

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

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

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**LORENA AFROILAN,**

**Plaintiff-Appellee,**

*vs.*

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

**Defendants-Appellants.**

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

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*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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## STATEMENT OF JURISDICTION

This appeal is from an Order of the Court of Common Pleas of Philadelphia County entered on July 12, 2005, which, among other things, denied certain preliminary objections of Defendant AT&T Wireless Services, Inc. (“AWS”) that are in the nature of a motion to compel arbitration. This Court has jurisdiction over this appeal pursuant to 42 Pa. C.S. § 7320(a) and Pennsylvania Rule of Appellate Procedure 311(a)(9).

## ORDER IN QUESTION

The Order entered on July 12, 2005, by the Honorable Mark I. Bernstein reads as follows:

AND NOW, this 8th day of July, 2005, upon consideration of the Preliminary Objections of Defendant AT&T Wireless Services, Inc. to Plaintiff’s Fifth Amended Class Action Complaint, and Plaintiff’s Response thereto, it is hereby ORDERED and DECREED that the preliminary objections are SUSTAINED as follows:

Counts I, II, and III having covered [sic] by the memorandum decisions of Judge Jones dated December 3, 2003 and October 22, 2004 are hereby dismissed. All other preliminary objections are overruled. Defendant’s [sic] shall file an answer within 30 days hereof and shall conduct any necessary discovery within 30 days thereafter.

A copy of this Order is appended to this brief as Exhibit A. A copy of the court’s Opinion, dated January 24, 2006, is appended as Exhibit B.

## STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In reviewing a ruling on preliminary objections, this Court accepts as true all well pled, material allegations in the complaint. *McNulty v. H&R Block*, 2004 PA Super 45, ¶ 3, 843 A.2d 1267, 1269. In reviewing a ruling on preliminary objections that is in the nature of a denial of a petition to compel arbitration, this Court examines the lower court’s ruling for abuse of discretion or error of law. *Id.* The issue of whether a contract is unconscionable is a question of law.

*Lytle v. Citifinancial Servs., Inc.*, 2002 PA Super 327, 810 A.2d 643, 658. This Court reviews questions of law *de novo*. *Wellspan Health v. Bayliss*, 2005 PA Super 76, ¶ 13, 869 A.2d 990, 996. The scope of review is plenary. *McNulty*, 2004 PA Super 45, ¶ 3, 843 A. 2d at 1269.

## STATEMENT OF THE QUESTIONS INVOLVED

1. Whether plaintiff's agreement to arbitrate claims arising out of her relationship with AWS is unconscionable merely because it requires that arbitration be conducted on an individual basis. *Answer below: Yes.*

2. If so, whether Pennsylvania law is preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* *Answer below: No.*

3. Whether claims under the Magnusson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, are arbitrable. *Answer below: Not addressed.*

## STATEMENT OF THE CASE

### *Form of Action and History of the Case*

Brandon Beckermeyer, the original named plaintiff in this case, filed this putative class action against AWS and co-defendant Panasonic Telecommunications System Company (“Panasonic”) in the Court of Common Pleas of Philadelphia County. Beckermeyer’s complaint alleged that certain features of his Panasonic cellular phone, which he allegedly purchased from an authorized sales agent of AWS, violated the Magnusson-Moss Warranty Act (“MMWA”), 15 U.S.C. §§ 2301 *et seq.*; breached state-law express and implied warranties; and violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 P.S. §§ 201-1 *et seq.* The court sustained Defendants’ preliminary objections to all counts but permitted Beckermeyer to amend his complaint to state different claims under the MMWA. Beckermeyer did so, and the court then overruled Defendants’ objections to certain of Beckermeyer’s claims under the MMWA and his state-law claim for breach of the implied warranty of merchantability.

Beckermeyer subsequently withdrew from the case, and Lorena Afroilan was allowed to intervene as the new named plaintiff. Under the terms and conditions of her AWS service, Afroilan is required to pursue any claims against AWS in individual arbitration or small claims court. AWS timely filed preliminary objections and asked the court to compel arbitration according to the terms of the parties’ agreement. By order entered July 12, 2005, the Honorable Mark I. Bernstein overruled AWS’s objections in relevant part. In a subsequent opinion, which is available on Westlaw at 2006 WL 416863, the court held that AWS’s arbitration clause was unconscionable and unenforceable because it requires that arbitration be conducted on an individual basis.

### *Statement of Facts*

**1. *Brandon Beckermeyer Commences This Putative Class Action.*** On August 7, 2002, Brandon Beckermeyer, the original named plaintiff in this case, filed a putative class action against AWS and co-defendant Panasonic Telecommunications Systems Company. Beckermeyer was then and is now employed as a wireless network engineer by Cingular Wireless LLC. Beckermeyer's complaint alleged that he purchased a Panasonic Duramax cellular phone for \$225 from Nationwide Wireless ("Nationwide"), which allegedly was acting as an "authorized sales agent" of AWS. (R. 93a). Beckermeyer alleged that, prior to purchasing the phone, he told Nationwide that he did not intend to purchase wireless service from AWS, although he did not allege how or when he communicated this information. (*Id.*) He claimed that Nationwide did not inform him that the phone would work only with AWS service. (*Id.*)

According to Beckermeyer, when the phone arrived he tried to program it to work on a wireless network other than AWS but was unable to do so as the result of a "system operator code lock" ("SOC lock") that allegedly prevented the phone from being reprogrammed to work on other networks. (*Id.*) Beckermeyer claimed that he then contacted both AWS and Panasonic and was told that the lock could not be removed. (R. 93a-94a). He further alleged that AWS and Panasonic would not repay him the purchase price for his phone (R. 94a), although he apparently never requested a refund or reimbursement from Nationwide.

Beckermeyer thereafter signed up for AWS service, but he cancelled that service a few months later. (*Id.*) He alleged that when he cancelled his service he again asked AWS and Panasonic to remove the locking device or to pay him for the cost of his phone, and that AWS and Panasonic again declined to do so. (*Id.*)

In his Third Amended Complaint, Beckermeyer alleged that, by programming his phone so that it would not work with other wireless providers, AWS and Panasonic had 1) violated the

MMWA; 2) breached state-law express and implied warranties; and 3) violated the UTPCPL. (R. 97a-100a). By order dated December 3, 2003, the Court of Common Pleas sustained Defendants' preliminary objections to the Third Amended Complaint and dismissed all three counts. (R. 156a). However, based on allegations that Beckermeyer first raised in his brief in opposition to Defendants' preliminary objections, the court granted Beckermeyer twenty days to file an amended complaint raising certain new claims under the MMWA. (R. 156a-157a; 162a n.3).

Contrary to the court's order, Beckermeyer's Fourth Amended Complaint reasserted all claims contained in his Third Amended Complaint. (R. 177a-180a). By order dated October 22, 2004, the court again dismissed claims alleging breach of express warranties and the warranty of fitness for a particular purpose and violation of the UTPCPL. (R. 285a-286a). The court overruled Defendants' objections to Beckermeyer's claims alleging breach of the implied warranty of merchantability and certain violations of the MMWA. (R. 286a-287a).

In late October 2004, AWS became part of Cingular.<sup>1</sup> In January 2005, Cingular informed Beckermeyer's counsel that Beckermeyer's continued participation in the lawsuit constituted a breach of his duty of loyalty to Cingular and that Cingular had advised Beckermeyer of this issue previously, while the merger was still undergoing regulatory review. (R. 499a). Accordingly, Cingular advised that Beckermeyer should either withdraw from the lawsuit or resign his employment. Beckermeyer subsequently withdrew from the lawsuit with the court's approval. (R. 624a).

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<sup>1</sup> Cingular Wireless LLC completed its merger with AWS on October 26, 2004. *See* Cingular Wireless, Investor Relations, at <http://www.cingular.com/investors>. AWS is now New Cingular Wireless Services, Inc., which is a wholly-owned subsidiary of Cingular Wireless II LLC, which in turn is wholly owned by Cingular Wireless LLC and its subsidiaries.

**2. Lorena Afroilan Intervenes As The Named Plaintiff.** At the time of Beckermeyer's withdrawal, Lorena Afroilan filed a petition to intervene as a new class representative and sought to adopt the allegations contained in Beckermeyer's Fourth Amended Complaint as her own. (R. 435a-436a). Defendants opposed Afroilan's petition on two principal grounds: First, under the terms and conditions of her AWS service agreement, Afroilan had agreed to submit any claim against AWS to individual arbitration (or, alternatively, to proceed in small claims court) and, further, had waived any right to participate in a class action in the event that her arbitration clause was deemed inapplicable or invalid. Thus, Afroilan was not a suitable class representative. Second, Afroilan's complaint failed to set forth the material facts or allegations on which her own personal claims were based. (R. 512a-516a). By order docketed March 4, 2005, the court granted Afroilan's petition to intervene subject to the requirement that she file an amended complaint setting forth her own personal, factual allegations within 20 days. (R. 624a).

Afroilan's "Fifth Amended Complaint" alleged that she purchased her Panasonic cellular phone from an AWS agent at a price of "at least \$50.00." (R. 629a). Like Beckermeyer, Afroilan alleged that her phone contained a SOC lock, that she obtained service through AWS, that she discontinued that service several months later, and that she was required to pay an early-termination fee as a result. (R. 630a). She also alleged that AWS and Panasonic refused to remove the SOC lock or refund the purchase price of the phone. (*Id.*) Unlike Beckermeyer, however, Afroilan apparently intended to obtain AWS service when she purchased her phone. (R. 629a-630a). In all other respects, her complaint was substantively identical to Beckermeyer's. Afroilan also reasserted all claims contained in Beckermeyer's Fourth Amended Complaint, including those that the court had dismissed twice already. (R. 633a-636a).

