No. 11-3600

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

G.R. HOMA, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS CENTURION BANK,
Defendants-Appellees.

Appeal from the U.S. District Court for the District of New Jersey
No. 06-cv-02985

APPELLANT'S OPENING BRIEF AND APPENDIX VOLUME I OF III (PAGES A1-A22)

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JURISDICTIONAL STATEMENT

Federal jurisdiction is based upon diversity of citizenship under the Class Action Fairness Act of 2005, 28 U.S.C. § 1132(d). Plaintiff alleges that the matter in controversy in this putative class action exceeds $5 million, and that he is a citizen of a state different from those of the Defendants. A41.

The Court of Appeals for the Third Circuit has jurisdiction under 9 U.S.C. § 16(a)(3) because this is an appeal from a final order granting Defendants' motion to compel arbitration. *See Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003). The District Court's order was entered on August 30, 2011. A4. Plaintiff filed his Notice of Appeal on September 22, 2011. A1.

STATEMENT OF THE ISSUES

1. Whether this Court should certify to the New Jersey Supreme Court the question of whether, under New Jersey law, if a plaintiff actually proves that he could not effectively vindicate his substantive statutory rights under the arbitration agreement, the arbitration agreement is unenforceable. A4-6; A32.

2. Whether the District Court erred by reinstating its original order compelling arbitration notwithstanding the factual record in this case establishing that the Plaintiff could not effectively vindicate his substantive statutory rights under Defendants' arbitration agreement. A4-6; A32-33.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has been before this Court previously. *See Homa v. American Express Co., et al.*, 558 F.3d 225 (3d Cir. 2008). Beyond this, Appellant is aware of no other case or proceeding that is in any way related to this appeal.

STATEMENT OF THE CASE

This is the second time this case has been before this Court. Plaintiff-Appellant G.R. Homa initially filed a putative class action lawsuit against Defendants-Appellees American Express Company and American Express Centurion Bank (collectively, "AmEx" or "Appellees") in the United States District Court for the District of New Jersey. A39. His complaint alleged that AmEx engaged in a bait-and-switch campaign involving financial rebates for credit card purchases. A39. Through his Amended Class Action Complaint, Mr. Homa alleged that this scheme violated the New Jersey Consumer Fraud Act, and he sought relief on behalf of a putative class of New Jersey residents. A48.

AmEx filed a motion to compel individual arbitration on the ground that its arbitration agreement banned class actions and required individual arbitration of all claims. A24. The District Court agreed, and on May 31, 2007 granted Appellees' motion to compel arbitration and dismissed Mr. Homa's case with prejudice. A26. On February 24, 2009, however, this Court reversed. *See Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) ("*Homa I*"). This Court rejected AmEx's argument that the Federal Arbitration Act ("FAA") categorically required the enforcement of its class action ban, reversed the District Court's order compelling arbitration, and remanded the case back to the District Court for factfinding over whether the arbitration clause actually deprived Mr. Homa from effectively vindicating his statutory rights. *Id.* at 233.

On remand, before the District Court ruled again on AmEx's motion to compel arbitration, the U.S. Supreme Court issued its decision in *AT&T Mobility*

LLC v. Concepcion, 131 S. Ct. 1740 (2011). Soon thereafter, on May 27, 2011, AmEx moved the District Court for an order "reinstating the Court's May 31, 2007 Order compelling arbitration." A32. Mr. Homa opposed this motion. A32. On August 24, 2011, a panel of this Court decided *Litman v. Cellco P'ship*, 655 F.3d 225 (3d Cir. 2011), in which it abrogated *Homa I*, and on August 30, 2011 the District Court granted AmEx's motion, reinstated its original order compelling arbitration, and dismissed the case with prejudice. A4-5; A34.

This appeal followed. A1.

STATEMENT OF THE FACTS

A. Facts Related to AmEx's Bait-and-Switch Scheme. As alleged in Mr. Homa's complaint, using its vast data-bank of existing and potential customers, AmEx engaged in a bait-and-switch solicitation, marketing, and advertising campaign in a variety of media that used splashy advertisements to present an offer for its "Blue Cash" credit card to consumers of cash rebates of up to 5% of purchases and balances. *See* A39; A43. Based on this offer, Mr. Homa obtained AmEx's card. When accepted, however, the offer resulted in the imposition of completely different and less favorable terms. A41.

