15-1407-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADAM BERKSON, individually and on behalf of all others similarly situated,
KERRY WELSH, individually and on behalf of all others similarly situated,
Plaintiffs/Appellees,

v.

GOGO LLC, GOGO INC.,
Defendants/Appellants.

On appeal from the United States District Court for the Eastern District of New York, No. 1:14-cv-01199, Hon. Jack B. Weinstein

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS/APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates conduct substantial business online. Indeed, hundreds of billions of dollars' worth of e-commerce transactions are conducted every year in the United States. Most of those transactions involve online contracts. The enforceability of online contracts is thus of critical importance to the Chamber and its members, as well as the Nation's economy more generally.

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

Moreover, many of the Chamber's members and affiliates regularly employ arbitration agreements in their online contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA") and the United States Supreme Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements. By subjecting online contracts that include arbitration provisions to a vague but heightened test for enforcement, the district court has created an unacceptable cloud of uncertainty over those agreements.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2013, the U.S. economy included an estimated $443 billion in e-commerce transactions in the service industry alone, growing more than five percent faster year-to-year than the overall service industry. *See* U.S. Department of Commerce, *E-Stats 2013: Measuring the Electronic Economy* at 2, *available at* http://www.census.gov/econ/estats/e13-estats.pdf. And e-commerce transactions in the retail industry added $261 billion to the economy, growing almost ten percent faster than the overall retail industry. *Id.* This enormous, and rapidly expanding,

sector of the economy relies almost exclusively on online contracts such as those that the district court refused to enforce here.

The district court's order here departed from settled principles of contract law that courts consistently have held are sufficient to decide questions of enforceability for on-line contracts. Instead of inventing a new four-part test for "on-line contracts of adhesion," the district court should have simply asked (i) whether Gogo provided plaintiffs with reasonable notice of the terms of its contract when it required them to take an affirmative step indicating assent to those terms, accompanied by a clearly disclosed hyperlink to the terms, and (ii) whether plaintiffs assented to those terms by taking the required affirmative step. Courts have regularly found that this type of contractual arrangement satisfies traditional standards for contract formation and is fully enforceable.

Moreover, by creating a higher standard for notice of what the district court characterized as "adverse terms" such as an arbitration clause, that court's test violates well established Supreme Court precedent holding that the enforcement of arbitration clauses must be subject to the same standards as other provisions in the contract.

ARGUMENT

I. The District Court's Order Undermines Recognized Principles Of Online Contract Formation.

A. The district court's approach to contract formation departs from well established principles of reasonable notice and mutual assent.

While the process of entering into a contract online self-evidently differs from the paper contracts of yesteryear, most courts—including this Court—have held that the traditional tests for contract formation "drawn from the world of paper contracting" continue to provide the appropriate framework for resolving disputes over the existence of online contracts. *Specht v. Netscape Comms. Corp.*, 306 F.3d 17, 31 (2d Cir. 2002). In particular, traditional tests for reasonable notice of contract terms and mutual assent to those terms "apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to "Download Now!". *Id.* As this Court underscored over a decade ago, "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004).

Specht is among the earliest cases during this century to confront questions of online contract formation. In *Specht*, this Court addressed what we might today characterize either as a failed "clickwrap" agreement or an unenforceable

"browsewrap" contract. Specifically, in *Specht* this Court addressed whether, by clicking on a "download" button located on a company's website for free software, individuals were bound by terms of use for the software. In holding that they were not, the Court held that the website at issue did not provide consumers with reasonable notice of the terms of use or secure adequate consent to those terms, in large part because the link to the terms was not located near the "download" button. The Court observed that, "once plaintiffs … had clicked on the 'Download' button located at or near the bottom of their screen, and the downloading of SmartDownload was complete, these plaintiffs encountered no further information about the plug-in program or the existence of license terms governing its use. The sole reference to SmartDownload's license terms on the 'SmartDownload Communicator' webpage was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen." *Id.* at 23. The Court held that, "a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload's license terms hidden below the 'Download' button on the next screen." *Id.* at 35; *see also id.* at 31 ("[P]laintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms.").

The outcome in *Specht* was driven by the same principles of reasonable notice and mutual assent that were applied to traditional paper contracts in the cases cited by the Court. Those cases (applying California law) held that, while "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing," "[a]n exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term." *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 107 Cal. Rptr. 2d 645, 651 (Ct. App. 2001). Thus, in a traditional paper-contract case, the court refused to enforce a contractual provision because "the provision in question is effectively hidden from the view of money order purchasers until after the transactions are completed." *Cory v. Golden State Bank*, 157 Cal. Rptr. 538, 541 (Ct. App. 1979). Specifically, the terms were printed only on the customer's copy of the money order, which the customer did not receive until after the transaction was complete. "Under these circumstances, it must be concluded that the Bank's money order purchasers are not chargeable with either actual or constructive notice of the service charge provision, and therefore cannot be deemed to have consented to the provision as part of their transaction with the Bank." *Id.* But, in another case, the court held that the plaintiff was bound by a bank's printed rules because she signed a signature card with a "clearly printed"

statement assenting to "the by-laws, regulations, rules and practices of the bank," which were available from another source, even though "she was not advised of the contents of the by-laws, rules and regulations." *Larrus v. First Nat'l Bank*, 266 P.2d 143, 145, 147 (Cal. Ct. App. 1954); *see also, e.g.*, *Krupp v. Franklin Sav. Bank*, 5 N.Y.S.2d 365 (App. Div. 1938) (same under New York law).

