SUPREME COURT OF FLORIDA

CASE NO. SC-11-514

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC, STEVE A. MCKENZIE, and BRENDA G. LAWSON,

Petitioners,

vs.

WENDY BETTS, DONNA REUTER, et al.,

Respondents.

L.T. Case No.: 4D08-493 & 4D08-494

On Review of a Certified Question of Great Public Importance from the Fourth District Court of Appeal

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing more than 3,000,000 businesses and organizations of every size and in every sector of the Nation's economy.

Many of the Chamber's members have adopted contract provisions that require the parties to pursue disputes in arbitration rather than courts of general jurisdiction. Chamber members use arbitration because—in its traditional, bilateral form—it is a quick, fair, inexpensive, and less adversarial method of resolving disputes. But those advantages would be lost if arbitration were conditioned on the availability of class-action procedures. The Chamber thus has a strong interest in explaining why bilateral arbitration agreements should be enforced.

SUMMARY OF ARGUMENT

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court held that the Federal Arbitration Act ("FAA") precludes a State from refusing to enforce an arbitration agreement on the ground that the agreement does not permit the plaintiffs to pursue class treatment of claims. As the Supreme Court explained, "States cannot require a procedure that is inconsistent with the FAA, ***even if it is desirable for unrelated reasons***." *Id.* at 1753 (emphasis added). On that basis, the Court specifically rejected the dissent's concern that "class

proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.*

Under *Concepcion*, the decision of the District Court of Appeal cannot stand. The DCA acknowledged that it had previously "held that an arbitration clause's class action waiver did not defeat [the] remedial purpose"o f the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). *McKenzie v. Betts*, 55 So. 3d 615, 622 (Fla. 4th DCA 2011) (citing *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019 (Fla. 4th DCA 2005)). But—relying chiefly on testimony by plaintiffs' lawyers who said that they would not handle the types of individual claims brought by plaintiffs—it concluded that "[t]he inability to bring a class action suit against McKenzie would eviscerate the remedial purposes of the relied-upon statutes" and thus would violate Florida public policy. *Id.* at 623. That holding would allow plaintiffs to evade their arbitration agreements by an easy maneuver: All their lawyers would need to do is recruit trial-bar colleagues to offer self-serving testimony asserting that class actions are indispensable. If arbitration agreements could be avoided by that simple expedient, such a rule of Florida law would be as "toothless and malleable" as the California rule held preempted in *Concepcion*.

Moreover, even if such a rule were not preempted by the FAA, this Court should hold that Florida law does not permit the enforceability of a bilateral

arbitration agreement to turn on the type of faux evidentiary assessment relied upon by the courts below. The vast majority of courts that have considered the question have concluded that agreements to arbitrate on an individual basis are fully enforceable, at least when the terms of those agreements do not contain other features—such as cost-sharing provisions or limitations on remedies—that make it inherently unlikely for customers to obtain redress for their claims. As these courts have recognized, so long as consumers can effectively vindicate their own claims in an arbitral forum, it does not violate public policy for them to trade the speculative right to participate in a class action for the certainty of lower prices of goods and services and a more efficient and effective dispute-resolution procedure. The Florida legislature has given no indication that it considers class actions an unwaivable right under Florida consumer-protection law. This Court should not accept plaintiffs' invitation to create such a policy on its own.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT PREEMPTS FLORIDA LAW AS INTERPRETED BY THE DISTRICT COURT OF APPEAL.

A. *Concepcion* Holds That A State May Not Declare Arbitration Agreements Unenforceable Merely Because They Preclude Class Treatment Of Claims.

In *Concepcion*, the Supreme Court explained that "[t]he overarching purpose of the FAA * * *, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." 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 citation omitted).

Applying these principles, the Supreme Court considered whether Section 2 of the FAA "preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." *Concepcion*, 131 S. Ct. at 1746 (citing *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005)). 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.

In holding that the FAA preempted California's rule declaring unenforceable arbitration clauses that preclude class proceedings, the Court specifically rejected the argument made by the dissent that "class proceedings are necessary to

prosecute small-dollar claims that might otherwise slip through the legal system." *Concepcion*, 131 S. Ct. at 1753. As the Court explained, "States cannot require a procedure that is inconsistent with the FAA"—such as California's public policy requiring the use of class procedures in cases involving small claims—"even if it is desirable for unrelated reasons." *Id.*

Concepcion therefore makes clear that state public policy must give way to the federal policy of promoting the fair and efficient resolution of disputes through arbitration. Accordingly, every court confronted with an attack on a provision requiring individual arbitration since *Concepcion* has held that the FAA requires enforcement of that provision. *See* Order, *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341 (N.D. Cal. June 27, 2011) (attached as Ex. A); *Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939 (D.N.J. June 22, 2011); *Bernal v. Burnett*, 2011 WL 2182903 (D. Colo. June 6, 2011); *D'Antuono v. Serv. Rd. Corp.*, 2011 WL 2175932 (D. Conn. May 25, 2011); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 (N.D. Cal. May 16, 2011); *Zarandi v. Alliance Data Sys. Corp.*, 2011 WL 1827228 (C.D. Cal. May 9, 2011); *Day v. Persels & Assocs.*, 2011 WL 1770300 (M.D. Fla. May 9, 2011); *Bellows v. Midland Credit Mgmt., Inc.*, 2011 WL 1691323 (S.D. Cal. May 4, 2011); *Wallace v. Ganley Auto Group*, 2011 WL 2434093 (Ohio Ct. App. June 16, 2011).

