UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: APPLE iPHONE 3G AND 3GS MMS MARKETING AND SALES PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:

Aleman v. Apple Inc.,
No. 10-cv-00502
(No. 10-cv-00011 (S.D. Tex.))

Baxter v. Apple Inc.,
No. 10-cv-00019
(No. 09-cv-13938 (E.D. Mich.))

Carbine v. Apple Inc.,
No. 09-cv-05470

Carr v. Apple Inc.,
No. 09-cv-07612
(No. 09-cv-01996 (N.D. Ohio))

Davis v. Apple Inc.,
No. 10-cv-00497
(No. 09-cv-01133 (M.D. Ala.))

Fernandez v. Apple, Inc.,
No. 10-cv-03236

Franklin v. Apple Inc.,
No. 10-cv-00018
(No. 09-cv-00704 (S.D. Ala.))

Friloux v. Apple Inc.,
No. 10-cv-00501
(No. 09-cv-00618 (E.D. Tex.))

MDL NO. 2116

2:09-md-2116

SECTION: J

JUDGE BARBIER

MAGISTRATE JUDGE WILKINSON

Goette v. Apple Inc.,
No. 09-cv-07609
(No. 09-cv-01480 (E.D. Mo.))
Irving v. Apple Inc.,
No. 09-cv-07608
(No. 09-cv-02613 (D. Minn.))
Ishmael v. Apple, Inc.,
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Jackson v. Apple Inc.,
No. 10-cv-00500
(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.))
Molina v. Apple Inc.,
No. 09-cv-07606
(No. 09-cv-2032 (S.D. Cal.))
Monticelli v. Apple Inc.,
No. 10-cv-00020
(No. 09-cv-09505 (S.D.N.Y.))
Novick v. Apple Inc.,
No. 10-cv-00498
(No. 10-cv-00002 (M.D. Fla.))
Pineda v. Apple Inc.,
No. 10-cv-00821
(No. 10-cv-00128 (E.D.N.Y.))
Sterker v. Apple Inc.,
No. 09-cv-07604
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Sullivan v. Apple Inc.,
No. 09-cv-07611
(No. 09-cv-01993 (N.D. Ohio))

Tran v. Apple Inc.,
No. 09-cv-07605
(No. 09-cv-04048 (N.D. Cal.))
West v. Apple, Inc.,
No. 10-cv-01739
(No. 10-cv-01370 (D.N.J.))
Wortman v. Apple, Inc.,
No. 10-cv-04109

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 these cases 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 unenforceable because—in their view—the requirement that arbitration take place on an individual basis prevents them from vindicating their rights. That argument is foreclosed by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and subsequent cases interpreting it.

In *Concepcion*, the Supreme Court held that courts may not refuse to enforce AT&T Mobility LLC's ("ATTM's") arbitration agreement on the ground that it precludes customers from pursuing a class action or class arbitration. As the Eleventh Circuit recently explained, "faithful adherence to *Concepcion* requires the rejection" of arguments that ATTM's arbitration agreement is unenforceable because "the class action waiver will be exculpatory." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011). That is because the Supreme Court "examined *this very arbitration agreement* and concluded that it did not produce such a result." *Id.* at 1215 (emphasis in original). In light of *Concepcion*, therefore, plaintiffs' attack on ATTM's arbitration provision is foreclosed as a matter of law.

BACKGROUND

A. The Plaintiffs Agreed 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 have agreed to

resolve their disputes by arbitration on an individual basis. According to ATTM's and Apple's records, most 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.[1] Other plaintiffs receive their service through the account of another person (likely a family member) who agreed to those Terms and Conditions.[2]

The arbitration provision in ATTM's standard terms of service used between July 2008 and early 2009 is identical to the arbitration provision at issue in *Concepcion*. *Compare Concepcion*, 131 S. Ct. at 1744 *with* Rives Decl. Ex. 1 at 14-17. ATTM's arbitration provision was revised in early 2009 to make it even more favorable to customers; the Supreme Court discussed the 2009 provision in *Concepcion* as well. 131 S. Ct. at 1744 n.3. 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 (Dkt. No. 118) ¶ 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. The 2009 provision, like earlier ones, requires both ATTM and the plaintiffs "to arbitrate all disputes and claims between" them. Rives Decl. Ex. 1 at 14; White Decl. Ex. 1 at 2.

