

NO. 243991

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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MICHAEL McKEE

Respondent

v.

AT & T CORPORATION

Appellant

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APPELLANT AT&T CORP.'S REPLY BRIEF

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Daniel M. Waggoner  
Cassandra L. Kinhead  
Davis Wright Tremaine LLP  
Attorneys for Appellant AT&T Corp.

1501 Fourth Avenue, Suite 2600  
Seattle, Washington 98101-1688  
(206) 622-3150 Phone  
(206) 628-7699 Fax

Laura Kaster, Esq.  
Deborah Droller, Esq.  
Howard Spierer, Esq.  
Counsel for AT&T Corp.

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## I. INTRODUCTION

There is a single issue in this appeal; whether this Court should compel arbitration of this dispute pursuant to the arbitration clause contained in the long-distance telephone services agreement (the "Agreement") between AT&T and Plaintiff McKee. This issue is controlled by two federal statutes: the Federal Arbitration Act ("FAA") and the Federal Communications Act ("FCA"). Application of each statute independently supports the reference of this dispute to arbitration.

Under the FAA, because Plaintiff argues that the *entire* Agreement is unconscionable, this Court must compel arbitration so the *arbitrator* may decide whether the Agreement in its entirety is enforceable. The recent United States Supreme Court decision in Buckeye Check Cashing, Inc. v. Cardegna, 2006 WL 386362, \*6 (Feb. 21, 2006), mandates that a "challenge to the validity of the contract as a whole, [as here], and not specifically to the arbitration clause, must go to the arbitrator."

Under the FCA, this Court must refrain from ruling on the validity of any terms of the Agreement, regardless of whether McKee challenges only the arbitration clause or the entire Agreement. As argued in AT&T's opening brief, the FCA preempts state court review of the terms and conditions of the Agreement. The FCC alone has authority over the terms and conditions of long-distance agreements, and this Court must enforce the Agreement absent an FCC ruling that the arbitration clause is invalid under the FCA. While McKee attempts to persuade this Court that AT&T

argues that there is *no* role for state courts with respect to long-distance contracts, AT&T's position is more limited: state courts may only determine whether a valid contract was formed or whether the parties wholly failed to perform their contract duties. The FCC expressly reserved these areas for state law jurisdiction while retaining its own authority over the terms and conditions of the agreements under Sections 201 and 202 of the FCA.<sup>1</sup>

If this Court nonetheless finds that it has jurisdiction to review the arbitration clause, the issue then is whether the clause's provision barring consumers from participating in class actions is so unconscionable that the entire arbitration clause must be stricken.<sup>2</sup> McKee makes two arguments for finding the clause unconscionable: (1) the clause effectively immunizes AT&T against all liability because it prevents class actions; and (2) the clause is one-sided. Neither argument is convincing or supported by the law of Washington State or any other jurisdiction. The Agreement does *not* immunize AT&T from liability. It merely creates a protocol for the prompt and inexpensive resolution of individual customer claims while preserving the rights of consumers to seek redress through the appropriate federal or state regulatory agencies for broader issues.

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<sup>1</sup> See, e.g., Order on Reconsideration, 12 FCC Rcd. 15,014, 15057 (1997) (distinguishing FCC review of the lawfulness of rates, terms, and conditions of long-distance contracts from "other issues," such as contract formation and breach, that are subject to review by state courts).

<sup>2</sup> McKee no longer argues that any other Agreement terms are unconscionable and thus effectively admits that all other terms challenged at the trial court level are not at issue. As AT&T established, all other clauses were removed from the Agreement before McKee brought this action, so they are not before this Court. CP 56, 133-39.

Evidence of hundreds of successful small claims actions and arbitrations -byAT&Tcustomersbelieves Plaintiff'scontention that the clause provides no real remedies. Moreover, there is no rule that allows the Court to strike a term from an arbitration clause merely because it operates to the benefit of only one party. In any event, striking a clause because it is "one-sided" violates the FAA, which prevents state courts from creating or applying "special" rules to limit arbitration clauses that are not equally applied to all types of contracts.

## II. ARGUMENT

### A. Under the FAA, An Arbitrator, Not This Court, Should Determine the Validity of the Agreement As a Whole.

Up until filing his response brief in this appeal, Plaintiff McKee has argued that the *entire* Agreement was usurious and unconscionable and thus should not be enforced. CP 1270 (Complaint), CP 1155 (Amended Complaint), CP 1072, CP 430. McKee argued to the trial court that several clauses that were not part of the arbitration clause were unconscionable. For example, McKee argued that the New York choice of law provision was unconscionable, CP 1064, and that the damages clause was unconscionable as well, CP 1065. Neither of these provisions is found in the arbitration clause. The trial judge accepted McKee's argument and found that the *entire* Agreement was unconscionable. RP 1, pp. 11-12. Indeed, the trial judge expressly stated that he was ruling on the unconscionability of the Agreement in its entirety. RP 1, p. 7.

An argument that an entire contract containing an arbitration clause is not valid—as opposed to an argument that is more narrowly focused on the arbitration provision itself—is an argument that the United States Supreme Court recently and unambiguously held must be resolved *by an arbitrator*, not by a court. See Buckeye Check Cashing, Inc. v. Cardegna, 2006 WL 386362, \*6 (Feb. 21, 2006) (reaffirming Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-4, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). To follow Buckeye's rule, which ensures that state courts do not improperly invalidate contracts containing arbitration clauses that are subject to the FAA, the court must compel arbitration and allow the arbitrator to determine whether the contract, as a whole, is valid. The Buckeye Court reasoned that although it is true that:

the Prima Paint rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void ... it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. Prima Paint resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

Buckeye Check Cashing, Inc., at \*6.

In the wake of this controlling decision, Plaintiff now tries to abandon the position it has taken in the pleadings and the motions that gave rise to this appeal and acts as if this case is focused solely on the

arbitration clause. Plaintiff's ploy comes too late. Because McKee  
\_ challenged and the trial court ruled on the validity of the Agreement as a  
whole, this Court must follow Buckeye and Prima Paint and order the  
arbitrator to determine the enforceability of the Agreement. As the Court  
stated in Buckeye, the "issue of the contract's validity is considered by the  
arbitrator in the first instance." Id. at \*5. This is the only result that  
accords with the FAA.

**B. The FCA Also Bars This Court From Judging the Enforceability of Terms of the Agreement, Including Its Arbitration Clause.**

Even if the Court finds that the FAA does not dictate compelling arbitration of this dispute, the Court must nevertheless exercise restraint in this case because long-distance contracts are subject to federal regulation by the FCC. Under the Federal Communications Act, the FCC - not a state court - determines whether clauses, such as class action prohibitions, are valid and enforceable under the terms of the FCA. See, eg., 12 FCC Rcd. at 15,057 (distinguishing between FCC determinations regarding the "lawfulness of rates, terms, and conditions" from "other issues, such as contract formation and breach"); In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1198 (E.D. Pa. 1996) (discussing Congress's direction to the FCC to continue to enforce sections 201, 202, and 208 of the FCA post-detariffing); 11 FCC Rcd. 20,730, 20,751 (1996).

Plaintiff misstates AT&T's position with respect to the role of state courts and apparently misapprehends AT&T's argument concerning

uniformity. McKee would have the Court believe that AT&T argues that the FCA "requires that long-distance carriers have uniform contracts that are *identical* for all of their customers." Resp. Brf. at 1, 11. This is untrue, although AT&T recognizes that nondiscriminatory rates and conditions must be offered to all who fit into given categories, and the terms must be fair and reasonable as judged exclusively by the FCC. AT&T argues that there is a statutory mandate requiring *a uniform standard* for judging the reasonableness of terms and conditions of long-distance contracts, and that the FCC should be (and in fact is) the body responsible for creating and maintaining that standard. In short, there is one body only with jurisdiction to determine whether the terms and conditions in interstate long-distance contracts should be enforced: that is the FCC. Congress and the FCC have given state courts a role only in determining whether valid long-distance contracts were created (i.e., was there valid offer and acceptance), and that role may extend to allowing state courts to make *procedural* unconscionability findings. See AT&T's Opening Brief at 18-28 (alternatively arguing that this Court should follow In re USF and similar decisions that permit state courts to review telecommunications contracts for procedural unconscionability only).<sup>3</sup>

Plaintiff's argument that the FAA trumps the FCA and authorizes this Court to review the terms of the Agreement under state law

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These are related issues since "procedural unconscionability relates to impropriety during the process of forming a contract." See Johnson v. Cash Store, 116 Wn. App. 833, 843, 68 P.3d 1099 (2003) (citation omitted).

substantive unconscionability standards is incorrect, without any support, and wholly misses the point. Resp. Brf.at 32. While numerous courts have recognized that other federal statutes may override various provisions of the FAA, these were all instances where the federal statute specifically contradicted the claim to arbitration. See, e.g., In re Winstar Commc'ns, Inc., 335 B.R. 556, 565 (D. Del. 2005) (recognizing that "strong federal policy favoring rigorous enforcement of arbitration clauses may be overridden by a countervailing policy manifested in another federal statute" - in this case, the Bankruptcy Code); Hatch v. Cross Country Bank, Inc., 703 N.W.2d 562, 571 (Minn. Ct. App. 2005) ("federal statute could remove claims from beyond the reach of the FAA's pro-arbitration policy if Congress clearly expressed intent to do so") (citation omitted). Here, the FCA supports the obligation to arbitrate because it furthers Congress' mandate to ensure national uniformity in the administration of contracts for long distance carriers such as AT&T.

