COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-11113

JOHN A. FEENEY, et al., Plaintiffs/Counterclaim Defendants/Appellees,

v.

DELL INC., et al., Defendants/Third-Party Plaintiffs/Counterclaim Plaintiffs/Appellants,

ON DIRECT APPELLATE REVIEW OF AN ORDER OF THE SUPERIOR COURT DENYING CONFIRMATION OF ARBITRATION AWARD

NO. SJC-09529

EDSON TELES MACHADO, et al., Plaintiffs/Appellees

v.

SYSTEM4 LLC, et al., Defendants/Appellants

ON DIRECT APPELLATE REVIEW OF AN ORDER OF THE SUPERIOR COURT DENYING A MOTION TO COMPEL ARBITRATION

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

The Chamber of Commerce of the United States of America respectfully submits this brief pursuant to the Court's solicitation of amicus briefs issued on June 12, 2012 and pursuant to the Chamber's motion under Mass. R. App. P. 17 for leave to file an amicus brief, filed herewith.

STATEMENT OF INTEREST

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.[1]

[1] No counsel for a party other than amicus, its members, or its counsel, authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Aspinall v. Philip Morris Cos., 442 Mass. 381, 480 n.8 (2004), undersigned counsel state that Wilmer Cutler Pickering Hale and Dorr LLP has previously represented Appellant Dell Inc., but not in connection with the issues presented in these cases.

ISSUE PRESENTED

Whether this Court's ruling in Feeney v. Dell Inc., 454 Mass. 192 (2009), continues to be viable in the wake of the Supreme Court's ruling in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

STATEMENT OF THE CASE

The Chamber has no independent knowledge of the facts in these cases but understands that the facts relevant to the question set forth above are not in dispute. Accordingly, for purposes of its arguments below, the Chamber accepts the statements of the case and of those facts that appear undisputed as set forth by the parties in their respective briefs before this Court.

SUMMARY OF ARGUMENT

In AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), the Supreme Court of the United States held that the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ("FAA"), precludes a State from refusing to enforce an arbitration agreement on the ground that the agreement does not permit a plaintiff to pursue claims on a class basis. As the Supreme Court explained, "States cannot require a procedure that is

inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. 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.

This Court's decision in Feeney v. Dell Inc., 454 Mass. 192 (2009), cannot be reconciled with Concepcion. Feeney ruled that "the public policy of the Commonwealth" required making class proceedings available for small-value claims brought under G.L. c. 93A and accordingly refused to enforce an agreement requiring individualized arbitration of such claims. Id. at 206. The rule announced in Feeney is preempted by the FAA, as interpreted in Concepcion, because it conditioned enforcement of an arbitration agreement on the availability of class treatment, a condition that frustrates the FAA's directive that arbitration agreements be enforced according to their terms.

Enforcing the arbitration agreements in these cases is not only federal law; it is also good public policy. The FAA promotes an emphatic federal policy in favor of arbitration, reflecting Congress's

judgment that arbitration provides an efficient, streamlined, and cost-effective method of resolving disputes--including consumer and employee disputes, as is evidenced by numerous studies cited below that show that customers and employees who arbitrate their claims are more successful and satisfied than customers and employees who litigate. Enforcing bilateral arbitration agreements is thus consistent with the Commonwealth's "statutory policy favoring arbitration as an expeditious and efficient means for resolving disputes." Massachusetts Highway Dep't v. Perini Corp., 444 Mass. 366, 374 (2005). Accordingly, the Chamber respectfully submits that the orders under appeal in Feeney and Machado should be reversed.

ARGUMENT

THE SUPREME COURT'S DECISION IN CONCEPCION COMPELS ENFORCEMENT OF THE ARBITRATION AGREEMENTS IN THESE CASES

A. This Court's 2009 Feeney Decision Cannot Be Reconciled With Concepcion

In Concepcion, the Supreme Court of the United States 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 observed that it is "beyond dispute that the FAA was designed to promote arbitration" and underscored that 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. at 1749 (internal quotation marks and citation omitted); see also Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012) (FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution").

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. Superior Ct., 113 P.3d 1100 (Cal. 2005)). In Discover Bank, the Supreme Court of California had articulated a rule of public policy very similar to this Court's rule in Feeney. The court noted that "because ... damages in consumer cases are often small[,] ... the class action is often the only effective way to halt and redress such exploitation." 113 P.3d at 1108-1109 (internal quotation marks and citation 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 court held that provisions requiring arbitration on an individualized basis in consumer contracts 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 sums of money." Id. at 1110.