As demonstrated by the Second Circuit's reliance in *Specht* on cases involving traditional paper contracts, courts have had little difficulty applying traditional principles of contract formation to the new context of online contracts. For example, the contractual terms for the online contract in *Specht* were unenforceable because, like the terms for the traditional contract in *Cory*, they were "effectively hidden from … view." 157 Cal. Rptr. at 541. But the contractual terms for the online contracts here, even more than the terms for the traditional contract in *Larrus*, are enforceable because there was a "clearly printed" statement that an identified affirmative action indicated assent to the terms, which plaintiffs had an opportunity to review. 266 P.2d at 147. The context has changed, but the principles of contract formation remain the same.

Other courts routinely apply the same principles that govern traditional contracts when enforcing online "clickwrap" agreements that are materially indistinguishable from Gogo's contracts here. As the Tenth Circuit recently put it, "Clickwrap agreements are increasingly common and have routinely been upheld.

Federal and state courts typically evaluate clickwrap agreements by applying state law contract principles." *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1256 (10th Cir. 2012) (internal quotation marks and citation omitted); *see also Carson v. LendingTree LLC*, 456 F. App'x 234, 236 (4th Cir. 2011) (customer "agreed to arbitrate" claims when she "affirmatively checked the box indicating that she agreed to the terms of use, which included the arbitration provision," which "no one prevented her from perusing"); *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 382, 385 (7th Cir. 2007) (enforcing terms of service when, "[a]s is common in Internet commerce," plaintiff "signifie[d] agreement by clicking on a box on the screen"); *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 452-54 (E.D.N.Y. 2013) (enforcing terms of service because, unlike in *Specht*, "defendant's reference to its Terms and Conditions of Service appear on the same screen as the button a prospective user must click in order to move forward in the registration process"); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 840 (S.D.N.Y. 2012) (enforcing clickwrap contract because the plaintiff "was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough."); *Bassett v. Elec. Arts, Inc.*, 2015 WL 1298632, at *6 (E.D.N.Y. Mar. 23, 2015) ("Plaintiff manifested assent to the agreement to arbitrate when he clicked 'I Accept' during both the registration process and when later confronted with updated Terms of Service."); *Jallali v. Nat'l Bd. of*

Osteopathic Med. Examiners, Inc., 908 N.E.2d 1168, 1173 (Ind. Ct. App. 2009) (upholding clickwrap agreement under general contract principles).

In sum, as this Court repeatedly has held, the test for contract formation is the same whether the contract is on paper or online. *See Register.com*, 356 F.3d at 403; *Specht*, 306 F.3d at 31. In both contexts, there must be: (i) "[r]easonably conspicuous notice of the existence of contract terms" and (ii) "unambiguous manifestation of assent to those terms by consumers." *Specht*, 306 F.3d at 35.[2] Here, the district court erred by treating online technology as a foreign world to be feared, requiring the invention of a novel four-factor test to assess the enforceability of online contracts (based on the court's skewed diversion into the fields of online psychology, social science, and web design). The court should have simply asked the same questions it would have asked with a traditional paper contract: whether Gogo's website included "[r]easonably conspicuous notice of the existence of contract terms" and required "unambiguous manifestation of assent to those terms." *Id.* at 35.

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[2] *See also Specht*, 306 F.3d at 34 n.17 (observing that California's statutory standard for disclosure of contractual terms online is "consistent with the principle of conspicuous notice of the existence of contract terms that is also found in California's common law of contracts"). While *Specht* applied California law, the traditional principles of contract formation are the same under New York or Illinois law. *See, e.g.*, *Express Indus. & Terminal Corp. v. N.Y. Dep't of Transp.*, 715 N.E.2d 1050, 1053 (N.Y. 1999); *Rosin v. First Bank of Oak Park*, 466 N.E.2d 1245, 1249 (Ill. Ct. App. 1984).

B. The district court's opinion is based on false assumptions about online consumers.

Applying this framework, the analysis of whether Gogo's arbitration agreement is enforceable should have been straightforward.