**1. Congress and the FCC Have Recognized and Affirmed the There is a Need for National Uniformity in Administering Contracts Like AT&T's.**

Vesting one regulatory agency with the power to review contract terms is the only way to ensure that carriers, such as AT&T, are subject to a national standard that is predictably and uniformly applied to all carriers and similarly-situated customers. When it detariffed the telecommunications industry, the FCC primarily was concerned with ensuring continuity for customers who previously had been bound by

uniform tariff rates, terms, and conditions. 12 FCC Rcd. at 15,023-24. When the FCC eliminated filed tariffs and required carriers to contract with customers, it fully retained its power to determine the legality of the core terms and conditions between carriers and their customers. See, e.g., 17 F.C.C.R. 13,192, 13,198 n.39 (2002) (only *existence* of contract decided under state law). Plaintiff admits as much - the "FCC responded that the FCC would continue to enforce the FCA." Resp. Brf. at 24.

This does not mean that there is no role for state courts. State courts can and should be allowed to decide whether a contractual relationship was *formed* between the parties, i.e., whether there was valid offer and acceptance or procedural unconscionability, but the inquiry must stop there. See, e.g., In re USE, 300 F.Supp.2d 1107,1121 (D. Kan. 2003) (procedural unconscionability challenges involve the contract formation process itself, "not the actual propriety of the terms and conditions of the service contract").

Plaintiffs attempt to imply that the FCC's comments concerning "marketplace" or "market forces" show that the FCC intended to cede its regulatory role to the states simply goes too far and is without credible support. Resp. Brf. at 24. In point of fact, the FCC's comments simply recognized that, in the absence of a federal tariff regime, issues relating to contract formation and breach would, by default, be subject to state law because long-distance companies would be entering into contracts with their customers, not relying on filed tariffs. Determinations of contract

formation became important because, under the tariff environment, the tariff was the contract and consumers were presumed to know all terms and conditions and were presumptively bound by them.

There is nothing to indicate, as Plaintiff contends, that Congress intended to go so far as to allow state courts to intrude upon the FCC's authority to determine the validity of the terms and conditions in the long-distance agreements. This view is entirely consistent with all FCC orders and FCA cases, including In re Southwestern Bell Mobile Sys., Inc. 14 F.C.C.R. 19,898, 19,903 (1999), which merely confirmed that long-distance carriers are not exempted from all state laws under the express language of section 332(c)(3)(A), which explicitly permits state regulation and is unlike sections 201 and 202 that apply to this case.

The cases and orders Plaintiff cites involve review of FCC adjudications under Sections 201 and 202 of the FCA. These authorities prove AT&T's point. The *FCC*, not state courts, determines the lawfulness of rates, terms, and conditions of service. See Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003) (reviewing FCC's determination of lawfulness of terms under FCA § 202 and APA); In re Sprint PCS, 17 F.C.C.R. at 13,198 n.39 (reaffirming that state contract law plays a role in determining the existence (but not the enforceability) of a telecommunications contract). The Orloff court observed that, under the new system, "we agree with the Commission that the legality of Verizon's

sales concessions practice depends not on the company's designation as a common carrier, but on -§ 202 (and § 201)." -Id.- at 420.

2. **Plaintiff Does Not and Cannot Distinguish Boomer.**

As argued in AT&T's opening brief at pages 18-28, the leading preemption case of Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002), is squarely on point. Plaintiff's attempts to distinguish Boomer and its progeny fail. See Resp. Brf at 27-30. Boomer is not "at odds" with a "series" of FCC decisions, as McKee claims, and is not distinguishable, for the following reasons:

- McKee cites one case, In re Sprint PCS, 17 F.C.C.R. at 13,198 n.39, in support of his claim. In that case, the U.S. District Court had recognized the FCC's primary jurisdiction over the matter and had referred the case to the FCC for decision. Although the FCC did cite Ting in a footnote, as McKee alleges, it cites the case only after citing its earlier order that provides that the FCA "does not govern other issues, such as contract formation and breach of contract." An offliand cite to Ting therefore, does not undercut the FCC's view of its regulatory role and the state courts' limited ability to decide issues relating to contract *formation* and breach.
- The Boomer court's discussion of the need for one body that determines whether terms and conditions satisfy the FCA was not erroneously based on an unsupported finding that "subjecting phone companies to normal state laws would increase their costs," as McKee alleges. As discussed by the FCC, 12 FCC Rcd. at 15,015-18, Congress had already determined that the FCC, not state courts, would implement the FCA's standards and decide how best to promote Congress' pro-competitive and deregulatory objections "by eliminating regulatory requirements that the [FCC] determined were no longer necessary ....".
- The Boomer court was not reviewing a significantly different AT&T consumer agreement than is involved here.

- Plaintiff cites Ting for the proposition that "AT&T's mailings were sent out in a way that ensured they were unlikely to be read by consumers." Resp. Brf. at 30. As the lower court here correctly held, Ting involved different facts and law and was not given collateral estoppel effect. RP 1, p. 7. See alson. 8.
- Plaintiff incorrectly claims that the FCC informed consumers that they would be protected by the "full range" of state CPA laws. Resp. Brf at 25. Again, there is no citation to authority for this statement.

For all of these reasons, this Court should follow Boomer and its progeny in holding that the FCA preempts state law unconscionability challenges to the arbitration clause of the Agreement.

### **3. There Is No Presumption Against Preemption Here.**

Plaintiff argues that there is a presumption against preemption in this case because this case presents an area of "traditional state regulation." Resp. Brf at 19. To the contrary, the terms and conditions of the provision of interstate long-distance telephone services is without a doubt an area that the FCC occupied prior to the 1996 FCA amendments. There is thus no presumption against preemption in this case. See Kroske v. US Bank Corp., --F.3d--, 2006 WL 319025, \*4 (9th Cir. 2006) (the presumption against preemption does not apply "when the State regulates in an area where there has been a history of significant federal presence.") (quoting United States v. Locke, 529 U.S. 89, 108 (2000)).

In fact, there is an unbroken history of a significant federal presence in the area of telecommunications services. See, e.g., Ting v. AT&T, 319 F.3d 1126, 1136 (9th Cir. 2003) ("we do not apply the

presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications"). Thus, although the 1996 FCA gave the FCC authority to delegate some role to state courts post-detariffing if it chose to do so, there is *no evidence* that Congress intended the FCC to surrender its plenary authority to regulate the telecommunications industry. Indeed, Congress did not even mandate that the FCC detariff; this decision was left to the FCC. See, *g.*, In re Comcast Cellular Telecomm. Litig., 949 F.Supp. at 1198 (stating that the FCC did not forebear from applying sections 201 or 202 of the FCA). Pursuant to its plenary authority, the FCC permits this Court to decide "other issues," such as contract formation, but the FCC does not permit this Court to decide whether the arbitration clause of the Agreement or the Agreement itself is lawful. See, *ems.*, 12 FCC Rcd at 15,057.

**C. If the Court Considers the Validity of the Arbitration Clause, It Should Not Find It Unconscionable.**

**1. The Class Action Bar In the Clause Is Not Exculpatory.**

Even assuming that this Court has the authority to examine the validity of the arbitration clause itself, the clause should be enforced.<sup>4</sup>

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a The clause is neither procedurally nor substantively unconscionable. Although the remainder of this brief focuses on Plaintiff's substantive unconscionability arguments, AT&T in no way concedes that the Agreement (or its arbitration clause) was formed in a procedurally unconscionable manner.

While McKee largely concedes that this Court reviews unconscionability findings *de novo*, McKee argues that this Court should review some of the procedural unconscionability findings as factual determinations and evaluate those facts under the substantial evidence standard. Resp. Brf. at 19. But courts routinely review *de novo* whether a contract is "lengthy and complex" or contains important terms "hidden in a maze of fine print." Zuver v. Airtouch Communications, Inc., 153 Wn.2d 302, 303, 103 P.2d 753 (2004). Thus, this Court -or more properly, the arbitrator- could determine for

Plaintiff argues that the clause is unconscionable and that the arbitration mandate should be discarded entirely as invalid because the class action bar deprives consumers of an effective remedy and is, in essence exculpatory, immunizing AT&T from lawsuits. See Resp. Brf. at 2-3, 15, and 18. This argument is flawed both legally and factually. Not only is there *no* case supporting McKee's argument and *numerous* cases supporting AT&T's position, but the record demonstrates that the class action bar does *not* immunize AT&T, and that Plaintiff, like other customers, has adequate remedies.

*The Law.* AT&T is not "eager" to avoid Washington law, as McKee charges, because Washington, like New York, upholds class action bars in arbitration clauses.<sup>5</sup> See, e.g., Heaphy v. State Farm Mut. Auto. Ins. Co., 117 Wn. App. 438, 72 P.3d 220 (2003); Stein v. Geonerco, Inc., 105 Wn. App. 41, 17 P.3d 1266 (2001); Tsadilas v. Providian Nat'l Bank, 13 A.D.3d 190, 191, 786 N.Y.S.2d 478 (N.Y. App. Div. 2004) ("arbitration provision is enforceable even though it waives plaintiff's right to bring a class action"); Ranieri v. Bell Atlantic Mobile, 304 A.D.2d 353, 354, 759 N.Y.S.2d 448 (N.Y. App. Div. 2003).<sup>6</sup>

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itself that AT&T's Agreement is not procedurally unconscionable because it is not lengthy, complex, written in legalese, and does not "hide important terms in small print."

