No. 11-35871

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRA SEVERANCE, individually
and on behalf of all others similarly situated,
Plaintiff–Appellant,

v.

AT&T MOBILITY LLC,
Defendant–Appellee.

Appeal from an Order of the United States District Court
for the Western District of Washington, No. 10-cv-00763-RAJ

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

AT&T Mobility LLC is a nongovernmental corporate entity that has no parent company. ATTM's members are all privately held companies that are wholly-owned subsidiaries of AT&T Inc., which is the only publicly held company with a 10 percent or greater ownership stake in ATTM.

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JURISDICTIONAL STATEMENT

Appellee accepts Appellant's jurisdictional statement.

ISSUES PRESENTED

Appellant Alexandra Severance had a contract for wireless service with Unicel Inc. As part of that contract, she agreed to arbitrate any disputes with Unicel or its "assignees, agents, employees, officers, directors, shareholders, parent companies, subsidiaries, affiliates, predecessors [or] successors." ER175. And she expressly waived any right to litigate or arbitrate on a class-wide basis. *Id.*

In December 2008, Appellee AT&T Mobility LLC acquired Severance's contract from Unicel in a transaction involving ATTM's affiliate and subsidiary companies. Four months later, ATTM sent Severance some free text messages, offering upgrades to her wireless service.

Despite the contract's arbitration provision, Severance filed this putative class action, alleging that ATTM violated federal law by sending her the text messages. ATTM filed a motion to compel arbitration, which the district court granted.

The questions presented are:

1. Whether the district court correctly concluded that ATTM is entitled to invoke the arbitration provision in Severance's agreement with Unicel, and that Severance's claims against ATTM are within the scope of the agreement.

2. Whether the district court correctly held that Severance's agreement to arbitrate her claims is enforceable.

STATEMENT OF THE CASE

Severance, a Vermont resident, filed a putative nationwide class action against ATTM in the U.S. District Court for the Western District of Washington. ER185, 188. ATTM moved to compel arbitration under 9 U.S.C. § 4. The district court granted that motion in September 2011, dismissing the case "without prejudice to the resolution of Plaintiffs' claims in arbitration." ER23.

STATEMENT OF FACTS

A. ATTM's Acquisition Of Unicel's Vermont Business.

In July 2007, Verizon Wireless entered into a merger agreement with Unicel, a wireless carrier that operated in Vermont and other rural markets. ER149. To get the federal government and the State of Vermont to approve the merger, however, Verizon had to divest

Unicel's wireless business in Vermont. *Id.*; *see United States v. Verizon Commc'ns Inc.*, 2009 WL 1380165, at *3-5 (D.D.C. Apr. 24, 2009). In December 2008, ATTM purchased most of the divested Unicel assets, including more than 100,000 contracts for cellular service that Unicel had with Vermont customers—thus making ATTM the wireless-service provider for those customers. ER150.

As is customary with complex corporate transactions, Verizon's sale of the Unicel assets to ATTM involved subsidiary and affiliate companies: In early December 2008, when Verizon was acquiring Unicel, it entered into an Exchange Agreement with ATTM, under which it agreed to transfer to ATTM the Unicel assets that it was required to divest. ER32. A few weeks later, Verizon and ATTM effected the transfer by means of an Assignment of Membership Interest between Verizon affiliate RCC Atlantic Licenses LLC and ATTM affiliate DC Newco Parent LLC. ER32-35. RCC Atlantic created a subsidiary called Rural Newco LLC, to which Verizon transferred the Unicel assets being sold, including Unicel's contracts with Severance and other Vermont customers. ER179; SER2. RCC Atlantic then sold Rural (and with it, the Unicel contracts) to DC Newco, making Rural a DC Newco subsidiary. ER32-35, 179-80.

Finally, in March 2009, ATTM merged Rural into New Cingular Wireless PCS (an ATTM subsidiary), and the Unicel contracts went with it. ER180. In other words, ATTM has owned the Unicel contracts ever since December 2008, first through affiliate DC Newco (which briefly owned Rural), and then through subsidiary New Cingular (into which Rural was merged). For simplicity's sake, we refer to the entire family of AT&T-related companies as "ATTM," except when more specific references are necessary.

B. The Transition Period.

Because Unicel's technology was incompatible with ATTM's, Verizon and ATTM established a one-year transition period following transfer of the Unicel contracts. ER150. During that period, ATTM would keep the old Unicel system running so that customers would have time to upgrade to ATTM-compatible phones and rate plans. *Id.* At the end of the year, however, ATTM would switch off the old Unicel system, meaning that any former Unicel customers who had not upgraded to ATTM's network would no longer receive cellular service and would be dropped from ATTM's subscriber rolls. ER179.

Beginning in early 2009, therefore, ATTM "informed Legacy Unicel Subscribers in Vermont that they were now [ATTM] customers

and urged them to subscribe to [ATTM] phones and rate plans." ER150. It did so by sending letters and free text messages to its customers, informing them that they had until December 2009 to upgrade from the old Unicel system if they wished to continue receiving service. *Id.*

Meanwhile, the Vermont Attorney General, who had required Verizon to divest the Unicel service contracts, also investigated the transition process; and in November 2009 that office entered into a court-approved Assurance of Discontinuance with ATTM. ER149-70. This agreement required ATTM to continue sending out "periodic text messages to [the former Unicel subscribers'] mobile devices without charge to the Consumer" to ensure that these customers fully understood that they needed to upgrade in order to keep receiving wireless service from ATTM. ER154.

Severance was one of the former Unicel customers whose contracts ATTM acquired from Verizon in December 2008. SER7-8. In early April 2009, a few days after the Rural–New Cingular merger, Severance began receiving the text-message notifications about upgrading her service. ER184, 187; Br. 5.

C. The Unicel Subscriber Agreement.

Severance's Unicel contract defines the terms "we" and "us" to mean "Unicel." ER175. It then uses those terms in an arbitration provision, which states:

> BINDING ARBITRATION. (a) RIGHT TO ELECT TO ARBITRATE: We (including our assignees, agents, employees, officers, directors, shareholders, parent companies, subsidiaries, affiliates, predecessors and successors) or you may elect to have any claim, dispute or controversy ("Claim") of any kind (whether in contract, tort or otherwise) arising out of or relating to your Service or this agreement (including any renewals or extensions), any goods or services provided to you, any billing disputes between you and us, or any prior or future dealings between you and us resolved by binding arbitration.

