently, Judge Steele of the U.S. District Court for the Middle District of Florida enforced the 2006 version of ATTM's arbitration provision—which is substantially similar to the provisions at issue in this case—concluding that the provision's requirement that arbitration be conducted on an individual basis does not violate Florida public policy because customers can fully vindicate their claims under the provision. *Cruz v. Cingular Wireless, LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), *appeal pending*,

No. 08-16080-CC (11th Cir.).[9] As these and other cases make clear, ATTM's arbitration provision is fully enforceable under Florida law.[10]

1. ATTM's arbitration agreement does not violate Florida public policy.

In *Fonte*, the Florida District Court of Appeal rejected the argument that an arbitration clause requiring bilateral arbitration was unenforceable because it would "defeat * * * the remedial purposes of FDUTPA" (903 So. 2d at 1024)—the same Florida consumer protection statute under which the Florida plaintiffs seek relief here. *See Novick* Compl. (Dkt. No. 82) ¶¶ 80-84, *Mejia* Compl. (Dkt. No. 81) ¶¶ 69-74. The court emphasized that under the arbitration provision at issue—promulgated by an ATTM predecessor, AT&T Wireless—plaintiff Fonte would "retain[] all substantive rights and remedies [available] * * * under FDUTPA, namely, actual damages, declaratory and injunctive relief, and attorney's fees," as well as the ability to "take a claim to small claims court." *Fonte*, 903 So. 2d at 1025. The court also noted that "there are numerous enforcement mechanisms which can protect consumers other than class actions," such as state enforcement agencies. *Id.* For these reasons, the court held that the AWS provision permitted consumers to fully vindicate their rights and was therefore enforceable under Florida law. *Id.* *Fonte* is controlling here because, under ATTM's current arbitration provision, the Florida plaintiffs also "retain[] all substantive rights and remedies [available] * * * under FDUTPA" (*id.*), and, if they prefer, may proceed in small claims court rather than arbitration.

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[9] The chief difference between the arbitration provision at issue in *Cruz* and the one governing the present disputes is that the former provided for a minimum award of $5,000 (rather than $10,000) if the arbitrator awarded a customer more than ATTM's settlement offer.

[10] The Eleventh Circuit recently certified to the Florida Supreme Court the question whether a requirement that disputes be arbitrated on an individual basis is unenforceable under Florida law and, if so, under what circumstances. *See Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1143-44 (11th Cir. 2010). That matter has been fully briefed in the Florida Supreme Court, although oral argument has not yet been scheduled. ATTM believes that the Florida Supreme Court is unlikely to adopt an approach in *Pendergast* under which ATTM's provision would be deemed unenforceable; moreover, if the Florida Supreme Court were to conclude that agreements to arbitrate on an individual basis are broadly unenforceable, such a state-law rule would be preempted by the FAA. *See* Part IV, *infra*.

Indeed, the Florida plaintiffs here are better off than the AT&T Wireless customers in *Fonte* because of the numerous additional pro-consumer features of ATTM's current arbitration provision.

The plaintiffs may point to a decision by another panel of the Florida District Court of Appeal that distinguished *Fonte* in the course of declining to enforce a different arbitration agreement. *See S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600 (Fla. Dist. Ct. App. 2007). But that panel's holding rested on the fact that the plaintiff in that case was suing under a particular section of FDUTPA that applies only to deceptive practices by ***auto dealers*** and places severe limitations on the potential recovery of attorneys' fees. That section states that "'[i]n any civil litigation resulting from a violation ***of this section***, when evaluating the reasonableness of an award of attorney's fees * * *, the trial court shall consider the amount of actual damages in relation to the time spent.'" *Id.* at 606 (emphasis added) (quoting Fla. Stat. § 501.976). Accordingly, the court reasoned, "an individual asserting a successful FDUTPA claim ***arising out of a motor vehicle dealer's violation of section 501.976*** * * * may recover only such attorney's fees as are reasonable in light of the amount of the individual's actual damages." *Id.* (emphasis added). For this reason, the court held that an auto dealer's agreement requiring bilateral arbitration is unenforceable when "the amount of an individual consumer's actual damages is small and attorney's fees are limited as a result." *Id.* at 607.[11]

S.D.S. is inapposite here. As the *S.D.S*. court recognized, *Fonte* was different because it—like this case—was "a case where section 501.976 had no application." 976 So. 2d at 609-10 (also noting *Fonte*'s holding that FDUTPA does not create any general, "non-waivable right to

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11 *See also S.D.S. Autos*, 976 So. 2d at 608 (reasoning that a requirement of individual arbitration would undermine FDUTPA with respect to "holders of small claims whose attorney's fees are limited by the amount of their individual damages"); *id.* at 610 (reasoning that a requirement of individual arbitration would undermine FDUTPA "[g]iven the restrictions on individual attorney's fee awards under section 501.976").

class representation"). As in *Fonte*, the claims here are not against an auto dealer and thus do not implicate section 501.976. Rather, the Florida plaintiffs may seek attorneys' fees pursuant to section 501.2105 of FDUTPA, which authorizes "[t]he trial judge [to] award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours ***actually spent*** on the case as sworn to in an affidavit" by the attorney. Fla. Stat. § 501.2105(3) (emphasis added). The Florida courts have "completely rejected" the notion that fee awards under section 501.2105 should be limited by the amount of damages recovered. *LaFerney v. Scott Smith Oldsmobile, Inc.*, 410 So. 2d 534, 536 (Fla. Dist. Ct. App. 1982). As the Florida District Court of Appeal explained in directing an award of fees that significantly exceeded the recovered damages, "[i]f, because of the small sums involved, consumers cannot recover in full their attorney fees, they will quickly determine it is too costly and too great a hassle to file suit, and ***individual*** enforcement of this act will fail." *Id.* (emphasis added); *see also Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 833-34 (Fla. 1990) (quoting *LaFerney* with approval). Under *LaFerney*, the Florida plaintiffs would be entitled to full attorneys' fees should they prevail on their FDUTPA claims.

Consequently, the decision in *Fonte* is controlling, and the narrow opinion in *S.D.S.* is inapposite. Indeed, that is precisely what Judge Steele concluded in *Cruz*, holding that *Fonte* rather than *S.D.S.* governed the enforceability of ATTM's arbitration provision, because "there is no limitation on attorneys' fees, and under certain circumstances, customers may be entitled to double their attorneys' fees." 2008 WL 4279690, at *3. Accordingly, any public-policy attack must fail under Florida law.

2. ATTM's arbitration agreement is not unconscionable under Florida law.

For similar reasons, any unconscionability attack on ATTM's arbitration provision also should be rejected. The "Florida courts have * * * emphasized that the concept [of

unconscionability] is to be used with great caution" and may be invoked "only where * * * enforcement of the terms of a contract [would be] so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice." *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 284 (Fla. Dist. Ct. App. 2003) (internal quotation marks omitted). Moreover, "[b]efore a court may hold a contract unconscionable, it must find that it is ***both*** procedurally and substantively unconscionable." *Id.* (emphasis in original). The Florida plaintiffs cannot establish either element.

a. ATTM's arbitration agreement is not substantively unconscionable under Florida law.

Under Florida law, a contract term is not substantively unconscionable unless it is "so outrageously unfair as to shock the judicial conscience." *Bland ex rel. Coker v. Health Care & Ret. Corp.*, 927 So. 2d 252, 256 (Fla. Dist. Ct. App. 2006) (internal quotation marks omitted). Stated another way, courts must take care not to "blur the legal distinction between 'unreasonable' and 'unconscionable'"; a contract is not unconscionable unless it is one that "no man in his right mind" would make. *Belcher v. Kier*, 558 So. 2d 1039, 1043, 1045 (Fla. Dist. Ct. App. 1990). The cases applying these standards make clear that ATTM's uniquely consumer-friendly arbitration provision is not substantively unconscionable under Florida law. On at least four occasions, federal courts in Florida have held that an arbitration provision that requires bilateral arbitration is not substantively unconscionable under Florida law so long as the provision affords the plaintiff all of the remedies that he or she could obtain in court. We are aware of no rulings to the contrary.

In *Rivera v. AT&T Corp.*, 420 F. Supp. 2d 1312 (S.D. Fla. 2006), for example, the court held that an arbitration provision in the service agreement of AT&T Corp. (the long-distance provider) was not substantively unconscionable under Florida law merely because it required that arbitration be conducted on an individual basis. Because the arbitration agreement in question in

Rivera—like the one here—allowed customers to pursue their claims in small claims court rather than arbitration and permitted recovery of attorneys' fees, the court held that the prohibition on class-wide treatment of claims did not render the agreement substantively unconscionable. *Id*. at 1322; *see also Sanders v. Comcast Cable Holdings, LLC*, 2008 WL 150479, at *10 (M.D. Fla. Jan. 14, 2008) (agreement requiring that arbitration be conducted on individual basis was not unconscionable because it allowed for recovery of attorneys' fees and provided that a prevailing plaintiff would not have to pay any costs of arbitration); *La Torre v. BSF Retail & Commercial Operations, LLC*, 2008 WL 5156301, at *5 (S.D. Fla. Dec. 8, 2008) (noting that agreements to arbitrate individually are consistent with arbitration's advantages of "simplicity, informality, and expedition"); *Hughes v. Alltel Corp.*, 2004 U.S. Dist. LEXIS 20705, at *13-*15 (N.D. Fla. Mar. 31, 2004) (noting that unavailability of class procedures is "the norm for arbitration").

These decisions confirm that it does not "shock the judicial conscience" (*Bland*, 927 So. 2d at 256) to require bilateral arbitration, particularly in light of the extraordinarily consumer-friendly features of ATTM's provision that provide incentives for customers to pursue their claims, and for the company to redress them. For those same reasons, ATTM's arbitration agreement can hardly be regarded as one that "no man in his right mind" would make. *Belcher*, 558 So. 2d at 1045. On the contrary, it makes perfect sense for a customer to agree to a provision like ATTM's that ensures that ATTM will have a strong incentive to resolve claims to the customer's satisfaction in exchange for giving up the speculative right to participate in a class action, especially given that the overwhelming majority of disputes are individualized and therefore could never be the subject of a class action. In such cases, as the Supreme Court has observed, if arbitration were not an option, "the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left

"without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

Plaintiffs may seek to rely on two decisions by Florida state courts that have declared that certain arbitration provisions that contained class waivers were substantively unconscionable. *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999); *Bellsouth Mobility LLC v. Christopher*, 819 So. 2d 171 (Fla. Dist. Ct. App. 2002). But in both of those cases, the determination of substantive unconscionability rested on factors that are absent here. For example, the provisions at issue in those cases "preclud[ed] the possibility that [the defendant would] ever be exposed to punitive damages, no matter how outrageous its conduct might be" (*Powertel*, 743 So. 2d at 576; *see also Christopher*, 819 So. 2d at 173) and also foreclosed injunctive and declaratory relief (*Powertel*, 743 So. 2d at 576; *Christopher*, 819 So. 2d at 173). Moreover, the provision in *Christopher* required the customer to arbitrate all claims while reserving the company's right to sue in court on customers' debts (819 So. 2d at 173). In both cases, the courts declared the clauses at issue substantively unconscionable based on the ***combined effect*** of these limitations on remedies and the prohibition of class arbitration. *See id.*; *Powertel*, 743 So. 2d at 576. By contrast, ATTM's arbitration provision places no limitations on the relief the Florida plaintiffs may obtain for themselves; indeed, the ATTM provision augments the remedies that would be available to plaintiffs in court. *See* pages 4-5, *supra*; s*ee also Cruz*, 2008 WL 4279690, at *3 (recognizing the limitations on remedies as central to the holding in *Powertel*). And, unlike in *Christopher*, ATTM and its customers are mutually obligated to arbitrate all disputes (or to pursue them in small claims court). Accordingly, ATTM's requirement that customers arbitrate disputes on an individual basis does not trigger the concerns that rendered the provisions in *Powertel* and *Christopher* substantively unconscionable under Florida law.

b. ATTM's arbitration agreement is not procedurally unconscionable under Florida law.

