

SUPREME COURT OF NEW JERSEY

NO. 58,437

DELTA FUNDING CORPORATION,	:	ON CERTIFICATION OF
	:	QUESTION OF LAW FROM THE
Plaintiff-Respondent	:	UNITED STATES COURT OF
	:	APPEALS FOR THE THIRD
	:	CIRCUIT
v.	:	DOCKET NO. 04-1951
	:	
	:	
ALBERTA HARRIS,	:	
	:	
Defendant-Appellant	:	
	:	

BRIEF OF *AMICUS CURIAE*
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE.....	1
PRELIMINARY STATEMENT.....	2
PROCEDURAL HISTORY AND STATEMENT OF FACTS.....	5
LEGAL ARGUMENT.....	6
I. AN AGREEMENT TO ARBITRATE ON AN INDIVIDUAL BASIS CANNOT BE DEEMED UNENFORCEABLE MERELY BECAUSE IT PROHIBITS CLASS-WIDE ARBITRATION.....	6
A. Under New Jersey Law, Class-Action Waivers Are Not Unconscionable.....	9
B. The FAA Would Preempt A Rule That Class- Arbitration Waivers In Arbitration Agreements Are Unconscionable As A Matter Of State Law.....	17
1. Section 2 of the FAA would expressly preempt any holding that prohibitions on class actions in arbitration provisions are unconscionable.....	17
2. Conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration would conflict with Congress’s objectives in enacting the FAA and would therefore be preempted under the Supremacy Clause of the U.S. Constitution.....	24
II. AN OFFER TO PAY THE COSTS OF ARBITRATION MOOTS ANY ARGUMENT THAT THE COSTS OF ARBITRATION ARE EXCESSIVE.....	30
III. TERM-BY-TERM MUTUALITY IS NOT NECESSARY FOR AN ARBITRATION PROVISION TO BE ENFORCEABLE.....	36
A. New Jersey Law Does Not Require Term-By-Term Mutuality In Any Contract, Including Arbitration Provisions.....	37
B. The FAA Would Preempt Any Rule Requiring Term-By- Term Mutuality In Arbitration Provisions.....	42
C. Under The FAA, The Policies Favoring The Enforcement Of Arbitration Provisions Trump Concerns About Piecemeal Litigation.....	43
IV. HARRIS MAY NOT EVADE HER OBLIGATION TO ARBITRATE BY LEVELING A PUBLIC-POLICY ATTACK ON THE UNDERLYING CONTRACT.....	45

TABLE OF CONTENTS
(continued)

	Page (s)
V. THE ENFORCEABILITY OF ARBITRATION PROVISIONS SHOULD NOT BE HINDERED BECAUSE THEY ARE CONTAINED WITHIN FORM CONTRACTS.....	49
CONCLUSION.....	53

TABLE OF AUTHORITIES

	Page (s)
CASES	
<i>3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.</i> , 1998 WL 657722 (9th Cir. Sept. 3, 1998).....	46
<i>Alexander v. Anthony Int'l, L.P.</i> , 341 <i>F.3d</i> 256 (3d Cir. 2003).....	33
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 <i>U.S.</i> 265, 115 <i>S. Ct.</i> 834, 130 <i>L.Ed.2d</i> 753 (1995).....	7, 8, 9, 25
<i>Am. Gen. Life & Accident Ins. Co. v. Wood</i> , ___ <i>F.3d</i> ___, 2005 WL 3031113 (4th Cir. Nov. 14, 2005).....	30
<i>Amchem Prods., Inc. v. Windsor</i> , 521 <i>U.S.</i> 591, 117 <i>S. Ct.</i> 2231, 138 <i>L.Ed.2d</i> 689 (1997).....	16
<i>Anders v. Hometown Mtg. Servs., Inc.</i> , 346 <i>F.3d</i> 1024 (11th Cir. 2003).....	32
<i>Anderson v. Delta Funding Corp.</i> , 316 <i>F. Supp. 2d</i> 554 (N.D. Ohio 2004).....	32
<i>AutoNation USA Corp. v. Leroy</i> , 105 <i>S.W.3d</i> 190 (Tex. Ct. App. 2003).....	15
<i>In re Ball</i> , 236 <i>A.D.2d</i> 158, 665 <i>N.Y.S.2d</i> 444 (1997).....	42
<i>Barcon Assocs., Inc. v. Tri-County Asphalt Corp.</i> , 86 <i>N.J.</i> 179 (1981).....	25
<i>Baughner v. Dekko Heating Techs.</i> , 202 <i>F. Supp. 2d</i> 847 (N.D. Ind. 2002).....	32
<i>Bess v. Check Express</i> , 294 <i>F.3d</i> 1298 (11th Cir. 2002).....	46
<i>Billups v. Bankfirst</i> , 294 <i>F. Supp. 2d</i> 1265 (M.D. Ala. 2003).....	14
<i>Blair v. Scott Specialty Gases</i> , 283 <i>F.3d</i> 595 (3d Cir. 2002).....	33
<i>Blue Cross Blue Shield of Ala. v. Rigas</i> , ___ <i>So. 2d</i> ___, 2005 WL 2175451 (Ala. Sept. 9, 2005).....	41
<i>Boomer v. AT&T Corp.</i> , 309 <i>F.3d</i> 404 (7th Cir. 2002).....	21

TABLE OF AUTHORITIES

(continued)

	Page (s)
<i>Brown v. KFC Nat'l Mgmt Co.</i> , 921 P.2d 146 (Haw. 1996).....	14
<i>Burden v. Check Into Cash of Ky., LLC</i> , 267 F.3d 483 (6th Cir. 2001).....	46
<i>In re Cadillac V-8 Class Action</i> , 93 N.J. 412 (1983).....	16
<i>Caley v. Gulfstream Aerospace Corp.</i> , ___ F.3d ___, 2005 WL 2840372 (11th Cir. Oct. 31, 2005).....	13, 30
<i>Carbajal v. H&R Block Tax Servs., Inc.</i> , 372 F.3d 903 (7th Cir. 2004).....	50
<i>Cardegna v. Buckeye Check Cashing, Inc.</i> , 894 So.2d 860 (Fla.), cert. granted, 125 S. Ct. 2937 (2005), argued Nov. 29, 2005.....	46
<i>Carnival Cruise Lines, Inc. v. Shute</i> , 499 U.S. 585, 111 S. Ct. 1522, 113 L.Ed.2d 622 (1991).....	21
<i>Carter v. Countrywide Credit Indus., Inc.</i> , 362 F.3d 294 (5th Cir. 2004).....	34
<i>Champ v. Siegel Trading Co.</i> , 55 F.3d 269 (7th Cir. 1995).....	13
<i>Conseco Fin. Servicing Corp. v. Wilder</i> , 47 S.W. 3d 335 (Ky. App. 2001).....	41
<i>Copeland v. Katz</i> , 2005 WL 3163296 (E.D. Mich. Nov. 28, 2005).....	13-14
<i>Crawford v. Results Oriented, Inc.</i> , 548 S.E.2d 342 (Ga. 2001).....	41
<i>In re Currency Conversion Antitrust Litig.</i> , 361 F. Supp. 2d 237 (S.D.N.Y. 2005).....	14, 32
<i>Dean Witter Reynolds Inc. v. Byrd</i> , 470 U.S. 213, 105 S. Ct. 1238, 84 L.Ed.2d 158 (1985).....	36, 44
<i>Delta Funding Corp. v. Harris</i> , 426 F.3d 671 (3d Cir. 2005).....	5
<i>Delta Funding Corp. v. Harris</i> , ___ F. Supp. 2d ___, 2004 WL 3562053.....	48

TABLE OF AUTHORITIES

(continued)

	Page (s)
<i>Discover Bank v. Superior Court</i> , 113 P.3d 1100 (Cal. 2005).....	15
<i>Dobbins v. Hawk’s Enters.</i> , 198 F.3d 715 (8th Cir. 1999).....	32
<i>Doctor’s Assocs., Inc. v. Casarotto</i> , 517 U.S. 681, 116 S. Ct. 1652, 134 L.Ed.2d 902 (1986).....	18
<i>Doctor’s Assocs. v. Distajo</i> , 66 F.3d 438 (2d Cir. 1995).....	41
<i>Edwards v. Blockbuster, Inc.</i> , ___ F. Supp. 2d ___, 2005 WL 3199440 (E.D. Okla. Nov. 17, 2005).....	14
<i>Fazio v. Lehman Bros. Inc.</i> , 340 F.3d 386 (6th Cir. 2003).....	41
<i>First Family Fin. Servs., Inc. v. Sanford</i> , 203 F. Supp. 2d 662 (N.D. Miss. 2002).....	32
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991).....	passim
<i>Gras v. Assoc. First Capital Corp.</i> , 346 N.J. Super. 42 (App. Div. 2001).....	passim
<i>Green Tree Fin. Corp.-Ala. v. Randolph</i> , 531 U.S. 79, 121 S. Ct. 513, 148 L.Ed.2d 373 (2000).....	31, 35
<i>Harris v. Green Tree Fin. Corp.</i> , 183 F.3d 173 (3d Cir. 1999).....	41, 42
<i>Harter v. Iowa Grain Co.</i> , 220 F.3d 544 (7th Cir. 2000).....	46
<i>Howard v. Diolosa</i> , 241 N.J. Super. 222 (App. Div. 1990).....	10, 20
<i>Hubbert v. Dell Corp.</i> , 835 N.E.2d 113 (Ill. App. Ct. 2005).....	15
<i>Hutcherson v. Sears Roebuck & Co.</i> , 793 N.E.2d 886 (Ill. App. Ct. 2003).....	14-15
<i>Iberia Credit Bureau, Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004).....	13, 18, 24, 29

