**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

# APPELLANTS' OPENING BRIEF


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## CORPORATE DISCLOSURE STATEMENT

AT&T Mobility LLC has no parent company. It has five members: SBC Long Distance, LLC; SBC Alloy Holdings, Inc.; AT&T Mobility Corporation; New BellSouth Cingular Holdings, Inc.; and BellSouth Mobile Data, Inc. New Cingular Wireless Services, Inc. has one shareholder, AT&T NCWS Holdings Inc. New Cingular Wireless PCS LLC has one member, AT&T Mobility II LLC, which is owned by both AT&T Mobility LLC and New Cingular Wireless Services, Inc.

All of these entities are privately held companies that are indirect, wholly owned subsidiaries of AT&T Inc., which is the only publicly held corporation with a 10 percent or more ownership interest in AT&T Mobility LLC; New Cingular Wireless Services, Inc.; or New Cingular Wireless PCS LLC.

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## JURISDICTIONAL STATEMENT

The district court had jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), because at least one plaintiff is from a state different than one defendant and the aggregate claims of the putative class exceed $5 million. Plaintiff-appellee Steven McArdle and the members of the putative class are citizens of California. ER 100. Defendants-appellants AT&T Mobility LLC and New Cingular Wireless PCS LLC are Delaware limited-liability companies with their principal places of business in Georgia. *Id.* Defendant-appellant New Cingular Wireless Services, Inc. is a Delaware corporation with its principal place of business in Georgia. *Id.*[1]

The district court denied ATTM's motion to compel arbitration on September 14, 2009. ER 1-16. ATTM timely filed a notice of appeal on October 6, 2009. ER 31. This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B), which authorizes an immediate appeal from an order denying a motion to compel arbitration.

## ISSUE PRESENTED

Whether, under *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Federal Arbitration Act ("FAA") requires enforcement of McArdle's agreement to arbitrate his dispute with ATTM on an individual basis.

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[1] We refer collectively to all defendants as "ATTM."

## STATEMENT OF THE CASE

McArdle filed a putative class action against ATTM in California state court. ATTM removed the case to the U.S. District Court for the Northern District of California. Notice of Removal (Dkt. No. 1). In its answer, ATTM asserted as a defense that McArdle was obligated to arbitrate his claims against ATTM. ER 91. McArdle filed a motion to strike the arbitration defense from the answer, and ATTM filed a cross-motion to compel arbitration. Mot. to Strike (Dkt. No. 40) at 1; Mot. to Compel Arb. (Dkt. No. 47) at 1. After the district court granted McArdle's motion to strike ATTM's arbitration defense and denied ATTM's motion to compel arbitration, ATTM filed this interlocutory appeal under 9 U.S.C. § 16(a).

## STATEMENT OF FACTS

### A. ATTM's Arbitration Provision.

The arbitration provision involved in this case requires both parties to "arbitrate **all disputes and claims** between us." ER 77 (emphasis in original). The provision specifies that "**[a]ny arbitration under this agreement will take place on an individual basis; class arbitrations and class actions are not permitted.**" *Id.* (emphasis in original).

As the Supreme Court recognized in *Concepcion* (131 S. Ct. at 1744 & n.3), ATTM's arbitration provision includes several features designed to ensure that

arbitration is a realistic and effective dispute-resolution mechanism for ATTM's customers:

- **Cost-free arbitration:** "[ATTM] will pay all [American Arbitration Association ("AAA")] filing, administration and arbitrator fees" for all claims up to $75,000 unless the arbitrator determines that the claim "is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))";[2]

- **$10,000 minimum award if arbitral award exceeds ATTM's settlement offer:** If the arbitrator awards the customer more than ATTM's "last written settlement offer made before an arbitrator was selected," ATTM will pay the customer the greater of $10,000 or the arbitral award;[3]

- **Double attorneys' fees:** If the arbitrator awards the customer more than ATTM's last written settlement offer, "[ATTM] will * * * pay [the customer's] attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration";[4]

- **ATTM disclaims right to seek attorneys' fees:** "Although under some laws [ATTM] may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, [ATTM] agrees that it will not seek such an

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[2] In the event that an arbitrator concludes that a customer's claim is frivolous, the AAA's consumer arbitration rules would cap the customer's arbitration costs at $125. *See* ER 43 (AAA, *Supplementary Procedures for Consumer-Related Disputes* § C-8).