These courts uniformly have rejected the argument that a State "could restrict a private arbitration agreement when it inherently conflicted with a public statutory purpose and transcended private interests," holding instead that *Concepcion* "decided that states cannot refuse to enforce arbitration agreements based on public policy." *Arellano*, 2011 WL 1842712, at *2; *see also, e.g.*, *Wallace*, 2011 WL 2434093, at *3 ("even if we were to find that the CSPA contains a policy favoring class actions * * *, this court may not apply that policy in a way that disfavors arbitration").

As this Court no doubt is aware, moreover, the Eleventh Circuit recently signaled its view that *Concepcion* would preempt the interpretation of Florida law urged by plaintiffs here and in *Pendergast v. Sprint Nextel Corp.*, No. SC-10-19. In *Pendergast*, the Eleventh Circuit had certified to this Court a number of questions relating to the enforceability of the requirement in Sprint's service agreement that customers arbitrate their disputes on an individual basis. After the U.S. Supreme Court decided *Concepcion*, Sprint moved to withdraw the certification, arguing that *Concepcion* rendered the certification moot. The Eleventh Circuit agreed that "had we had *Concepcion* before us * * *, we would not have certified questions to the Florida Supreme Court, as *Concepcion* does appear to resolve—or at a minimum significantly impact the resolution of—all four questions we certified." *See* Order at 5, *Pendergast v. Sprint Nextel Corp.*, No. 09-

10612 (11th Cir. June 17, 2011) (attached as Ex. B).[1] For similar reasons, another federal court in Florida has recognized that this Court's "answer [in *Pendergast*] will have no determinative effect here because, even if it says that the class action waivers are invalid, that answer would be pre-empted by the FAA under *AT&T Mobility*." *Day*, 2011 WL 1770300, at *5.

In sum, as these decisions make clear, any rule of Florida law that would mandate the use of class procedures rather than agreements to arbitrate on an individual basis would be preempted by the FAA.

B. The Rule Applied By The Courts Below Conflicts With The FAA.

The DCA's holding in this case is the functional equivalent of California's *Discover Bank* rule, dressed up in different garb. According to the DCA, Florida law provides as follows:

> Because payday loan cases are complex, time-consuming, involve small amounts, and do not guarantee adequate awards of attorney's fees, individual plaintiffs cannot obtain competent counsel without the procedural vehicle of a class action. The class action waiver prevents consumers from vindicating their statutory rights, and thus violates public policy.

McKenzie, 55 So. 3d at 629.

The premise of California's *Discover Bank* rule was that, "because * * *

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[1] The Eleventh Circuit declined to withdraw the certification, however, recognizing that this Court "has already reviewed the parties' briefs and heard oral argument" and deferring to this Court to "decide whether [it] wishes to proceed to answer the state law questions * * * or * * * to decline the certification and return the appeal to this Court for further proceedings in light of *Concepcion*." *Id.*

damages in consumer cases are often small * * *, the class action is often the only effective way to halt and redress * * * exploitation." 113 P.3d at 1108-09 (internal quotation marks omitted). Finding "no indication * * * that, in the case of small individual recovery, attorney fees are an adequate substitute for the class action or arbitration mechanism," the California Supreme Court held in *Discover Bank* that provisions requiring arbitration on an individual basis in "consumer contracts of adhesion" are "unconscionable under California law and should not be enforced," "at least" when "disputes * * * predictably involve small amounts of damages" and "it is alleged" that the company "has carried out a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money." *Id.* at 1110. Indeed, the DCA cited *Discover Bank* repeatedly in reaching its conclusion that the requirement of individual arbitration in appellees' contracts violates Florida public policy (*see McKenzie*, 55 So. 3d at 624, 625, 627 n.10), confirming that its approach is different from California's in name only.[2]

Plaintiffs may contend that the DCA's rule is narrower than the *Discover*

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[2] The DCA also cited a number of other decisions that themselves relied on *Discover Bank*. *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 60, 61 n.23 (1st Cir. 2006); *Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1370 (S.D. Fla. 2009) (applying Delaware law); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1282, 1285, 1288-90 (D. Ariz. 2007); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 98-99 (Mo. Ct. App. 2008); *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 610 n.16 (Fla. 1st DCA 2007); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004-08 (Wash. 2007); *Muhammad v. Cnty. Bank of Rehoboth Beach*, 912 A.2d 88, 95, 97 n.3, 98-99, 102-103 (N.J. 2006).

Bank rule and therefore can survive *Concepcion*'s preemption holding. Specifically, they are likely to latch onto the DCA's assessment that "evidence established that individuals could not secure competent representation to pursue small claims." *McKenzie*, 55 So. 3d at 623. But that is a distinction without a difference: Whether based on a purported evidentiary showing (as in this case) or on a conclusion of law (as in *Discover Bank*), both decisions ultimately are based on the premise that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *See Concepcion*, 131 S. Ct. at 1753. But the FAA forbids States from employing such considerations as a basis for refusing to enforce agreements to arbitrate on an individual basis. As the Supreme Court flatly held: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.*

Moreover, the DCA's reliance on an evidentiary showing below does nothing to differentiate the DCA's holding from the ruling in *Concepcion*. The trial court reached its conclusion—and the DCA approved it—on an exceptionally slender record, consisting nearly entirely of the testimony of three plaintiffs' lawyers who contended that plaintiffs would be unable to secure competent counsel on an individual basis. *See McKenzie*, 55 So. 3d at 619-20.