TABLE OF AUTHORITIES

(continued)

	Page (s)
<i>Jenkins v. First Am. Cash Advance of Ga., LLC</i> , 400 F.3d 868 (11th Cir. 2005).....	13, 46
<i>Johnson v. W. Suburban Bank</i> , 225 F.3d 366 (3d Cir. 2000).....	13
<i>Jones v. Genus Credit Mgmt. Corp.</i> , 353 F. Supp. 2d 598 (D. Md. 2005).....	14
<i>Jung v. Ass'n of Am. Med. Colls.</i> , 300 F. Supp. 2d 119 (D.D.C. 2004).....	32
<i>Kalman Floor Co. v. Jos. L. Muscarelle, Inc.</i> , 98 N.J. 266 (1985).....	40
<i>Kalman Floor Co. v. Jos. L. Muscarelle, Inc.</i> , 196 N.J. Super. 16 (App. Div. 1984).....	39, 40
<i>Lackey v. Green Tree Fin. Corp.</i> , 498 S.E.2d 898 (S.C. Ct. App. 1998).....	41
<i>Large v. Conseco Fin. Servicing Corp.</i> , 292 F.3d 49 (1st Cir. 2002).....	32
<i>Lawrence v. Comprehensive Bus. Servs. Co.</i> , 833 F.2d 1159 (5th Cir. 1987).....	46
<i>Leonard v. Terminix Int'l Co.</i> , 854 So. 2d 529 (Ala. 2002).....	15
<i>Livadas v. Bradshaw</i> , 512 U.S. 107, 114 S. Ct. 2068, 129 L.Ed.2d 93 (1994).....	29
<i>Livingston v. Assocs. Fin., Inc.</i> , 339 F.3d 553 (7th Cir. 2003).....	31
<i>Lloyd v. MBNA Am. Bank, N.A.</i> , 27 Fed. Appx. 82 (3d Cir. 2002).....	13
<i>Lomax v. Woodmen of the World Life Ins. Soc'y</i> , 228 F. Supp. 2d 1360 (N.D. Ga. 2002).....	14
<i>Lux v. Good Guys</i> , 2005 WL 1713421 (C.D. Cal. July 11, 2005).....	14
<i>Martindale v. Sandvik, Inc.</i> , 173 N.J. 76 (2002).....	7, 9, 48

TABLE OF AUTHORITIES

(continued)

	Page (s)
<i>McKenzie Check Advance of Miss., LLC v. Hardy</i> , 866 So. 2d 446 (Miss. 2004).....	41
<i>Metro East Center for Conditioning & Health v. Qwest Communications Int’l, Inc.</i> , 294 F.3d 924 (7th Cir. 2002).....	21
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985).....	25, 47
<i>Moses H. Cone Memorial Hospital v. Mercury Construction Corp.</i> , 460 U.S. 1, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983).....	44, 45, 46
<i>Muhammad v. County Bank of Rehoboth Beach</i> , 379 N.J. Super. 222 (App. Div. 2005).....	10, 12, 19
<i>Munoz v. Green Tree Fin. Corp.</i> , 542 S.E.2d 360 (S.C. 2001).....	41
<i>Nelson v. Insignia/ESG, Inc.</i> , 215 F. Supp. 2d 143 (D.D.C. 2002).....	32
<i>Nur v. K.F.C., USA, Inc.</i> , 142 F. Supp. 2d 48 (D.D.C. 2001).....	32
<i>O’Quin v. Verizon Wireless</i> , 256 F. Supp. 2d 512 (M.D. La. 2003).....	14
<i>Oblix, Inc. v. Winiecki</i> , 374 F.3d 488 (7th Cir. 2004).....	18, 20, 40, 43
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815, 119 S. Ct. 2295, 144 L.Ed.2d 715 (1999).....	16
<i>Parilla v. IAP Worldwide Services, VI, Inc.</i> , 368 F.3d 269 (3d Cir. 2004).....	33, 34
<i>Perry v. Thomas</i> , 482 U.S. 483, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987).....	passim
<i>Phillips v. Assocs. Home Equity Servs., Inc.</i> , 179 F. Supp. 2d 840 (N.D. Ill. 2001).....	32
<i>Pick v. Discover Fin. Servs., Inc.</i> , 2001 U.S. Dist. LEXIS 15777 (D. Del. Sept. 28, 2001).....	14

TABLE OF AUTHORITIES

(continued)

	Page (s)
<i>Pitchford v. AmSouth Bank</i> , 285 <i>F. Supp. 2d</i> 1286 (M.D. Ala. 2003).....	15
<i>Pridgen v. Green Tree Fin. Serv. Corp.</i> , 88 <i>F. Supp. 2d</i> 655 (S.D. Miss. 2000).....	41
<i>Prima Paint v. Flood & Conklin Manufacturing Co.</i> , 388 <i>U.S.</i> 395, 87 <i>S. Ct.</i> 1801, 18 <i>L.E.2d</i> 1270 (1967).....	46, 48
<i>Pyburn v. Bill Heard Chevrolet</i> , 63 <i>S.W.3d</i> 351 (Tenn. Ct. App. 2001), appeal denied (Tenn. Nov. 19, 2001).....	29
<i>Ragan v. AT&T Corp.</i> , 824 <i>N.E.2d</i> 1183 (Ill. App. Ct. 2005).....	14
<i>Rains v. Found. Health Sys. Life & Health</i> , 23 <i>P.3d</i> 1249 (Colo. Ct. App. 2001).....	14, 41
<i>Ramirez v. Cintas Corp.</i> , 2005 <i>WL</i> 658984 (N.D. Cal. Mar. 22, 2005).....	41
<i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> , 490 <i>U.S.</i> 477, 109 <i>S. Ct.</i> 1917, 104 <i>L.Ed.2d</i> 526 (1987).....	28, 34
<i>Rosen v. SCIL, LLC</i> , 799 <i>N.E.2d</i> 488 (Ill. App. Ct. 2003).....	14
<i>Rudbart v. North Jersey District Water Supply Commission</i> , 127 <i>N.J.</i> 344 (1992).....	47, 48, 49
<i>Saturna v. Bickley Constr. Co.</i> , 555 <i>S.E.2d</i> 825 (Ga. Ct. App. 2001).....	41
<i>Scherk v. Alberto-Culver Co.</i> , 417 <i>U.S.</i> 506, 94 <i>S. Ct.</i> 2449, 41 <i>L.Ed.2d</i> 270 (1974).....	7
<i>Schultz v. AT&T Wireless Servs., Inc.</i> , 376 <i>F. Supp. 2d</i> 685 (N.D. W. Va. 2005).....	15, 29
<i>Sitogum Holdings v. Ropes</i> , 352 <i>N.J. Super.</i> 555, (Ch. Div. 2002)), leave to appeal granted, 185 <i>N.J.</i> 254 (2005).....	10, 20

TABLE OF AUTHORITIES

(continued)

	Page (s)
<i>Snowden v. CheckPoint Check Cashing</i> , 290 <i>F.3d</i> 631 (4th Cir. 2002).....	13, 46
<i>Southland Corp. v. Keating</i> , 465 <i>U.S.</i> 1, 104 <i>S. Ct.</i> 852, 79 <i>L.Ed.2d</i> 1 (1984).....	7
<i>Spinetti v. Service Corp. Int’l</i> , 324 <i>F.3d</i> 212 (3d Cir. 2003)].....	33
<i>State ex rel. Dunlap v. Berger</i> , 567 <i>S.E.2d</i> 265 (W. Va. 2002).....	15
<i>Stein v. Geonerco, Inc.</i> , 17 <i>P.3d</i> 1266 (Wash. Ct. App. 2001).....	15
<i>Stenzel v. Dell, Inc.</i> , 870 <i>A.2d</i> 133 (Me. 2005).....	15
<i>Strand v. U.S. Bank Nat’l Ass’n ND</i> , 693 <i>N.W.2d</i> 918 (N.D. 2005).....	15
<i>Taylor v. First N. Am. Nat’l Bank</i> , 325 <i>F. Supp. 2d</i> 1304 (M.D. Ala. 2004).....	16
<i>Torrance v. Aames Funding Corp.</i> , 242 <i>F. Supp. 2d</i> 862 (D. Or. 2002).....	41
<i>Tsadilas v Providian Nat’l Bank</i> , 786 <i>N.Y.S.2d</i> 478 (N.Y. App. Div. 2004).....	15
<i>United States v. Locke</i> , 529 <i>U.S.</i> 89, 120 <i>S. Ct.</i> 1135, 146 <i>L.Ed.2d</i> 69 (2000).....	24
<i>Vigil v. Sears Nat’l Bank</i> , 205 <i>F. Supp. 2d</i> 566 (E.D. La. 2002).....	14
<i>Walther v. Sovereign Bank</i> , 872 <i>A.2d</i> 735 (Md. 2005).....	15, 41
<i>Wilko v. Swan</i> , 346 <i>U.S.</i> 427, 74 <i>S. Ct.</i> 182, 98 <i>L.Ed.</i> 168 (1953), overruled on other grounds by <i>Rodriguez de Quijas v. Shearson/American Express,</i> <i>Inc.</i> , 490 <i>U.S.</i> 477, 109 <i>S. Ct.</i> 1917, 104 <i>L.Ed.2d</i> 526 (1987).....	28
<i>Willis Flooring, Inc. v. Howard S. Lease Constr. Co.</i> & <i>Assocs.</i> , 656 <i>P.2d</i> 1184 (Alaska 1983).....	42