The bait-and-switch scheme was as complicated as the initial offer was clear. AmEx told potential cardholders like Mr. Homa that holders of the Card could "earn up to 5% cash back" on their purchases and/or monthly balances and would be applied as a flat rate, set forth by the following calculation:

Total Annual Spend	Cash Back on Everyday Purchases	Cash Back on Other Purchases
Up to $2,000	0.50%	0.25%
$2,001 - $6,000	1.00%	0.50%
$6,001 - $50,000	3.00%	1.50%
Bonus % if you carry a balance	2.00%	0.50%

A43-44.

Under this program, Mr. Homa was led to believe that if he spent over $6,000 annually, he would receive 3% cash back for his total "everyday purchases", along with an additional 2% cash bonus on everyday purchases for carrying a balance, and 1.5% back on all of their other purchases, with an additional 0.5% bonus for carrying a balance. A44.

As it turns out, Mr. Homa had been misled. In fact, there was no way Mr. Homa could ever receive a 5% total rebate. *See* A46. Even if a holder of the Card carried a monthly balance and thereby qualified to earn an additional 2% rebate, he or she could not earn the additional 2% rebate because the total rebate would be a blend of a .5% rebate (on $0 to $2,000) and a 1% rebate (on $2,001 to $6,000) on the first $6,000 put on the Card. *See* A46-47.

But AmEx made no effort to make this clear. Instead, after Mr. Homa received a statement from AmEx which purported to have calculated his correct rebate (what he believed should have been 5%), he saw that AmEx's calculations

were off, and began an effort to reconcile his understanding about how the rebate system worked with AmEx's calculations. A46.

This effort lasted for well over a year. To begin, in May of 2004, Mr. Homa telephoned AmEx after receiving his May Blue Cash statement with questions regarding how his Blue Cash card cash rewards were calculated. A62-63. AmEx customer service was unable to explain to him how his reward amount was derived. A63-64. Mr. Homa believed, based on the Initial Advertisement, which included the table and its description set forth above, that once his annual spend exceeded $6,000 he was entitled to one and a half to three percent on **all** of his purchases or, in other words, that his cash rewards would be calculated on a "flat basis." Instead, Amex customer service seemed to be indicating that they were calculating his cash rewards using "tiers." A66; A69; A80.

Based upon the natural reading of AmEx's contract and promotional materials, Mr. Homa also believed that, because he carried a balance every month (albeit minimal), he was entitled, according to the terms of the Initial Advertisement, to receive up to an additional 2% "revolve bonus" for purchases made during the month that he carried the balance. A78-79; A88.

But when he raised these points with AmEx, Mr. Homa found that the customer representatives were confused as to how to make the calculations, A73; A76; A87, and, in particular, whether there was a *recalculation* by AmEx of monthly rebate amounts of spending in lower spend categories once he reached a higher spend category. A68.

Eventually Mr. Homa came to understand that even though he knew he was spending or would spend more than six-thousand and one dollars per year, AmEx was calculating his cash rebate in layers. A70. By "tiering" the calculations, AmEx ensured that Mr. Homa would only get the cash rebate of a maximum of .5% based on the percentages described in the chart set forth above for first tier, ($0-$2,000) and a maximum of 1% for spending in the second tier (from $2,001 to $6,000), even though the initial offer made clear that, so long as his "total annual spend" exceeded $6,000 he should have received a maximum cash rebate of 3% of all "EveryDay" purchases he made. *See* A99.

Mr. Homa began to realize that the AmEx representatives were providing responses that were inaccurate or unfaithful to the promises in their own literature. A72. As a result, on June 30, 2004 he sent his first letter to AmEx stating that he believed that when he signed up for the Blue Cash card he would get 3% back on all of his everyday purchases when his "Total Annual Spend" exceeded $6,000. *See* A102. On July 22, 2004, Amex sent a letter back to Mr. Homa stating that, in contrast to the Initial Advertisement, the calculations were based on a "tier and not a flat 5%." *See* A99.

