Nos. 11-3768 and 11-3773

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: WHOLESALE GROCERY PRODUCTS ANTITRUST LITIGATION

KING COLE FOODS, INC., et al.
Plaintiffs-Appellants,

v.

SUPERVALU, INC. and C&S WHOLESALE GROCERS, INC.,
Defendants-Appellees.

BLUE GOOSE SUPER MARKET, INC. and
MILLENNIUM OPERATIONS, INC., doing business as R.C. Dick's Market,
Plaintiffs-Appellants,

v.

SUPERVALU, INC. and C&S WHOLESALE GROCERS, INC.,
Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Minnesota
Case No. 09-MD-2090 ADM/AJB (Montgomery, J.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. As stated in the accompanying motion for leave to file, counsel for the appellees has consented to the filing of this brief, but appellants have withheld consent.

130 S. Ct. 1758 (2010); *In re Am. Express Merchants' Litig.*, No. 06-1871-cv (2d Cir.) (filed Feb. 15, 2012).[2]

Many of the Chamber's members and affiliates regularly employ arbitration agreements in their contracts because arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA") and the Supreme Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements.

These arbitration agreements typically require that disputes be resolved on an individual, rather than class-wide, basis. Class actions interfere with the simplicity, informality, and expedition that are characteristic of arbitration. A decision overturning the district court's order in this case—which held that the plaintiffs are required to arbitrate their antitrust claims on an individual basis—would

[2] A collection of the Chamber's most recent briefs in arbitration cases is available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

undermine existing agreements and erode the benefits offered by arbitration as an alternative to litigation. Because the advantages of arbitration would be lost if the district court's order is not affirmed, the Chamber has a strong interest in this case.

SUMMARY OF THE ARGUMENT

Invoking a recent Second Circuit decision, plaintiffs argue that requiring them to arbitrate their claims on an individual basis would effectively preclude them from vindicating those claims given the expense of pursuing such claims on an individual basis. *See* King Cole Br. 24-27 (citing *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), *pet. for reh'g en banc pending*, No. 06-1871-cv). The court below did not address whether that is a legally permissible basis for invalidating an arbitration agreement under the FAA, because plaintiffs failed to show as a factual matter that it would be cost-prohibitive for them to proceed individually. *See* J.A. 209-10.

We agree that plaintiffs failed to show that arbitrating their claims on an individual basis would be prohibitively expensive. But the Court need not reach that issue, because plaintiffs' efforts to evade their arbitration agreements fail for an even simpler reason: The FAA does

not permit courts to invalidate arbitration agreements on the ground that they require arbitration to be conducted on an individual basis. That is the clear lesson of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that states may not condition the enforcement of arbitration agreements on the availability of class actions. Although *Concepcion* addressed a state-law basis for refusing to enforce an arbitration provision, its reasoning equally compels rejection of plaintiffs' argument that courts may refuse to enforce agreements to arbitrate on an individual basis as a matter of federal law. To be sure, Congress may choose to declare a particular federal claim to be non-arbitrable; and it also may prohibit parties from waiving class actions for arbitrable claims. But it has done neither with respect to federal antitrust claims. *See* Part I, *infra*.

In any event, as the district court correctly recognized, plaintiffs who arbitrate their claims on an individual basis remain free to pool resources and to share costs with others who are arbitrating similar or identical claims. *See* J.A. 210. That is especially so when, as here, many of the plaintiffs share the same lawyers, who can easily spread the costs of pursuing identical claims across multiple clients and whose

research and preparation can be recycled in each successive arbitration. *See* Part II, *infra.*

Because there is no other basis to refuse to enforce plaintiffs' arbitration agreements, the district court's decision should be affirmed.