This low evidentiary threshold would in practice amount to no threshold at all. If the evidence adduced by plaintiffs in this case is enough to avoid

enforcement of agreements to arbitrate on an individual basis, then ***any*** arbitration agreement—no matter how fair—could be struck down whenever counsel for a plaintiff enlists a few compatriots to aver that they are unwilling to represent plaintiffs on an individual basis. The Supreme Court's holding in *Concepcion*—which squarely rejects state-law rules that obstruct the FAA's purpose of encouraging arbitration—cannot be overturned by self-serving testimony. As the California Court of Appeal recently observed in rejecting such a strategy, "[t]here is an element of self-fulfilling prophecy to these declarations; it cannot be the law that attorneys who may specialize in representing consumers can control whether a class action waiver is unenforceable simply by refusing to represent plaintiffs on an individual basis." *Arguelles-Romero v. Super. Ct.*, 109 Cal. Rptr. 3d 289, 306 n.20 (Cal. Ct. App. 2010).

The typically self-interested nature of such testimony is illustrated by the testimony in this case: At least two of their three attorney witnesses have a significant economic or professional stake in the outcome of this case, because they represent plaintiffs in consumer disputes in which the plaintiffs have resisted their obligation to arbitrate their claims. For example, one of plaintiffs' witnesses,

Steven Fahlgren, has handled at least three such cases.[3] Another such lawyer, Bambi Lynn Drysdale, has contested arbitration in two other cases.[4]

This tactic is not limited to this case. Counsel for plaintiffs who seek to evade arbitration agreements often seek out and procure similar testimony from other plaintiffs' attorneys (who, it turns out, have similar economic or professional interests at stake). Mr. Fahlgren, for example, is a repeat player; he testified that he wouldn't handle consumer arbitrations in a different case involving the same counsel who represent plaintiffs here.[5] And in another Florida case, *Cruz v. Cingular Wireless, LLC*, No. 07-cv-00714 (M.D. Fla.), appeal pending, No. 08-16080-C (11th Cir.), the plaintiffs submitted declarations from three attorneys who testified that consumers would have difficulty obtaining competent counsel on an individual basis. Of those three declarants, two had represented plaintiffs in putative class actions in which the defendant had moved to compel arbitration on an individual basis; the third had served as co-counsel with plaintiffs' counsel in a

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3 *See, e.g., Tropical Ford, Inc. v. Major*, 882 So. 2d 476 (Fla. 5th DCA 2004); *Bill Heard Chevrolet Corp. v. Wilson*, 877 So. 2d 15 (Fla. 5th DCA 2004); *Jones v. TT of Longwood, Inc.*, No. 06-cv-651 (M.D. Fla.).

4 *Wall v. The Military Fin. Network, Inc.*, No. 01-cv0556 (M.D. Fla.); *Fudge v. Avenues Motions, LTD*, No. 11-cv-00441 (M.D. Fla.).

5 *See* Decl. of Steven M. Fahlgren, Dkt. No. 140, *Coneff v. AT&T Corp.*, No. 06-cv-0944 (W.D. Wash., filed July 6, 2006).

number of other class actions.[6]

Such tactics—and such conflicts of interest—also are common in cases outside of Florida. For example, in a Missouri case the trial court had pointed to testimony from attorneys who said they would not handle small claims on an individual basis. *Woods v. QC Fin, Servs., Inc.*, 2007 WL 4688113 (Mo. Cir. Ct. Dec. 31, 2007), *aff'd*, 280 S.W.3d 90 (Mo. Ct. App. 2008). At least one of those witnesses, Stuart Rossman, seeks to challenge the enforcement of agreements to arbitrate on an individual basis in other putative class actions. *See, e.g., In re: Checking Account Overdraft Litig.*, No. 09-md-02036 (S.D. Fla.).[7] And in yet another recent case, the plaintiff submitted a declaration from an attorney named Danieal H. Miller, who testified that attorneys would not have a sufficient

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[6] The declarations in *Cruz* were filed by attorneys Marcus Viles, Tod Aronovitz, and Jerrold S. Parker. *See Cruz*, Dkt. No. 43. Viles and Aronovitz have sought to represent classes (and resisting arbitration) in at least two cases. *See, e.g., Hancock v. Am. Tel. & Tel. Co.*, No. 10-cv-822 (W.D. Okla.) (Viles); *Caban v. J.-P. Morgan Chase & Co.*, No. 08-cv-60910 (S.D. Fla.) (Aronovitz). The third lawyer, Parker, is co-counsel to the *Cruz* plaintiffs' counsel in a number of cases. *See In re Toyota Motor Corp. Unintended Acceleration Mktg. & Sales Practices Litig.,* No. 10-ml-2151 (C.D. Cal.), *In re Light Cigarettes Mktg. & Sales Practices Litig.*, No. 09-md-02068 (D. Me.), *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, No. 09-md-02023 (E.D.N.Y.), *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 09-md-02047 (E.D. La.) (all reflecting that Parker is co-counsel with Scott Weinstein, one of the counsel for plaintiffs in *Cruz*).

[7] Mr. Rossman also apparently is a committed warrior in this cause; like Mr. Fahlgren, he too submitted a declaration in *Coneff*. Decl. of Stuart T. Rossman, Dkt. No. 152, No. 06-cv-0944 (W.D. Wash., filed Mar. 14, 2008).

incentive to bring claims like his on an individual basis. Dkt. No. 10, *Fay v. New Cingular Wireless, PCS, LLC*, No. 10-cv-00883 (E.D. Mo., filed June 3, 2010). Mr. Miller had served as co-counsel with plaintiffs' attorney, Seth Shumaker, on previous occasions,[8] rendering the value of his testimony suspect from the outset. That was confirmed when Mr. Shumaker was compelled to withdraw from representing Fay during his appeal and Mr. Miller stepped in to replace him. *See* Letter and Notice of Appearance, *Fay v. New Cingular Wireless*, No. 10-3814 (8th Cir., filed Feb. 8, 2011).