First, the contractual nature of the transaction is reasonably conspicuous. Gogo's website includes commonplace language stating that by taking an action required to use Gogo's service (either clicking a box or signing in to the service), the consumer was agreeing to Gogo's terms of use—and those terms were readily accessible through a hyperlink. Indeed, the relevant language was clearly printed immediately next to a button or box that the user was required to click in order to access Gogo's services. The district court speculated that the average Internet user may not realize that this language was forming a contract. But armchair psychology aside, the statement "I agree to the terms of use" has no other logical meaning. Notably, the district court's foray into academic literature identified nothing to suggest that this phrase is regularly misunderstood or is simply a mystery to the average person using the Internet. Neither did the district court distinguish this language from traditional phrases that have long been recognized as expressing assent to contractual terms. *See, e.g.*, *Larrus*, 266 P.2d at 145 (signature card stated that "the depositor agreed that the account was to be carried as a savings account and that the funds in it should be governed by the by-laws, regulations, rules and practices of the bank"); *Krupp*, 5 N.Y.S.2d at 366 ("signature

card … stated that he agreed to the by-laws of the Bank"). In any event, "[e]ven resolving all doubts and inferences in [plaintiffs'] favor, it is impossible to infer that a reasonable adult in [plaintiffs'] position would believe that" Gogo was offering to provide recurring access to Internet service during flights without a contract. *Schwartz v. Comcast Corp.*, 256 F. App'x 515, 519-20 (3d Cir. 2007) (customer was bound by contract terms for Internet service available on provider's website).

Further, the terms of use themselves were readily accessible to consumers through a hyperlink in the same sentence indicating assent to those terms on Gogo's web page. Again without identifying any support for the proposition, the district court speculated that the average Internet user may not know how to use a hyperlink. A188, 224. But the only reasonable inference is that users like plaintiffs who must understand how to click on a box or button to purchase Gogo's services, and who are willing to pay money in order to ensure Internet access during a flight, also will understand how to click on a hyperlink in order to access Gogo's terms of use. Again, the district court did not identify any evidence that a significant portion of the population that uses the Internet—let alone the population that uses Gogo's services—does not know how to click on a hyperlink. And the district court gave short shrift to the many cases that have routinely enforced online terms that are accessed by clicking on a hyperlink. *See, e.g.*, *Fteja*, 841 F. Supp. 2d at 839-40;

Zaltz, 952 F. Supp. 2d at 454; *Nicosia v. Amazon.com, Inc.*, __ F. Supp. 3d __, 2015 WL 500180, at *6-7 (E.D.N.Y. Feb. 4, 2015). As Judge Holwell has put it:

> The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase "Terms of Use" is really a sign that says "Click Here for Terms of Use." So understood, at least for those to whom the internet is an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket.

Fteja, 841 F. Supp. 2d at 839; *see also, e.g.*, *Adelson v. Harris*, 973 F. Supp. 2d 467, 483-84 (S.D.N.Y. 2013) ("Not so long ago, the Second Circuit could not discuss the hyperlink without defining the innovation for its readers. … Nearly two decades later, it is simply assumed that persons navigating the Internet understand hyperlinks as means of connecting one webpage to another.").

In general, the district court was mistaken to conclude that, "[i]t is not unreasonable to assume that there is a difference between paper and electronic contracting" and "[b]ased on assumptions about Internet consumers, they require clearer notice than do traditional retail buyers." A193. Setting aside that the "assumptions" being drawn by the district court are contrary to the weight of judicial authority, the very statistics that the district court cited indicate that Internet users *are* the same people as traditional retail buyers: 87% of the U.S. population uses the Internet. A186 (citing Pew Research Center Internet Project

Survey, January 9-12, 2014). And other publicly available statistics indicate that 74.4% of Internet users—representing over half of the total U.S. population—made at least one online purchase in 2014. *See* eMarketer, *Retailers Look to Merge Offline and Online Shopping Experiences in 2014*, *available at* http://www.emarketer.com/Article/Retailers-Look-Merge-Offline-Online-Shopping-Experiences-2014/1010812. In other words, the population using the Internet—including those making purchases online—is not materially distinct from the population generally. Notably, again, the district court identified nothing to suggest that individuals who purchase goods and services online tend to be particularly unsophisticated or otherwise require heightened protection. On the contrary, the statistics cited by the district court suggest that, to the extent they are marginally different from the overall population, Internet users are younger, better educated, and wealthier. *See* A186.

There is even less reason to impose a heightened standard for contract formation with respect to the group of consumers who use Gogo's services. Gogo's users must, at minimum: (i) be flying; (ii) with a device that has Internet connectivity; (iii) know how to search for and connect that device to Gogo's service; (iv) know how to complete the financial transaction involved in paying for Gogo's services on their device; and (v) value Internet connectivity for the duration of the flight at or above the cost of Gogo's services. Thus, if the district

court were to draw any particular inference about Gogo's customers, it would have to assume that they are, relatively speaking, technologically sophisticated.

