

IN THE SUPERIOR COURT OF PENNSYLVANIA

Nos. 2197 EDA 2005 & 2277 EDA 2005 (Consolidated Appeals)

LORENA AFROILAN,

Plaintiff-Appellee,

vs.

**AT&T WIRELESS and PANASONIC TELECOMMUNICATIONS
COMPANY, division of MATSUSHITA ELECTRIC
CORPORATION OF AMERICA,**

Defendants-Appellants.

REPLY BRIEF OF APPELLANT AT&T WIRELESS SERVICES, INC.

*Appeal from the Order of the Court of Common Pleas of Philadelphia County
August 2002 Term, No. 00469, Entered on July 12, 2005*

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Appellee Lorena Afroilan admits that she agreed to arbitrate her disputes with AT&T Wireless (“AWS”). She nevertheless raises a hodgepodge of arguments designed to support her lawyers’ quest to pursue a class-action lawsuit. None of these arguments has merit.

Afroilan’s waiver argument is premised on an assumption already rejected by the Court of Common Pleas: that she is simply the alter ego of Brandon Beckermeyer, the original named plaintiff in this case. Afroilan raises entirely new factual allegations and circumstances. She was not allowed by the lower court to simply step into Beckermeyer’s shoes and adopt his experience as her own; she was required to file an amended complaint with her own allegations. AWS timely moved to compel arbitration upon Afroilan’s intervention. She has suffered no prejudice, and AWS has not waived its right to compel arbitration.

Afroilan also fails to demonstrate that any aspect of AWS’s arbitration provision is unconscionable. She argues that it would be impractical for an *individual* consumer to shoulder the burden and expense of litigating a complicated *class action*. Afroilan’s arbitration agreement, however, requires her to do no such thing. Rather, it provides for a speedy, inexpensive, and impartial decision by a neutral arbitrator empowered to award all remedies that would be available to her in court, including attorneys’ fees. There is nothing unreasonable—let alone unconscionable—about an offer of wireless service that includes a simplified, informal dispute resolution process which necessarily excludes the speculative possibility of receiving a pennies-on-the-dollar class-action recovery.

In addition, the Federal Arbitration Act preempts the Court of Common Pleas’ reading of Pennsylvania law, which conditions the enforcement of arbitration provisions on the availability of class arbitration. No company can or will risk facing a potentially massive class-wide arbitral judgment that is subject to a standard of review that is “among the narrowest known to law.”

Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C., 430 F.3d 1269, 1275 (10th Cir. 2005) (citations and quotation marks omitted). Afroilan does not dispute that, if such a standard of review applies, the predictable consequence is that businesses will abandon consumer arbitration altogether. It is hard to imagine a result more inconsistent with the purposes of the FAA than the wholesale elimination of arbitration as a dispute-resolution mechanism in this Commonwealth.

Finally, as explained in our opening brief, Afroilan’s arguments that her Magnusson-Moss Warranty Act claims are inarbitrable rely on a Federal Trade Commission rule that most courts have rejected. The MMWA addresses only *non-binding* “informal dispute settlement procedures,” not *binding* arbitration; because the FTC’s contrary interpretation is not reasonable, the FAA requires Afroilan to arbitrate her MMWA claims.

ARGUMENT

I. THE COURT OF COMMON PLEAS DID NOT ABUSE ITS DISCRETION IN REJECTING AFROILAN’S WAIVER ARGUMENTS.

Afroilan devotes much of her brief to arguing that AWS waived its right to compel arbitration of her claims. In making that alternative argument for affirmance, Afroilan misstates the record below, suggesting that the Court of Common Pleas “never addressed” that argument. Afroilan Br. 8. In fact, Afroilan raised waiver below (R. 741a-744a), and the court rejected it in a separate order entered a week prior to the order from which this appeal was taken (R. 912a). This fact is crucial because the Court of Common Pleas’ determination of this issue is reviewed only for an abuse of discretion. *See Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs.*, 416 Pa. Super. 45, 48, 610 A.2d 499, 500 (1992). Here, the Court of Common Pleas was well within its discretion in rejecting Afroilan’s waiver arguments.

As the U.S. Supreme Court has explained, “[t]he [FAA] establishes that, as a matter of federal law, *any* doubts concerning the scope of arbitrable issues should be resolved in favor of

arbitration [when] the problem at hand is . . . *an allegation of waiver*, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983) (emphasis added). “[A] waiver of a right to proceed to arbitration pursuant to the term of a contract providing for binding arbitration should not be lightly inferred[,] and unless one’s conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished that right.” *Kwalik v. Bosacco*, 329 Pa. Super. 235, 238, 478 A.2d 50, 52 (1984); accord, e.g., *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975), abrogated on other grounds by *Zosky v. Boyer*, 856 F.2d 554 (3d Cir. 1988). Thus, a party opposing arbitration on this ground bears a “heavy burden” of proving waiver. E.g., *Am. Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 95 (4th Cir. 1996); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir.1990). Afroilan simply failed to meet that burden.

A. AWS Raised Its Arbitration Objection To Afroilan’s Complaint As Soon As The Objection Became Available.

Although Afroilan relies heavily on the rule that “[a]ll preliminary objections shall be raised at one time,” she acknowledges that this rule applies only to those preliminary objections that could have been raised initially. Afroilan Br. 15 (quoting Pa. R. C. P. 1028(b)). It is well established that additional preliminary objections are permitted “if an amended pleading contains something that the original pleading did not.” *Goodrich Amram 2d* § 1028(b):10. “Rule 1028(b) does not prevent a second set of preliminary objections which relate to actions by a plaintiff occurring after the first objections were filed, because clearly, these could not have been included in the original objections.” *Id.* § 1028(b):11.

That principle applies with even more force when, as here, the objections relate to an entirely new plaintiff. Afroilan’s waiver arguments miss this fundamental point: she assumes that AWS waived its right to compel arbitration of *her* claims by not objecting to Beckermeyer’s

complaints based on *his* separate arbitration agreement. But she lacks any support for this assumption. The primary authority she offers—albeit divorced from its context (*see* Afroilan Br. 16)—is the Pennsylvania Supreme Court’s statement that the “denial of class action status” is an appealable final order because the unnamed class members were “more properly characterized as parties to the action” and had been “put[] out of court” as a result of the order. *Bell v. Beneficial Consumer Discount Co.*, 465 Pa. 225, 229, 348 A.2d 734, 736 (1975). The unexceptional rule that denials of class certification are appealable has no bearing on the waiver issue.¹

Although Afroilan and the other unnamed class members were, for some purposes, “more properly characterized as parties” even while Beckermeyer was the named plaintiff, the fact remains that they could not be bound by any preliminary objections raised against Beckermeyer. Pa. R. C. P. 1715(b)(1). Beckermeyer’s complaints were based on his own cell phone purchase and did not implicate Afroilan or her arbitration provision. For precisely that reason, the Court of Common Pleas required Afroilan, as a condition of intervention, to file an amended complaint reciting her own “personal factual allegations” (R. 624a) and rejected her attempt to “adopt” Beckermeyer’s allegations (R. 436a). Afroilan’s amended complaint presented new and distinctly different issues—including the applicability of her arbitration provision—that Beckermeyer’s pleadings did not raise.