Id. The arbitration agreement goes on to provide that the company will pay the filing fee and all other costs if it initiates arbitration, or all but $75 if the customer is the one to initiate arbitration. *Id.* It also informs the customer that, if either party elects arbitration, "you will not have the right to go to court or to have a jury trial," and "you will not have the right to have any claim arbitrated as a class action." *Id.*

Severance signed the contract, "CONFIRM[ING] THAT YOU HAVE READ AND AGREE TO ALL OF THE PROVISIONS OF THIS

AGREEMENT." ER174. She also separately initialed a declaration stating that "I have read the arbitration clause * * * and I understand that it limits certain rights, including the right to a jury trial." *Id.*

D. ATTM's Arbitration Provision.

Although Severance's relationship with ATTM is otherwise governed by her Unicel contract, ATTM has a policy of permitting all current and former customers to take advantage of the exceptionally consumer-friendly terms of the arbitration provision that ATTM includes in its current subscriber agreements—effectively waiving any older, less consumer-friendly terms. *See* SER3; *see also* ER17 (district court's finding that "ATTM has agreed to waive the terms of the Unicel Arbitration agreement and permit Plaintiffs to take advantage of the friendlier terms of the ATTM Agreement").

The current ATTM arbitration provision is functionally equivalent to the version involved in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), in which the Supreme Court held that the Federal Arbitration Act ("FAA") preempts state-law rules that condition the enforcement of arbitration provisions on the availability of class-wide procedures. That decision lists the many consumer-friendly features of the 2006 version of ATTM's arbitration

provision. *Id.* at 1744. It also notes the principal difference between the 2006 version and the current version. *Id.* at 1744 n.3.[1]

In *Concepcion*, the Court rejected the argument that class actions are necessary to ensure that small-dollar claims won't "slip through the legal system," observing that "the claim here was most unlikely to go unresolved" because ATTM's arbitration provision "provide[s] incentive for the individual prosecution of meritorious claims that are not immediately settled." 131 S. Ct. at 1753. Indeed, the Supreme Court endorsed the district court's conclusion that the plaintiffs "were *better off* under their arbitration agreement with [ATTM] than they would have been as participants in a class action." *Id.* (emphasis in original).

E. Proceedings Below.

Plaintiffs' counsel filed this putative class action in May 2010 on behalf of a single named plaintiff, Ashley Adams. But although Adams purported to represent a class of former Unicel subscribers, it turned out that she herself had never been a subscriber. In September 2010, Plaintiffs' counsel amended the complaint, replacing

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[1] The current version appears at pages SER14-19 in the Supplemental Excerpts of Record.

Ashley with her mother, Bonnie Adams (who was a subscriber), and adding Severance and Melissa Meece as co-plaintiffs. ER183. Plaintiffs alleged that ATTM violated the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by sending free text messages inviting them to "upgrade to an ATT plan." ER187 (capitalization omitted). Plaintiffs purported to sue on behalf of a nationwide class of "current and former Unicel subscribers * * * who received one or more unauthorized text message advertisements on behalf of [ATTM]." ER188.

In October 2010, ATTM moved to compel arbitration. *See* Dkt. 37. Anticipating, however, that Plaintiffs would argue that their arbitration agreements are unconscionable because they do not allow for class actions, ATTM requested in the alternative that the district court stay the case pending the Supreme Court's decision in *Concepcion*. Plaintiffs opposed arbitration but did not object to a stay. *See* Dkt. 43, at 2.

The Supreme Court issued its decision in *Concepcion* in April 2011. Following supplemental briefing on the effect of that decision, the court below issued a consolidated Order (ER1-23) granting both ATTM's motion to compel arbitration in this case and a similar

motion that Verizon had made in an otherwise-unrelated case (*Stoican v. Cellco P'ship*, No. 10-cv-1017 (W.D. Wash. filed June 21, 2010)).

The district court rejected Severance's argument that ATTM had no right to enforce Unicel's arbitration provision. ER9. The court went on to hold, under *Concepcion*, that the FAA preempts Severance's state-law argument that her arbitration agreement is unconscionable because it bars class-wide resolution of disputes. ER14-15. Finally, the court found that Severance had made no serious attempt to prove "that [her] arbitration agreement deprives [her] of the opportunity to vindicate her [federal] statutory claims" under the TCPA. ER22-23. Because no party requested a stay pending arbitration, the district court dismissed the case "without prejudice to the resolution of Plaintiffs' claims in arbitration." ER23.

Severance now appeals the judgment; her named co-plaintiffs do not.

SUMMARY OF ARGUMENT

1. Severance's service agreement permits Unicel to assign its interest in the agreement, and provides that Unicel's successors, assignees, parent companies, and affiliates may elect to have claims

resolved through binding arbitration. Accordingly, Severance acknowledges, as she must, that the parent or affiliate of Unicel's assignee has the right to elect to have claims arbitrated. The district court found that New Cingular is Unicel's successor, and that ATTM is New Cingular's parent. Those findings are not clearly erroneous. Indeed, Severance conceded the former below, and she has never disputed the latter. Thus, ATTM has the right to elect arbitration.

Ignoring her own concession, however, Severance now contends that Unicel's assignee is not New Cingular but DC Newco—an entity that ATTM manages. Although she is mistaken, it makes no difference: As a legal matter, being DC Newco's manager makes ATTM its corporate affiliate. Accordingly, even if Severance were correct about who owns her contract, ATTM would still have the right to invoke the arbitration provision.