[3] *Concepcion* involved an earlier version of ATTM's arbitration provision in which the minimum payment for California customers was $7,500. *See Concepcion*, 131 S. Ct. at 1744. But the Court also described the current version at issue in this case, noting that it employs a uniform minimum payment of $10,000. *Id.* at 1744 n.3.

[4] This attorney premium "supplements any right to attorneys' fees and expenses [that the customer] may have under applicable law." ER 78. Thus, even if an arbitrator were to award a customer less than ATTM's last settlement offer, the customer would be entitled to an attorneys' fee award to the same extent as if the claim had been brought in court.

award [from the customer]";

- **Small claims court option:** Either party may bring a claim in small claims court;

- **No confidentiality requirement:** The parties need not keep the arbitration confidential;

- **Full remedies available:** The arbitrator can award the same individual remedies (including statutory damages, punitive damages, attorneys' fees, and injunctions) that a court could award;

- **Flexible consumer procedures:** Arbitration will be conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;

- **Conveniently located hearing:** Arbitration will take place "in the county * * * of [the customer's] billing address";

- **Choice of in-person, telephonic, or no hearing:** For claims of $10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator"; and[5]

- **Right to a reasoned decision:** "Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based."

ER 77-78.

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[5] Under the AAA rules that would otherwise apply, either party may insist on a hearing in cases involving claims of $10,000 or less. *See* ER 42 (AAA, *Supplementary Procedures for Consumer-Related Disputes* §§ C-5, C-6). For claims exceeding $10,000, a hearing would be held unless both parties agreed to forgo it. *Id.*

### B. Proceedings Below.

McArdle, an ATTM customer from California, sued ATTM, alleging that it did not adequately disclose that he would be charged when it delivered calls to his wireless phone in Italy that went to voice mail and when he sent text messages from Italy to persons in the United States. ER 100, 106-07. Asserting fraud and violations of California consumer-protection statutes, he requests actual, statutory, and punitive damages, restitution, injunctive relief, and attorneys' fees. *Id.* at 106-08, 111-20. McArdle seeks to represent a putative class of California customers. *Id.* at 108-11.

McArdle also challenged the enforceability of his arbitration agreement. In the district court, McArdle acknowledged that he entered into a service agreement with ATTM that requires the parties to arbitrate disputes on an individual basis. *Id.* at 115; Mot. to Strike at 5. But he alleged that his arbitration agreement is unconscionable because it requires arbitration to take place on an individual basis, thereby precluding him from pursuing a class action. ER 115; Mot. to Strike at 5-12. McArdle sought an injunction that would prohibit ATTM from invoking the arbitration provision and require it to pay restitution and actual, statutory, and punitive damages. ER 115.[6]

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[6] These allegations are from McArdle's first amended complaint, which was the operative complaint at the time of the ruling below. While this appeal was pending, McArdle filed a second amended complaint adding claims on behalf of (cont'd)

In its answer to McArdle's complaint, ATTM asserted that McArdle was contractually bound to arbitrate his dispute on an individual basis. ER 91. ATTM also contended that McArdle's claims challenging ATTM's arbitration provision are preempted by the FAA. *Id.* at 92.

McArdle responded to ATTM's answer by moving to strike a number of ATTM's affirmative defenses—including the defenses of arbitration and FAA preemption. *Id.* at 17; Mot. to Strike at 7-14. In his motion to strike, McArdle argued that his arbitration agreement was unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), as interpreted by this Court in *Shroyer v. New Cingular Services, Inc.*, 498 F.3d 976 (9th Cir. 2007). ER 6-8, 17-18; Mot. to Strike at 9-14.