Nor did AWS waive its rights under *Afroilan’s* arbitration agreement by defending against Beckermeyer’s claims in court. Pennsylvania law is clear that “[a] judgment entered on preliminary objections in a class action before certification shall bind only the named parties to

¹ Afroilan’s reliance on the same language, as quoted by this Court in *Ravitch v. Price Waterhouse*, 2002 PA Super 49, 793 A.2d 939 (*see* Afroilan Br. 16), is equally misplaced. *Ravitch* considered the status of putative class members in determining “whether a class action filed in another state will toll the statute of limitations for a subsequent action filed in Pennsylvania.” 2002 PA Super at ¶ 5, 793 A.2d at 941. Again, that issue has nothing to do with waiver.

the action.” Pa. R. C. P. 1715(b)(1). Thus, reduced to its plainest terms, Afroilan’s argument is that AWS waived its right to compel arbitration based on *her* arbitration provision, by not seeking to compel arbitration (i) against a different plaintiff (ii) under that plaintiff’s separate arbitration provision (iii) at a stage in this case at which Afroilan could not have been bound by any ruling on the issue. This interpretation of Rule 1028(b) defies law and logic, and Afroilan cites no case supporting it. To the contrary, the law is clear that the requirement that “[a]ll preliminary objections shall be raised at one time” applies *only* to preliminary objections that are then available. *Goodrich Amram 2d* § 1028(b):11.

Finally, if there were any doubt as to the propriety and timeliness of AWS’s preliminary objection, Rule of Civil Procedure 2330(b) explicitly provides that, when a new party intervenes, “[*a*]ny party to the action may amend *any* pleading filed by the party to include *any* claim or defense available against [the] intervening party” (emphasis added). The rule could not be clearer: if a new party is allowed to intervene, all other parties are granted an unconditional right to raise new defenses against the intervening party. Because this provision particularly addresses the effect of intervention, it necessarily takes precedence over Rule 1028(b), which applies in all civil actions. *See* Pa. R.C.P. 132 (if there is a conflict between a “general provision” and a “particular provision,” “the particular provision[] shall prevail and shall be construed as an exception to the general provision”). Rule 2330(b) is thus the nail in the coffin for Afroilan’s waiver arguments because whatever minimal plausibility her interpretation of Rule 1028(b) might have in the abstract, Rule 2330(b) provides the more specific rule of procedure applicable here.

B. Afroilan Has Suffered No Prejudice As A Result Of Proceedings Predating Her Intervention In The Case.

Even accepting Afroilan’s assertion that AWS should have raised an arbitration objection sooner than it did, Afroilan also had to show that she was prejudiced by that delay. Indeed,

“prejudice is the touchstone for determining whether the right to arbitrate has been waived.” *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 925 (3d Cir. 1992). “Waiver should not be inferred unless [the party requesting arbitration] has gained an undue advantage or prejudiced the opposition.” *Thermal C/M Servs. v. Penn Maid Dairy Prods.*, 2003 PA Super 318, ¶ 5 n.2, 831 A.2d 1189, 1191 n.2 (2003). As such, the party opposing arbitration bears the “heavy burden” of establishing prejudice. *Am. Recovery Corp.*, 96 F.3d at 95; *Britton*, 916 F.2d at 1412.

Afroilan offers no explanation as to how she has been prejudiced, much less one that could satisfy this heavy burden. Despite the long line of state and federal case law holding that prejudice is an indispensable element of waiver, Afroilan’s only reference to the subject is the conclusory assertion that AWS “engaged in extensive, costly, and time-consuming litigation, to the prejudice of *the putative class*” (Afroilan Br. 13 (emphasis added))—an implicit concession that she herself has suffered no prejudice. In any event, her unsupported assertion that “the putative class” has suffered prejudice is demonstrably false. The potential class members have invested neither time nor money in this litigation; indeed, they remain blissfully unaware of it, and their legal rights remain unaffected by the case.

More to the point, AWS does not seek to compel arbitration with “the putative class”; it seeks to compel arbitration with Afroilan. Accordingly, the only issue here is whether *Afroilan* was prejudiced. She was not. Immediately upon Afroilan’s intervention, AWS sought to compel arbitration; in fact, it raised her arbitration provision and class-action waiver in opposition to her petition to intervene. Thus, Afroilan was well aware at the time that she entered the case that AWS intended to enforce her agreement to arbitrate. (R. 502a-503a, 512a-515a).²

² Indeed, though Afroilan claims that AWS “never raised the arbitration issue” until she intervened (Afroilan Br. 15), AWS raised this issue in opposition to class certification while Beckermeyer was still the named plaintiff. At that juncture, AWS argued that unnamed class

On facts indistinguishable from the present case, the Alabama Supreme Court held that defendants had not waived their right to compel arbitration of the claims of a late-arriving named plaintiff and other putative class members, even though they had done so with respect to the original named plaintiff. *Voyager Life Ins. Co. v. Hughes*, 841 So. 2d 1216, 1219-21 (Ala. 2001). In *Hughes*, the original named plaintiff filed suit in 1996 and added class allegations a year later. *Id.* at 1217-18. “Three years of complaints, answers, motions for discovery, a possible class certification, and other motions from each party followed.” *Id.* at 1218. In 2000, the complaint was then amended again to add a second named plaintiff, at which point the defendants promptly moved to compel arbitration. *Id.* at 1220. Though the Alabama Supreme Court found that defendants had waived their right to compel the *original* named plaintiff to arbitrate (*id.*), this determination did not affect the arbitrability of the claims of the new named plaintiff or the unnamed class members. Rather, the court reasoned that “[t]he determination whether the defendants have waived their right to compel arbitration needs to be made separately for *each plaintiff*, based on the defendants’ behavior toward each of them.” *Id.* at 1219. And because the defendants had moved to compel arbitration shortly after the new plaintiff’s entry into the case, the court concluded that they had not waived their right to arbitrate with her or the unnamed putative class members. *Id.* at 1220.