**3. Afroilan's Arbitration Agreement.** The cellular phone that Afroilan obtained, like all AWS phones, was packaged in a box with a Welcome Guide containing the terms and conditions of AWS service. (R. 647a-649a; 676a). Afroilan admits that she received the Welcome Guide in connection with her purchase of her AWS phone. (R. 737a). Page 2 of Afroilan's Welcome Guide urged her to "please read the following important information." (R. 681a). The first item of that important information, entitled "**Terms and Conditions,**" states:

By using the phone or service, accepting a benefit in exchange for committing to new Terms and Conditions, or by paying any amount billed to your account, you consent to the Terms and Conditions set forth in this guide. If you do not agree with these Terms and Conditions, do not use the phone or service and notify us immediately to cancel service. A full copy of the Terms and Conditions can be found starting on page 21.

(*Id.*) The Welcome Guide also provided that any phones purchased from AWS could be returned for a refund for 30 days following the purchase. (R. 694a).

The Terms and Conditions of Afroilan's AWS wireless service contain a provision that, subject to two specific exceptions, requires individual arbitration of "[a]ny dispute or claim" between Afroilan and AWS. (R. 703a). In relevant part, this provision provides:

**5. RESOLUTION OF DISPUTES.** PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS RIGHTS THAT YOU MAY OTHERWISE HAVE. IT PROVIDES FOR RESOLUTION OF MOST DISPUTES THROUGH ARBITRATION INSTEAD OF COURT TRIALS AND CLASS ACTIONS. ARBITRATION IS FINAL AND BINDING AND SUBJECT TO ONLY VERY LIMITED REVIEW BY A COURT....

**a. Binding Arbitration.** This provision is intended to be interpreted broadly to encompass all disputes or claims arising out of our relationship. Any dispute or claim made by you or against us ... arising out of or relating to this Agreement or the Service or any equipment used in connection with the Service (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration except that (1) you may take claims to small claims court if they qualify for hearing by such court, or (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to

us. However, even for those claims that may be taken to court, you and we both waive any claims for punitive damages and any right to pursue claims on a class or representative basis.

**b. Arbitration Procedures.** ... An arbitrator may not ... order consolidation or arbitration on a class wide or representative basis, or award punitive damages or any other damages aside from the prevailing party's actual damages, except that the arbitrator may award on an individual basis damages required by statute and may order injunctive or declaratory relief pursuant to an applicable consumer protection statute.... If any portion of this arbitration clause is determined by a court to be inapplicable or invalid, then the remainder shall still be given full force and effect.

**c. Costs of Arbitration.** ... [F]or claims of less than \$1,000, you will be obligated to pay \$25 and we will pay all other administrative costs and fees....

**d. Waiver of Punitive Damage Claims and Class Actions.** By this agreement, both you and we are waiving certain rights to litigate disputes in court. If for any reason this arbitration clause is deemed inapplicable or invalid, you and we both waive, to the fullest extent allowed by law, any claims to recover punitive or exemplary damages and any right to pursue any claims on a class or consolidated basis or in a representative capacity.

(R. 703a-704a).

**4. AWS Moves To Compel Arbitration.** Based on this provision, AWS filed timely preliminary objections to Afroilan's complaint and asked that the court compel arbitration or, if the court determined that any of Afroilan's claims were not arbitrable, strike Afroilan's class allegations and representative claims. (R. 647a-653a).<sup>2</sup> Afroilan responded by arguing that the arbitra-

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<sup>2</sup> AWS also objected to Afroilan's attempt to revive claims already dismissed in two prior orders. (R. 653a-655a). The court sustained this objection. (R. 919a).

Afroilan meanwhile filed preliminary objections to AWS's preliminary objections, arguing that AWS had failed to comply with Pennsylvania Rule of Civil Procedure 1028(b) ("All preliminary objections shall be raised at one time.") and had waived the right to compel arbitration by litigating against Beckermeyer. (R. 741a-744a). AWS responded that Afroilan's objections were meritless because it had moved to compel arbitration as soon as Afroilan became a party to the case. (R. 893a-899a). By Order dated July 5, 2005, the court agreed with AWS and overruled Afroilan's objections. (R. 912a).

tion agreement was unconscionable because it did not provide for class arbitration and that her claims under the MMWA were not arbitrable. (R. 863a-876a). In reply, AWS argued that Afroilan's arbitration agreement was not unconscionable, that the FAA would preempt any state-law unconscionability holding to that effect, and that Afroilan's MMWA claims, like all her other claims, were fully arbitrable. (R. 892a-910a). The court overruled AWS's preliminary objections by order dated July 12, 2005. (Order, Exhibit A to this brief).

AWS filed a timely notice of appeal. (R. 914a).

**5. *The Opinion Below.*** In a subsequent opinion, the Court of Common Pleas, after acknowledging the benefits of arbitration and the longstanding state and federal policies favoring agreements to arbitrate (Mem. Op., Exhibit B to this brief, at 6-7), emphasized general policy considerations supporting the use of the class-action device (*id.* at 7-8). Before considering Afroilan's unconscionability defense, the court dismissed AWS's argument that the FAA would preempt a state-law holding of unconscionability based on the unavailability of class arbitration. (*Id.* at 8-10). The court reasoned that, because the FAA does not expressly preempt generally applicable contract defenses, such as unconscionability, it does not preempt the unconscionability defense on which Afroilan relies. (*Id.* at 10).

Before addressing Afroilan's agreement to arbitrate, the court again emphasized the "great public importance" of class actions, stating that class actions "remain the essential vehicle by which consumers may vindicate their lawful rights" and that "[t]he average consumer, having limited financial resources and time, cannot individually present claims in court or in an arbitration." (*Id.* at 14). The court then concluded broadly that "[n]o individual consumer possibly could or ever will individually litigate most consumer claims," reasoning that "[t]he cost of lawyers, fees, and expert witnesses" makes the individual pursuit of such claims "impractical." (*Id.*

at 15) It also concluded that if “the law require[d] consumers to litigate or arbitrate individually, defendant corporations [would be] effectively immunized from redress of grievances.” (*Id.* at 15-16).

The court stated that Afroilan paid only \$50 for her phone and concluded that “[e]veryone knows [such a case] will never be arbitrated on an individual basis” because “[n]o individual will expend the time, fees, [costs and/or] other expenses necessary for individual litigation or individual arbitration for this small potential recovery.” (*Id.* at 16). The court accordingly reasoned that enforcing Afroilan’s agreement to arbitrate individually would “immunize[]” AWS “from any minor consumer claims” and that it was “clearly contrary to public policy to immunize large corporations from liability.” (*Id.* at 16-17). The court then announced a broad rule that “[t]he preclusion of classwide litigation or classwide arbitration of consumer claims, imposed in a contract of adhesion, is unconscionable and unenforceable.” (*Id.* at 17).

## SUMMARY OF ARGUMENT

The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 *et seq.*, “embodies the national policy favoring arbitration.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. \_\_\_, \_\_\_, 126 S. Ct. 1204, 1207 (2006). In keeping with this policy, Section 2 “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The single exception to this rule is that courts may refuse to compel arbitration if “the agreement to arbitrate ... is revocable ‘upon such grounds as exist at law or in equity for the revocation of *any* contract.’” *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting 9 U.S.C. § 2) (emphasis added). Notwithstanding these well-established principles, the court below denied AWS’s motion to compel arbitration of Afroilan’s dispute because her contract requires her to arbitrate her dispute on an individual basis rather than as a class representative. That ruling is wrong and should be reversed for two independent reasons.

*First*, an agreement is unconscionable only when “the contractual terms are unreasonably favorable to the drafter and ... there is no meaningful choice on the part of the other party regarding the acceptance of the provisions.” *McNulty*, 2004 PA Super 45, ¶ 26, 843 A.2d at 1273. Neither of these conjunctive requirements was met here. To begin with, Afroilan presented no evidence that she lacked a “meaningful choice” as to the terms of her arbitration clause. To the contrary, under her contract, Afroilan was offered a 30-day period during which she could have returned her phone for a full refund if she did not like any of the terms and conditions, including the arbitration provisions. Thus, Afroilan was free to reject her agreement with AWS in favor of any one of AWS’s competitors. In addition, the Court of Common Pleas’ holding that AWS’s arbitration agreement is unconscionable simply because it requires arbitration on an individual basis is contrary to both the great weight of authority nationwide and this Court’s recent prece-

dent. An arbitration clause that caps consumer arbitration fees at \$25 cannot fairly be characterized as “unreasonably favorable to the drafter.” Nor is there any basis for the court’s belief that the arbitration clause serves to “immunize [AWS] from liability.” Because Afroilan seeks damages well in excess of her cost to arbitrate, and because attorneys’ fees and costs are recoverable under the MMWA and the UTPCPL, arbitration remains a meaningful and practical alternative to class-action litigation. Numerous courts have so held.

*Second*, under well-established principles of conflict preemption, the Court of Common Pleas’ holding that arbitration clauses are enforceable only if they permit class arbitration is preempted by the FAA. Arbitration is a favored means of resolving disputes, including small consumer claims, precisely because it saves time, trouble, and expense. Conditioning the enforceability of arbitration provisions on the availability of class arbitration would eviscerate these benefits, discourage the use of arbitration agreements, and ultimately spell the end of consumer arbitration. Nothing could more obviously frustrate the objectives of the FAA, and any such rule of state law would, therefore, be preempted.

We anticipate that, as in the court below, Afroilan will argue that her MMWA claims are not arbitrable. Her first argument relies on an FTC regulation to that effect, but the great weight of authority has rejected the regulation as an unreasonable interpretation of the MMWA. Afroilan’s second argument relies on a different FTC regulation that requires that “informal dispute resolution mechanisms” be identified on the warranty document itself. But binding arbitration provisions are not such mechanisms, as the text of the statute and regulation make clear, and the reasoning of many courts confirms. Accordingly, Afroilan’s MMWA claims, like every other federal statutory claim the Supreme Court has addressed over the past two decades, are fully arbitrable.