ARGUMENT

I. THE FAA REQUIRES THAT PLAINTIFFS' ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS.

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court held that the FAA forbids states from conditioning the enforcement of arbitration agreements on the availability of class-action procedures. The only difference in the FAA's treatment of the state-law claim in *Concepcion* and the federal-law claim here is that Congress, unlike a state legislature, may override the FAA to exempt a cause of action from the federal policy favoring arbitration. But when Congress has not exercised that authority, the fact that the claim arises under federal law makes no difference. Because Congress has not authorized any exception to the FAA for federal antitrust claims, the FAA requires that plaintiffs' arbitration agreements be enforced according to their

terms, including the requirement that plaintiffs arbitrate their claims on an individual basis.

A. *Concepcion* Establishes That Enforcement Of Arbitration Agreements Under The FAA May Not Be Conditioned On The Availability Of Class Procedures.

The Supreme Court held in *Concepcion* that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. Though it did so in the context of a state-law rule declaring most agreements to arbitrate on an individual basis to be unenforceable, the Court's analysis applies equally to the argument made here that enforcing plaintiffs' arbitration agreements as written would make it difficult for them to vindicate their claims and thereby undermine enforcement of the antitrust laws.

1. *Concepcion* held that "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the FAA. 131 S. Ct. at 1744. The Court rejected the argument, advanced in the dissenting opinion, that class procedures must remain available because some claims are too small to be worth pursuing on an individual basis. *Id.* at

1753; *see also Coneff v. AT&T Corp.*, ___ F.3d ___, 2012 WL 887598, at *2 (9th Cir. Mar. 16, 2012) (observing that *Concepcion* "expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers"); *Kilgore v. Keybank Nat'l Ass'n*, ___ F.3d ___, 2012 WL 718344, at *7 (9th Cir. Mar. 7, 2012) ("Neither was the Court persuaded by the dissent's policy argument that requiring the availability of class proceedings allows for vindication of small-dollar claims that otherwise might not be prosecuted"). The Court explained that "States cannot require a procedure"—namely, class actions—"that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753.

Refusing to enforce an arbitration agreement on the ground that it does not allow class actions is impermissible because such a requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA. *Id.* (internal quotation marks omitted). The purpose of arbitration, as envisioned by the FAA, "is to allow for efficient, streamlined procedures tailored to the type of dispute" at issue. *Id.* at 1749. Congress recognized that arbitration is "desirable" because it

"reduc[es] the cost and increas[es] the speed of dispute resolution." *Id.* The FAA thus "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam) (internal quotation marks omitted).

So-called "class arbitration," however, "is not arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 131 S. Ct. at 1753. Class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. The Supreme Court thus "observed that individualized proceedings are an inherent and necessary element of arbitration." *Coneff*, 2012 WL 887598, at *2 (citing *Concepcion*).

Furthermore, because class arbitration involves the same high stakes as a judicial class-action without any meaningful opportunity for judicial review, it is "hard to believe" that any company would willingly agree to it. *Concepcion*, 131 S. Ct. at 1752. For this reason, requiring parties to permit classwide resolution of claims in arbitration is tantamount to prohibiting arbitration altogether—a result that is

manifestly at odds with the FAA's purpose and objective "to promote arbitration." *Id.* at 1749.

Concepcion additionally recognized that conditioning enforcement of an arbitration provision on the availability of class procedures is inconsistent with the FAA as a historical matter. When Congress enacted the FAA in 1925, the arbitration that it contemplated necessarily was ***individual*** arbitration. "[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925," as it "is a 'relatively recent development.'" *Id.* at 1751. The FAA's legislative history accordingly "contains nothing—not even the testimony of a stray witness in committee hearings—that contemplates the existence of class arbitration." *Id.* at 1749 n.5.

For these reasons, *Concepcion* held that courts may not refuse to enforce arbitration agreements on the ground that they require arbitration to be conducted on an individual basis. It is inconsistent with the FAA to condition access to the arbitral forum on the availability of class-action procedures, whether or not doing so would be "desirable for unrelated reasons." *Id.* at 1753; *see also Coneff*, 2012 WL 887598, at *3 ("[A]s the Supreme Court stated in *Concepcion*, * * *

policy concerns, however worthwhile, cannot undermine the FAA."); *Kilgore*, 2012 WL 718344, at *10 ("[P]olicy arguments * * * however worthy they may be, can no longer invalidate an otherwise enforceable arbitration agreement.").