<sup>5</sup>Although McKee claims that AT&T did not address the Restatement test for conflicts of laws, Resp. Brf. at 46, which has been adopted in Washington and New York, AT&T argued and maintains that under the Restatement approach, the trial court should have applied New York law to determine whether the challenged clauses were unconscionable. See CP 756-60 for prior briefing on these points.

<sup>6</sup>In Stein, Division 1 of the Court of Appeals enforced an arbitration provision even though it "prevented [Stein] from bringing a class action " or proceeding in arbitration on a "class-wide basis." Stein, 105 Wn. App. at 48-49. The Stein court expressly rejected plaintiff's argument that the arbitration provision agreed to was "unenforceable because it

The Southern District of Florida very recently considered the identical-AT&T-Agreement at issue here, and joined the-nearly- - - - unanimous<sup>7</sup> view that it is *not* substantively or procedurally unconscionable, even though it arguably required customers to give up some specific legal remedies, such as class actions. See Rivera et al. v. AT&T Corp., No. 05-60970 - CIV at 13 (S.D. Fla. February 23, 2006). The court found that the availability of relief in small claims court, the ability to recover fees in individual arbitrations, and the right to seek redress through the appropriate state and federal agencies, such as the

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prevents him from bringing a class action," stating that there is no conflict between the concept of individual arbitration and "statutory provisions, contract law, or due process requirements." 105 Wn. App. at 48-49. Similarly, in Heaphy, Division 2 again rejected the argument that arbitration clauses containing class action bars are unconscionable. 117 Wn. App. at 447. Remarkably, McKee does not even mention, much less address, Stein or Heaphy. And even though McKee cites Al-Safm v. Circuit City Stores, Inc., 394 F.3d 1254, 1261 (9th Cir. 2005) as authority, that case is distinguishable because the Ninth Circuit ignored Stein and Heaphy when it purported to apply Washington law and cited no controlling authority in this state for its holding. 394 F.3d at 1270 (Bea, J., dissenting).

The only court to date that has found that the Agreement was implemented in a procedurally unconscionable manner was the Ninth Circuit in Ting v. AT&T Corp. As explained in AT&T's Opening Brief and prior briefing, Ting is readily distinguishable because customers, such as McKee, who ordered service from AT&T after August 2001 were made aware of and expected to receive the Agreement from AT&T shortly after ordering their service. Therefore, the "surprise" factor upon which the Ting court placed such great reliance is not at issue here. Compare Ting, 182 F.Supp.2d 902, 929-30 (N.D. Cal. 2002) (describing factors that led court to conclude that AT&T perceived detariffing as a "non-event" and therefore did not highlight the existence of the arbitration clause in its 2001 mass mailing to its customers), with Rivera v. AT&T Corp., No. 05-60970 - CIV (S.D. Fla. February 23, 2006) in Appendix A (enforcing November 2002 Agreement, which is the same version that binds McKee) and CP 133-39. In addition, Ting was decided *before* the Agreement was implemented, so that the court could only speculate about the reaction of customers to the Agreement. Here there is a factual record detailing how customers have reacted. Moreover, because Ting was a preemptive attack on the CSA, customers were not yet relying on the Agreement. The situation has changed, both because the manner of notice and terms of the Agreement have been changed in response to Ting and millions of AT&T customers have been relying on the terms as modified.

FCC, all required a finding that plaintiffs had "other forums within which  
-to seek a remedy for AT&T's allegedly unlawful billing practice." *Id.* at \_\_\_

14. For that reason, the arbitration clause was not unconscionable.

The Florida court also found that AT&T "prominently disclosed the existence of the arbitration provision through separate cover letters to its customers and through a 'FAQ' page concerning the [Agreement]." As a result, there was no basis to find that the existence or terms of the Agreement would come as a surprise to customers. In the absence of surprise, the Agreement was not procedurally unconscionable. This decision is attached to this Reply at [Appendix A-1](#).

There is no basis for McKee's argument that "courts throughout the United States have recognized that contractual bans on class actions serve as exculpatory clauses, and thus violate generally applicable state contract laws." Resp. Brf. at 37. Furthermore, *none* of the cases McKee cites for this broad proposition support his argument.<sup>8</sup> No court, to

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<sup>8</sup> McKee claims that Ting is the leading case invalidating a class action waiver clause as exculpatory, but Ting involved different facts and law from those presented here. The AT&T agreement at issue in Ting required consumers to split the arbitrator's fees with AT&T and required arbitration proceedings to remain confidential. 182 F.Supp.2d 902, 931-34 (N.D. Cal. 2002). Neither of these provisions exists in the Agreement at issue here. Furthermore, the Ting court applied California law, which requires both types of unconscionability before invalidating contracts, and which allows courts to use a sliding scale in finding unconscionability. Thus, a contract with heavy procedural unconscionability will be invalidated with only slight substantive unconscionability. This is precisely what happened in Ting, where the court focused far more on procedural than substantive unconscionability and the *process* AT&T used for informing its customers that they would soon be governed by a private contract with AT&T and not by a tariff. 319 F.3d at 1133, 1149. Because the court found procedural unconscionability, it needed to find only that the combination of clauses in the agreement were *slightly* unfair in order to find the agreement substantively unconscionable under California law. See CP 761-63 for more discussion of Ting's distinguishing features.

AT&T's knowledge, has ever held that class action waivers are in and of themselves exculpatory and thus make arbitration clauses containing them unconscionable. Rather, courts consider the circumstances of each case in determining whether a class action prohibition will be upheld. Indeed, the vast majority of these cases uphold class action waiver clauses, and *every federal appellate court except the Ninth Circuit (on facts distinguishable from those in this case) and the substantial majority of other federal and state courts enforce arbitration agreements that preclude class actions.*<sup>9</sup>

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McKee cites a number of cases in note 14 for the proposition that class action bars are *per se* exculpatory and unconscionable standing alone. None of these cases made this general holding. Instead, they all found that in each case the plaintiff could not vindicate his rights due to a combination of clauses. See a g., State ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002) (class action waiver in conjunction with bar on punitive damages); Leonard v. Terminix Int'l Co., 854 So.2d 529, 535-37 (Ala. 2002) (same, and agreement also required arbitration under commercial rules, noting that "practical effect affords the defendant immunity"); Powertel, Inc. v. Bexley, 743 So.2d 570, 576-77 (Fla. Dist. Ct. App. 1999) (same); Acorn v. Household Int'l, Inc., 211 F.Supp.2d 1160, 1174 (N.D. Cal. 2002) (same, because clause "eliminat[ed] the financial incentive to bring a claim" and included clauses requiring confidentiality and costs to the consumer); Comb v. PayPal, Inc., 218 F.Supp.2d 1165, 1173-76 (N.D. Cal. 2002) (class action waiver in combination with other provisions, such as costs of arbitration under AAA's Commercial Rules, was cost prohibitive); Eagle v. Fred Martin Motor Co., 157 Ohio App. 3d 150, 178 (Ohio Ct. App. 2004) (class action waiver and secrecy clause); In re Knepp, 229 B.R. 821, 838, 842 (N.D. Ala. 1999) (class action waiver and arbitration fees ranging from \$500 to \$7,000 with no possibility of attorney fee recovery).

Finally it should be noted that the holding of Dunlap v. Berger, 567 S.E.2d 265, has been disagreed with by two federal district courts in West Virginia and the Fourth Circuit. Merrill Lynch v. Coe, 313 F. Supp.2d 603, 615 (S.D. W.Va. 2004); Schultz v. AT&T Wireless, 376 F.Supp.2d 685, 689-90 (N.D. W. Va. 2005); Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 2005 WL 3031113 (4th Cir. Nov. 14, 2005).

<sup>9</sup> e.g., Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877-78 (11th Cir. 2005), cert. denied, 2006 WL 452482 (Feb. 27, 2006); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 174-75 (5th Cir. 2004); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003); Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000); Cf. Champ v. Siegel Trading Co., Inc., 55 F.3d 269, 276-77 (7th Cir. 1995); Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002); Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002); Lloyd v. MBNA Am. Bank, N.A., 27 Fed. Appx. 82, 84 (3d Cir. 2002); Randolph v. Green Tree Fin. Corp., 244 F.3d 814, 818-19 (11th Cir. 2001); Billups v. Bankfirst, 294 F. Supp. 2d 1265, 1274

*The Facts.* The question then is whether McKee can obtain a remedy for his alleged wrong here. It is uncontested that he can, in all of the following ways:

- **Small Claims Court.** The Agreement provides that consumers may bring small claims court actions. CP 136. The evidence shows that from August 2001 to March 2005, consumers filed 439 cases against AT&T in small claims court, CP 128, and that the consumer prevailed in 272 of those cases. *Id.* The total amount of damages sought in those matters was \$789,859.95, and of that amount, AT&T paid \$432,920.28 in small claims judgments. *Id.*
- **FCC Complaints.** The Agreement also provides that consumers may file complaints with the FCC or other appropriate state or federal agencies. CP 136. It is clear that the FCC intended customers to retain the right to challenge the justness and reasonableness of long-distance providers' contract terms under FCA § 208, even after detariffing. 11 FCC Rcd at 20,751.