Any argument that the Florida plaintiffs' arbitration agreements are procedurally unconscionable would be foreclosed by *Fonte*. There, the court held that the arbitration provision at issue was not procedurally unconscionable, even though "[t]here [was] no doubt that AT&T [Wireless]"—a predecessor of ATTM—"had almost unilateral bargaining power," and "the arbitration clause was somewhat buried [at] page 38 of a 40-page booklet." 903 So. 2d at 1025-26. The *Fonte* court rejected the plaintiff's contention that the agreement was procedurally unconscionable, noting that AT&T Wireless "included the arbitration clause in the [plaintiff's] original contract" and "notified [her] numerous times to carefully review the Terms and Conditions of her" contract, and that the plaintiff "was free to choose any wireless service provider without limitation." *Id.* at 1026-27. The same is true here. The Florida plaintiffs, or the person on whose account they receive service, acknowledged that they agreed to ATTM's Terms of Service when they purchased their iPhones (*see* Mahone-Gonzalez Decl. ¶¶ 28-29, 37 & Exs. 48-50, 62-64); those terms disclose at the outset that arbitration is required (Rives Decl. Ex. 1 at 1, Ex. 3 at 1); and plaintiffs were "free to choose any wireless service provider without limitation." *Fonte*, 903 So. 2d at 1026-27; *see* page 14, *supra*.

Accordingly, the Florida plaintiffs cannot establish procedural unconscionability. For this reason alone, any unconscionability challenge cannot succeed. *Fonte*, 903 So. 2d at 1027 ("As we have found a lack of procedural unconscionability, * * * we need not address substantive unconscionability.").

C. ATTM's Arbitration Agreement Is Enforceable Under Illinois Law.

The Illinois plaintiffs cannot show that their arbitration agreements are unconscionable under Illinois law. It is firmly established that "Illinois courts favor using arbitration as a matter of settling disputes." *Jenkins v. Trinity Evangelical Lutheran Church*, 825 N.E.2d 1206, 1210

(Ill. App. Ct. 2005). In addition, the party attempting to avoid enforcement of an arbitration agreement bears the burden of proving unconscionability. *Pivoris v. TCF Fin. Corp.*, 2007 WL 4355040, at *6 (N.D. Ill. Dec. 7, 2007); *Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 541 (Ill. App. Ct. 2004). Under Illinois law, "[a] finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both." *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263 (Ill. 2006). But such a showing would be impossible for the Illinois plaintiffs to make: A federal court in Illinois has already held that an earlier arbitration provision used by ATTM's predecessor, AT&T Wireless, is not unconscionable. *Crandall v. AT&T Mobility, LLC*, 2008 WL 2796752, at *4 (S.D. Ill. July 18, 2008). The same is true of ATTM's current arbitration provision, which is substantially more favorable to consumers.

1. ATTM's arbitration agreement is not substantively unconscionable under Illinois law.

To establish that ATTM's arbitration provision is substantively unconscionable under Illinois law, the Illinois plaintiffs would have to show that its terms are "inordinately one-sided in one party's favor" (*Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622 (Ill. 2006)) and are "onerous or oppressive" (*Kinkel*, 857 N.E.2d at 267). "'Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.'" *Id.* (quoting *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995)).

Arbitration agreements are not unconscionable under Illinois law simply because they require arbitration on an individual basis; rather, enforceability "must be determined on a case-by-case basis, considering the totality of the circumstances." *Kinkel*, 857 N.E.2d at 275; *see also In re Jamster Mktg. Litig.*, 2008 WL 4858506, at *5 (S.D. Cal. Nov. 10, 2008) ("class action waivers are not *per se* unconscionable" under Illinois law). As the Illinois Supreme Court has

explained, "a class action waiver will ***not*** be found unconscionable * * * if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner." *Kinkel*, 857 N.E.2d at 274 (emphasis added); *see also Pivoris*, 2007 WL 4355040, at *5-*6 (enforcing agreement to arbitrate on an individual basis because agreement provided same rights to fee-shifting that claimant would have had in court); *Deaton v. Overstock.com, Inc.*, 2007 WL 4569874, at *2 (S.D. Ill. Dec. 27, 2007) (in light of defendant's agreement to pay plaintiff's arbitration costs, "the Court cannot conclude that arbitration of this action is prohibitively expensive").

In *Kinkel*, the Illinois Supreme Court held that an early version of Cingular's arbitration provision (which was superseded in mid-2003) was substantively unconscionable. The *Kinkel* court pointed to a number of features of the earlier Cingular provision that it found troublesome: (1) that its provisions required customers to pay $125 to arbitrate their claims; (2) that the $125 arbitral fee was not disclosed on the face of the agreement; and (3) that the provision contained a "strict confidentiality clause" that prohibited disclosure of "'the existence, content, or results of any arbitration.'" 857 N.E.2d at 268, 275. Taken together, these features led the court to conclude that Cingular's provision did not afford the individual plaintiff a "reasonable, cost-effective means of obtaining a complete remedy." *Id.* at 275. By contrast, the ATTM arbitration provision at issue in this case generally imposes ***no*** arbitral fees on customers—and expressly discloses that fact—and does not impose any confidentiality requirement. In addition, ATTM's provision contains affirmative incentives to encourage consumers with relatively small claims to pursue arbitration. The provision is therefore fully enforceable under *Kinkel*.

Indeed, applying *Kinkel*, several courts in Illinois have upheld far less pro-consumer arbitration provisions. For example, in *Crandall* the federal court for the Southern District of

Illinois upheld an arbitration provision used by a predecessor of ATTM—AT&T Wireless—in 2003. As the court explained in *Crandall*, that provision specified that "for claims involving less than $1,000, the customer must pay $25 and [AT&T Wireless] will pay all other administrative costs and fees." 2008 WL 2796752, at *3. That provision was enforceable under *Kinkel* because the plaintiffs could not show that "the expenses that they necessarily and definitely would incur would make arbitration prohibitive." *Id.* at *5. *A fortiori*, the Illinois plaintiffs cannot make that showing here because ATTM's current arbitration provision provides for cost-free arbitration and makes available additional incentives to pursue arbitration.

Similarly, the Northern District of Illinois held in *Pivoris* that an arbitration clause that was markedly less consumer-friendly than ATTM's was not substantively unconscionable under *Kinkel*, rejecting the argument that it prevented the plaintiff from vindicating her claim. 2007 WL 4355040, at *5. As the *Pivoris* court noted, the Seventh Circuit has "had little difficulty" in enforcing an "arbitration clause that precluded class actions." *Id.* at *6 (citing *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 556 (7th Cir. 2003)). And even though the clause at issue in *Pivoris* did not allow for cost-free arbitration—the defendant had agreed to pay only the first $2,500 of the customer's share of arbitration costs—the court held that the provision was enforceable under *Kinkel* because it "does not appear to impose limitations that would preclude [the plaintiff] from obtaining a remedy for her claims against [the defendant] in a cost-effective manner." *Pivoris*, 2007 WL 4355040, at *6. In particular, the provision permitted the customer to recover her attorneys' fees "where such a remedy is available under the substantive law governing the dispute subject to arbitration" (*id.* at *5), and—as here—the plaintiff could not show that "the cost of arbitration would exceed the costs she would incur in litigation" (*id.*).

For similar reasons, a federal court in California upheld T-Mobile's arbitration provision under Illinois law. *In re Jamster*, 2008 WL 4858506, at *6. That provision (like ATTM's

provision) requires consumers to arbitrate on an individual basis, but (unlike ATTM's provision) requires customers to pay arbitral fees to pursue claims that are greater than $25 and includes no affirmative inducements to arbitrate like ATTM's premium provision. Applying *Kinkel*, the *Jamster* court nonetheless enforced T-Mobile's clause under Illinois law, concluding that "[t]he provision does not limit plaintiffs['] * * * ability to obtain relief." *Id.*

ATTM's provision is more favorable to consumers than the provisions upheld in *Crandall*, *Pivoris*, and *Jamster*. By making arbitration free and convenient to individual consumers, and by providing customers (and their attorneys) affirmative incentives to pursue their disputes in arbitration, ATTM fully addresses—indeed, goes above and beyond resolving—the concerns expressed in *Kinkel*. Accordingly, the Illinois plaintiffs' arbitration agreements are not substantively unconscionable under Illinois law.

2. ATTM's arbitration agreement is not procedurally unconscionable under Illinois law.

In Illinois, "'[p]rocedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice.'" *Kinkel*, 857 N.E.2d at 264 (quoting *Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co.*, 408 N.E.2d 403, 410 (Ill. App. Ct. 1980)). Procedural unconscionability "refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power." *Razor*, 854 N.E.2d at 622.

In *Kinkel*, the Illinois Supreme Court held that a much earlier arbitration provision used by ATTM's predecessor, Cingular Wireless, implicated "a degree of procedural unconscionability" because it stated that "fee information" regarding arbitration was available "upon request" rather than specifying the actual cost to the customer to arbitrate the claim. 857 N.E.2d at 266. The court rejected the notion that Cingular's arbitration agreement could be

invalidated merely because it was part of a form contract—*i.e.*, that it was "nonnegotiable and presented in fine print in language that the average consumer might not fully understand." *Id.* As the court recognized, "[s]uch contracts * * * are a fact of modern life. Consumers routinely sign such agreements to obtain * * * products and services. It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable." *Id.* But "an additional fact particular to [*Kinkel*]" was that the contract did not inform the customer that she would be required to pay some of the costs of arbitration; the court described this fact as "a factor to be considered" in determining whether the clause was unconscionable. *Id.* By contrast, ATTM's current arbitration provision makes clear that ATTM pays ***all*** the costs of arbitration for non-frivolous consumer claims of $75,000 or less. Accordingly, unlike the provision at issue in *Kinkel*, the arbitration agreements between ATTM and the Illinois plaintiffs do not involve even "a degree" of procedural unconscionability. *Id.* Thus, because the Illinois plaintiffs cannot demonstrate the existence of either substantive or procedural unconscionability, they cannot establish that their arbitration agreements are unenforceable under Illinois law.

D. ATTM's Arbitration Agreement Is Enforceable Under Louisiana Law.

The Fifth Circuit has squarely held that an earlier arbitration agreement used by ATTM's predecessor, Cingular Wireless, is enforceable under Louisiana law. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004). *Iberia* forecloses any argument that Louisiana plaintiff Ryan Casey may make that ATTM's current—and far more pro-consumer—arbitration provision is unenforceable under Louisiana law.

As the Fifth Circuit noted in *Iberia*, Louisiana law does not "directly address[], in so many words, the doctrine of unconscionability." 379 F.3d at 167. Instead, under Louisiana law a contract may be invalidated if the plaintiff proves that it "possess[es] features of both adhesionary formation and unduly harsh substance" (*id.*), which are concerned (respectively)

with the circumstances of the contract's formation and its substantive fairness. Louisiana law squarely places the burden of proving unenforceability on the "party seeking to invalidate the contract." *Aguillard v. Auction Mgmt. Corp.*, 908 So. 2d 1, 10 (La. 2005). Here, Casey cannot establish that his arbitration agreement possesses either set of features, much less both.

1. ATTM's arbitration agreement is not unduly harsh under Louisiana law.

To begin with, Casey cannot prove that ATTM's arbitration agreement is so "unduly harsh" (*Iberia*, 379 F.3d at 167) or "unduly burdensome" (*LaFleur v. Law Offices of Anthony G. Buzbee, P.C.*, 960 So. 2d 105, 113 (La. App. Ct. 2007)) as to be unenforceable under Louisiana law.

Any argument that the agreement's requirement that arbitration be conducted on an individual basis renders it "unduly harsh" is foreclosed by *Iberia*, which upheld the prohibition of class arbitration in an earlier—and less pro-consumer—version of ATTM's (then Cingular's) arbitration provision. The Fifth Circuit observed that the Louisiana Unfair Trade Practices Act ("LUTPA") simultaneously ***authorizes*** the attorney general to seek "class" restitution "on behalf of the state and its consumers" for violations of that law (*Iberia*, 379 F.3d at 175 (citing La. Rev. Stat. Ann. § 51:1404(B), 1407, 1408, 1414)) and ***forbids*** individual plaintiffs from bringing such suits (*id.* at 174-75 (citing La. Rev. Stat. Ann. § 51:1409(A)). This fact, the Fifth Circuit explained, "significantly diminish[es any] argument that prohibiting class proceedings in consumer litigation is unconscionable under Louisiana law," even as to claims to which LUTPA's "prohibition does not apply." *Id.* at 175. Because the Louisiana legislature has concluded that a private plaintiff cannot bring a consumer class action in court under LUTPA ***at all***, the *Iberia* court concluded that Louisiana law permits consumers to agree to forgo class arbitration without "so oppress[ing] them as to rise to the level of unconscionability." *Id.* Accordingly, Casey's arbitration agreement is enforceable under Louisiana law.