Severance also contends that her dispute with ATTM is outside the scope of her arbitration provision. Although she is less than clear on the point, we understand her argument to turn on the fact that a parenthetical after the word "we" in the arbitration provision states that "we" includes corporate parents, subsidiaries, affiliates, predecessors, successors, and assignees, while there is no parallel

parenthetical following the word "us." Accordingly, the argument goes, although the "we" who can invoke the arbitration provision may include assignees, successors, etc., the "us" whose disputes are subject to arbitration is limited to Unicel. But "we" and "us" are synonyms—not just for purposes of the contract, but as a matter of basic English. Even if there were any ambiguity, the FAA's strong presumption in favor of arbitrability requires that Severance's claims be submitted to arbitration if the arbitration provision can plausibly be read to cover them. As the district court determined, it surely can. In any event, the arbitration provision also expressly covers all disputes relating to Severance's wireless service, without making any reference to "us"—thus rendering Severance's claims arbitrable regardless of how expansive or narrow a meaning is given to the word "us."

2. In the alternative, Severance argues that, notwithstanding *Concepcion*, courts may refuse to enforce any arbitration agreement that would effectively prevent a plaintiff from vindicating his or her federal statutory claims. And she asserts that she established this basis for evading arbitration by submitting a declaration from her attorney asserting that the cost of preparing and presenting her case

on an individual basis would greatly exceed her potential recovery. That argument fails for at least three reasons.

First, the Supreme Court has held time and again that the FAA requires enforcement of arbitration agreements as written—including when they require arbitration of disputes on an individual basis—unless Congress expresses a contrary intention. For TCPA claims, Congress has done no such thing.

Second, in *Concepcion* the Supreme Court squarely rejected the argument that class procedures must remain available for claims that allegedly are too small to be worth pursuing on an individual basis—and that is as true for claims arising under federal statutes as it is for those arising under state statutes. Although a two-judge panel of the Second Circuit has held that *Concepcion* is limited to claims arising under state law (*see In re Am. Express Merchs.' Litig.*, 667 F.3d 204 (2d Cir. 2012), *reh'g en banc denied*, __ F.3d __, 2012 WL 1918142 (May 29, 2012), ***this Court*** has expressed the view that the Second Circuit's decision cannot be squared with *Concepcion* (*see Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158-59 & nn.2-3 (9th Cir. 2012)).

Finally, even if Severance were correct that a plaintiff could in theory avoid arbitration by establishing that the costs of pursuing a

federal statutory claim make it unrealistic to arbitrate the claim on an individual basis, the district court found that she had failed to make such a showing. That factual finding is correct, not clearly erroneous.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's decision to grant or deny a motion to compel arbitration. The underlying factual findings are reviewed for clear error." *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 652 (9th Cir. 2009) (citation omitted).

ARGUMENT

I. Severance's Arbitration Agreement Applies To Disputes With ATTM Arising After ATTM And Its Subsidiary Became Unicel's Successor And Assignee.

A. ATTM Has The Contractual Right To Invoke The Arbitration Provision In Severance's Agreement With Unicel.

The Unicel contract generally defines "we" and "us" as synonyms for "Unicel," and then states, in the arbitration provision, that "[w]e (including our assignees, * * * parent companies, subsidiaries, affiliates, predecessors and successors) or you may elect to have any claim * * * resolved by binding arbitration." ER175.

In the court below, Severance conceded that "New Cingular is the successor to Plaintiffs' contracts with Unicel." Dkt. 43, at 6. But she contended that New Cingular's right to demand arbitration as Unicel's successor under the contract does not extend to parents or affiliates of Unicel's successors, such as ATTM. The district court rejected that argument, concluding:

> When New Cingular acquired the Unicel service agreements, it replaced Unicel as the contracting party in those agreements. No one argues otherwise. Once New Cingular did so, the first sentence of the arbitration clause effectively read as follows: "We, meaning New Cingular (including our assignees, agents, . . . parent companies, . . .) or you may elect . . . ." There is no dispute that ATTM was New Cingular's parent company. It therefore became entitled to invoke the arbitration clause once New Cingular acquired the Unicel agreements.

ER9 (omissions in original).

On appeal, Severance "take[s] no issue with" the district court's conclusion that ATTM can demand arbitration if New Cingular has that right. Br. 23-24.[2] Instead, ignoring her concession below, she now

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[2] Nor could she. Under Vermont law, the "assignee of [a] contract * * * stands in the shoes of" the original party. *DaimlerChrysler Servs. N. Am. LLC v. Ouimette*, 830 A.2d 38, 43 (Vt. 2003). The "assignee takes whatever interest the assignor possessed" and is "entitled to the same rights as the assignor." *In re Ambassador*

disputes the district court's factual finding that New Cingular is Unicel's successor. She contends here that the entity that owns the Unicel contracts is DC Newco (which temporarily owned Rural after it was transferred from Verizon to ATTM but before it was merged into New Cingular), and that New Cingular merely "holds" the contracts but has no rights under them. Br. 10-11.

The district court's factual finding that New Cingular is Unicel's successor is not clearly erroneous; indeed, it is clearly correct. Severance simply misapprehends the record evidence regarding the corporate transformations that took place in the wake of Verizon's sale of the Unicel contracts to ATTM. DC Newco ***never*** directly owned the contracts; ***Rural*** did. ER32-33, 179-80. DC Newco owned Rural, and therefore indirectly owned the contracts, from December 2008 through March 2009—at which point Rural merged into New

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Ins. Co., 965 A.2d 486, 493 (Vt. 2008). Thus, when New Cingular became the successor to Severance's contract, it acquired all Unicel's rights, including the right to have its corporate parent demand arbitration. *See N. Sec. Ins. Co. v. Mitec Elecs., Ltd.*, 965 A.2d 447, 456 (Vt. 2008) (concluding that contract binding "successors, affiliates, and assigns" covered new entity that was successor to two consolidated affiliates, because assigned contractual rights "would be hollow indeed if" lost simply because parties "chang[ed] their corporate form once").

Cingular, taking the contracts with it. ER32-33, 179-80. Thus, in conceding on appeal that Unicel's successors and their corporate parents can demand arbitration, Severance has conceded that ATTM also has that right.[3]

But even if DC Newco did own the Unicel contracts, the result would be the same. In that event, DC Newco would stand in Unicel's shoes—as Severance acknowledges. Br. 26-27. And the undisputed evidence is that DC Newco is ATTM's affiliate, meaning that ATTM has the same contractual right to invoke the arbitration provision as DC Newco has.