The Supreme Court held that California's rule "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Concepcion, 131 S. Ct. at 1748. 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. Put simply, class arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." Id. at 1753 (emphasis added); see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010) (differences between bilateral and class arbitration are "fundamental" and "crucial").

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. Refusing to enforce an arbitration agreement on the ground that it does not allow class actions is impermissible because such a requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA. Id.; see also Litman v. Cellco P'ship, 655 F.3d 225, 231 (3d Cir. 2011) ("We understand the holding of Concepcion to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration 'is desirable for unrelated reasons.'").

Like California's now-abrogated Discover Bank rule, this Court's prior decision in Feeney cannot be reconciled with the FAA. Feeney announced a categorical rule that, where "small value claims [are]

sought under our consumer protection statute, G.L. c. 93A[], a clause effectively prohibiting class proceedings in any forum violates the public policy of the Commonwealth." 454 Mass. at 206. The Court grounded this rule in a public policy that "strongly favors G.L. c. 93A class actions." Id. at 200. Observing that "the Legislature specifically intended to provide for the vindication of small-value claims," this Court found in the legislative history of Chapter 93A "evidence [of] a strong public policy in favor of the aggregation of small consumer protection claims." Id. at 200-201. The Court emphasized that "[t]he right to a class action in a consumer protection case is of particular importance where, as here, aggregation of small claims is likely the only realistic option for pursuing a claim." Id. at 202.[2] This Court also identified two additional public policies that supported invalidating an individualized arbitration agreement. First, this Court ruled that a requirement of arbitration on an individual, non-class

[2] Lower courts have not limited Feeney to Chapter 93A cases, but have expanded it to reach other statutory and common-law claims. The Machado case before this Court is an example.

basis "undermines the public interest in deterring wrongdoing." Id. at 203. Second, this Court decided that the Commonwealth's public policy favored aggregation of consumer claims because "the loss of an individual consumer's right to bring a class action negatively affects the rights of those unnamed class members on whose behalf the class action would proceed." Id.

Feeney's holding and reasoning are no longer viable after Concepcion. As the Supreme Court stated: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." Concepcion, 131 S. Ct. at 1747 (citing Preston v. Ferrer, 552 U.S. 346, 353 (2008)). Because traditional, bilateral arbitration is "arbitration as envisioned by the FAA," Concepcion, 131 S. Ct. at 1753, the practical effect of Feeney is to "prohibit[] outright the arbitration of a particular type of claim" (id. at 1747)--any Chapter 93A claim (or similar claim under state law) in which the plaintiff seeks to recover for others as well as himself. The Feeney rule is accordingly preempted by the FAA.

Moreover, the public policy concerns that this Court identified in Feeney are precisely the sorts of state public policy that the FAA preempts in order to ensure that FAA's broad policy favoring arbitration is enforced nationwide. See, e.g., Coneff v. AT&T Corp., 673 F.3d 1155, 1158 (9th Cir. 2012) (Concepcion "expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers"). Any public policy interest in aggregating individual claims--whether based on a concern that businesses will "insulate themselves from small value consumer claims" (454 Mass. at 205) or a related concern--must yield to the emphatic federal policy favoring the enforcement of arbitration agreements according to their terms.

Notably, Feeney expressly relied on two decisions from other states, neither of which survived Concepcion: California's Discover Bank decision and the New Jersey Supreme Court's decision in Muhammad v. County Bank, 912 A.2d 88 (N.J. 2006). The Supreme Court itself disapproved the Discover Bank rule. And

the Third Circuit, on remand after Concepcion,[3] concluded that Muhammad was likewise preempted by the FAA. Litman, 655 F.3d at 229-231; see id. at 232 ("Because the United States Supreme Court's decision in Concepcion holds that state law '[r]equiring the availability of classwide arbitration ... is inconsistent with the FAA[,] we now endorse the District Court's decision to reject New Jersey law holding that waivers of class arbitration are unconscionable[.]'" (first, second, and third alterations in original; citations omitted)). Because Feeney mirrors the holding and rationale of Discover Bank and Muhammad, it, too, is preempted under the FAA. See Spencer, Arbitration, Class Waivers, and Statutory Rights, 35 Harv. J. L. & Pub. Pol'y 991, 1003 (2012) (decisions that "simply mirror Discover Bank's analysis ... cannot survive Concepcion").

[3] Before Concepcion, the Third Circuit ruled that arbitration provisions in consumer adhesion contracts were generally unconscionable and unenforceable under New Jersey law, as articulated in Muhammad, because such provisions functionally exculpated the defendant from small-dollar claims. See Homa v. American Express Co., 558 F.3d 225, 230-233 (3d Cir. 2009).