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[1] *See* Decl. of Caroline Mahone-Gonzalez (Dkt. No. 113) ¶¶ 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 (Dkt. No. 115) ¶¶ 4-5, 7, 9, 11-12 & Exs. 2-3, 5, 7, 9-10; Decl. of Ramon L. Menendez (Dkt. No. 114) ¶¶ 3-4; Decl. of Harry Bennett (Dkt. No. 112) ¶¶ 7-8 & Exs. 5-6; Decl. of Scott Williamson (Dkt. No. 119) ¶ 3; Second Decl. of Scott Williamson ¶ 3; Decl. of Stacie Dobbs ¶¶ 3-4; Decl. of Steven Bethel ¶¶ 4, 6, 8 & Exs. 1-3, 7-11; Decl. of Roger Dicke ¶ 4 & Exs. 1-2; Second Decl. of Richard Pianka Exs. 1-2.

[2] *See* Mahone-Gonzalez Decl. ¶¶ 13-14, 17-18, 22, 28-29, 31-32, 43, 46-47 & Exs. 21-23, 27-29, 48-50, 78-80; Pantano Decl. ¶¶ 6, 8, 10 & Exs. 4, 6, 8; *see also* Decl. of Richard J. Rives (Dkt. No. 117) 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").

Based on ATTM's and Apple's records, every plaintiff either directly or indirectly through the accountholder under whose account he or she receives service agreed to either the 2006 or 2009 arbitration provision, and all plaintiffs who agreed to the former provision either directly or indirectly would have received notice of the later provision. *See* pages 1-2 and notes 1-2, *supra*.[3]

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

As the Supreme Court recognized in *Concepcion*, both the 2006 version of ATTM's arbitration provision (the one governing the Concepcions) and the subsequent 2009 version include several features that ensure that ATTM's customers have "sufficient * * * incentive for the individual prosecution of meritorious claims that are not immediately settled" and "essentially guarantee[]" that aggrieved customers will "be made whole." *Concepcion*, 131 S. Ct. at 1753 (internal quotation marks omitted). The features of the 2009 provision include:

- **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))";[4]

- **$10,000 minimum award if arbitral award exceeds ATTM's last settlement offer**: If the arbitrator awards a customer more than ATTM's "last written settlement offer made before an arbitrator was selected," ATTM must pay the customer $10,000 in lieu of any smaller arbitral award;

- **Double attorneys' fees available:** If the arbitrator awards the customer more than ATTM's last settlement offer, "[ATTM] will * * * pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses (including expert fees

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[3] Although ATTM has been unable to locate the records of plaintiff Kevin Khoi Duy Tran, he alleges in his complaint that he "purchased an iPhone 3G-S from Defendant Apple and as an iPhone customer pays Defendant AT&T monthly service charges." Compl. ¶ 24, No. 09-cv-04048 (N.D. Cal.). In order to activate that iPhone, Tran, like the other plaintiffs, would have had to accept ATTM's Terms and Conditions.

[4] Even if an arbitrator concludes that a customer's claim is frivolous, if the claim is for less than $10,000, the AAA's consumer arbitration rules would cap the amount of costs the customer would have to pay at $125. *See* Decl. of Richard Pianka (Dkt. No. 116) Ex. 1 (AAA, *Consumer-Related Disputes Supplementary Procedures* § C-8).

and costs) that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[5]

- **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 and his or her attorney need not keep the arbitration confidential;

- **Full individual remedies available:** The arbitrator may award the customer any form of relief on an individualized basis (including punitive damages, statutory damages, attorneys' fees, and injunctions affecting the claimant alone) 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;

- **Convenient located hearing:** Arbitration will take place "in the county * * * 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";[6] 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."

Rives Decl. Ex. 4 at 14-19.

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[5] The provision for double attorneys' fees "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.

[6] Under the AAA rules that would otherwise apply, either party may insist on a hearing in cases involving claims of $10,000 or less. *See* Pianka Decl. Ex. 1 (AAA, *Consumer-Related Disputes Supplementary Procedures* §§ C-5, C-6). For claims exceeding $10,000, a hearing would be held unless both parties agree to forgo it. *Id.* § C-6.