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[3] Severance suggests that the district court should not have considered evidence regarding the transactions that ATTM submitted with its reply in support of the motion to compel arbitration. Br. 22 n.4. But Severance did not move to strike the evidence, which merely supplemented the McGee Declaration (ER178-80) that ATTM had provided with its opening memorandum. Nor did she seek to refute the evidence in her supplemental brief following issuance of the decision in *Concepcion*. *See* Dkt. 66, at 1 (arguing that "[n]othing in *Concepcion* affects the facts or law demonstrating that * * * ATTM is not a 'successor' entitled to compel Plaintiffs to arbitrate under their Unicel contracts"). Indeed, she now affirmatively relies on it in arguing that ATTM is DC Newco's manager (Br. 10-11, 26)—the issue to which we turn next. The district court did not abuse its discretion by considering the evidence; and any objections to it are now waived. *See, e.g.*, *Getz v. Boeing Co.*, 654 F.3d 852, 868 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 1582 (2012); *Provenz v. Miller,* 102 F.3d 1478, 1483 (9th Cir. 1996).

To be sure, Severance contends that ATTM is DC Newco's "manager," "not * * * its parent, assignee, affiliate, or successor." Br. 10; *see also* Br. 26 (stating that Assignment of Membership Interest (ER32) "unambiguously is executed by ATTM as 'manager' of DC Newco"). But as a legal matter, the manager of a corporation ***is*** the corporation's affiliate. In determining whether two entities are affiliates, the touchstone is control: If one exercises some control over the other's business or assets, or if they are under common control by a third party, they are affiliates.[4] Thus, the Federal Communications Commission defines the term "affiliate" in the wireless industry—the relevant industry here—to include any situation in which one company "[d]irectly or indirectly controls or has the power to control" another. 47 C.F.R. § 1.2110(c)(5)(i). *See generally id.* § 24.720 (definition of affiliate in 47 C.F.R. § 1.2110 applies to wireless

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[4] *See, e.g.*, BLACK'S LAW DICTIONARY 67 (9th ed. 2009) (defining "affiliate" as "[a] corporation that is related to another corporation by shareholdings or other means of control"); 11 U.S.C. § 101(2)(C)–(D) (Bankruptcy Code defines "affiliate" to include any situation in which one entity operates the business or substantially all the property of another); 17 C.F.R. § 230.144 (under Securities Act Rule 144, an affiliate of an issuer of securities is any entity "that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer").

industry). Entities are therefore affiliates if "officers, directors, or key employees [of one] serve as * * * the management of" the other. *Id.* § 1.2110(c)(5)(vi).[5]

B. The Arbitration Provision Covers Disputes With Unicel's Successors.

1. Severance also argues that, because her service agreement generally defines "we" and "us" as "Unicel," without expressly referring to Unicel's assignees, successors, parents, affiliates, employees, or anyone else, both "we" and "us" must be read narrowly to refer to Unicel alone, unless they are redefined elsewhere. *See* Br. 33 ("Unicel could have defined 'we,' 'us,' and 'Unicel' in the introductory paragraph to include assignees, agents, employees, etc., but Unicel chose not to do so."). *See generally* Br. 27-30, 33-34. Thus, she contends, although the arbitration provision explains that the term "we" includes assignees, successors, parents, and affiliates for

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[5] Not only is ATTM the manager of DC Newco, as Severance acknowledges, but an officer of ATTM (senior vice president for corporate development Rick Moore) executed the Assignment of Membership Interest on DC Newco's behalf. *See* ER34. That a "key employee [of ATTM] * * * has a critical influence in or substantive control over the operations or management of" DC Newco is an independent basis for concluding that the companies are affiliates. 47 C.F.R. § 1.2110(c)(5)(ii)(B).

purposes of that provision, "us" continues to refer solely to Unicel. As a result, she says, even if ATTM is entitled to invoke her arbitration provision, it may do so only for disputes that she has with Unicel itself.

This argument ignores that the contract expressly provides for assignment: "We may assign all or part of this agreement without such assignment being considered a change to the agreement." ER175. Thus, the terms "we" and "us" ***never*** mean Unicel alone; they must include, at the very least, whichever entity happens at the moment to be Unicel's successor or assignee. Any other interpretation would read the assignment clause out of the contract.[6]

2. Perhaps Severance means to argue that, by specifically defining "we" in the arbitration provision to include "assignees,

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[6] It would also render the entire service agreement nonsensical. The parties agreed that "we" would provide wireless service to Severance, and that she would pay "us" for that service. Were Severance's view to be accepted, there would have been no one left to provide the service, and no one to make payments to, when Unicel was merged into Verizon and ceased to exist as an independent entity called "Unicel." Vermont law disfavors such "'nonsensical' interpretations of contracts * * * because people are unlikely to make contracts with absurd consequences." *Post v. Killington, Ltd.*, 2010 WL 3323659, at *7 (D. Vt. May 17, 2010), *aff'd*, 424 F. App'x 27 (2d Cir. 2011).

agents, employees, officers, directors, shareholders, parent companies, subsidiaries, affiliates, predecessors and successors" (ER175)), while including no parallel definition for "us," the parties intended to limit the meaning of "us" to Unicel alone. On this view, the "we" who can demand arbitration is not the same as the "us" whose disputes can be arbitrated. Thus, the argument goes, even if ATTM is among the "we" who can require Severance to arbitrate, it may do so only with respect to disputes that she has with Unicel.

This argument suffers from multiple flaws.

To begin with, the service agreement's general definition of "we" and "us" as synonyms applies to the arbitration provision no less than to any other clause. But even without that contractual definition, it is a matter of basic English that the words "we" and "us" are synonyms. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523 (2002) (principal definition of "us" is "we"). "We" and "us" are merely the nominative and objective cases of the same first-person-plural pronoun. *Id. See generally* CHICAGO MANUAL OF STYLE §§ 5.22, 5.47-.50 (15th ed. 2003) (explaining that "[p]ersonal pronouns change form (or decline) according to person, number, and case"). Failure to acknowledge the relationship between the nominative and objective

cases is neither careful parsing of contractual language nor construction of an ambiguous term; it is "debilitated grammar." BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 663-64 (3d ed. 2009).

