No. 09-17218

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN MCARDLE,

Plaintiff-Appellee,

vs.

AT&T MOBILITY LLC, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:09-cv-01117-CW
The Honorable Claudia Wilken

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McArdle concedes, as he must, that, in light of *Concepcion*, the district court's order no longer may stand. Plaintiff-Appellee's Answering Brief ("Ans. Br.") 1. Subsequent case law confirms the need for that concession. As the Eleventh Circuit recently recognized, "faithful adherence to *Concepcion* requires the rejection of the Plaintiffs' argument" that ATTM's arbitration provision is unenforceable under Florida law. *Cruz v. Cingular Wireless, LLC*, __ F.3d __, 2011 WL 3505016, at *8 (11th Cir. Aug. 11, 2011). And the Third Circuit has concluded—in a case involving an arbitration provision less favorable to customers than ATTM's—that "the holding of *Concepcion* [is] both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'" *Litman v. Cellco P'ship*, __ F.3d __, 2011 WL 3689015, at *5 (3d Cir. Aug. 24, 2011) (quoting *Concepcion*, 131 S. Ct. at 1753).

Nonetheless, McArdle urges this Court to remand this case to the district court so that he can attempt to evade *Concepcion* on new grounds. But it is undeniable that he had a full and fair opportunity to raise these arguments before, yet failed to articulate them until after it was clear that *Concepcion* made his defense of the current appeal untenable. Moreover, a remand would be unnecessary in any event, because each of McArdle's arguments is foreclosed

either by *Concepcion* and cases following it or by other Supreme Court or Ninth Circuit authority. Remanding the case would serve only to cause delay and thereby frustrate a key purpose of the FAA: "'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible'" (*Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983))).[1]

In short, this Court should reverse and remand with instructions that the district court enter an order compelling McArdle to arbitrate his claims on an individual basis in accordance with ATTM's arbitration agreement.

ARGUMENT

A. McArdle Cannot Avoid His Agreement To Arbitrate On An Individual Basis By Insisting That He Is Entitled To Press Claims for "Public" Injunctive Relief Under California Law.

McArdle argues that, because California law provides that he may pursue claims for injunctive relief under the Unfair Competition Law ("UCL") and Consumers Legal Remedies Act ("CLRA") on behalf of the general public, he cannot be required under the FAA to resolve his UCL and CLRA injunction claims on an individual basis in accordance with his agreement. *See* Ans. Br. 9-16. His

[1] McArdle also attempts to poison the well by presenting a tendentious account of the merits of his claims, drawn largely from evidence that was not before the district court when it ruled on the motion at issue in this appeal. *See* Ans. Br. 3-6. Needless to say, ATTM strongly disagrees with McArdle's characterization, which in any event is wholly irrelevant to whether his arbitration agreement is enforceable under *Concepcion*.

argument breaks down into two parts. He first argues half-heartedly that *Concepcion* does not preempt the holdings in *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003) and *Broughton v. CIGNA Healthplans*, 988 P.2d 67 (Cal. 1999) that claims for public injunctive relief are non-arbitrable. Ans. Br. 12. He then argues, even if that holding were preempted, ATTM's arbitration provision still would be unenforceable because "it purports to preclude the customer from seeking a public injunction ***in any forum***." *Id.* at 13 (emphasis in original). Both arguments are foreclosed by *Concepcion*.

1. *Cruz* and *Broughton* do not survive *Concepcion*.

In *Cruz* and *Broughton*, the California Supreme Court declared that claims for "public" injunctive relief under the UCL and CLRA are non-arbitrable—meaning that while claims for individual relief must be arbitrated, claims for public injunctive relief must be resolved in court. *Concepcion* establishes that *Cruz* and *Broughton* are preempted by the FAA. As the Supreme Court explained in *Concepcion*, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S. Ct. at 1747. *Cruz* and *Broughton* undeniably "prohibit[] outright" the arbitration of certain claims—namely, claims for public injunctions against conduct that allegedly violates either the CLRA or the UCL. Accordingly, under *Concepcion*, they must give way to the FAA. Indeed, in the aftermath of

Concepcion, every federal court that has considered the question—including two in cases involving ATTM's arbitration provision—has so held. *See Nelson v. AT&T Mobility LLC*, 2011 WL 3651153, at *2 (N.D. Cal. Aug. 18, 2011) (Henderson, J.); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (Whyte, J.); *In re Gateway LX6810 Computer Prods. Litig.*, 2011 WL 3099862, at *1-*3 (C.D. Cal. July 21, 2011) (Tucker, J.); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (Alsup, J.); *Zarandi v. Alliance Data Sys. Corp.*, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (Fischer, J.).[2]

The "straightforward" analysis in *Concepcion* (131 S. Ct. at 1747)—upon which these five decisions each rely—in turn is founded upon an unbroken line of Supreme Court decisions holding that states (usually California, as it happens) may not place certain disputes off limits to arbitration. *See Preston*, 552 U.S. at 356 (FAA preempted California statute that "grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate"); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) ("clear federal policy" underlying the FAA

[2] In a case pre-dating *Concepcion*, this Court observed that in *Broughton* and *Cruz* the California Supreme Court rejected the contention that the FAA precluded it from declaring claims for public injunctions non-arbitrable. *See Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1080 (9th Cir. 2007). However, in neither *Davis* nor any other case has this Court itself affirmatively embraced that view. In any event, as the five district courts concluded, *Concepcion* is an intervening authority that compels addressing the preemption issue anew.