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(M.D. Ala. 2003); O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 518-19 (M.D. La. 2003); Lomax v. Woodmen of the World Life Ins. Soc'y, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); Rains v. Found. Health Sys. Life & Health, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); Brown v. KFC Nat'l Mgmt. Co., 921 P.2d 146, 166-67 n.23 (Haw. 1996); Ragan v. AT&T Corp., 824 N.E.2d 1183, 1191 (111. Ct. App. 2005) (New York law); Rosen v. SCIL, LLC, 799 N.E.2d 488, 494-95 (Ill. Ct. App. 2003) (Illinois law); Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886, 894-96 (Ill. Ct. App. 2003) (Arizona law); Tsadilas v. Providian Nat'l Bank, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004); AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. App. 2003); cf. Burden v. Check Into Cash of Ky., L.L.C., 267 F.3d 483, 492-93 (6th Cir. 2001) (remanding case to district court to decide unconscionability challenge to arbitration agreement, but indicating that class action waiver was likely valid under existing law). But see Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1261 (9th Cir. 2005) (class action bar in arbitration provision that did not provide an alternative means for vindicating small claims found unconscionable under Washington law); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (same under California law). Notably, in Al-Safin, the dissent criticized the majority for failing to cite any *Washington* authority that would prohibit class action waivers in arbitration agreements, and observed that "an analogous line of cases suggests that the *Washington* courts would not find the provision substantively unconscionable on the facts here." 394 F.3d at 1270 (Bea, J., dissenting) (emphasis added). Indeed, the majority in Al-Safin completely ignored Stein v. Geonerco, Inc., 105 Wn. App. 41, 17 P.3d 1266 (2001) and Heaphy v. State Farm Mut. Auto. Ins. Co., 117 Wn. App. 438, 72 P.3d 220 (2003), even though it purportedly applied Washington law.

- **Individual Arbitrations.** From August 2001 to March 2005, consumers filed 30 arbitrations against AT&T, CP 128, and the consumer prevailed in 21 of those cases. The aggregate amount demanded in arbitration was \$508,909.46, and the aggregate amount paid was \$7,204.18. *Id.* These number only reflect those matters that proceeded to arbitration and do not include all those matters resolved before a formal arbitration was commenced.
- **Arbitration Is Cheaper Than Filing Fees.** For most customers, arbitration will cost far less than a filing fee in small claims court, so McKee's argument that the arbitration clause makes it harder for consumers to recover against AT&T is illogical. If a customer does not demand a live hearing, the customer pays a \$20 filing fee for a telephonic or "desk" arbitration (document submission only) for a claim of less than \$10,000. CP 130. For claims between \$10,000 and \$75,000, a \$375 filing fee is required. *Id.* In each instance, AT&T pays all other administrative fees. *Id.*
- **AT&T May Cover All Arbitration Costs.** AT&T sometimes pays all arbitration costs, CP 130, and AT&T has offered to pay McKee's small costs of arbitrating, such as the AAA filing fee and other expenses. See, e.g., Gipson v. Cross Country Bank, 294 F. Supp.2d 1251, 1263-64 (M.D. Ala. 2003) (upholding class action bar in arbitration agreement that permitted plaintiff to ask defendant to pay hearing fees).
- **No Other Limitations.** The arbitration clause does not require that arbitrations be kept confidential, it does not shorten the statute of limitations, and it does not limit damages. CP 136-38.

In an attempt to do an end run around the uncontested facts establishing these available avenues of redress, McKee argued that customers would not be able to retain counsel to vindicate their rights if class actions are barred. Resp. Brf at 5. McKee's argument disregards the fact that lawyers are not necessary to vindicate claims brought in small

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<sup>10</sup> Although McKee could not assert a class action, McKee may still be able to recover injunctive relief benefiting all Washington State residents if he can prove a Washington State CPA violation. See Hockley v. Hargitt, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973).

claims court or arbitrations, and it further ignores that consumers are  
- - -entitled to-recover-attorneys' fees ifthey-pr-evail. -Courts repeatedly have - -  
acknowledged that a plaintiff should be able to find counsel, regardless of  
the unavailability of a class action, if fees can be recovered. See, e.g.  
Gipson, 294 F.Supp.2d at 1261-6 (class action bar valid when statute  
permits fee recovery), enf granted, 354 F.Supp.2d 1278 (M.D. Ala. 2005);  
Taylor v. Citibank USA, N.A., 292 F.Supp.2d 1333, 1343 (M.D. Ala.  
2003) (same); Adkins v. Labor, Inc., 185 F.Supp.2d 628, 630-31 (S.D. W.  
Va. 2001) (same), aff d, 303 F.3d 496 (4th Cir. 2002); Snowden v.  
CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002) (same);  
Johnson, 225 F.3d at 374 (same); Jenkins, 400 F.3d at 877-78 (same,  
stating "arbitration agreements prohibiting class action relief do not  
`necessarily choke off the supply of lawyers willing to pursue claims on  
behalf of debtors [due in part to ability to recover fees in arbitration]. m).

Here, the Agreement permits McKee to recover attorneys' fees in  
arbitration that "are expressly authorized by statute." CP 137. McKee  
seeks fees under his CPA claim, CP 1159-61. Thus, this Court should  
follow the accepted rule that if fees are available, a "court cannot conclude  
that either the plaintiff or [his] attorneys are so lacking in economic  
incentive to warrant a finding that a class action prohibition is  
unconscionable." Billups v. BankFirst, 294 F. Supp.2d 1265, 1274 (M.D.  
Ala. 2003). Indeed, the United States Supreme Court repeatedly has  
emphasized that "Section 2 is a congressional declaration of a liberal

federal policy favoring arbitration agreements, notwithstanding any state substantive-or procedural policies to-the-contrary.-" - Moses -H.-Cone Mem'-1 - -  
Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24, 103 S. Ct. 927 (1983).

2. **The Clause Is Not "One-Sided" and Unconscionable.**

The arbitration clause is not unconscionable as "one-sided," meaning that it benefits only AT&T, as McKee alleges. Resp. Brf at 33-35. There is no such rule, and even if there were, such a rule would violate the FAA in this case.

a. **There is No Rule Invalidating "One-Sided" Clauses.**

Washington law is clear that contractual provisions, including arbitration clauses, may operate in a one-sided manner so long as "the contract *as a whole* is otherwise supported by consideration on both sides." Walters v. AAA Waterproofing, Inc., 120 Wn. App. 354, 359, 85 P.3d 389 (2004). As the Zuver court explained, "mutuality of obligation" means that "both parties are bound to perform the contract's terms - not that both parties have identical requirements." 153 Wn.2d at 317.

McKee's argument that several cases hold that "one-sided" contract terms are substantively unconscionable is simply incorrect, as is shown by an analysis of the cases McKee cites. McKee cites Luna, Adler, Zuver, Al-Safin, and Discover Bank to support his claim that one-sided contract terms are substantively unconscionable. In none of these cases (which applied either Washington or California law), did the court strike a contract term merely because it was found to be one-sided. Rather, the

courts struck multiple terms found to be one-sided and overreaching, and --thus-shocking to the conscience, -because, -when *readtogether*, -they *deprived the plaintiff in those cases of any remedy whatsoever.*<sup>11</sup>

In the Adler and Zuver decisions, for example, the Court refused to enforce only those aspects of the challenged arbitration provisions that - unlike the class-action waiver at issue here - directly interfered with the plaintiffs' ability to obtain a remedy for their claims. Adler v. Fred Lind Manor, 153 Wn.2d 331, 355-56, 103 P.3d 773 (2005) (statute of limitations shortened and attorneys' fees barred); Zuver, 153 Wn.2d at

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<sup>11</sup> Luna v. Household Fin. Corp., 236 F.Supp.2d 1166, 1175-83 (W.D. Wash. 2002). (invalidating class action bar when considered along with clause requiring one locale for arbitration that was inconvenient for plaintiff, contract was 100+ pages long, contained confidentiality clause); Al-Safm, 394 F.3d at 1261062 (evaluating clauses regarding coverage of claims, remedies, arbitration fees, cost-splitting, statute of limitations, and prohibition on class actions to reach substantive unconscionability decision). The Discover Bank case did not hold that "all class action waivers are necessarily unconscionable," as McKee suggests, and that case is at the far end of the spectrum concerning class action prohibitions. Resp. Brf. at 38. It has not been followed by *any* court outside of California, and it has been limited by other California courts. The case held that "when the waiver is found in a consumer contract of adhesion in which disputes...predictably involve small amounts of damages, and when it is alleged that the [defendant] has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," then the clause will be unconscionable as exculpatory under California law. Our case is clearly not governed by California law, McKee did not allege a scheme to deliberately cheat large numbers of AT&T customers out of small sums of money, and AT&T's clause was not forced on McKee after the fact, through the use of a notice in a bill staffer. In addition, cases interpreting the Discover Bank case have upheld class action waivers in consumer agreements where the plaintiff had the ability to opt out of the arbitration clause, Jones v. Citigroup, Inc., 135 Cal. App. 4th 1491, 1497, 38 Cal. Rptr.3d 461(Cal. U. App. Jan. 26, 2006), and in the context of an employment agreement that gave plaintiff 30 days to opt out of the arbitration clause, Gentry v. Superior Court, 2006 WL 137228, \*4 (Cal. Ct. App. Jan. 19, 2006). Finally, the Discover Bank case was remanded to the trial court for a determination of governing law. The trial court held that the Delaware choice of law provision applied, and that Delaware law upholds class action waivers, so the trial court did not reach the issue of whether the clause at issue was invalid under California law. 134 Cal. App. 4th 886, 895 (Cal. Ct. App. Dec. 7, 2005).

312-15 (confidentiality clause). These cases do not create a "new" rule of substantive-unconscionability; they simply stand for the proposition that clauses that together deprive a consumer of any meaningful remedy whatsoever can be found substantively unconscionable.