TABLE OF AUTHORITIES

(continued)

	Page (s)
<i>Wilson v. Mike Steven Motors, Inc.</i> , 2005 WL 1277948 (Kan. Ct. App. May 27, 2005).....	15
<i>Zawikowski v. Beneficial Nat'l Bank</i> , 1999 U.S. Dist. LEXIS 514 (N.D. Ill. Jan. 11, 1999).....	14
<i>Zobrist v. Verizon Wireless</i> , 822 N.E.2d 531 (Ill. Ct. App. 2004).....	32, 41
<i>Zuver v. Airtouch Communications, Inc.</i> , 103 P.3d 753 (Wash. 2004).....	18, 32, 41

STATUTES

Rule 4:32-1.....	16
Fed. R. Civ. P. 23.....	16
9 U.S.C. §§ 1-16	passim
9 U.S.C. § 2	passim
9 U.S.C. § 10	28
28 U.S.C. § 1711 note.....	23
H.R. REP. NO. 97-542, at 13 (1982)	25
N.J.S.A. 2A:23B-10(c).....	12

MISCELLANEOUS

Elizabeth P. Allor, <i>Note, Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts</i> , 71 CAL. L. REV. 1239 (1983)	27
Lindsay R. Androski, <i>Comment, A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses</i> , 2003 U. CHI. LEGAL F. 631	27
Jonathan R. Bunch, <i>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</i> , 2004 J. DISP. RESOL. 259	27

TABLE OF AUTHORITIES

(continued)

	Page (s)
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JOHN D. CALAMARI & JOSEPH M. PERILLO, <i>THE LAW OF CONTRACTS</i> (4th ed. 1998).....	39
Ronald H. Coase, <i>The Choice of the Institutional Framework: A Comment</i> , 17 J.L. & ECON. 493 (1974).....	50
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E. ALLAN FARNSWORTH, <i>CONTRACTS</i> (1982)	40
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Harris Interactive, <i>Arbitration: Simpler, Cheaper, and Faster Than Litigation</i> (Apr. 2005), at 5, available at http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf	22
Deborah R. Hensler, <i>Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation</i> , 11 DUKE J. COMP. & INT'L L. 179 (2001).....	23
<i>Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary</i> , 68th Cong., 1st Sess., at 7 (1924).....	24
Joshua Lipshutz, <i>Note, The Court's Implicit Roadmap: Charting the Prudent Course At the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits</i> , 57 STAN. L. REV. 1677 (2005)	22
Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, <i>Polling on The Class Action System: National Results</i> , available at http://www.instituteforlegalreform.com/resources/classaction.pdf	22-23

TABLE OF AUTHORITIES

(continued)

	Page (s)
1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS (rev. ed. 1993)	49-50
2 JOSEPH M. PERILLO & HELEN HADJIYANNIKAS BENDER, CORBIN ON CONTRACTS (rev. ed. 1995)	38
RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (5th ed. 1998)	50
<i>Restatement (Second) of Contracts</i> (1981)	39
Jean R. Sternlight, <i>As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?</i> , 42 WM. & MARY L. REV. 1 (2000)	27
Stephen J. Ware, <i>Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements</i> , 2001 J. DISP. RESOL. 89	21
Jack Wilson, "No-Class-Action Arbitration Clauses," <i>State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action</i> , 23 QUINNIPIAC L. REV. 737 (2004)	27, 28

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes. Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties.

In this case, appellant Alberta Harris joins a growing (and disturbing) bandwagon of parties who seek to avoid arbitration agreements by use of state-law unconscionability principles. If this Court were to nullify the arbitration agreement at issue here on unconscionability grounds, it would wreak havoc on countless arbitration provisions in contracts entered into by the Chamber's members. Such an outcome would be gravely troubling because the business community has substantially relied on arbitration provisions - indeed, businesses have structured millions of contractual relationships around them - in light of the U.S. Supreme Court's consistent endorsement of arbitration over the past several decades as a favored means of dispute resolution. Thus, the Chamber has a strong interest in

explaining why this Court should hold that the arbitration agreement at issue here is enforceable.

PRELIMINARY STATEMENT

Although Harris and her *amici* raise a litany of arguments to challenge the parties' arbitration agreement, in this brief we focus on a subset of those attacks that are especially important to the business community as a whole.

1. Because of its importance to businesses and consumers in New Jersey and throughout the nation, we initially focus on the question whether a court may rely upon a requirement that arbitration proceed on an individual basis to invalidate an arbitration provision. See Harris Br. 52-55 (arguing that class-arbitration waiver renders arbitration agreements unconscionable). There are a number of reasons why a court may not do so. To begin with, New Jersey unconscionability law does not support the invalidation of class-arbitration waivers. Moreover, the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), would expressly preempt any effort to fashion a new unconscionability principle directed at the use of such waivers in arbitration provisions. Furthermore, mandating that class-action procedures be available in arbitration would undermine the very benefits of arbitration that lead parties to enter into arbitration agreements in the first place – inexpensive, streamlined, and expeditious dispute resolution. A procedure

that would subvert these goals cannot possibly be an indispensable prerequisite to enforcement of an arbitration agreement. Indeed, because the result of imposing such procedures on arbitration would be to discourage and reduce the use of arbitration provisions, such a requirement would conflict with the purposes of the FAA and thus be preempted.

2. Harris also argues extensively that it is too expensive for her to arbitrate her dispute, and tries to use that as a hook for invalidating the arbitration provision. She therefore tries to discount the fact that respondent Delta Funding Corporation has offered to pay the full costs of arbitration. As we explain, in such circumstances, numerous courts around the country have held that it is appropriate for a company to offer to pay the costs of arbitration, and that such an offer negates a challenge to the enforceability of an arbitration provision on the ground that it imposes prohibitive costs. This practice (followed by the district court here) is eminently sensible: it ensures that customers will have access to the agreed-upon arbitral forum, thereby effectuating the federal policy favoring the enforcement of arbitration provisions.

3. Though Harris phrases the argument differently, she also challenges the fact that the arbitration agreement at issue (like many arbitration provisions) lacks perfect mutuality because certain types of claims - mainly related to real

property - are excluded from arbitration. But such a requirement of perfect, term-by-term mutuality is widely discredited, both in New Jersey and around the country. Moreover, any new mutuality requirement for arbitration provisions would be preempted by the FAA. And under controlling U.S. Supreme Court precedent, Harris's argument that the non-mutual nature of an arbitration agreement leads to the piecemeal resolution of disputes cannot justify refusal to enforce the agreement.

4. We also point out that Harris's reliance on policy challenges to predatory lending as a basis for invalidating her arbitration agreement is an improper diversion because she is not entitled to attack the validity of the underlying contract. As the U.S. Supreme Court made clear nearly four decades ago, an arbitration agreement is separable from the remainder of a contract, and its enforceability must be determined independently from an analysis of any challenge to the contract as a whole.

5. Finally, we explain why, in resolving the issues in this case, the Court should reject the hostility to standard form contracts that so evidently underlies Harris's arguments. Form contracts of the sort involved here are critically necessary to the modern economy. As a consequence, any rule of law that categorically impairs the enforceability of form

contracts would have devastating implications for both businesses and consumers.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Alberta Harris entered into a mortgage loan agreement with plaintiff-respondent Delta Funding Corporation, which primarily makes loans to borrowers who "historically [have] been excluded from obtaining credit from traditional lenders." *Delta Funding Corp. v. Harris*, 426 F.3d 671, 672 (3d Cir. 2005). As part of that agreement, Harris agreed to arbitrate her disputes with Delta.

Harris failed to make the payments on her loan, and Wells Fargo Bank, the trustee for the holder of the mortgage, began foreclosure proceedings in the Superior Court of New Jersey. Harris filed a third-party complaint against Delta, alleging violations of the federal Truth in Lending Act and Real Estate Settlement Procedures Act and the New Jersey Consumer Fraud Act. In response, Delta filed a petition to compel arbitration under Harris's agreement in federal district court. That court granted Delta's motion, rejecting Harris's arguments that the agreement to arbitrate was unconscionable.

Harris appealed to the United States Court of Appeals for the Third Circuit. Following briefing and oral argument, the Third Circuit petitioned this Court for certification of the

question whether the arbitration agreement between Harris and Delta is unconscionable.

LEGAL ARGUMENT

Harris's challenges to the enforcement of her arbitration agreement are imbued with the hostility towards arbitration that the Federal Arbitration Act was enacted eight decades ago to prevent. Not only do her arguments give short shrift to the federal and New Jersey policies favoring arbitration; they also inappropriately invoke her merits arguments (wholly unrelated to arbitration) to distract this Court from those policies and the resultant necessity of enforcing arbitration agreements.

Rather than duplicate the arguments Delta gives for why Harris's challenge to her arbitration agreement should fail, in this brief we make several related but distinct points to demonstrate to this Court why the decision of the federal district court was correct, and why requiring these parties to arbitrate is important to the business community generally.

I. AN AGREEMENT TO ARBITRATE ON AN INDIVIDUAL BASIS CANNOT BE DEEMED UNENFORCEABLE MERELY BECAUSE IT PROHIBITS CLASS-WIDE ARBITRATION.