B. Plaintiffs' Efforts To Evade Concepcion Fail

Plaintiffs in these cases try to evade the import of Concepcion, contending that its application depends upon the particular characteristics of the arbitration proceedings--specifically, on how favorable the anticipated arbitration proceedings are to the plaintiff as compared with hypothetical class litigation. See Machado Pl. Br. 18 (arguing that Concepcion applies only where arbitration results in "streamlined proceedings," but not where the agreement "create[s] significant obstacles" to plaintiff's vindication of his claims); Feeney Pl. Br. 29-35 (arguing that Concepcion applies only when the plaintiff would be "better off" arbitrating rather than litigating).

These arguments are simply variations on the arguments rejected in Concepcion. Nothing in the FAA or Concepcion allows a court to refuse enforcement of an arbitration agreement because the projected cost of proving the claim is high relative to the claim's value. Such a rule would be particularly inappropriate in Feeney itself, where plaintiffs seek to vindicate their claims under Chapter 93A, which

provides "for a minimum recovery, attorney's fees, [and] treble damages in certain cases." Feeney, 454 Mass. at 201.

To be sure, the Supreme Court has held that an arbitration agreement may be unenforceable in cases where the costs unique to arbitration are greater than the cost of litigating in court. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 81 (2000) (court may "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," i.e., due to "steep arbitration costs" such as "filing fees, arbitrators' costs, and other arbitration expenses"). Such statements, however, have only been made in the context of federal statutory claims and do not necessarily apply to claims based on state law. See, e.g., Coneff, 673 F.3d at 1159 n.2. Moreover, Plaintiffs here do not assert that arbitration of their claims would impose any unique costs that would not be incurred in litigation. Instead, they argue that the cost of arbitration is higher than the claim's value. But the Supreme Court has never suggested that a court can disregard an arbitration agreement's terms for such a reason. Indeed, if a

comparison of a claim's value to the costs of arbitration were the touchstone of an arbitration agreement's enforceability, courts would be required to hold a lengthy mini-trial in order to determine both figures.

Nor can a state evade the preemptive reach of the FAA by creating a statutory remedy and declaring that the public policy of the state is to secure enforcement of that remedy in court. See Feeney Pl. Br. 35-40 (arguing that Concepcion does not apply to "the assertion of a statutory claim for relief ... as to which a class action remedy is essential"). If states could declare a statute beyond the scope of the FAA simply because the legislature decided that the statute was most effectively implemented through class actions, then states could effectively exempt any category of dispute from the FAA simply by enacting statutes. That route has long been foreclosed. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272-273 (1995) (there are no "statutory niche[s] in which a State remains free to apply its antiarbitration law or policy"); Perry v. Thomas, 482 U.S. 483, 489 (1987) (the FAA "foreclose[d] state

legislative attempts to undercut the enforceability of arbitration agreements" (internal quotation marks omitted)).

C. Enforcement Of Arbitration Agreements Is Sound Public Policy

Congress's directive that arbitration agreements be enforced according to their terms is not only good law, but also sound public policy. As the Supreme Court has repeatedly remarked, individual arbitration provides many advantages that "often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." Dobson, 513 U.S. at 280-281; 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1464 (2009) (same); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) (same). In bilateral arbitration in particular, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Stolt-Nielsen, 130 S. Ct. at 1775.

Notably, it is precisely the sort of consumer claims at issue in Feeney that Congress had in mind in enacting the FAA and making it applicable to consumer disputes as well as business disputes. See Dobson, 513 U.S. at 280 (Congress intended the FAA to apply fully in the consumer context).[4] Congress intended for arbitration to provide consumers with a forum characterized by its "simplicity, informality, and expedition." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (internal quotation marks omitted). As the Third Circuit has noted:

> [A] Senate Judiciary Committee Report supporting the legislation explained that arbitration provides benefits to both consumers and businesses in speed and lower costs. "The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expense increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals."

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[4] Nothing in the FAA itself or the Supreme Court's arbitration precedents distinguishes between arbitration agreements applicable to consumer disputes and those applicable, for example, to disputes between an employee and her employer.

Johnson v. West Suburban Bank, 225 F.3d 366, 376 (3d Cir. 2000) (quoting S. Rep. No. 68-536, at 3 (1924)).