**b. The FAA Preempts Consideration of Whether Class-Action Bars in Arbitration Clauses Are One-Sided and Unconscionable.**

The very notion that an arbitration clause can be disfavored because it is purportedly one-sided violates the FAA's dictate that arbitration clauses may not be uniquely disfavored and must be promoted. McKee effectively admits this in footnote 20 of his brief, in which he concedes that the claim that the "FAA prohibits courts from invalidating arbitration agreements under state laws that apply only to arbitration agreements" is a "true statement of the law." Resp. Brf at 48, n.20.

Section 2 of the FAA bars state courts from striking down provisions of an arbitration clause that would not be struck down under state law. Such a practice is expressly preempted by federal law. Under Section 2 of the FAA:

[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, "save upon such grounds as exist at law or in equity for the revocation of *any* contract." \* \* \* A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

Perry v. Thomas, 482 U.S. 483, 492 n.9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (citations omitted; emphasis in original) (quoting 9 U.S.C. § 2).

Thus, agreements to arbitrate may be invalidated on state-law grounds

only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." -Id. As the Washington Supreme Court recently emphasized, this principle means that "courts may not refuse to enforce arbitration agreements under state laws that apply only to such [arbitration] agreements, or by relying on the uniqueness of an agreement to arbitrate." Zuver, 153 Wn.2d at 302 (punctuation omitted). See also Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L.Ed.2d 902 (1996).

Washington law does not preclude parties from agreeing to waive class action rights in contracts that do not contain arbitration clauses. McKee cannot and does not claim that Washington has such a general rule or policy. As a result, Washington law cannot preclude arbitration clauses containing class action bars. Such a prohibition would make little sense given that class actions for damages themselves began no more than 38 years ago.<sup>12</sup> This recent procedural device cannot be deemed so fundamental as to make contractual waivers of it unconscionable.

In an attempt to escape the express preemptive force of the FAA, McKee argues that Washington law does not permit parties with greater bargaining power to write one-sided contracts that immunize themselves

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<sup>12</sup> "[C]lass action practice emerged in the 1966 revision of [Federal Rule of Civil Procedure] 23" (Ortiz v. Fibreboard Corp., 527 U.S. 815, 833, 119 S. Ct. 2295, 144 L.Ed.2d 715 (1999)), which gave federal-court class actions their "current shape" (Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997)). Washington class actions began in 1967, when the State adopted its current Rule 23. See 3A WASH. PRAC., RULES PRACTICE CR 23 (4th ed.).

even if they violate the law. Resp. Brf at 32.<sup>13</sup> As discussed above, that is not the effect of the arbitration provision at issue in this case. See discussion supra Section C. In any event, Section 2 of the FAA bars courts from impeding the enforceability of arbitration agreements by fashioning rules that invoke broad concepts of contract law but in fact apply only or predominantly to the arbitration setting. As the Fifth Circuit recently explained in upholding Cingular Wireless's arbitration provision:

That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. \* \* \* [S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.

Iberia Credit Bureau, Inc., 379 F.3d at 167; see also Zuver, 153 Wn.2d at 302 ("courts may not refuse to enforce arbitration agreements under state laws which apply only to such agreements, or by relying on the *uniqueness* of an agreement to arbitrate"); Obliv, Inc. v. Winiecki, 374 F.3d 488, 492 (7th Cir. 2004) ("no state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule."). This is precisely what McKee urges this Court to do by finding the AT&T arbitration provision is unconscionable due to its class action bar.

McKee may disagree with the policy choice Congress made in passing the FAA, but the forum for that discussion is in Congress, not in this Court. See, e.g., Rosen, 799 N.E.2d at 494 (enforcing class action bar

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<sup>13</sup> McKee claims that AT&T's Agreement, particularly the clause in the Agreement "banning class actions," "strips its customers of a remedy that many would invoke over time, but strips no remedy from AT&T that it would ever wish to pursue." Resp. Brf. at 34. See discussion supra section C.

in arbitration clause and stating that "the question of whether an individual is entitled to participate in a class action as a matter of right is a question of public policy, which we suggest should be addressed by the legislature"); State v. Templeton, 148 Wn.2d 193, 212-18, 59 P.3d 632 (2002) (stating that courts can create only procedural rules such as CR 23; the legislature must create substantive rights). Only Congress, not this Court, may create a policy disfavoring arbitration clauses.

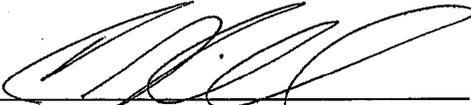
Indeed, the United States Supreme Court repeatedly has emphasized that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983). As Judge Posner observed, "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

### III. CONCLUSION

For the reasons stated herein and in AT&T's Opening Brief, AT&T asks this Court to reverse the trial court's decision denying AT&T's motion to compel arbitration.

RESPECTFULLY SUBMITTED this 13th day of March, 2006.

Davis Wright Tremaine LLP  
Attorneys-for Appellant AT&T Corp:

By 

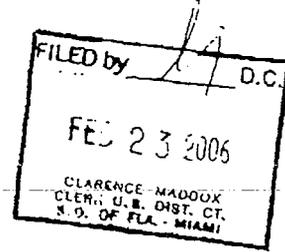
Daniel Maggoner, WS A # 9439  
Cassandra Kinkead, WSBA # 22845  
1501 Fourth Avenue, Suite 2600  
Seattle, Washington 98101-1688  
(206) 622-3150 Phone  
(206) 628-7699 Fax

Laura Kaster, Esq.  
Howard Spierer, Esq.  
Deborah Droller, Esq.  
Counsel for AT&T Corp.

# **APPENDIX A-1**

**CLOSED  
CIVIL  
CASE**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 05-60970-C'IV-Si:IT7 M(ALILEY



1)AMARIS RIVERA and ANA  
D)ANIEi.. on their own behalf and on  
behalf of till thirse Similarly siuafed.

Plaintiffs,

v.

AT&T CORP.,

Defendant.

**OMNIHIS ORDER)GRANTING DEFENDANT'S MOTION TO COMPEL, ARBITRATION  
AND DISMISS/STAY PROCEEDINGS; AND (2) DENYING PLAINTIFFS' MOTION FOR  
LEAVE TO AMEND COMPLAINT**

This litigation arises out of Plaintiffs Damaris Rivera and Ana Daniel's purchases of international callin<sup>s</sup> plans from AT&T. Plaintiffs contend that AT&T billed them, and many other customers like them, for "uncompleted" telephone calls to the Republic of Cuba - including "busy tone calls, ring with no answer calls, and dead airsilence calls. " Comp]. 'I 14. Arguing that AT&T has a "license to steal," they Look to this Court to remedy AT&T's widespread practice of "unauthorzcd belling."

AT&T has not yet responded to the merits of Plaintiff's putative class-action complaint. Instead, it argues that Plaintiffs cannot seek relief in this Court because A'T&T's Customer Services Agreement (the " C'SA") requires them to submit all of-their claims to binding arbitration. Plaintiffs disagree, stating that they never agreed to arbitrate their claims (indeed, they never even *received a copy* of the CSA). i' liey further contend that the (SA is both procedurally and substantively unconscionable.

This matter is formally before the Court based on two motions. The first is AT&T's Motion to Compel Arbitration and Dismiss/Stay Proceedings IDF-61. The second is Plaintiffs' Motion for leave to File Amended Complaint IDF-30). The Court heard argument on AT&T's Motion to Compel Arbitration on February 15, 2006. Based on the Court's review of the parties' papers and the statements of counsel

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at the hearing, the Court shall grant AT&T's Motion to Compel Arbitration and Dismiss/Stay Proceedings. The Court shall deny Plaintiffs Motion for Leave to File an Amended Complaint.

1. **FACTUAL AND PROCEDURAL BACKGROUND**

-A. **-The-CSA-and -its-Relevant-Provisions - - -**

Plaintiffs make the following allegations against AT&T: (1) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et. seq.*; (2) breach of contract; (3) money had and received; (4) unjust enrichment; (5) breach of the duty of good faith and fair dealing; and (6) fraud. Plaintiffs claim that AT&T "intentionally" charged them, and other customers like them, "for uncompleted telephone calls originating from locations throughout the United States to the Republic of Cuba." I.) Plaintiffs seek recovery for this allegedly unauthorized billing, including

interest. (Id.)

AT&T responded to Plaintiffs' Complaint by filing a Motion to Compel Arbitration and Dismiss/Stay Proceedings [1]E-61. AT&T bases its motion on an arbitration clause in the CSA, which AT&T maintains established a contractual relationship with Plaintiffs. AT&T argues that, beginning August 1, 2001, the Federal Communications Commission ("FCC") required it to establish contractual relationships with its customers instead of filing tariffs with the FCC. (Def.'s Reply to Mot. to Compel 6): (see also Farinella Decl.' 1 13.) In anticipation of the FCC 's August 2001 deadline, AT&T issued notices in May/June 2001 to all of its current customers, apprising them of this change and including a copy of the CSA. (Def.'s Mot. to Compel 3): (see also Farinella Decl. 6-13.) The mailing included a cover letter, a copy of the CSA, and a page listing frequently asked questions ("FAQ 's") about the CSA. (Farinella Decl. 116 and Exhs. 1-4 thereto.) The CSA contained the following pertinent provisions:

**BY ENROLLING IN, USING OR PAYING FOR THE SERVICES,  
YOU AGREE TO THE PRICES, CHARGES, TERMS AND**

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"Farinella Decl." refers to the Declaration of Mark J. Farinella, submitted in support of AT&T's Motion to Compel Arbitration.