Harris asks this Court to manipulate the law of unconscionability so as to condemn the prohibition against class-wide arbitration in her loan agreement and thereby nullify the agreement to arbitrate that was a condition of the extension of credit. Her arguments are premised on a fundamental

misconception – that, because the doctrine of unconscionability is generally applicable to all contracts, an arbitration agreement may be voided by the simple expedient of making an *ad hoc* determination that one of its provisions is “unconscionable.” In fact, the FAA cannot be circumvented so easily.

In enacting the FAA, Congress “declared a national policy favoring arbitration and 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, 104 S. Ct. 852, 858, 79 L.Ed.2d 1, 12 (1984). The Act’s “basic purpose” is “to put arbitration provisions on ‘the same footing’ as a contract’s other terms.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275, 115 S. Ct. 834, 840, 130 L.Ed.2d 753, 765 (1995) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 2453, 41 L.Ed.2d 270, 276 (1974)). See also *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 83-84 (2002) (“Congress enacted the Federal Arbitration Act * * * to abrogate the then-existing common law rule disfavoring arbitration agreements ‘and to place arbitration agreements upon the same footing as other contracts.’”) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L.Ed.2d 26, 36 (1991)).

Accordingly, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless 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, 107 S. Ct. 2520, 2525, 96 L.Ed.2d 426, 435 (1987) (quoting 9 U.S.C. § 2). Unless that savings clause applies, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law." *Id.* at 492 n.9 (emphasis in original) (citation omitted).

Thus, section 2 of the FAA carves out a limited role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state-law grounds only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493 n.9 (emphasis in original). Accordingly, Section 2 gives the states, for example, "a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision." *Allied-Bruce*, 513 U.S. at 281. However, "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry*, 482 U.S. at 493 n.9 (citation omitted). "Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be

unconscionable, for this would enable the court to effect what
* * * the state legislature cannot." *Id.*

In sum, as the Supreme Court has ruled:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.

Allied-Bruce, 513 U.S. at 281. See also *Martindale*, 173 N.J. at 86 (quoting *Allied-Bruce*).

The *ad hoc* creation of unconscionability doctrine in order to defeat arbitration is impermissible under any circumstances. But in this case it is particularly uncalled for because Harris has not sought to represent a class and the issue therefore is not properly presented here. Even if the Court were to reach the issue, however, it would be inappropriate to deny enforcement of Harris's arbitration agreement on the ground that it contains a class-arbitration waiver. Under the existing law of this state, the inclusion of such a waiver in an arbitration provision is not unconscionable. Moreover, any newly-minted principle of New Jersey law that invalidates class-arbitration waivers would be preempted by the FAA.

A. Under New Jersey Law, Class-Action Waivers Are Not Unconscionable.

Harris challenges the class-action waivers in her contracts as unconscionable under New Jersey law. See *Harris Br.* 52-55.

Her arguments in this case are a particularly clear example of the burgeoning strategy of seeking the invalidation of arbitration agreements based on state-law rules that are described under the rubric of general contract law, but in fact have been fashioned solely to deal with arbitration agreements. As we show, there is no place for her arguments in the law of this state.

Courts are (and should be) sparing in their reliance on the doctrine of unconscionability to invalidate contractual agreements. In accordance with this principle, the standards under New Jersey law for a finding of unconscionability are stringent.¹ As one appellate court has explained, to "demonstrate unconscionability," a plaintiff must "show[] some overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that **no reasonable person** not acting under compulsion or out of necessity would accept its terms." *Howard v. Diolosa*, 241 N.J. Super. 222, 230 (App. Div. 1990) (emphasis added). See also

¹ Courts in New Jersey (as in many other states) examine unconscionability by looking "at two factors, namely, unfairness in the formation of the contract (procedural unconscionability) and excessively disproportionate terms (substantive unconscionability)." *Muhammad v. County Bank of Rehoboth Beach*, 379 N.J. Super. 222, 236 (App. Div. 2005) (citing *Sitogum Holdings v. Ropes*, 352 N.J. Super. 555, 564 (Ch. Div. 2002)), *leave to appeal granted*, 185 N.J. 254 (2005). We focus here on the issue of substantive unconscionability.

Sitogum, 352 N.J. Super. at 565 (Ch. Div. 2002) (contract is substantively unconscionable only if it is "so one-sided as to **shock the court's conscience**") (emphasis added).

Given the strict nature of New Jersey's unconscionability standard, it is no surprise, then, that the leading New Jersey appellate decision on the issue has concluded that class-action waivers in arbitration provisions are fully enforceable. See *Gras v. Assoc. First Capital Corp.*, 346 N.J. Super. 42, 54 (App. Div. 2001). In *Gras*, the plaintiffs argued (as Harris does here) that an "arbitration agreement's preclusion of their right to proceed as a class * * * violates New Jersey's policy of protecting consumers." *Id.* at 49. Canvassing case law from around the country, the Appellate Division noted some of the many cases that have found class-action waivers to be enforceable. *Id.* at 49-51. As to those cases "where courts have found arbitration agreements precluding a class action to be unenforceable because of their detrimental impact on consumers' rights" (*id.* at 51), the court's conclusion was straightforward: "These cases are not persuasive." *Id.* Finally, the court held that nothing about the Consumer Fraud Act ("CFA") precluded parties to an arbitration agreement from agreeing to arbitrate CFA claims on an individual basis. *Id.* at

53-54. See also *Muhammad*, 379 N.J. Super. at 244-48 (rejecting challenge to prohibition on class actions).²

Gras, Muhammad, and the federal district court's ruling here are all consistent with the decisions of the overwhelming majority of courts around the country that have addressed the question and declared that a class-action waiver, standing by itself, is not substantively unconscionable.

To begin with, the U.S. Supreme Court broached the issue in *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*. The plaintiff there contended that disputes under the Age Discrimination in Employment Act ("ADEA") should not be subject to arbitration because, among other things, arbitration procedures "do not provide for * * * class actions." 500 U.S. at 32. The Supreme Court rejected that argument, explaining that, "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation

² These decisions receive further support from the recently adopted version of the New Jersey Arbitration Act, under which "a court **may not** order consolidation of the claims of a party to an agreement to arbitrate **if the agreement prohibits consolidation.**" N.J.S.A. 2A:23B-10(c) (emphasis added). This provision reflects the Legislature's policy determination that arbitration provisions should be enforced as they are written, including when they prohibit consolidated (*i.e.*, class) actions.

were intended to be barred." *Id.* (quotation marks and citation omitted; alteration in original).

Numerous other courts have upheld arbitration provisions that included a prohibition on class actions. As the U.S. Court of Appeals for the Seventh Circuit has explained, "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. * * * One of those * * * is the possibility of pursuing a class action." *Champ v. Siegel Trading Co.*, 55 *F.3d* 269, 276 (7th Cir. 1995) (quotation marks and citation omitted). This is perfectly acceptable because the right to a class action is "merely a procedural one, * * * that may be waived." *Johnson v. W. Suburban Bank*, 225 *F.3d* 366, 369 (3d Cir. 2000).

The list of other cases upholding class-arbitration waivers is long and growing by the day. See, e.g., *Caley v. Gulfstream Aerospace Corp.*, ___ *F.3d* ___, 2005 *WL* 2840372, at *13-*14 (11th Cir. Oct. 31, 2005) (Georgia law); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 *F.3d* 868, 877-78 (11th Cir. 2005) (Georgia law); *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); *Copeland v. Katz*, 2005 *WL*

3163296, at *4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.*, ___ F. Supp. 2d ___, 2005 WL 3199440, at *4 (E.D. Okla. Nov. 17, 2005) (Oklahoma law); *Lux v. Good Guys*, 2005 WL 1713421 (C.D. Cal. July 11, 2005) (Nevada law); *In re Currency Conversion 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); *Ragan v. AT&T Corp.*, 824 N.E.2d 1183, 1193-94 (Ill. App. Ct. 2005) (New York law); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494-95 (Ill. App. Ct. 2003) (Illinois law); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d

886, 894-96 (Ill. App. Ct. 2003) (Arizona law); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 125-26 (Ill. App. Ct. 2005) (Texas law); *Wilson v. Mike Steven Motors, Inc.*, 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, 749-51 (Md. 2005) (Maryland 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); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1270-71 (Wash. Ct. App. 2001) (Washington law).³

³ *But see, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (determining that in "some circumstances" class action waivers in arbitration provisions are unconscionable); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-81 (W. Va. 2002); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002). 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) (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"). Numerous federal district courts in Alabama have distinguished *Leonard* and enforced class-action 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 the award of attorneys' fees. See, e.g., *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003) ("The costs of

That so many courts have held that there is nothing unconscionable about class-arbitration waivers makes perfect sense because class actions, although at times useful, are in no way so fundamental to the vindication of consumer claims as to be unwaivable. For the vast majority of the history of this state and this nation, class actions for money damages did not even exist. Class actions for damages of the type so prevalent today took shape no more than 40 years ago.⁴ Such a recent innovation can hardly be deemed so fundamental as to make a contractual waiver of it categorically unconscionable under New Jersey law. Indeed, the *Gras* court recognized as much, explaining that the CFA contains no "legislative mandate or overriding public policy in favor of class actions," whereas

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."); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004) (Alabama law).