Congress's intentions in passing the FAA were thus consistent with the Commonwealth's own public policy, which "favor[s] arbitration as an expeditious and efficient means for resolving disputes." Massachusetts Highway Dep't v. Perini Corp., 444 Mass. 366, 374 (2005); see also Maltz v. Smith Barney, Inc., 427 Mass. 560, 563 (1998) ("Our arbitration statute was enacted for the speedy resolution of disputes by a method which is not subject to delay in the courts."); Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990) (noting the "strong public policy favoring arbitration as an expeditious alternative to litigation for settling commercial disputes"). As Congress anticipated and intended, consumers, employees, and businesses alike benefit from the streamlined proceedings intrinsic in bilateral arbitration.

1. Arbitration benefits individual consumer and employee litigants

Plaintiffs in these cases argue that they should not be held to their contractual obligations to

arbitrate disputes on an individual basis. But resolving a claim through individual arbitration can be dramatically cheaper and more expedient than securing relief through class-action litigation.

First, an individual arbitration does not require the complexity of evidence demanded in litigation, especially class-action litigation that attempts to resolve thousands of claims at once. Individual arbitration typically calls for only targeted discovery and limited (if any) motion practice. Arbitral procedures and evidentiary rules are more relaxed than court rules of civil procedure and evidence and are thus less likely to enmesh the parties in lengthy and expensive side disputes. By contrast, class-action litigation "requires procedural formality" to adjudicate the claims of multiple parties--including absent parties--while comporting with due process. Concepcion, 131 S. Ct. at 1751.

Second, individual arbitration spares parties the enormously expensive and time-consuming class-certification contest, a process which must necessarily be rigorous in order to satisfy the demands of applicable federal and state rules of civil

procedure and due process. In individual arbitration, parties need not spend months or years litigating whether there are common questions of fact or law that predominate over individualized issues or whether the named plaintiffs adequately represent the interests of the putative class--issues that may easily cost millions of dollars to litigate.

The differences between individual and class proceedings are "fundamental" and "crucial." Stolt-Nielsen, 130 S. Ct. at 1776. In a class proceeding, an adjudicator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." Id. With more people come more rules and endless procedural complexity. See id.; see also Concepcion, 131 S. Ct. at 1751. Moreover, in some aggregate proceedings, "the presumption of privacy and confidentiality that applies in many bilateral arbitrations" does not apply. Stolt-Nielsen, 130 S. Ct. at 1776 (internal quotation marks omitted).

These costs and burdens of litigating class-certification issues all arise before the parties even

broach the merits of their dispute. Individual arbitration, by contrast, allows parties to go straight to the merits, securing faster and more affordable relief for all parties involved.[5]

2. Plaintiffs can effectively vindicate their rights in individual arbitration

Claims that might be asserted through a class action can be vindicated effectively through arbitration. As described above, arbitration provides a streamlined, cost-effective forum for plaintiffs to pursue legitimate claims. Statutory fee-shifting provisions--like that of Chapter 93A--encourage individual litigants to pursue their claims by reducing the expected expense they must bear. See

[5] The only people who are almost sure to profit from class actions are the attorneys who bring them. See, e.g., 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("The class action judicial system has become a joke, and no one is laughing except the trial lawyers ... all the way to the bank." (internal quotation marks omitted; ellipsis in original)). Class-action litigation can drag on for years in pursuit of "relatively paltry potential [individual] recoveries." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotation marks omitted). Lawyers' fees, on the other hand, usually consume a large portion of a class's recovery. This may be why Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed[.]" Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4, 4.

Feeney, 454 Mass. at 201-202. And while plaintiffs' arbitration agreements require their claims to be resolved in separate arbitration proceedings, nothing forbids them from sharing the expense of expert witnesses, fact investigation, and attorney preparation. Similarly, nothing precludes plaintiffs' attorneys from sharing successful strategies and pooling information and evidence gathered from non-confidential sources. Especially in employment cases like Machado, counsel should have no difficulty mustering cooperation from a sufficient number of claimants employed by the same employer in order to make individual arbitration cost-effective.

Further, arbitral fora are committed to facilitating the fair, expeditious, and cost-effective resolution of individual consumer and employee claims. For example, the American Arbitration Association (AAA)--one of the leading arbitration fora for consumer and employee disputes, and the one identified in the Machado arbitration provision--"has developed a set of principles, known as the Consumer Due Process Protocol, to protect consumers and ensure they are treated equitably in arbitration." Jenkins v. First

Am. Cash Advance of Ga., LLC, 400 F.3d 868, 879 (11th Cir. 2005); see also Green Tree Fin. Corp., 531 U.S. at 94-95 (Ginsburg, J., concurring) (recognizing the AAA Consumer Due Process Protocol as a consumer-protective measure in arbitration; describing AAA's fee structure as a "model[] for fair cost and fee allocation" for consumers in "small-claims arbitration").