"places § 2 of the [FAA] in unmistakable conflict with California's [Labor Code] § 229 requirement that litigants be provided a judicial forum for resolving wage disputes," and "[t]herefore, under the Supremacy Clause, the state statute must give way"); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (FAA preempted provision of the California Franchise Investment Law that precluded arbitration of claims under that law).

As the Supreme Court put it over a quarter-century ago: "In enacting § 2 of the federal Act, 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*, 465 U.S. at 10. That is, under the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. Accordingly, because the California Supreme Court had "interpreted" California law "to require judicial consideration of claims brought under the State statute," that law, "[s]o interpreted, * * * directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Id.* at 10; *see also Perry*, 482 U.S. at 489 (quoting *Southland*, 465 U.S. at 10, 16); *Preston*, 552 U.S. at 353 (quoting *Southland*, 465 U.S. at 16).[3]

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[3] Numerous commentators agree that *Cruz* and *Broughton* cannot be squared with the Supreme Court's precedents. *See, e.g.*, Thomas A. Manakides, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and*

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In short, *Concepcion*, *Preston*, and the decisions on which they are based compel the conclusion that the FAA preempts the California Supreme Court's decisions in *Cruz* and *Broughton*.

2. ***Concepcion* makes clear that California may not thwart agreements to arbitrate on an individual basis by insisting that plaintiffs be able to pursue class-like relief.**

No doubt realizing that *Cruz* and *Broughton* are not long for this world, McArdle devotes most of his argument to contending that California remains entitled to refuse to enforce ATTM's arbitration clause to the extent that it precludes him from seeking an injunction on behalf of all California customers (as opposed to just himself) either in court or in arbitration. As he sees it, because the California legislature has enacted laws authorizing individual consumers to pursue "public" injunctions on behalf of classes of similarly situated consumers, it violates

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the Federal Arbitration Act, 76 S. Cal. L. Rev. 433, 461-463 (2003) (explaining that *Broughton* was wrongly decided because existing U.S. Supreme Court precedent established that under the FAA, "[s]tate legislatures cannot legislate around arbitration clauses by claiming that a strong public policy exists"); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 416 (2004) ("*Broughton* and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date."); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why the Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 84 ("notwithstanding the dictates of the FAA, the California Supreme Court has explicitly acknowledged its suspicion of arbitration agreements" in cases such as *Cruz* and *Broughton*); Alan S. Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 Tex. Int'l L.J. 449, 452 n.11 (2005) ("I can't even begin to understand the California Supreme Court's decision in *Broughton*," in light of existing Supreme Court precedent).

California public policy for consumers to enter into arbitration agreements in which they are limited to seeking only individualized monetary and injunctive relief.

This argument runs headlong into *Concepcion*'s holding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. Just as the FAA requires that ATTM and its customers be permitted to agree to arbitrate their disputes on an individual basis notwithstanding California's belief that class actions advance important public policies, it equally requires that ATTM and its customers be permitted to agree that customers may seek only individualized relief notwithstanding California's belief that public injunctions serve important public policies.

As one federal court recently explained, the argument that states may create a representative claim and then bar individuals from waiving that claim by agreeing to arbitrate disputes only on an individual basis "is no longer tenable in light of the Supreme Court's recent decision in * * * *Concepcion*." *Quevedo v. Macy's, Inc.*, __ F. Supp. 2d __, 2011 WL 3135052, at *17 (C.D. Cal. June 16, 2011). *Quevedo* concerned a plaintiff's attempt to avoid arbitration of a claim under California's Private Attorney General Act ("PAGA"). *Id.* at *3. The plaintiff argued that, because PAGA permitted him to obtain relief for other employees in court, "sending the PAGA claim to arbitration would irreparably

frustrate the purpose of PAGA and prevent [him] from fulfilling the [California] Legislature's mandate." *Id.* at *15 (internal quotation marks omitted). The court rejected that argument, concluding instead that "requiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA." *Id.* at *17. As the *Quevedo* court explained, for a state to mandate the availability of representative PAGA relief in arbitration is the functional equivalent of requiring that class procedures be available in arbitration—something that *Concepcion* forbids:

> A claim brought on behalf of others would, like class claims, make for a slower, more costly process. In addition, representative PAGA claims "increase[ ] risks to defendants" by aggregating the claims of many employees. Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would "go uncorrected" given the "absence of multilayered review." Just as "[a]rbitration is poorly suited to the higher stakes of class litigation," it is also poorly suited to the higher stakes of a collective PAGA action.