2. Plaintiffs suggest that, while *Concepcion* establishes that courts may not refuse to enforce arbitration provisions that contain a class-action waiver on ***state-law*** grounds, it does not preclude courts from refusing to enforce such provisions on the ground that requiring arbitration on an individual basis would undermine enforcement of a ***federal*** statute. That two-tiered approach finds no support in either the FAA or Supreme Court precedent. To the contrary, the Court reiterated just this year that the FAA's mandate to "enforce agreements to arbitrate according to their terms" applies "***even when*** the claims at issue are federal statutory claims." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis added).

Concepcion likewise precludes plaintiffs' two-tiered approach. *Concepcion* "is broadly written" (*Coneff*, 2012 WL 887598, at *2), and its unequivocal holding—that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and

thus creates a scheme inconsistent with the FAA" (131 S. Ct. at 1748)—is just as applicable when the plaintiff seeks to avoid individual arbitration by invoking the policy underlying a federal statute as when the plaintiff invokes a policy grounded in state law.

B. Congress Has Not Authorized Any Exception To The FAA For Federal Antitrust Claims.

The only difference between the state-law ground at issue in *Concepcion* and the federal-law argument raised here is that Congress, unlike a state legislature, may override the FAA by statute. To do so, however, "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Here, Congress has evinced no intention to forbid individual arbitration of antitrust claims.

1. The Supreme Court has never recognized an exception to the FAA for federal antitrust claims. To the contrary, the Court squarely held in 1985 that federal antitrust claims may be arbitrated. *See Mitsubishi Motors*, 473 U.S. at 628-40. Stressing "the absence of any explicit support for such an exception in the Sherman Act or the Federal Arbitration Act" (*id.* at 628-29), the Court held that the FAA

permits a "prospective litigant [to] provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery" in an arbitral, rather than judicial, forum (*id.* at 636). The Court reaffirmed that holding in 1991, stating that "[i]t is by now clear that statutory claims"—including "claims arising under the Sherman Act"—"may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

If Congress disagreed with these decisions, it has had ample opportunity to amend the antitrust laws or the FAA. The Supreme Court has stressed time and again in arbitration cases that "Congress is fully equipped 'to identify any category of claims as to which agreements to arbitrate will be held unenforceable.'" *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (quoting *Mitsubishi Motors*, 473 U.S. at 627); *see, e.g.*, 15 U.S.C. § 1226(a)(2) (prohibiting enforcement of pre-dispute arbitration agreements in motor vehicle franchise contracts). Yet Congress has chosen not to do so here.

2. Even putting these cases aside, Congress has never demonstrated an intent to restrict the arbitration of antitrust claims or

to exclude them from the FAA. The text of the antitrust laws makes no mention of arbitration; nor is it discussed in the legislative history. As the Supreme Court reiterated earlier this year, when a statute "is silent on whether claims under the [a]ct can proceed in an arbitrable forum," the FAA "requires the arbitration agreement to be enforced according to its terms." *CompuCredit*, 132 S. Ct. at 674.

Plaintiffs likewise cannot show that Congress intended to bar parties from waiving the right to bring antitrust claims on a class-wide basis. To the contrary, the Sherman and Clayton Acts were enacted more than a half-century before the creation of the modern class action. Just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 131 S. Ct. at 1752), class arbitration and class-action litigation did not exist when Congress passed the Sherman Act in 1890 and the Clayton Act in 1924. Congress could not, when enacting these statutes, have mandated a procedure not yet in existence.

Plaintiffs assert, without citation or support, that the enforcement of their arbitration agreements would be inconsistent with the "important regulatory and deterrence functions" (King Cole Br. 19) of

the antitrust laws. But the Supreme Court rejected that same claim in *Mitsubishi Motors*, explaining that "the fundamental importance * * * of the antitrust laws" does not preclude these claims from being brought in arbitration. 473 U.S. at 634; *see id.* at 634-40. Contrary to plaintiffs' insistence, there is no "inherent conflict" (*Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)) between individual arbitration and the purpose of the antitrust laws, especially when the arbitration agreement places no limits on the remedies (such as treble damages and attorneys' fees) that the plaintiff can obtain on an individual basis.