Whereas *Hughes* is on all fours with this case, all of the cases that Afroilan cites (*see* Afroilan Br. 18-20) are inapplicable. In each case, the party seeking to compel arbitration had engaged in substantial litigation with, and caused prejudice to, the party that was *actually* opposing arbitration.³ Here, however, Afroilan *herself* suffered no prejudice because AWS promptly

members who had agreed to arbitrate and waived the opportunity to participate in a class action should be excluded from the class for that reason.

³ *See Teodori v. Penn Hills Sch. Dist. Auth.*, 413 Pa. 127, 133-34, 196 A.2d 306, 310

raised her obligation to arbitrate in opposition to her petition to intervene (R. 500a-503a; 512a-515a) and in its preliminary objections (R. 645a-650a). Afroilan's argument to the contrary is based solely on alleged prejudice to *Beckermeyer*. But she cites no case holding that a late-arriving plaintiff such as herself may invoke the prejudice allegedly suffered by a prior plaintiff onto her own claim, and we are aware of none. Much less is there any precedent for the proposition that Afroilan's lawyers have standing to raise the costs *they* incurred in pursuing a putative class action as a basis for finding waiver of the right to arbitrate anyone's claim, let alone that of unnamed class members. Accordingly, the Court of Common Pleas surely did not abuse its discretion in rejecting Afroilan's waiver argument.

II. AFROILAN'S AGREEMENT TO ARBITRATE IS NOT UNCONSCIONABLE.

Afroilan contends that her arbitration agreement is procedurally and substantively unconscionable. *See* Afroilan Br. 20-31. Her procedural unconscionability argument requires little response: she asserts that her agreement is procedurally unconscionable merely because it is part of a non-negotiable form contract. But as Pennsylvania law recognizes, that is not enough; Afroilan's position would render virtually every contract in the modern economy procedurally unconscionable. *See* AWS Opening Br. 14-16.⁴ Afroilan's substantive unconscionability argu-

(1964) (defendant first raised the issue of arbitration as to named plaintiff on appeal); *Goral v. Fox Ridge, Inc.*, 453 Pa. Super. 316, 321-24, 683 A.2d 931, 933-34 (1996) (defendant failed to raise arbitration as a preliminary objection to named plaintiff's complaint and first moved to compel arbitration 19 months after the parties opposing arbitration filed their complaint); *Maranca*, 416 Pa. Super. at 49-51, 610 A.2d at 501-02 (defendant failed to raise arbitration as a preliminary objection or new matter and moved to compel arbitration as to named plaintiff only after receiving adverse rulings on other pretrial motions); *Kwalick*, 329 Pa. Super. at 239-40, 478 A.2d at 51-52 (holding that plaintiff did *not* waive his right to compel arbitration because he did not "prejudice" the defendant or gain "any undue advantage" by filing a complaint).

⁴ Afroilan seems to argue that her arbitration provision is procedurally unconscionable because she could not have obtained AWS service without agreeing to arbitrate. Afroilan Br. 22-23. As we explained in our opening brief (at 14-16), however, a party asserting unconscionability must prove that she lacked any meaningful choice other than to accept the provision; simply alleging that the provision was part of a standardized contract is insufficient. Afroilan could

ments also are misguided: they are based on a distorted picture of her arbitration agreement and misconceptions about how individual arbitration functions.

A. The Class-Arbitration Waiver In Afroilan’s Arbitration Agreement Is Fully Enforceable.

Afroilan asserts that the class-arbitration waiver to which she agreed is unenforceable because she “cannot vindicate her individual claim without a class action.” Afroilan Br. 25. This claim is fundamentally flawed for several reasons.

First, Afroilan cavalierly dismisses the fact that it would cost her just \$25 to arbitrate under AWS’s provision—and nothing under Cingular’s arbitration provision.⁵ She fails to address any of the cases we cited that have found that similar or even greater costs are perfectly reasonable. *See* AWS Opening Br. 20. And she disparages the utility of small claims court without foundation. *See* Afroilan Br. 30-31.

have selected a different service provider or done without wireless service—which is hardly a necessity of life—altogether. *See Denlinger, Inc. v. Dendler*, 415 Pa. Super. 164, 178, 608 A.2d 1061, 1068 (1992) (credit application was not procedurally unconscionable because the defendant’s products were “readily available from a variety of sources” and, if the plaintiff “found the terms of [the] credit application onerous, he was at liberty to seek a credit account elsewhere”).

⁵ As we explained in our opening brief (at 20 n.6), Cingular has announced on its website that it will make the features of its arbitration provision available to all former AWS customers. *See* http://www.cingular.com/customer_service/disputeresolution. Under this provision, Cingular pays the *entire* cost of arbitration unless the arbitrator finds the claim to be so frivolous that it violates Federal Rule of Civil Procedure 11(b). *Id.* Cingular has also agreed that if the arbitrator grants relief equal to or greater than the claimant’s demand, Cingular will pay the claimant’s reasonable attorney’s fees and expenses, even in cases in which the underlying claim does not provide a basis for such an award of attorney’s fees and expenses. *Id.* Although Afroilan briefly asserts that the Court should ignore Cingular’s provision, the vast majority of courts have held that such changes in arbitration policy should be considered. *See, e.g., Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 & n.3 (7th Cir. 2003); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002); *Dobbins v. Hawk’s Enters.*, 198 F.3d 715, 717 (8th Cir. 1999). At least one court has specifically held that, because former AWS customers are entitled to avail themselves of Cingular’s arbitration provision, any challenges to the AWS provision are moot. *See Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip op. at 3 (Mo. Cir. Ct. Nov. 28, 2005) (attached as Addendum A).

Afroilan also tries to establish that no individual consumer will ever invest the time or money necessary to undertake complex litigation. Afroilan Br. 24-26. That argument, however, approaches the question from the wrong perspective, largely because it ignores the point of individual arbitration. Unlike class litigation, individual arbitration does not involve a pitched battle between armies of lawyers whose economic interests may motivate the very same “extensive, costly, and time-consuming litigation” (*id.* at 13) Afroilan decries in her waiver argument. Afroilan is wrong to suggest that, under her arbitration agreement, she or any other customer is required “to proceed with complex legal claims and statutory interpretation,” hire expert witnesses, or pay “exorbitant” costs. *Id.* at 31. Because the stakes of the dispute are drastically reduced from the stakes involved in a class action, *neither* party will have an incentive to invest the time or money necessary to develop complex legal arguments or expert testimony. Rather, Afroilan’s arbitration agreement and the relevant American Arbitration Association (AAA) rules provide for a speedy, inexpensive, and informal alternative to the kind of complex litigation that is more familiar to her attorneys. The process is flexible enough to be tailored to the parties’ preferences: they can choose a brief, in-person hearing; a telephonic hearing; or a “desk” arbitration based on the submission of documents alone. See AAA, *Consumer Due Process Protocol*, Principle 12(1) & cmt., available at <http://www.adr.org/sp.asp?id=22019>. Following brief and informal presentations by the parties, the arbitrator will render a prompt, final decision. Had she filed her claim in accordance with her agreement, Afroilan would have obtained a resolution of her complaints long ago. Rather than “preclud[ing] [Afroilan] from seeking justice” (Afroilan Br. 20), AWS’s provision provides customers with a faster, more accessible, and “less expensive alternative to litigation” (*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995)).