That plaintiffs' lawyers frequently work together to build a self-serving record of this sort should come as no surprise: One of the counsel for plaintiffs in this case has co-authored an article expressly recommending the tactic. As the article suggests, to resist arbitration agreements, "[l]eading attorneys in the area can testify that they would not take the class' claims on an individualized basis." F. Paul Bland, Jr. *et al.*, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 377 (2009).[9]

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[8] *See, e.g.*, *Oak River Ins. Co. v. Truitt*, 390 F.3d 554 (8th Cir. 2004).

[9] In response to plaintiffs' witnesses, defendants submitted testimony from two lawyers who stated that they would handle payday lending cases on an individual basis as well as another witness who "presented evidence of hundreds of small claims complaints" in state and federal courts. *McKenzie*, 55 So. 3d at 620. In addition, defendants pointed to a number of "cases where attorney-represented plaintiffs brought small-value individual complaints involving FDUTPA" and other consumer claims. *Id.* Although this evidence should have sufficed to show

In short, if Florida courts could refuse to enforce agreements to arbitrate on an individual basis whenever plaintiffs' lawyers follow the playbook, no arbitration agreement will be enforceable in this State again (at least as a matter of state law). Such a rule—like the California rule struck down in *Concepcion*—is directly at odds with the FAA's policy of promoting arbitration.

Accordingly, this Court should reverse the decision below and remand with instructions to compel arbitration—or at minimum, to reconsider in light of *Concepcion*.

II. AGREEMENTS REQUIRING BILATERAL ARBITRATION DO NOT VIOLATE THE PUBLIC POLICY OF THIS STATE.

Even putting the preemption issue aside, it has never been Florida's public policy to condition the enforcement of arbitration agreements on the availability of

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that lawyers in Florida ***will*** handle individual claims under FDUTPA for small amounts, the courts below discounted defendants' evidence because it did not "*pinpoint*[] either the plaintiffs' degree of success in those cases or the adequacy of the compensation of plaintiffs' counsel." *Id.*

Under *Concepcion*, the FAA precludes states from requiring the type of evidence submitted below (by both sides) to assess whether an arbitration agreement is enforceable. It nonetheless bears mention that it is quite impressive that defendants were able to submit evidence on this score at all. As common sense suggests, it is very easy for plaintiffs' lawyers to find other plaintiffs' lawyers to say that (i) class actions are essential and (ii) they prefer litigating class actions to handling individual arbitrations because the latter involve less compensation. Even though (as defendants showed here) many lawyers in fact represent individual consumers with small claims, common sense suggests that it is far more difficult for a corporate defendant to locate lawyers who will cross their colleagues in the plaintiffs' bar and admit that they would pursue such claims. It is predictable that those who do so will see their referral networks dry up overnight.

class-wide relief. This Court should not adopt such a policy now.

A. The Vast Majority Of Courts To Have Considered The Issue Have Held Bilateral Arbitration Agreements Enforceable.

It is the overwhelming majority rule among States that have considered the issue that provisions requiring bilateral arbitration are fully enforceable—at least when they are not joined with other provisions that make it infeasible to obtain redress on an individual basis.[10] Similarly, to our knowledge, it has been the

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[10] Illustrative cases include: **Alabama:** *Matthews v. AT&T Operations, Inc.*, 764 F. Supp. 2d 1272 (N.D. Ala. 2011); **Arkansas:** *Davidson v. Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007); **Colorado:** *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249 (Colo. Ct. App. 2001); **Connecticut:** *D'Antuono*, 2011 WL 2175932; **Delaware:** *Edelist v. MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001); **District of Columbia:** *Szymkowicz v. DirecTV, Inc.*, 2007 WL 1424652 (D.D.C. May 9, 2007); **Georgia:** *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); **Hawaii:** *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996); **Illinois:** *Montgomery v. Cornithian Colls., Inc.*, 2011 WL 1118942 (N.D. Ill. Mar. 25, 2011); **Kansas:** *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (Kan. Ct. App. 2005); **Louisiana:** *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004); **Maryland:** *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005); **Michigan:** *Francis v. AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009); **Minnesota**: *Green v. SuperShuttle Int'l, Inc.*, 2010 WL 3702592 (D. Minn. Sept. 13, 2010); **Mississippi:** *Anglin v. Tower Loan of Miss., Inc.*, 635 F. Supp. 2d 523 (S.D. Miss. 2009); **Nebraska**: *Schreiner v. Credit Advisors, Inc.*, 2007 WL 2904098 (D. Neb. Oct. 2, 2007); **New York:** *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566 (S.D.N.Y. 2009); **North Dakota:** *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918 (N.D. 2005); **Ohio:** *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758 (N.D. Ohio 2009); **Oklahoma:** *Edwards v. Blockbuster Inc.*, 400 F. Supp. 2d 1305 (E.D. Okla. 2005); **Pennsylvania:** *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009); **South Dakota:** *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005); **Tennessee:** *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001); **Texas:** *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190 (Tex. Ct. App. 2003); **Utah:** *Miller v. Corinthian Colls., Inc.*, __ F.

unanimous view of federal district courts in Florida that provisions requiring bilateral arbitration are fully enforceable under Florida law so long as they neither impose undue costs on consumers nor limit the individual remedies that consumers can obtain.[11] Of course, this Court is not bound by federal decisions interpreting Florida law. That said, it is clear that plaintiffs are running into a headwind of authority in asking this Court to declare agreements to arbitrate on an individual basis against the public policy of this State.