Id. (quoting *Concepcion*, 131 S. Ct. at 1752) (alterations in *Quevedo*). The court acknowledged that, as a policy matter, "a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions," but explained that "*Concepcion* makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA." *Id.*

McArdle's claims for public injunctive relief under the UCL and CLRA are equally incompatible with arbitration. As Judge Henderson recently pointed out,

the FAA requires enforcing arbitration agreements that permit only individualized relief, "even though plaintiffs may argue that 'preclusion of injunctive relief on behalf of the class equates to preclusion of the ability to obtain effective [relief] enjoining deceptive practices on behalf of the public in general,' and in spite of 'public policy arguments thought to be persuasive in California.'" *Nelson*, 2011 WL 3651153, at *2 (quoting *Arellano*, 2011 WL 1842712, at *2) (alteration in *Nelson*). Just like a class arbitration, a proceeding to resolve the propriety of a "public" injunction affecting tens of millions of AT&T customers would be a "slow[]" and "costly process," with "'high[] stakes,'" and would run the same risk that an erroneous company-wide injunction would "'go uncorrected.'" *Quevedo*, 2011 WL 3135052, at *17 (quoting *Concepcion*, 131 S. Ct. at 1752). Such claims are just as inconsistent with arbitration as the class-action procedures addressed in *Concepcion*. Indeed, a plaintiff may bring a claim for public injunctive relief under the UCL only in the context of a certified class action (Cal. Bus. & Prof. Code § 17203)—which is precisely what *Concepcion* forbids California from requiring.[4]

[4] Ignoring *Quevedo*, McArdle asserts that the California Court of Appeal's divided decision in *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Ct. App. 2011), another PAGA case, "is instructive." Ans. Br. 13. But as the dissenting Justice observed in *Brown*, the majority's decision is irreconcilable with "the consistent line of [U.S.] Supreme Court cases mandating enforcement of arbitration clauses under the FAA, even in the face of California statutory or decisional law requiring court or administrative action rather than arbitration." 128

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B. McArdle Cannot Escape His Arbitration Agreement By Contending That He Is Unable To Vindicate His Individual Claim Under ATTM's Arbitration Provision.

McArdle urges the Court to remand the case so that he can argue to the district court that he is unable to vindicate his own rights in arbitration—and so that he can conduct discovery on that question. Ans. Br. 2. To support this vindication-of-statutory-rights theory, he argues that *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), stands for the proposition that "statutory claims are arbitrable, 'so long as the prospective litigant effectively may vindicate its statutory cause of action.'" Ans. Br. 17 (quoting *Mitsubishi Motors*, 473 U.S. at 637). But McArdle's argument fails for two reasons: First, the vindication theory cannot be applied to his state-law claims. Second, even if the theory were applicable, he could not succeed in making the requisite showing in view of *Concepcion*.

To begin with, because McArdle's claims arise under ***state*** law, *Mitsubishi Motors* and other cases discussing the vindication-of-rights rationale are irrelevant. Those cases "are limited by their plain language to the question of whether an arbitration clause is enforceable where ***federal statutorily provided*** rights are

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Cal. Rptr. 3d at 867 (Kriegler, J., dissenting). Thus, it is hardly surprising that, when confronted with the choice between the majority decision in *Brown* and *Quevedo*, Judge Henderson sided with "the *Quevedo* court's reasoning," noting that "[c]uriously, the *Brown* majority cited *Quevedo* only in a footnote" and "did not otherwise attempt to refute the *Quevedo* court's conclusions." *Nelson*, 2011 WL 3651153, at *4 & n.1.

affected"; by contrast, when (as here) a plaintiff, "through diversity jurisdiction, seek[s] to enforce * * * rights provided by state law," those cases "simply do not apply." *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006) (emphasis added); *see also, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (noting possibility that "the existence of large arbitration costs could preclude a litigant * * * from effectively vindicating her ***federal*** statutory rights in the arbitral forum") (emphasis added). The reason is simple: Whereas "Congress [may] evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (*Randolph*, 531 U.S. at 90), the Supremacy Clause of the U.S. Constitution prevents states from doing the same.

But even if McArdle were entitled to invoke the "vindication" theory with respect to his state-law claims, it fails at the outset in view of *Concepcion*. As the Eleventh Circuit recently held, "[e]ven if the *Mitsubishi* vindication principle applies to state as well as federal statutory causes of action, and even if it could be applied to strike down a class action waiver in the appropriate circumstance, such an argument is foreclosed here, because the *Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result." *Cruz*, 2011 WL 3505016, at *8 (internal citations omitted; emphasis in original).