CONDITIONS IN THIS AGREEMENT. IF YOU DO NOT AGREE TO **THESE PRICES, CHARGES, TERMS AND CONDITIONS**, 1)0 NOT **USE THE SERVICES**, AND CANCEL **THE SERVICES IMMEDIATELY BY CALLING AT&T AT 1-888-288-4099 FOR FURTHER DIRECTIONS.**

**DISPUTE RESOLUTION.**

**IT IS IMPORTANT THAT YOU READ THIS ENTIRE SECTION CAREFULLY. THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF *IN A COURT* BY A JUDGE OR JURY OR THROUGH A CLASS ACTION ... .**

**Binding Arbitration.** The arbitration process established by this section is governed by the Federal Arbitration Act ("FAA"). 9 U.S.C. tt (-16. You have the right to take any dispute that qualifies to small claims court rather than arbitration. All other disputes arising out of or related to this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal or equitable theory) must be resolved by final and binding arbitration. This includes any dispute based on any product, service, or advertising having a connection with this Agreement and any dispute not finally resolved by a small claims court.

NO **DISPUTE** MAY BE JOINED WITH **ANOTHER LAWSUIT**, OR IN AN ARBITRATION WITH A **DISPUTE** OF ANY OTHER PERSON, OR **RESOLVED** ON A **CLASS-WIDE** BASIS.

(Fah. 1 to Farinella Decl.) (emphases and font style in original).

**B. AT&T's Mailings of the CSA to Plaintiffs When They Purchase a Calling Plan**

AT&T states that it mailed CSAs to Plaintiff Rivera on three occasions. When Plaintiff Rivera purchased a calling plan in 2002, AT&T sent her the CSA via regular mail on January 30, 2002 to 1500 Presidential Way, Apt. 103, West Palm Beach, Fl. 33401. (Farinella Dec 1.11 14): (Sapp! Farinella Decd.' 1.11 3-7 and E.xh. C' thereto.) Rivera has admitted that she purchased one of AT&T's calling plans in 2002.

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"Stipp! Farinella Decd." refers to the Supplemental Declaration of Mark J. Farinella, submitted in support of AT&T's reply to Plaintiff's opposition to the Motion to Compel Arbitration.

that the Presidential Way address was her correct address at the time of purchase. and that she did not discontinue AT&T service at this address until more than a year and a half later (July 2003).<sup>5</sup> (Rivera

Aff.' 11114. 10. 19.) AT&T mailed another CSA to Plaintiff Rivera at the Presidential Way address on

June 4, 2003. (Farinella Decl. 11; (Suppl. Farinella Decl. 15-7 and 18; C thereto.) AT&T has no

record of the return of either of these mailings. (Farinella Decl. 14); (Suppl. Farinella Decl. 1; 7.)

Finally, AT&T states that it mailed a CSA to Plaintiff Rivera a third time, on August 13, 2003, when she

changed residences and switched service. Exhibit D to the Supplemental Farinella Declaration shows

that the mailing was sent to Plaintiff Rivera at 9340 S.W. 23rd Street, Apt. 4303, Plantation, FL 33324.

(Suppl. Farinella Decl. ¶ 7.) However, Plaintiff Rivera states that she lived in Ft. Lauderdale, after

disconnecting service at her West Palm Beach address to July 2003. (Rivera Aff. 1110. 12.) AT&T has

no record of the return of this mailing. (Suppl. Farinella Decl. ¶ 7.)

AT&T states that it mailed a CSA to Plaintiff Daniel on June 28, 2001, to 2581 Barkley Drive West, Apt. E. West Palm Beach, FL 33415. (Farinella Decl. 11 14); (Suppl. Farinella Decl. ¶¶ 5, 8 and 18; D thereto.) Plaintiff Daniel has not argued that this was an incorrect address. (See generally Daniel Aff.) AT&T has no record of the return of this mailing. (Farinella Decl. ¶ 14); (Suppl. Farinella Decl. 1, 8.)

### C. The CSA's Inclusion in Monthly Telephone Bills

AT&T also states that it included in its monthly billing statements to its customers the following message regarding the CSA:

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Although Rivera claims that AT&T sent the CSA to the wrong address because the first Farinella Declaration states that her address was "1500 West Presidential Way" instead of "1500 Presidential Way," Mr. Farinella corrected this typographical error in his supplemental declaration.

"Rivera Aff." refers to the Sworn Affidavit of Dantaris Rivera, submitted in support of her opposition to Defendant's Motion to Compel Arbitration.

"Daniel Aff." refers to the Sworn Affidavit of Ana Daniel, submitted in support of her opposition to Defendant's Motion to Compel Arbitration.

Important information about your telephone service.

#### AT&T Consumer Services Agreement

In the past, AT&T filed information about our long-distance services with the FCC. In keeping with recent FCC rulings, we are instead providing this information directly to our customers in the new AT&T Consumer Services Agreement.

The Agreement took effect on August 1, 2001. It covers AT&T state-to-state and international long-distance consumer calling services, and explains the relationship between you and AT&T, as well as each of our rights and responsibilities, including billing and payment. It also describes our new binding arbitration process, which uses an objective third party rather than a jury for resolving disputes that may arise. You accept the terms of the Agreement simply by continuing to use or pay for any AT&T consumer calling service covered under the Agreement.

#### 44

If you have not yet received a copy of the AT&T Consumer Services Agreement, you can access it at <http://www.att.com/serviceguide/home> or call us at 1 888 288 4099 to request a copy of the Agreement.

(ref.'s Reply to Mot. to Compel 4-5); (Suppl. Farinella Decl. 10.) AT&T has not included a copy of Plaintiffs' bills showing this message, because by 2004 at the latest, AT&T deleted these records from its systems. (Suppl. Farinella Decl. ¶ 9.)

Plaintiff Daniel does not specify whether or not she received her bills directly through AT&T or through her local telephone carrier. Plaintiff Rivera has stated that she

never received a CSA because, at the time [she] orally agreed to use AT&T, the only phone bill [she] received was from [her] local provider, Bell South, which contained a section noting: "This portion of your bill is provided as a service to AT&T."

(Suppl. Rivera Aff. ¶ 19.) To dispute Plaintiffs' assertion, AT&T has offered evidence of its agreement with Bell South, pursuant to which Bell South included various AT&T messages in its monthly phone

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Pursuant to 47 C.F.R. § 42.0, AT&T must retain billing and call detail records for eighteen months only. (Suppl. Farinella Decl. ¶ 9.)

"Suppl. Rivera Aff." refers to the Supplemental Affidavit of Damaris Rivera.

bills. (Spierer Decl. ¶ 11. 4-7 and Exhs. A-f) thereto.) AT&T has offered a copy of its actual message included to Bell South's November and December 2001 bills for Florida customers:

The AT&T Consumer Services Agreement covers AT&T state-to-state and international long distance consumer calling services and explains the relationship between you and AT&T, as well as each of our rights and responsibilities, including killing and payment. It also describes our new binding arbitration process, which uses an objective third party rather than a jury for resolving disputes that may arise. You accept the terms of the Agreement simply by continuing to use or pay for any AT&T consumer calling service covered under the Agreement. Your AT&T service or billing will not change under the agreement: there's nothing you need to do to continue your current service with us. If you do not have a copy of the Agreement you can access it at <http://www.att.com/serviceguide/home>, or call us at 1-888-288-4099.

(Exhs. F and G to Spierer Decl.) AT&T also has stated that its "practice of using Bell South for billing, collection and messaging to AT&T customers continues through this date." and has provided a section of a December 25, 2005 bill for a Bell South customer in North Carolina, showing the AT&T bill message that Bell South delivered that month to AT&T's customers. (Spierer Decl. ¶ 7 and Exh. G thereto.)

It is undisputed that Plaintiffs Rivera and Daniel did not sign AT&T's CSA." (*See generally* Rivera Aff.); (see *also* Daniel Aff.); (Dell's Resp. to PL's Mot. for Leave to File Am. Compl. ¶ 1 L) Further, both Plaintiffs deny ever having received a CSA. (Rivera Aff. ¶¶ 11, 12, 14, 16-17); (Daniel Aff. ¶ 3.4.) Plaintiffs make three arguments as to why this Court should deny the instant motion to compel arbitration: (1) because the CSA does not govern billing for "non-phone calls," it does not apply to the substance of this lawsuit; (2) Plaintiffs never agreed to arbitrate their claims; and (3) even if the CSA does bind Plaintiffs, the arbitration provision is substantively and procedurally unconscionable. In response, AT&T states that Plaintiffs agreed to the CSA by continuing to use their AT&T services, and that the Federal Communications Act (the "Act"), 47 U.S.C. §§ 201-202, preempts Plaintiffs' assertion of

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<sup>s</sup> "Spierer Decl." refers to the Declaration of i toward Spierer, filed on February 16, 2001.

Plaintiffs assert that they never signed a CSA and AT&T has neither introduced into evidence Plaintiffs' signatures on a CSA nor contended that Plaintiffs actually signed a CSA.

unenforceability under state law.