B. Bilateral Arbitration Agreements Allow Fair And Efficient Resolution Of Consumer Disputes.

As the U.S. Supreme Court explained even prior to *Concepcion*, "[i]n 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." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). Consumers benefit from bilateral arbitration because it is the most inexpensive way to resolve their claims, the vast majority of which are

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Supp. 2d __, 2011 WL 652478 (D. Utah Feb. 15, 2011); **Virginia:** *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007); **West Virginia:** *State ex rel. AT&T Mobility, LLC v. Shorts*, 703 S.E.2d 543 (W. Va. 2010).

[11] *See, e.g., Delano v. Mastec, Inc.*, 2010 WL 4809081 (M.D. Fla. Nov. 18, 2010); *Brueggemann v. NCOA Select, Inc.*, 2009 WL 1873651 (S.D. Fla. June 30, 2009); *La Torre v. BSF Retail & Commercial Operations, LLC*, 2008 WL 5156301 (S.D. Fla. Dec. 8, 2008); *Cruz v. Cingular Wireless, LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), appeal pending, No. 08-16080-C (11th Cir.); *Sanders v. Comcast Cable Holdings, LLC*, 2008 WL 150479 (M.D. Fla. Jan. 14, 2008).

individualized and thus could not be brought as class actions.[12] Indeed, were businesses to stop providing for bilateral arbitration—an inevitable consequence of conditioning arbitration on the availability of class procedures—consumers with small, individualized claims would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

In addition, because arbitrators are less likely to impose the kinds of evidentiary or procedural burdens that frequently cause consumers to lose in court, consumers prevail more often in arbitration than in litigation. For example, a recent study of consumer claims filed with the AAA found that customers win relief 53.3% of the time. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 845 (2010).[13] By contrast, in court, virtually all consumer actions that are not settled or voluntarily withdrawn are dismissed, with only a tiny fraction ever

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[12] The American Arbitration Association ("AAA") caps fees for small consumer claims at $125. A recent study of AAA consumer arbitrations found that "consumer claimants paid an average of $96 ($1 administrative fees + $95 arbitrator fees)" to arbitrate their claims. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 845 (2010).

[13] *See also* AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, *available at* http://www.adr.org/si.asp?id=5027 (AAA arbitrators ruled for the consumer in 48% of cases brought by consumers between January and August 2007).

reaching trial, much less a verdict for the plaintiff.[14] Those same reduced evidentiary and procedural burdens often mean that a consumer can pursue claims in arbitration without the help of an attorney. For example, the AAA's rules contemplate "desk arbitrations," in which the arbitrator can resolve the dispute on the papers if neither party requests a hearing. AAA, *Consumer-Related Disputes Supplementary Procedures* § C-5, *available at* http://www.adr.org/sp.asp?id=22014#C5.

Moreover, it is not just the subset of consumers seeking to pursue disputes who benefit from arbitration. The many consumers who never have a dispute of any kind also benefit because arbitration "lower[s] [businesses'] dispute-resolution costs," and "whatever lowers costs to businesses tends over time to lower prices to consumers." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-55 (2006).

C. Adoption Of A Newly Minted Public Policy Favoring The Use Of Class Actions Would Not Benefit Consumers.

The Legislature has not chosen to forbid consumers from bargaining away the ability to bring a class action. Nor would it be sound public policy for this Court to do so. Class actions are not so uniformly beneficial as to justify the

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[14] *See* Admin. Office of U.S. Courts, *2009 Judicial Facts and Figures* tbl. 4.10, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table410.pdf (only 1.2% of federal civil cases reach trial).

effectively untouchable status to which plaintiffs ask this Court to exalt them. While there are cases in which class actions serve a valuable function, the vast majority of consumer disputes concern inherently individualized issues for which class treatment will not be available. *Cf. InPhyNet Contracting Servs., Inc. v. Soria*, 33 So. 3d 766, 772 (Fla. 4th DCA 2010) ("Where both liability and damages depend on individual factual determinations, resolution of these claims can only be decided on an individual basis."). Indeed, classes are certified only about 20% of the time.[15] And in the few class actions that are certified, the percentage of consumers who participate in the ensuing settlements is astonishingly small—often on the order of one percent, or less.[16]

On the other hand, consumers benefit from exchanging the right to bring class actions for the lower-priced products and services that bilateral arbitration

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[15] *See, e.g.*, Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 635-36, 638 (2006).

[16] *See, e.g.*, Cheryl Miller, *Ford Explorer Settlement Called a Flop*, THE RECORDER, July 13, 2009, at 1 (only 75 out of "1 million" class members—or 0.0075 percent—participated in class settlement); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 649-50 (7th Cir. 2006) (a "paltry three percent" of class members had filed claims under the settlement); *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at *2 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement—a take rate of under 0.06%); *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct. May 7, 2007) ("only 337 valid claims were filed out of a possible class of 1,500,000"—a take rate of just over 0.02%), *rev'd*, 664 S.E.2d 569 (N.C. Ct. App. 2008).

permits and for faster, cheaper, and less adversarial dispute-resolution procedures than are available in court—procedures that will often be their only viable recourse in the case of inherently individualized, small-value disputes. *See supra*, pages 16-18. In sum, although class actions may at times be useful, they are in no way so fundamental as to be unwaivable.

For these reasons, the Court should reject the notion that it violates Florida public policy to agree to arbitrate disputes on an individual basis.

CONCLUSION

The Court should reverse the judgment of the DCA and remand with instructions to compel arbitration of plaintiffs' claims.