Afroilan is equally mistaken in asserting—without any evidence—that “the factual and

legal complexities posed by this case make it inconceivable that any attorney would accept it on an individual basis” (Afroilan Br. 25). Not only is this claim lacking in foundation, but, as noted in our opening brief (at 23), this Court has specifically rejected it because attorneys’ fees under the MMWA are calculated based on actual time expended, not as a percentage of the recovery, and therefore serve to make even small consumer claims viable. *Croft v. P & W Foreign Car Serv., Inc.*, 383 Pa. Super. 435, 438, 557 A.2d 18, 20 (1989). Moreover, Afroilan’s argument assumes that AWS would defend individual arbitrations in precisely the same way it defends class actions. To the contrary, because often the amount at stake in an individual arbitration is modest and because the entire purpose of arbitration is to reduce costs, AWS ordinarily would not even retain counsel for an individual arbitration, much less raise complex issues of state or federal law. Indeed, as noted in our opening brief (at 21 n.7), given that it will likely pay up to \$1700 in arbitration fees alone, AWS has every incentive to settle even colorable claims brought against it.⁶ See Lindsay R. Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 659 (reasoning that “a putative class could call a defendant’s bluff by initiating a multitude of arbitration claims,” each of which, if meritorious, could tax the defendant with arbitration costs and attorneys’ fees). These commonsense points are reflected in practice: AWS has reached settlements with the vast majority of consumers who have filed demands for arbitration. See AAA, *CCP Section 1281.96 Data Collection Requirements*, at 24-34 (identifying AWS consumer arbitrations between Jan. 1, 2003 and Dec. 31, 2005), available at <http://www.adr.org/CCPQ405.pdf>. That practice makes

⁶ Afroilan describes this straightforward economic point as “disingenuous” because AWS could have offered a *classwide* settlement at the outset of this litigation (Afroilan Br. 21 n.3). That contention is misguided for two reasons. First, AWS has never conceded that Afroilan’s claims are colorable. Second, unlike individualized settlements, classwide settlements are inherently time-consuming and expensive, reintroducing the very transaction costs individual arbitration is intended to avoid.

sense; Cingular is in the business of keeping its customers satisfied, so it is not beneficial for the company to fight with its customers. Indeed, “[m]aintaining happy customers is certainly wise, considering that each subscriber costs several hundred dollars to sign up.” Margo McCall, *Balance Swings to Customer Retention*, WIRELESS WEEK (Jan. 15, 2006), at 16.

Moreover, the notion that enforcement of AWS’s arbitration provision and class waiver would somehow “immunize [AWS] for its wrongful conduct” (Afroilan Br. 25) is unfounded for the additional reason that it ignores the Pennsylvania Attorney General’s and the FTC’s statutory authority to enforce the statutes under which Afroilan seeks relief. *See* 15 U.S.C. §§ 45 & 2310(b)-(c) (MMWA); 73 P.S. §§ 201-4, -4.1, -5 (Pennsylvania Unfair Trade Practices and Consumer Protection Law). As the Third Circuit has recognized, such enforcement provisions confer “sufficient sanctioning power to provide a meaningful deterrent to” regulated entities. *Johnson v. W. Suburban Bank*, 225 F.3d 366, 375 (3d Cir. 2000); *see also, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (holding class waiver not to be unconscionable in part because Louisiana attorney general could seek restitution on behalf of customers under state consumer protection statute).

Afroilan argues that the terms of her arbitration agreement “unreasonably favor AWS” (Afroilan Br. 20), implying that she has received inadequate benefits as a result of that agreement. An objective analysis of the agreement reveals, however, that the trade-off Afroilan made—wireless service at lower cost in exchange for giving up the right to be part of a class action—is perfectly rational.⁷ Afroilan suggests that this Court should ignore our argument that

⁷ As explained in our opening brief (at 26 & n.12), the unconscionability doctrine examines the reasonableness of the bargain at the time it was made, not at the time of the lawsuit. Although Afroilan argues that AWS’s “prayer for an *ex ante* examination of the contract has no support whatsoever in case law” (Afroilan Br. 30), this is in fact **black-letter law**. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (“If a contract or term thereof is unconscionable **at the time the contract is made** a court may refuse to enforce the contract....”) (emphasis added).

arbitration inevitably results in lower prices for its customers because factual support for it is not “in the record” (Afroilan Br. 21). But “it is inconsistent with basic economics” to suggest that consumers do not benefit from arbitration provisions “because whatever lowers costs to businesses tends over time to lower prices to consumers”—particularly in competitive markets such as the market for wireless phones and service. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, at 4-5 (Aug. 26, 2005), available at <http://ssrn.com/abstract=791807>. Although Afroilan would prefer that the Court ignore this basic economic principle and the FCC’s determination that the market for wireless services is highly competitive (*see* AWS Opening Br. 16 n.3), courts routinely evaluate the probable economic consequences of their decisions based on basic economic assumptions and government reports.⁸ Afroilan’s exhortation that this Court turn a blind eye to such practical considerations and useful data is contrary to accepted judicial practice.

In challenging the fairness of her agreement, Afroilan also relies on the flawed assumption that class actions produce clear benefits that no reasonable customer would willingly forgo. But Congress, the courts, and the public have all recognized that class actions are subject to abuse, and that consumers frequently recover little or nothing while the lawyers reap large fees. “That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.” *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980).⁹

⁸ See, e.g., *Granholt v. Heald*, 544 U.S. 460 (2005) (relying extensively on the FTC’s report on the effects of state law on e-commerce in the wine industry); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (“passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued”). Indeed, Afroilan’s own amici cite the same FCC report. See Amici Br. 9.