Even if this Court were writing on a blank slate, however, any assertion that arbitration under ATTM's provision is "unduly harsh" would be meritless. As noted above, Casey would not have to pay anything to arbitrate his claims and can recover all the remedies available to him in a court of law. *See* page 4-5, *supra*. And because ATTM's provision allows him to proceed by telephone hearings or arbitration by mail, he can arbitrate without leaving his home should he so choose. *Id.* In addition, he may recover a minimum of $10,000, plus double attorneys' fees, if the arbitrator awards him more than the amount of ATTM's last settlement offer. *Id.* Accordingly, there is nothing unduly harsh or burdensome about requiring Casey to arbitrate on an individual basis.

2. ATTM's arbitration agreement is not adhesionary in form under Louisiana law.

Moreover, the manner in which Casey agreed to arbitrate disputes was not adhesionary under Louisiana law. ATTM's arbitration provision may be part of a form contract, but the Louisiana Supreme Court has emphasized that "not every contract in a standard form may be regarded as a contract of adhesion," as that term is understood in Louisiana law. *Aguillard*, 908 So. 2d at 9 (internal quotation marks omitted). To the contrary, "the real issue in a contract of adhesion analysis is not the standard form of the contract, but rather whether a party truly consented to all the written terms." *Id*. at 10. As the court has explained, this inquiry looks to three factors: (a) whether the contract is a standard form, (b) whether the contract obscures the challenged term with "unreasonably small" print, and (c) whether the term was negotiable or part of a transaction that the plaintiff could have "refused to participate in." *Id.* at 10, 13, 16-17. In light of these factors, Casey cannot establish an invalid contract of adhesion.

First, a state-of-the-art iPhone 3G and wireless service are not so "necessary" that Casey was "compelled to enter" into his arbitration agreement. *Aguillard*, 908 So. 2d at 17. As the Fifth Circuit has explained, under Louisiana law "'a party who signs a written agreement is

presumed to know its contents,'" and if a consumer wishes to avoid a term contained within such an agreement, he or she can do so "'by simply not signing the agreement.'" *Brown v. Pacific Life Insurance Co.*, 462 F.3d 384, 397 (5th Cir. 2006) (quoting *Aguillard*, 908 So. 2d at 17). Just as in *Brown*, Casey was "not forced to agree to the terms of [the arbitration agreement]" because he "could have avoided arbitration by not engaging [ATTM]'s services." 462 F.3d at 397-98. At the time Casey entered into his ATTM service agreement, at least three wireless carriers provided service without requiring that disputes be arbitrated on an individual basis. Pianka Decl. ¶¶ 6-9 & Exs. 4-9. Or Casey could have forgone wireless service altogether. *See, e.g.*, *Halprin v. Verizon Wireless Servs., LLC*, 2008 WL 961239, at *7 (D.N.J. Apr. 8, 2008) (plaintiff "could have chosen not to obtain a cell phone" because wireless phone service "hardly constitutes" necessity).

Second, Casey cannot claim that he was duped into agreeing to arbitrate. ATTM's arbitration provision was not obscured by the use of print that is "unreasonably small," or indeed any smaller than "the other clauses in the standard form contract." *Aguillard*, 908 So. 2d at 16. Not only is ATTM's arbitration provision in the same size font as the rest of the contract, that provision is highlighted in the first paragraph of ATTM's Terms of Service, which states: "**This Agreement requires the use of arbitration to resolve disputes** * * *." Rives Decl. Ex. 1 at 1 (emphasis in original). As the Fifth Circuit observed in rejecting a challenge to the manner in which an earlier version of ATTM's arbitration provision was presented, that provision was "the only provision given such prominent billing." *Iberia*, 379 F.3d at 172 n.14. Moreover, Casey signed his name on an electronic signature-capture device in an ATTM store under an acknowledgment that he had been presented with and agreed to ATTM's Terms of Service. Mahone-Gonzalez Decl. Ex. 11; Menendez Decl. ¶¶ 3-4. Casey's arbitration agreement is thus not adhesionary in form and fully enforceable for this reason alone. *See Iberia*, 379 F.3d at 167.

In sum, ATTM's arbitration agreement is fully enforceable under Louisiana law. Just as in *Brown*, "[t]here is nothing exceptional or burdensome about [the arbitration provision], and there is [therefore] no reason to believe that the [plaintiffs] did not knowingly and willingly accept [its] terms." 462 F.3d at 398.

E. ATTM's Arbitration Agreement Is Enforceable Under Michigan Law.

Two federal judges in Michigan have squarely rejected unconscionability challenges to ATTM's 2006 arbitration provision, the immediate predecessor to the 2009 arbitration clause that governs Michigan plaintiff Baxter. *See Moffat v. Cingular Ameritech Mobile Commc'ns, Inc.*, 2010 WL 451033, at *2 (E.D. Mich. Feb. 5, 2010); *Francis v. AT&T Mobility LLC*, 2009 WL 416063, at *2, *10 (E.D. Mich. Feb. 18, 2009).[12] This Court should likewise enforce Baxter's arbitration agreement.

Under Michigan law, the party asserting that a contract is unconscionable must prove that "both procedural and substantive unconscionability [are] present." *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 474 (Mich. Ct. App. 2005). To establish substantive unconscionability, the party must show that "the inequity of the [challenged] term is so extreme as to shock the conscience"—it is not enough merely to show that the term appears "foolish for one party and very advantageous to the other." *Id.* at 475. To establish procedural unconscionability, the party must show that he or she had "no realistic alternative to acceptance of the term." *Id.* at 474. Under these standards, Baxter cannot establish either substantive or procedural unconscionability—much less both.

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[12] The 2006 provision at issue in *Moffat* and *Francis* provided for a minimum award of $5,000 and double attorneys' fees if the arbitrator awarded a customer more than ATTM's last settlement offer. *See Moffat*, 2010 WL 451033, at *1; *Francis*, 2009 WL 416063, at *2. ATTM's current provision provides Baxter with a potential minimum recovery of $10,000, plus double attorneys' fees. *See* pages 4-5 & n.2, *supra*.

1. ATTM's arbitration agreement is not substantively unconscionable under Michigan law.

Baxter cannot show that ATTM's arbitration provision imposes an "inequity" that "is so extreme as to shock the conscience." *Clark*, 706 N.W.2d at 475. On the contrary, far from being "inequitable," ATTM's provision has many consumer-friendly provisions. As detailed above, ATTM's arbitration agreement provides Baxter with cost-free, close-to-home arbitration in which he enjoys greater remedies than he could receive in court—including a potential minimum recovery of $10,000, plus double attorney's fees. *See* pages 4-5, *supra*. Moreover, Baxter likely would not need to arbitrate at all in order to obtain relief. Because ATTM must pay the significant costs of arbitration and potentially $10,000, plus double attorneys' fees, if it loses in arbitration, it has a strong incentive to settle the dispute to Baxter's satisfaction before arbitration commences.[13] As the *Francis* court noted, by encouraging ATTM to make generous settlement offers, ATTM's provision serves "the goal of informally resolving * * * disputes before they reach arbitration." 2009 WL 416063, at *9. Arbitration under these terms simply cannot be said to be so "inequitable" as to "shock the conscience."

Unsurprisingly, federal courts in Michigan have rejected the argument that ATTM's arbitration agreement is substantively unconscionable merely because it requires arbitration on an individual basis. In *Francis*, the court observed that the potential premium recovery—there, $5,000, plus double attorneys' fees—"provides a significant incentive for" an individual customer to pursue his or her claim in arbitration. 2009 WL 416063, at *7. In light of these incentives, the court held that the plaintiff could not "demonstrate that the AT&T class action waiver is substantively unconscionable" because it was not "so extreme as to shock the

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13 If a customer selects an in-person hearing, ATTM must pay at least $1,725 in arbitration costs: $775 in administrative fees, a $200 case service fee, and $750 in arbitrator fees. *See* Pianka Decl. Ex. 1 § C-8. The amount could well be higher than this minimum because of the requirement in the arbitration provision that arbitrators produce a reasoned written opinion.

conscience." *Id*. at *9.

Similarly, the court in *Moffat* upheld ATTM's arbitration provision because the $5,000 potential recovery "exceeds the value in time and energy required to arbitrate [the plaintiff's] claims," noting that if the plaintiff "request[ed] a desk review of her claims," that would "decreas[e] the time and energy involved." 2010 WL 451033, at *2. The court observed that the potential for double attorneys' fees under ATTM's provision ensures that "effective legal representation is not foreclosed." *Id.* And even if a customer is not entitled to double attorneys' fees because he or she cannot best ATTM's settlement offer in arbitration, the arbitrator may still award statutory attorneys' fees whenever they are available under applicable law. *See* page 5 & n.1, *supra*.

Francis and *Moffat* are not the only decisions by courts in Michigan to have enforced agreements to arbitrate on an individual basis. Indeed, federal judges have twice upheld such agreements even though they were far less favorable to consumers than ATTM's arbitration provision. In one of those cases, the court upheld an arbitration provision under which the plaintiff would have been responsible for paying up to $125 or $250 (depending on the arbitration provider) if the arbitration hearing had exceeded one day. *Copeland v. Katz*, 2005 WL 3163296, at *3-*4 (E.D. Mich. Nov. 28, 2005). In the other, the court rejected an unconscionability challenge to an arbitration agreement under which customers were generally responsible for paying "well in excess of $250" in arbitration fees (though the fees could be waived under certain circumstances). *Adler v. Dell*, 2008 WL 5351042, at *8 (E.D. Mich. Dec. 18, 2008). By contrast, Baxter will not be required to pay any of the costs of arbitration unless the arbitrator determines that his claims are frivolous—in which case the fees would be capped at $125. Rives Decl. Ex. 4 at 16-17; Pianka Decl. Ex. 1 at § C-8. And neither of the provisions in *Copeland* and *Adler* provided for the types of affirmative incentives to pursue arbitration that are

the hallmark of ATTM's arbitration clause.[14]

Accordingly, Baxter's arbitration provision is not substantively unconscionable. That alone suffices for this Court to reject any unconscionability challenge to Baxter's arbitration agreement. *See Moffat*, 2010 WL 451033, at *2 ("The Court need not resolve [the question of procedural unconscionability] as it finds that Plaintiff cannot establish substantive unconscionability under the terms of the revised arbitration provision.").

2. ATTM's arbitration agreement is not procedurally unconscionable under Michigan law.

Even if this Court were to find Baxter's arbitration agreement to be substantively unconscionable, he cannot establish the requisite procedural unconscionability. It is not enough under Michigan law for Baxter simply to allege that the arbitration provision is part of a standardized contract. "[C]ourts routinely have rejected a finding of procedural unconscionability on the grounds that a plaintiff was presented with a preprinted, form contract rather than engaging in a clause-by-clause negotiation of an agreement." *Pichey v. Ameritech Interactive Media Servs., Inc.*, 421 F. Supp. 2d 1038, 1046-49 (W.D. Mich. 2006) (citing cases); *see also UPF, Inc. v. Motoman, Inc.*, 2006 WL 1195825 (E.D. Mich. May 2, 2006) (enforcing an arbitration clause first presented to the purchaser as boilerplate text on the back of an invoice). Rather, to establish procedural unconscionability, Baxter must show that ATTM was the "sole

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[14] In two cases, federal courts in Michigan have refused to enforce agreements to arbitrate on an individual basis. Each of those cases is distinguishable. Unlike ATTM's arbitration provision, the provision in *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000), imposed substantial costs on the plaintiffs and prohibited declaratory or injunctive relief. And in *Wong v. T-Mobile USA, Inc.*, 2006 WL 2042512 (E.D. Mich. July 20, 2006)—in which the court made clear that its analysis focused on "the facts of this case" (*id.* at *5)—the provision precluded consumers from recovering attorneys' fees or consequential or statutory damages (in addition to requiring consumers to pay some of their own arbitration fees). *See* Pl.'s Resp. in Opp'n to Mot. to Compel Arbitration at 4-5, *Wong*, 2006 WL 655345 (No. 05-73922, Dkt. No. 17). By contrast, ATTM's arbitration provision imposes no such limitations. *See Moffat*, 2010 WL 451033, at *2 (distinguishing earlier ATTM arbitration provision from the provision in *Wong*).

provider[]" of the wireless service she sought, that providers that did not require customers to agree to bilateral arbitration were not a "realistic alternative" to ATTM service, or that ATTM possessed "monopolistic power" of the sort that allowed it to coerce adherence to its arbitration provision. *Pichey*, 421 F. Supp. 2d at 1049 (citing *Allen v. Michigan Bell Tel. Co.*, 171 N.W.2d 689, 694 (Mich. Ct. App. 1969)).