Respectfully submitted,

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Dated: July 1, 2011

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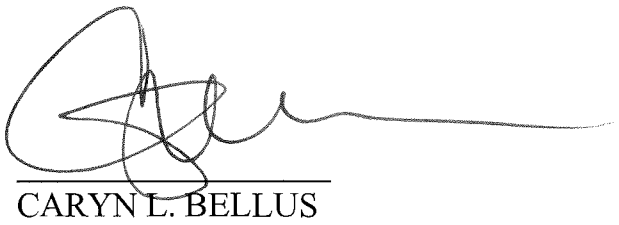

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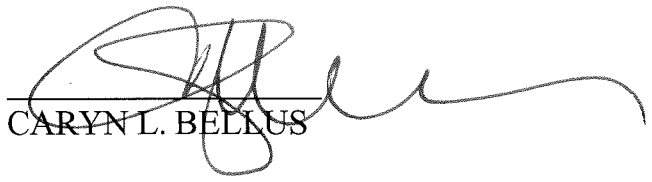
Dated: July 1, 2011

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2) and has been prepared using 14-point Times New Roman font.



CARYN L. BELLUS

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE CALIFORNIA TITLE INSURANCE ANTITRUST LITIGATION

No. 08-01341 JSW

THIS DOCUMENT RELATES TO ALL ACTIONS

ORDER GRANTING MOTION TO COMPEL ARBITRATION

_____/

Now before the Court for consideration is Defendants' joint motion to compel arbitration. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and concludes that the matter is suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). Accordingly, the hearing set for July 1, 2011 is HEREBY VACATED. For the reasons set forth in the remainder of this Order, Defendants' motion is GRANTED and the matter is STAYED pending completion of arbitration.

BACKGROUND

Each Plaintiff in this consolidated matter purchased title insurance coverage from one of the defendant companies in connection with the purchase of real estate. The "Defendants are five companies and their affiliates or subsidiaries that dominate the title insurance market, both nationally and in California." (Consolidated Second Amended Class Action Complaint at ¶ 1.) Plaintiffs allege that Defendants "manipulated, controlled and maintained the cost of title insurance at supra-competitive levels" and "fixed prices at rates that far exceed the risk and loss

experience associated with title insurance." (*Id.* at ¶¶ 1, 6.) The title insurance policies for each real estate transaction at issue included an arbitration clause which was silent as to whether class-action arbitration was permissible.

The Supreme Court, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), held that the Federal Arbitration Act preempts California's unconscionability law regarding arbitration of potential class action claims. Pursuant to the recent change in law, Defendants move to compel arbitration and to stay the litigation pending resolution of the matter in arbitration.

The Court shall address as necessary in the remainder of this order.

ANALYSIS

A. Legal Standards Applicable to Motions to Compel Arbitration.

Pursuant to the Federal Arbitration Act ("FAA"), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Once the Court has determined that an arbitration agreement involves a transaction involving interstate commerce, thereby falling under the FAA, the Court's only role is to determine whether a valid arbitration agreement exists and whether the scope of the parties' dispute falls within that agreement. 9 U.S.C. § 4; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). "Under § 4 of the FAA, a district court must issue an order compelling arbitration is the following two-pronged test is satisfied: (1) a valid agreement to arbitrate exists; and (2) that agreement encompasses the dispute at issue." *United Computer Systems v. AT&T Corp.*, 298 F.3d 756, 766 (9th Cir. 2002).

The FAA represents the "liberal federal policy favoring arbitration agreements" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). Under the FAA, "once [the Court] is satisfied that an agreement for arbitration has been made and has not been honored," and the dispute falls within the scope of that agreement, the Court must order arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967). That the Court must order arbitration is true "even where the result

would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). In addition, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Notwithstanding the liberal policy favoring arbitration, by entering into an arbitration agreement, two parties are entering into a contract. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989) (noting that arbitration "is a matter of consent, not coercion"). Thus, as with any contract, an arbitration agreement is "subject to all defenses to enforcement that apply to contracts generally." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003.) Although courts can initially determine whether a valid agreement exists, disputes over the meaning of specific terms are matters for the arbitrator to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Prima Paint*, 388 U.S. at 403-04 (holding that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate").

1. Ruling in *Concepcion.*

In the wake of new Supreme Court precedent, arbitration agreements may be "invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1742-43 (internal quotation marked omitted). Accordingly, the Court is compelled to enforce the parties' arbitration provisions in the contracts at issue.

Before the decision in *Concepcion*, governing California law instructed that courts refuse to enforce any contract found to have been unconscionable at the time it was made or to limit the application of any unconscionable clause. *See* Cal. Civ. Code § 1670.5(a). In *Discover Bank*, the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held that a class-action waiver in an arbitration agreement

constituted a deliberate scheme to cheat large numbers of consumers from relatively small amounts of money and to protect businesses from responsibility for their own fraud. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162 (2005), *aff'd Discover Bank, Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (2009). However, the United States Supreme Court in *Concepcion* specifically found that the FAA preempts California's *Discover Bank* rule and held that courts must compel arbitration even in the absence of the opportunity for plaintiffs to bring their claims as a class action.

