SUPREME COURT
STATE OF FLORIDA

JAMES PENDERGRAST,
Individually and on behalf of all others similarly situated,

Appellants,

v.

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

Appellees.
_____/

CASE NO.: SC10-19
L.T. Case No.: 09-10612

AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLEES

Questions Certified from the United States
Court of Appeals for the Eleventh Circuit

PETER B. RUTLEDGE
Admitted Pro Hac Vice
100 Herty Drive
Athens, GA 30602
(706) 542-1328 - telephone
(706) 542-5556 - facsimile

ROBIN S. CONRAD
Admitted Pro Hac Vice
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5605 - telephone

MAJOR B. HARDING
Fla Bar No.: 0033657
JOHN BERANEK
Fla Bar No.: 0005419
Ausley & McMullen
123 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, Florida 32301
(850) 224-9115 – telephone
(850) 222-7560 – facsimile

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IDENTITY AND INTEREST

Identity: The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of business companies and associations. It represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, sector and geographic region of the country. The Chamber is a non-profit corporation organized under the laws of the District of Columbia and has not issued any stock.

***Interest*:** The Chamber has a keen interest in a robust well-functioning system of arbitration. Many of its members, including those who conduct business in Florida, utilize arbitration agreements in contracts with their customers. Those agreements produce tangible benefits – both for those customers who have complaints (in the form of an inexpensive, expeditious and fair system of dispute resolution) and for those customers who do not (in the form of lower prices). A contrary result threatens to spawn litigation over these agreements and thereby deprive both consumers and businesses of these benefits. Consequently, it is critical that this Court answer the certified questions in a manner that vindicates the right of the Chamber's members and their customers to enter into enforceable arbitration agreements.

SUMMARY OF ARGUMENT

This Court should answer the certified questions in a manner that rejects Appellant's unconscionability challenge to the parties' arbitration agreement. The Chamber endorses Appellees' argument that Florida law requires the party resisting arbitration to prove both the procedural and substantive unconscionability of the arbitration agreement. It also shares Appellees' view that the agreement at issue in this case is not unconscionable.

The Federal Arbitration Act ("FAA") commands courts to enforce arbitration agreements "according to their terms." Courts may refuse enforcement only "upon such grounds as exist at law or in equity for the revocation of any contract." Unconscionability may supply such a "ground" in some extreme circumstances, but Appellant's proposed distortion of this ground renders it indistinguishable from the type of anti-arbitration rule that the FAA prohibits. Section 2 of the FAA unquestionably would preempt a state law that declared unenforceable an arbitration clause containing a class waiver. Just as the FAA precludes direct efforts to thwart arbitration, so too does it prohibit efforts to accomplish the same result indirectly through distortions of state contract-law doctrines like unconscionability. Those distortions undercut the substantial benefits that arbitration confers on consumers – benefits that the Supreme Court has recognized and a mounting body of empirical evidence confirms.

Whatever the precise scope of unconscionability as a "ground" under Section 2, it surely does not encompass the sort of class waiver present here. Appellant's attack overlooks the numerous alternative mechanisms such as fee-shifting, small-claims court and public enforcement which ensure that arbitration agreements containing class waivers do not inadvertently operate as exculpatory clauses. It also overstates the value of class actions – those actions are rarely available, rarely produce much benefit for individual litigants and do so only at a snail's pace.

ARGUMENT

In order to overcome "an anachronistic judicial hostility to agreements to arbitrate," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n. 14 (1985), the FAA requires both federal and state courts to enforce those agreements. Consistent with this "national pro-arbitration policy," states generally lack the power to declare arbitration agreements unenforceable, subject to only two limitations. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). First, an arbitration agreement that lacks any nexus to interstate commerce is not subject to the FAA's protection and therefore could be invalid under a state's own arbitration law, *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). Second, an arbitration agreement can be invalid "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. "[N]othing in the

[FAA] indicat[es] that the broad principle of enforceability is subject to any additional limitations under state law." *Southland*, 465 U.S. at 12.

This case concerns exclusively the second limitation (Appellant does not rely on the first). Appellant argues that the unconscionability doctrine supplies a "ground" for refusing enforcement of the parties' agreement and that the presence of the class waiver renders their agreement unconscionable in this case. That argument is incorrect.