3. Similarly, Federal Rule of Civil Procedure 23 does not create a substantive right to pursue claims on a class-wide basis. Rule 23 was promulgated under the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.2d 468, 474 (5th Cir. 2011) (noting "the ever-antecedent and overarching limitation" that "[t]he Federal Rules of Civil Procedure cannot work as substantive law"). It therefore cannot be the source of any substantive limitation on the enforceability of arbitration agreements.

Instead, Rule 23 confers "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 345 (1980) (internal quotation marks omitted). And it is well established that, under the FAA, the parties may "'trade[] the procedures * * * of the courtroom'"—including the class-action procedures of Rule 23—"'for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

Thus, the fact that plaintiffs ***may*** pursue antitrust claims on a class-wide basis if they satisfy the requirements of Rule 23 hardly means that Congress intended to preclude plaintiffs from waiving that procedural option. Indeed, even when Congress has expressly provided for class- or collective-action procedures for a particular statutory claim, this "does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted). No other evidence suggests that Congress intended to bar resolution of antitrust claims on an individual basis.

C. Courts May Not Refuse To Enforce Agreements To Arbitrate On An Individual Basis Under Federal Common Law.

Notwithstanding that Congress has never exempted antitrust claims from any aspect of the FAA, plaintiffs ask this Court to adopt a new rule prohibiting enforcement of arbitration agreements whenever a plaintiff can prove that it would be unduly expensive to pursue an antitrust claim on an individual basis. Because they cannot identify a statutory basis for that rule, however, the only remaining possible source would have to be federal common law. Yet for two reasons, federal common law does not empower courts to superimpose particular procedures on contractual arbitration.

First, the Supreme Court has made clear repeatedly that arbitration agreements must be enforced as written unless Congress provides otherwise by statute. *See CompuCredit*, 132 S. Ct. at 669 (the FAA "requires courts to enforce agreements to arbitrate according to their terms * * * unless the FAA's mandate has been 'overridden by a contrary ***congressional*** command'") (emphasis added) (quoting *McMahon*, 482 U.S. at 226).

Federal courts—unlike Congress—enjoy no such power to override the FAA. After all, "[t]he FAA was enacted * * * in response to widespread ***judicial*** hostility to arbitration agreements." *Concepcion*, 131 S. Ct. at 1745 (emphasis added). Because "the judicial hostility towards arbitration that prompted the FAA * * * manifested itself in a great variety of devices and formulas declaring arbitration against public policy" (*id.* at 1747 (internal quotation marks omitted)), the FAA cannot coexist with a rule that would permit courts to kill arbitration by insisting that arbitration agreements allow for class-wide dispute resolution.

Accordingly, "the FAA requires" that, unless Congress has said otherwise, an "arbitration agreement [must] be enforced according to its terms." *CompuCredit*, 132 S. Ct. at 673. The FAA thereby eliminates any federal common-law-making authority in this area, because "when Congress addresses a question[,] * * * the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981); *cf. Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (the FAA "leaves no place for the exercise of discretion by a district court").

Second, even if there were some residual common-law-making authority in this area, the statute remains the "prime repository of federal policy and a starting point for federal common law." *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966); *see also*, *e.g.*, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979) ("[I]n fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy.").

Here, as discussed above, the undeniable intent of the FAA was to preclude courts from invoking policy grounds as a basis for refusing to enforce arbitration provisions. A common-law rule that would empower judges to refuse to enforce an arbitration provision whenever the plaintiff contends that it is economically impractical to pursue a federal antitrust claim (or, indeed, any other federal claim for that matter) on an individual basis would be antithetical to that congressional purpose.