2. Argument re Waiver.

Plaintiffs argue that Defendants have waived their right to enforce the arbitration agreements in this matter because they failed to raise the issue previously in the course of litigation. A "party seeking to prove waiver of a right to arbitrated must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). "The party arguing waiver of arbitration bears a heavy burden of proof." *Id.*

Although Defendants argue that moving to compel arbitration would have earlier been futile, Plaintiffs contend that the precedent of *Concepcion* does not change the law as applied in this matter as the applicable arbitration agreements are silent as to class-action waivers. However, the Supreme Court, analyzing an arbitration agreement silent as to class-actions, determined that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (emphasis in original); *accord Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001) "[B]ecause the ... agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals."); *see also Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002) ("a district court cannot order arbitration to proceed on a class-wide basis unless the arbitration clause contains a provision for class-wide resolution of claims."). Therefore, prior to the ruling in *Concepcion*, in the absence

of class-wide arbitration provision, class arbitration would not have been available. It therefore would indeed have been futile for Defendants in this matter to have moved to compel arbitration prior to the decision in *Concepcion*. Accordingly, the Court finds that Plaintiffs have failed to meet their burden to demonstrate that Defendants had an existing– and therefore waivable – right to compel arbitration. *See Olivares v. Hispanic Broadcasting Corp.*, 2001 WL 477171, at *1 (C.D. Cal. Apr. 26, 2001) (holding that "Defendants' delayed filing of its motion to compel until now does not constitute waiver because it was the first opportunity for Defendant to file such a motion."); *see also Conover v. Dean Witter Reynolds, Inc.*, 837 F.2d 867, 868 (9th Cir. 1988) (holding that two-year delay in filing a motion to compel arbitration did not constitute a waiver because "[a]n earlier motion to compel would have been futile.")

Further, in order to prevail on their argument of waiver, Plaintiffs have the burden of demonstrating that they have been prejudiced by inconsistent efforts to enforce the arbitration provision. *See Britton*, 916 F.2d at 1412; *see also ATSA of Cal. v. Cont'l Ins.*, 702 F.2d 172, 175 (9th Cir. 1983) ("inconsistent behavior alone is not sufficient; the party opposing the motion to compel arbitration must have suffered prejudice.") There is nothing in the record to support Plaintiffs' conclusory contention that granting the motion to compel arbitration "would unfairly prejudice Plaintiffs." (*See* Opp. Br. at 6.) Although this case has been litigated for some time, substantive discovery has only recently commenced and the trial is not set for well over a year. The Court finds that Plaintiffs have failed to meet their burden of demonstrating that they would suffer prejudice. Because Plaintiffs have failed to establish either that Defendants had knowledge of an existing right to compel arbitration or that they would suffer prejudice from inconsistent acts, the Court finds there was no waiver by Defendants. *See Britton*, 916 F.2d at 1412.

B. Enforceability of Arbitration Provisions.

Next, Plaintiffs contend that the arbitration provisions are unenforceable because: (1) the designated arbitral forum and rules are no longer available; (2) the loan policies with the mortgage lenders are not enforceable as to any named plaintiff; and (3) there is no evidence of any signed arbitration agreement for two of the named plaintiffs.

1. Designated Arbitral Forum and Rules.

First, each of the arbitration clauses at issue provide either that the arbitration "shall be under the Title Insurance Arbitration Rules of the American Arbitration Association" or that "the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association." Plaintiffs argue, however, that the Title Insurance Arbitration Rules of the American Land Title Association ("ALTA") should apply and such rules provide for arbitration administered by the National Arbitration Forum ("NAF"), which no longer arbitrates consumer disputes. As a result, Plaintiffs invoke the Title Insurance Arbitration Rules of the ALTA to argue that the parties may, only by mutual agreement, decide to conduct an arbitration in an alternate forum.

However, the arbitration provisions of the policies at issue here provide for use of the Title Insurance Arbitration Rules of the American Arbitration Association ("AAA"). Those rules specifically provide that the AAA administers the arbitration. Regardless, in the absence of the NAF as an available forum, the Court must designate an appropriate arbitral forum. *See* 9 U.S.C. § 5; *see also Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1328 (9th Cir. 1987); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (holding that the unavailability of the NAF does not destroy the arbitration clause, but instead allows the mechanism under Section 5 of the FAA for the court to appoint the forum to be employed). The Court therefore finds that the forum provided by the AAA was contemplated by the agreement of the parties and, as there is no evidence to support a proposition that the selection of the NAF was an integral part of the agreement, the Court assigns the parties' agreed-upon arbitral forum of the AAA. *See Brown*, 211 F.3d at 1222 (holding that the only exception to the mandatory rule to enforce arbitration when a designated arbitrator is unavailable is where it is clear that the arbitrator selection was "an integral part of the agreement").

2. Loan Policies.

Second, Plaintiffs contest arbitration on the basis that the arbitration provisions appear in the loan documents with the lender, not the plaintiff owners. However, the loan agreements

contain arbitration provisions which cover the real estate transactions about which Plaintiffs complain. The arbitration clauses are broad and "contemplate coverage of matters or claims independent of the contract or collateral thereto." *See Boston Telecom. Group v. Deloitte Touche Tohmatsu*, 278 F. Supp. 2d 1041, 1046 (N.D. Cal. 2003) (citations omitted). With respect to the mortgage policies, rules governing arbitration specifically provide that the arbitrator is responsible for deciding the scope of the arbitration agreements, including whether they encompass all of Plaintiffs' claims. *See, e.g., Bank of America N.A. v. Micheletti Family Partnership*, 2008 WL 4571245, at *6 (N.D. Cal. Oct. 14, 2008). Further, the Court is compelled to follow Supreme Court precedent which provides that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Dean Witter Reynolds*, 470 U.S. at 221.