## ARGUMENT

### **I. THERE IS NOTHING UNCONSCIONABLE ABOUT AN ARBITRATION AGREEMENT THAT REQUIRES ARBITRATION TO PROCEED ON AN INDIVIDUAL BASIS.**

Under Pennsylvania law, a contractual provision is not deemed unconscionable unless it is both substantively unconscionable (“unreasonably favorable to the drafter”) and procedurally unconscionable, which means that the non-drafting party has “no meaningful choice” other than to accept it. *McNulty*, 2004 PA Super 45, ¶ 26, 843 A.2d at 1273. As the party resisting arbitration, Afroilan bore the burden of proving that her arbitration agreement was unconscionable. *See Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (applying Pennsylvania law). Contrary to the holding of the Court of Common Pleas, she failed to meet that burden as to either procedural or substantive unconscionability.

#### **A. The Class-Action Waiver In The Parties’ Arbitration Agreement Is Not Procedurally Unconscionable.**

An agreement is not unenforceable unless it is *both* substantively unconscionable and procedurally unconscionable. Under Pennsylvania law, a contract can be procedurally unconscionable if the non-drafting party had “no meaningful choice” other than to “accept[] [its] provisions”—*i.e.*, if it is a contract of adhesion. *McNulty*, 2004 PA Super 45, ¶ 26, 843 A.2d at 1273. While AWS’s Welcome Guide is assuredly a form contract, “not every form contract can be termed a contract of adhesion. Whether a contract is, in fact, an adhesion contract must be determined on an individual basis, in light of the particular circumstances and parties involved,” and “the party challenging the contract or provision bears the burden of affirmatively ... proving the unconscionability.” *Denlinger, Inc. v. Dendler*, 415 Pa. Super. 164, 175, 608 A.2d 1061, 1067 (1992).

Afroilan put forward no evidence that she lacked a “meaningful choice” as to the purchase of her phone. Nor do the circumstances of the transaction suggest that this was the case. AWS “is not an exclusive supplier of rare or much-sought-after goods, a situation which could induce one to ‘adhere’ to an unfavorable contract and thereby reduce meaningful choice.” *Id.* at 178, 608 A.2d at 1068 (citation omitted). Rather, wireless phones and service “are readily available from a variety of sources”; if Afroilan found AWS’s terms “onerous, [she] was at liberty to seek a [phone and service] elsewhere.” *Id.*; accord *Dabney v. Option One Mortgage Corp.*, 2001 WL 410543, at \*5 (E.D. Pa. Apr. 19, 2001) (“There is no evidence that Plaintiff attempted to negotiate over the challenged [arbitration] provision or that she did not have the opportunity to obtain other financing sources if the provision was unacceptable to her.”).

In addition, page 2 of Afroilan’s AWS Welcome Guide urged her to review the Terms and Conditions of her wireless service, advising her that she would consent to those terms by using her phone or service. (R. 681a). The Welcome Guide further stated that she should cancel service immediately if she did not agree to those terms (*id.*) and offered a 30-day window during which she could return her phone for a full refund (R. 694a). Finally, the class waiver is mentioned three times in the arbitration clause, including in the first paragraph in all capital letters. (R. 703a-704a).

Relying on the notice provided by the AWS Welcome Guide and the fact that consumers are free to choose among numerous providers of wireless service, two recent decisions have held that arbitration clauses contained in similar AWS Welcome Guides were not procedurally unconscionable. See *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 705 (S.D. Ill. 2005) (“even though Chandler could not negotiate the terms of the contract, she was free to make other choices, such as choosing a cellular service other than AWS”); *Fonte v. AT&T Wireless Servs.*,

*Inc.*, 903 So. 2d 1019, 1027 (Fla. Dist. Ct. App. 2005) (“If Fonte was unsatisfied with the terms, she did not have to sign the contract.... Fonte was free to choose any wireless service provider without limitation.”); *see also, e.g., Lux v. Good Guys*, 2005 WL 1713421, at \*1 (C.D. Cal. July 11, 2005) (holding that an arbitration clause containing a class waiver was not procedurally unconscionable where the borrower was free to seek another lender if he objected to the terms he was offered). The same result should obtain here, as there is no basis for the Court of Common Pleas’ conclusion that Afroilan was “forced to accept” the arbitration agreement at issue. Mem. Op. at 16. Rather, as in *Chandler* and *Fonte* Afroilan was free to choose from any number of wireless service providers, the AWS Welcome Guide reasonably alerted her to the terms and conditions to which she was consenting, and she remained free to reject AWS’s terms and conditions, cancel her service, and receive a full refund within thirty days of her purchase.<sup>3</sup> (R. 694a).

Given the ubiquity of standardized contracts and their importance to the modern economy, procedural unconscionability must mean something more than that the agreement was a form contract. To hold otherwise would eliminate half of the unconscionability test with respect to 99% of all contracts in use today. John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000) (estimating that standard form contracts account for 99% of all contracts now made).

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<sup>3</sup> The marketplace for wireless services in the United States is exceptionally competitive; most consumers are able to choose from a host of wireless carriers offering services in a given market. *See* FCC, Tenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (*In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 05–71) (Sept. 30, 2005) ¶ 41, at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-173A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-173A1.pdf); *see also id.* ¶ 4 (finding that consumers are able “to pressure carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service”).

**B. The Class Waiver In The Parties' Arbitration Agreement Is Not Substantively Unconscionable.**

To establish that an agreement is substantively unconscionable in Pennsylvania, as elsewhere, the party attacking the agreement must show that “the contractual terms are unreasonably favorable to the drafter.” *McNulty*, 2004 PA Super 45, ¶ 26, 843 A.2d at 1273. An agreement does not “unreasonably favor[] ... the drafter” simply because it requires that arbitration be conducted on an individual basis. Far from it; as the U.S. Supreme Court has recognized, “Congress, when enacting [the FAA], had the needs of consumers ... in mind,” as “arbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). Here, Afroilan is “complaining about a product,” and, at a cost of only \$25 to her, arbitration is certainly a “less expensive alternative to litigation.” Moreover, Afroilan’s complaint seeks—and her arbitration agreement permits the arbitrator to award—statutory attorneys’ fees and treble damages. The very purpose of such remedies is to ensure that it is economically feasible to pursue even relatively small statutory claims. Thus, far from being “unreasonably favorable” to AWS, Afroilan’s arbitration agreement is entirely fair and establishes a perfectly reasonable mechanism for quickly resolving even relatively small claims.

Not surprisingly, an overwhelming majority of courts nationwide have upheld clauses requiring arbitration on an individual basis against the same sort of unconscionability argument advanced here. *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law), *pet. for cert. pending*, No. 05-959 (filed Jan. 30, 2006); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (Georgia law), *cert. denied*, \_\_\_ U.S. \_\_\_, 2006 WL 452482 (Feb. 27, 2006); *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004) (Louisiana law); *Snowden v. CheckPoint Check*

*Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (Maryland law); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002) (Delaware law); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1204-06 (C.D. Cal. 2006) (Texas law); *Dambrosio v. Comcast Corp.*, 2005 WL 3543794, at \*17 (E.D. Pa. Dec. 27, 2005) (Pennsylvania and Illinois law); *Cunningham v. Citigroup*, 2005 WL 3454312, at \*6-7 (D. N.J. Dec. 16, 2005); *Copeland v. Katz*, 2005 WL 3163296, at \*4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) (Oklahoma law); *Lux*, 2005 WL 1713421 (Nevada law); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 & n.11 (S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005) (Maryland law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, at \*15 (D. Del. Sept. 28, 2001) (Delaware law); *Zawikowski v. Beneficial Nat'l Bank*, 1999 U.S. Dist. LEXIS 514, at \*5 (N.D. Ill. Jan. 11, 1999) (Illinois law); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat'l Mgmt Co.*, 921 P.2d 146, 166-67 & n.23 (Haw. 1996) (Hawaii law); *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct., 5th Dist. 2005) (Texas law); *Ragan v. AT&T Corp.*, 824 N.E.2d 1183 (Ill. App. Ct., 5th Dist. 2005) (New York law); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at \*7 (Kan. Ct. App. May 27, 2005) (Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-43 (Md. 2005) (Maryland law); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886 (N.J.

App. Div. 2001) (New Jersey law); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (New York law); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (North Dakota law); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (Texas law). *But see Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-81 (W. Va. 2002);<sup>4</sup> *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002).<sup>5</sup>

**1. Individual arbitration is a viable and economically feasible alternative to litigation given that Afroilan claims damages significantly in excess of her nominal arbitration fee, as well as statutory treble damages and attorneys' fees.**

In addition to dispelling any notion that an agreement to arbitrate individually is generally “unconscionable,” the numerous decisions upholding class-arbitration waivers have emphasized that arbitration is a particularly practical and meaningful alternative to litigation when (i) the business agrees to pay the lion’s share of arbitration costs, (ii) the arbitrator is not precluded from awarding statutory remedies (such as treble damages), and (iii) a prevailing claimant has a

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<sup>4</sup> The U.S. District Court for the Northern District of West Virginia recently refused to follow *Berger* on the ground that its analysis is preempted by the FAA. *See Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005).