ATTM, however, is not a monopolistic provider of a unique service; Baxter had alternative sources of wireless service available to him. *See* Pianka Decl. ¶¶ 6-9 & Exs. 4-9. Accordingly, Baxter cannot meet his burden of demonstrating that he lacked a reasonable alternative to agreeing to ATTM's arbitration agreement, and thus cannot prove procedural unconscionability. *See Pack v. Damon Corp.*, 320 F. Supp. 2d 545, 556 (E.D. Mich. 2004) (finding no procedural unconscionability because "Plaintiff has not shown that [Defendant] was his only source for buying a new motor home, or that other potential sources required submitting disputes to arbitration"), *rev'd in part on other grounds*, 434 F.3d 810 (6th Cir. 2006); *see also Adler*, 2008 WL 5351042, at *9 ("Adler's claim of procedural unconscionability fails because he cannot show that he lacked choices other than the Dell computer he purchased.); *Copeland*, 2005 WL 3163296, at *2 ("Plaintiff has failed to demonstrate that he could not have obtained a vehicle from another seller who would not have required Plaintiff to sign an arbitration agreement."); *Pichey*, 421 F. Supp. 2d at 1047 (limitation-of-liability clause was not procedurally unconscionable because it was "undisputed that the internet hosting and web design services * * * were available from many sources"); *Clark*, 706 N.W.2d at 475 ("plaintiff did not present any evidence that he had no realistic alternative to employment with defendant"); *Dean v. Haman*, 2006 WL 1330325, at *2 (Mich. Ct. App. May 16, 2006) ("plaintiffs have failed to present any evidence that they lacked a reasonable alternative to inspection of the house by

Buyer's Home").[15]

F. ATTM's Arbitration Agreement Is Enforceable Under Minnesota Law.

Under Minnesota law, courts may refuse to enforce a contract if it is an invalid "contract of adhesion" or if it is unconscionable. *Siebert v. Amateur Athletic Union*, 422 F. Supp. 2d 1033, 1040-41 (D. Minn. 2006). As we explain, any such challenges to ATTM's consumer-friendly arbitration provision under Minnesota law must fail.

1. ATTM's arbitration agreement is not unconscionable under Minnesota law.

Under Minnesota law, "[a] contract is unconscionable if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" *Vierkant v. AMCO Ins. Co.*, 543 N.W.2d 117, 120 (Minn. Ct. App. 1996) (quoting *In re Estate of Hoffbeck,* 415 N.W.2d 447, 449 (Minn. Ct. App. 1987)). *See also Wold v. Dell Fin. Servs., L.P.*, 598 F. Supp. 2d 984, 988 (D. Minn. 2009) ("a contract is unconscionable if no clear-thinking person would make it, or if no such person would accept it") (citing *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 502 (Minn. Ct. App. 1999)). Minnesota plaintiff Kyle Irving cannot satisfy this stringent standard. To begin with, "the fact that arbitration agreements are preferred as a matter of national policy creates a presumption that they are generally reasonable as a matter of contract law." *Wold*, 598 F. Supp. 2d at 988 (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006)). No

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[15] We acknowledge that in *Francis*, the court held that the plaintiff's arbitration agreement was procedurally unconscionable because, in its view, the alternative wireless providers that did not require arbitration were not "comparable cell phone services" because their coverage areas were not as broad as ATTM's. 2009 WL 416063, at *6. ATTM respectfully disagrees with the implicit notion that a "realistic alternative" must be an exact substitute. Rather, the proper inquiry is whether ATTM had such "monopolistic power" as to preclude a "realistic alternative." *Pichey*, 421 F. Supp. 2d at 1049. In any event—just as the *Francis* court itself recognized—because Baxter cannot prove substantive unconscionability, his agreement is enforceable even if the Court finds that some degree of procedural unconscionability is present. *See Francis*, 2009 WL 416063, at *10; *Moffat*, 2010 WL 451033, at *2.

Minnesota court appears to have held any arbitration agreement unconscionable. To the contrary, courts in Minnesota have enforced arbitration agreements that are far less consumer-friendly than ATTM's. For example, in *Siebert* the court upheld the arbitration provision at issue even though it did not permit the plaintiff to seek punitive damages and required arbitration in the state of Florida far from the plaintiff's Minnesota home. 422 F. Supp. 2d at 1043-44. ATTM's provision, by contrast, imposes no limitations on recovery, and permits arbitration close to the customer's home, by phone, or on the papers. *See* pages 4-5, *supra*. And in *Chiafos v. Restaurant Depot, LLC*, 2009 WL 2778077, at *3 (D. Minn. Aug. 28, 2009), the court upheld an arbitration agreement in an employment contract that allowed the arbitrator to require the employee to pay half of the arbitration costs and required the employee to commence arbitration within one year of the event giving rise to the dispute, regardless of whether a longer statute of limitations would apply in court. ATTM's provision generally allows customers with modest claims to arbitrate at no cost, and does not require a customer to commence arbitration sooner than he or she would have to bring a claim in court. Given that such arbitration provisions are enforceable under Minnesota law, along with the many reasons why a consumer might prefer bilateral arbitration under ATTM's incentive-laden arbitration provision to a class action, ATTM's arbitration agreement cannot reasonably be characterized as one that "no man in his senses and not under delusion would make." *Vierkant*, 543 N.W.2d at 120 (internal quotation marks omitted). Accordingly, ATTM's arbitration provision is not unconscionable under Minnesota law.

2. ATTM's arbitration agreement is not an invalid contract of adhesion under Minnesota law.

Nor is ATTM's arbitration agreement an invalid "contract of adhesion" under Minnesota law. As courts in Minnesota have explained, an invalid contract of adhesion is one "which 'is drafted unilaterally by a business enterprise and forced upon an unwilling or unknowing public

for services that cannot readily be obtained elsewhere.'" *Siebert*, 422 F. Supp. 2d at 1040 (quoting *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn. 1982)). "In determining whether an arbitration clause is an invalid contract of adhesion, a court should 'examine the sophistication of the parties, the circumstances surrounding the execution of the agreement, and the burden arbitration places on the complaining party.'" *Chiafos*, 2009 WL 2778077, at *5 (quoting *Ottman v. Fadden,* 575 N.W.2d 593, 597 (Minn. Ct. App. 1998)). "No one factor is dispositive"; rather, courts "weigh all of the factors." *Id.* (citing *Ottman*, 575 N.W.2d at 597); *see also Lindsley v. DaimlerChrysler Fin. Servs. Am. LLC,* 2009 WL 383616, at *2 (D. Minn. Feb. 11, 2009).

Here, Irving cannot make that showing. Mr. Irving, who receives service on an account opened in the name of Michelle Irving, cannot show that ATTM's arbitration agreement was foisted upon Ms. Irving unwillingly or unknowingly. *Siebert*, 422 F. Supp. 2d at 1040. According to ATTM's records, Ms. Irving accepted ATTM's Terms and Conditions when she entered into a new wireless service agreement with the purchase of an iPhone. *See* Mahone-Gonzalez Decl. ¶¶ 17-18 & Exs. 27-29.

Nor can Irving show that ATTM's provision "is imposed on the public for *necessary* service." *Heath v. Travelers Co.*, 2009 WL 1921661, *5 (D. Minn. July 1, 2009) (quoting *Schlobohm*, 326 N.W.2d at 924) (emphasis in original). Under Minnesota law, a contract provision cannot be deemed an invalid contract of adhesion unless the party resisting enforcement shows that the term is part of a "a contract for a public necessity." *Lindsley*, 2009 WL 383616, at *2 (holding that "a contract for the financing of the purchase of a motor vehicle is not a contract for a public necessity"). Even when a contract concerned a "desirable, even *unique*" youth basketball program, "that [did] not make it a 'necessity' within the contemplation of the adhesion-contract rule." *Seibert*, 422 F. Supp. 2d at 1041 (emphasis added).

Wireless telephone service—and *a fortiori* service for a specific top-of-the line wireless telephone model such as the iPhone 3G or 3GS—is not a "necessary" service. Moreover, other wireless providers offer cell phones with cameras, music players, and email and Internet access without requiring customers to agree to arbitrate on an individual basis. *See* Pianka Decl. ¶¶6-14 & Exs. 4-14. Thus, ATTM's arbitration agreement is not an invalid contract of adhesion under Minnesota law.

G. ATTM's Arbitration Agreement Is Enforceable Under Mississippi Law.

The Mississippi Supreme Court "has consistently recognized the existence of a liberal federal policy favoring arbitration agreements" (*Terminix Int'l, Inc. v. Rice*, 904 So. 2d 1051, 1054 (Miss. 2004) (internal quotation marks omitted)), and has itself "adopted this preference for arbitration" (*E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002)). As that court has explained, "[a]rbitration is firmly embedded in both our federal and state laws." *EquiFirst Corp. v. Jackson*, 920 So. 2d 458, 461 (Miss. 2006) (en banc). As with any other contractual provision, a party seeking to avoid enforcement of an arbitration provision on the ground of unconscionability must prove both procedural and substantive unconscionability, "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *Id.* at 516-17 (internal quotation marks omitted). Neither showing can be made here, especially given that class actions are unavailable in Mississippi state courts.

1. ATTM's arbtiration provision is not substantively unconscionable under Mississippi law.

Under Mississippi law, a substantively unconscionable contract is one that "no man in his senses and not under a delusion would make on the one hand, and * * * no honest and fair man would accept on the other." *Norwest Fin. Miss., Inc. v. McDonald*, 905 So. 2d 1187, 1193 (Miss. 2005) (internal quotation marks omitted). It must involve terms that are "unreasonably

favorable" to one party and "oppressive" to the other. *Cleveland v. Mann*, 942 So. 2d 108, 114 (Miss. 2006) (en banc); *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002) (en banc).

ATTM's arbitration provision does not fit this description. That is particularly so because Mississippi ***does not allow class actions in its state courts***. As the Mississippi Supreme Court has explained, "[w]hen the Mississippi Rules of Civil Procedure were adopted, Rule 23, Class Actions, was intentionally, not accidentally, omitted. * * * Mississippi does not permit class actions, even equitable class actions in chancery court." *Am. Bankers Ins. Co. v. Booth*, 830 So. 2d 1205, 1214 (Miss. 2002) (en banc); *see also, e.g.*, *USF&G Ins. Co. v. Walls*, 911 So. 2d 463, 467 (Miss. 2005) (en banc) ("[T]here is no rule or statute which expressly or impliedly provides for class actions * * * [and] they are not permitted in any legal proceedings in our state courts."); Miss. R. Civ. P. 23 cmt. (declining to introduce class-action practice in state courts in light of the "widespread criticism" of and "dissatisfaction" with the federal rule and the lack of "meaningful reforms * * * to render class action practice a more manageable tool").

In light of Mississippi's considered determination to preclude class actions in state court, it can hardly be said that it is "oppressive" or "unreasonably favorable" to ATTM to require that arbitration take place on an individual rather than class-wide basis. Moreover, we are unaware of any case holding that an arbitration agreement is unconscionable under Mississippi law for that reason. By contrast, the Mississippi Supreme Court has upheld at least two consumer arbitration agreements that required arbitration to be conducted on an individual basis, albeit without discussing whether the unavailability of class actions renders such an agreement unconscionable. *EquiFirst Corp.*, 920 So. 2d at 461, 464-65; *Norwest Fin.*, 905 So. 2d at 1190, 1196. Reviewing the full body of Mississippi case law, federal courts applying Mississippi law have consistently concluded that agreements to arbitrate on an individual basis are not

unconscionable. *E.g.*, *In re Jamster*, 2008 WL 4858506, at *5 ("the class action waiver contained within the [T-Mobile] arbitration provision is not unconscionable under Mississippi law"); *Steed v. Sanderson Farms, Inc.*, 2006 WL 2844546, at *10 (S.D. Miss. Sept. 29, 2006) ("the court does not find * * * unconscionable" a provision forbidding "multi-party arbitration" because "courts generally uphold waivers of class actions in arbitration agreements, even in the context of an adhesion contract and even where the right to proceed by class action derives from statute"). Accordingly, any argument that ATTM's arbitration provision is substantively unconscionable under Mississippi law would be meritless.