3. Martinez Plaintiffs.

Lastly, Plaintiffs contend that Defendants have failed to produce the policies pertaining to two of the named Plaintiffs and only produce duplicate forms. However, as set forth in the declaration of Denisa Kirchoff, the policy jacket and pre-printed policy terms of the 1987 policies were issued in connection with the Martinez's property purchase and would have been identical to the forms submitted with her declaration. (*See* Declaration of Denisa Kirchoff at ¶ 7, Exs. A-D.) Ms. Kirchoff states that as a "general business practice, when [the title company] issues insurance policies, it often retains in its file only the policy terms that are unique to the individual transaction." (*Id.* at ¶ 6.) The other policy terms can be readily ascertained from the record of standard policies. *See Lee v. Fidelity Nat'l Title Ins. Co.*, 188 Cal. App. 4th 583, 589 (2010). Accordingly, the Court finds that the Martinez Plaintiffs are similarly compelled to arbitrate their claims.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to compel arbitration. The parties are ordered to proceed immediately to arbitration of all claims. The Court shall retain jurisdiction to enforce any award. This consolidated action is hereby stayed

pending completion of such arbitration. The Clerk is directed to close the files in all related cases for administrative purposes. The consolidated case may be reopened for such additional proceedings as may be appropriate and necessary upon conclusion of arbitration. If the matter is resolved by settlement, the parties shall promptly file a dismissal of this action.

IT IS SO ORDERED.

Dated: June 27, 2011

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-10612

D. C. Docket No. 08-20551-CV-PAS

JAMES PENDERGAST,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

versus

SPRINT NEXTEL CORPORATION,

Defendant,

SPRINT SOLUTIONS, INC.,
SPRINT SPECTRUM L.P.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before CARNES and HULL, Circuit Judges, and GOLDBERG,* Judge.

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*Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

BY THE COURT:

Plaintiff-Appellant James Pendergast, a former customer of Defendants-Appellees Sprint Solutions, Inc. and Sprint Spectrum, L.P., (collectively, "Sprint"), sued Sprint in district court on behalf of himself and a similarly-situated class, alleging Sprint charged improper roaming fees for calls placed within Sprint's coverage areas. The district court granted Defendant Sprint's motion to compel arbitration based on the arbitration clause in the Terms and Conditions of Plaintiff's contract with Sprint. Though the Terms and Conditions of Plaintiff's contract were revised several times, Plaintiff's contract always included an arbitration provision expressly referencing the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"). The district court compelled arbitration pursuant to the FAA.

Plaintiff appealed, arguing that his contract's class action waiver is procedurally and substantively unreasonable under Florida law. Because the contract provides the arbitration clause and class action waiver are not severable, Plaintiff contends the invalidity of the class action waiver is fatal to the arbitration clause as well.

On January 4, 2010, this Court found that resolution of the appeal depends on unsettled questions of Florida law and certified four questions to the Florida Supreme Court:

(1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?
(2) Is the class action waiver provision in Plaintiff's contract with Sprint procedurally unconscionable under Florida law?
(3) Is the class action waiver provision in Plaintiff's contract with Sprint substantively unconscionable under Florida law?
(4) Is the class action waiver provision in Plaintiff's contract with Sprint void under Florida law for any other reason?

Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1143-44 (11th Cir. 2010).

On or about January 11, 2010, the Florida Supreme Court accepted certification of the above questions. The Florida Supreme Court ordered briefing, which is completed. On February 10, 2011, the Florida Supreme Court held oral argument.

On April 27, 2011, the United States Supreme Court issued its decision in AT&T Mobility LLC v. Concepcion, — U.S. —, 131 S. Ct. 1740 (2011), which directly impacts the issues in this case. In Concepcion, the Supreme Court concluded that the FAA preempted California's judicial rule that held most class arbitration waivers in consumer contracts are unconscionable. Concepcion, 131 S. Ct. 1740.

On May 4, 2011, the Defendant Sprint filed in this Court a motion to withdraw certification to the Florida Supreme Court and affirm the district court's

order compelling arbitration under the FAA.[1] Defendant Sprint argues the outcome of this appeal is now completely controlled by Concepcion because the Supreme Court in Concepcion enforced the plaintiffs' arbitration agreement on federal-law grounds, specifically on the basis that the FAA preempted California's Discover Bank rule that prohibited class action waivers in arbitration agreements.[2] The Supreme Court stressed: (1) the "federal policy favoring arbitration"; (2) that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA"; and (3) that California's Discover Bank rule interferes with arbitration because, although it "does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post." Id. at 1745, 1748, 1750. Plaintiff opposes the motion, arguing that Concepcion is inapposite because it "did not broadly hold that the terms of arbitration agreements can no longer be challenged under state laws on enforceability," but rather "held that a defendant cannot be forced into an arbitration procedure [class-action arbitration] that it did not consent to."

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[1]Also before us are motions by the parties to exceed the page limits for motion responses and replies. Appellant's motion to exceed the page limit for motion responses is GRANTED. Appellees' motion to exceed the page limit for motion replies is GRANTED.

[2]See Discover Bank v. Superior Court, 113 P. 3d 1100 (Cal. 2005).

After reviewing the record and the parties' arguments, we conclude that had we had Concepcion before us at the time of our initial consideration of this appeal, we would not have certified questions to the Florida Supreme Court, as Concepcion does appear to resolve—or at a minimum significantly impact the resolution of—all four questions we certified. However, given that the Florida Supreme Court has accepted the certification and has already reviewed the parties' briefs and heard oral argument, and out of deference to our State Court colleagues, we deny Sprint's motion to withdraw certification. This will allow the Florida Supreme Court the opportunity to consider and decide whether that Court wishes to proceed to answer the state law questions we certified or whether it now wishes to decline the certification and return the appeal to this Court for further proceedings in light of Concepcion. We leave that decision entirely to the Florida Supreme Court, with the understanding that regardless of what it elects to do in this case we remain grateful, as always, for the spirit of cooperative federalism that Court has always shown us in the past.

Appellees' motion to withdraw the certified questions is DENIED. To the extent that this motion to withdraw also requests this Court to summarily affirm at this time, without hearing from the Florida Supreme Court, the motion is DENIED. The Clerk is directed to transmit this Order and the parties' motions

papers to the Florida Supreme Court to supplement our earlier certification of questions to that Court.