ATTM then moved to compel arbitration. The district court denied ATTM's motion to compel arbitration and granted McArdle's motion to strike in part. Agreeing with McArdle, the court held that ATTM's arbitration provision was unenforceable under California law because "[a]ll three parts of the *Discover Bank* test are satisfied by the class arbitration waiver in the present case * * *." ER 7. First, the court noted that McArdle's "service agreement is a consumer contract of adhesion." *Id.* Second, the court held that "disputes between cellular telephone

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two new putative classes of California customers: (1) those whose ATTM service agreements include provisions requiring arbitration to take place on an individual basis; and (2) those against whom ATTM had sought to invoke the arbitration provision. Second Am. Compl. (Dkt. No. 78) ¶¶ 41-43.

service providers and their customers predictably involve small amounts of damages," observing that McArdle's "alleg[ation] that he suffered only fourteen dollars in damages * * * exemplifies the point." *Id.* Third, the court noted that McArdle "alleges that Defendants have engaged in a scheme whereby they charge international roaming fees that are relatively small with respect to individual customers," thus obtaining "ill-gotten profits." *Id.* at 7-8.

The district court noted that the unique features of ATTM's current arbitration provision "are desirable and increase the fairness of the arbitration process to customers" but concluded that "these features do not change the fact that the *class arbitration waiver* is substantively unconscionable" under *Discover Bank*. *Id.* at 9 (emphasis in original).

The district court also rejected ATTM's contention that the FAA preempts California law. That contention, the court held, was "foreclosed by *Shroyer*." *Id.* at 15-16.

Because the arbitration agreement specifies that the prohibition of class arbitration is non-severable, the court concluded that ATTM's motion to compel arbitration should be denied. *Id.* at 2. The court also struck ATTM's arbitration defenses from the answer. *Id.* at 16-19.

ATTM appealed pursuant to Section 16 of the FAA. ER 32. Three weeks later, this Court held that a materially equivalent version of ATTM's arbitration

provision is unconscionable under California law (citing *Discover Bank*) and that the FAA does not preempt that law (citing *Shroyer*). *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853-59 (9th Cir. 2009). On April 27, 2011, the Supreme Court reversed this Court's decision in *Laster*, holding that the FAA does indeed preempt California's "*Discover Bank* rule." *Concepcion*, 131 S. Ct. at 1753.

## STANDARD OF REVIEW

"The validity * * * of an arbitration clause [is] reviewed de novo." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc).

## SUMMARY OF ARGUMENT

McArdle opposed ATTM's motion to compel arbitration on a single ground—that his arbitration agreement is unconscionable under *Discover Bank* because arbitration must be conducted on an individual basis. In *Concepcion*, the Supreme Court declared that "California's *Discover Bank* rule is preempted by the FAA." 131 S. Ct. at 1753.

There can be no question that *Concepcion* is dispositive here: The arbitration provision that McArdle identified in his complaint as the applicable one is ATTM's current provision, which is even more consumer-friendly than the predecessor version involved in *Concepcion*. *See id.* at 1744 & n.3 (comparing the two provisions). As the Supreme Court observed (quoting the lower courts), under ATTM's arbitration provision, consumers arguably would be "*better off* * * * than

they would be as participants in a class action." 131 S. Ct. at 1753. Because the application of *Discover Bank* to McArdle's arbitration agreement is preempted by the FAA, the order below should be reversed and remanded with instructions to compel arbitration.

## ARGUMENT

The district court concluded that McArdle's arbitration agreement is unconscionable under California's *Discover Bank* rule. ER 7-11. *Concepcion* establishes that the FAA preempts that state-law rule, eliminating any impediment to arbitration of McArdle's claims.

In *Concepcion*, the plaintiffs filed a putative class action, alleging that ATTM had not adequately disclosed that it would collect sales tax on the full retail price of cell phones offered as "free" or at a discount when bundled with ATTM wireless service. 131 S. Ct. at 1744. ATTM moved to compel arbitration under the arbitration provision in the Concepcions' service agreement (*id.*), which is the predecessor of the one in McArdle's agreement. The chief difference is that the minimum amount that ATTM would be required to pay the Concepcions in the event the arbitrator were to award them more than ATTM's last settlement offer was $7,500, whereas the minimum amount here would be $10,000. *See id.* at 1744 & n.3 (comparing the provisions); *see also* page 3, *supra*.