A. Section 2 of the Federal Arbitration Act Precludes Efforts to Smuggle Anti-arbitration Doctrines Under the Guise of Generally Applicable Contract Defenses.

The FAA requires courts to give effect to the terms of the parties' agreement. *See* 9 U.S.C. §§3, 4, 5, 9. This consistent emphasis on enforcing arbitration agreements "according to their terms" – a principle that the United States Supreme Court re-enforced just last month – evidences a clear congressional purpose to honor both the parties' choice to arbitrate *and* the procedures by which arbitration will occur. *See Stolt-Nielsen, S.A. v. Animalfeeds, Int'l Corp.*, No. 08-1198, __ S.Ct. __, Slip Op. at 18 (Apr. 27, 2010); *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Caudle v. American Arbitration Ass'n*, 230 F.3d 920. 921 (7th Cir. 2000). Challenges to arbitration clauses rooted in the unconscionability doctrine can easily conflict with that congressional purpose. As one of Appellant's *amici*

acknowledges, they invite courts to rewrite the terms of the parties' agreement, either by imposing a different set of procedures on the parties (by severing the class waiver) or invalidating the arbitration agreement entirely. *See* Brief of the AARP at 15-18.

Such distortions of the unconscionability doctrine conflict with the U.S. Supreme Court's decisions precluding facially neutral state rules that effectively discriminate against arbitration. The critical precedents are *Southland Corp. v Keating*, 465 U.S. 1, and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). *Southland* involved California's Franchise Investment Law which contained an anti-waiver provision but did not specifically "single out" arbitration. 465 U.S. at 4 n. 1. The California Supreme Court relied on the public policy defense to invalidate an agreement requiring arbitration of claims arising under the franchise law. *Id.* at 19-21 (Stevens, J., concurring in part and dissenting in part). The United States Supreme Court reversed the California court's judgment and held that the FAA preempted its invocation of a "public policy" defense predicated on the franchise law's anti-waiver provision. *Southland*, 465 U.S. at 16 n. 11. *Buckeye* involved this Court's determination that an arbitration clause was unenforceable because the underlying contract violated Florida public policy and, thus, was "void." 546 U.S. 440. The United States Supreme Court rejected the view that courts could preemptively invalidate arbitration agreements on this

ground. Central to its conclusion was its rejection of the idea that "enforceability of the arbitration agreement should turn on 'Florida public policy and contract law.'" *Buckeye*, 546 U.S. at 446 (citation omitted). Under *Buckeye* and *Southland*, the FAA would preempt a state legislative enactment declaring unenforceable arbitration clauses that contain class waivers. *See also Dobson*, 513 U.S. 265; *Casarotto*, 517 U.S. 681; *Oppenheimer & Co., Inc. v. Young*, 475 So.2d 221, 222 (Fla. 1985) (*per curiam*).

Just as the FAA precludes state legislative rules that single out arbitration, so too does it preclude efforts to accomplish that exact same result indirectly by twisting general contract doctrines like unconscionability. *See Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) ("Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny."). Much like the "public policy" arguments rejected in *Southland* and *Buckeye*, arguments grounded in the unconscionability doctrine are easily malleable. *Cf. Dep't of Business Regulation v. National Manufactured Housing Federation, Inc.*, 370 So.2d 1132, 1136 (Fla.

1970) (finding unconscionability provision of Florida statute too vague). As a procedural matter, virtually any agreement can be characterized as the product of "unequal bargaining position" because two parties' "bargaining positions rarely will be equal." E. Allen Farnsworth, Contracts §4.28 at 335 (1990). As a substantive matter, virtually any term of an arbitration agreement can be challenged as "unfair" in some setting. *See generally* National Consumer Law Center, *Consumer Arbitration Agreements* §6.5 (2007 & Supp. 2009) (identifying at least nine different theories for using the unconscionability doctrine to attack arbitration agreements). Thus, stripped of their legal jargon, the sort of distorted unconscionability arguments advanced here are nothing more than dressed-up attacks on arbitration, which are fundamentally at odds with the FAA's purpose of overcoming "the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

B. Distortions of the Unconscionability Doctrine, if Accepted, Would Deprive Consumers of the Substantial Benefits of Arbitration.