<sup>5</sup> A number of federal district court decisions in Alabama have distinguished *Leonard* and enforced class-arbitration waivers under Alabama law on the ground that the arbitration fees in *Leonard* were far greater than any potential recovery and that the arbitration provision in *Leonard* limited the types of damages that could be awarded and in particular precluded an award of attorneys’ fees. *See Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003) (“The costs of arbitrating the Leonards’ claim (at least [\$1,100]) exceeded the dollar value of their claim (less than [\$500]), which effectively made arbitration an illusory forum for vindicating their substantive rights.”); *Battels v. Sears Nat'l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Billups*, 294 F. Supp. 2d at 1276-77; *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1263-64 (M.D. Ala. 2003); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1345-46 (M.D. Ala. 2003).

statutory or contractual right to recover attorneys' fees. Each of these circumstances is present here.

a. To begin with, Afroilan's agreement obligates AWS to cover all costs of arbitration after the first \$25.<sup>6</sup> Numerous courts have concluded that similar—and even less consumer-friendly—fee-sharing arrangements are fair and reasonable. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 95 & n.2 (2000) (Ginsburg, J., concurring in part and dissenting in part, joined by Stevens, Souter, and Breyer, JJ.) (citing rules capping consumer fees in small-claims arbitration at \$49, \$125, and \$175, respectively, as “models for fair cost and fee allocation”); *Jones*, 353 F. Supp. 2d at 602 (holding that a \$125 fee “cannot be said to be prohibitive” in a clause requiring individual arbitration); *Provencher*, 409 F. Supp. 2d at 1202 (stating that a clause capping consumer fees at \$35 and requiring individual arbitration provides “an inexpensive, convenient, and efficient forum”); *Cunningham*, 2005 WL 3454312, at \*4-5 (upholding a clause requiring individual arbitration and capping arbitration fees at the filing fee the claimant would pay in court); *Ragan*, 824 N.E.2d at 1159-61 & n.3 (holding that consumer fees of \$20 to \$125 in a clause requiring individual arbitration are not unconscionable); *Stenzel*, 870 A.2d at 144 (same with respect to fees of \$25 to \$200); *Norwest Fin. Miss., Inc. v. McDonald*, 905 So. 2d 1187, 1196 (Miss. 2002) (“A maximum \$125 fee should not prevent anyone from pursuing a remedy via arbitration.”). Moreover, by agreeing to pay all additional costs of the arbitration,

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<sup>6</sup> Cingular has announced on its website that, as a matter of policy, it will make the features of its arbitration provision available to former AWS customers. *See* Cingular Wireless, Dispute Resolution, at [http://www.cingular.com/customer\\_service/disputeresolution](http://www.cingular.com/customer_service/disputeresolution). Accordingly, as a former AWS customer, Afroilan is entitled to take advantage of this policy if she pursues individual arbitration. Under Cingular's arbitration provision, Cingular pays the *entire* cost of arbitration unless the arbitrator finds that the claim is so frivolous that it violates Federal Rule of Civil Procedure 11(b).

AWS has essentially committed itself to paying \$1675.<sup>7</sup> On its face, this fee allocation plainly is *not* “unreasonably favorable” to AWS. Indeed, by committing itself to pay these substantial costs, AWS has granted consumers unique leverage in any disputes that arise, for at this price AWS has a strong incentive to settle any colorable claim.

By way of comparison, the minimum filing fee in the Philadelphia Small Claims Court (in which Afroilan’s agreement also permits her to proceed) is \$39.50, with additional fees if, as here, the plaintiff names more than one defendant or asserts claims exceeding \$500. The Philadelphia Municipal Court, Small Claims Court Brochure, *available at* <http://courts.phila.gov/pdf/-brochures/small-claims-court.pdf>. Arbitration would thus be *less* expensive for Afroilan than small claims court, which the City touts as a forum in which claims can be resolved “easily, quickly and inexpensively.” *Id.*

**b.** Afroilan’s arbitration agreement also specifically authorizes the arbitrator “to award on an individual basis damages required by statute” (R. 704a), such as treble damages under the UTPCPL. Courts have frequently recognized that the possibility of a multiple-damage award can provide financial incentives to litigate even relatively small claims individually. *See, e.g., Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (“[A]lthough the district court stated that class treatment may be the ‘only feasible method of adjudication, given the

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<sup>7</sup> An AAA-conducted arbitration that includes a hearing will cost approximately \$1700, consisting of \$750 in administrative fees, a \$200 case service fee, and \$750 in arbitrator fees. *See* AAA, *Supplementary Procedures For Consumer-Related Disputes*, Section C-8 (effective Sept. 15, 2005), *available at* <http://www.adr.org/sp.asp?id=22014>. Under the AAA rules, customers are entitled to a hearing as a matter of right. *Id.*, Sections C-5 and C-6. Although Afroilan’s agreement calls for use of the Wireless Industry Arbitration Rules, those rules incorporate the Supplementary Procedures for Consumer-Related Disputes in consumer cases. *See* AAA, *Wireless Industry Arbitration Rules*, Section R-1 (effective July 1, 2003), *available at* <http://www.adr.org/sp.asp?id=22010>.

small size of each member’s claims,’ we note that even small individual claims under RICO can be feasible given the possibility of the award of treble damages and attorneys’ fees to successful plaintiffs.”) (citation omitted); *Billups*, 294 F. Supp. 2d at 1275 (upholding a class-action waiver in part because the statutory double-damages provision of the Fair Credit Billing Act, 15 U.S.C. § 1640(a)(2)(A), provides sufficient incentive for consumers to arbitrate claims individually).

The significance of the treble-damages remedy—and its availability under Afroilan’s arbitration clause—is illustrated clearly by the facts of this case. Afroilan’s (now-dismissed) claim under the UTPCPL sought actual damages or \$100, whichever is greater, plus treble damages. (R. 636a); *see* 73 P.S. § 201-9.2(a).<sup>8</sup> As noted above, Afroilan alleges that the “[i]nitial purchase price [of her phone] was *at least* \$50.00.” (R. 629a) (emphasis added). In contrast, the original named plaintiff, Brandon Beckermeyer, alleged that his phone cost \$225. (R. 172a). Thus, many class members—if not Afroilan herself—may claim damages based on the cost of the phone alone that significantly exceed \$50. Afroilan’s claim for actual damages also appears to incorporate the \$150 early termination fee she paid when she cancelled her AWS service. (R. 438a, 630a, 636a). Treble damages thus transform this relatively small consumer dispute into a claim potentially worth several hundred dollars—and, more to the point, worth pursuing individually.

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<sup>8</sup> Although Afroilan’s UTPCPL claim was dismissed *by the court*, it is still relevant to the question whether “the damages *claimed* by [the plaintiff] are sufficient to permit [her] to seek legal redress for [her] injuries in the absence of a class action.” *Lytle*, 2002 PA Super 327, ¶ 41, 810 A.2d at 666 (emphasis added). Had Afroilan not breached her agreement to arbitrate, she could have pursued all of her claims in arbitration or small claims court. That some have now been dismissed as a result of her decision to intervene in the instant class action is simply a risk of litigation, not an indication that arbitration is a less viable alternative.

c. The availability of attorneys' fees under both the UTPCPL (73 P.S. § 201-9.2(a)) and the MMWA (15 U.S.C. § 2310(d)(2))—as well as under Cingular's arbitration clause<sup>9</sup>—creates a significant incentive for consumers and their attorneys to pursue even relatively small claims. As this Court has previously recognized:

In the Senate Report concerning this section of the Magnuson-Moss Act it was stated, "It should be noted that an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery. *This requirement is designed to make the pursuit of consumer rights involving inexpensive consumer products economically feasible.*"

*Croft v. P & W Foreign Car Serv., Inc.*, 383 Pa. Super. 435, 438, 557 A.2d 18, 20 (1989) (quoting S. REP. No. 93-151, 1st Sess. (1973) at 23-24) (emphasis added).

The availability of attorneys' fees provides the same powerful incentive in arbitration. As a federal district court recently explained, the concern that the absence of the class-action device will preclude the assertion of low-value claims

is *not present* in an individual suit seeking damages under statutory provisions that provide prevailing plaintiffs with multiple damages, costs and attorneys' fees, because the existence of these remedies provides parties and lawyers with incentives to pursue their cases.... Indeed, *the central purpose behind statutory attorneys fees* is to encourage lawyers to accept cases in which damages may be small or nominal. Although [the plaintiff] and his lawyers may be unwilling to litigate this case due to the fact that it may not provide them with enough financial incentive to justify their efforts, this court cannot conclude that either the Plaintiff or his attorneys are so lacking in economic incentive to warrant a finding that [defendant's] class action prohibition is unconscionable.

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<sup>9</sup> Under Cingular's arbitration provision (*see supra* note 6), if the arbitrator awards relief equal to or greater than the amount demanded, Cingular will pay the claimant's reasonable attorneys' fees and expenses even in cases in which the underlying claim does not provide a basis for such an award—*e.g.*, a claim for breach of contract or breach of warranty.

*Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1343-44 (M.D. Ala. 2003) (emphasis added; footnotes and citations omitted).<sup>10</sup> Thus, the Court of Common Pleas' concern that the "fees, [costs] and ... other expenses necessary for individual arbitration" will render individual arbitration "impractical" (Mem. Op. at 16) simply "is not present" (*Taylor*, 292 F. Supp. 2d at 1343) in arbitration under AWS's (or Cingular's) arbitration provision. In addition, it is far from clear that Afroilan would even *need* an attorney in arbitration. Recently, Ernst & Young conducted a survey of consumers who had initiated arbitrations with National Arbitration Forum and found that "the vast majority, or 86 percent, of survey respondents said they did not hire a legal representative." Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, at 13 (2004), available at [http://www.arb-forum.com/media/EY\\_2005.pdf](http://www.arb-forum.com/media/EY_2005.pdf). The report posits that "[t]his result coupled with the overall satisfaction with the process" (69% of respondents were satisfied or very satisfied with their experience) "may suggest that consumers consider the process straightforward enough not to require the assistance of legal representation."

*Id.*

d. Finally, in addition to being an economically feasible alternative to litigation, individual arbitration produces real benefits for consumers. Studies have consistently shown that

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<sup>10</sup> See also, e.g., *Jenkins*, 400 F.3d at 878 ("when the opportunity to recover attorneys' fees is available, lawyers will be willing to represent [debtors with small claims] in arbitration"); *Iberia*, 379 F.3d at 175 & n.19 (holding that a class-action waiver "does not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability" because, among other things, the arbitrator could award damages under the state unfair trade practices act); *Snowden*, 290 F.3d at 638 (rejecting argument that small Truth in Lending Act claim was not economically viable unless brought on a class-wide basis as "unfounded in light of ... the fact that attorney's fees are recoverable ... in a TILA action."); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) ("Nor will arbitration necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors. Attorneys' fees are recoverable under the TILA..."); *Strand*, 693 N.W.2d at 926 (upholding a class-arbitration waiver based in part on the availability of attorney's fees for prevailing plaintiffs).