On September 14, 2004, Mr. Homa sent AmEx a second letter. *See* A105. As in his first letter, he asked for a breakdown of how his cash back reward bonus was calculated, as well as a breakdown of how the 2% revolve bonus on "everyday" purchases he made during the period that he carried a balance was calculated. In particular, he repeated the request (also made in numerous telephone conversations) that he be provided a "transaction by transaction"—or

complete—breakdown of how his cash rewards were calculated so that he could see how AmEx was determining what was an "everyday" or "non-everyday purchase," given that different percentages applied depending upon the type of purchase. A73; A77-78; A81-82; A96.

AmEx failed to honor this request. Instead, Mr. Homa received several letters from AmEx, including one dated September 28, 2004, which contained an "internal" handwritten calculation purporting to explain his monthly benefits broken down into "ED" (Everyday) and "NED" (Non-Everyday) spend, but that did not contain the transaction by transaction breakdown that Mr. Homa had requested. *See* A107-108. This response by AmEx only served to further "confuse[]" Mr. Homa, and confirm his belief that the AmEx customer service representatives did not really understand the problem and still could not provide him with the "numbers" he had requested. A89.

Finally, in a last ditch effort to understand AmEx's calculations, Mr. Homa sent a third letter to AmEx on July 14, 2005, attaching a 10-page spreadsheet he had created. *See* A110-122. In his spreadsheet, Mr. Homa performed painstaking calculations for each of his purchases on his Blue Cash card from March 3, 2004 through February 19, 2005, breaking down each transaction into categories of "Everyday" and "Non-Everyday" spending. *See* A110-122. According to these calculations, Mr. Homa demonstrated that he was entitled to approximately an additional $354.00. A110.

At around this time, AmEx disseminated a new advertisement on the internet for its Blue Cash Card (the "Corrected Advertisement") that significantly

revamped the various spend categories and explained, for the first time in a public document, how the spend categories worked. *See* 124-127. According to this new document, AmEx asserted that rewards would be calculated based not on "**Total Annual Spend"** but rather upon "**your prior spend at the time of purchase** and the type of purchase…." *See* A126 (emphasis supplied).

This was the first time customers were informed that the AmEx's rebate program was not based on their "total annual spend," and, at a minimum, demonstrates that AmEx was aware that the original language had not disclosed that the calculations of rebates were based on specific "tiered" method.

B. The Uncontroverted Evidence that AmEx's Class Action Ban would Effectively Preclude Mr. Homa From Vindicating His Substantive Statutory Rights. On February 24, 2009, this Court issued its first opinion in this case, declining to hold AmEx's class action ban unconscionable under New Jersey law and instead remanding to the District Court for fact-finding to determine whether the claims at issue were such "as effectively to preclude relief if decided individually." *Homa I*, 558 F.3d at 233.

In construing New Jersey law, this Court made clear that, under *Muhammad v. County Bank of Rehobeth Beach, Delaware*, 912 A.2d 88 (N.J. 2006), a determination of the enforceability of an arbitration provision involves a multi-factored, fact-intensive, analysis. Thus, as Judge Weis observed in concurrence, *Muhammad* "relied on several factors in striking the class-action ban," including (1) "the consumer's ability to obtain representation," (2) "counsel's incentive to undertake the litigation," (3) "the lawsuit's complexity," (4) "the amount of

damages involved," and (5) "the availability of attorney's fees and statutory multipliers." *Id.* at 233 (Weis, J., concurring). He instructed that the parties should "brief[] the elements pertinent in *Muhammad*," and that this Court should "explore" all of these factors before deciding whether AmEx's class action ban is unenforceable.

On remand, and even after the U.S. Supreme Court decided *Concepcion*, this mandate still controlled, and Mr. Homa submitted substantial evidence to the District Court that, on the facts of this particular case, the *Muhammad* factors weigh strongly in favor of a finding that AmEx's class action ban effectively precludes relief if the claims were required to be decided individually, and therefore required that the clause be invalidated.