As McArdle did here, the Concepcions opposed arbitration, chiefly by

arguing that their arbitration agreement was unconscionable under *Discover Bank* because it requires that arbitration be conducted on an individual basis. *See Concepcion*, 131 S. Ct. at 1745. The district court agreed with that assessment and also rejected ATTM's contention that the FAA preempts California law. *Id.* This Court affirmed in *Laster*, relying on its earlier decision in *Shroyer*. *Id.*

The Supreme Court granted certiorari to "consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744. The Court explained that "[t]he overarching purpose of the FAA, evident in the text of [9 U.S.C.] §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. The Court added that it is "beyond dispute that the FAA was designed to promote arbitration." *Id.* at 1749. In particular, the FAA embodies a "national policy favoring arbitration and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* (internal quotation marks and citations omitted).

The Court concluded that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. The Court explained that "the

switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. In addition, the Court noted that "class arbitration *requires* procedural formality" that Congress would not have intended to allow states to impose. *Id.* at 1751-52. The Court also observed that class arbitration so "greatly increases risks to defendants" that they would abandon arbitration altogether if states could condition enforcement of arbitration agreements on the availability of class procedures. *Id.* at 1752. The Court therefore concluded that, "[b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's *Discover Bank* rule is preempted by the FAA." *Id.* at 1753 (internal quotation marks and citation omitted).

The Court also rejected the argument made in the dissenting opinion that "class proceedings are sometimes necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* As the Court explained, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"—such as California's public policy favoring the use of class procedures in cases involving small claims. *Id.* The Court added that, in view of the features of ATTM's arbitration provision, "the claim here was most unlikely to go unresolved." *Id.* The Court then endorsed this Court's conclusion

that "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole" under ATTM's arbitration provision. *Id.* (quoting *Laster*, 584 F.3d at 856 n.9) (alteration by Court). The Court also endorsed the district court's assessment that plaintiffs arguably are "*better off* under their arbitration agreement with AT&T than they would have been as participants in a class action." *Id.* (citing *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *12 (S.D. Cal. Aug. 11, 2008)) (emphasis added by Court).

*Concepcion* makes clear that the order below must be reversed with instructions to compel arbitration. The court below concluded that McArdle's arbitration agreement is unenforceable under the *Discover Bank* rule and that the FAA does not preempt that rule. ER 11-13. The Supreme Court held to the contrary that "California's *Discover Bank* rule is preempted by the FAA." *Concepcion*, 131 S. Ct. at 1753.

Accordingly, McArdle's dispute should be referred to arbitration promptly. The Supreme Court long ago explained that "the unmistakably clear congressional purpose" of the FAA is "that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *see also, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) ("Congress's clear intent, in the [FAA], [was] to move the parties

to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."). Given the clear holding in *Concepcion*, any further delay of arbitration is inappropriate.

## 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: June 13, 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

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DATED: June 13, 2011

MAYER BROWN LLP

s/ Evan M. Tager
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## STATEMENT OF RELATED CASES

Counsel for ATTM is aware of three related cases pending in this Court:

- *Cherny v. AT&T Mobility LLC*, No. 09-56964
- *Coneff v. AT&T Corp.*, No. 09-35563
- *Knudtson v. AT&T Mobility LLC*, No. 10-35242

*Cherny* and *Knudtson* are appeals from orders denying motions to compel arbitration under the same version of ATTM's provision as in this case. *Coneff* is an appeal from an order denying of a motion to compel arbitration under an earlier, but substantially similar, version of ATTM's arbitration provision.

Unlike this case, the plaintiff in *Cherny* opposed arbitration on multiple grounds that McArdle did not raise here. In addition, *Coneff* and *Knudtson* do not involve the issue of whether the FAA preempts California law. Rather, those cases involve preemption of Washington law. *Coneff* also involves choice-of-law issues. Following the completion of briefing, this Court has determined that *Coneff* and *Knudtson* are to be argued on the same day before the same panel.

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of June 2011, 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 also deposited four copies of the Excerpts of Record with a third party commercial carrier for overnight delivery to the Clerk of the Court.

DATED: June 13, 2011

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