For all these reasons, the district court's decision to create a new four-part test for enforcement of on-line contracts not only is contrary to case law, it is based on assumptions that are either unsupported or demonstrably false.

II. The District Court Impermissibly Created A Heightened Standard For Enforcement Of Arbitration Agreements.

As the United States Supreme Court has observed, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011). Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted); *see also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration.") (citing *Concepcion*, 131 S. Ct. at 1745). At the heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate … is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting 9 U.S.C. § 2). "By enacting § 2, …

Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U. S. 506, 511 (1974)).[3]

In other words, Section 2's savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Casarotto,* 517 U.S. at 687). Section 2 prohibits the imposition of "prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston v. Ferrer*, 552 U.S. 346, 356 (2008).

Applying these principles, the United States Supreme Court held in *Casarotto* that the FAA preempts any rule of state law that imposes on arbitration provisions notice requirements that do not apply to all other contract clauses. In

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[3] *See also, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009); *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 & 16 n.11 (1984).

Casarotto, the Montana Supreme Court refused to enforce an arbitration agreement based on a Montana statute that required contracts containing arbitration clauses to declare that fact in "underlined capital letters on the first page of the contract." 517 U.S. at 683 (internal quotation marks omitted). That requirement, the Court held, "directly conflict[ed] with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a *special notice requirement not applicable to contracts generally.*" *Id.* at 687 (emphasis added).

Here, the district court's analysis of whether an enforceable arbitration agreement was formed fails Section 2 of the FAA for similar reasons. Although the district court purported to couch the rule it announced in "general[] terms," in fact the key step of the district court's "four-part inquiry in analyzing sign-in wraps, and electronic contracts of adhesion" discriminates against arbitration provisions:

> Did the merchant clearly draw the consumer's attention to material terms that would alter what a reasonable consumer would understand to be her default rights when initiating an online consumer transaction from the consumer's state of residence. The right to (a) not have a payment source charged without notice (i.e., automatic payment renewal); (b) bring a civil consumer protection action under the law of her state of residence and in the courts in her state of residence and (c) participate in a class or collective action?

A227-28. Since the ability to "bring a civil consumer protection action … in the courts" and to participate in "a class or collective action" are the two most salient features of judicial procedure that parties agree to waive when they enter into bilateral arbitration agreements, the rule discriminates on its face against

arbitration. Moreover, the court specified that "[p]roof of ***special know-how*** based on the background of the potential buyer or adequate warning of adverse terms by the design of the agreement page or pages should be required before adverse terms, such as compelled arbitration or forced venue, are enforced." A228 (emphasis added).

The district court's test runs directly afoul of *Casarotto*, which held that a rule "'requiring *greater information or choice* in the making of agreements to arbitrate than in other contracts is preempted.'" 517 U.S. at 687 (emphasis added) (quoting 2 Ian R. Macneil *et al.*, FEDERAL ARBITRATION LAW § 19.1.1, pp. 19:4-19:5 (1995)). By treating arbitration clauses as an "adverse term" to which a merchant must "clearly draw the consumer's attention," the district court created a higher standard for enforcement of arbitration clauses than exists for other clauses of the contract (or else a higher standard for enforcement of contracts that contain arbitration clauses than for contracts that do not).

The district court's rule that special warning or notice must be given that the contract contains an arbitration clause that displaces the consumer's "default rights" to "bring a civil consumer protection action … in the courts in her state of residence" (A227-28), necessarily rests on "the tired assertion that arbitration

should be disparaged as second-class adjudication."[4] *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004). As the Supreme Court explained three decades ago, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). The "mistrust of the arbitral process" reflected in the conditions imposed by the court below on the enforceability of arbitration agreements long "has been undermined by" the Supreme Court's "arbitration decisions." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n.5 (1991).

By requiring a heightened standard for proving mutual assent to contracts containing an arbitration clause, the "four factor" test invented by the district court runs afoul of clear precedent that prevents rules like this that single out arbitration clauses for special adverse treatment. For that reason as well, the district court's order should be vacated.

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[4] The district court singled out arbitration clauses based in part on report "finding that arbitration clauses used by companies to avoid lawsuits take away consumers' rights to sue in court and offer little, if any, benefit to consumers." *See* A210-11. But that view ignores the Supreme Court's recognition in *Concepcion* that plaintiffs "were *better off* under their arbitration agreement … than they would have been as participants in a class action." 131 S. Ct. at 1753. And in all events, such "judicial hostility to arbitration agreements" is precisely what the FAA was enacted to prevent. *Id.* at 1745.

CONCLUSION

The Court should reverse the district court's decision and remand the case for further proceedings.

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Respectfully submitted.

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s/ Archis A. Parasharami
Archis A. Parasharami

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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