“consumers are likely to fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation” and that “parties who participate in arbitration proceedings are generally satisfied, both in terms of the fairness of the process and the equity of the outcome.” Joshua Lipshutz, Note, *The Court’s Implicit Roadmap: Charting the Prudent Course At the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1712 (2005) (footnotes omitted). In the Ernst & Young study discussed above, for example, consumers prevailed in 55% of the arbitrations that went to a hearing. That figure increases significantly if settlements are taken into account. Ernst & Young, *supra*, at 2.

And because individual arbitration reduces litigation costs, it also “tends over time to lower prices to consumers.” Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, at 4 (Aug. 26, 2005), available at <http://ssrn.com/abstract=791807>. Indeed, even “under non-competitive conditions,” “it is inconsistent with basic economics to question” this benefit to consumers. *Id.* at 4-5; see also *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”). In the highly competitive wireless industry (*see supra* note 3), customers certainly benefit from this cost savings.<sup>11</sup>

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<sup>11</sup> In contrast, the likelihood that a consumer class-action will actually benefit consumers in any given case is uncertain to say the least. As Congress has found, “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed.” Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(3)(A). Moreover, whereas “class actions tend to be run by, and for the benefit of, plaintiffs’ attorneys” with little active involvement on the part of consumers (Christopher R. Drahozal, “*Unfair*” *Arbitration Clauses*, 2001 U. ILL. L. REV. (cont’d)

Our point is not that, after the fact, consumers will *always* be completely satisfied with arbitration. After all, the question here is not whether Afroilan—or, more precisely, her lawyers—would *now* prefer participating in a class action to arbitrating on an individual basis;<sup>12</sup> rather, the question is whether her arbitration agreement, freely entered into as a condition of wireless service, is so oppressively one-sided that Afroilan should be allowed to avoid its terms. Because it is perfectly rational for a consumer to forgo the uncertain benefits of a potential class action in exchange for the simplicity and savings of consumer-friendly arbitration, the answer to that question is “no.”

**2. Afroilan’s arbitration agreement also permits her to pursue claims in small claims court, which—like arbitration—provides a meaningful forum for vindicating small consumer claims.**

In addition to providing an inexpensive arbitral forum, the AWS arbitration clause allows consumers to assert claims in small claims court.<sup>13</sup> (R. 703a). Much like arbitration, small claims court provides a simple, speedy, and inexpensive forum in which consumers can vindicate any valid claims without the need for a class action.

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(... cont’d)

695, 754 (2001)), an individual consumer can actively and directly participate in his or her arbitration.

<sup>12</sup> See *Ware, supra*, at 30-31 (explaining that a proper application of the unconscionability doctrine examines the bargain from an *ex ante* perspective, when the consumer trades an uncertain right to pursue claims on a class basis—a right that may never have any actual value—in exchange for the certainty of a reduced price for the good or service).

<sup>13</sup> Cingular’s arbitration provision also allows consumers to sue in small claims court as an alternative to arbitration. See Cingular Wireless, Dispute Resolution, at <http://www.cingular.com/disputeresolution>.

It has long been recognized that the very purpose of small claims courts is “to make it possible for plaintiffs with meritorious claims for small amounts of money ... to bring th[o]se claims to court without spending more money on attorney’s fees and court expenses than the claims [a]re worth.” *City & County of San Francisco v. Small Claims Ct.*, 141 Cal. App. 3d 470, 474 (1983). Indeed, small claims court is often a better option than a class action for the resolution of small claims because “[c]ertification of ... a class [can] promote complicated lengthy legal embattlement,” while small claims court allows parties to resolve disputes “expeditiously and with minimum costs and fees.” *Pulver v. 1st Lake Props., Inc.*, 681 So. 2d 965, 970 (La. App. 1996).

Thus, the Fifth Circuit noted the availability of small claims court as one of several reasons for rejecting the contention that Cingular’s original arbitration provision made it impossible to pursue small claims. *See Iberia*, 379 F.3d at 175 n.19 (“Cingular’s arbitration clause expressly permits customers to bring inexpensive small-claims actions.”). The Eleventh Circuit also relied on the existence of a small-claims-court provision in rejecting challenges to a class-arbitration waiver. As that court explained:

[T]he provision providing access to small claims tribunals was intended to benefit, not injure, consumers. The American Arbitration Association (AAA) has developed a set of principles, known as the Consumer Due Process Protocol, to protect consumers and ensure they are treated equitably in arbitration. Principle 5 of this Protocol expressly states that consumer arbitration agreements, like those at issue here, should offer all parties the option of seeking adjudication in a small claims tribunal. The Comment to Principle 5 explains ‘access to small claims tribunals is an important right of Consumers’ because it provides ‘a convenient, less formal, and relatively expeditious judicial forum for handling ... disputes’ involving small amounts of money. By including a provision that offers access to such tribunals, the Arbitration Agreements at issue here merely complied with the AAA’s Consumer Due Process Protocol.

*Jenkins*, 400 F.3d at 879 (quoting AAA, Consumer Due Process Protocol (available at <http://www.adr.org/protocols>) (internal citations omitted)).<sup>14</sup>

Indeed, the Philadelphia Small Claims Court affirmatively encourages citizens to file a claim if they “have a consumer complaint which can’t be settled in a friendly way,” or “letters and telephone calls to the individual or company [with whom they have a dispute] don’t bring satisfactory results,” or “[w]hen the Mayor’s Office of Consumer Services or other consumer agencies can’t resolve the problem.” Philadelphia Small Claims Court Brochure, *supra*. The reason that small claims court, like arbitration, is an ideal venue for resolving consumer disputes is the simplicity and informality of the procedures these forums use. *Id.* (“The courtroom procedure [in small claims court] is simple and informal.”). Moreover, it is generally unnecessary to hire an attorney in small claims court. *See* Pa. Legal Aid Network, Public Information Pamphlet # 29: District Justice Courts, *available at* [http://www.palegalservices.org/Brochures/english/29\\_District\\_Justice\\_Courts.pdf](http://www.palegalservices.org/Brochures/english/29_District_Justice_Courts.pdf) (revised Apr. 2003) (“District Justice Courts have the advantage of being less formal, less costly and faster. Also, you do not need an attorney in a District Justice Court”). Again, small claims courts exist for this very reason.

By establishing and consistently funding the Philadelphia Small Claims Court and the many District Justice Courts across the State (*see* 42 Pa. C.S. § 1515), the General Assembly has implicitly rejected the view of the court below that individual adjudication of small, civil claims on an informal and inexpensive basis is “impractical.” The long tradition of such courts in this

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<sup>14</sup> *See also* Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration: Green Tree Fin. Corp. v. Bazzle*, 2004 J. DISP. RESOL. 259, 274 (“In light of the alternatives available even in the absence of class-wide arbitration, such as small claims court or individual arbitration, it should not be said that plaintiffs would be left without alternatives, especially because these alternatives may not necessitate the hiring of costly legal counsel.”).

Commonwealth indicates that they are a viable and valuable means of resolving consumer disputes and that an agreement to settle disputes in that forum would not be “unconscionable.” And because arbitration compares favorably to small claims court in every way, there is necessarily nothing “unconscionable” about an agreement to arbitrate individually. Afroilan’s agreement, which offers a choice between these two forums, is all the more reasonable.

**3. The Court of Common Pleas’ broad holding is inconsistent with this Court’s precedent and fails to consider significant factors that distinguish this case from *Lytle* and *McNulty*.**

In holding that class-arbitration waivers in consumer contracts are unconscionable and unenforceable, the Court of Common Pleas relied heavily on this Court’s decisions in *Lytle* and *McNulty*.<sup>15</sup> A careful reading of those cases, however, reveals that their reasoning was very fact-specific and tied closely to the economic feasibility of arbitrating individually. The decision of the court below, in contrast, is broad and pays little attention to the circumstances discussed above—low arbitration fees and the availability of treble damages and attorneys’ fees—that

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<sup>15</sup> The trial court also relied on this Court’s decision in *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 286, 596 A.2d 860 (1991), which held that arbitration may be conducted on a class-wide basis when the arbitration clause is silent as to whether class arbitration is permissible. *Id.* at 296-301, 596 A.2d at 864-67. *Cf. Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 450-53 (2003) (plurality op.) (holding that the arbitrator should determine whether a “silent” contract permits arbitration to be conducted on a class-wide basis). Thus, *Dickler* did *not* address an express class waiver such as the one at issue here. To be sure, the *Dickler* Court expressed the view that “individual arbitration would force individuals ... to fight alleged improprieties at an exorbitant economic cost.” 408 Pa. Super. at 300, 596 A.2d at 867. That view is dictum, however, as the Court did not have before it an arbitration provision that actually prohibited class arbitration. Moreover, that dictum antedates the numerous cases cited above that held that class waivers in arbitration provisions are fully enforceable if they do not require consumers to bear high arbitration costs, and allow arbitrators to award prevailing plaintiffs reasonable attorneys’ fees under fee-shifting statutes. *See* pages 17-19, *supra*. As we already have discussed, that is the situation here, so the concern expressed in *Dickler* is inapplicable.

make individual arbitration a meaningful alternative to litigation in this case. For this reason, the lower court's reliance on *Lytle* and *McNulty* was misplaced.