C. Plaintiffs Filed Their Lawsuits Against ATTM Notwithstanding Their Agreements To Arbitrate.

This multidistrict litigation comprises 23 putative class actions brought by plaintiffs in 16 different states against Apple Inc. ("Apple") and ATTM, alleging that ATTM and Apple misrepresented the ability of the iPhone 3G and 3GS to support Multimedia Messaging Service on ATTM's network. The plaintiffs bring claims under state consumer protection statutes and common law, and seek to represent nationwide and statewide classes of iPhone 3G and 3GS purchasers.

In August 2010, ATTM moved to compel arbitration of the disputes of each named plaintiffs who had filed an amended complaint.[7] Dkt. Nos. 95-110. In response, plaintiffs sought what they characterized as arbitration-related discovery. ATTM responded in part to the discovery requests and identified its objections. After several weeks of meeting and conferring over the discovery requests—including seeking this Court's intervention—plaintiffs and ATTM agreed in early November 2010 to stay plaintiffs' claims against ATTM because *Concepcion*

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[7] 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, pursuant to this Court's order of May 28, 2010. Dkt. Nos. 66-82. An amended complaint in *West v. Apple Inc.*, No. 11-cv-01370 (D.N.J.), was filed on August 20, 2010. Dkt. No. 158. Amended complaints have not been filed in six actions: *Carr v. Apple Inc.*, No. 09-cv-1996 (N.D. Ohio); *Tran v. Apple Inc.*, No. 09-4048 (N.D. Cal.); *Molina v. Apple Inc.*, No. 09-cv-2032 (S.D. Cal.); and "tag-along actions" that were filed after the Court's May 28, 2010 order, *Fernandez v. Apple Inc.*, No. 10-cv-03236 (E.D. La.); *Ishmael v. Apple Inc.*, No. 11-cv-00590 (E.D. La.); and *Wortman v. Apple Inc.*, No. 10-cv-04109 (E.D. La.).

Plaintiffs in four of the original underlying actions voluntarily dismissed their complaints on June 18, 2010. Dkt. Nos. 86-89. In addition, a number of individuals who were named plaintiffs in the original complaints have been omitted from the 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.

was pending before the United States Supreme Court. Dkt. No. 193. And on November 17, 2010, this Court stayed all proceedings in this case pending the resolution of *Concepcion*. Dkt. No. 206. The Supreme Court ruled in favor of ATTM in *Concepcion* on April 27, 2011.

This Court ordered the parties to submit position papers on *Concepcion*'s effect, and at a status conference on September 22, 2011, set a new briefing schedule.

ARGUMENT

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

The FAA requires that plaintiffs' arbitration agreements be enforced. It is "beyond dispute that the FAA was designed to promote arbitration." *Concepcion*, 131 S. Ct. at 1749. The centerpiece of the FAA is Section 2, which 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. Sections 3 and 4 also emphasize the duty of courts to compel arbitration "in accordance with the terms of the [arbitration] agreement." *Id.* §§ 3-4. As the Supreme Court has explained, "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. And this "liberal federal policy favoring arbitration agreements" applies "notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 1749 (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).

In view of these principles, the FAA requires enforcement of plaintiffs' arbitration agreements with ATTM. 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: (i) ATTM's arbitration provision is in writing (*see* pages 3-4, *supra*); and (ii) contracts for wireless service involve interstate commerce, because wireless devices, even "during intrastate use," are "[i]nterstate commerce facilities." *United States v. Marek*, 238 F.3d 310, 318 (5th Cir. 2001). Indeed, the arbitration provision itself specifies that the ATTM service agreement "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, plaintiffs' claims unquestionably are covered by their agreements to arbitrate "all disputes and claims between" them and ATTM. *Id*.

When, as here, the FAA governs arbitration provisions that cover a plaintiff's claims, 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. IN LIGHT OF *CONCEPCION*, PLAINTIFFS CANNOT AVOID THEIR ARBITRATION AGREEMENTS.

Plaintiffs have indicated that they will attempt to challenge the enforceability of their arbitration agreements by arguing that, because the agreements require arbitration on an individual basis, they may be unable to vindicate their state-law claims. But those efforts are destined to fail, because in *Concepcion* the Supreme Court made it crystal clear that the FAA requires enforcing ATTM's provision as a matter of federal law.