McArdle's arguments amount to nothing more than a rehash of the arguments that were rejected in either *Concepcion* itself or the cases following it.

Thus, even though the Supreme Court, after detailing the features of ATTM's provision (*see* 131 S. Ct. at 1744 & n. 3), explained that the claim in that case "was most unlikely to go unresolved" (*id.* at 1753), McArdle dismisses that conclusion as "merely rel[ying] on the district court's findings" (Ans. Br. 17). Other plaintiffs have tried the same argument with no success.

Most notably, the Eleventh Circuit rejected an effort to distinguish *Concepcion* on the ground that the plaintiffs in that case had not introduced evidence to establish that they would not be able to vindicate their claims on an individual basis in arbitration, explaining bluntly that the Supreme Court had "not[ed that] ATTM's arbitration provision ensured 'that aggrieved customers who filed claims would be essentially guaranteed to be made whole.'" *Cruz*, 2011 WL 3505016, at *8 (emphasis in original) (quoting *Concepcion*, 131 S. Ct. at 1753). Similarly, Judge Whyte recently held that "[p]laintiffs' contention that their modest claims 'simply do not provide sufficient motivation for an aggrieved customer to seek redress' on an individual basis * * * is the very argument that was struck down in *Concepcion*" and therefore "[p]laintiffs [had] fail[ed] to identify any terms of ATTM's arbitration agreement that might preclude enforcement after *Concepcion*." *In re iPad*, 2011 WL 2886407, at *3-*4.

Invoking "Judge Posner['s]" oft-quoted "observat[ion]" that "'[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual

suits, as only a lunatic or a fanatic sues for $30,'" McArdle contends that he should be permitted to submit evidence that a "miniscule" number of consumers have pursued ATTM's dispute-resolution process. Ans. Br. 18-19 (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in *Carnegie*)).[5] Putting aside the fact that nothing stopped him from adducing such evidence when the case was in the district court, the Supreme Court has already considered and rejected this argument. The dissenting opinion in *Concepcion* quoted the same language from *Carnegie* and then contended that, "[i]n California's perfectly rational view, nonclass arbitration over [small-dollar] sums will also sometimes have the effect of depriving claimants of their claims." 131 S. Ct. at 1761 (Breyer, J., dissenting). The majority, however, was not persuaded by "the dissent['s] claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. It explained that "States cannot require a procedure that is inconsistent with the FAA"—such as California's public policy favoring the use of class procedures in cases involving small claims—"even if it is desirable for unrelated reasons." *Id.*; *see also Cruz,* 2011 WL 3505016, at *8 (rejecting plaintiffs' "vindication" argument because *Concepcion* majority had rejected the same argument when raised by the dissenting

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[5] McArdle fails to acknowledge that the comparison that the Seventh Circuit was drawing in *Carnegie* was between class actions and individual ***litigation*** in court, not individual arbitration.

opinion in that case); *Boyer v. AT&T Mobility Servs., LLC*, 2011 WL 3047666, at *3 n.4 (S.D. Cal. July 25, 2011) (relying on *Concepcion* Court's response to "the dissent's point that class actions are necessary to prosecute small dollar claims that might otherwise not be pursued" in rejecting the "argu[ment] that the factual distinctions between the instant matter and *AT&T Mobility* warrants invalidating the arbitration agreement on public policy grounds").

For this reason, the Eleventh Circuit recognized in *Cruz* that *Concepcion* forecloses arguments like McArdle's. Indeed, the type of statistical evidence that McArdle hopes to develop before the district court was already in front of the court in *Cruz*. As the Eleventh Circuit explained:

> It is true that the Plaintiffs here have presented a factual record not present in *Concepcion* * * *. Plaintiffs also provide some statistical evidence—which the consumer-plaintiffs also presented in *Concepcion*—showing the "infinitesimal" percentage of ATTM subscribers who have arbitrated a dispute with ATTM, "starkly demonstrat[ing] the claim-suppressing effect of the [class action] ban."