⁹ See also Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(3)(A)

Afroilan asserts that AWS has “ignore[d] the law of this Commonwealth” (Afroilan Br. 20) in arguing that she is bound by her arbitration agreement. To the contrary, in our opening brief (at 29-33) we squarely addressed the leading Pennsylvania cases on the issue—*McNulty v. H&R Block*, 2004 PA Super 45, 843 A.2d 1267; and *Lytle v. Citifinancial Servs., Inc.*, 2002 PA Super 327, 810 A.2d 643. As we explained, this case is different from *McNulty* and *Lytle*: under AWS’s low-cost arbitration provision—or, *a fortiori*, under Cingular’s cost-free arbitration provision—Afroilan is fully able to seek redress through arbitration or small claims court in the absence of a class action.

Relatedly, Afroilan ignores the overwhelming weight of authority upholding class waivers (*see* AWS Opening Br. 17-19) and instead cites a few scattered decisions from other jurisdictions in support of her position. These decisions are either easily distinguishable or unpersuasive.

Afroilan repeatedly invokes *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), to support her argument that AWS’s arbitration provision is unconscionable. Her reliance on *Ting*, however, is founded on a serious factual mistake. Contrary to her repeated assertions (*see, e.g.*, Afroilan Br. 23, 24 n.4) AWS’s arbitration provision is **not** the “very same” arbitration provision as the one at issue in *Ting*. The opinion in *Ting* is abundantly clear that the case involved AT&T’s (not AWS’s) “residential long-distance customers”—*i.e.*, its landline customers. *Ting*, 319 F.3d at 1134.¹⁰ The arbitration provision at issue in *Ting* is completely different from AWS’s provision:

(“Class members often receive little or no benefit from class actions, and are sometimes harmed.”); Penn, Schoen & Berland Assocs., U.S. Chamber of Commerce, Institute for Legal Reform, *Polling on The Class Action System: National Results* (Mar. 2003), at <http://www.instituteforlegalreform.com/resources/classaction.pdf> (reporting that “67% of Americans believe that lawyers benefit most from the current class action suit system while 61% think that consumers (32%) and class members (29%) benefit least from the current system”).

¹⁰ Afroilan makes the mistaken assumption that the AT&T Corporation was the same com-

these are different companies with different contracts. *Compare* 319 F.3d at 1133 n.4 (reprinting substantial portion of AT&T landline provision) *with* R. 703a-704a (AWS provision).¹¹

The other cases Afroilan cites are similarly inapposite. For example, in *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005), the court emphasized that the arbitration provision required the plaintiff to bear significant arbitration costs and precluded an award of attorneys' fees (*id.* at 304, 311). A subsequent Missouri decision addressing Cingular's and AWS's arbitration provisions distinguished *Whitney* on that basis. *See Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281 (Mo. Cir. Ct. Nov. 28, 2005). Similarly, in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), the U.S. Court of Appeals for the First Circuit distinguished many decisions by other federal courts of appeals upholding class waivers on the grounds that the arbitration agreement at issue did not permit the recovery of attorney's fees and expenses and that the plaintiffs' antitrust claims would be extraordinarily complex to litigate, requiring \$300,000 to \$600,000 in expert fees (*id.* at 56-58).¹² Here, of course, AWS's arbitration provision would not bar Afroilan from recovering statutory attorneys' fees, and there is no need for expensive experts for her to pursue her warranty claims. *Janda v. T-Mobile, USA, Inc.*, 2006 U.S. Dist. LEXIS 15748 (N.D. Cal. Mar. 17, 2006), fails to address any of these issues, instead applying a formulaic three-part test it derived from the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). Whether or not this is a correct

pany as AT&T Wireless. In fact, AWS had no affiliation with AT&T Corp. after it was split off as a stand-alone public company in July 2001.

¹¹ For example, the arbitration provision in *Ting*, among other things, "require[d] customers to split the arbitrator's fees with AT&T" (319 F.3d at 1151), whereas AWS's provision commits it to paying all arbitration fees above \$25 (R. 704a).

¹² Afroilan states that in *Kristian* the First Circuit "[l]iken[ed] the class action prohibition found in the Comcast agreement to that found in the AWS agreement." Afroilan Br. 29. Once again, that assertion is the product of her misconception that AWS's arbitration provision was at issue in *Ting*. *See id.*

statement of California law,¹³ it is flatly inconsistent with the individualized assessment required by Pennsylvania law (*see* AWS Opening Br. 29-33) and is preempted by the FAA (*see id.* at 33-37).¹⁴

B. Afroilan’s Challenges To The Provision’s Limitation On Punitive Damages And Exception For Claims Relating To Customer Debts Are Without Merit.

Afroilan also briefly challenges as unconscionable the AWS provision’s limitation on punitive damages and its exception for claims that “relate solely to the collection of any debts” owed by the customer to AWS. Afroilan Br. 24, 27. Neither contention is persuasive. To begin with, neither provision is included in Cingular’s arbitration provision, which has been made available to all former AWS customers, rendering Afroilan’s complaints moot. *See* note 5, *supra*. Moreover, Afroilan lacks standing to challenge the limitation on punitive damages because punitive damages are neither requested in her complaint nor available as a matter of law. *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 402 (3d Cir. 2004) (under Pennsylvania law punitive damages are not recoverable in a breach of warranty action).¹⁵ Insofar as treble damages would be available under the Pennsylvania Unfair Trade Practices and Consumer Protection

¹³ *But see Shroyer v. New Cingular Wireless Servs., Inc.*, No. 2:06-CV-01792, slip op. at 4-6 (C.D. Cal. May 30, 2006) (attached as Addendum B) (holding that the class waiver in Cingular’s arbitration provision is not unconscionable under *Discover Bank* and that any holding to the contrary would be preempted by the FAA).

¹⁴ Afroilan also cites *Kinkel v. Cingular Wireless LLC*, 828 N.E.2d 812 (Ill. App. Ct. 2005), in which an Illinois appellate court held that the class waiver in a now-superseded version of Cingular’s arbitration provision is unconscionable. *Kinkel* conflicts with another Illinois appellate court’s holding that class waivers are not unconscionable. *See Rosen v. SCIL, LLC*, 799 N.E.2d 488 (Ill. App. Ct. 2003). The Illinois Supreme Court granted review to resolve the split. The case has been fully briefed and was argued on May 16.

¹⁵ *See also, e.g., Kelly v. Fleetwood*, 377 F.3d 1034 (9th Cir. 2004) (punitive damages are recoverable under the MMWA only if they are recoverable in a state-law breach of warranty action); 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE § 6:03 (2d ed. 2000) (“No product liability case has been found in which punitive damages were awarded based solely on a breach of warranty.”); 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 12.1(A) (5th ed. 2005) (“because breach of warranty actions have their roots in contract law, punitive damages generally are not granted unless accompanied by an independent tort”).