⁴ "[M]odern class action practice emerged in the 1966 revision of [Federal Rule of Civil Procedure] 23" (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833, 119 S. Ct. 2295, 2308, 144 L.Ed.2d 715, 731-32 (1999)), which gave federal-court class actions their "current shape" (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 2245, 138 L.Ed.2d 689, 706 (1997)). Revised Rule 23's "most adventuresome innovation" was its authorization of "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Id.* at 614-15. The rule governing modern class actions in New Jersey state courts is of even more recent vintage; Rule 4:32-1 "is modeled after" Federal Rule 23 (*In re Cadillac V-8 Class Action*, 93 N.J. 412, 424-25 (1983)).

compelling public policy favors the enforcement of arbitration provisions. 346 *N.J. Super.* at 54.

B. The FAA Would Preempt A Rule That Class-Arbitration Waivers In Arbitration Agreements Are Unconscionable As A Matter Of State Law.

As we explained above (at 9-17), class-arbitration waivers contained in arbitration agreements are not unconscionable under New Jersey law. Beyond that, the FAA would preempt any state-law holding that the inclusion of a class-arbitration waiver in an arbitration provision is unconscionable.

1. Section 2 of the FAA would expressly preempt any holding that prohibitions on class actions in arbitration provisions are unconscionable.

Under Section 2 of the FAA,

[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, "save upon such grounds as exist at law or in equity for the revocation of any contract." * * * A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

Perry, 482 *U.S.* at 492-93 n.9 (citation omitted; emphasis in original) (quoting 9 *U.S.C.* § 2). Thus, agreements to arbitrate may be invalidated on state-law grounds only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* (emphasis in original).

That principle does not simply prohibit the invalidation of "arbitration agreements under state laws applicable *only* to

arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L.Ed.2d 902, 909 (1986) (emphasis in original). It also bars courts from impeding the enforceability of arbitration agreements by fashioning rules that invoke broad concepts of contract law but in fact apply only or predominantly to the arbitration setting. As the Fifth Circuit recently explained:

That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. * * * [S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.

Iberia, 379 F.3d at 167.

Nor, despite Harris's exhortation to do so, could the Court manufacture new principles in the context of thwarting an arbitration agreement. To put it bluntly, "no state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule." *Obliv, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004). See also *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 759 (Wash. 2004) ("courts may not refuse to enforce arbitration agreements under state laws which apply only to such agreements, or by relying on the *uniqueness* of an agreement to arbitrate") (quotation marks, alterations, and citations omitted; emphasis in original).

To accept Harris's invitation to declare Delta's arbitration provision unconscionable because it prohibits class arbitration would run afoul of these rules and thus would be expressly preempted by Section 2 of the FAA.

First, New Jersey has no **generally applicable** prohibition against contractual waivers of class actions. Neither Harris nor the *amici* supporting her have pointed to any authority for the proposition that class-action waivers are generally unenforceable under New Jersey law outside the context of arbitration.⁵ Absent such case law or statutory authority, the FAA does not permit the creation of such a rule specifically in the context of arbitration. In essence, what Harris is asking the Court to do is to declare a **new** principle of unconscionability and then to apply it in the very same case to strike down an arbitration provision. That request for an *ad hoc* creation of unconscionability doctrine is inconsistent with the Supreme Court's admonition that state-law contract defenses may be used to void arbitration provisions only if they "**arose** to govern issues concerning the validity, revocability, and enforceability of contracts **generally**" (*Perry*, 482 U.S. at 493

⁵ In fact, as we noted above, the leading New Jersey appellate decision on the issue has concluded that class-action waivers in arbitration provisions are fully enforceable. See *Gras*, *supra*, 346 N.J. Super. at 54; see also *Muhammad*, *supra*, 379 N.J. Super. 222.

n.9 (emphasis added)). Indeed, Congress's rationale for authorizing contract-law exceptions to the general rule that arbitration provisions are enforceable – that there can be no impermissible animosity toward arbitration when a court is merely applying an **extant**, generally applicable contract-law defense – loses all force when, as here, the party seeking to avoid arbitration is trying to make up unconscionability doctrine as it goes along. See *Oblivion*, 374 F.3d at 492 (“[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.”).

Second, as noted above (at 10-11), the **generally applicable** standard for finding unconscionability in New Jersey is a strict one. Under that standard, a plaintiff must “show[] some overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that no reasonable person not acting under compulsion or out of necessity would accept its terms.” *Howard*, 241 N.J. Super. at 230. Put another way, a contract is unconscionable only if it is “so one-sided as to shock the court’s conscience.” *Sitogum*, 352 N.J. Super. at 565.

We submit that it is impossible to conclude that it shocks the conscience, or that one must be acting “under compulsion,” to accept a fully disclosed class-action waiver in an arbitration provision. To the contrary, there are many reasons

why a reasonable person would accept an arbitration provision that allows for the easy resolution of her own actual, concrete disputes, but deprives her of the ability to bring class actions for other customers' benefit. Foremost among them is that individual arbitration is the least expensive means of dispute resolution and hence serves to moderate the cost of goods and services (such as the interest rate and loan fees associated with the mortgage at issue here). See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594, 111 S. Ct. 1522, 1527, 113 L.Ed.2d 622, 632 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers); see also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 94 (arguing that class arbitration makes consumers worse off by increasing the cost of doing business and, as a result, raises prices for consumers). As the Seventh Circuit has recognized, "[a]rbitration offers cost-saving benefits * * * and 'these benefits are reflected in a lower cost of doing business that in competition are passed along to customers.'" *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) (quoting *Metro East Center for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002) (Easterbrook, J.)).

Individuals may also understand that arbitration will provide them with better results. Studies have shown that "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). Consumer perceptions match the reality. A recent poll found that "[a]rbitration is widely seen" by participants "as faster (74%), simpler (63%), and cheaper (51%) than going to court." Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* (Apr. 2005), at 5, available at <http://www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf>.

Moreover, many Americans have become skeptical of class actions. A March 2003 survey found that "67% of Americans believe that lawyers benefit most from the current class action suit system while 61% think that **consumers** (32%) and **class members** (29%) **benefit least** from the current system." Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, *Polling on The Class Action System: National*

Results, available at <http://www.instituteforlegalreform.com/resources/classaction.pdf> (emphasis added). These results support the view that “[m]any ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys.” Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 180 (2001). As Congress has recently recognized, “abuses of the class action device” have “undermined public respect” for the judicial system, and created a system in which “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed,” while lawyers generate large fees. Class Action Fairness Act of 2005, Pub. L. 109-2, § 2 (codified at 28 U.S.C. § 1711 note).

Accordingly, a consumer would not be in the least bit irrational to trade the right to be part of a class action for the availability of arbitral dispute resolution, particularly because individual arbitration generally leads to reduced dispute-resolution costs for consumers.⁶ To assume otherwise would contravene New Jersey’s **generally applicable** approach to unconscionability, and Section 2 of the FAA precludes departures

⁶ Of course, the consumer could also rationally choose to trade the right to be part of a class action in consideration for other benefits furnished as part of the underlying contract, such as a lower interest rate.

from, or distortion of, the general approach in the context of arbitration provisions like the one at issue here. See *Iberia*, 379 F.3d at 167 (“Even when using doctrines of general applicability, the state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.”).

2. Conditioning the enforceability of arbitration provisions on the availability of class-wide arbitration would conflict with Congress’s objectives in enacting the FAA and would therefore be preempted under the Supremacy Clause of the U.S. Constitution.

Any holding that an arbitration provision must allow for class-wide arbitration in order to be enforceable is also preempted under traditional principles of conflict preemption 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, 120 S. Ct. 1135, 1148, 146 L.Ed.2d 69, 89 (2000) (internal quotation marks and citation 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 later 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, 105 S. Ct. 3346, 3354, 87 L.Ed.2d 444, 456 (1985). See also *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 187 (1981) (arbitration's "object is the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties") (citation and quotation marks omitted).

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 *Allied-Bruce*, 513 U.S. at 280-81), class actions can take years. These complex matters 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 very often (v) a motion for leave to appeal initiated by the losing party; and, if leave is granted, (vi) the subsequent, fully-briefed interlocutory appeal.

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 begin and likely continue for years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a 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.

Whether conducted by a court or by an arbitrator, all of the procedures necessary to the fair administration of a class action make arbitration more expensive and more time consuming – and, in the process, eradicate the distinction between

arbitration and litigation.⁷ In fact, some commentators believe that "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) (emphasis added); see also 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").

⁷ See 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, 272 ("[W]hen 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. It is somewhat ironic that the greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration * * * lessens the distinction between the two processes."); 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) ("[S]everal 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) ("[W]hen conducted on a classwide basis, arbitration is unlikely to remain inexpensive and efficient").

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, 74 S. Ct. 182, 187, 98 L.Ed. 168, 176 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1987). In such circumstances, few businesses would be willing to roll the dice by including an arbitration provision in their consumer contracts; "[c]lass arbitration just seems to present too many risks." Wilson, *supra*, 23 QUINNIPIAC L. REV. at 778.

As the distinction between litigation and arbitration erodes, businesses will stop including arbitration provisions in their contracts in the first place, concluding "that the known, class litigation, is preferable to unknown, class arbitration." *Id.* 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, 114 S. Ct. 2068, 2074, 129 L.Ed.2d 93, 105 (1994)) of the FAA. As the Fifth Circuit recently explained in upholding an attack on a class-action waiver contained in an arbitration provision in a wireless service agreement, "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*, 500 U.S. at 31); 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").