## II. I.F.GA1. STANDARD

Pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., a district court must compel arbitration and stay court proceedings if the parties have agreed to arbitrate their dispute. 9 U.S.C. §§ 2, 3. However, if the validity of the arbitration agreement is in issue, a district court must first decide if the arbitration clause is enforceable against the parties. *Id.* § 4; *Chastain v. Me Robinson-Flunrplu•ei Co., The.*, 957 F.2d 551, 854 (11th Cir. 1992) (citing *Prima Paint Corp. v. Hood & Conklin Al/k. Co.*, 388 U.S. 395, 403-04 (1967)) (holding that if the making of an arbitration agreement is in issue, "the federal court may proceed to adjudicate it"). Because "parties cannot be forced to submit to arbitration if they have not agreed to do so," a court must determine whether such an agreement exists. *Chastain*, 957 F.2d at 854.

The heart of the matter before this Court is the legal effect of the ('SA, in the absence of Plaintiffs' signatures. "Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration." *Id.* However,

It the calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration. In such a case, that party is challenging the very existence of any agreement, including the existence of an agreement to arbitrate. Under these circumstances, there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the Act. If a party has not signed an agreement containing arbitration language, such a party may not have agreed to submit grievances to arbitration at all. Therefore, before sending any such grievances to arbitration, the district court itself must first decide whether or not the non-signing party can nonetheless be bound by the contractual language.

*Id.* To entitle the party seeking to avoid arbitration to a jury trial on the arbitrability question, that party must unequivocally deny an agreement to arbitrate, as well as produce "some" evidence to substantiate the denial.

*Id.* (citing *MR Enters. v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5th Cir. 1980))

t[**DISCUSSION**

A. **AT&T's Motion to Compel Arbitration and Dismiss/Stay Proceedings**

1. -----Brief-Discussion-of-Cases-Addressing-the-CSA-'s-Arbitration-Provision)-----

Several courts have already addressed the arbitration provision in AT&T's CSA. For example, in *Boomer v. AT&T Corp.*, 309 F.3d 404, 424 (7th Cir. 2002), the Seventh Circuit found the arbitration clause in the CSA to be binding on AT&T customers. Plaintiff Boomer alleged that AT&T overcharged its customers for contributions to the federal Universal Services Fund. *Id.* at 408. He filed suit in the Northern District of Illinois and defended against AT&T's motion to compel arbitration by claiming that the CSA was not a valid contract, and even if it were, the arbitration clause contained therein was unconscionable. *Id.* at 414.

In support of its motion to compel arbitration, AT&T established that it had mailed to Boomer the CSA and accompanying documents, that it never received notice of the mailing's return, and that Boomer continued to be an AT&T customer after receiving the CSA. *Id.* at 411. The Court found that (1) Boomer had a reasonable opportunity to reject the offer, but instead continued to use his AT&T services; and (2) sections 201 and 202 of the Federal Communications Act preempted Boomer's state-law claims of unconscionability, because they demonstrated a "[C]ongressional intent that customers of individual long-distance carriers receive uniform terms and conditions of service," and "allowing a state law challenge to the GSA's arbitration clause would result in customers receiving different terms based on their locality." *Id.* at 415-16, 418,

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<sup>10</sup> In *Bonner v. City of Burlington*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent pre-1981 decisions of the former Fifth Circuit.

Although this discussion does not contain an exhaustive list of the cases to address AT&T's CSA, the parties have not cited, and the Court has not found, any cases from the Eleventh Circuit dealing with the CSA.

Boomer did not dispute receiving the CSA.

In 2003, the United States District Court for the District of Massachusetts followed the Seventh Circuit's *Bonnier* decision when confronted with AT&T's CSA. *Kivala v. AT&T Corp.*, No. 02-10752-MH (D. Mass. Jan. 15, 2003). The court granted AT&T's motion to compel arbitration on the grounds that the plaintiffs had received the AT&T notice curvaining the arbitration provision, the CSA was a proper contract, and state law did not apply because the issue was preempted. *Id.* at 7. However, in *Ting v. AT&T Corp.*, 319 F.3d 1126, 1152 (9th Cir. 2003), the Ninth Circuit reached the opposite conclusion and criticized the *Bonnier* decision. The *Ting* court held that the CSA's arbitration provisions were "unenforceable as unconscionable under California law, the application of which is not preempted by §\* 201(b) and 202(a) of the federal Communications Act."

Plaintiffs Argument That the CSA Does Not APPLY to the Substance of This Lawsuit Because It Does Not Govern Billing for "Non-Phone Calls" Lacks Merit.

As previously discussed, AT&T has moved to compel arbitration of Plaintiffs' claims against it, including all claims on behalf of others similarly situated, based on provisions contained in its CSA. At the February 15, 2006 hearing, Plaintiff's raised for the first time the argument that the CSA does not apply to the substance of this lawsuit, because it does not govern billing for "non-phone calls" - for example, "busy tone calls, ring with no answer calls, and dead air/silence calls." Compl. 14. Although Plaintiffs insisted that this argument appeared in their opposition to AT&T's Motion to Compel Arbitration, it did not. The argument lacks merit.

The CSA includes the following pertinent provisions:

**BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT. IF YOU DO NOT AGREE TO THESE PRICES, CHARGES, TERMS AND CONDITIONS, DO NOT USE THE SERVICES, AND CANCEL THE SERVICES IMMEDIATELY BY CALLING AT&T AT 1-888-288-4099 FOR FURTHER DIRECTIONS.**

'Service' or 'services' means; (I) the AT&T state-to-state and

international consumer telecommunications services you are enrolled in, use, or pay for that AT&T provided to you under tariffs filed with the Federal Communications Commission as of July 31, 2001; and (2) any new or additional AT&T state-to-state and international consumer telecommunications services that you enroll in, use or pay for, after July 31, 2001.

(F.xh. 1 to Farinella Dec1.) (emphases and font style in original). The charges Plaintiffs dispute are for "busy tone calls, ring with no answer calls, and dead air/silence calls" that occurred *when Plaintiff/e were trying to make legitimate, completed phone calls to Cuba, using the AT&T international calling plans they purchased*. Put another way, Plaintiffs used the service they purchased, but now dispute certain charges because the service allegedly never completed the phone calls for which they were charged. The charges in dispute come within the CSA's clear definition of "service." Accordingly, the CSA applies.

3. The Arbitration Clause in AT&T's CSA Binds Plaintiffs.

It is undisputed that Plaintiffs Rivera and Daniel did not sign a CSA. (*See generally* Rivera Decl); (*see also* Daniel Decl.); (Def. 's Reap. to Pl.'s Mot. for Leave to File Am. Comp( . 11.) Accordingly, this Court must determine whether or not the unsigned arbitration provision can bind them.

Plaintiffs have denied their agreement to arbitrate their claims against AT&T, thereby meeting the first prong of the *Chastain*<sup>7</sup> & R test. However, Plaintiffs have not introduced evidence to substantiate their denial. *See Chastain*, 957 P.2d at 855-56 (district court ordered to proceed to trial on arbitrability question where plaintiff asserted that (1) someone forged her signature on the arbitration agreement (which Defendant conceded); and (2) she did not provide a power of attorney to her father to assent to arbitration on her behalf). In response to AT&T's evidence that it mailed a CSA to Plaintiffs which never returned to AT&T, Plaintiffs simply state that they never received the CSA.<sup>9</sup> This is

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Plaintiff Rivera also states that the AT&T customer service representative from whom she purchased her calling plan over the telephone "neither mentioned nor explained any arbitration agreement." (Rivera All. 1 i 5-(i.) However, this point is not dispositive. Commercial transactions occur every day in which people pay for products with terms to follow ... terms about which they did not learn when placing their order. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *see also Hill v. Gateway 2000*, 105 Fed.1 147 (7th Cir. 1997); *Penal, Me r. Zeulr, rherl.*, 86 F.3d 1447 (7th Cir. 1996). The Seventh Circuit has stated:

insufficient to send the arbitrability question to a jury. *See id.*; see also *Barneii v. Okeechobee 1/usp.*, 283 F.3d 1232, 1239 (11th Cir. 2002) ("The common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee.") (internal citations omitted). Moreover,

AT&T has offered evidence that it included notices about the SA in its own monthly-billing statements, as well as those distributed by Bell South. (Def.'s Reply to Mot. to Compel 4-5); (Suppl. Farinetia Decl. ¶ 10.) (Spier et al. Decl. ¶¶ 4-9 and Exhs. A-G thereto.) Finally, Plaintiff Rivera admits that she continued AT&T service for more than a year and half after AT&T mailed her a CSA, and Plaintiff Daniel offers no evidence as to when or if she discontinued service. (Rivera Decl. ¶¶ 14, 10, 19.) Plaintiffs have not met their burden, thus the CSA hinders Plaintiffs.

4. This Court Need Not Reach the Issue of Preemption. Because Even If the Federal Communications Act Does Not Prevent State-Law Challenges to the CSA, Those State-Law Challenges Would Fail.

Plaintiff has argued that the CSA is both substantively and procedurally unconscionable, primarily relying on the Ninth Circuit's decision in *Wing*. AT&T has argued that the Act preempts any state-law challenges to the CSA (relying on the Seventh Circuit's *Boomer* decision), and that if it does not, Plaintiffs' state-law challenges would still fail. This Court need not address whether or not it would follow the *Bonnier* or *Wing* decisions in assessing whether the Act preempts state-law challenges to the USA, because such a challenge would ultimately fail under Florida law.

To succeed on a claim of unconscionability, a plaintiff must show both procedural and

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If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up to a rage over the waste of their time. And oral recitation *would* not avoid customers' assertions (whether true or feigned) that the clerk did not read terms X to theta, or that they did not remember or understand it.