As a matter of law, "the contract language must be given effect in accordance with its plain, ordinary, and popular meaning." *Simpson Dev. Corp. v. Herrmann*, 583 A.2d 90, 92 (Vt. 1990); *accord Downtown Barre Dev. v. GU Mkts. of Barre, LLC*, 22 A.3d 1174, 1176-77 (Vt. 2011). "We" is the proper form when used as the subject of a sentence; "us" is the proper form when used as the direct object; "our" is the proper form when used as a possessive. The linguistic happenstance that personal pronouns change form does not and cannot alter their meaning. Otherwise, the contract would be rendered unintelligible—a result that Vermont law does not countenance. *See, e.g.*, *Post*, 2010 WL 3323659, at *7.

Beyond that, the Unicel arbitration provision defines the class of arbitrable issues to include not just "disputes * * * between you and us" and disputes arising out of "any prior or future dealings between you and us," but also "disputes * * * arising out of or relating to your Service or this agreement (including any renewals or

extensions)" and those "arising out of or relating to * * * any goods or services provided to you." ER175. Neither of those latter clauses refers to "us" at all. Severance's claims here relate to her wireless service, to "renewals or extensions" of that service, and to her service agreement because, as she alleges in her Complaint, the text messages that ATTM sent her were "designed to convince [her] to switch from" the old Unicel service (ER186-87), which ATTM was then operating, to ATTM's regular service.

But even if everything turned on the meaning of "us," and even if that term were ambiguous, "[t]he [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). It follows that "where [a] contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). "[A]ny doubts concerning the scope of arbitrable issues should

be resolved in favor of arbitration [when] the problem at hand is the construction of the contract language." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (internal quotation marks omitted).

The court below opined that the meaning of "us" is ambiguous, explaining that, even if the word might carry the narrow meaning urged by Severance, "[i]t is reasonable to conclude that Unicel meant the agreement to apply broadly to essentially any claim arising between a customer and Unicel or any person or entity with a relationship with Unicel." ER10.[7] Under those circumstances, as the

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[7] The district court based its determination that the word "us" is ambiguous on the following hypothetical: "I met Janet at noon. We (along with our friends) went to the courthouse because the judge wanted to speak with us." ER10 (internal quotation marks omitted). The court reasoned that more context would be necessary to determine whether the hypothetical judge wanted to speak with Janet and the author only, or also with their friends. Taking that to mean, in essence, that "us" is inherently ambiguous, the court concluded that there was insufficient context in the Unicel contract to clear up all possible confusion. But "along with our friends" is not a definition of "we" the way that "including our assignees, agents, etc." is. And even if "us" were ambiguous in the hypothetical, that does not make it so in other contexts, such as the Unicel contract. The context for understanding "us" here is the contract's definition of "we" and "us" as synonyms, as well as the rules of English grammar and usage described above.

court below held, Severance does not and cannot overcome the heavy presumption of arbitrability. *Id.*

3. Severance also argues that the Vermont Supreme Court has already held that messages sent by ATTM are outside the scope of the Unicel arbitration provision, and she contends that the district court erred in refusing to give that decision preclusive effect. Br. 38-40 (citing *Porter v. AT&T Mobility, LLC*, 35 A.3d 1002 (Vt. 2011)).[8]

The district court had "broad discretion" to decline to apply offensive nonmutual issue preclusion—the relevant preclusion doctrine here. *Syverson v. Int'l Bus. Machs. Corp.*, 472 F.3d 1072, 1078-79 (9th Cir. 2007). "[A]pplication of offensive nonmutual issue preclusion is appropriate only if," among other requirements, "the identical issue * * * was actually litigated in the prior action * * * [and] was decided in a final judgment." *Id.* at 1078. And "even where [those] standard prerequisites are met," the district court always retains "the authority to take potential shortcomings or indices of

[8] *Porter* was still on appeal at the time that the district court granted ATTM's motion to compel arbitration. It was the *Porter* trial-court order to which the district court denied preclusive effect.

unfairness into account." *Id.*[9] Thus, this Court "will not disturb a district court's exercise of discretion" without "a definite and firm conviction that the court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 329 (9th Cir. 1988) (ellipses in original; internal quotation marks omitted).

Here, the district court determined that not even the standard prerequisites were met because it "[could not] be confident that the *Porter* court resolved any issue essential to this litigation." ER12. That determination is not an abuse of discretion: It is clearly correct.

Porter did not address whether the Unicel arbitration agreement covers claims against ATTM arising out of conduct occurring after ATTM acquired a Unicel customer's contract. Rather, the Vermont courts found in *Porter* that ATTM had failed to provide sufficient evidence that Verizon sold the particular plaintiff's contract

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[9] *See generally, e.g.*, *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 248-49 (3d Cir. 2006) (discretion to deny offensive non-mutual preclusion is critical because of doctrine's "unique potential for unfairness" to defendants) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979)); *Sales v. Grant*, 158 F.3d 768, 780 (4th Cir. 1998) (broad discretion necessary because of doctrine's "particular possibilities for inequity").

when it divested the Unicel assets in 2008. *See Porter*, 35 A.3d at 1004. This factual finding was the basis for the Vermont courts' ruling that, when ATTM sent text messages to the plaintiff in *Porter*, it did not have a contractual relationship with him or any connection to his service. *See id.* For that reason—and for that reason alone—the courts found that ATTM could not assert rights under the arbitration provision in the *Porter* plaintiff's contract.[10]

In this case, by contrast, it is undisputed that Severance's contract was acquired from Verizon in December 2008. SER7-8 ("According to ATTM's records," Severance's contract was "acquired by AT&T in December 2008 and subsequently transferred to ATTM's billing system."). As the district court held, therefore, Severance "cannot take refuge in [*Porter*], because [she does] not dispute ATTM's

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[10] Indeed, the Vermont Supreme Court's opinion affirmatively ***supports*** our position here. The court had no doubt that "AT&T, as Unicel's assignee and successor, certainly took whatever interest the assignor possessed when it assumed [plaintiff's] contract." 35 A.3d at 1007 (internal quotation marks omitted). The problem for ATTM was that "that 'interest' did not include the ability to compel arbitration between [plaintiff] and AT&T" because "[a]t the time AT&T sent [plaintiff] the offending text messages, AT&T was not—***based on the evidence it submitted***—a party to the contract." *Id.* (emphasis added).

evidence that it acquired [her] Unicel agreement[] in December 2008." ER12.