D. *Randolph* Does Not Authorize Courts To Permit Plaintiffs To Avoid Arbitration Based On The Ordinary Costs Of Adjudicating An Antitrust Claim.

Plaintiffs contend that the "analytical approach" set forth in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), authorizes courts to refuse to enforce arbitration agreements based on

the projected cost of proving the claim at issue. King Cole Br. 33-35. In making this argument, they rely heavily upon a recent decision of the Second Circuit, which held that, under *Randolph*, courts may decline to enforce an arbitration agreement if they are convinced that "the cost of * * * individually arbitrating [a] dispute * * * would be prohibitive." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 217 (2d Cir. 2012), *pet. for reh'g en banc pending*, No. 06-1871-cv; *see also* King Cole Br. 24-27 (citing *In re Am. Express*).

Plaintiffs—and the Second Circuit—are mistaken. In *Randolph*, the Supreme Court considered a plaintiff's effort to avoid arbitration on the ground that her arbitration agreement did not "affirmatively protect [her] from potentially steep arbitration costs," such as "filing fees, arbitrators' costs, and other arbitration expenses." 531 U.S. at 82, 84. While rejecting the challenge in the case before it, the Court indicated that courts could "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive." *Id.* at 92. Here, plaintiffs do not contend that the cost of accessing the arbitral forum is "prohibitively expensive." Instead, they ask the Court to extend *Randolph* to cover cases in which the cost of proving the claim—

whether in court or in arbitration—is high in relation to its value. Any such extension of *Randolph* would run headlong into *Concepcion*.

1. Contrary to plaintiffs' contention, *Randolph* does not hold—or even imply—that a court may refuse to enforce an arbitration agreement whenever the cost of proving the claim at issue is high. Instead, *Randolph* indicates only that an arbitration clause may be invalidated when the plaintiff is subjected to excessive costs ***intrinsic to arbitration***—*i.e.*, costs that would not be incurred if the claim were instead brought in a judicial forum. *Randolph* thus speaks of "arbitration costs" (531 U.S. at 90) and "arbitration expenses" (*id.* at 84), and the two examples it offers—"filing fees" and "arbitrators' costs" (*id.*)—both refer to costs imposed by the arbitral forum.

The focus of the *Randolph* inquiry thus is not on the ordinary costs of proving a claim, but instead on whether the price of gaining entry to the arbitral forum is materially greater than the cost the plaintiff would incur in federal court. The driving principle is one of ***access*** to the arbitral forum, not whether the would-be claimant has a sufficient economic interest to advance the claim.

Unlike in *Randolph*, plaintiffs here do not base their argument on costs intrinsic to arbitration. Instead, they invoke the (assumed) cost of pursuing antitrust claims on an individual basis in ***any*** forum. That argument finds no support in *Randolph*, and it is in direct conflict with *Concepcion*'s holding that the FAA prohibits courts from superimposing class procedures on otherwise valid agreements to arbitrate, "even if" such procedures are "desirable for unrelated reasons." 131 S. Ct. at 1753.

2. Even if the cost of proving a claim were considered, moreover, *Randolph* does not so much as hint—much less hold—that a court may declare an arbitration agreement invalid as a matter of federal law simply on the ground that it does not authorize class procedures for small-value claims. In fact, the Supreme Court has said just the opposite. In *Gilmer*, the Court rejected the argument that class procedures are indispensible for the vindication of federal rights under the Age Discrimination in Employment Act ("ADEA"). If anything, the argument for requiring class procedures was stronger in *Gilmer* than it is here, because the ADEA—unlike the antitrust laws—expressly provides for collective actions (*see* 29 U.S.C. § 626(b)). Nevertheless, the

Court stated that ADEA claims may be arbitrated "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted). If plaintiffs with small-value ADEA claims may be required to arbitrate those claims on an individual basis, then the plaintiffs here may be required to arbitrate their antitrust claims on an individual basis as well.