In *Lytle*, the plaintiffs filed a class action alleging that the defendant-mortgagor's collection of certain prepayment penalties and finance charges violated federal and state law. 2002 PA Super 327, ¶ 3, 810 A.2d at 647. The defendant petitioned to compel arbitration based on an arbitration clause contained in the plaintiffs' loan documents. *Id.* at ¶ 4, 810 A.2d at 647-48. The arbitration clause provided that the plaintiffs would have to pay an initial filing fee of \$125 to arbitrate. *Id.* at ¶ 6, 810 A.2d at 651. The clause also provided that if the plaintiffs did not prevail they would be required to pay the costs of any arbitration that exceeded one day. *Id.* A study published shortly before the *Lytle* decision reported that a mortgage-lending case such as *Lytle* would likely require *three days* of hearings at a cost of \$150-\$300 per hour if administered by JAMS, the designated arbitration administrator in the *Lytle* arbitration clause. Pub. Citizen, Congress Watch, *The Costs of Arbitration*, at 47 (Apr. 2002), available at <http://www.citizen.org/documents/ACF110A.PDF>. Accordingly, the plaintiffs faced the threat of being forced to pay several thousand dollars in arbitration fees in the event that they lost on the merits. Under these circumstances, although this Court found no "evidence that would establish that the *damages claimed* ... [were] insufficient to permit the [plaintiffs] to seek legal redress for their injuries in the absence of a class action," it nonetheless remanded the case so that the court below could consider whether "the *costs* associate[d] with individual versus class-based litigation would, in light of the amount of their damages, result in continuing immunity for [the defendant]." *Lytle*, 2002 PA Super 327, ¶ 41, 810 A.2d at 666 (emphasis added). Thus, the real problem with the arbitration clause in *Lytle* was the substantial risk that the high costs of arbitration would effectively immunize the defendant, not the mere "absence of a class action."

In *McNulty*, the plaintiffs filed a class action alleging that the defendant-tax preparation service had charged its clients unnecessary fees for filing their tax returns electronically. 2004 PA Super 45, ¶ 1, 843 A.2d at 1268. The defendant petitioned to compel arbitration, and the lower court denied the petition on the ground that the parties' arbitration agreement did not cover the claims asserted. *Id.* at ¶ 2, 843 A.2d at 1269. This court affirmed on that basis, but “also note[d] an alternative ground to affirm the denial of transfer to arbitration”—unconscionability. *Id.* at ¶ 24, 843 A.2d at 1273. The arbitration clause at issue in *McNulty* required the consumer to pay an initial filing fee of \$50 as well as any costs of the arbitration in excess of \$1500. *Id.* at ¶ 29, 843 A. 2d at 1273. In contrast, the individual consumer's potential recovery under the facts alleged in her complaint was “at most \$37.00.” *Id.* at ¶ 29, 843 A.2d at 1274. The opinion also gave no indication that the consumer was suing under any statute that provided for multiple damages or attorneys' fees. *See id.* at ¶ 29 n.7, 843 A.2d at 1274 n.7 (noting that the court's assumption concerning the costs of arbitration “necessarily presume[d] no cost for legal representation”). Thus, at best, a prevailing consumer would have *lost* \$13—and possibly much more if the costs of arbitration exceeded \$1500—and would have been required to either proceed pro se or pay her own legal fees. Under these circumstances, the court reasoned that few, if any, consumers would be “so incensed” by an improper tax return filing fee that “they would spend significant time and \$50.00 for the possibility of a \$30.00 award.” *Id.* at ¶ 29, 843 A.2d at 1274. Accordingly, the court held that, “[a]s applied to [these] facts ... , the enforcement of the arbitration provision would work to deny the allegedly injured parties access to justice and [would] therefore [be] unconscionable.” *Id.* at ¶ 30, 843 A.2d at 1274 (emphasis added). The Court, however, was also quick “to reinforce ... that the unconscionability of [the] arbitration provision [was] *only in reference to the ... factual situation*” it addressed. *Id.* at ¶ 30 n.9, 843 A.2d at

1274 n.9 (emphasis added); *see also id.* at ¶ 29, 843 A.2d at 1274 (“*this is a situation* where the costs of arbitration, minimal though they may seem, work to preclude the individual presentation of claims”) (emphasis added).

The present case is worlds apart from *Lytle* and *McNulty* for a number of reasons. Unlike *McNulty*, this case does not involve a negative-value claim; as explained above, Afroilan seeks damages of several hundred dollars, while her agreement requires her to pay only a nominal arbitration fee (a fee that is waived under Cingular’s arbitration provision, made available to all former AWS customers). Afroilan’s fee is also substantially lower than the fees at issue in *McNulty*. Moreover, Afroilan’s arbitration fee is capped at \$25, whereas the consumers in *Lytle* faced the risk of substantial additional fees if they did not prevail, and the *McNulty* consumers were responsible for any arbitration fees exceeding \$1500. Thus, unlike the AWS agreement, the arbitration agreement in *Lytle* tended to discourage the assertion of claims by providing that consumers would be responsible for additional fees in the event that they did not prevail in arbitration. Finally, neither *Lytle* nor *McNulty* discuss the possibility of recovering attorneys’ fees as an incentive to pursue individual arbitration. For all of these reasons, this case is easily distinguishable from *Lytle* and *McNulty*.

The Court of Common Pleas’ broad holding that “[t]he preclusion of classwide litigation or classwide arbitration of consumer claims, imposed in a contract of adhesion, is unconscionable and unenforceable” (Mem. Op. at 17) fails to take account of these important differences. As a result, both the court’s reasoning and its result are inconsistent with *Lytle* and *McNulty*, which plainly require a case-by-case, fact-specific analysis. *See McNulty*, 2004 PA Super 45, ¶¶ 29-30 & n.7, 843 A.2d at 1273-74 & n.9; *Lytle*, 2002 PA Super 327, ¶ 40-41 & 45, 810 A.2d at 666, 668.

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In sum, the court below erred in holding that Afroilan’s agreement to arbitrate her disputes with AWS is unconscionable. The features of AWS’s arbitration provision (especially as supplemented by Cingular’s arbitration provision) make it economically feasible for individual consumers to vindicate their claims. Accordingly, under Pennsylvania law, the arbitration agreement is fully enforceable.

**II. THE COURT OF COMMON PLEAS’ HOLDING IS PREEMPTED BY THE FAA.**

Even if correct as a matter of Pennsylvania law (which it isn’t), the Court of Common Pleas’ holding that an arbitration provision must allow for class-wide arbitration in order to be enforceable is preempted under the Supremacy Clause of the U.S. Constitution because it “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA. *United States v. Locke*, 529 U.S. 89, 109 (2000) (citation and internal quotation marks omitted).

Section 2 of the FAA declares pre-dispute arbitration agreements “valid, irrevocable, and enforceable” because “arbitration saves time, saves trouble, saves money.” *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess., at 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce). As Congress has subsequently explained, arbitration usually is “cheaper and faster than litigation,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling.” H.R. Rep. No. 97-542, at 13 (1982). The U.S. Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Indeed, the Court has recognized that “Congress, when enacting [the FAA], had the needs of consumers ... in mind” and that “arbitra-

tion's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.” *Allied-Bruce*, 513 U.S. at 280.

Class-action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the hallmark of arbitration. While the average length of an AAA arbitration from filing to award is less than six months (*see id.* at 280-81), class actions take years. Such complex cases invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including depositions of all class representatives (and often other witnesses) for purposes of determining such statutory prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and (v) the interlocutory appeal that inevitably follows.

If, after all of that, a class is certified, there would have to be full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would then commence and likely continue for months, if not years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, due process would necessitate another round of notice followed by a fairness hearing, complete with extensive briefing by both sides, as well as by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide trial—one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses. These procedures would make arbitration more expensive and more time consuming—and, in the process, eradicate the distinction between arbitra-

tion and litigation.<sup>16</sup> Indeed, given that class arbitration would also involve interlocutory applications in court to vacate various arbitral rulings, “class arbitration may actually prove more burdensome than class litigation.” Jack Wilson, “*No-Class-Action Arbitration Clauses*,” *State-Law Unconscionability and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 774 (2004).

Not only would grafting time-consuming and expensive class-action procedures onto an arbitral proceeding essentially eliminate the distinction between arbitration and litigation, but it also presents businesses with a “worst-of-all-worlds” scenario. While the stakes would be increased exponentially over an individual arbitration, any class-wide arbitral award would remain reviewable only for fraud, bias, or “manifest disregard” of the law. *See* 9 U.S.C. § 10; *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). No rational business would grant a decision-maker subject to only very limited judicial review—and thus, as a practical matter, only loosely bound by substantive rules of law—the authority to render a massive class award. *See* Transcript of Oral Argument, *Bazze v. Green Tree Fin. Corp.*, 539 U.S. 444 (2003) (No. 02-

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<sup>16</sup> *See, e.g.*, Lindsay R. Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 649 (hybrid class arbitration “subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration”); Bunch, *supra*, 2004 J. DISP. RESOL. at 272 (“when class-wide arbitration is chosen as the means to resolve many similar claims, the many benefits of the arbitration process are lost in favor of a procedural device which brings the burdens of litigation into the arbitral forum”); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 WM. & MARY L. REV. 1, 44-45 (2000) (“several attorneys who have actually participated in classwide arbitrations have found that the procedure, at least as used to date, differs very little from litigation and thus offers few, if any, advantages”); Elizabeth P. Allor, Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CAL. L. REV. 1239, 1253 (1983) (“when conducted on a classwide basis, arbitration is unlikely to remain inexpensive and efficient”)

634) (observation of one Justice that “[y]ou might not want to put your company’s entire future in the hands of one arbitrator”) *available at* 2003 WL 1989562, at \*29; Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update: Bazzle v. Green Tree Fin. Corp.—Dazzle for Green Tree, Fizzle for Practitioners*, 59 BUS. LAW. 1265, 1272-73 (2004) (“Because courts on the whole are vastly more experienced than arbitrators in administering class action procedures, most companies faced with the prospect of class arbitration would likely prefer to remain in court rather than navigate through the uncharted waters of class-wide arbitration.”); Wilson, *supra*, 23 QUINNIPIAC L. REV. at 778-80 (predicting the same).