What is more, the district court properly exercised its discretion in determining that "it would not be fair to apply issue preclusion" here, because the pro se plaintiff in *Porter* "was not attempting to represent a class of all ATTM's former Unicel customers in Vermont," and therefore "ATTM had a lesser incentive to litigate the *Porter* case." ER 13; *see, e.g.*, *Parklane*, 439 U.S. at 330-31; *Syverson*, 472 F.3d at 1079. That determination was not an abuse of discretion; and it alone is enough to support the district court's decision not to apply issue preclusion. *See Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 776 (9th Cir. 2003) (affirming denial of preclusion "notwithstanding [district court's] erroneous conclusion on the 'necessarily decided' question" because court properly considered question of unfairness to defendant).

II. Supreme Court And Ninth Circuit Precedent Foreclose Severance's Vindication-Of-Statutory-Rights Argument.

Relying principally on *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012) ("*AmEx III*"), *reh'g en banc denied*, __ F.3d __, 2012 WL 1918142 (May 29, 2012), Severance

argues that a court may refuse to enforce an agreement to arbitrate on an individual basis if it concludes that the plaintiff cannot vindicate federal statutory claims without class-wide procedures. Br. 42-43. This argument fails for multiple reasons.

1. First of all, the court below found that Severance "f[e]ll well short of proving" that her arbitration agreement makes it impossible for her to vindicate her TCPA claims. ER22.[11] That finding is clearly correct—and certainly not clearly erroneous. "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 92 (2000). Even if proof that the cost of pursuing a claim in arbitration exceeds its value were sufficient to avoid arbitration under Supreme Court

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[11] Severance is mistaken in asserting that the district court "correctly recognized that an arbitration clause and class action waiver is invalid if it prevents a plaintiff from vindicating her federal statutory rights" (Br. 42). The court never reached that legal question. ER21 & n.11 ("Even assuming that the Ninth Circuit would apply the vindication-of-statutory-rights defense * * *, it would be of no benefit" here because "[n]o Plaintiff has shown that their arbitration agreement deprives them of the opportunity to vindicate their statutory claims.").

precedent (*but see* pp. 33-41, *infra*), Severance's proof consisted solely of a declaration by her attorney that the anticipated discovery costs would be high and that the potential recovery would be too low to interest any lawyer in taking the case. ER40. Severance offered nothing to support those assertions—no expert testimony, no list of anticipated expenditures, no cost estimates, and no comparative data from similar cases.

Nor could she: Individual arbitration would not be expensive. To pursue her claim, Severance would need only identify the supposedly illegal text messages and then join issue with ATTM over whether they were within the TCPA's safe harbor for calls made to existing customers (*see* 47 U.S.C. § 227(b)(1)(C) (TCPA exempts unsolicited advertisements "from a sender with an established business relationship with the recipient")). These kinds of unexceptional tasks hardly cost so much as to make vindication of a TCPA claim unrealistic. *Cf. Francis v. AT&T Mobility LLC*, 2009 WL 416063, at *8 (E.D. Mich. Feb. 18, 2009) (rejecting argument that it would require "millions of dollars in discovery and expert costs" to arbitrate claim that customer had been improperly charged for domestic calls at international rates, and noting that customer could present a claim

based on his bills, memory, and travel records).[12] That is all the more true given the availability to Severance of ATTM's exceptionally consumer-friendly arbitration agreement, which provides affirmative incentives for both claimants and their attorneys to pursue claims on an individual basis. *See Concepcion*, 131 S. Ct. at 1753 (endorsing district court's finding that ATTM's arbitration provision "provide[s] incentive for the individual prosecution of meritorious claims that are not immediately settled"). As the district court found, Severance "will be hard-pressed to prove that [she] cannot vindicate [her] statutory

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[12] Severance contends that she would need substantial discovery and a queue of experts to prove that ATTM sent the text messages using an "automatic telephone dialing system" as defined by the TCPA. *See* Br. 50 (citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009)). That conflates full-scale class-action litigation, which "requires procedural formality" in order to adjudicate the claims of absent class members while comporting with due process (*Concepcion*, 131 S. Ct. at 1751 (emphasis omitted)), with the "lower costs [and] greater efficiency and speed" of individual arbitration (*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010)). If it were necessary in individual arbitration to prove that ATTM used an "automatic telephone dialing system," that could be accomplished by means of a straightforward written interrogatory.

rights in arbitration," "given that ATTM has offered to substitute the terms of its arbitration agreement." ER22.[13]

For this reason, the unsupported assertion of Severance's counsel that the potential recovery in individual arbitration would be too low to interest lawyers in taking a case like this one (ER40) misses the point: Under the consumer-friendly terms available to

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[13] Severance contends that ATTM "cannot unilaterally substitute its terms for those in the Unicel agreement." Br. 57. But in keeping with the mandate that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" (*Moses H. Cone*, 460 U.S. at 24), the federal courts routinely look to unilateral improvements in terms by the proponent of arbitration when determining the enforceability of an arbitration agreement. *See, e.g.*, *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 124 (2d Cir. 2010); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 n.3 (5th Cir. 2004) (defendant's representation that it will pay arbitration costs, extending to former employees the terms of arbitration provision in current employees' contracts, "completely forecloses" possibility that plaintiff would face prohibitive arbitration fees and costs); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1029 (11th Cir. 2003); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) (defendant's offer to pay arbitration costs and to hold arbitration in plaintiffs' home state "mooted the issue of arbitration costs"); *see also, e.g.*, *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 763 & n.7 (Wash. 2004) (en banc) ("refus[ing] to ignore" defendant's offer to pay arbitration fees and costs, which rendered "moot" any argument that fees were unconscionable).