3. Plaintiffs' broad reading of this dicta from *Randolph* is particularly untenable following *Concepcion*. As one federal court recently put it, the notion "that arbitration must never prevent a plaintiff from vindicating a claim" is "inconsistent with *Concepcion*," because *Concepcion* held a class-action waiver enforceable under the FAA even after "recogniz[ing] the possibility that 'small-dollar claims might slip through the system.'" *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048 (N.D. Cal. 2011) (alterations omitted) (quoting *Concepcion*, 131 S. Ct. at 1753), *reconsideration denied* (N.D. Cal. Nov. 8, 2011), *pet. for mandamus denied*, No. 11-73752 (9th Cir. Jan. 9, 2012); *see also Coneff*, 2012 WL 887598, at *2 (*Concepcion* "expressly rejected the dissent's argument regarding the possible

exculpatory effect of class-action waivers."); *Kilgore*, 2012 WL 718344, at *7 (observing that the Supreme Court was not "persuaded by the dissent's policy argument that requiring the availability of class proceedings allows for vindication of small-dollar claims that otherwise might not be prosecuted"); *Hendricks v. AT&T Mobility, LLC*, ___ F. Supp. 2d ___, 2011 WL 5104421, at *4-5 (N.D. Cal. Oct. 26, 2011) (Breyer, J.) (plaintiffs' broad reading of *Randolph* "is also foreclosed by *Concepcion*"). It is simply "incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake." *Kaltwasser*, 812 F. Supp. 2d at 1049.[3]

Because plaintiffs' reading of *Randolph* cannot be reconciled with the more recent decision in *Concepcion*, it cannot justify refusing to enforce their agreements to arbitrate on an individual basis. As the Ninth Circuit put it earlier this month, "[e]ven if we could not square *Concepcion* with previous Supreme Court decisions, we would remain

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[3] Plaintiffs' approach would also be impossible in practice, since "it is simply unworkable for 'every court evaluating a motion to compel arbitration' to 'have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiff's case.'" *Hendricks*, 2011 WL 5104421, at *5 (quoting *Kaltwasser*, 812 F. Supp. 2d at 1049).

bound by *Concepcion*, which more directly and more recently addresses the issue on appeal in this case." *Coneff*, 2012 WL 887598, at *3.[4]

Thus, in light of *Concepcion*, "[i]f [*Randolph*] has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. *Concepcion* forecloses plaintiffs from objecting to [their] arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages." *Kaltwasser*, 812 F. Supp. 2d at 1050 (citation omitted).

II. PLAINTIFFS' CLAIMS CAN EFFECTIVELY BE VINDICATED THROUGH INDIVIDUAL ARBITRATION.

Because plaintiffs do not advance a legally permissible basis for invalidating their arbitration agreements, there is no need for this Court to review the district court's factual findings. If the Court does reach the issue, however, it should be plain that the district court correctly found that plaintiffs' assertion that they "would each likely

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[4] Accordingly, the Ninth Circuit explained that "[t]o the extent that the Second Circuit's opinion [in *American Express*] is not distinguishable, we disagree with it." *Coneff*, 2012 WL 887598, at *3 n.3.

incur $1,400,000.00 in litigation expenses" is "entirely speculative" and lacks any credible basis. J.A. 209-10. That estimate of their individual arbitration expenses suffers from at least two critical flaws that render it grossly exaggerated.

First, plaintiffs incorrectly assume that proving a claim in arbitration would be just as expensive as proving that claim in full-fledged class-action litigation. Much to the contrary, however, the key advantages of arbitration are its simplicity, informality, and expedition, all of which serve to make arbitration a dramatically cheaper alternative compared to traditional litigation, and especially compared to class-action litigation.

Second, plaintiffs incorrectly assume that each individual claimant must independently incur the full cost of proving its case, even when a large number of claimants bring overlapping or identical claims. But nothing requires each claimant to reinvent the wheel; individual claimants remain free to share costs and information with other claimants who have similar claims. Indeed, such coordination among claimants has become increasingly common.