At issue in *Concepcion* was whether the FAA preempted a state-law rule "classifying most collective-arbitration waivers in consumer contracts as unconscionable," which the Supreme Court referred to as "the *Discover Bank* rule." *Concepcion*, 131 S. Ct. at 1746 (citing *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005)). Answering that question in the affirmative, the Court explained that state laws "[r]equiring the availability of classwide

arbitration interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Id.* at 1748. "Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Court held, the "*Discover Bank* rule is preempted by the FAA." *Id.* at 1753 (internal quotation marks and citation omitted).

The Supreme Court also held that the policy concerns underlying the *Discover Bank* rule—that without class actions, some small claims might not be vindicated—are beside the point, because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753. Moreover, the Court endorsed the observations of the district court and Ninth Circuit in *Concepcion* that "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole" under ATTM's arbitration provision and that plaintiffs are "*better off* under their arbitration agreement with [ATTM] than they would have been as participants in a class action." *Id.* (emphasis and first alteration in original).

Here, each plaintiff is bound by an ATTM arbitration provision that is materially equivalent to the one held enforceable in *Concepcion*. *See* page 2, *supra*. Accordingly, under *Concepcion*, the FAA requires that the provision be enforced, and plaintiffs' state-law challenges to the provision would be preempted.

Post-*Concepcion* authority powerfully confirms that conclusion. In the six months since *Concepcion* was decided, six federal courts—including the Eleventh Circuit—have held that ATTM's arbitration agreement is fully enforceable as a matter of law under the FAA. *See Cruz*, 648 F.3d 1205; *Kaltwasser v. AT&T Mobility LLC*, __ F. Supp. 2d. __, 2011 WL 4381748 (N.D. Cal. Sept. 20, 2011); *Adams v. AT&T Mobility, LLC*, __ F. Supp. 2d. __, 2011 WL 4720194 (W.D. Wash. Sept. 20, 2011); *Nelson v. AT&T Mobility LLC*, 2011 WL 3651153 (N.D. Cal. Aug.

18, 2011); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407 (N.D. Cal. July 19, 2011); *Boyer v. AT&T Mobility Servs., LLC,* 2011 WL 3047666 (S.D. Cal. July 25, 2011).

As the Eleventh Circuit put it in *Cruz*:

> [W]e now hold that, in light of *Concepcion*, the class action waiver in the Plaintiffs' arbitration agreements is enforceable under the FAA. Insofar as Florida law would invalidate these agreements as contrary to public policy (a question we need not decide), such a state law would "stand[ ] as an obstacle to the accomplishment and execution" of the FAA, and thus be preempted.
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> * * *
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> Thus, in light of *Concepcion*, state rules mandating the availability of class arbitration based on generalizable characteristics of consumer protection claims—including that the claims "predictably involve small amounts of damages," that the company's deceptive practices may be replicated across "large numbers of consumers," and that many potential claims may go unprosecuted unless they may be brought as a class—are preempted by the FAA, even if they may be "desirable[.]"

648 F.3d at 1207, 1212 (citations omitted). Another court recently agreed that "*Concepcion* not only rejected the *Discover Bank* rule but ***also upheld the 2006 agreement*** at issue in that case." *Kaltwasser*, 2011 WL 4381748, at *6 (emphasis added).

In fact, the U.S. Court of Appeals for the Third Circuit recently upheld an arbitration provision that is less favorable to customers than ATTM's provision, explaining that "the holding of *Concepcion* [is] both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'" *Litman v. Cellco P'ship*, __ F.3d __, 2011 WL 3689015, at *5 (3d Cir. Aug. 24, 2011) (quoting *Concepcion*, 131 S. Ct. at 1753); *see also Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("Our reading of *Concepcion* convinces us the state-law-based

challenge involved here suffers from the same flaw as the state-law-based challenge in *Concepcion*—it is preempted by the FAA. Consequently, *Concepcion* forecloses [plaintiff's] claim that the district court erred in concluding the class action waivers were enforceable.").