Law (73 P.S. §§ 201-1 *et seq.*), AWS's arbitration provision would not preclude them. (R. 704a) ("the arbitrator may award on an individual basis damages required by statute"). To the extent there is any doubt on that score, the question would be for the arbitrator to resolve.¹⁶

Afroilan's argument that the debt-collection exception to arbitration is unconscionable (*see* Afroilan Br. 27) is likewise without merit for three reasons. First, as with the provision related to punitive damages, the debt-collection exception is not contained in Cingular's arbitration provision, and Cingular has represented that it will not invoke that exception against former AWS customers.¹⁷ Second, the provision applies to both parties: "***you or we*** may choose to pursue claims in court if the claims relate solely to the collection of any debt you owe to us." (R. 703a) (emphasis added). *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (rejecting the same argument because "[t]he promises are mutual: both parties are required to arbitrate covered claims, and neither is required to arbitrate non-covered claims"). Precisely because the provision is bilateral, Cingular has not sought to compel arbitration of claims filed by former AWS customers under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, that relate to debts owed by the customer. *See, e.g., Uddin v. Equifax Info. Servs.*, No. 05-2161 (E.D.N.Y., complaint filed May 4, 2005); *Rovers v. Int'l Mercantile Co.*, No. 05-6122-AA

¹⁶ *See, e.g., Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003) (question whether a limitation on punitive damages precludes treble damages under RICO is for the arbitrator); *Zuver v. Airtouch Commc's, Inc.*, 103 P.3d 753, 763-64 (Wash. 2004) ("where parties dispute the potential but unknown effect of a particular provision in an arbitration agreement," the provision cannot be declared unconscionable on the basis of speculation as to how the arbitrator might interpret it); *Anders v. Hometown Mortgage Servs.*, 346 F.3d 1024, 1030-33 (11th Cir. 2003) (the arbitrator, not the court, should address the enforceability of a limitation on remedies in an otherwise enforceable arbitration agreement).

¹⁷ *See* <http://www.cingular.com/disputeresolution> ("[I]n those rare occasions when Cingular may have a claim against a current or former customer, Cingular will arbitrate that claim or bring it in small claims court, notwithstanding language in versions of predecessor company's arbitration provision that entitle Cingular to pursue such claims in any court that has jurisdiction.").

(D. Or., complaint filed Apr. 20, 2005).¹⁸ Third, even if the provision were not bilateral, Afroilan’s strict equality-of-remedies argument was rejected by the Pennsylvania Supreme Court more than 100 years ago. *See Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 220, 51 A. 973, 975 (1902). “Pennsylvania law, consistent with the most recent restatement of contracts, does not otherwise require both parties to an agreement to have equivalent obligations to satisfy the standard of mutuality of obligation.” *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (citing *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 540-41, 526 A.2d 1192, 1195 (1987); and *Darlington v. Gen. Elec.*, 350 Pa. Super. 183, 204, 504 A.2d 306, 316 (1986)).¹⁹ To apply the standard differently in the arbitration context would run afoul of the FAA. *Perry v. Thomas*, 482 U.S. 483, 493 & n. 9 (1987).

III. THE FAA WOULD PREEMPT ANY STATE-LAW RULE THAT DECLARES THE CLASS-ARBITRATION WAIVER IN AWS’S ARBITRATION PROVISION UNCONSCIONABLE.

Afroilan argues that the FAA would not preempt a refusal by state courts to enforce class-arbitration waivers because her “challenge to this arbitration clause [is] grounded on principles of Pennsylvania law which apply to all contracts.” Afroilan Br. 32. But even if that were true, Afroilan ignores the point of our conflict-preemption argument: that a generally applicable state-law defense is nevertheless impliedly preempted if it would *frustrate the purposes* of the

¹⁸ In contrast, in *Lytle v. Citifinancial Servs., Inc.*, the arbitration agreement excluded “[a]ny action to effect a foreclosure,” which did have the effect of reserving access to the courts solely to the defendant. 2002 PA Super 327, ¶¶ 6, 36-37, 810 A.2d at 650, 665.

¹⁹ We note that the Pennsylvania Supreme Court has recently granted a petition for certification from the U.S. Court of Appeals for the Third Circuit, raising the question whether an arbitration provision that allowed a creditor to pursue certain remedies in court while requiring the debtor to arbitrate all claims is unconscionable under Pennsylvania law. *See Salley v. Option One Mortgage Corp.*, No. 04-4241, 2005 WL 3724871 (3d Cir. Oct. 20, 2005), *petition for certification granted*, No. 50 EAP 2005 (Pa. Dec. 28, 2005). The Third Circuit perceived a conflict between *Harris* and *Lytle* (*see* 2005 WL 3724871, at *2-*3), but that conflict is not relevant here because, unlike in those cases, the debt-collection exception to AWS’s arbitration provision is fully bilateral.

FAA. *See* AWS Opening Br. 33-37. As the U.S. Supreme Court has made clear in other contexts, the existence of a “savings clause ... does *not* bar the ordinary working of conflict preemption principles.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (emphasis in original).²⁰

In a role reversal, Afroilan claims that our conflict-preemption argument actually “undermines federal policies favoring arbitration.” Afroilan Br. 31. In Afroilan’s view, our explanation of why companies will abandon arbitration if class waivers are unenforceable “demonstrates the very fear of and hostility towards arbitration that the FAA was enacted to overcome.” *Id.* at 33. But this argument misunderstands the point of arbitration: as many businesses in Pennsylvania and around the nation, including AWS, have concluded, traditional arbitration—which had long been understood to mean *individual* arbitration—is worthwhile because disputes may be resolved cheaply, quickly, and informally.²¹ These benefits outweigh the risks of an adverse arbitral award that is subject only to limited review under a narrow standard.

As we explained in our opening brief (at 33-36 & n.16), the possibility of class-wide ar-

²⁰ Afroilan claims that the U.S. Supreme Court held in *Green Tree Finance Corp. v. Bazzle*, 539 U.S. 444 (2003), that “whether a class action can be brought in arbitration depends upon state law.” Afroilan Br. 35 (citing *Bazzle*, 539 U.S. at 447). She misunderstands the holding in *Bazzle*. What the Court actually said is that, when an arbitration provision is *silent* as to whether class arbitration is available, the question is a matter of contract interpretation for an *arbitrator* to determine. *Bazzle*, 539 U.S. 447. *Bazzle* simply does not resolve the FAA preemption question in this case; for that reason, we did not cite the decision to support our conflict-preemption argument in our opening brief, despite Afroilan’s assertion that we did (*see* Afroilan Br. 35).