2011 WL 3505016, at *7 (quoting brief of *Concepcion* respondents). But the court concluded that this distinction made no difference, stating that "at least as applied to the facts of this case, we believe that faithful adherence to *Concepcion* requires the rejection of the Plaintiffs' argument." *Id.* at *8. The court reasoned that "[t]he Plaintiffs' evidence goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*—namely, that

the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted." *Id.* That argument would sweep "too broadly" because it "would preserve mandatory class actions for *all* 'small but numerous' consumer claims," and therefore if a state "adopted such a rule," it "[u]nquestionably * * * would be preempted by the FAA, under the reasoning in *Concepcion*." *Id.*.[6]

Equally unavailing is McArdle's contention that "[t]he problems with individual arbitration become especially pronounced" in his case because (he says) his claims would "require[] detailed expert testimony about the operation of international mobile telephone systems" and "comb[ing] through * * * hundreds of thousands of pages of documents" (Ans. Br. 19) that ATTM produced during class-certification discovery. True, such onerous efforts necessarily must take

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[6] McArdle relies heavily on the record in *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009)—and seeks an opportunity to undertake discovery to construct a similar record—in his effort to distinguish *Concepcion*. Ans. Br. 18-19. But he fails to acknowledge that the *Coneff* plaintiffs presented that record to the Supreme Court in *Concepcion*. *See* Br. of *Amici Curiae* Marygrace Coneff et al., *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 3973886. There, the *amici* argued that they had "successfully proven that AT&T's class action ban would as a factual matter exculpate AT&T from liability" and thus that ATTM's arbitration provision does not "provide[] customers with an effective means of redress." *Id.* at *2-*3. That argument relied entirely on what the *amici* called "[t]he rich factual record developed in *Coneff*, along with that of another putative class action against AT&T, *Cruz v. Cingular Wireless, LLC*." *Id.* at *7-*24. Thus, those contentions and data were presented to the Supreme Court, which nevertheless held unequivocally that enforcement of ATTM's arbitration agreement could not be conditioned on the availability of class-wide procedures.

place when ***class*** actions are litigated in court: The party seeking class certification bears the heavy burden of proving both the existence of a "common issue"—*i.e.*, a "common contention" that is "capable of classwide resolution[,] which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke" (*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011))— and that such common issues predominate over individualized questions (Fed. R. Civ. P. 23(b)(3)). To meet those standards, counsel for the putative class might well find it necessary to investigate the technological underpinnings of the international wireless telephone system to show that there are common issues that can be proven through common evidence in a single trial. It is thus certainly the case that McArdle's experts and counsel would have to do a lot of work to support an attempt to certify a class—and would meet heavy resistance from ATTM, which (like most defendants) would defend vigorously against class proceedings.

But that is not how arbitration on an individual basis works. In consumer arbitrations involving modest individual claims, there are typically no pretrial motions, battles of the experts, or other expensive trappings of litigation. Instead, individual arbitration is a simple and accessible means of dispute resolution for consumers. A customer like McArdle who seeks to challenge allegedly improper charges for international wireless service can do so by pointing to his bills and

testifying as to why he believes the charges are improper. *See Francis v. AT&T Mobility LLC*, 2009 WL 416063, at *7-*8 (E.D. Mich. Feb. 18, 2009) (rejecting argument that it would cost "millions of dollars in discovery and expert costs" to arbitrate claim that customer had been improperly charged for domestic calls at an international rate, and noting that customer could prepare a claim by relying upon his or her bills, memory, and travel records). And ATTM's arbitration provision makes individual arbitration especially simple and convenient for its customers, which is why the Supreme Court explained in *Concepcion* that a customer's individual claims are "most unlikely to go unresolved" when brought under ATTM's process. 131 S. Ct. at 1753.

McArdle nonetheless attacks particular aspects of ATTM's arbitration provision in an effort to show that the individual arbitration process would be unfair to him (or other hypothetical customers). First, he argues that customers with small claims would need to "front a $125 arbitration fee unless the consumer certifies that he is unable to pay," though he admits that ATTM "promises to reimburse the fee upon receipt of the notice of arbitration." Ans. Br. 20. Class actions are better, he says, because "in a class action settlement or judgment, claimants are never required to pay a $125 fee to file a claim." *Id.* Of course, under *Concepcion*, McArdle's contention fails because the FAA precludes states from imposing a policy choice favoring class actions. Moreover, to the extent that

ATTM does not settle a customers' claim in response to receiving his or her notice of dispute (which would obviate the need for a customer to advance a filing fee in the first place), there is nothing unfair about asking the customer to pay the AAA filing fee and then reimbursing him or her, especially given ATTM's commitment to pay the fee directly when a customer represents that he or she lacks the resources to do so herself.

Second, McArdle asserts that "AT&T also threatens the consumer with the obligation to reimburse AT&T for all arbitration fees and costs if the arbitrator finds the action 'frivolous' or 'brought for an improper purpose.'" Ans. Br. 20. That is false. ATTM's arbitration provision specifies that, if a customer's claim is frivolous or brought for an improper purpose, as measured by the standards of Fed. R. Civ. P. 11, "the payment of [arbitration] fees will be governed by the AAA Rules"; those rules in turn provide that a consumer cannot be required to pay more than $125 for claims that do not exceed $10,000. ER 43, 77. Needless to say, customers and their counsel who bring claims in court that violate Rule 11 face sanctions that are likely to be ***far*** more severe than $125. *See, e.g.*, *Patterson v. Apple Computer, Inc.*, 256 F. App'x 165, 168 (9th Cir. 2007) (affirming award of $5,000 in Rule 11 sanctions).