2. ATTM's arbitration agreement is not procedurally unconscionable under Mississippi law.

Under Mississippi law, there are two "indicators of procedural unconscionability * * *: (1) lack of voluntariness and (2) lack of knowledge." *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998); *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 458 (5th Cir. 2005). ATTM's arbitration agreement does not implicate either consideration.

"A lack of knowledge is demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and lack of opportunity to study the contract and inquire about contract terms." *Norwest Fin.*, 905 So. 2d at 1193 (quoting *Entergy*, 726 So. 2d at 1207). ATTM's arbitration provision is written in plain language and is at least as conspicuous as the other terms and conditions in the service agreement. *See* Rives Decl. Ex. 4 at 15-19; White Decl. Ex. 1. Moreover, as a matter of Mississippi law, plaintiffs "are charged with knowledge of the documents they execute." *Norwest Fin.*, 905 So. 2d at 1194; *Russell*, 826 So. 2d at 726. For example, they cannot avoid their obligation to arbitrate merely by alleging that they were "unsophisticated consumers with limited means and limited education" or that company representatives did not "explain what arbitration was." *Norwest Fin.*, 905 So. 2d at 1193-94.

Even the "inability to read does not render a person incapable of possessing adequate knowledge of the arbitration agreement he or she signed." *Cleveland*, 942 So. 2d at 114; *accord EquiFirst Corp.*, 920 So. 2d at 463-64; *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264-65 (5th Cir. 2004) (applying Mississippi law). Thus, Mississippi plaintiff Jackson cannot demonstrate the "lack of knowledge" requisite to a finding of procedural unconscionability. *See, e.g.*, *Steed*, 2006 WL 2844546, at *8 (rejecting procedural unconscionability argument where arbitration provision was "written in the same size and type font as the rest of the" agreement); *Pac. Life Ins. Co. v. Heath*, 370 F. Supp. 2d 539, 545 (S.D. Miss. 2005) (rejecting procedural unconscionability argument where agreement "state[d] just above the signature line that 'I (we) understand and agree to the terms and conditions * * * located on the back of this application [,]' [t]he arbitration agreement [was] located on the back of the application [and the] arbitration provision [was] not obscured by inconspicuous print").

Nor could she demonstrate a lack of voluntariness. "A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all." *Norwest Fin.*, 905 So. 2d at 1193 (quoting *Entergy*, 726 So. 2d at 1207). As explained above, Jackson could have acquired comparable wireless service from other providers without agreeing to bilateral arbitration. *See* page 30, *supra*. Moreover, under Mississippi law there is no procedural unconscionability if the party challenging the agreement "could * * * do without" the goods or services at issue. *Norwest Fin.*, 905 So. 2d at 1195. Because wireless phone service—and *a fortiori* a specific model such as the iPhone 3G or 3GS—is not a necessity of life, Jackson also had the option of "refrain[ing] from contracting at all." *Id.* at 1193; *Steed*, 2006 WL 2844546, at *7 (plaintiffs "had a choice as

to whether to become poultry growers"). This is not a case in which the company was the "sole supplier of electricity in the area" (*Entergy*, 726 So. 2d at 1208), or where the plaintiff had to choose between signing an arbitration agreement and "forgoing necessary medical treatment" in an exigent situation (*Cleveland*, 942 So. 2d at 116). In short, Jackson can establish neither of the considerations for procedural unconscionability under Mississippi law.

H. ATTM's Arbitration Agreement Is Enforceable Under Missouri Law.

The Eighth Circuit and federal district courts in Missouri have repeatedly upheld agreements to arbitrate on an individual basis. Under those cases, Missouri plaintiff Paige Lierman cannot avoid enforcement of her arbitration agreement.

As the Eighth Circuit has explained, under Missouri law, a party seeking to avoid arbitration on grounds of unconscionability must prove that the agreement is "both procedurally and substantively unconscionable." *Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. 2009). Procedural unconscionability involves an "examination of contract formation" in order to determine whether "the process" was unconscionable. *Id.* A contract is substantively unconscionable when it is one that "no man in his senses and not under delusion would make, on the one hand, and [that] no honest and fair man would accept on the other," or one where there is "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." *Id.* (internal quotation marks omitted). Lierman cannot establish either element.

1. ATTM's arbitration agreement is not substantively unconscionable under Missouri law.

The Eighth Circuit has twice squarely rejected the contention that, standing alone, a requirement that arbitration be conducted on an individual basis can be substantively unconscionable under Missouri law. *See Cicle*, 583 F.3d at 555-56; *Pleasants v. Am. Express Co.*, 541 F.3d 853, 858-59 (8th Cir. 2008).

In *Pleasants*, a consumer "argue[d] that under Missouri law, the class-action waiver contained in the arbitration clause [in her cardholder agreement] is unconscionable and thus unenforceable." 541 F.3d at 857. The Eighth Circuit noted that the "clause in this case does not limit [the consumer's] remedies" in bilateral arbitration: She "may recover attorney's fees, costs, statutory damages (up to $2,000), and actual damages." *Id.* at 858. Because the consumer's "total recovery" could "exceed the costs of pursuing her claim," the court held that "[e]nforcing the agreement under the circumstances of this case, therefore, does not lead to an unconscionable result." *Id.* at 859.

Similarly, in *Cicle*, a consumer asserted that a provision requiring bilateral arbitration in her credit card agreement was unconscionable because it left her with "no effective remedy" for her $80 claim. 583 F.3d at 555. The district court had agreed and "found the class-action waiver" to be "unconscionable." *Id.* at 553. The Eighth Circuit reversed and upheld the arbitration agreement. The court first observed that an exception to the agreement permitted the consumer to sue in small claims court. That alternative, the court explained, provided her with "a relatively inexpensive, quick, and easy adjudication" that is "specifically designed for claims like hers." *Id.* at 555. The court also noted that the defendant had offered to "reimburse [her] up to $500 for the initial arbitration filing fee" and for "two days of hearings" and that "the arbitration agreement makes no attempt to limit" the "punitive damages, attorney's fees, and equitable relief" available under Missouri law. *Id.* at 556. These features, the court held, "save [the arbitration clause] from being unconscionable on its face" and made it "err[or] [to] sever[] the class-action waiver from the agreement to arbitrate." *Id.*

ATTM's current arbitration agreement is even more favorable to the consumer than the arbitration provisions upheld in *Pleasants* and *Cicle*. It also is more pro-consumer than the arbitration provisions that other federal judges in Missouri have upheld against unconscionability

challenges. *See Bass v. Carmax Auto Superstores, Inc.*, 2008 WL 2705506, at *3 (W.D. Mo. July 9, 2008) (enforcing agreement to arbitrate on individual basis because the plaintiff would pay no costs, the agreement placed no limits on remedies, and small claims court was available in lieu of arbitration); *Kates v. Chad Franklin Nat'l Auto Sales N., LLC*, 2008 WL 5145942, at *5 (W.D. Mo. Dec. 1, 2008) (agreements to arbitrate on an individual basis are not unconscionable "absent limitations on the remedies available to claimants"); *Guitierrez v. State Line Nissan, Inc.*, 2008 WL 3155896, at *3 (W.D. Mo. Aug. 4, 2008) (same). As in those cases, under ATTM's provision customers may obtain the same individual remedies that they could obtain in court. *See* pages 4-5, *supra.* They may also arbitrate their claims for free. *Id*. And, if they choose, they may bring a claim in small claims court as an alternative to arbitration. *Id.* Moreover—going far beyond the provisions upheld in *Cicle, Pleasants*, *Bass*, *Kates*, and *Guitierrez*—ATTM's provision gives customers an affirmative incentive to arbitrate their claims on an individual basis by guaranteeing a recovery of $10,000, plus double attorneys' fees, if the arbitrator awards more than ATTM's last settlement offer. *Id.* Especially because Lierman would not enjoy these expanded remedies in court, it would be baseless for her to contend that she would have had to be "under delusion" to agree to ATTM's provision.

Plaintiffs may cite *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005), in which the Missouri Court of Appeals held that Alltel's arbitration agreement was unconscionable. But *Whitney* identified a number of features of Alltel's provision—beyond the prohibition of class arbitration—that impeded the ability of customers to pursue their claims. In particular, *Whitney* disapproved of Alltel's arbitration provision because that provision imposed "prohibitively expensive" costs of arbitration and deprived the arbitrator of the "power or authority" to award attorneys' fees and incidental, consequential, punitive, or exemplary damages. *Id.* at 304 & n.3, 311. In so holding, the *Whitney* court specifically distinguished the

Fifth Circuit's decision in *Iberia*—which had upheld an earlier version of ATTM's arbitration provision—on the ground that "the record established that the plaintiff's rights could be vindicated through arbitration under the contractual provisions and factual circumstances involved in that case." *Id.* at 313 & n.10 (citing *Iberia*, 379 F.3d at 174-75).

Indeed, any notion that *Whitney* broadly precludes agreements to arbitrate on an individual basis has been rejected by the Eighth Circuit in *Pleasants* and *Cicle*. As the *Pleasants* court explained, "[t]he court in *Whitney* relied heavily on the concern that because the arbitration clause [at issue in that case] prohibited an award of attorney's fees or 'any incidental, consequential, punitive, or exemplary damages,'" the costs of arbitrating on an individual basis would likely exceed any recovery that could be gained. 541 F.3d at 858 (quoting *Whitney*, 173 S.W.3d at 313); *see also Cicle*, 583 F.3d at 556. That concern is absent when an arbitration provision "does not limit [the plaintiff's] remedies" or impose excessive costs, and accordingly under such circumstances a "class-action waiver is not substantively unconscionable" under Missouri law. *Pleasants*, 541 F.3d at 858-59; *see also Cicle*, 583 F.3d at 556.[16] Because ATTM's arbitration agreement does not share these defects, ATTM's arbitration agreement is

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[16] The Eighth Circuit also has rejected the contention that *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. Ct. App. 2008), establishes a *per se* rule against class action waivers in arbitration provisions, when the *Cicle* court denied a petition for rehearing based on that case (which had been decided almost ten months before *Cicle*). *See* Pet. for Reh'g or Reh'g *En Banc* at 1, *Cicle v. Chase Bank USA, N.A.*, No. 08-1362 (8th Cir.) (filed Oct. 20, 2009) (attached as Exhibit B); Order Denying Rehearing at 1, *Cicle v. Chase Bank USA, N.A.*, No. 08-1362 (8th Cir. Nov. 23, 2009) (attached as Exhibit C). Since *Cicle* and *Pleasants* were decided, the Missouri Court of Appeals has held that arbitration agreements requiring arbitration on an individual basis were unconscionable in *Brewer v. Missouri Title Loans, Inc.*, 2009 WL 4639899 (Mo. Ct. App. Dec. 8, 2009), *Ruhl v. Lee's Summit Honda*, 2009 WL 3571309 (Mo. Ct. App. Nov. 3, 2009), and *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556 (Mo. Ct. App. 2009). But the Missouri Supreme Court vacated *Brewer* and *Ruhl* by granting review of those decisions on March 2, 2010. *See Ruhl v. Lee's Summit Honda*, No. SC90601 (Mo. March 2, 2010); *Brewer v. Missouri Title Loan, Inc.*, No. SC90647 (Mo. March. 2, 2010). And *Shaffer* is just like the Missouri decisions distinguished in *Cicle* and *Pleasants*: it too addressed a situation in which "the expense of pursuing a claim in individual arbitration far exceed[ed] the * * * potential damages available" to the plaintiff. *Id.* at 560. By contrast, ATTM's arbitration clause provides for cost-free arbitration and offers the potential for a substantial recovery of $10,000 plus double attorneys' fees if a customer receives an award greater than ATTM's last settlement offer.

not substantively unconscionable under Missouri law, and any unconscionability challenge would fail on that ground alone.