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, 364 (Tenn. Ct. App. 2001), appeal denied (Tenn. Nov. 19, 2001). See also *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 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"); *Am. Gen. Life & Accident Ins. Co. v. Wood*, __ F.3d __, 2005 WL 3031113, at *6 (4th Cir. Nov. 14, 2005) ("West Virginia precedent generally barring state claims from arbitration must be necessarily circumscribed in light of [the FAA]"); *Caley*, __ F.3d __, 2005 WL 2840372, at *13 (arbitration provision's prohibition of class actions is "consistent with the goal of 'simplicity, informality, and expedition' touted by the Supreme Court in *Gilmer*") (quoting *Gilmer*, 500 U.S. at 31).

The strong pro-arbitration purposes of the FAA thus preempt the invention of any state-law principle that would broadly invalidate class-action waivers in arbitration provisions.

II. AN OFFER TO PAY THE COSTS OF ARBITRATION MOOTS ANY ARGUMENT THAT THE COSTS OF ARBITRATION ARE EXCESSIVE.

Harris argues vigorously that the costs of arbitration under her agreement are prohibitively expensive. In this case, recognizing that Harris was of limited means, Delta offered to pay all of the costs of arbitration in its briefing before the federal district court. Harris has rebuffed this offer, however, so that she can continue to pursue her argument that it

is too expensive for her to arbitrate. Allowing her to do so would be entirely unjustified.

To be sure, the U.S. Supreme Court has recognized that, in some circumstances, "the existence of large arbitration costs could preclude a litigant * * * from effectively vindicating her * * * rights in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 522, 148 L.Ed.2d 373, 383 (2000). But the Court made clear that the mere "'risk' that [one] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement" (*id.* at 91). Nevertheless, plaintiffs routinely invoke such speculation as a stratagem to avoid arbitration. As a result, businesses that are members of the Chamber often find themselves faced with the argument (whether legitimate or not) that arbitral costs are too high.

In such circumstances, offers to pay the costs of arbitration (such as the one Delta has made here) are entirely appropriate. As numerous courts around the nation have explained, in order to effectuate the strong federal policy favoring arbitration, offers to pay the costs of arbitration should be credited when considering whether an arbitration provision is enforceable. See, e.g., *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) ("the fact that [the defendant] agreed to pay all costs associated with

arbitration forecloses the possibility that the [plaintiffs] could endure any prohibitive costs in the arbitration process") (emphasis in original); *Anders v. Hometown Mtg. Servs., Inc.*, 346 F.3d 1024, 1026 (11th Cir. 2003); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) ("Conseco's offer to pay the costs of arbitration and to hold the arbitration in the Larges' home state of Rhode Island mooted the issue of arbitration costs."); *Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir. 1999); *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554, 567 (N.D. Ohio 2004); *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 148-49 (D.D.C. 2004); *In re Currency Conversion Fee Antitrust Litig.* 265 F. Supp. 2d at 411-12; *Nelson v. Insignia/ESG, Inc.* 215 F. Supp. 2d 143, 157 (D.D.C. 2002); *First Family Fin. Servs., Inc. v. Sanford*, 203 F. Supp. 2d 662, 667 (N.D. Miss. 2002); *Baughner v. Dekko Heating Techs.*, 202 F. Supp. 2d 847, 850 (N.D. Ind. 2002); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001); *Nur v. K.F.C., USA, Inc.*, 142 F. Supp. 2d 48, 52 (D.D.C. 2001); *Zuver*, 103 P.3d at 763 & n.7 ("refus[ing] to ignore" defendant's "offer[] to 'defray the cost of arbitration' by paying arbitration fees," thus rendering "moot" the plaintiff's argument that the fees were unconscionable); *Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 539 (Ill. Ct. App. 2004) ("Verizon has already stipulated to a waiver of [the cost-

sharing] provision, which, in effect, serves to moot the plaintiff's argument" that arbitration costs are excessive).

Harris and her *amici* cite a handful of cases that treat offers to pay the costs of arbitration as unaccepted offers to modify a contract (*i.e.*, the arbitration agreement). At bottom, the holding of these cases amounts to a rule that an individual may rely on a contractual term for the sole purpose of seeking to invalidate that contract as unconscionable.⁸ That kind of

⁸ Among the cases Harris cites is *Parilla v. IAP Worldwide Services, VI, Inc.*, 368 *F.3d* 269 (3d Cir. 2004), in which the court stated that "an after-the-fact offer to waive certain contract provisions can have no effect on our analysis" (*id.* at 285). This statement conflicts with an earlier statement by a different panel of the Third Circuit in *Blair v. Scott Specialty Gases*, 283 *F.3d* 595 (3d Cir. 2002), in which the court held that, on remand, a defendant "should also be given the opportunity to * * * as has been suggested in other cases, offer to pay all of the arbitrator's fees." *Id.* at 610. And in yet another case, the same court declined to reach the issue. See *Alexander v. Anthony Int'l, L.P.*, 341 *F.3d* 256, 270 n.10 (3d Cir. 2003) ("In *Blair*, this Court indicated that the other party should be given the opportunity to 'offer to pay all of the arbitrator's fees.' * * * However, we apparently rejected such 'after-the-fact' offers as irrelevant to the cost inquiry in *Spinetti [v. Service Corp. Int'l]*, 324 *F.3d* 212 (3d Cir. 2003) * * * We express no opinion at this time as to the appropriate role of these offers.") (citations omitted).

In short, the Third Circuit is all over the map on this question. It bears noting, however, that even in cases like *Parilla* and *Spinetti*, which disapprove of offers to pay costs, the court considered whether severance of the arbitration costs provision was appropriate to effectuate the policies favoring arbitration. See *Spinetti*, 324 *F.3d* at 214 ("we agree with the district court that [t]he provisions regarding payment of arbitration costs and attorney's fees represent only a part of [the] agreement and can be severed without disturbing the primary intent of the parties to arbitrate their disputes. * * *

reliance interest lacks legitimacy; in any event, it must fall to the policies favoring arbitration. As the U.S. Supreme Court has explained in a different context, parties resisting enforcement of their arbitration agreements could not avoid arbitration based on the claim "that they agreed to arbitrate future disputes * * * in reliance on [an earlier case] holding that such agreements would be held unenforceable by the courts." *Rodriguez*, 490 U.S. at 485. Along similar lines, the Fifth Circuit reversed a lower court's holding that an offer to pay costs constituted an "invalid" unilateral revision to a contract. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 n.3 (5th Cir. 2004). The court explained that, although that "observation may be accurate as a matter of contract law, what is at issue here is whether *these* plaintiffs will be required to pay prohibitive arbitration fees and costs if they are forced to proceed to arbitration." *Id.* (emphasis in original). Given an offer to bear all costs, the answer to that question is plainly "no."

The strong federal policy favoring arbitration also supports viewing such offers to pay the costs of arbitration as

You don't cut down the trunk of a tree because some of its branches are sickly.") (alterations in original; internal quotation marks and citation omitted); *Parilla*, 368 F.3d at 289 (remanding for a determination whether arbitration cost provision should be severed).

mooting challenges based on cost. When companies draft standardized arbitration provisions for large numbers of customers, they cannot predict *ex ante* which customers will initiate arbitration with them, what the issues will be in those arbitrations, or what those customers' financial status will be at the time of those disputes. Standardized arbitration provisions nonetheless must allocate arbitration fees between the company and customer in a way that *ex ante* seems reasonable (or, with some frequency, incorporate the default fee schedules of arbitration providers such as the American Arbitration Association or National Arbitration Forum, which Justice Ginsburg has described as providing "models for fair cost and fee allocation." *Randolph*, 531 *U.S.* at 95 (Ginsburg, J., concurring in part and dissenting in part)). Like any *ex ante* estimate, of course, from time to time the estimated arbitration costs will be more expensive than some customers can reasonably bear (and in other instances will be less expensive than other customers can bear). If the arbitration provision were held unconscionable with respect to every customer who could not afford the costs of arbitration (or claimed he or she could not), that would lead to the widespread invalidation of arbitration provisions. Such a result would run counter to "[t]he preeminent concern of Congress in passing the [FAA]," which "was to enforce private agreements into which parties had

entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1243, 84 L.Ed.2d 158, 166 (1985). Permitting a company to offer to pay arbitration costs alleged to be unaffordable, by contrast, serves the policies favoring arbitration, and enhances the stability and predictability of the enforcement of arbitration agreements.

III. TERM-BY-TERM MUTUALITY IS NOT NECESSARY FOR AN ARBITRATION PROVISION TO BE ENFORCEABLE.

Harris also asks this Court to invalidate her arbitration agreement on the ground that it lacks mutuality, though she shies away from that particular phrase. See Letter of Counsel for Harris to Court (Nov. 17, 2005). Despite her reluctance to say so, Harris's argument nevertheless amounts to an assertion that the arbitration agreement is unenforceable because it provides that, while Harris must arbitrate all of her claims, certain remedies such as foreclosure are not subject to arbitration. Harris says that "it is not the fact that foreclosures are exempt from arbitration that [she] asserts is unconscionable: it is the preclusion of [her] counterclaims against Delta * * * in the foreclosure proceeding." Harris Br. 39 (underlining in original). In other words, her argument boils down to a claim that it is not permissible for an arbitration provision to require her to arbitrate disputes while permitting Delta or a third party (here, Wells Fargo) to

litigate other disputes. Arguments based on asymmetry of this sort have been termed by several courts (and by many plaintiffs' lawyers) as an argument that an arbitration provision "lacks mutuality."