For similar reasons, many other courts have relied on *Concepcion* in enforcing agreements to arbitrate on an individual basis that are not as favorable to customers or employees as ATTM's provision. *See, e.g.*, *Tory v. First Premier Bank*, 2011 WL 4478437 (N.D. Ill. Sept. 26, 2011); *Meyer v. T-Mobile USA Inc.*, 2011 WL 4434810 (N.D. Cal. Sept. 23, 2011); *King v. Advance Am., Cash Advance, Ctrs., Inc.*, 2011 WL 3861898 (E.D. Pa. Aug. 31, 2011); *Clerk v. Cash Am. Net of Nev., LLC*, 2011 WL 3740579 (E.D. Pa. Aug. 25, 2011); *Clerk v. Cash Cent. of Utah, LLC*, 2011 WL 3739549 (E.D. Pa. Aug. 25, 2011); *Alfeche v. Cash Am. Int'l, Inc.*, 2011 WL 3565078 (E.D. Pa. Aug. 12, 2011); *Carney v. Verizon Wireless Telecom, Inc.*, 2011 WL 3475368 (S.D. Cal. Aug. 9, 2011); *Swift v. Zynga Game Network, Inc.*, 2011 WL 3419499 (N.D. Cal. Aug. 4, 2011); *Murphy v. DirectTV, Inc.*, 2011 WL 3319574 (C.D. Cal. Aug. 2, 2011); *Carrell v. L & S Plumbing P'ship, Ltd.*, 2011 WL 3300067 (S.D. Tex. Aug. 1, 2011); *In re Gateway LX6810 Computer Prods. Litig.*, 2011 WL 3099862 (C.D. Cal. July 21, 2011); *Estrella v. Freedom Fin.*, 2011 WL 2633643 (N.D. Cal. July 5, 2011); *Hopkins v. World Acceptance Corp.*, __ F. Supp. 2d __, 2011 WL 2837595 (N.D. Ga. June 29, 2011); *In re Cal. Title Ins. Antitrust Litig.*, 2011 WL 2559633 (N.D. Cal. June 27, 2011); *Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939 (D.N.J. June 22, 2011); *Villegas v. US Bancorp*, 2011 WL 2679610 (N.D. Cal. June 20, 2011); *Bernal v. Burnett*, 2011 WL 2182903 (D. Colo. June 6, 2011); *D'Antuono v. Serv. Rd. Corp.*, 2011 WL 2175932 (D. Conn. May 25, 2011); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 (N.D. Cal. May 16, 2011); *Zarandi v. Alliance Data Sys. Corp.*, 2011 WL 1827228 (C.D. Cal. May 9, 2011); *Day v. Persels & Assocs.*, 2011 WL 1770300 (M.D. Fla. May 9, 2011); *Bellows v. Midland Credit Mgmt., Inc.*, 2011 WL 1691323

(S.D. Cal. May 4, 2011); *Wallace v. Ganley Auto Group*, 2011 WL 2434093 (Ohio Ct. App. June 16, 2011); *see also Fensterstock v. Educ. Fin. Partners*, 426 F. App'x 14 (2d Cir. 2011) (concluding that *Concepcion* was dispositive of plaintiff's argument that the requirement that he arbitrate on an individual basis is unconscionable under California law and remanding for consideration of other issues).

In short, the FAA and *Concepcion* foreclose any argument plaintiffs might make that their arbitration agreements should not be enforced because those agreements require arbitration on an individual rather than class-wide basis.[8]

III. IN LIGHT OF *CONCEPCION*, THERE IS NO NEED FOR ARBITRATION-RELATED DISCOVERY.

As the Supreme Court has explained, "Congress's clear intent, in the [FAA], [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) ("[T]he unmistakably clear congressional purpose" of the FAA was "that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."); *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)). Thus, when a motion to compel arbitration has been filed, the FAA

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[8] For the reasons we explained in our prior motions to compel arbitration, even without *Concepcion*, ATTM's arbitration agreement would be enforceable as a matter of state law in virtually all of the states in which the named plaintiffs reside. *See* Dkt. No. 111 at 11-63 (addressing law of states of then-current named plaintiffs). But in light of *Concepcion*, which requires enforcement of ATTM's provision as a matter of federal law, there is no need to address the question whether that provision is enforceable under the laws of the plaintiffs' home states. *See Cruz*, 648 F.3d at 1207 (explaining that whether the law of a particular state would invalidate ATTM's provision is "a question we need not decide" because "such a state law would 'stand[ ] as an obstacle to the accomplishment and execution' of the FAA, * * * and thus be preempted") (quoting *Concepcion*, 131 S. Ct. at 1753).