In the context of arbitration agreements, distortions of the unconscionability doctrine rest on the belief that the civil litigation system offers consumers a superior forum for resolution of their claims. Those arguments, as the United States Supreme Court has recognized, are unsound. Arbitration benefits both

individual consumers with valid claims and the larger group of consumers who never have a complaint about a product or service.

1. Arbitration benefits individual consumer litigants.

The Supreme Court has recognized that "arbitration's advantages 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. A growing body of empirical evidence supports the Supreme Court's commonsense view.

First, arbitration produces outcomes for individuals often superior to, and at least comparable to, those produced by litigation. Several empirical studies, measuring outcomes by a variety of metrics, support this proposition. *See, e.g.*, Searle Civil Justice Institute, Consumer Arbitration Task Force, *Consumer Arbitration Before the American Arbitration Association* ("*Searle Study*") at 67-68 (2009), *available at* http://searlearbitration.org/p/full_report.pdf; Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* at 2 (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf (finding that 55% of arbitrations were resolved in consumer's favor and an additional 24% were settled or dismissed at consumer's request). According to one recent study of consumer arbitration before the American Arbitration Association ("the Searle Study"), consumer claimants won some form of relief in over 50% of the arbitrations that they

commenced. *See Searle Study* at 67-68. Studies of win-rates in civil litigation, most of which admittedly concern employment litigation, show similar results. *See, e.g.*, David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1569 (2005) (collecting studies).

Second, arbitration produces those favorable outcomes far more quickly than civil litigation. Just last month, the Supreme Court reaffirmed that the "benefits" of arbitration include "greater efficiency and speed." *Stolt-Nielsen*, Slip Op. at 21. *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S.20, 31 (1991) (describing the "simplicity, informality and expedition" of arbitration). Virtually every study comparing disposition times in arbitration and litigation supports this commonsense observation. *See* Searle Study at 8 (collecting empirical research). According to the Searle Study, the median time from filing to final award for cases brought by consumers was 6.6 months; expedited cases (such as ones that could be resolved on the basis of documents) were resolved even more quickly. *Id.* at 63-64. By contrast, median times from filing to disposition in civil litigation generally are far longer. *See* National Center for State Courts, *Case Processing Time Standards in 2007* at 34-35, *available at* http://www.ncsconline.org /cpts/cptsState.asp (showing disposition times for civil cases in Florida to range between twelve and eighteen months).

Third, arbitration produces those expeditious outcomes more efficiently than the civil litigation system. As this Court has recognized, "[a]rbitration is a valuable right that is inserted into contracts for the purpose of enhancing the effective and efficient resolution of disputes." *Raymond James Financial Services, Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005). Unlike judges, arbitrators are not straitjacketed by a single, inflexible set of rules of civil procedure. Instead, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Consequently, as Congress concluded in terms echoing this Court's view in *Raymond James* : "[arbitration] is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . ." U.S. House of Representatives, H. R. Rep. No.97-542, 97th Cong., 2d Sess. at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765. *See also* Y2K Act, Pub. L. No. 106-37, § 2(a)(3)(B)(iii)-(iv), 113 Stat. 185, 186 (1999) (codified at 15 U.S.C. §§ 6601-17) (noting that arbitration helps avoid the "delays, expenses, uncertainties, loss of control and animosities that frequently accompany litigation" and that "individuals … already find the legal system inaccessible, because of its complexity and expense"). This procedural flexibility enables arbitrators to resolve disputes far more cheaply, a

feature which "may be of particular importance [in cases that] involv[e] smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 123 (2001).

In sum, this Court should reject Appellant's indictment of arbitration advanced under the guise of the unconscionability doctrine. That indictment is grounded in premises that are at best empirically unverified and at worst demonstrably wrong.

2. Arbitration benefits consumers generally.

Standardized contracts, also known as contracts of adhesion, "are used all the time in today's business world" and perform an essential function in our society. *Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009). *See also Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002). So long as they are enforceable, such contracts supply a valuable predictability about the terms under which companies offer their products and services. *Cicle*, 583 F.3d at 555 (observing that if the adhesive quality of contracts sufficed to render them unenforceable, "much of commerce would screech to a halt"). That predictability enables companies to reduce their costs and pass savings onto consumers.