Third, McArdle argues in a footnote that he should be permitted to raise questions in the district court about "whether the designated arbitral forum, the

AAA, will provide a fair hearing." Ans. Br. 21 n.6. He predicates this request on the fact that the AAA has placed a moratorium on arbitration of debt-collection actions. But that moratorium is limited to actions brought by businesses against consumers and will continue only until various safeguards, including the Consumer Debt Collection Due Process Protocol, are implemented. The moratorium does not apply to "demands for arbitration filed by consumers against businesses," which already are subject to the AAA's Consumer Due Process Protocol. *See* http://www.adr.org/sp.asp?id=36427; *see also Black v. JP Morgan Chase & Co.*, 2011 WL 3940236, at *7-*10 (W.D. Pa. Aug. 25, 2011) (examining and rejecting argument that AAA moratorium renders forum unavailable, and explaining that "the moratorium's concerns were specifically directed to consumer debt collection arbitrations brought by lenders, and thus, would have no relevance to the decisions in [two other cases] or to the instant matter"). McArdle's reliance on the moratorium on debt-collection arbitrations is thus self-evidently misplaced. Stripped of that fig leaf, McArdle is left with nothing other than speculation.

Yet the Supreme Court repeatedly has made clear that "speculat[ion] that arbitration panels will be biased" is not a valid ground for resisting enforcement of an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). Indeed, numerous courts have refused to engage in just the sort of

speculation that McArdle asks this Court to indulge.[7]

Finally, because all of McArdle's challenges to ATTM's arbitration provision fail as a matter of law, his request for the case to be remanded so that discovery can take place necessarily is meritless too. The FAA, which requires disputes to be moved out of court and into arbitration as quickly as possible, does not permit the kind of fishing expedition McArdle exhorts the Court to let him undertake.[8]

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[7] *See, e.g.*, *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 899 (2d Cir. 1991) (rejecting party's request to "engage[] in a fishing expedition in an attempt to determine if there is some basis, however farfetched, to prosecute a claim of bias" on the part of an arbitrator, without first "present[ing] clear evidence of any impropriety") (internal quotation marks omitted); *Lehnert v. Ferris Faculty Ass'n-MEA-NEA*, 893 F.2d 111, 112 (6th Cir. 1989) (rejecting plaintiffs' claim of "inherent bias" on part of AAA and noting that "safeguards are available to them" under the AAA rules to challenge a specific arbitrator for bias); *Pan Am Flight 73 Liaison Group v. Dave*, 711 F. Supp. 2d 13, 26 (D.D.C. 2010) ("the mere possibility of bias is insufficient to render arbitration inappropriate"); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 845 (N.D. Ill. 2001) (rejecting contention that "the [AAA] is biased in favor of the defendants," because plaintiff "provides no evidence that the AAA, one of the country's leading no[t]-for-profit dispute resolution organizations, is on defendants' payroll or any other evidence of actual bias").

[8] McArdle cites a single decision in support of his request for discovery, *Hamby v. Power Toyota Irvine*, __ F. Supp. 2d __, 2011 WL 2852279 (S.D. Cal. July 18, 2011). But *Hamby* did not involve an arbitration provision that the U.S. Supreme Court already had considered. By contrast, the lower federal courts that have examined requests for discovery in the context of ATTM's provision have rejected them in view of *Concepcion*. *See In re iPad*, 2011 WL 2886407, at *6 ("The argument that plaintiffs seek to support through arbitration related discovery has already been addressed and rejected by the [U.S.] Supreme Court in *Concepcion*."); Order at 2, *Kaplan v. AT&T Mobility, LLC*, No. 10-cv-03594 (C.D.

(cont'd)

C. Binding Supreme Court Precedent Precludes McArdle's Argument That He Was Entitled To Rely On The State Of The Law At The Time He Entered Into His Arbitration Agreement.

Even though McArdle conceded below that he had accepted a service agreement containing ATTM's arbitration provision (ER 115; Mot. to Strike, Dkt. No. 40, at 5), he now argues that he never really agreed to arbitrate because, at the time he entered into it, the arbitration agreement was unenforceable under California law—namely, *Discover Bank*, *Cruz*, and *Broughton*. Ans. Br. 23.

But the Supreme Court definitively rejected an identical argument in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In *Rodriguez de Quijas*, the district court had held that the plaintiff could not be compelled to arbitrate his claims under the Securities Act of 1933—notwithstanding his arbitration agreement—because, under the Supreme Court's then-prevailing decision in *Wilko v. Swan*, 346 U.S. 427 (1953), federal securities claims could not be arbitrated. The Second Circuit reversed, concluding that *Wilko* had been rendered obsolete by subsequent decisions. The Supreme Court granted certiorari and proceeded to expressly overrule *Wilko*, holding that claims under the Securities Act could indeed be arbitrated.