"call[s] for an expeditious and summary hearing, with only ***restricted inquiry*** into factual issues." *Moses H. Cone*, 460 U.S. at 22 (emphasis added). Otherwise, the expense of litigating the enforceability of the arbitration agreement threatens to eliminate the "simplicity, informality, and expedition" of arbitration (*Mitsubishi*, 473 U.S. at 628) and thereby undermine the point of agreeing to arbitrate in the first place. Plaintiffs' insistence on extensive discovery threatens to do just that. As this Court observed at the September 22, 2011, status conference, if plaintiffs were permitted to take arbitration-related discovery, "you all are going to spend a lot of money and time, * * * and it may be all for naught anyway." Tr. of Sept. 22, 2011, Status Conf. (Dkt. No. 232) at 14:21-23.

Plaintiffs have suggested that they need discovery for two reasons. First, they claim to need discovery to attempt to show that ATTM's arbitration agreement is "either substantively unconscionable or generally unenforceable" under the laws of some states because it "prevents a party from being able to vindicate statutory rights or * * * effectively exculpates a defendant from liability." Pls.' Position Paper (Dkt. No. 225) at 9. Second, they claim to need discovery to "show that a contract was never formed." *Id*. at 8. But, as explained above, *Concepcion* squarely forecloses plaintiffs' substantive unconscionability argument as a matter of federal law. And plaintiffs do not need discovery regarding whether they themselves entered into arbitration agreements with ATTM, as that information is within their own knowledge.

A. Plaintiffs Cannot Pursue Discovery In A Futile Attempt To Show That ATTM's Arbitration Agreement Is Substantively Unconscionable.

Well before *Concepcion*, this Court recognized that there was no need for the kind of wide-ranging discovery plaintiffs seek, because the enforceability of their arbitration agreements is a question of law:

> What I'm saying, one way or another, you're signing up for some agreement. It's in the agreement. Whatever it is, it is. I just don't

> understand what kind of discovery you're going to need on that. It seems to me they could tee that up as a legal issue.

Tr. of Jan. 15, 2010 Status Conf. (Dkt. No. 21) at 22; *see also id.* at 21 (noting that whether an arbitration agreement is unconscionable is a legal, not factual, issue); *id.* at 25 (noting that arbitrability is a legal issue). *See also Giles v. GE Money Bank*, 2011 WL 4501099, at *2 (D. Nev. Sept. 27, 2011) (rejecting discovery requests because "[w]hether the arbitration agreement is enforceable against [plaintiff], is a straightforward matter of contract law," and "[t]he court can glean from the face of the document whether it is unconscionable").

Concepcion confirms that whether ATTM's arbitration provision is enforceable is a question of law, and answers that question by holding that the FAA mandates enforcing the provision. As the Supreme Court explained, the terms of ATTM's arbitration provision are "sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled," and "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole." *Concepcion*, 131 S. Ct. at 1753 (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009)). In fact, the Court recognized that the plaintiffs in that case were "*better off* under their arbitration agreement with [ATTM] than they would have been as participants in a class action." *Id.* (emphasis in original). No amount of discovery can justify disregarding those conclusions.

For these reasons, the Eleventh Circuit recently rejected—as a matter of law—a challenge to ATTM's arbitration provision that relied on purported "evidentiary proof regarding whether parties could vindicate their statutory rights in arbitration." *Cruz*, 648 F.3d at 1213. The plaintiffs in *Cruz* argued that "evidence" they had amassed proved that they could not vindicate their rights because "it would not be cost-effective for them to pursue" their "legally complex but small-value claims" individually. *Id.* at 1212, 1214. But the Eleventh Circuit concluded that such "evidence goes only to substantiating the very public policy arguments that

were expressly rejected by the Supreme Court in *Concepcion*—namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted." *Id.* at 1214. Thus, "such an argument is foreclosed here, because the *Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result." *Id.* at 1215 (emphasis in original).