3. Consumers and employees fare better in arbitration

The proof of bilateral arbitration's manifold virtues is found in consumers' and employees' levels of success and satisfaction in arbitration. Consumers tend to "fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Lipshutz, Note, The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits, 57 Stan. L. Rev. 1677, 1712 (2005). One recent study of consumer claims filed with the AAA found that customers win relief 53.3% of the time. See Drahozal & Zyontz, An Empirical Study of AAA Consumer Arbitrations, 25 Ohio

St. L.J. Disp. Res. 843, 845-846 (2010).[6] By contrast, virtually all court actions brought by consumers that are not settled or voluntarily withdrawn are dismissed, with only a tiny fraction ever reaching trial, much less a verdict for the plaintiff. It is not surprising, then, that consumers--as opposed to the plaintiffs' bar and certain courts--have largely been satisfied with arbitration as an alternative to litigation. Lipshutz, 57 Stan. L. Rev. at 1712.

Likewise, the Supreme Court has noted that employees in particular benefit from arbitration because of its decreased costs, "a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001). Indeed, research shows that employees who arbitrate their claims are more likely to prevail than employees who litigate. See, e.g., Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum.

[6] See also AAA, Analysis of the American Arbitration Association's Consumer Arbitration Caseload (AAA arbitrators ruled for the consumer in 48% of cases brought by consumers between January and August 2007).

Human Rts. L. Rev. 29, 46 (1998). One study of employment arbitration in the securities industry concluded that employees who arbitrate were 12% more likely to win their disputes than employees litigating in the Southern District of New York. See Delikat & Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And, taking account of attorney's fees, awards obtained by employees in arbitration are typically the same as or even larger than court awards. See id.; see also National Workrights Institute, Employment Arbitration: What Does the Data Show? (2004) (employees 20% more likely to prevail in arbitration).

4. Invalidating an arbitration clause that requires individualized proceedings does not meaningfully benefit consumers or employees

The "benefits of private dispute resolution" that account for greater consumer and employee satisfaction in arbitration--including "lower costs" and "greater efficiency and speed," Stolt-Nielsen, 130 S. Ct. at 1775--are lost in class proceedings. See Concepcion, 131 S. Ct. at 1752 n.8 ("It is not reasonably deniable

that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate."). These benefits are similarly dissipated by a state rule that would condition an arbitration agreement's enforceability on the availability of class proceedings.

Indeed, the most likely effect of such a rule is that companies would abandon arbitration altogether. Were businesses to stop providing for bilateral arbitration--an inevitable consequence of conditioning arbitration on the availability of class procedures--consumers with small, individual 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." Dobson, 513 U.S. at 281.

Moreover, it is not just the subset of consumers and employees pursuing disputes in arbitration who benefit from arbitration. Rather, these benefits extend even to those who never have a dispute of any kind, because arbitration "lower[s] [businesses'] dispute resolution costs," which manifests in a "wage increase" for employees and "lower prices to consumers." Ware, The Case for Enforcing Adhesive

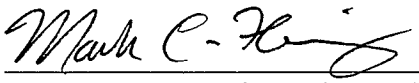
Arbitration Agreements--With Particular Consideration of Class Actions and Arbitration Fees, 5 J. Am. Arb. 251, 254-256 (2006); see also Boomer v. AT&T Corp., 309 F.3d 404, 419 n.7 (7th Cir. 2002) (benefits achieved by consumer arbitration agreements in the telecommunications industry "are reflected in the lower cost of doing business that in competition are passed along to customers"); cf. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) (customers who accept contracts with forum-selection clauses "benefit in the form of reduced fares reflecting the savings that the [company] enjoys by limiting the fora in which it may be sued").

This Court should preserve parties' ability--enshrined in the FAA--to opt for an alternative dispute resolution mechanism that allows both sides to vindicate their rights economically and efficiently, rather than forcing them to choose class-wide arbitration or no arbitration at all.

CONCLUSION

For the foregoing reasons, the orders on appeal should be reversed.

Respectfully submitted,



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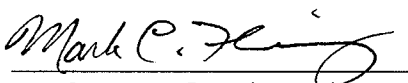
October 2, 2012

CERTIFICATION PURSUANT TO MASSACHUSETTS RULES OF APPELLATE PROCEDURE 16(k)

I hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including Mass. R. App. P. 17 and 20.



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