Severance, lawyers can obtain double attorneys' fees if their clients are awarded more than ATTM's last settlement offer. SER17-18. That aspect of the arbitration provision creates a powerful incentive for ATTM to include a reasonable amount of attorneys' fees in its settlement offers, and hence for lawyers to represent ATTM customers on an individual basis. *See Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *10 n.7 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom. Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (rejecting Ninth Circuit's holding that FAA does not preempt California's rule invalidating agreements to arbitrate disputes on individual basis, but agreeing with district court that ATTM's arbitration provision offers adequate incentives for individual prosecution of claims). And even apart from the unique incentives created by ATTM's arbitration provision, a Chicago-based lawyer's opinion that "[t]he relatively small amount of individual damages at issue for claims under the TCPA provides little incentive for attorneys to take on such cases on an individual basis" (ER40) hardly constitutes proof that there are no competent lawyers in Vermont who

would be willing to pursue TCPA claims on behalf of Vermont customers on an individual basis.[14]

2. In any event, *Concepcion* and this Court's subsequent decisions in *Kilgore v. Keybank, National Association*, 673 F.3d 947 (9th Cir. 2012), and *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), reject the legal premise of Severance's argument. Those and other decisions make clear that, unless Congress expresses its intention to forbid individual arbitration in a particular category of cases, which it has not done in the TCPA, the FAA requires that arbitration agreements be enforced as written. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (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'"); *Mitsubishi*, 473 U.S. at 628 (to overcome

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[14] Severance suggests that no attorney would take on an individual TCPA case because the cost of retaining an attorney would outstrip the potential statutory recovery of $1,500 per violation. Br. 51-52 (citing ER39-40). But she overlooks the fact that a Vermont resident who proves a violation of the TCPA would be entitled to an award of attorneys' fees under state law. *See* 9 VT. STAT. ANN. §§ 2464a–2464c.

FAA, "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue").

Nothing in the text or legislative history of the TCPA specifically authorizes—or even mentions—class actions, much less declares them sacrosanct. *See* 47 U.S.C. § 227; *Leyse v. Flagship Capital Servs. Corp.*, 2004 WL 5641598 (N.Y. Sup. Ct. 2004) ("It is uncontroverted that 47 USC § 227 does not specifically authorize a class action recovery."), *aff'd*, 803 N.Y.S. 2d 52 (App. Div. 2005).[15]

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[15] Not only did Congress decline to authorize class actions and forbid arbitration, but it created only a conditional right to bring private actions ***even on an individual basis***. The TCPA authorizes private suits only to the extent that they are "otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3). Thus, it is state, not federal, law that determines whether the class device is even potentially available. *Holster v. Gatco, Inc.*, 618 F.3d 214, 216-18 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 2151 (2011); *see also Giovanniello v. ALM Media, LLC*, 660 F.3d 587, 592 & n.3 (2d Cir. 2011) (reaffirming *Holster*), *petition for cert. filed*, No. 11-1411 (U.S. May 21, 2012); *U.S. Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112 (10th Cir. 2007) (state law governs when plaintiff has standing to bring TCPA action). And state law may be far more restrictive of class actions than the Federal Rules of Civil Procedure are. *Compare* Fed. R. Civ. P. 23 *with, e.g.*, N.Y. C.P.L.R. 901(b) (prohibiting class actions except when specifically authorized by statute). In declining to create an independent, private right of action under federal law, Congress cannot have meant to confer an even more expansive, non-waivable right to litigate on behalf of a class.

But even if Congress ***had*** expressly created a right to bring class actions under the TCPA, that ***still*** would not support Severance's position here. The question is not just whether Congress meant to allow for class actions, but whether it intended to "preclude a waiver of judicial remedies" under the TCPA. *Mitsubishi*, 473 U.S. at 628. Thus, for example, although the Age Discrimination in Employment Act ***does*** explicitly authorize class actions (29 U.S.C. § 626(b) (incorporating express authorization of class actions in Fair Labor Standards Act, 29 U.S.C. § 216(b))), the Supreme Court has nonetheless held that the FAA requires courts to enforce agreements to arbitrate ADEA claims—"even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator" (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (internal quotation marks omitted)). "[T]he fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* (internal quotation marks omitted). If the FAA requires enforcement of agreements to arbitrate individually even when the plaintiff's claims arise under a federal statute that expressly authorizes class actions, "*a fortiori*, the same result obtains under the

[TCPA], which do[es] not." *In re Am. Express Merchs.' Litig.*, __ F.3d __, 2012 WL 1918412, at *10 (2d Cir. May 29, 2012) (Jacobs, C.J., dissenting from denial of reh'g in banc).

3. What is more, the Supreme Court has flatly rejected the argument that class procedures must remain available for claims that are too small to be worth pursuing on an individual basis. *Compare* Br. 43 *with Concepcion*, 131 S. Ct. at 1753, *Coneff*, 673 F.3d at 1158 (*Concepcion* "expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers"), *and Kilgore,* 673 F.3d at 957 ("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"). As the Supreme Court explained in *Concepcion*, the FAA forbids superimposing class procedures on otherwise-valid agreements to arbitrate, "even if" those procedures are "desirable for unrelated reasons." 131 S. Ct. at 1753; *see Coneff*, 673 F.3d at 1159 ("as the Supreme Court stated in *Concepcion*, * * * policy concerns, however worthwhile, cannot undermine the FAA"); *Kilgore*, 673 F.3d at 961 ("policy arguments * * *, however worthy they may be, can no longer invalidate an otherwise enforceable arbitration agreement").

Although the Supreme Court made these pronouncements in the context of invalidating a state-law rule that declared class-action waivers unconscionable, *Concepcion* "is broadly written." *Coneff*, 673 F.3d at 1158. It unequivocally holds that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748; *see Coneff*, 673 F.3d at 1158. That holding 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 rooted in state law. Thus, the Supreme Court recently reiterated 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*, 132 S. Ct. at 669.