1111, 105 F.3d at 1149.

<sup>14</sup> "Spier et al. Decl." refers to the Declaration of Plaintiff Spier, filed on February 16, 2006.

substantive unconscionability. *Complete Interiors, Inc. v. Behan*, 558 So. 2d 48, 52 (Fla. 5th DCA 1990). To determine procedural unconscionability, "a court must look to the circumstances surrounding the transaction to determine whether the complaining party had a meaningful choice at the time the contract was entered." *Gainesville Health Care (enter, lfr. t: l 'surr. -8-S7 Sot 2d-278r-28-5 Wla.-I-st* (Fla. 5th DCA 2003) (internal quotations omitted). "To determine whether a contract is substantively unconscionable, a court must look to the terms of the contract, itself, and determine whether they are so outrageously unfair as to shock the judicial conscience." *Id.* at 284-85. The case law provides no direction requiring this Court to address one component of unconscionability before the other. See *Monte AT T Wireless So-vs.*, 903 So. 2d 1019, 1025 (Fla. 4th DCA 2005). Accordingly, the Court first addresses procedural unconscionability and then substantive unconscionability.

a. Procedural unconscionability

Plaintiffs argue that the CSA is a contract of adhesion," and therefore, procedurally unconscionable. They cite to the Florida Court of Appeal's decision in *Powertel* for this proposition. However, the *Powertel* court did not find that, because the at-issue arbitration agreement was an adhesion contract, it automatically was procedurally unconscionable. [Id.](#) at 574 ("Although not dispositive of this point, it is significant that the arbitration clause is an adhesion contract.") Other, important facts contributed to the *Powertel* court's finding, and they serve to distinguish *Powertel* from the instant case. *Powertel*'s customers had already purchased equipment that worked only with *Powertel* wireless telephone service, and they had obtained telephone numbers that could not transfer to a new provider. *Id.* at 575. Further, *Powertel* did not specifically call attention to its new arbitration clause, such that many (if not all) customers likely did not know it existed. *Id.*

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<sup>1</sup> An adhesion contract is a "standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording [the] consumer a realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing in the form contract" *Powertel, Inc. v. Raba*, 743 So. 2d 570, 574 (Fla. 1st DCA 1991).

By contrast, AT&T prominently disclosed the existence of the arbitration provision through separate cover letters to its customers and through a "FAQ" page concerning the GSA. (Exit. I to Farmella Dccl.) AT&T also used hold-laced, all-caps print to delineate the arbitration clause from the -rest-of-the at^ceutl\_ (Seeicl.)\_ Moreover, Plaintiffs have offered no evidence that they made an investment in AT&T equipment or that they lacked other alternatives for telephone service. Indeed, AT&T gave Plaintiffs an opportunity to reject the CSA and to choose service with another carrier. (Sec' Fxh. 1 to Fartnella Decl.) Thus, Plaintiffs' reliance on *Pmeerlci* is misplaced. *See Futile*, 903 So. 2d at 1026 (distinguishing *Jowerlei* on the same grounds); *Orkin Exterminating .Co. r. Petsclr*, 872 So. 2d 259, 265 tFla, 2d D)'A 2004) (form contract containing arbitration provision neither procedurally nor substantively unconscionable). The CSA is not procedurally unconscionable.

h. Substantive unconscionability

Plaintiffs also contend that the CSA is substantively unconscionable. They argue that the CSA is "substantively unconscionable because it requires customers to give up many specific legal remedies." (Opp'n to Mot. to Compel Arbitration 12.) The Court disagrees.

The only specific legal remedy about which Plaintiffs appear concerned is the ability to sue AT&T on a class-wide basis. However, the Eleventh Circuit has held that arbitration agreements precluding class-action relief are valid and enforceable. *Jenkins r. Rev Am. Cash Advance of Ga., LLC*, 400 F.3d 86X, 877 ( 1 1 t h Cir. 2005) (citing *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th 2001)). In *Randrtiph*, the court of appeals held that a contractual provision to arbitrate claims under the Truth in Lending Act ("TII.A") is enforceable, "even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TII.A." *Randolph*, 244 F.3d at 819. The Eleventh Circuit noted that'liLA provides for enforcement by administrative agencies. and it contains other incentives for bringing'TII.A claims such as statutory damages and attorneys' fees. fd. at 818.

Here, the CSA provides for relief in small claims court as an alternative to arbitration, and allows

Plaintiffs to seek attorneys' fees if authorized by applicable substantive law. (1:18-cv-01000-1 to Farinella Dec 1.) Federal law provides for a third option: an individual may file a complaint with the Federal Communications Commission, which shall investigate the matter to determine any wrongdoing. See 47 §§ 207, 208. Further, the Attorney General may act on behalf of citizens allegedly wronged by a telephone carrier. See 18 U.S.C. § 1964(b) (providing that the Attorney General may institute proceedings against a particular defendant for RICO violations). Because arbitration agreements precluding class-action relief are enforceable and Plaintiffs have other forums within which to seek a remedy for AT&T's allegedly unlawful billing practice, the Court finds that the CSA is not substantively unconscionable.

#### **B. Plaintiffs' Motion for Leave to Amend Complaint**

Plaintiffs filed a Motion for Leave to Amend Complaint on November 23, 2005, more than two months following the close of the briefing schedule for AT&T's Motion to Compel Arbitration. Plaintiffs seek to allege, among other things, that they entered an oral rather than written contract with AT&T for telephone service and that they never orally agreed to arbitrate their claims. (Pls.' Mem. for Leave to Amend Compl. at 3-6; Proposed Am. Compl. 120, 40.) Plaintiffs further seek to allege that AT&T never provided them with a written agreement containing an arbitration provision, and that they never signed such an agreement. (Proposed Am. Compl. at 1, 20, 40, 41.) Finally, Plaintiffs seek to allege that, if consumers did receive the CSA, it was "only stealthily provided" and "induced by fraud." (Id. ¶¶ 1, 1011.)

Federal Rule of Civil Procedure 15 provides that a party seeking to amend its complaint more than twenty days after service must seek leave of court or the adverse party's written consent. Fed. R. Civ. P. 15(a). The rule also provides that "leave shall be freely given when justice so requires." *Id.*

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<sup>16</sup> For example, the RICO statute, under which Plaintiffs have brought one of their claims against AT&T, allows individuals to seek attorneys' fees and also contains a treble damages remedy. 18 U.S.C. § 1964(c).

However, "Ip]erntission may he denied where leave would cause undue delay or prejudice to the opposing party, where prior amendments have failed to cure deficiencies, or if the motive of the amendment is dilatory." *llullifurton & Assocs.. Inc. v. Henderson, Prim' & Co.* 774 F.2d 441, 443 (I 1th Ctr. 1955 ). A court may also deny leave to amend where the amendment would be futile. *l|l* at 444-45.

First, it is noteworthy that Plaintitfs did not file their motion to amend their complaint until after they had reviewed Defendants' papers and evidence supporting the motion to compel arbitration. Plaintiffs' attempt to avoid arbitration by amending their complaint to include non-arbitrable claims is without merit. The new allegations are insufficient to avoid arbitration.

Plaintiffs wish to add allegations denying receipt of AT&1's CSA. Plaintiffs have already raised these issues in their opposition to AT&T's Motion to Compel Arbitration. The Court has addressed Plaintiff's denial in Section 111, A of this Order and has explained how this denial does not prevent arbitration of Plaintiffs' claims. Adding this allegation to an amended complaint will not change this result. Moreover, as the Court further explained in Section III. A of this Order. Plaintiff Rivera's assertion that she never orally agreed to an arbitration agreement during her telephone conversation with the AT&T telemarketer who sold her an AT&T calling plan is not diapositive and will not change the result.

Plaintiff's also now wish to allege that the CSA was "only stealthily provided to" consumers, and that AT&T "induc[ed] any such 'agreement ' by fraud." (Pls.' Am. Compl. 1.) Plaintiffs ' position appears to be that this Court must decide a claim of fraud in the inducement of a contract containing an arbitration provision. This argument requires only a citation to *!Timor Paint C'nip.*, 388 U.S. at 403-404, which held that an *arbitrator* must hear charges of fraud in the inducement of a contract containing an arbitration clause. Plaintiffs have not included any allegations in their proposed amended complaint that AT&ck T' fraudulently induced its customers' agreement to the arbitration clause itself - separate and apart from the ('SA. Accordingly. amending the complaint to include an allegation of fraud in the inducement

with respect to the C'SA will not avoid arbitration. *See hi.* Plaintiffs' Motion for Leave to Amend Complaint must be denied.

IV. CONCLUSION

For the foregoing reasons it is hereby

ORDERED that:

(1) AT&T's Motion to Compel Arbitration and Dismiss/Stay Proceedings f DE-61 is GRANTED.

Pursuant to 9 U.S.C. \* 3, all further proceedings in this case are STAYED. Plaintiffs Rivera and Daniel must individually pursue their claims against AT&T according to the arbitration procedure set forth in the C'SA:

(2) Plaintiffs' Motion for Leave to File Amended Complaint [DE-301 is DENIED:

(3) All pending motions not otherwise discussed in this Order are DENIED AS MOOT: and

(4) This case is CLOSED FOR ADMINISTRATIVE PURPOSES.

LONE AND ORUIiREI) in Miami, Florida, this . day of February, 2006.

  
PATRICIA A. KELLY  
UNITED STATES DISTRICT JUDGE

cc: United States Magistrate Judge Chris M. McAlilcy  
All Counsel of Record