2. ATTM's arbitration agreement is not procedurally unconscionable under Missouri law.

Lierman also cannot demonstrate that the manner in which she accepted her arbitration agreement was procedurally unconscionable. ATTM's arbitration provision may have been part of a form contract. But as the Eighth Circuit has explained, "[t]hese sorts of take-it-or-leave-it agreements between businesses and consumers are used all the time in today's business world," and "[i]f they were all deemed to be unconscionable and unenforceable contracts of adhesion, or if individual negotiation were required to make them enforceable, much of commerce would screech to a halt." *Cicle*, 583 F.3d at 555. "Because the bulk of contracts signed in this country are form contracts," "any rule automatically invalidating adhesion contracts" would be "completely unworkable." *Id.* (internal quotation marks omitted).

Finally, there is no basis for Lierman to assert that she was coerced into agreeing to ATTM's arbitration provision. She was not "obligated to execute the contract" with ATTM. *Bass*, 2008 WL 2705506, at *2; *see also Guitierrez*, 2008 WL 3155896, at *4 (no procedural unconscionability because plaintiffs could have financed car purchase elsewhere); *Spalding v. Bally Total Fitness Corp.*, 2005 WL 2138239, at *4 (W.D. Mo. Sept. 1, 2005) (plaintiff "was not obligated to execute the contract" because he could have joined another "fitness center[]"). To the contrary, at the time that Lierman accepted her contract, at least one major nationwide cellular phone provider did not include an arbitration clause in its customer agreements, and at least two others permitted customers to opt out of arbitration. *See* Pianka Decl. ¶¶ 6-9 & Exs. 4-9. Moreover, a state-of-the-art iPhone "hardly qualifies as a necessity of life the importance of which is so great that one must have it regardless of the terms upon which it is offered." *Spalding*, 2005 WL 2138239, at *4.

In sum, Lierman cannot demonstrate procedural unconscionability. For that independent reason, any challenge to her arbitration agreement must fail.

I. ATTM's Arbitration Agreement Is Enforceable Under New York Law.

It is well established that agreements to arbitrate on an individual basis are fully enforceable in New York. Under New York law, a party claiming that a contractual term is unconscionable must show that "no reasonable and competent person would accept [its] terms, which are so inequitable as to shock the conscience." *La Salle Bank Nat'l Ass'n v. Kosarovich*, 820 N.Y.S.2d 144, 146 (App. Div. 2006) (internal quotation marks omitted); *see also Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988) (contract must be "'grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place'") (quoting *Mandel v. Liebman*, 100 N.E.2d 149, 152 (N.Y. 1951)). In particular, to avoid enforcement of an arbitration agreement, the party resisting arbitration has the burden of proving that the agreement "was ***both*** procedurally and substantively unconscionable when made"—that is, that there was an "absence of meaningful choice" on his or her part "together with contract terms which are unreasonably favorable to" ATTM. *Gillman*, 534 N.E.2d at 828 (emphasis added; internal quotation marks omitted); *Nichols v. Wash. Mut. Bank*, 2007 WL 4198252, at *8 (E.D.N.Y. Nov. 21, 2007) (same); *see also Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 573 (S.D.N.Y. 2009) ("the Court need only find an absence of either procedural or substantive unconscionability in order to compel arbitration").[17] New York employs a sliding-scale approach to unconscionability under which the less the "imbalance in a contract's terms," the "more questionable the meaningfulness of choice" must be for the contract to be set aside,

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[17] The Court of Appeals indicated in *Gillman* that there may be "exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." 534 N.E.2d at 829. Given the unprecedented pro-consumer terms of ATTM's arbitration provision, the *Gillman* exception self-evidently is inapplicable here.

and vice versa. *Nichols*, 2007 WL 4198252, at *8; *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (App. Div. 1983). Under governing case law, the New York plaintiffs cannot establish either element.

1. ATTM's arbitration agreement is not substantively unconscionable under New York law.

Nearly thirty years ago, New York's intermediate appellate court rejected the contention that an arbitration provision is unenforceable simply because it precludes the customer from pursuing claims on behalf of a class. *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70, 75 (App. Div. 1981) , *aff'd*, 435 N.E.2d 1097 (N.Y. 1982). The court held that New York law requires enforcement of an agreement to arbitrate notwithstanding the purported "significance of the availability of the class action device." 441 N.Y.S.2d at 75. It further explained that, "[e]ven were a balancing of interests permissible, it is clear * * * that the interests favoring arbitration should prevail over those favoring the class action." *Id.* New York's highest court subsequently affirmed this ruling "for reasons stated in the [Appellate Division's] opinion." *Harris*, 435 N.E.2d at 1097.

Harris indisputably establishes the law of New York on this issue, and New York state courts have routinely followed it in rejecting attacks on agreements to arbitrate claims on an individual basis. "[A] contractual proscription against class actions" contained in a standardized cellular service agreement "is neither unconscionable nor violative of public policy." *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (App. Div. 2003); *see also Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (App. Div. 2006); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (App. Div. 2004); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (App. Div. 1998). As the *Brower* court explained, a consumer's preference for a class-action lawsuit "does not alter the binding effect of the valid arbitration clause contained in [his] agreement." *Id.* Other courts applying New York law repeatedly have recognized the enforceability of agreements to arbitrate

on an individual basis. *See*, *e.g.*, *Douglas v. U.S. Dist. Ct.*, 495 F.3d 1062, 1068 (9th Cir. 2007) (arbitration agreements that include "class action waiver provision[s] * * * aren't substantively unconscionable under New York law"); *Nayal*, 620 F. Supp. 2d at 573 ("[c]ourts applying New York law * * * have ***uniformly held*** that class action waivers are not unconscionable") (emphasis added).[18]

2. ATTM's arbitration agreement is not procedurally unconscionable under New York law.

As we have shown, ATTM's arbitration provision is not substantively unconscionable under New York law at all. But even if the New York plaintiffs could show some modicum of substantive unconscionability, the arbitration provision would be, at most, on the low end of the spectrum. Accordingly, the provision must rise high on the spectrum of procedural unconscionability for it to be unenforceable. The New York plaintiffs cannot come close to clearing this high bar.

It is true that ATTM's arbitration provision is part of a standard form contract. But under New York law, an "agreement cannot be considered procedurally unconscionable, or a contract of adhesion, simply because it is a form contract." *Rosenfeld v. Port Auth. of N.Y. & N.J.*, 108 F. Supp. 2d 156, 164 (E.D.N.Y. 2000); *see also Morris v. Snappy Car Rental, Inc.*, 637 N.E.2d 253, 256 (N.Y. 1994) (rejecting assertion that form car rental agreement "was part of an adhesion

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[18] A lone federal judge in the Northern District of California has held that an earlier version of ATTM's arbitration provision is unenforceable under New York law. *In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1300 (N.D. Cal. 2008). We respectfully submit that the court's decision in *In re Apple* is fundamentally mistaken, as it failed to recognize the Ninth Circuit's discussion of New York law in *Douglas* as well as the many New York cases we have cited, and erroneously assumed that New York law is no different from California law. *But see*, *e.g.*, *Douglas*, 495 F.3d at 1068; Geoffrey P. Miller, *Bargains Bicoastal: New Light On Contract Theory*, 31 CARDOZO L. REV. 1475, 1518-19 (2010) ("New York and California adopt different approaches to [class-arbitration] waivers. In New York they are presumptively valid and regularly enforced against claims that they are unconscionable or violate public policy. California, in contrast, generally invalidates these clauses on grounds of public policy or unconscionability.") (footnotes omitted).

contract or the result of procedural unconscionability in the contract formation process"). Moreover, "New York courts have not found contracts to be procedurally unconscionable merely because they were offered on a 'take it or leave it' basis." *Ragone v. Atl. Video at Manhattan Ctr.*, 2008 WL 4058480, at *7 (S.D.N.Y. Aug. 29, 2008) , *aff'd*, 595 F.3d 115 (2d Cir. 2010); *see also Nayal*, 620 F. Supp. 2d at 571 ("even if the Agreement was a form contract offered on a 'take-it-or-leave-it' basis and [defendant] refused to negotiate the Arbitration Provision, this is not sufficient under New York law to render the provision procedurally unconscionable"). To the contrary, even when one's employment is conditioned on accepting an arbitration agreement, that fact is insufficient to establish procedural unconscionability in New York. *See Ragone*, 2008 WL 4058480, at *7; *Forbes v. A.G. Edwards & Sons, Inc.*, 2009 WL 424146, at *6 (S.D.N.Y. Feb. 18, 2009). The case for finding procedural unconscionability here is even weaker than in the employment context because the New York plaintiffs had a far more realistic opportunity to reject ATTM's arbitration provision than a jobseeker has to reject an offer of employment. Wireless service for use with a cell phone (especially a high-end model such as the iPhone 3G) is surely non-essential.

In addition, "[i]nequality of bargaining power alone does not invalidate a contract as one of adhesion when the purchase can be made elsewhere." *Ranieri*, 759 N.Y.S.2d at 449. The New York plaintiffs could have obtained wireless service from a provider that does not require bilateral arbitration (*see* Pianka Decl. ¶¶ 6-9 & Exs. 4-9), rendering their arbitration agreements with ATTM procedurally fair as a matter of law. *See, e.g.*, *Nayal*, 620 F. Supp. 2d at 572 (there could be no procedural unconscionability when "the services offered by [defendant company] were available from another" provider); *Advanced Med. & Alternative Care, P.C. v. N.Y. Energy Sav. Corp.*, 21 Misc.3d 1145(A) (N.Y. Sup. Ct. 2008) (same); *Bar-Ayal v. Time Warner Cable Inc.*, 2006 WL 2990032, at *16 (S.D.N.Y. Oct. 16, 2006) (same); *Anonymous v. JP Morgan*

Chase & Co., 2005 WL 2861589, at *6 (S.D.N.Y. Oct. 31, 2005) (same). The availability of alternative service does not require that plaintiffs be able to obtain the exact same product from a different provider. For example, under New York law, the terms of service of E-ZPass—the region's exclusive automated toll service (akin to GeauxPass in Louisiana)—are not procedurally unconscionable because drivers "remain free to continue to use traditional cash toll lanes." *Rosenfeld*, 108 F. Supp. 2d at 165.

Because the New York plaintiffs cannot show that their arbitration agreements are either substantively or procedurally unconscionable—much less both—their agreements are enforceable under New York law.

J. ATTM's Arbitration Agreement Is Enforceable Under Ohio Law.

As the Ohio Supreme Court has explained, "[a] number of our cases decided over the course of many years reflect this court's dedication to the strong public policy favoring arbitration." *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1245 (Ohio 1992); *see also id.* (noting "the favored status of the arbitration system of dispute resolution in [Ohio]"). This policy cannot be overridden on grounds of unconscionability except under extremely limited circumstances. "The party asserting unconscionability of a contract bears the burden of proving that the agreement is ***both*** procedurally and substantively unconscionable." *Taylor Bldg. Corp. v. Benfield*, 884 N.E.2d 12, 20 (Ohio 2008) (emphasis added); *see also Hayes v. Oakridge Home*, 908 N.E.2d 408, 412 (Ohio 2009) (same). To establish procedural unconscionability, a party must show that "individualized circumstances surrounding each of the parties to a contract" were such that "no voluntary meeting of the minds was possible." *Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993). And to show that a contract is substantively unconscionable, a party must demonstrate that its terms are "unreasonable and unfair." *Taylor*, 884 N.E.2d at 17, 22; *see also Hayes*, 908 N.E.2d at 414 ("[a]n assessment of whether a contract

is substantively unconscionable involves consideration of the terms of the agreement and whether they are commercially reasonable"). Under these standards, Ohio plaintiff Sullivan cannot establish either procedural or substantive unconscionability, much less both.

1. ATTM's arbitration agreement is not substantively unconscionable under Ohio law.

Sullivan cannot establish that his arbitration agreement is so "unfair and unreasonable" (*Taylor*, 884 N.E.2d at 17, 22) as to render it substantively unconscionable. On the contrary, as noted above, ATTM's provision is exceedingly favorable to consumers. *See* pages 4-5, *supra*. Because it would not be "unreasonable" for a consumer to agree to this method of dispute resolution, ATTM's arbitration provision passes muster under Ohio law.