In keeping with that rule, this Court held in *Coneff* that the FAA forbids invalidating class-action waivers on the ground that individual claims "cannot be vindicated effectively because they are worth much less than the cost of litigating them"—and that is true regardless of whether the claims arise under a federal or state statute. 673 F.3d at 1158-59 & nn.2-3; *see id.* at 1157 (plaintiffs

alleged violations of Federal Communications Act as well as various state-law claims). Thus, even if "most customers would not bother filing claims because the amounts are too small to be worth the trouble," that is not a valid ground for departing from the FAA's clear mandate to enforce arbitration agreements as written:

> [T]he concern is not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so. That concern is, of course, a primary policy rationale for class actions * * *. But as the Supreme Court stated in *Concepcion*, such unrelated policy concerns, however worthwhile, cannot undermine the FAA.

Id. at 1159 (emphasis in original).

Severance relies on the Second Circuit's decision in *AmEx III* for the proposition that the Supreme Court's decision in *Green Tree* makes arbitration agreements unenforceable if the cost of pursuing an individual claim under a federal statute is high and the potential recovery is small. Br. 44. But this Court stated in *Coneff* that, if the *AmEx III* panel really meant to say that, "we disagree with it." 673 F.3d at 1159 & n.3 (*AmEx III*'s statement that "'the only *economically feasible means* for plaintiffs enforcing their statutory rights is via a class action'" improperly focuses on incentives to bring individual

claims rather than on genuine inability to vindicate rights) (emphasis in original). Indeed, five judges of the Second Circuit agree that *AmEx III* is irreconcilable with *Coneff*—and at least three, if not all five, also agree that *Coneff* is correct and that *AmEx III* cannot be squared with Supreme Court precedent. *See In re Am. Express Merchs.' Litig.*, 2012 WL 1918412, at *7 (Jacobs, C.J., joined by Cabranes and Livingston, JJ., dissenting from denial of reh'g in banc) (*AmEx III* is irreconcilable with *Coneff* and erroneous under *Concepcion* and *Green Tree*); *id.* at *11 (Raggi, J., joined by Wesley, J., dissenting from reh'g in banc) ("circuit split [with *Coneff*] appears unwarranted in light of controlling Supreme Court precedent for the reasons forcefully advanced by Chief Judge Jacobs").[16] In all events, *Coneff*, not *AmEx III*, is binding Circuit precedent.

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[16] As Chief Judge Jacobs recognized, *Coneff* rejected vindication-of-statutory-rights arguments for federal as well as state statutes "because under the FAA it is irrelevant whether customers 'have insufficient incentive' 'to vindicate their rights.'" *Id.* at *7 (quoting *Coneff*, 673 F.3d at 1159 (citing *Concepcion*, 131 S. Ct. at 1753)). Chief Judge Jacobs went on to explain that *Green Tree*'s "dicta" about "large arbitration costs" potentially preventing litigants from vindicating federal statutory rights "is not a reference to expense generally," but instead refers solely to "the cost of access to an arbitral forum and is about the price of admission: 'payment of filing fees, arbitrators' costs, and other arbitration expenses.'" *Id.* at *9 (quoting *Green Tree*, 531 U.S. at 84); *accord Hendricks v. AT&T Mobility, LLC*, 823 F. Supp. 2d

Simply put, the notion "that arbitration must never prevent a plaintiff from vindicating a claim" is "inconsistent with *Concepcion*," in which the Supreme Court held that class-action waivers are enforceable even after it "recognized the possibility that 'small-dollar claims might slip through the system.'" *Kaltwasser*, 812 F. Supp. 2d at 1048 (quoting *Concepcion*, 131 S. Ct. at 1753) (alterations omitted); *accord Coneff*, 673 F.3d at 1158; *Kilgore*, 673 F.3d at 957; *Hendricks*, 823 F. Supp. 2d at 1021. It is just "incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case

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1015, 1022 (N.D. Cal. 2011); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011) ("If *Green Tree* has any continuing applicability [post-*Concepcion*], 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 class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed[s] potential individual damages.") (citation omitted). Severance would bear none of those costs here. If *Green Tree* instead meant that ordinary litigation expenses are a basis to void arbitration agreements, it could not be squared with *Concepcion*, and this Court "would remain bound by *Concepcion*, which more directly and more recently addresses the issue on appeal in this case." *Coneff*, 673 F.3d at 1159; *accord In re Am. Express Merchs.' Litig.*, 2012 WL 1918412, at *9 (Jacobs, C.J., dissenting from denial of reh'g in banc).

basis simply by providing individualized evidence about the costs and benefits at stake." *Kaltwasser*, 812 F. Supp. 2d at 1049.[17]

CONCLUSION

This Court should affirm the district court's order compelling Severance to arbitrate her disputes on an individual basis.

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[17] Such case-by-case review would be impracticable as well as irreconcilable with the FAA, because it would require federal courts to undertake a "searching" inquiry "on the merits in many critical respects * * * before any class arbitration can in fact take place." *In re Am. Express Merchs.' Litig.*, 2012 WL 1918412, at *6 (Jacobs, C.J., dissenting from denial of reh'g in banc). "Without a close inquiry into the merits, no court can decide what expert testimony would be required, or how much discovery is needed," or what the controlling law is, or what defenses might be available—all of which are prerequisites to determining how much it would cost to prepare and litigate a case. *Id.* "Under the FAA, however, all those questions are for the arbitrator to decide. * * * [R]equiring the district court to consider this at the threshold * * * effectively displaces arbitration with a trial court proceeding whenever lawyers assert a class claim[,] * * * [thus] render[ing] arbitration too expensive and too slow to serve any of its purposes." *Id.* at *7. In short, "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*, 823 F. Supp. 2d at 1021 (quoting *Kaltwasser*, 812 F. Supp. 2d at 1049).

Respectfully submitted,

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June 18, 2012

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June 18, 2012

STATEMENT OF RELATED CASES

Counsel for AT&T is unaware of any related cases pending in this Court.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of June 2012, I electronically filed the foregoing brief 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. I further certify that everyone who has filed a notice of appearance in this case is a registered CM/ECF user.

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