06-1871-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, CASE NO. 03-CV-9592

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that the Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF *AMICUS*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing more than 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and trade and professional organizations. Because many of the Chamber's members regularly use arbitration agreements in their contracts with customers and employees, the Chamber often participates in cases involving arbitration agreements. *E.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

SUMMARY OF THE ARGUMENT

This is one of those rare cases that requires rehearing en banc and correction by the full body of this Court. The panel decision conflicts with the teaching of recent Supreme Court precedent, Fed. R. App. P. 35(b)(1)(A), most notably *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Concepcion* prohibits conditioning the enforceability of arbitration agreements on the availability of class procedures and it rejects the very rationale relied upon by the panel. The panel artificially limited *Concepcion* to the bare facts of that case. It then badly misread

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party, or person other than *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

The issue has potentially far-reaching consequences.[2] In fact, the arbitrability of class and collective actions post-*Concepcion* is presently raised in at least three other cases pending before this Court.[3] The issue should not be resolved by a two-member panel of this Court without full briefing and oral argument. The Supreme Court has already vacated and remanded the panel's original decision in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), indicating the Court's belief that there was a "reasonable probability" that the panel would reverse course, *Lawrence v. Chater*, 516 U.S. 163, 171-72 (1996). The panel's decision to instead reaffirm its ruling, particularly after its reasoning was substantially undercut by *Concepcion*, warrants en banc reconsideration. This case presents exactly the kind of "question of exceptional importance" that warrants consideration by all the active members of the full court. Fed. R. App. P. 35(a)(2).

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[2] Litigants have already begun seizing on the panel's rationale as the basis for an exception that could effectively swallow the rule of *Concepcion*. *E.g.*, Notice Supp. Auth. at 1-2, Dkt. No. 86, *Kilgore v. KeyBank Nat'l Ass'n*, No. 09-16703 (9th Cir. filed Feb. 8, 2012); Notice Supp. Auth. at 1, Dkt. No. 57, *Cardenas v. Americredit Fin. Servs. Inc.*, No. 10-17292 (9th Cir. filed Feb. 7, 2012); Notice Supp. Auth. at 1, Dkt. No. 50, *Aggarao v. Mol Ship Mgmt. Co.*, No. 10-2211 (4th Cir. filed Feb. 6, 2012).

[3] *See Raniere v. Citigroup Inc.*, No. 11-5213 (2d Cir. filed Dec. 15, 2011); *Chen-Oster v. Goldman, Sachs & Co.*, No. 11-5229 (2d Cir. filed Dec. 15, 2011); *Sutherland v. Ernst & Young LLP*, No. 12-304 (2d Cir. filed Jan. 24, 2012).

I. THE PANEL DECISION CONFLICTS WITH THE RULE OF LAW ANNOUNCED IN *CONCEPCION*.

In *Concepcion*, the Supreme Court held that "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the FAA. 131 S. Ct. at 1744. The *Concepcion* Court rejected the theory that class procedures must remain available to ensure that sufficient financial incentive exists for the advancement of claims that otherwise might not be economically feasible. *Id.* at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). The Court also held that class arbitration is inconsistent with the essential features of arbitration itself, and cannot be required absent consent. *Id.* at 1750-51.

Yet, as the Petition explains, the panel "refused to enforce American Express's arbitration agreement with merchants that choose to accept American Express cards because that agreement does not allow classwide arbitration." Pet. at 1; *see also* Op. 24. And it did so on the theory that class procedures are necessary to ensure that the antitrust claims at issue would be "economically feasible." Op. 22. That the panel did not actually compel class arbitration, but instead required potential class treatment in court, Op. 15, does nothing to alleviate the conflict. The panel declared an arbitration agreement unenforceable because it does not make class procedures available. After *Concepcion*, no lower federal court has the authority to arrive at that result.

No doubt recognizing this conflict, the panel imposed an extremely narrow view of *Concepcion*, improperly limiting the case to its facts. According to the panel, *Concepcion* only "offers a path for analyzing whether a state contract law is preempted by the FAA," whereas "our holding rests squarely on 'a vindication of statutory rights analysis[.]'" Op. 14.

The FAA precludes the panel's attempt to pigeonhole *Concepcion* as only applying to state laws that conflict with the FAA. The Supreme Court held unequivocally that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. The rule of law that class arbitration "is not arbitration as envisioned by the FAA," *id.* at 1753, and may be imposed by a court based only on consent of the parties, is binding in *any* application of the FAA in *any* context. It is a part of the body of "federal substantive law of arbitrability" that the panel purported to rely upon in this case, Op. 14, and it is directly contradictory to the panel's reasoning and result.