Mr. Homa himself submitted a declaration in this case that made clear that he, personally, would not have been able to obtain relief if he was forced to pursue his claim though individual arbitration. *See* A175-177. In his declaration, Mr. Homa attested that (1) because the amount of his damages was relatively small in relation to the costs of arbitration, (2) because AmEx refused to provide him with the information or documentation he requested which was necessary to establish his losses and the extent to which he had been cheated, and (3) because the cost of an individual legal action in relation to the amount of money at stake was prohibitive, the only way he could vindicate his rights or pursue his claim against AmEx was through the class action device. A176-177. He also testified that he believed he could not pursue his claims without the assistance of a lawyer. A177.

Mr. Homa also submitted expert testimony from New Jersey consumer and legal services attorneys with extensive experience representing consumers in individual cases. A129-152. As set forth below, each expert testified, based on his or her personal knowledge of the kinds of cases consumer lawyers accept, that without the possibility of pursuing claims on a class action basis, few if any of AmEx's cardholders would be able to obtain any legal remedy for the wrongs alleged in this lawsuit. Mr. Homa's experts based these conclusions on the complaint in **this case**, and testified about the specific costs and legal and factual challenges raised by Mr. Homa's claims.

First, the experts testified that the claims at issue here are too small individually, and too complex, for attorneys to handle on an individual basis. *See, e.g.,* A133-134; A140-141. Because the amount at stake to each individual cardholder is small (less than $1,000, and in Mr. Homa's case approximately $350) but the claims against AmEx involve complicated legal theories arising under statutory law, few (if any) cardholders will have the desire or ability to expend the time and effort necessary to litigate *or* arbitrate their claims against AmEx on an individual basis. For example, as Christopher McGinn explained, "[t]he types of claims brought by Plaintiff in this action are complex and can require a significant investment in attorney time and resources. Moreover, the litigation strategy of well-financed companies like Amex frequently involves creating obstacles that may require a consumer to expend significant[ly] more attorney's fees and costs." A133.

Second, the evidence established that incredibly few consumers would realize that they have the claims raised in this case, and thus have any possibility of effectively vindicating their rights, without a class action. Indeed, as explained above, in order, even, for Mr. Homa to determine that he was not receiving the promised 5% rebate he had to perform hundreds of calculations of his individual transactions spanning years of purchase history. *See* A110-122. And then, even after sharing these calculations with AmEx, he was unable to fully grasp that AmEx had, in fact, changed the rebate program.

Mr. Homa's experts shared this opinion. All of these experts are experienced consumer lawyers who have evaluated many potential consumer cases and have represented many victims of consumer fraud in both individual and class action cases. Andrew Wolf explained, for example, that the nature of AmEx's alleged fraud, premised as it is on a "bait and switch" scheme, means that "the unlawful conduct alleged by plaintiffs is hidden and unlikely to be discovered." A141-142. Indeed, in order to uncover the nature of the scheme, a cardholder would have to closely review their monthly bills and be capable of performing complex mathematical operations that would allow him to discover that the amount of AmEx's rebate did not match the 5% promise made in the Cardholder agreement.

Mr. Homa's experts, all of whom handle vast numbers of consumer intakes every year, testified that they have virtually never "encountered credit card customers who had closely reviewed their bills to determine if the rebates they'd received were at the appropriate level." A135. Nor have they ever "spoken to a

customer who was familiar with their rights under the [New Jersey Consumer Fraud Act]." A135. Thus, "[w]ithout a class action, many victims of defendants' misconduct will almost certainly never discover AmEx's alleged fraud—leaving those victims without any remedy at all and permitting defendants the full benefit of their misconduct for those absent, putative class members." A141-142; *see also* A147 ("I believe that it is very unlikely that more than a handful of consumers in Mr. Homa's situation would ever have realized that they had received lower rebates than promised . . . . Very few consumers would be likely to ever contact an attorney over claims such as those asserted in this case.").