No matter what nomenclature is assigned to it, a requirement of term-by-term mutuality in arbitration provisions is legally unsupportable both as a matter of New Jersey law and as a matter of federal law. New Jersey – like every other state – generally does not require term-by-term mutuality in a contract. This Court should reiterate that this rule of state law applies with equal force to arbitration provisions. See pages 37-42, *infra*. But even if term-by-term mutuality were required as a matter of New Jersey law, such a rule of state law would be preempted by the FAA as applied to arbitration agreements subject to that federal statute. See pages 42-43, *infra*.

A. New Jersey Law Does Not Require Term-By-Term Mutuality In Any Contract, Including Arbitration Provisions.

There is no support for the argument that New Jersey law requires every contract to be mutual, let alone that each independent provision of a contract must be mutual. Rather, the relevant question is whether a contract as a whole is adequately supported by mutual consideration.

A rule that term-by-term mutuality is unnecessary makes perfect sense. In most contracts, each party has a set of distinct rights and obligations. For example, in the classic contract for the sale of goods one party is required to provide goods while the other is required to pay for those goods – two non-identical undertakings. Similarly, in an employment contract the employee is required to perform specified tasks, whereas the employer is required to pay the employee's wages – again, non-mutual obligations. And if an employer also were to require an employee to sign a non-compete provision – a non-mutual obligation and an additional obligation on top of the obligation to perform specified tasks – the employee could of course choose whether to work for that employer at the specified compensation, but she could not rely on the lack of mutuality to argue that a court should excuse her from the non-compete obligation. In every instance, the presumption is that the parties to a contract have determined that the consideration they are receiving – the other party's bundle of obligations under the contract – is sufficient in exchange for the bundle of obligations that the first party is agreeing to undertake.

Thus, it is no wonder that the so-called contractual requirement of "mutuality of obligation is now widely discredited." 2 JOSEPH M. PERILLO & HELEN HADJIYANNIKAS BENDER, CORBIN ON CONTRACTS § 6.1 (rev. ed. 1995). The general rule remains that

"[i]f the requirement of consideration is met, there is no additional requirement of * * * 'mutuality of obligation.'" *Restatement (Second) of Contracts* § 79(c) (1981); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 4.12, at 201 (4th ed. 1998) (doctrine of mutuality of obligation has been "thoroughly discredited").

Furthermore, there is no cause to have a different rule in the context of arbitration provisions. Like any other provision in a contract, an arbitration provision may affect the attractiveness of that contract, considered as a whole by the parties; it is part of the bundle of obligations that constitute the consideration for one or both of the parties. Thus, even if that arbitration provision required one party to arbitrate all disputes but the other to arbitrate none, the relevant question is not whether that arbitration provision in particular is "mutual," but rather whether the entire contract is supported by consideration.

In fact, such a rule has been established in New Jersey in the very context of arbitration provisions. As one appellate court explained, "we see no statutory or current philosophical bar to a contract clause which requires commercial arbitration of only certain disputes between the parties or permits unilateral triggering of the arbitration clause." *Kalman Floor Co. v. Jos. L. Muscarelle, Inc.*, 196 N.J. Super. 16, 28 (App.

Div. 1984). Rather, the court cited the "'now discredited mutuality of remedy rule'" (*id.* (quoting E. ALLAN FARNSWORTH, CONTRACTS § 12.4, at 822 n.18 (1982))), and held "that there is no inherent unfairness in enforcing a contractual clause which gives [one contractual party] alone the right to compel AAA arbitration," concluding that there is "no reason why justice should require perfect symmetry of remedy" (*id.* at 29). And after hearing argument in the case, this Court affirmed that decision "substantially for the reasons expressed in the opinion of the Appellate Division." *Kalman Floor Co. v. Jos. L. Muscarelle, Inc.*, 98 N.J. 266, 267 (1985).

New Jersey is by no means alone in holding that term-by-term mutuality is not required to enforce a contract generally, or more specifically to enforce an arbitration provision in a contract. Indeed, the vast majority of courts throughout the country that have addressed the question have rejected arguments like those made by Harris and her *amici* and have instead held that an arbitration provision need not be entirely mutual in order to be enforceable. See, e.g., *Oblix*, 374 F.3d at 491 ("That Oblix did not promise to arbitrate all of its potential claims is neither here nor there. Winieki does not deny that the arbitration clause is supported by consideration – her salary. Oblix paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution.");

Fazio v. Lehman Bros. Inc., 340 F.3d 386 (6th Cir. 2003); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999); *Doctor's Assocs. v. Distajo*, 66 F.3d 438, 451-52 (2d Cir. 1995); *Ramirez v. Cintas Corp.*, 2005 WL 658984, at *7 (N.D. Cal. Mar. 22, 2005); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002); *Pridgen v. Green Tree Fin. Serv. Corp.*, 88 F. Supp. 2d 655, 658 (S.D. Miss. 2000); *Walther*, 872 A.2d at 747-49; *Zobrist*, 822 N.E.2d at 542; *Zuver*, 103 P.3d at 766-67; *Blue Cross Blue Shield of Ala. v. Rigas*, __ So. 2d __, 2005 WL 2175451, at *10 (Ala. Sept. 9, 2005); *McKenzie Check Advance of Miss., LLC v. Hardy*, 866 So. 2d 446, 453 (Miss. 2004); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W. 3d 335, 342 (Ky. App. 2001); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001); *Saturna v. Bickley Constr. Co.*, 555 S.E.2d 825, 826-27 (Ga. Ct. App. 2001) (arbitration agreement not unconscionable merely because it requires one party to arbitrate all claims and reserves to the other party the right to institute judicial proceedings under certain circumstances) (citing *Crawford v. Results Oriented, Inc.*, 548 S.E.2d 342 (Ga. 2001)); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001); *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898, 905 (S.C. Ct. App. 1998) ("[T]here is no requirement that the consideration for one party's obligation to arbitrate all issues under a contract be the other party's obligation to arbitrate

all issues under that contract"); *In re Ball*, 236 A.D.2d 158, 665 N.Y.S.2d 444, 446 (1997); *Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184, 1185 (Alaska 1983) ("As one clause in a larger contract, the [arbitration] clause is binding to the same extent that the contract as a whole is binding").

Harris is illustrative. Though confronted with an arbitration provision that reserved the company's right to go to court against the consumer in certain limited situations, the United States Court of Appeals for the Third Circuit held that the provision must be enforced, explaining: "Modern contract law largely has dispensed with the requirement of reciprocal promises * * * provided that a contract is supported by sufficient consideration." 183 F.3d at 180.

Given New Jersey's existing law that mutuality of terms is not required so long as the contract as a whole is supported by consideration, this Court should reaffirm that this rule applies equally to arbitration provisions.

B. The FAA Would Preempt Any Rule Requiring Term-By-Term Mutuality In Arbitration Provisions.

Even if there were some basis in New Jersey law for deeming mutuality to be necessary to the enforceability of an arbitration provision (*but see* pages 37-42, *supra*), the FAA would expressly preempt that rule of state law. As we have

explained (see page 17, *supra*), under Section 2 of the FAA, “[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.” *Perry*, 482 U.S. at 492 n.9; see also, e.g., *Oblivion*, 374 F.3d at 492 (“If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 of the Federal Arbitration Act.”).

In other words, under the FAA only state-law principles that arose to govern all contractual provisions, not those that sprang into existence only after an arbitration provision was put in issue, may be the basis for invalidating an agreement to arbitrate. No principle of New Jersey law requires equal and mutual obligations as to each individual term of a contract. Thus, the FAA would preempt a new rule requiring arbitration provisions to be mutual.

C. Under The FAA, The Policies Favoring The Enforcement Of Arbitration Provisions Trump Concerns About Piecemeal Litigation.

Harris also attacks the non-mutuality of her arbitration agreement by focusing on potential inefficiencies resulting from what she terms “duplicative adjudication” (Harris Br. 39) of Wells Fargo’s foreclosure action in court and the possible arbitration of her claims against Delta. See *id.* at 38-45;

ACLU-NJ *Amici* Br. 38-42. These arguments need not detain the Court for long; the U.S. Supreme Court has repeatedly rejected arguments like Harris's that arbitration agreements should be sacrificed on the altar of efficiency in a particular case. For example, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983), the Court affirmed an order compelling arbitration even though the arbitration would result in bifurcated proceedings. That was so because the FAA "**requires** piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 20 (emphasis added).

The Court outlined its rationale more fully in *Dean Witter*, explaining that it was

not persuaded by the argument that the conflict between two goals of the Arbitration Act - enforcement of private agreements and encouragement of efficient and speedy dispute resolution - must be resolved in favor of the latter * * *. The **preeminent concern** of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, **even if the result is "piecemeal" litigation** * * *.

470 U.S. at 221 (emphasis added).

Thus, in *Moses H. Cone*, the Court held that under the FAA, "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement. * * * [T]he Hospital's two disputes will be resolved separately - one in

arbitration, and the other * * * in state-court litigation." 460 *U.S.* at 20 (footnote omitted). The equivalent situation exists here; the litigation between Wells Fargo and Harris may proceed in state court, but the FAA requires that - regardless of potential inefficiency - the dispute between Harris and Delta must be resolved through arbitration.