Reading the handwriting on the wall, the plaintiffs in *Rodriguez de Quijas*

Cal. Aug. 9, 2011) (attached as Exhibit A) ("The Court finds that arbitration-related discovery is neither necessary nor proper and therefore denies plaintiff's request therefor."), *case voluntarily dismissed* (Aug. 29, 2011).

argued that, even if the Court were to overturn *Wilko* and hold that their Securities Act claims were arbitrable, "it should not apply its ruling retroactively to the facts of this case." 490 U.S. at 485. The Supreme Court "disagree[d]," holding that "the customary rule of retroactive application is appropriate here." *Id*. The Court reasoned that applying its decision retroactively would not have "substantial inequitable results" because the plaintiffs had not made "any serious allegation that they agreed to arbitrate future disputes relating to their investment contracts in reliance on *Wilko*'s holding that such agreements would be held unenforceable by the courts." *Id*. (internal quotation marks omitted).

Here, the case for applying *Concepcion* retroactively is even stronger. Unlike *Rodriguez de Quijas*, *Concepcion* did not overrule anything. It simply reversed a decision of this Court. Insofar as McArdle may have relied on Ninth Circuit law in entering into his arbitration provision, he did so at his own risk. Moreover, as in *Rodriguez de Quijas*, McArdle does not make "any serious allegation" that he personally relied on this Court's precedents. Instead, he asserts only that he "should be entitled to rely upon a reasonable person's understanding of the law at the time of contracting." Ans. Br. 22. That is plainly insufficient to justify deviating from "the customary rule of retroactive application."

The conclusion is reinforced by the Third Circuit's recent decision in *Litman*. Recognizing that the court might conclude that *Concepcion* preempts

New Jersey's rule limiting the enforceability of class waivers—known as the *Muhammad* rule—the plaintiffs in *Litman* argued that they nonetheless should not be required to arbitrate on an individual basis because their arbitration agreement (like ATTM's) stated that it would be void "'if for some reason the prohibition on class arbitrations . . . is deemed unenforceable'" and, at the time they entered into the agreement, *Muhammad* made the prohibition unenforceable. 2011 WL 3689015, at *5 n.8 (alteration in original). The Third Circuit rejected that contention, explaining that "because *Muhammad* is preempted by the FAA, it is inapplicable here and cannot trigger that provision." *Id.*; *see also Murphy v. DirecTV, Inc.*, 2011 WL 3319574, at *2-*3 (C.D. Cal. Aug. 2, 2011) (rejecting argument that, notwithstanding *Concepcion*, plaintiffs were entitled to avoid arbitration because "[a]t the time of contracting, Plaintiffs would have expected the prevailing law at the time—finding the class action waiver unconscionable—to be controlling").[9]

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[9] In support of his argument, McArdle cites *O'Hare v. Municipal Resource Consultants*, 132 Cal. Rptr. 2d 116 (Ct. App. 2003). Ans. Br. 24. But as McArdle himself acknowledges, *O'Hare* concerned changes to the provisions of the arbitration agreement itself, not to the controlling case law concerning enforceability. *Id.* Here, by contrast, there is no "attempt to make an end run around the legislative direction to evaluate the contract based upon ***its terms at the time of execution***." 132 Cal. Rptr. 2d at 127 (emphasis added). Because there has been no attempt to retroactively change the *terms* of McArdle's agreement, *O'Hare* is irrelevant.

D. The District Court Would Not Lose Jurisdiction If This Court Were To Hold That McArdle's Agreement To Arbitrate On An Individual Basis Is Enforceable.

In a final act of desperation, McArdle argues that, if ATTM's arbitration agreement is enforceable, that would mean that he "never actually had a right to plead class claims" and thus that there never was federal jurisdiction over this case under the Class Action Fairness Act ("CAFA"). Ans. Br. 25-26. But CAFA confers jurisdiction over a case as long as it is ***pleaded*** as a class action, whether or not the action can ultimately ***proceed*** as a class action. The statute confers federal jurisdiction on "any civil action ***filed under*** rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action," as long as the diversity and amount-in-controversy requirements are met. 28 U.S.C. § 1332(d) (emphasis added).

McArdle acknowledges that this Court has rejected the argument that a district court is divested of CAFA jurisdiction when the court determines that a putative class cannot be certified. Ans. Br. 26 (citing *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co.*, 602 F.3d 1087, 1092 (9th Cir. 2010)). Other courts have reached the same conclusion. *See, e.g.*, *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009). Indeed, it could not be otherwise: If CAFA jurisdiction were lost whenever a court

declines to certify a class, on remand the state court might allow the class claims to be reinstated—surely what McArdle hopes for in raising this argument—which would in turn give rise to federal CAFA jurisdiction all over again. Congress's purpose in enacting CAFA could not have been to establish an endless loop of removal and remand between federal and state court. *See United Steel*, 602 F.3d at 1090 (describing the "jurisdictional ping-pong game" that would occur if CAFA "bizarrely permits" remand upon a finding that a class cannot be maintained).