Finally, Mr. Homa's experts opined that few if any consumers could pursue the claims set forth in this case without legal representation, and, for the type of claims alleged here, finding competent legal counsel to pursue the claims would be highly difficult. *See* A146 ("It is my opinion that the resources and time required to litigate this case would render it economically infeasible for my firm or other consumer attorneys to handle a case such as that set forth in this complaint on an individual basis."). There are only a few consumer attorneys in the region who have experience with credit card fraud cases. *See* A141. And even those that do are reluctant to take many (if any) individual, non-class cases because the attorneys' fees and expenses associated with an individual case are likely to exceed any consumer's recovery. A146. As Mr. McGinn explained, "[b]ecause of the complexity involved, consumers litigating a case like this against AmEx must have legal counsel in order to have any hope of success. But litigating a case like this requires counsel to make a significant up-front investment of both time and money,

and that investment is likely to be far greater than the amount at stake in the case, unless the case may be pursued as a class action." A133. Moreover, because, in an individual case, "courts typically gauge an award of attorney's fees based, in part, on consideration of the amount of claim. . . . , [t]he risk that an attorney may need to spend many hours working on a case but may well only recover a fraction of that time even if her client prevails makes it even less economically viable for a consumer attorney to take such a small dollar claim on an individual basis." A133-134.

In addition, Mr. Homa submitted uncontroverted evidence from AmEx's own arbitration providers demonstrating that, since 2006, fewer than 25 consumer arbitrations involving the AmEx Defendants relating to any kinds of disputes, not necessarily those involved in this case, have been conducted nationwide. A155-156. Given that AmEx has over 80 million cards-in-force, this evidence thoroughly corroborates the testimony of Mr. Homa's experts that AmEx's class action ban is exculpatory.

This factual record makes clear that, as long as AmEx's arbitration clause continues to prohibit class actions in court or in arbitration, it operates to effectively preclude individual consumers like Mr. Homa from vindicating their substantive statutory rights under New Jersey consumer protection laws.

In contrast, AmEx offered ***no evidence*** that any of the factors weigh in its favor. Instead, it chose merely to rely on *Concepcion* for the proposition that a company's class action ban must always be enforced no matter what factual showing a plaintiff makes.

SUMMARY OF ARGUMENT

This case involves the enforceability of a mandatory arbitration clause that AmEx has included in their standard credit cardholder contracts. As explained below, the uncontradicted evidentiary record in this case establishes that enforcing AmEx's arbitration clause would make it impossible for any person, including Plaintiff-Appellant G.R. Homa, to effectively vindicate his substantive statutory rights.

AmEx argues that this fact is irrelevant, and that they are entitled to enforce their arbitration agreement even if it has been proven by admissible, uncontroverted evidence that consumers could not effectively vindicate their substantive statutory rights against AmEx for damages it caused them by violating the New Jersey Consumer Fraud Act. This position, however, has never been addressed by the New Jersey Supreme Court, and runs contrary to a rule embedded in the FAA and consistently endorsed by the U.S. Supreme Court. To adopt it here, without input from the court that is most capable of definitively answering whether it is valid, would overturn decades of precedent and would ignore a fundamental rule of limitation in the FAA.

The key question in this case hinges on an issue of first impression for this Court: whether the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) would preempt a narrowly tailored rule of state law that would allow a court to refuse to enforce an arbitration provision—including a class action ban—where uncontroverted and specific evidence demonstrates that even the individual named plaintiff in a case could not

effectively vindicate his substantive statutory rights if he was forced to pursue his claim through individual arbitration.

In *Concepcion*, the Supreme Court held 5-4 that the FAA preempted California's "*Discover Bank* rule," which—according to *Concepcion*—would allow courts to mechanically invalidate a class action ban in an arbitration clause—and force the parties into non-consensual class arbitration—whenever three common factors are present: (1) a consumer contract of adhesion; (2) predictably small damages; and (3) an allegation that the defendant engaged in a scheme to cheat consumers. 131 S. Ct. at 1750. The Court reasoned that the rule would effectively prohibit arbitration of a broad category of claims and would impose procedures—namely, classwide arbitration—against the parties' consent, which would be inconsistent with and preempted by the FAA. *Id.* at 1746.