Arbitration clauses contained in such contracts offer a similar benefit. As the U.S. Supreme Court has recognized, contractual clauses designating forums reduce a company's dispute resolution costs and likewise yield a savings that is

passed onto consumers in the form of lower prices. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991). Empirical studies suggest arbitration clauses can have a similar effect. *See* Sherwyn, 57 Stan. L. Rev. at 1589 (collecting studies). Specifically in the telecommunications industry, the benefits achieved by these clauses "are reflected in the lower cost of doing business that in competition are passed along to customers." *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n. 7 (7th Cir. 2002) (citation omitted).

To secure these benefits, however, arbitration clauses contained in adhesion contracts likewise must be enforceable. If their non-negotiated quality sufficed to render them unenforceable, companies would lack the necessary predictability about the anticipated costs of resolving disputes. Higher anticipated dispute resolution costs would be passed on to consumers in the form of higher prices. Thus, the net result of Appellant's suggested ruling would be to leave worse off the very consumers whom Appellant purports to protect.

C. The Unconscionability Doctrine Does Not Invalidate an Arbitration Clause Containing a Class Waiver Where Adequate Mechanisms Ensure That Such Clauses Do Not Have an Exculpatory Effect.

Relying heavily on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), Appellant's argument presumes that the class waiver discourages individuals from pursuing their claims and effectively operates as an exculpatory clause. Appellant bears the burden of

proving this proposition. *See Cicle*, 583 F.3d at 556; *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007); *Autonation USA Corp. v. Leroy*, 105 S.W.3d 190, 195 (Tex. App. 2003). *Cf. Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (party resisting enforcement of arbitration clause bears burden of proving that dispute resolution costs render arbitration prohibitively expensive). In this case, Appellant cannot carry that burden. Several mechanisms ensure that arbitration clauses do not have an exculpatory effect.

First, statutory fee-shifting provisions encourage individual litigants to pursue their claims. Such statutes (including one chosen by Appellant here) enable the prevailing party to recover its attorneys' fees and costs from the losing party and thereby reduce the expected expense that a party must bear. *See* Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. §501.2105(1) (2007). Arbitral rules generally authorize arbitrators to award attorneys' fees to the extent permitted by law. *See, e.g.*, American Arbitration Association Commercial Rules R. 43(d)(ii).

While Appellant complains that fee awards under the FDUTPA are discretionary, Appellant's Brief at 50, that complaint rests on the faulty premise that arbitrators will not exercise their discretion to award fees. The available empirical evidence points in exactly the opposite direction. According to one

study of consumer arbitration, arbitrators awarded attorneys' fees to consumer-claimants in 63.1% of the cases in which they were sought. *See Searle Study* at 71.

Appellant also complains that fee-shifting does not supply an adequate incentive due to the risk that consumers might lose their case and, thus, have to pay the company's attorneys' fees. This argument is flawed in several respects. For one thing, it also applies in court, so it is not the arbitration clause *per se* that is discouraging litigation. Moreover, that regime reflects an eminently sensible policy choice by the legislature: to the extent a claim is meritorious, a plaintiff's counsel has nothing to fear; to the extent it is not, a permissive, bilateral fee shifting rule discourages frivolous lawsuits. Thus, this Court should find, as numerous other courts have, that a statutory fee-shifting provision provides a strong reason to reject – rather than embrace – an unconscionability challenge to an arbitration agreement grounded in a class waiver. *See, e.g., Pleasants v. Am. Express Co.*, 541 F.3d 853, 858 (8th Cir. 2008); *Strand v. U.S. Bank Nat'l Ass'n, Inc.*, 693 N.W.2d 918, 926 (N.D. 2005); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005); *Iberia Credit Bureau*, 379 F.3d at 175 n. 19; *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001).

Second, small-claims courts offer individuals another low-cost option to pursue their valid claims. Arbitration clauses (including the one at issue here, 592 F.3d at 1124) often specify that the clause does not bar the consumer's right to

pursue a claim in small-claims court. *See, e.g.*, American Arbitration Association, Consumer Due Process Protocol Article 5. As numerous courts have found, small-claims court, much like arbitration, offers "a relatively inexpensive, quick and easy adjudication" which ensures that individual litigants with valid claims are fully compensated for any wrong they have suffered. *Cicle*, 583 F.3d at 555. *See also Iberia Credit Bureau*, 379 F.3d at 175 n. 19; *Rivera v. AT&T Corp.*, 420 F. Supp. 2d 1312, 1322 (S.D. Fla. 2006).