Similarly, as another court recently observed, "the notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with *Concepcion*. In striking down the *Discover Bank* rule, the Supreme Court recognized the possibility that 'small-dollar claims ... might ... slip through the system' because of the cost of proving a claim." *Kaltwasser*, 2011 WL 4381748, at *5 (quoting *Concepcion*, 131 S.Ct. at 1753) (alterations in *Kaltwasser*). The *Kaltwasser* court concluded that *Concepcion* does not "allow for the plaintiffs to avoid class-action waivers by offering evidence about particular costs of proof they would face—essentially applying the underlying rationale of *Discover Bank* without relying on *Discover Bank* as a 'rule.'" *Id*. Thus, any challenge to the fairness of ATTM's provision "must be confined to circumstances in which a plaintiff argues that ***costs specific to the arbitration process***, such as filing fees and arbitrator's fees, prevent [them] from vindicating [their] claims. *Id*. at *6 (emphasis added). Anything else would be "unworkable as a practical matter of judicial administration," and "[i]t is highly doubtful that in striking down the *Discover Bank* rule, the Supreme Court intended to open the door to" the kind of case-by-case, fact-specific inquiries plaintiffs seek "as a means for plaintiffs to avoid arbitration agreements." *Id.*[9]

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[9] Moreover, the Supreme Court in *Concepcion* was itself presented with the kind of evidence plaintiffs here claim the need to gather. In an *amicus* brief submitted in support of the *Concepcion* plaintiffs, counsel for plaintiffs in another putative class action against ATTM—*Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009)—offered the same arguments, along with the record they and other plaintiffs had compiled in district court proceedings. *See* Br. of *Amici Curiae* Marygrace Coneff et al., *Concepcion*, 2011 WL 3973886. There, the *amici*

Here, the costs of arbitration can be determined from the face of the agreement and the relevant AAA rules. In other words, in light of *Concepcion*, plaintiffs here have no need for discovery that, they suggest, might somehow "show that the agreement is substantively unsconscionable." Pls.' Position Paper at 9. Indeed, since *Concepcion* was decided, each federal court to consider the question has refused to permit discovery concerning ***ATTM's provision***. As one federal court put it, "[t]he argument that plaintiffs seek to support through arbitration related discovery has already been addressed and rejected by the Supreme Court." *In re iPad*, 2011 WL 2886407, at *6. Another federal court summarily denied a plaintiff's request for arbitration-related discovery, finding it "neither necessary nor proper." Order at 2, *Kaplan v. AT&T Mobility, LLC*, No. 10-3594-CAS(Ex) (C.D. Cal. Aug. 9, 2011) (attached as Exhibit A).

Courts have reached the same conclusion even in cases involving arbitration provisions that are less consumer-friendly than ATTM's—and which were not expressly approved by the Supreme Court. As one federal court put it, a plaintiffs' request for discovery "directed at whether the class-waiver clause itself is unlawful"—because it was, in plaintiffs' view, exculpatory and unconscionable—"falls outside this Court's role * * * in light of *Concepcion* and *Litman*." *King*, 2011 WL 3861898, at *8. Another court observed that "discovery as to the potential damages [plaintiff] can recover individually" was "simply irrelevant to the substantive unconscionability inquiry" in light of *Concepcion*, which rejected the "argument that class actions are necessary to bring small-dollar claims that might otherwise slip through the legal system." *Black v. JP Morgan Chase & Co.*, 2011 WL 3940236, at *21 (W.D. Pa. Aug. 25,

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argued that they had "successfully proven that AT&T's class action ban would as a factual matter exculpate AT&T from liability" and thus that ATTM's arbitration provision does not "provide[] customers with an effective means of redress." *Id*. at *2. That argument relied entirely on what the *amici* called "[t]he rich factual record developed in *Coneff*, along with that of another putative class action against AT&T, *Cruz v. Cingular Wireless, LLC*, * * * 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008)." *Id*. at *7-8. Needless to say, it did not persuade the Supreme Court.