AmEx contends that *Concepcion* extends to preempt any state law that would allow a court to bar enforcement of an arbitration provision even if it would mean that no individual would ever be able to obtain relief for an alleged harm. They point to this Court's post-*Concepcion* decision in *Litman v. Cellco P'ship*, 655 F.3d 225 (3d Cir. 2011) ("*Litman II*"), as confirmation of this conclusion, because there a panel of this Court found that *Concepcion* preempted the New Jersey Supreme Court's decision in *Muhammad v. County Bank of Rehobeth Beach, Delaware*, 912 A.2d 88 (N.J. 2006) and abrogated this Court's decision in *Homa I*. AmEx contends that this result therefore ends any possibility that Mr. Homa could challenge the enforceability of AmEx's class action ban under generally-applicable principles of New Jersey contract law. To put it another way,

according to AmEx the facts do not matter under *Concepcion*, because any company's class action ban and arbitration clause are always enforceable no matter what the evidence may show. As explained below, however, neither *Concepcion* nor *Litman II* reached *this* case, or the question now before this Court.

First, in no less than five cases, the U.S. Supreme Court has held that arbitration clauses are to be enforced only where they allow individuals to effectively vindicate their substantive statutory rights. This rule, which *Concepcion* did not overturn, embodies a distinct principle embedded in the FAA and applies to any court faced with a motion to compel a forum selection clause. The only way to harmonize these cases with *Concepcion* is to recognize that the *Concepcion* rule—class action bans in arbitration clauses are generally enforceable—has an exception: *except* where it has been proven through admissible evidence they would prevent parties from vindicating their statutory rights. In *this* case, unlike virtually any other case, Mr. Homa has proved that enforcement of AmEx's class action ban would indeed have this exculpatory effect.

This Court's decision in *Litman II* does not alter this framework. In *Litman II*, a panel of this Court held that the reasoning of *Concepcion* preempted the state rule in *Muhammad*, but it did so in a case in which the plaintiffs (1) presented no evidence that the class action ban would effectively prevent a party from vindicating their rights, and (2) conceded that *Muhammad* was preempted. Thus, the panel's decision is inapplicable to the question posed by this case.

Because *Concepcion* left this FAA rule intact, and because *Litman II* did not address a factually similar case, neither call into question the validity of a narrowly-tailored state law that would allow a court to bar enforcement of class action bans where, in a particular case, the admissible evidence demonstrates—as a matter of fact—that the bans would prevent individuals from effectively vindicating their rights under consumer protection or civil rights laws on an individual basis in arbitration.

As an example of the type of narrowly-tailored state law rule that would survive *Concepcion*, at least one state Supreme Court has embraced such an "evidence based" test that is tethered to the vindication of substantive statutory rights exception to the regular rule of enforceability of class action bans. Such a test is fundamentally different than the categorical *Discover Bank* rule that the U.S. Supreme Court struck down in *Concepcion*. *See Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). In the wake of *Concepcion*, several state and federal courts have indicated that the case-by-case evidence based *Gentry* test survives *Concepcion*.

Against this backdrop, this Court should certify this question to the New Jersey Supreme Court. When a panel of this Court decided, in *Litman II*, that the governing New Jersey rule as set forth in *Muhammad* was preempted by the FAA, it created a vacuum in controlling New Jersey law. Under these circumstances, because there is now an unresolved question about whether New Jersey law conditions the enforcement of class action bans on an evidentiary record demonstrating that a defendant's class action ban would foreclose effective vindication of the plaintiffs' rights—which would be consistent with the FAA and

in harmony with *Concepcion*—this Court should certify that question to the New Jersey Supreme Court.

Here, AmEx's class action ban has been proven by the compelling evidentiary record in *this* case to prevent Mr. Homa from effectively vindicating his rights under New Jersey's consumer protection statutes. As this brief highlights, Mr. Homa submitted substantial evidence to the court demonstrating that AmEx's class action ban would effectively exculpate AmEx from liability for the particular small-value, yet demonstrably complex consumer claims he has alleged in this case. AmEx submitted *no* evidence to the contrary. Given that the evidentiary record in this case demonstrates that Mr. Homa would be without any effective means to vindicate his statutory rights absent a class action, this Court should allow the New Jersey Supreme Court to determine whether its own state law would allow a court to invalidate a class action ban in the narrowly-tailored circumstances that this case presents.