IV. HARRIS MAY NOT EVADE HER OBLIGATION TO ARBITRATE BY LEVELING A PUBLIC-POLICY ATTACK ON THE UNDERLYING CONTRACT.

Harris's back-door challenge to the arbitration agreement on public policy grounds should also be rejected. Harris and her *amici* spend pages of their briefing excoriating "predatory lending" practices in an effort to convince this Court that it should invoke policy concerns related to such practices to deny enforcement of Delta's arbitration provision. See Harris Br. 14-19; ACLU-NJ *Amici* Br. 4-5, 9-25. But such arguments are wholly irrelevant to the enforceability of a specific arbitration provision in a specific contract.

Concerns about predatory lending, loans in the subprime market, or particular alleged abuses by specific lenders can and should be addressed to the New Jersey State Legislature or the Office of the New Jersey Attorney General, which are well-equipped to handle them.

However, such attacks cannot be used to escape from an agreement to arbitrate disputes arising out of a ***specific***

contract. Under the FAA, challenges to the validity of a contract as a whole that contains an arbitration provision are for the arbitrator, not a court, to decide. An arbitration agreement is separable from, and must be considered independently of, the underlying contract. *Prima Paint v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 402-04, 87 S. Ct. 1801, 1805-06, 18 L.E.2d 1270, 1276-77 (1967). As a matter of the "federal substantive law of arbitrability" (*Moses H. Cone*, 460 U.S. at 24), the sole focus must be on the **arbitration** agreement. The subject matter of the underlying contract is of no legitimate concern to the Court; such merits issues are reserved for the arbitrator.⁹ Indeed, Harris is free to argue to the arbitrator that her entire loan agreement is invalid on public policy grounds; there is no basis to think that an arbitrator cannot make such a determination, as "we are well past the time when judicial suspicion of the desirability of

⁹ Hence, for example, every federal circuit court of appeals to have considered the issue has held that a party cannot avoid an arbitration agreement by simply challenging the underlying contract as illegal. See *Jenkins*, 400 F.3d at 880-82; *Bess v. Check Express*, 294 F.3d 1298, 1304-06 (11th Cir. 2002); *Snowden*, 290 F.3d at 636-38; *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000); *3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.*, 1998 WL 657722, at *2 (9th Cir. Sept. 3, 1998) (unpublished); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (5th Cir. 1987). But see, e.g., *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So.2d 860 (Fla.), cert. granted, 125 S. Ct. 2937 (2005), argued Nov. 29, 2005.

arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27.

Rudbart v. North Jersey District Water Supply Commission, 127 N.J. 344 (1992), does not alter this rule. In *Rudbart*, this Court held that two factors "in determining whether to enforce the terms of a contract of adhesion" are "the subject matter of the contract" and "the public interests affected by the contract." 127 N.J. at 356. The *amici* supporting Harris point to the "public interest" factor, arguing that "the arbitration agreement in this case must be viewed in the context of the surging crisis in abusive home mortgage lending." ACLU-NJ *Amici* Br. 27; see also *id.* at 4-5, 9-25 (detailing *amici*'s view of "public policy crisis of predatory home lending"). Indeed, their argument for the invalidation of Harris's agreement to arbitrate largely hinges on "New Jersey's stated interest in rooting out home mortgage abuses" (*id.* at 5) and "this State's strong public policy against consumer fraud and home lending abuse" (*id.* at 6).

Without trivializing New Jersey's legitimate interests in these areas – which as discussed above can be addressed by the New Jersey legislature or Attorney General – it nonetheless remains the case that the FAA does not permit reliance on such "public policy" grounds to eviscerate the enforceability of

arbitration agreements. *Prima Paint* requires courts to determine arbitrability with reference to the arbitration agreements **alone**: courts "may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. Thus, to avoid a conflict between *Rudbart* and *Prima Paint*, the *Rudbart* "subject matter" and "public interest" factors involved in determining the enforceability of form arbitration agreements must look to the "subject matter" of and "public interests" involved in the arbitration agreement itself, **not** the underlying contract. On that score, it is clear that, just as under federal law, "New Jersey courts also have favored arbitration as a means of resolving disputes." *Martindale, supra*, 173 N.J. at 84; see also *id.* at 85 (collecting cases). The *Rudbart* "public interest" factor, then, supports enforcement of the arbitration provision.

Hence, Harris's attempt to shift attention from the arbitrability of her dispute to policy concerns about predatory lending cannot withstand scrutiny under *Prima Paint* and its progeny. The federal district court was right to reject it. See *Delta Funding Corp. v. Harris*, __ F. Supp. 2d __, 2004 WL 3562053, at *4 ("That some sub-prime lenders act in a predatory fashion is an issue that may be relevant to the merits of Harris's state court claims. What is before this Court,

however, is the validity of an agreement to have those claims resolved in an arbitral, rather than judicial, forum.").

V. THE ENFORCEABILITY OF ARBITRATION PROVISIONS SHOULD NOT BE HINDERED BECAUSE THEY ARE CONTAINED WITHIN FORM CONTRACTS.

Harris also expends much effort criticizing her arbitration agreement because it is part of a form contract drafted by a company. See Harris Br. 20-22; see also ACLU-NJ *Amici* Br. 26, 29-33. Indeed, many of Harris's arguments are, boiled down to their essence, nothing more than a challenge to the use of form contracts themselves. However, as this Court has explained, "the observation that [a given contract] fit[s] the definition of contracts of adhesion is the beginning, not the end, of the inquiry." *Rudbart*, 127 N.J. at 354. Although it is incumbent on courts to ensure that form contracts – like any other contract – are not used in such a one-sided fashion as to deny consumers their rights, those contracts are critical to the modern economy and the business of the Chamber's members; generic aspersions on them have no place in the law of this or any other state.

The standardization of contractual terms serves the same values as the standardization of goods and services, and is equally "essential to the functioning of the economy." 1 JOSEPH

M. PERILLO, CORBIN ON CONTRACTS (rev. ed. 1993) § 1.4, at 15.¹⁰ Form contracts reduce transaction costs by obviating the need to negotiate and draft a separate agreement for each transaction. Market forces enhance the efficiency of standard-form terms; even form contractual terms that appear unduly advantageous to the drafter benefit consumers *ex ante* by resulting in lower prices due to the drafter's lower marginal costs. See *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) ("[f]orms reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices"); see generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 127-29 (5th ed. 1998); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 39-40 (1993); Ronald H. Coase, *The Choice of the Institutional Framework: A Comment*, 17 J.L. & ECON. 493, 494 (1974).

Indeed, without form contracts, significant portions of the modern economy would come to a complete standstill. Were banks required to negotiate individually with consumers each time a

¹⁰ See also John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000) (estimating that standard forms account for more than 99 percent of all contracts); Robert W. Gomulkiewicz, *The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891, 895-900 (1998) (noting that standard-form terms make electronic commerce possible).

consumer applied for a credit card or a mortgage, no one but Bill Gates would **have** a credit card or mortgage. Were manufacturers required to negotiate each term in a warranty prior to the sale of an appliance, all televisions would come "as is," without any warranty - or manufacturers would alternatively simply stop making televisions. Were cellular telephone providers required to negotiate each term of their contracts on a customer-by-customer basis, there would be no cell phones available for love or money.

Furthermore, even were it the case that some form contracts contain terms that may be insufficiently protective of the rights of consumers, the marketplace is itself more than adequate to correct such abuses. For example, consumer objections to the early-cancellation fees contained in certain cellular telephone contracts has caused several companies to offer plans that may be canceled at any time without a fee (but under which the companies presumably charge more for equipment and/or cellular service). Similarly, if a consumer finds the inclusion of an arbitration provision in his mortgage to be objectionable, he can find an alternative provider that does not include that term. Indeed, *amici* supporting Harris have identified several companies that lend in the "subprime" market that do not require arbitration. See ACLU-NJ *Amici* Br. 24-25. Moreover, even if there were no such alternatives at present,

but if enough consumers were to express their desire to have one, some lender would surely offer it – though, of course, other terms of that no-arbitration mortgage might differ, as the provider would have to price the loan based on its expected costs, including litigation costs. The marketplace will demonstrate whether consumers are willing to pay a somewhat higher interest rate or closing fees in exchange for a mortgage under which all disputes may be resolved in court or via class-wide arbitration; this Court's intervention is unnecessary to achieve that result.

Accordingly, this Court should clarify that, merely because a business offers a form contract on a uniform basis to all who seek that business's services, such a contract is in no way suspect. Any contrary rule would be disastrous for businesses and consumers.

CONCLUSION

This Court should reemphasize its commitment to the well-established principles of federal and New Jersey law favoring the resolution of disputes through arbitration by clarifying that, under New Jersey law, the arbitration agreement between Harris and Delta is not unconscionable.

Respectfully submitted,

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DATED: December 6, 2005

SUPREME COURT OF NEW JERSEY

NO. 58,437

DELTA FUNDING CORPORATION,	:	ON CERTIFICATION OF
	:	QUESTION OF LAW FROM THE
Plaintiff-Respondent	:	UNITED STATES COURT OF
	:	APPEALS FOR THE THIRD
	:	CIRCUIT
v.	:	DOCKET NO. 04-1951
	:	
	:	
ALBERTA HARRIS,	:	
	:	
Defendant-Appellant	:	
	:	

CERTIFICATION OF FILING and PROOF OF SERVICE

I, the undersigned, hereby certify that on this 6th day of December, 2005, the original of the foregoing **BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT** was filed with the Supreme Court of New Jersey, at the Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625-0970, via overnight delivery.

I further certify that on the same date, true and correct copies of the foregoing **BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT** were served by overnight delivery, upon the following individuals:

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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Andrew C. White

DATED: December 6, 2005