Congress may, of course, make exceptions to the statutory commands of the FAA and thereby alter the "body of federal substantive law of arbitrability" that is otherwise "applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). But where Congress declines to exercise that authority, the FAA applies to a federal

statutory claim in precisely the same manner as it applies to a claim under state law. There is no basis for permitting federal courts to create rules of federal common law that bar enforcement of arbitration clauses on grounds that the FAA forbids to the States. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms . . . [e]ven when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command.") (quotation omitted). Because nothing in the antitrust laws requires parties that agree to arbitrate their claims to preserve the availability of class procedures, the panel's decision to condition the enforceability of an arbitration agreement on the availability of class procedures cannot stand in the face of *Concepcion*.

II. THE PANEL'S "VINDICATION OF FEDERAL STATUTORY RIGHTS" RATIONALE RESTS UPON A FUNDAMENTAL MISUNDERSTANDING OF *GREEN TREE*.

Green Tree explained that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. at 90. The panel ignored *Green Tree*'s focus on "*arbitration* costs" and instead nullified American Express's arbitration clause based on putative litigation expenses that are not connected in any way to arbitration itself and, in fact, may not even be incurred in the less formal setting of

arbitration. In fact, it is more likely that many of the costs of formal litigation under the Federal Rules of Evidence will not be incurred in individual arbitration. *See Stolt-Nielsen*, 130 S. Ct. at 1775 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs [and] greater efficiency and speed."). Thus, even under the wrong cost inquiry, the panel erroneously assumed that all costs of litigation would be present in the bilateral arbitration. Op. 22-23.

Green Tree offers the proper, limited cost inquiry. First, it makes clear that the "arbitration costs" to which it refers are not the costs borne by a claimant in adjudicating her claim in *any* forum but, rather, only those costs borne "in an arbitral forum," *i.e.*, those costs *unique* to arbitration. *Id.* Indeed, the Court referenced only "filing fees" and the "arbitrator's fee," but not expenses that may be part of proving one's claim in any forum. *Id.* at 91 n.6. The panel ignored this critical limitation and considered the costs of litigation generally, including "attorney's fees" and what it estimated as "substantial expert witness costs," in deciding whether there was adequate incentive to bring the claim in the forum selected by the parties. Op. 22-23. This erroneous cost consideration is nothing more than the *Discover Bank* rule that was rejected in *Concepcion* dressed up in the garb of federal common law. *See Concepcion*, 131 S. Ct. at 1750-51.

Second, the panel compounded its error by comparing the total costs of adjudicating the case against the amount of the plaintiff's potential award to determine whether the plaintiff would have sufficient economic incentive to bring its claim on an individual basis. Even aside from the fact that this is the precise mode of analysis barred by the rule of *Concepcion*,[4] there is no support for this type of comparative analysis in *Green Tree*. The driving principle of *Green Tree* is one of *access* to the arbitral forum, not whether the would-be claimant has sufficient economic interest to advance or prevail on his claim. In fact, *Green Tree* itself involved an arbitration agreement with a class waiver provision, *id.* at 92 n.7, but this fact passed unmentioned in the Court's analysis of the "costs of arbitration."

The panel's expansion of *Green Tree* beyond arbitration-specific costs is in substantial conflict with Supreme Court precedent, which has generally rejected judge-made exceptions to rigorous enforcement of the terms of all arbitration agreements. The Court reinforced that principle only weeks ago in *CompuCredit*,

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[4] As one federal court put it, "[i]f *Green Tree* has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims . . . . *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages." *Kaltwasser v. AT&T Mobility LLC*, __ F. Supp. 2d. __, No. C 07-00411, 2011 WL 4381748, at *6 (N.D. Cal. Sept. 20, 2011).

132 S. Ct. at 669. *CompuCredit* makes clear that it is for Congress, not a federal appellate court, to make any exceptions to the enforceability of an arbitration clause. As the Supreme Court previously emphasized in *14 Penn Plaza v. Pyett*: "Congress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable." 129 S. Ct. 1456, 1472 (2009) (quotation omitted). The panel clearly erred in refusing to enforce an arbitration agreement based on a novel, judicially-crafted exception to the FAA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 29 and 35, counsel for *amicus curiae* certifies that the foregoing brief does not exceed 7.5 double-spaced pages. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared using a proportionally spaced typeface, using Microsoft Office Word 2003, 14-point Times New Roman font.

/s/ Andrew G. McBride
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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25 and Local Rule 25.2, I hereby certify that the foregoing brief was filed on February 15, 2012 by delivering the original and 15 paper copies of the brief by hand to the Clerk's office and by sending a digital version of the brief by electronic mail to civilcases@ca2.uscourts.gov on February 15, 2012.

I further certify that, on February 15, 2012, two paper copies of the brief were served by overnight mail on the parties on the attached service list, and a digital version of the brief was served by electronic mail on the parties on the service list below.

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