As this Court explained, "post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing." *United Steel*, 602 F.3d at 1091-92. Nevertheless, McArdle argues that in *United Steel* this Court speculated that its holding might not apply "when there was no jurisdiction to begin with because the jurisdictional allegations were frivolous from the start." *Id.* at 1092 n.3. But the ***jurisdictional*** allegations were not frivolous: McArdle filed this case as a class action—albeit in disregard of his obligation to arbitrate on an individual basis—and there is no dispute that the diversity and amount-in-controversy requirements of CAFA were met at the time of filing.

CONCLUSION

The order of the district court should be reversed, and the case should be remanded with instructions to enter an order compelling arbitration.

Dated: September 14, 2011

Respectfully submitted,

/s Evan M. Tager

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1

I certify that:

X 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 6,504 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _______ words or ________ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

DATED: September 14, 2011

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 14th day of September 2011, I caused the foregoing brief to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: September 14, 2011

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EXHIBIT A

JS-5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-3594-CAS(Ex)	Date	August 9, 2011
Title	BEN KAPLAN, ETC. v. AT&T MOBILITY, LLC; ET AL.		

Present: The Honorable	CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

RITA SANCHEZ	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: **DEFENDANT AT&T MOBILITY, LLC'S MOTION TO COMPEL ARBITRATION AND TO DISMISS CLAIMS OR, IN THE ALTERNATIVE, TO STAY CASE** (filed 07/08/10)

DEFENDANT ASURION MOBILE APPLICATIONS, INC.'S MOTION TO COMPEL ARBITRATION AND DISMISS ACTION, OR, IN THE ALTERNATIVE, TO STAY ACTION (filed 07/09/10)

On July 8, 2010, defendant AT&T filed a motion to compel arbitration and dismiss claims or, in the alternative, to stay case. On July 9, 2010, defendant Asurion filed a motion to compel arbitration and dismiss action, or, in the alternative, to stay action. On September 3, 2010, plaintiff filed oppositions to both motions. On September 13, 2010, both defendants filed replies in support of their motions. On September 27, 2010, the Court stayed the case pending the Supreme Court's decision in AT&T Mobility LLC v. Concepcion, (petition for certiorari granted in AT&T Mobility LLC v. Concepcion, __ U.S. __, 2010 WL 303962 (Mem.)). [1] In that order, the parties were instructed to file a

[1] In deciding to stay the action, the Court rejected plaintiff's argument that the stay was not warranted because the arbitration clause in the Asurion contract creates an express exception for claims for injunctive relief, and therefore that plaintiff's claims for injunctive relief would be unaffected by the Supreme Court's decision in Concepcion. The Court concluded that this would require plaintiff to proceed against Asurion only, and AT&T is a necessary party in this case. Moreover, the Court concluded that there is no proper or reasonable way to proceed solely on plaintiff's injunctive relief claims, and therefore found it is appropriate to stay the case in its entirety.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-3594-CAS(Ex)	Date	August 9, 2011
Title	BEN KAPLAN, ETC. v. AT&T MOBILITY, LLC; ET AL.		

joint status report within 21 days of the decision in Concepcion as to its effect on the current dispute.

On April 27, 2011, the Supreme Court issued its decision in Concepcion. On May 18, 2011, the parties submitted a joint status report. In the joint status report, plaintiff request arbitration-related discovery, or, at least, the opportunity to brief the request for discovery, and the opportunity for all parties to re-brief defendants' motions to compel arbitration. Report at 2. Defendants contest the need for arbitration-related discovery. Id. at 3. They further request that the Court compel arbitration on plaintiff's claims in light of the Supreme Court's decision in Concepcion, given that "[t]he arbitration provision that applies to Kaplan's relationship with ATTM in this case is materially equivalent to the ATTM arbitration provision at issue in *Concepcion*." Id.

The Court finds that arbitration-related discovery is neither necessary nor proper and therefore denies plaintiff's request therefor. No further briefing on the issue of discovery will be entertained. The Court directs each defendant to file any supplemental briefing, not to exceed fifteen (15) pages each, on their motions to compel in light of the Supreme Court's decision in Concepcion on or before August 22, 2011. Plaintiff is instructed to file any supplemental oppositions, not to exceed fifteen (15) pages each, on or before August 29, 2011. Defendants are instructed to file any supplemental reply memoranda, not to exceed ten (10) pages each, on or before September 6, 2011. A hearing will be held on the matter on September 19, 2011 at 10:00 a.m.

IT IS SO ORDERED.

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