Appellant objects that small-claims court is not a viable alternative due to the costs of proving his case. Appellant's Brief at 50. To the extent that argument is valid (and not merely asserted by Appellant's self-interested affiants), state enforcement authorities (discussed below) have ample investigative tools. In most cases, though, the premise of Appellant's argument is doubtful. Most small-claims disputes do not require complex proof. For example, this case ultimately boils down to an individualized fee dispute. Appellant maintains that he was inappropriately charged fees for certain wireless telephone calls. Like millions of consumers around the country, Appellant is perfectly capable of reviewing his bill and does not need "seven figure discovery" to decide whether, in his opinion, it is too high. *Francis v. AT&T Mobility LLC*, Case No. 07-CV-14921, 2009 WL 416063 at *9 (E.D. Mich. Feb. 18, 2009). Such a claim is ripe for small-claims

court. Fla. Sm. Cl. R. 7.010 provides: "These rules shall be construed to implement the simple, speedy and inexpensive trial of actions in county courts."

Finally, arbitration clauses do not preclude governmental agencies from exercising their enforcement authority on behalf of an aggrieved group. In unanimous opinion, the U.S. Supreme Court made clear that administrative agencies with enforcement authority under a given statute retain the ability to commence litigation even when the individuals on whose behalf they sue are parties to an arbitration clause. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). *See also Gilmer*, 500 U.S. at 32. As numerous courts have recognized, administrative enforcement provides a meaningful mechanism for pursuing collective litigation without the perverse incentives that exist when that litigation is being brought by "lawyers … interested in their fees." *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008). *See, e.g., Iberia Credit Bureau*, 379 F.3d at 175; *Snowden v. Check Point Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 375 (3d Cir. 2000); *Pomposi v. Game Stop, Inc.*, No. 3:09-cv-340 (VLB), 2010 WL 147196 (D. Conn. Jan. 11, 2010); *Rivera*, 420 F.Supp.2d at 1322.

Appellant objects that such remedies are inadequate because government authorities are overworked and underfunded. Appellant's Brief at 19. Tellingly, though, the only support that Appellant offers for this proposition is briefs from

three states' attorneys general filed in other cases and an affidavit from a government official in Washington State. Appellant does not substantiate this argument with any declaration from Florida's own attorney general or state officials. Even if Appellant's argument accurately represented the state of affairs in Florida, it would not supply a reason to invalidate an arbitration clause due to the presence of a class waiver. Government agencies, whether prosecutors' offices or civil administrative agencies, inevitably must set enforcement priorities and allocate state resources on the basis of those priorities, enabling them to focus on valid claims and to weed out meritless ones.

In sum, ample avenues ensure that individual consumers have opportunities, in addition to arbitration, to pursue their valid claims. Appellant consequently cannot meet his burden of proving that a class waiver renders an arbitration clause effectively exculpatory.

D. Invalidating an Arbitration Clause Due to the Presence of Class-Action Waiver Does Not Meaningfully Benefit Consumers.

Appellant's whole argument rests on the premise that litigants can more effectively vindicate their rights in the civil courts system by means of a class action. That premise is not correct. Class actions for monetary damages are an "adventuresome innovation" of quite recent pedigree. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). *See also* Fla. R. Civ. P. 1.220 Committee

Note (describing development of modern class action in Florida only in 1980). Consequently, class actions for money damages remain subject to strict standards, *see, e.g.*, Fed. R. Civ. P. 23, making them "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

For one thing, it is hardly clear that Appellant's case would qualify for class certification. As the Eleventh Circuit's opinion demonstrates in great detail, the history of Appellant's relationship with Sprint is unusual, involving several cell phone purchases over several years and several different versions of the parties' arbitration agreement. *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1121-31 (11th Cir. 2010). His claims moreover are grounded on the specifics of the many locations from which he made roaming calls. Consequently, Appellant has "[a]t most … only a possibility of litigating a class action with no guaranty that the [district court] ever would certify a class in this lawsuit." *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 364 (Tenn. App. 2001). It makes no sense to invalidate the parties' arbitration agreement merely because it makes unavailable a procedural device to which Appellant may not even be entitled.