A. Arbitration Is Designed To Be Less Costly Than Class-Action Litigation.

Plaintiffs err in assuming that the cost of pursuing a claim on an individual basis in arbitration would be the same as the cost of bringing a class action. For a variety of reasons, resolving a claim through individual arbitration can be dramatically cheaper and far more expedient than securing relief through class-action litigation.

First, an individual arbitration does not require the complexity of evidence demanded in litigation, especially class-action litigation that attempts to resolve thousands of claims at once. As the Supreme Court has recognized—in the context of an antitrust case—parties agreeing to individual arbitration "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs [and] greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). Individual arbitration typically calls for only targeted discovery and limited (if any) motions practice. Procedural and evidentiary rules in arbitration are more relaxed than the Federal Rules of Civil Procedure and Evidence, and thus less likely to enmesh the parties in lengthy and expensive side disputes. By contrast, class-action litigation

"*requires* procedural formality" to adjudicate the claims of multiple parties—including absent parties—while comporting with due process. *Concepcion*, 131 S. Ct. at 1751.

Second, individual arbitration spares the parties from the enormously expensive and time-consuming class-certification contest. In individual arbitration, there is no need for parties to spend months or years litigating whether there are common questions of fact or law that predominate over individualized issues or whether the named plaintiffs adequately represent the interests of the putative class.

These class-certification issues alone may easily cost millions of dollars to litigate. On top of the expense of class-wide discovery, plaintiffs in antitrust class actions often must produce extensive expert testimony to establish all of the prerequisites for certifying a class. "[I]n a typical case of direct or indirect purchasers," for example, plaintiffs seeking to certify a class must retain an economist to demonstrate that "each member of the putative class would have been impacted" and to assess "whether the overcharge pass through is fundamentally similar or different across putative class members." ABA Section of Antitrust Law, *Antitrust Class Actions Handbook* 192 (2010). This task is

expensive and time-consuming: The economist must "gather relevant information about the industry, review documents and even transaction-level data produced in discovery by plaintiffs and defendants (and, increasingly, third parties in the distribution chain), perform independent research, confer with other testifying or consulting experts, such as industry practitioners, or perform statistical analyses." *Id.*

These costs and burdens of litigating class-certification issues all come before the parties even ***begin*** to broach the merits of their dispute. Individual arbitration, by contrast, allows parties to avoid the inherent costs of class certification and go straight to the merits, securing faster and more affordable relief for all parties involved.

B. Claimants In Individual Arbitration Can Pool Resources And Information.

The district court was also correct to reject plaintiffs' cost estimate because that estimate incorrectly assumes that each claimant must independently bear the full cost of proving an antitrust violation "without explaining why they could not share costs." J.A. 210. Although plaintiffs' arbitration agreements require their claims to be resolved in separate arbitration proceedings, nothing forbids them from

sharing the expense of expert witnesses, fact investigation, and attorney preparation. Similarly, nothing precludes plaintiffs' attorneys from sharing successful strategies and from pooling information and evidence gathered from non-confidential sources.

By plaintiffs' own estimate, their antitrust claims are worth approximately $500,000 per plaintiff. If those antitrust claims have merit, there should be no difficulty mustering cooperation from the handful of claimants needed to make individual arbitration cost-effective—even accepting plaintiffs' erroneous assumptions about the costs of arbitration. And with each additional claimant that plaintiffs recruit to share in the costs, arbitrating these claims would become increasingly lucrative.

Given such strong financial incentives, there should be no question that pursuing serial individual arbitrations (or small-claims actions) can be an economically viable business model—especially in view of the ability to reach multiple similarly situated individuals by means of websites and social media. Because plaintiffs' counsel have the means and the motive to identify other businesses or individuals with similar claims who can share in the costs of litigation, each

individual claimant's true responsibility for litigation costs should be only a fraction of the total cost of proving a claim. For this reason, the district court was correct to discredit the grossly inflated $1.4 million figure invoked by plaintiffs in this case.

CONCLUSION

The district court's order dismissing plaintiffs' claims in favor of arbitration should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 5,581 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 4, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in this case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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