2011). *See also Meyer*, 2011 WL 4434810, at *9-*10 ("Plaintiff's proposed discovery requests are beyond the scope allowed by the FAA").[10]

B. Discovery Is Irrelevant To The Question Whether Plaintiffs Agreed To Arbitrate Their Disputes With ATTM.

Equally irrelevant is plaintiffs' contention that they need discovery to determine whether they agreed to arbitrate, or whether the circumstances under which they did so were procedurally unconscionable. At the recent status conference, plaintiffs argued that *Concepcion* "carved out contract formation as a fertile ground to figure out whether these arbitration clauses are being procedurally imposed correctly on consumers." Tr. of Sept. 22, 2011, Status Conf. at 12:21-23. But as the Court suggested, these are straightforward questions that do not require discovery to answer: "[Y]ou either agree to [the terms of service], you either accept the service with this provision or you don't." *Id*. at 14:16-17. And plaintiffs themselves have conceded that a "customer could not sign up for a service plan [with ATTM] without acquiescing to the agreement." Pls.' Position Paper at 8.

ATTM has provided evidence showing that plaintiffs, or the users on whose accounts they receive service, agreed to ATTM's terms of service—including the arbitration agreement—as a condition of receiving wireless service. Plaintiffs have not offered any reason to suppose that discovery could shed any light on the question whether they in fact did so. Nor could they: Whether they agreed to ATTM's terms of service is a fact within their own knowledge. Thus, as a federal district court in Mississippi has observed—in a decision affirmed by the Fifth Circuit—"there is no apparent need for discovery as to [a party's] knowledge of" the circumstances under which that party agreed to arbitrate, because they "are matters only [they themselves] could

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[10] Plaintiffs likely will point to a handful of cases in which courts have authorized arbitration-related discovery even after *Concepcion*. In addition to being inconsistent with the FAA and *Concepcion*, these cases also are irrelevant, because, unlike here, they did not involve arbitration provisions that the Supreme Court already has considered and approved.

know." *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 828 (S.D. Miss. 2001), *aff'd*, 34 F. App'x 964 (5th Cir. 2002).

It is clear that plaintiffs seek discovery not to determine whether ***they*** agreed to arbitrate—a question that can be answered without discovery—but rather to investigate the circumstances under which ***other*** ATTM customers agreed to arbitrate. Thus, they seek, for example, information on "[n]egotiations between AT&T and customers regarding the terms and conditions of any arbitration clauses" and "[m]ethods by which customers are provided copies of" the wireless service agreement. Pls.' Position Paper at 9. But the only question before the court is whether ***these plaintiffs*** entered into valid, enforceable agreements to arbitrate. The experience of any other ATTM customers is wholly irrelevant, and thus not the proper subject of discovery. As the Eighth Circuit has explained, "whether other consumers have elected to arbitrate claims under other contracts is not material to the determination of" the plaintiff's unconscionability challenge in that case. *Pleasants v. Am. Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008).

Courts thus regularly reject requests for discovery relating to the arbitration agreements of non-parties to the litigation. For example, in *Meyer*, the court rejected similar discovery requests because "[m]ost of Plaintiff's discovery requests do not relate to the validity of *Plaintiff's* arbitration agreement with [defendant]. Instead, they concern all agreements, disputes, arbitrations and lawsuits relating to T–Mobile customers in California *other than Plaintiff*." 2011 WL 4434810, at *10 (emphasis in original). And in another case, the court rejected a request for discovery "as to whether Plaintiff and the members of the proposed [nationwide] Class agreed to arbitrate their claims," because it was undisputed that the plaintiff had signed the agreement containing the arbitration provision, and because "allowing such discovery would contravene the policy of the FAA that issues of arbitrability should be

determined promptly." *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1284 n.3 (N.D. Ga. 2008) (internal quotation marks omitted).

* * * * * * *

In short, plaintiffs do not need discovery to support an argument that their arbitration agreements prevent them from vindicating their claims, because those arguments are foreclosed by *Concepcion*. And they do not need discovery to support challenges to the manner in which they formed their contracts because that information is already in their possession. The Court should not allow plaintiffs to further put off the inevitable by permitting them to expose ATTM to the delay and expense of discovery in a futile attempt to resist their arbitration agreements.

CONCLUSION

The Court should compel the plaintiffs to arbitrate their claims on an individual basis in accordance with their arbitration agreements, and should dismiss their claims against ATTM.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2011, 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