For another thing, cases that qualify for class certification rarely yield their promised benefits. As Congress itself has recognized, "class members often receive little or no benefit from class actions, and are sometimes harmed." Class

Action Fairness Act of 2005, 28 U.S.C. §1332 (d), Pub. L. No. 109-2, 119 Stat. 4. Many consumer class actions, once certified, result in little more than "coupon" settlements where class members eventually are entitled to receive some token *in kind* benefit from the defendant. *See* C.R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. Rev. 991 (2002). Moreover, only a fraction of those individuals entitled to this benefit actually complete the paperwork necessary to receive it. *See* 4 William Rubenstein *et al.*, Newberg on Class Actions §14:7 (4th ed. 2007). The only parties who truly "come out ahead" in the class-action game are the plaintiffs' lawyers who typically draw down a fee calculated as a substantial percentage of the overall settlement's claimed value. *See* Jill Fisch, *Class Action Reform, Qui Tam and the Role of the Plaintiff*, 60 L. & Contemp. Probs. 167, 168 (1997).

Finally, even where class actions do result in some meaningful benefit to individual consumers, those benefits do not come quickly. As noted above, the civil litigation system as a general matter produces results far more slowly than arbitration. The story of class actions is even bleaker. According to one study of securities class actions, the average case took nearly four years to settle, with some cases lasting ten years or more. *See* S.R. Marino & R.D. Marino, *An Empirical Study of Recent Securities Class Action Settlements Involving Accountants, Attorneys or Underwriters*, 22 Sec. Reg. L. J. 115, 127 (1994).

Class actions almost never yield a tangible and timely benefit for the individual consumer. Consequently, it makes little sense to stretch the unconscionability doctrine to encompass waivers of this rarely available and rarely productive procedural device as a "ground" for invalidating parties' arbitration agreements.

CONCLUSION

At the end of the day, this case turns on two principles – (1) protecting the enforceability of contracts as written and (2) ensuring that Florida unconscionability doctrine is not distorted. Under those principles, this Court should answer the certified questions in a manner that rejects Appellant's unconscionability challenge to the parties' arbitration agreement.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Times New Roman 14 point, a font that is proportionately spaced.

/s/ Major B. Harding
MAJOR B. HARDING
Fla Bar No.: 0033657
JOHN BERANEK
Fla Bar No.: 0005419
Ausley & McMullen
123 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, Florida 32301
(850) 224-9115 – telephone
(850) 222-7560 – facsimile

PETER B. RUTLEDGE
Admitted Pro Hac Vice
100 Herty Drive
Athens, GA 30602
(706) 542-1328 - telephone
(706) 542-5556 - facsimile

ROBIN S. CONRAD
Admitted Pro Hac Vice
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5605 - telephone

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the following this 18th day of May, 2010:

Douglas F. Eaton
Eaton & Wolk PL
The Four Seasons Tower
1441 Brickell Ave., Ste. 1200
Miami, FL 33131

David E. Mills
Daniel Prichard
Dow Lohnes, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, DC 20036

James Anthony Kowalski, Jr.
Law Offices of James A. Kawalski, Jr.
12627 San Jose Blvd., Ste. 203
Jacksonville, FL 32223-8638

Bard Daniel Rockenbach
Burlington & Rockenbach, P.A.
444 W. Railroad Ave., Ste. 430
West Palm Beach, FL 33401-4136

Lynn Drysdale
Jacksonville Area Legal Aid, Inc.
126 W. Adams Street
Jacksonville, FL 322202-8349

Brian William Warwick
20 Lagrande Blvd.
The Villages, FL 32159-2384

Thomas Richard Julin
Hunton & Williams
1111 Brickell Avenue, Ste. 2500
Miami, FL 33131-3101

Mr. Andrew G. McBride
Wiley, Rein & Fielding
1776 K Street NW
Washington, DC 20006

Mr. Evan M. Tager
Mayer Brown LLP
1999 K Street, N.W.
Washington DC 20006-1101

/s/ Major B. Harding
Attorney