²¹ One academic reported in 2000 that, despite her “extensive efforts” to locate attorneys who had participated in class arbitrations, she “found just a handful,” indicating to her that “very few arbitrations have been handled as class actions.” Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38 n.148 (2000). Indeed, it was not until the summer of 2003 that the major arbitration service providers first prescribed rules to conduct class arbitrations. Carole Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 186-87 & n.3 (2006); *see also* AAA, *American Arbitration Association Policy on Class Actions* (July 14, 2005), at <http://www.adr.org/Classarbitrationpolicy> (“On October 8, 2003, ... the [AAA] issued its Supplementary Rules for Class Arbitrations”).

bitration radically transforms the risk-benefit analysis. As a result, few businesses will include an arbitration provision in their consumer contracts. Accordingly, by conditioning the enforceability of arbitration provisions on the availability of class-arbitration procedures that destroy all the benefits of arbitration, the Court of Common Pleas' ruling (if upheld) would lead to the elimination of consumer arbitration in Pennsylvania.²²

Afroilan suggests that the risks of class arbitration can be mitigated by “redraft[ing] the contract to provide for broader appellate review.” Afroilan Br. 34. Though she confidently asserts that “the FAA allows parties to contractually modify the scope of appellate review” (*id.*), in fact there can be no assurance of that, as courts around the country are divided on the issue, and the only Pennsylvania court to address it has held that “Pennsylvania courts will not enforce an agreement providing for a de novo review of an arbitration award.” *Trombetta v. Raymond James Fin. Servs.*, 71 Pa. D. & C. 4th 12, 34 (Pa. Ct. Com. Pl. 2005).²³

²² Afroilan asserts that her concerns with “restraints on review of an arbitrator’s decision” as to her “individual case” are equivalent to AWS’s concerns in the context of a class arbitration. Afroilan Br. 33 n.9. That defies common sense. Afroilan and AWS agreed to limited review in the context of an individual arbitration. But businesses will not—indeed, rationally, could not—agree to class arbitration given the heightened stakes: millions or billions of dollars, and perhaps, the company’s very survival.

²³ A number of courts have held or suggested that they will not allow parties to contract for a different standard of judicial review under the FAA. *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003) (en banc); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001); *see generally* Kristen M. Blankley, *Be More Specific! Can Writing A Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL CIR. REV. 391, 414 (2006) (“Of the eight circuits examining the issue of whether parties can contract around the FAA to expand judicial review, four have held the parties may do so while four decided the opposite.”). While the federal courts are equally divided, “[m]ost state courts that have considered this issue have ruled that the parties may not contractually expand the scope of judicial review of arbitration awards.” *Trombetta*, 71 Pa. D. & C. 4th at 24.

Moreover, if parties to an arbitration agreement must insist on all of the procedures that are attendant to litigation, that effectively converts arbitration into litigation.²⁴ Afroilan accuses Cingular of not “want[ing] to arbitrate claims at all,” but rather desiring to “eliminate the risk of large-scale liability” (Afroilan Br. 34). That attack underscores Afroilan’s disdain for traditional arbitration, which is recognized as a more efficient, less expensive, and less adversarial forum than litigation. True, AWS seeks to replace the inefficient class-action device—which frequently benefits lawyers the most and the class members the least—with individual arbitration, a forum favored by federal law. But there is nothing sinister in that: “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

IV. AFROILAN’S MMWA CLAIMS ARE FULLY ARBITRABLE.

As explained in our opening brief (at 38-46), both of Afroilan’s MMWA arguments—*i.e.*, that all MMWA claims are inarbitrable and that AWS’s arbitration violates the “single-document rule”—flow from the erroneous supposition that ***binding*** arbitration somehow constitutes a ***non-binding*** “informal dispute settlement procedure,” as contemplated by 15 U.S.C. § 2310(a). The overwhelming majority of courts, including the Fifth and Eleventh Circuits, have refused to treat arbitration as a non-binding dispute settlement procedure because that notion is inconsistent with the text and legislative history of Section 2310. *See* AWS Opening Br. 38-41; *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002); *Davis v. S. Energy Homes, Inc.*, 305 F.3d

²⁴ Afroilan asserts that under the AAA’s Wireless Industry Arbitration (“WIA”) rules AWS could obtain “broader judicial review” of an arbitrator’s decision, and, indeed, has already contracted for it. Afroilan Br. 34. That is not so. Under the WIA rules (contained in the procedures for “cases involving claims of at least \$500,000,” WIA Rules, Large/Complex Case Track, available at <http://www.adr.org/sp.asp?id=22010>), a party may seek review only by a new arbitrator. *Id.*, Rule L-6. The standards for judicial review remain unaltered.

1268 (11th Cir. 2002). As these courts have recognized, while the MMWA clearly authorizes warrantors to “establish ... informal dispute settlement procedure[s]” that “consumer[s] must resort to ... *before* pursuing any legal remedy” under the statute (15 U.S.C. § 2310(a)(3)(C) (emphasis added)), it does not suggest that *binding* arbitration is such a procedure. Any such conclusion would ignore the fact that “binding arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite.” *Walton*, 298 F.3d at 475 (emphasis in original).

Afroilan responds to this wealth of authority with semantic sleight-of-hand, stating: “AWS cannot have it both ways. If arbitration’s informality is critical to FAA preemption, the same informality makes it a non-binding dispute resolution mechanism.” Afroilan Br. 38. This Alice-in-Wonderland argument is flawed on its face; it inexplicably assumes that no “informal” procedure can be final and binding. That assumption is false and is, in fact, rebutted by a case Afroilan herself cites: “The General Assembly has clearly favored the use of non-judicial dispute resolution mechanisms . . . for example, in mandating arbitration of unresolved grievances in the public sector. In doing so, the Legislature has emphasized *informality and finality*.” Afroilan Br. 39 (quoting *Kozura v. Tulpehocken Area Sch. Dist.*, 568 Pa. 64, 69, 791 A.2d 1169, 1172-73 (2002)) (emphasis added).²⁵ In short, while it is certainly true that arbitration’s informality is one of its chief advantages, that does *not* make arbitration a non-binding, “informal dispute resolution mechanism” within the meaning of the MMWA.