In fact, a substantial body of Ohio case law confirms that ATTM's arbitration provision is not substantively unconscionable. On at least seven occasions, state and federal courts in Ohio have analyzed arbitration provisions that required arbitration to be conducted on an individual basis. Critically, ***no*** court in Ohio has held that an arbitration agreement is substantively unconscionable solely because it requires arbitration on an individual basis. Indeed, in five of these seven cases, a court enforced the arbitration agreement at issue.

The Ohio Court of Appeals has made clear that agreements to arbitrate on an individual basis are not *per se* substantively unconscionable under Ohio law. *See Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 2009 WL 2963770, at *3-4 (Ohio Ct. App. Sept. 17, 2009); *Hawkins v. O'Brien*, 2009 WL 50616, at *5 (Ohio Ct. App. Jan. 9, 2009). ATTM's arbitration provision is more favorable to customers than the clause at issue in *Alexander*, which did not provide the types of unique affirmative incentives to pursue arbitration that ATTM's provision offers. *Cf. Hawkins*, 2009 WL 50616, at *5 (holding that arbitration agreement that precluded class actions did not violate Ohio public policy).

ATTM's provision also is more favorable than those clauses that have been upheld by three federal judges in Ohio—each of whom concluded that an arbitration agreement that contains a class waiver is enforceable so long as it does not limit the individual remedies available to plaintiffs. For example, in *Price v. Taylor*, 575 F. Supp. 2d 845 (N.D. Ohio 2008), the court rejected a plaintiff's argument that the arbitration agreement at issue limited her legal remedies by preventing her from pursuing a Federal Housing Act claim on a class-wide basis as a "private attorney general." The court observed that the plaintiff did "not point out any statutory remedies which would be unavailable" if her claims were arbitrated on an individual basis, and accordingly concluded that the class waiver did not render the arbitration agreement substantively unconscionable. *Id*. at 855. Similarly, the court in *Howard v. Wells Fargo Minn., N.A.*, 2007 WL 2778664 (N.D. Ohio Sept. 21, 2007), rejected the argument that an agreement to arbitrate on an individual basis frustrated the remedial purpose of the Ohio statute under which the plaintiff had brought her claim. The court explained that, rather than being "deprived of her remedies," the plaintiff was "only limited to the forum in which she may establish her right to relief." *Id*. at *4. And in *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758 (N.D. Ohio 2009), a federal court once again enforced an agreement to arbitrate on an individual basis. The court reasoned that "class actions are procedural mechanisms that aid plaintiffs in vindicating their rights," not substantive rights in and of themselves. *Id.* at 772. Just as in *Price, Howard*, and *Stachurski*, ATTM's arbitration agreement does not deprive Sullivan of any remedies to which he would be entitled in court. Indeed, ATTM's provision augments the remedies available to consumers.

On two occasions, state appellate courts in Ohio have refused to enforce agreements to arbitrate on an individual basis. But in each of those cases, the arbitration provision at issue made it infeasible for consumers to pursue their claims on an individual basis. In *Schwartz v.*

Alltel Corp., 2006 WL 2243649 (Ohio Ct. App. June 29, 2006), Alltel was sued by its customers under Ohio's Consumer Sales Practice Act ("CSPA"), a statute that permits prevailing plaintiffs to recover attorneys' fees. Because Alltel's arbitration provision expressly prohibited an award of attorneys' fees, however, the court concluded that deprivation of that remedy rendered the clause substantively unconscionable. The court explained: "Because Alltel's arbitration provision eliminates the right to proceed through a class action ***and*** prohibits an award of attorney fees that are statutorily authorized, the arbitration clause invades the policy considerations of the CSPA. This limitation of consumer rights * * * establishes a quantum of substantive unconscionability." *Id*. at *5 (emphasis added; citation omitted). Here, by contrast, ATTM's provision expressly makes statutory attorneys' fees available to the same extent they would be in court—and makes double attorneys' fees available to customers who receive an arbitral award that exceeds ATTM's last written settlement offer (regardless of whether there is a statutory entitlement to fees).

Similarly, *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004) focused on a combination of factors that made it infeasible to arbitrate on an individual basis. The *Eagle* court based its substantive unconscionability holding chiefly on the fact that the costs of arbitration imposed on the customer were prohibitive—indeed, "substantially larger" than the fees the plaintiff would have incurred to bring her claim in court. *Id.* at 1173. The court held that these costs deterred consumers from vindicating their rights. *Id*. at 1173-74, 1177. ATTM's arbitration provision, by contrast, imposes ***no costs*** whatever on customers who bring non-frivolous claims for up to $75,000, making the arbitral forum even more accessible to plaintiffs than court. *See* pages 4-5, *supra*. Accordingly, the excessive costs of arbitration that led the *Eagle* court to find the clause at issue there unconscionable are wholly absent here.

2. ATTM's arbitration agreement is not procedurally unconscionable under Ohio law.

Sullivan cannot show that ATTM's arbitration provision is procedurally unconscionable. Although ATTM's arbitration provision is part of a non-negotiable form contract, "simply showing that a contract is preprinted and that the arbitration clause is a required term, without more, fails to demonstrate the unconscionability of the arbitration clause." *Taylor*, 884 N.E.2d at 23. Rather, a finding of procedural unconscionability requires that a variety of other "factors must be examined and weighed in their totality." *Hayes*, 908 N.E.2d at 414. These factors include the "'age, education, intelligence, business acumen and experience'" of the party alleging unconscionability and "'whether there were alternative sources of supply for the goods in question.'" *Id.* at 413 (quoting, *inter alia*, *Collins*, 621 N.E.2d at 1299). In addition, Ohio courts examine whether there was (i) "[a] belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract;" (ii) "knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract;" (iii) "knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement;" or (iv) "similar factors." *Id.* (internal quotation marks omitted).

None of these indicia of procedural unconscionability are present here. To begin with, there is no reason to think that Sullivan's "age, education, intelligence, business acumen and experience" are such that they would render it impossible for him to come to a "meeting of the minds" with ATTM. *See Collins,* 621 N.E.2d at 1299. Moreover, he cannot show that ATTM (i) expected that he would not perform his obligations under the contract; (ii) believed that he would not substantially benefit from it; or (iii) knew that he could not understand the agreement due to personal limitations. Furthermore, Sullivan cannot meet his burden of proving that there

were no "alternative sources of supply for the goods in question," in this case, wireless telephone service. At the time Sullivan purchased his iPhone, at least three other wireless carriers provided service without requiring customers to agree to arbitrate disputes on an individual basis. *See* Pianka Decl. ¶¶ 6-9 & Exs. 4-9; *see also Howard*, 2007 WL 2778664, at *4 (rejecting argument that consumer lacked "meaningful choice" when accepting arbitration provision in mortgage agreement because she did not show that "other lenders" also required arbitration). Sullivan also could have simply gone without an iPhone and wireless service, which are "not a necessity." *Stachurski*, 642 F. Supp. 2d at 768 (holding that DirecTV's arbitration clause is not procedurally unconscionable "because satellite television services are not a necessity and Defendant is not the only provider of those services"). Accordingly, ATTM's arbitration agreement is not procedurally unconscionable under Ohio law, and any unconscionability challenge would therefore fail without regard to the substance of ATTM's arbitration provision. *See Alexander*, 2009 WL 2963770, at *3 (when the record does not "support a finding of procedural unconscionability, this court does not need to analyze whether the arbitration clause was substantively unconscionable").

3. ATTM's arbitration agreement does not violate Ohio public policy.

Sullivan alternatively may contend that enforcement of ATTM's arbitration provision would violate Ohio public policy. But that argument too would be meritless. Sullivan may rely on *Eagle*, in which the Ohio Court of Appeals cited public policy underlying the Ohio CSPA (the state's consumer protection statute) as a ground for refusing to enforce the arbitration provision before it. But as the Ohio Court of Appeals more recently put it, *Eagle* "addresses a narrow issue" because the arbitration agreement "contained * * * a confidentiality clause" (*Alexander*, 2009 WL 2963770, at *3); moreover, the provision required a customer to pay excessive fees to commence arbitration. *See Eagle*, 809 N.E.2d at 1173-77, 1180. A federal court in Ohio has

also recently explained that the Ohio CSPA does not erect a *per se* rule against prohibitions of class arbitration. *Credit Acceptance Corp. v. Davisson*, 644 F. Supp. 2d 948, 958-59 (N.D. Ohio 2009) (rejecting argument that "arbitration agreements [are] unenforceable as contrary to public policy when * * * such agreements contain class action waivers"). Here, the concerns that the *Eagle* court identified are inapplicable: ATTM's arbitration provision does not require confidentiality, so nothing would stop a customer who pursues arbitration from disclosing information about the nature and results of that arbitration. Indeed, as a federal court in Florida recently explained in upholding an earlier version of ATTM's arbitration provision, the provision does not "require consumers to execute a confidentiality agreement, thereby allowing consumers the option of disseminating the information in the manner of their choosing" and preventing the agreement from obscuring the defendant's "alleged illegal practices." *Cruz*, 2008 WL 4279690, at *4; s*ee also Francis*, 2009 WL 416063, at *9 (rejecting plaintiff's contention that "consumers will remain in the dark if he is required to pursue his claim individually").

The Ohio Court of Appeals itself also recently distinguished *Eagle* for the same reason, pointing out: "As in *Eagle*, the arbitration clause in the present case prevents Hawkins from proceeding as a private attorney general, as well as in a class action, but ***it does not contain a confidentiality clause***, which was a particular concern in *Eagle*." *Hawkins*, 2009 WL 50616, at *6 (emphasis added). Because in *Hawkins*—as here—the arbitration clause did not require confidentiality, the court rejected the argument that the clause violated public policy. As the *Hawkins* court explained, "[t]he private attorney general and class action provisions of [the CSPA] are procedural mechanisms that aid consumers in their prosecution of CSPA violations. They confer no additional substantive rights." *Id.* In *Hawkins*—just as in this case—"nothing in the arbitration clause denies [the plaintiff] any of the substantive rights conferred on him by the CSPA." *Id.* Hence, "[t]he arbitration clause in [*Hawkins*] preserves the statutory substantive

rights and remedies [the plaintiff] sought in the action he commenced." *Id.* The same is true here, and accordingly (just as in *Hawkins*) this Court should reject any argument that ATTM's arbitration clause violates Ohio public policy.

K. ATTM's Arbitration Agreement Is Enforceable Under Texas Law.

Courts around the country have repeatedly held that, under Texas law, agreements to arbitrate on an individual basis are fully enforceable. Under Texas law, a party resisting arbitration "must prove *both* substantive and procedural unconscionability to prevail on the unconscionability issue." *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1184 (5th Cir. 1988) (emphasis in original). To establish substantive unconscionability, the Texas plaintiffs must show that the arbitration provision is "one-sided or oppressive" (*id.*)—that is, a contract term that "'no man in his sense and not under a delusion would enter into'" and that "'no honest and fair person would accept.'" *Lindemann v. Eli Lilly & Co.*, 816 F.2d 199, 204 (5th Cir. 1987) (quoting *Blount v. Westinghouse Credit Corp.*, 432 S.W.2d 549, 554 (Tex. Civ. App. 1968)); *see also Besteman v. Pitcock*, 272 S.W.3d 777, 789 (Tex. Ct. App. 2008) ("the inequity of the term" must be "so extreme as to shock the conscience") (internal quotation marks omitted). To establish procedural unconscionability, they must "present[] evidence of [ATTM's] 'overreaching or sharp practices' combined with [their own] 'ignorance or inexperience.'" *Arkwright*, 844 F.2d at 1184. The Texas plaintiffs cannot show that either substantive or procedural unconscionability exists, much less that "[t]he circumstances surrounding both prongs of the unconscionability defense" are "sufficiently shocking or gross to compel the courts to intercede." *Nichols v. YJ USA Corp.*, 2009 WL 722997, at *16 (N.D. Tex. Mar. 18, 2009) (internal quotation marks omitted).