As a result, the decision below (if upheld) will *not* result in companies modifying their arbitration agreements to permit class arbitration. Rather, it inevitably will cause companies to abandon arbitration altogether and bring about the end of consumer arbitration in Pennsylvania. *See, e.g.*, Cingular Wireless, Dispute Resolution, *supra* note 6 (“if this [class-action waiver] is found to be unenforceable, then the entirety of this arbitration clause shall be null and void”); Kaplinsky & Levin, *supra*, 59 BUS. LAW. at 1272 (advising companies to modify their arbitration clauses to provide that if the class-action waiver is invalidated, then the entire arbitration clause is null and void). Thus, the consequence of conditioning the enforcement of consumer arbitration provisions on the business subjecting itself to class-wide arbitration would not be fairer or more efficient arbitration—but rather *more litigation* and *less arbitration*. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA.

As the Fifth Circuit recently put it in rejecting an unconscionability attack on Cingular’s original arbitration provision, “the fact that certain litigation devices may not be available in arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ characteristics that generally make arbitration an attractive vehicle for the resolution of

low-value claims.” *Iberia*, 379 F.3d at 174 (quoting *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 31 (1991)); *see also id.* at 175-76 (for parties to demand “all of the procedural accoutrements that accompany a judicial proceeding” would undermine “the point of arbitration”). More recently, the Eleventh Circuit agreed that a prohibition of class-wide arbitration is “consistent with the goals of ‘simplicity, informality, and expedition’ touted by the Supreme Court in *Gilmer*,” (*Caley*, 428 F.3d at 1378 (quoting *Gilmer*, 500 U.S. at 31)), which is another way of saying that a rule requiring class arbitration is inconsistent with the purposes of the FAA. Given that a class-arbitration waiver is “part and parcel” of arbitration, the decision below does much more than merely require that arbitration agreements include certain terms—although that alone would be sufficient to trigger preemption under the FAA. Rather, it is a frontal attack on arbitration itself and the “emphatic federal policy in favor of arbitral dispute resolution.” *Mitsubishi*, 473 U.S. at 631.

Accordingly, under the doctrine of conflict preemption—and regardless of any state-law concern about “the unavailability of class action relief”—“the Supremacy Clause of the Federal Constitution ... preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action.” *Pyburn v. Bill Heard Chevrolet*, 63 S.W. 3d 351, 365 (Tenn. Ct. App. 2001); *see also Schultz*, 376 F. Supp. 2d at 691 (West Virginia Supreme Court’s holding that class-arbitration waiver was unconscionable is preempted by the FAA and therefore “the plaintiff’s argument that the arbitration clause is unconscionable due to its foreclosure of class action relief ... lacks merit”). It is well-settled that state law is preempted when, as here, it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

### **III. AFROILAN'S MMWA CLAIMS ARE SUBJECT TO ARBITRATION**

In the Court of Common Pleas, Afroilan argued that her claims under the MMWA are not arbitrable because the MMWA (i) effects a limited implied repeal of the FAA and (ii) requires that any arbitration clause be included in the text of the warranty itself. Though the court did not reach these arguments, we anticipate that Afroilan will raise them as alternative bases for affirmance. The vast majority of courts, however, have rejected such arguments, concluding instead that it is unreasonable to interpret the MMWA to preclude arbitration and that the FTC's "single document rule" does not apply to arbitration clauses.

#### **A. The Federal Trade Commission's Interpretation Of The MMWA As Overriding The FAA Is An Unreasonable One That The Courts Have Consistently Rejected.**

In the court below, Afroilan first argued that the MMWA, as interpreted by the Federal Trade Commission ("FTC"), overrides the FAA, making her claims under the MMWA non-arbitrable. This position is untenable, however, in light of the demanding standard for establishing that Congress intended to render a particular statutory claim non-arbitrable, and it has been flatly rejected by the overwhelming majority of courts, including the Fifth and Eleventh Circuits and the supreme courts of Illinois, Texas, Michigan, and Alabama. *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002); *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1275 (11th Cir. 2002); *S. Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000) (adopting dissenting opinion of Justice See in *S. Energy Holmes v. Lee*, 732 So. 2d. 994, 1008, 1011-12 (Ala. 1999)); *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957, 965-66 (Ill. 2004); *Abela v. Gen. Motors Corp.*, 677 N.W. 2d 325 (Mich. 1994); *In re Am. Homestar*, 50 S.W.3d 480 (Tex. 2001); *see also, e.g., Pack v. Damon Corp.*, 320 F. Supp. 2d 545 (E.D. Mich. 2004); *Results Oriented, Inc. v. Crawford*, 538 S.E. 2d 73 (Ga. App. 2000), *aff'd*, 548 S.E.2d 342 (Ga. 2001). As these courts

have concluded, the FTC’s interpretation of the MMWA is not a reasonable one and, in fact, relies on reasoning that the Supreme Court has expressly rejected.

Although the Supreme Court has acknowledged that, “[l]ike any statutory directive, the [FAA’s] mandate [making arbitration agreements valid, irrevocable, and enforceable] may be overridden by a contrary congressional command,” “[t]he burden is on the party opposing arbitration ... to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). Congressional intent to preclude arbitration of statutory claims must be evident from the statute’s text or legislative history or from an “inherent conflict between arbitration and the statute’s underlying purposes.” *Id.* at 227. Applying this test, the Supreme Court has consistently, and without exception, upheld agreements to arbitrate federal statutory claims.<sup>17</sup>

Afroilan’s (and the FTC’s) position is based on language in the MMWA authorizing warrantors to “establish an informal dispute settlement procedure” that a “consumer must resort to ... *before* pursuing any legal remedy” provided by the statute. 15 U.S.C. § 2310(a)(3)(C) (emphasis added). They reason that, by sanctioning the use of non-binding, “informal dispute settlement procedure[s] ... before pursuing any legal remedy,” Congress implicitly precluded binding arbitration.<sup>18</sup> But this argument ignores the text of the statute: it does *not* say that binding arbitration is an “informal dispute settlement procedure” or that Congress intended to preclude

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<sup>17</sup> See *Gilmer*, 500 U.S. 20 (Age Discrimination in Employment Act); *Rodriguez de Quijas*, 490 U.S. 477 (Securities Act of 1933); *McMahon*, 482 U.S. 220 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi*, 473 U.S. 614 (Sherman Act).

<sup>18</sup> For the FTC’s position, see 64 Fed. Reg. 19700, 19708-09 (1999); 40 Fed. Reg. 60168, 60210-11 (1975); and 16 C.F.R. § 703.5(j).

binding arbitration as an alternative to litigation. *Walton*, 298 F.3d at 475 (“binding arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite”); *accord Davis*, 305 F.3d at 1275; *Lee*, 732 So. 2d. at 1011-12; *Borowiec*, 808 N.E. 2d at 965-66; *In re Am. Homestar*, 50 S.W. 3d at 487; *cf. Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3d Cir. 1997) (“the informal dispute resolution mechanism [governed by the FTC regulations] does not constitute arbitration within the meaning of the FAA”). Indeed, in *Gilmer*, the Supreme Court reasoned that binding arbitration was entirely “consistent with” a provision of the Age Discrimination in Employment Act that directed the EEOC “to pursue ‘informal methods of conciliation, conference, and persuasion’” to resolve statutory claims. 500 U.S. at 29 (quoting 29 U.S.C. 626(b)). Thus, a statute’s provision for informal, non-binding methods of dispute resolution does not, by negative implication, preclude pre-dispute agreements to arbitrate.<sup>19</sup> Therefore, the text of the MMWA does not evince a congressional intent to preclude binding arbitration.

Afroilan and the FTC also believe that the legislative history of the MMWA supports their position. The record on this point, however, is ambiguous at best. The legislative history, like the statute’s text, simply indicates that Congress intended “informal dispute settlement procedures” to be a prerequisite, not a bar, to further pursuit of legal remedies under the statute. It does *not* indicate that Congress intended to preclude binding arbitration. *E.g., Walton*, 298 F.3d at 476-77; *Davis*, 505 F.3d at 1275-76. In fact, it does not even once refer to “arbitration.” *In re Am. Homestar*, 50 S.W.3d at 488. The best evidence on this point is actually found in a Senate report describing an earlier version of the MMWA, which states that Congress intended for

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<sup>19</sup> Nor does the MMWA’s provision for concurrent federal and state jurisdiction over consumer claims (15 U.S.C. § 2310(d)) preclude binding arbitration agreements. *See, e.g., McMahon*, 482 U.S. at 227-28 (holding that a provision granting federal courts *exclusive* jurisdiction over statutory claims does not preclude arbitration).

“warrantors of consumer products ... to establish informal dispute settlement mechanisms that take care of consumer grievances *without aid of litigation or formal arbitration.*” *Id.* at 488 (quoting S. REP. No. 91-876, at 22-23 (1970)) (emphasis by the court). “This passage arguably demonstrates that Congress contemplated a consumer’s resort to courts *or* binding arbitration if the informal dispute settlement procedure did not resolve the dispute. Or, at a minimum, it shows [that] the legislative history is ambiguous.” *In re Amer. Homestar*, 50 S.W.3d at 488-89. Under the long line of Supreme Court precedent holding that numerous important federal statutory claims are arbitrable, the silence of the MMWA’s legislative history on this point is fatal to Afroilan’s argument. *E.g.*, *Walton*, 298 F.3d at 477 (observing that the Supreme Court previously rejected a more persuasive legislative history argument in *McMahon*, *supra*); *Lee*, 732 So. 2d at 1009 (same).<sup>20</sup>

To counter the overwhelming authority rejecting her position, Afroilan has relied primarily on the plurality opinion in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002). *Parkerson* is unpersuasive because it relies on the flawed textual and legislative history arguments discussed above, as well as several federal district court decisions that are no longer good law in light of the Fifth and Eleventh Circuits’ subsequent decisions on the issue. *See id.* at 532-34.<sup>21</sup> In addi-

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<sup>20</sup> Afroilan has not suggested that there is any “inherent conflict between arbitration and the [MMWA’s] underlying purposes.” *McMahon*, 482 U.S. at 227. Any such claim would be precluded by the Supreme Court’s repeated admonition that “even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions.” *Randolph*, 531 U.S. at 90 (internal quotation marks omitted).