In our opening brief (at 41-42 & n.20), we explained why the cases that Afroilan cites (see Afroilan Br. 40-41) were wrongly decided. Afroilan does little to confront our arguments,

²⁵ See also, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 82-83 (2000) (“The agreement also provided that all disputes ... would be resolved by binding arbitration.”); AAA, *Alternative Dispute Resolution Basics FAQs* (Q: “What if a party disagrees with the arbitrator’s decision?” A: “Arbitration awards are binding and are vacated only under limited circumstances, as outlined in state and federal arbitration laws.”), at <http://www.adr.org/sp.asp?id=26090>.

adding only that *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910 (N.D. Ohio 2003) is a “notabl[e]” decision because it “rejected” the decisions of the Fifth and Eleventh Circuits. Afroilan Br. 41. But as we pointed out in our opening brief (at 42 n.21), *Rickard* is irreconcilable with the Supreme Court’s FAA jurisprudence. Moreover, *Rickard* has itself been rejected by two federal district courts and an Ohio appellate court.²⁶ In short, because the MMWA does not address **binding** arbitration, and because the FAA establishes “a liberal federal policy favoring arbitration agreements” (*Moses H. Cone*, 460 U.S. at 24), the FTC’s position that MMWA claims are non-arbitrable is not a reasonable one. See AWS Opening Br. 38-42.

As explained in our opening brief (at 42-46), Afroilan’s “single document argument” fails for a similar reason: Warrantors must disclose in a “single document,” among other things, any “[i]nformation respecting the availability of any informal dispute settlement mechanism.” 16 C.F.R. § 701.3(a)(6); see 15 U.S.C. § 2302(a). However, because **binding** arbitration is not an “informal dispute settlement mechanism” under the MMWA, any agreement to arbitrate disputes need not be disclosed in the warranty.²⁷

In response, Afroilan relies first on *Cunningham v. Fleetwood Homes, Inc.*, 253 F.3d 611 (11th Cir. 2001). As explained in our opening brief (at 44-45), two recent decisions, including one by a district court within the Eleventh Circuit, have recognized that the Eleventh Circuit’s subsequent decision in *Davis* implicitly overruled *Cunningham*. *Cunningham*’s flaw is that it treated binding arbitration as an “informal dispute settlement mechanism,” a position that *Davis*

²⁶ See *Pack v. Damon Corp.*, 320 F. Supp. 2d 545, 558 (E.D. Mich. 2004) (rejecting *Rickard* and following *Davis* and *Walton* as “the more persuasive authority”); *Dombrowski v. Gen. Motors Corp.*, 318 F. Supp. 2d 850 (D. Ariz. 2004) (following *Davis* and *Walton* and rejecting *Rickard*); *McDaniel v. Gateway Computer Corp.*, 2004 WL 2260497, at *3 (Ohio Ct. App. Sept. 24, 2004) (following *Davis* and *Walton* and finding *Rickard* unpersuasive).

²⁷ Afroilan states that the Court of Common Pleas “expressly adopted the ‘single document’ rule espoused in *Cunningham*.” Afroilan Br. 43 n.11 (citing R. 278a). But this ruling addressed the substance of Beckermeier’s MMWA claims, not whether Afroilan’s claims are arbitrable.

squarely rejected. *See* AWS Opening Br. 43-45. Recognizing this difficulty, Afroilan tries to paint a broader picture of *Cunningham*, arguing that it “was based on the principle that a binding arbitration clause materially impacts consumers under the warranty and Congress wanted all such material terms present in clear language in a single document.” Afroilan Br. 43. Here, however, the principle that Afroilan has divined runs afoul of the clear language of the MMWA itself, which provides that warrantors must make disclosures *only* “to the extent required by rules of the [FTC].” 15 U.S.C. § 2302(a). The FTC, in turn, does not require the disclosure of arbitration provisions in the warranty itself. *See* 16 C.F.R. § 701.3(a). The only other case Afroilan cites on this point commits the same error of inferring extra-statutory disclosure requirements. *See Daimler Chrysler Corp. v. Matthews*, 848 A.2d 577, 587-88 (Del. Ch. 2004).

As a fallback, Afroilan argues that 16 C.F.R. § 701.3(a)(8), which requires disclosure of “[a]ny exclusions of or limitations on relief such as incidental or consequential damages,” requires disclosure of an arbitration agreement. But as courts have explained time and again, parties do not waive any substantive rights or remedies by agreeing to arbitrate or to forgo participation in a class action.²⁸ Nor, as Afroilan suggests, is the MMWA’s class-action provision somehow uniquely substantive in nature (Afroilan Br. 44); indeed, the MMWA states that “consumers may not *proceed* as a class” unless the warrantor is first afforded an opportunity to cure any vio-

²⁸ *See, e.g., Mitsubishi*, 473 U.S. at 628 (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”); *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1996) (Federal Rule of Civil Procedure 23 “must be interpreted in keeping with ... the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right,’ 28 U.S.C. § 2072(b).”); *Jenkins v. First Am. Cash Advance, LLC*, 400 F.3d 868, 878 (11th Cir. 2005) (“[P]recluding class action relief will not have the practical effect of immunizing [the defendants]. The Arbitration Agreements permit [the plaintiff] and other consumers to vindicate all of their substantive rights in arbitration.”); *Lilian v. Commonwealth*, 467 Pa. 15, 21, 354 A.2d 250, 253-54 (1976) (“The class action in Pennsylvania is a procedural device ... ; class status or the lack of it is irrelevant to the question whether an action is to be heard in equity or at law or whether, indeed, either form is available in light of the statutory remedy.”).

lation and that ordinary Rule 23 standards apply (15 U.S.C. § 2310(e) (emphasis added)). Therefore, because AWS’s arbitration provision does not limit the “relief” or “damages” available to Afroilan, it was not required to be included in her warranty. *See* 16 C.F.R. § 701.3(a)(8).

In any event, Afroilan’s MMWA arguments do not implicate the arbitrability of her state-law implied warranty claim. *See, e.g., Patriot Mfg. v. Dixon*, 399 F. Supp. 2d 1298, 1302 (S.D. Ala. 2005) (“[Plaintiffs’] reliance on the ‘single document rule’ implicates only the arbitrability of their express warranty and MMWA causes of action, and in no way affects or relates to the arbitrability of the claims for ... breach of implied warranties[.]”). Thus, even if this Court were to conclude—contrary to the weight of authority—that Afroilan’s MMWA claims are inarbitrable, it should nevertheless stay those claims pending the arbitration of her implied warranty claim. *See Cruz v. Pacificare Health Sys., Inc.*, 66 P.3d 1157, 1168 (Cal. 2003).

CONCLUSION

AWS respectfully requests that the Court reverse the judgment of the Court of Common Pleas and remand with instructions to enter an order staying proceedings and requiring Afroilan to submit her claims to arbitration.

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Respectfully submitted,

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