1. ATTM's arbitration agreement is not substantively unconscionable under Texas law.

To begin with, it is settled Texas law that an agreement to arbitrate on an individual

(rather than class-wide) basis is not substantively unconscionable. The Fifth Circuit already has "rejected an argument that an arbitration clause prohibiting plaintiffs from proceeding collectively was unconscionable under Texas law." *Iberia*, 379 F.3d at 174 (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298, 301 (5th Cir. 2004)). The Texas Court of Appeals also has squarely held that "a prohibition on class treatment" in arbitration does not "rise to the level of fundamental unfairness" necessary for a finding of substantive unconscionability. *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003). As the court explained in *AutoNation*, "[t]he Texas Supreme Court has made it clear that the FAA is part of [the] substantive law of Texas, and has stressed that procedural devices such as * * * class actions, may not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action. Accordingly, there is no entitlement to proceed as a class action." *Id.* (citations, alterations, and internal quotation marks omitted). The court squarely rejected the plaintiff's argument that "without the class action device, consumers will be disinclined to pursue individual remedies for small damages." *Id.*; *see also id.* at 200 n.5.

Courts around the country have reached the same conclusion. As a federal court in Michigan has explained, "[s]ince *AutoNation* was decided, federal district courts applying Texas law have uniformly upheld arbitration agreements including class action waivers." *Adler*, 2008 WL 5351042, at *6. Likewise, a federal court in New York has held that "[u]nder Texas law and the FAA," a provision requiring that arbitration be conducted on an individual basis "is fair and valid" despite the plaintiff's argument that "consumers are disadvantaged and individually burdened because of the class-wide arbitration bar." *Sherr v. Dell, Inc.*, 2006 WL 2109436, at *7 (S.D.N.Y. July 27, 2006). As the *Sherr* court stated, "plaintiff is not entitled to a class action suit or class-wide arbitration to vindicate the rights of everyone else with a similar problem. The FAA's primary purpose is not to create a right to sue as a class. Its main purpose is 'to ensure

that private agreements to arbitrate are enforced according to their terms.'" *Id.* (quoting *AutoNation*, 105 S.W.3d at 200). Other courts have interpreted Texas law in the same way. *See*, *e.g.*, *Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018, 1024 (N.D. Cal. 2007) ("Under Texas law, an arbitration clause with a class action waiver is not substantively unconscionable; rather, it is likely to be enforceable."), *rev'd on other grounds,* 594 F.3d 1081 (9th Cir. 2010); *Davis v. Dell, Inc.*, 2007 WL 4623030, at *6 (D.N.J. Dec. 28, 2007) ("the Court finds that class action waivers are not unconscionable under Texas contract law"); *Brazil v. Dell Inc.*, 2007 WL 2255296, at *7 (N.D. Cal. Aug. 3, 2007) ("It appears that Texas would enforce arbitration clauses containing class action waivers such as the one at issue here."); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 123-26 (Ill. App. Ct. 2005) (rejecting contention that "arbitration agreement was unconscionable [under Texas law] because it prevented the plaintiffs from proceeding with a class action lawsuit"); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (rejecting argument that an "arbitration provision is substantively unconscionable [under Texas law] because it expressly precludes [plaintiffs] from bringing class action lawsuits").

ATTM's arbitration provision is even more favorable to consumers than the ones at issue in these cases because plaintiffs are entitled to arbitrate their claims for free and enjoy enhanced remedies in arbitration. *See* pages 4-5, *supra*. Given the unbroken line of authority declaring agreements to arbitrate on an individual basis valid under Texas law, the Texas plaintiffs cannot claim that arbitration on ATTM's consumer-friendly terms is so oppressive as to "shock the conscience." *Besteman*, 272 S.W.3d at 789. The Texas plaintiffs' unconscionability challenge may be rejected on this ground alone. *See Arkwright*, 844 F.2d at 1184.

2. ATTM's arbitration agreement is not procedurally unconscionable under Texas law.

In any event, the Texas plaintiffs also cannot establish that the manner in which they agreed to arbitrate was procedurally unconscionable. The Texas Supreme Court has held that

even a "gross disparity in bargaining power between the parties"—as when an employee would be "discharge[d]" for rejecting an arbitration provision—is insufficient to establish procedural unconscionability. *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002) (orig. proceeding). Here, the Texas plaintiffs could have declined to obtain service from ATTM without risking their livelihoods. They were free to forgo a cell phone or to obtain service from a wireless provider that does not require arbitration of disputes on an individual basis. *See* Pianka Decl. ¶¶ 6-9 & Exs. 4-9. The availability of "choice in selecting another company" rules out the possibility of procedural unconscionability. *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 745 (Tex. Ct. App. 2005); *see also Am. Employers' Ins. Co. v. Aiken*, 942 S.W.2d 156, 162 (Tex. Ct. App. 1997) (no procedural unconscionability where plaintiff had "other alternatives"); *Mireles v. Tejas Appraisal & Inspection Co.*, 2007 WL 1826074, at *1 (Tex. Ct. App. June 27, 2007); *D'Lux Movers & Storage v. Fulton*, 2007 WL 1299400, at *3 (Tex. Ct. App. May 3, 2007); *Dillee v. Sisters of Charity of Incarnate Word Health Care Sys.*, 912 S.W.2d 307, 310 (Tex. Ct. App. 1995); *Wade v. Austin*, 524 S.W.2d 79, 86-87 (Tex. Civ. App. 1975).

In sum, ATTM's agreement is not unconscionable under Texas law. The agreement therefore should be enforced in accordance with the Texas and federal policies "strongly favor[ing]" arbitration. *Prudential Secs. Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (orig. proceeding) (per curiam).

L. ATTM's Arbitration Agreement Is Enforceable Against The California Plaintiffs.

ATTM acknowledges that the Ninth Circuit has held that an earlier, but substantially similar, version of ATTM's arbitration agreement is unconscionable under California law because it prohibits class arbitration. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853-55 (9th Cir. 2009). The *Laster* court further held that the FAA does not preempt that interpretation of California law. *Id.* at 856-59. While ATTM concedes that its arbitration provision is

unconscionable as a matter of California law, this Court is not bound by the Ninth Circuit's holding on FAA preemption—a holding that is in grave doubt in light of the Supreme Court's recent grant of ATTM's petition for certiorari in *Concepcion*. Rather, as we explain next, this Court should hold that the FAA preempts any state-law rule that—like California's—broadly invalidates arbitration agreements merely because they preclude class arbitration.

IV. ANY ARGUMENT THAT ATTM'S ARBITRATION PROVISION IS UNCONSCIONABLE UNDER THE LAW OF THE RELEVANT STATES WOULD BE PREEMPTED BY THE FAA.

For the reasons we have explained above, ATTM's arbitration agreement is fully enforceable under the law of each plaintiff's home state (with the exception of California). But if ATTM's arbitration were deemed unconscionable under the law of any of these states, including California, that law would be preempted by the FAA. The Supreme Court recently granted certiorari in *Concepcion* to decide whether the FAA preempts California law. If the Supreme Court rules in ATTM's favor, that holding likely would require enforcement of all the plaintiffs' arbitration agreements under the FAA, notwithstanding any state-law rule to the contrary. Accordingly, if this Court concludes that ATTM's arbitration agreement may be unenforceable under the law of any particular state (such as California), the Court should await the Supreme Court's decision in *Concepcion* before declining to compel arbitration as to named plaintiffs from any such state.[19]

That said, existing precedent already amply demonstrates that the FAA preempts such law. As the Fifth Circuit held in *Iberia*, the FAA requires the enforcement of arbitration agreements "*unless* they are invalid under principles of state law that govern ***all*** contracts." 379

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[19] In these circumstances, it would be more efficient to withhold decision until the Supreme Court has decided *Concepcion* than to hold that the arbitration provision is unenforceable under the law of some states. The latter course would necessitate an interlocutory appeal by ATTM, which would almost surely result in issuance of a stay of proceedings in this Court. Those additional procedural steps could be avoided by deferring action until the Supreme Court rules.

F.3d at 166 (second emphasis added). Thus, the FAA forbids courts from invalidating arbitration agreements either by applying "general doctrines [of contract law] in ways that subject arbitration clauses to special scrutiny" or "on the basis of a rule of law that applies *only* to such agreements." *Id.* at 166-67 (emphasis in original). Under these principles, the FAA would preempt any state law under which ATTM's arbitration provision is deemed unenforceable. That is so for two independent reasons.

First, a state-law rule invalidating ATTM's arbitration clause simply because it requires arbitration in its traditional, bilateral form would be preempted by Section 2 of the FAA because such a rule applies only to contracts pertaining to dispute resolution—and therefore is not a "principle[] of state law that govern[s] all contracts." *Iberia*, 379 F.3d at 166. Nor may such a rule be saved from preemption by calling it an application of the "general doctrine" of unconscionability. *Id* at 167. As discussed above, the relevant states deem unconscionable only those contract terms that no reasonable person would accept or that would "shock the conscience." That simply cannot be said of ATTM's exceptionally pro-consumer arbitration provision without materially watering down those standards and thereby singling out arbitration agreements for "special scrutiny"—something that the FAA forbids. *Id.* As the Supreme Court has explained, under Section 2 of the FAA, "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix*, 513 U.S. at 281.

Moreover, to condition the enforcement of arbitration agreements on the availability of court procedures such as class actions would "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). In *Iberia*, the Fifth Circuit declared that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' * * * characteristics that

generally make arbitration an attractive vehicle for the resolution of low-value claims." 379 F.3d at 174 (quoting *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 31 (1991)). Thus, for example, "[i]f every arbitration were required to produce a publicly available, 'precedential' decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding." *Id.* at 175-76. Imposing such procedures—including class actions—on arbitration would defeat "the point of arbitration," which "is that one 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 176 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Thus, "the recognition that [the] arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009).

Second, any state-law rule conditioning the enforceability of an arbitration agreement on the availability of class-wide proceedings would conflict with the FAA's purpose of "ensur[ing] that private agreements to arbitrate are enforced ***according to their terms***." *Stolt-Nielsen*, 130 S. Ct. at 1773 (emphasis added; internal quotation marks omitted). *Stolt-Nielsen* confirms that the FAA preempts any state-law rule requiring the availability of class arbitration when, as here, a class action is not necessary to ensure that plaintiffs can vindicate their rights.

In *Stolt-Nielsen*, the issue was whether an arbitration provision that is "silent" on the subject may be construed to permit class arbitration. The Supreme Court explained that, under the FAA, "parties are generally free to structure their arbitration agreements as they see fit," including by "agree[ing] on rules under which any arbitration will proceed" and "*with whom* they

choose to arbitrate their disputes." 130 S. Ct. at 1774 (emphasis in original; internal quotation marks omitted). Accordingly, the Court reasoned, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). But such an agreement "cannot be presumed" because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.* at 1775-76. Not only are the "lower costs" and "efficiency" of bilateral arbitration lost, but also "class-action arbitration" combines the massive "commercial stakes of class-action arbitration"—which "are comparable to those of class-action litigation"—with a "scope of judicial review [that] is much more limited" than what would be available in court. *Id.*

For the same reason, the FAA preempts states from refusing to enforce provisions that require bilateral arbitration when, as here, it is fully realistic for the plaintiffs to vindicate their claims on an individual basis. After all, if the FAA precludes arbitrators from conducting class arbitration when the parties' agreement is silent on the subject, it follows inexorably that the FAA also precludes states from requiring parties to submit to class arbitration as the price of admission to the arbitral forum. Indeed, if states can condition the enforcement of arbitration agreements that, like ATTM's, enable consumers to vindicate their claims on an individual basis, businesses will abandon arbitration altogether. Although many businesses are willing to take the risk of limited judicial review in a bilateral arbitration because of the cost savings and their desire for a less adversarial method of resolving disputes with customers, the calculus changes dramatically if class-wide arbitration is required. If faced with the choice between exposing themselves to the risk of a class-wide arbitration or giving up on arbitration entirely, businesses will unfailingly choose the latter course. Nothing could more clearly "frustrate the purpose" (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA to "achieve 'streamlined

proceedings and expeditious results.'" *Preston*, 552 U.S. at 357 (quoting *Mitsubishi*, 473 U.S. at 633).

CONCLUSION

The Court should compel the plaintiffs to pursue their claims in accordance with their arbitration agreements, and dismiss their claims against ATTM.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2010, I served the foregoing by causing it to be filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to case participants.

/s/ Archis A. Parasharami
Archis A. Parasharami