<sup>21</sup> Five of the six district court decisions cited by *Parkerson* are no longer good law in light of the Fifth Circuit’s decision in *Walton* and the Eleventh Circuit’s decision in *Davis*. *See Parkerson*, 817 So. 2d at 532 (citing *Yeomans v. Homes of Legend, Inc.*, 2001 WL 237313 (M.D. Ala. Mar. 5, 2001); *Raesly v. Grand Housing, Inc.*, 105 F. Supp. 2d 562 (S.D. Miss. 2000); *Rhode v. E & T Invs., Inc.*, 6 F. Supp. 2d 1322 (M.D. Ala. 1998); *Boyd v. Homes of Legend*, 981 F. Supp. (cont’d)

tion, Afroilan’s heavy reliance on the FTC’s regulations and commentary is misplaced. As explained above, the FTC’s position is in direct conflict with the FAA and the Supreme Court’s decisions interpreting the FAA, and it is unsupported by the text and the legislative history of the MMWA. Because “the text, legislative history, and purpose of the MMWA do not evince a congressional intent to bar arbitration of MMWA ... claims,” “[t]he clear congressional intent in favor of enforcing valid arbitration agreements controls.” *Walton*, 298 F.3d at 478.

**B. The “Single Document Rule” Does Not Require That An Arbitration Clause Be Included In A Product’s Warranty.**

Recognizing the weakness of her broader argument that all claims under the MMWA are inarbitrable, Afroilan also argued in the court below that those same claims are not subject to arbitration because her arbitration agreement was not included in the same document as her warranty. This argument fails, however, because a warranty need only include the information that is “required by rules of the [FTC]” (15 U.S.C. § 2302(a)), and the FTC rules do not call for inclusion of an arbitration agreement in a product’s warranty (16 C.F.R. § 701.3). Afroilan’s ar-

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(... cont’d)

1423 (M.D. Ala. 1997); *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997), *aff’d*, 127 F.3d 40 (11th Cir. 1997)). The sixth case cited by the court relied heavily on one of the first five now-discredited decisions, as well as the FTC’s unpersuasive interpretation of the MMWA. *See Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 963-65 (W.D. Va. 2000). The only other case Afroilan cited below reasoned that the FAA’s drafters did not intend to require arbitration of consumer claims and, therefore, “notwithstanding the Supreme Court’s recent expansion of the FAA, the statute’s ‘liberal policy’ should not encroach on or undermine the manifest pro-consumer policy of the MMWA.” *Rickard v. Teynor’s Homes, Inc.*, 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003); *see also id.* at 921 n.12 (collecting law review articles critical of the Supreme Court’s FAA jurisprudence). The Supreme Court, however, has specifically recognized that the FAA’s drafters “had the needs of consumers ... in mind.” *Allied-Bruce*, 513 U.S. at 280. The Court has also made clear that this sort of “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, ... has fallen far out of step with [its] current strong endorsement of” arbitration. *Rodriguez de Quijas*, 490 U.S. at 481.

gument to the contrary relies on an Eleventh Circuit decision that is no longer good law in light of a subsequent decision by that same court.

The MMWA provides that,

[i]n order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, *to the extent required by rules of the [FTC]*, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty.

15 U.S.C. § 2302(a) (emphasis added). The disclosures required by § 2302(a) are thus limited to those required by the FTC rules. The FTC, in turn, requires warrantors to “clearly and conspicuously disclose in a single document” certain information, including, as is relevant here, “[i]nformation respecting the availability of any informal dispute settlement mechanism.” 16 C.F.R. § 701.3(6). As we explained just above, courts have consistently held that binding arbitration is *not* an “informal dispute settlement mechanism.” Thus, there is no requirement under the MMWA that an arbitration clause be included in a product’s warranty.

Afroilan’s argument that the AWS arbitration clause should have been included in her phone’s warranty ultimately relies on the Eleventh Circuit’s decision in *Cunningham v. Fleetwood Homes, Inc.*, 253 F.3d 611 (11th Cir. 2001). As a district court in the Eleventh Circuit and the Alabama Supreme Court have recently explained, however, *Cunningham* is no longer good law in light of the Eleventh Circuit’s subsequent decision in *Davis* (discussed in section III.A, *supra*). In *Cunningham*, the court held that the defendant could not compel arbitration because its “failure to disclose in the warranty a term or clause requiring the [plaintiffs] to utilize an *informal dispute resolution mechanism* [ran] afoul of the disclosure requirements of the [MMWA].” 253 F.3d at 624 (emphasis added); *see also id.* at 621 n.13 (“[The MMWA’s] treatment of *informal dispute resolution mechanism clauses* in warranties is consistent with general

contract law, in that arbitration clauses, like other kinds of forum selection clauses, are generally considered material terms under state law variants of the Uniform Commercial Code.”) (emphasis added); *id.* at 622 (noting that the defendant “failed to disclose in the warranty a term or clause requiring the [plaintiffs] to utilize an *informal dispute resolution mechanism*”) (emphasis added). Subsequently, however, the Eleventh Circuit concluded that binding arbitration is *not* an “informal dispute settlement procedure.” *Davis*, 305 F.3d at 1276 (“the fact that any informal dispute settlement procedure must be non-binding, does not imply that Congress meant to preclude binding arbitration, which is of a different nature”) (quoting *Walton*, 298 F.3d at 476).

The Eleventh Circuit’s conclusion in *Davis* is required by the plain language of the MMWA. *Binding* arbitration simply cannot be an “informal dispute settlement procedure” under the MMWA because the statute itself provides that a “consumer may not commence a civil action ... unless he initially resorts to [any valid informal dispute settlement] procedure.” 15 U.S.C. § 2310(a)(3)(C)(i). “[B]inding arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite.” *Walton*, 298 F.3d at 475; *cf. Harrison*, 111 F.3d at 351 (“the informal dispute resolution mechanism [governed by the FTC regulations] does not constitute arbitration within the meaning of the FAA”). Because *Cunningham* rested on a contrary premise that the same court has since rejected, it is unpersuasive and no longer good law.

A federal district court in the Eleventh Circuit recently confirmed that “*Cunningham*’s assumption that an arbitration agreement is an ‘informal dispute settlement mechanism’ for purposes of the MMWA’s single document rule is no longer good law in this Circuit” after *Davis*. *Patriot Mfg., Inc. v. Dixon*, 399 F. Supp. 2d 1298, 1303 (S.D. Ala. 2005). As a result, the court held that the FTC’s “single document rule” (16 C.F.R. § 701.3) does not apply to arbitration agreements. *Dixon*, 399 F. Supp. 2d at 1303-04. A unanimous Alabama Supreme Court also

recognized recently that *Davis*, at a minimum, “significantly undermined” *Cunningham*. *Patriot Mfg. v. Jackson*, \_\_\_ So. 2d \_\_\_, \_\_\_, 2005 WL 3086668, at \*8 (Ala. Nov. 18, 2005). The court went on to conclude that, because binding arbitration is not an informal dispute settlement mechanism, arbitration clauses are not covered by the single-document rule or the MMWA, which requires disclosures only to the “extent required by the rules of the [FTC].” *Id.* (quoting 15 U.S.C. § 2302(a)). Accordingly, the court overruled its own contrary precedent (also relied on below by Afroilan) that had “relied solely upon *Cunningham*.” *Id.*

Perhaps recognizing that binding arbitration is *not* an “informal dispute settlement procedure,” Afroilan characterized *Cunningham* as holding more broadly that a warrantor must “disclose in a single document all of the relevant terms of the warranty.” *Cunningham*, 253 F.3d at 622. (R. 868a). This argument fails, however, for two reasons: First, it relies on a single, loosely-phrased sentence fragment from *Cunningham*, whereas the rest of *Cunningham* specifically emphasizes that the warranty’s deficiency was its failure to mention any “informal dispute resolution mechanism.” *See* pages 43-44, *supra*; *Dixon*, 399 F. Supp. 2d at 1304-06 (rejecting the same interpretation of *Cunningham* urged by Afroilan). Second, under the MMWA, the terms and conditions of a warranty must be disclosed in the warranty document only “to the extent required by rules of [the FTC].” 15 U.S.C. § 2302(a). Therefore, the “relevant terms” of a warranty are precisely those—and *only* those—specified in the FTC rule (16 C.F.R. § 701.3), and that rule does not require disclosure of arbitration agreements (*see Dixon*, 399 F. Supp. 2d at 1304, 1309-10; *Jackson*, 2005 WL 3086668, at \*3, \*5-6, \*8).

Lastly, Afroilan suggested below that 15 U.S.C. § 2302(a)(9), which states that the FTC “may require inclusion in the warranty of ... [a] brief, general description of the legal remedies available to the consumer,” required AWS to include the arbitration clause and class-action

waiver in the warranty. (R. 868a). The FTC has exercised its authority under this subsection to require that warranties include:

Any exclusion of or limitations on relief such as incidental or consequential damages, accompanied by the following statement ...:

Some states do not allow for the exclusion of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

16 C.F.R. § 701.3(8). Thus, the FTC’s rule plainly focuses on *substantive* remedies “such as incidental or consequential damages,” not procedural issues such as arbitration and class actions. The Supreme Court has repeatedly held that, “[b]y 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.” *Mitsubishi*, 473 U.S. at 628. Likewise, the right to a class action is “merely a procedural one ... that may be waived.” *Johnson*, 225 F.3d at 369; *see also 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).”). Therefore, because neither the arbitration clause nor the class-action waiver exclude or limit the substantive remedies, damages, or relief available to Afroilan, § 701.3(8) is inapplicable.

## 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.

Respectfully submitted,

Dated: March 20, 2006.

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## **ORDER AND OPINION BELOW**

The Order issued by the Court of Common Pleas of Philadelphia County overruling AWS's preliminary objection in the nature of a motion to compel arbitration, entered on July 12, 2005, is attached to this brief as Exhibit A. The Court of Common Pleas' Opinion, entered January 27, 2006, is attached to this brief as Exhibit B.