Finally, to the extent that this Court finds the panel's decision in *Litman II* controlling, it is wrongly decided. The panel's decision—that the reasoning of *Concepcion* preempts the New Jersey Supreme Court's decision in *Muhammad*—sweeps too broadly, and fails to acknowledge the critical distinctions between New Jersey's rule and California's *Discover Bank* rule. *Concepcion* did not overrule the two central holdings of *Muhammad*: (1) that, under New Jersey law, a class action ban is unenforceable *only if* it would effectively preclude relief were a plaintiff's claims to be decided individually; and (2) that, under the FAA, courts may refuse

to enforce arbitration agreements when, under the particular facts of the case, they prevent plaintiffs from effectively vindicating their substantive statutory rights.

These limitations, though not present in the *Discover Bank* rule, embody an integral feature of New Jersey law, and are grounded in a line of U.S. Supreme Court cases not impacted by *Concepcion*. They therefore place the rule set forth in *Muhammad* comfortably outside the reach of *Concepcion*. However, even if this Court disagrees, in the wake of *Concepcion's* guidance, the New Jersey Supreme Court should be given an opportunity in the first instance to interpret the contours of its own law.

STANDARD OF REVIEW

This Court exercises plenary review of questions concerning the "validity and enforceability of an agreement to arbitrate." *Edwards v. Hovensa, LLC*, 497 F.3d 355, 357 (3d Cir. 2007).

ARGUMENT

I. THIS COURT SHOULD CERTIFY TO THE NEW JERSEY SUPREME COURT THE QUESTION OF WHETHER, UNDER NEW JERSEY LAW, IF A PLAINTIFF ACTUALLY PROVES HE COULD NOT EFFECTIVELY VINDICATE HIS RIGHTS UNDER THE ARBITRATION AGREEMENT, THE ARBITRATION AGREEMENT IS UNENFORCEABLE.

The question of whether enforcement of AmEx's class action ban in this case would violate a narrowly-tailored, case-specific rule of New Jersey contract law is a now unresolved—and controlling—issue of New Jersey state law that should be certified for decision to the New Jersey Supreme Court. This issue is now unresolved because, in *Litman II*, this Court held that the governing New

Jersey rule of contract law was preempted under the reasoning of *Concepcion*. *See Litman II*, 655 F.3d at 231 (holding that "the rule established by the New Jersey Supreme Court in *Muhammad* is preempted by the FAA"). As a result, by wiping this decision off the books, New Jersey no longer has any rule governing the enforceability of arbitration agreements and class action ban clauses.

Under New Jersey law, the Supreme Court of New Jersey may answer a legal question certified by this Court "if the answer may be determinative of an issue in litigation pending in the Third Circuit and there is no controlling appellate decision, constitutional provision, or statute in this State." N.J. Court Rule 2:12A-1. In this case, certification is appropriate because "the case raises a serious and undecided issue of New Jersey law." *Delta Funding Corp. v. Harris*, 426 F.3d 671, 671 (3d Cir. 2005) ("*Delta Funding I*") (certifying a question about the enforceability of an arbitration agreement under New Jersey law to the New Jersey Supreme Court); *see also Salley v. Option One Mortgage Corp.*, 2005 WL 3724871 (3d Cir. Oct. 20, 2005) (certifying a question regarding the validity of an arbitration agreement under Pennsylvania law to the Supreme Court of Pennsylvania).

A. By Compelling Arbitration Notwithstanding the Evidentiary Record in this Case, the District Court Created a Rule of State Law Without Guidance from the New Jersey Supreme Court.

The District Court's decision to enforce AmEx's class action ban was presumably based on its interpretation of *Concepcion* and this Court's decision in

Litman II.[1] In applying those decisions to this case, the District Court erected a rule of state law that would *require* the automatic enforcement of any class action ban embedded in an arbitration agreement even if it were shown, on the specific facts of an individual case, to bar any and all plaintiffs from being able to vindicate their substantive statutory rights. Such a holding, if it is adopted by this Court, would overturn decades of Supreme Court precedent that was not disturbed by either *Concepcion* or *Litman II* and would prevent the court most capable of definitively deciding this issue—the New Jersey Supreme Court—from doing so. As explained below, even after these decisions, courts—and states—remain free to apply well-established rules of contract law to invalidate class action bans embedded in arbitration agreements where a plaintiff can show—on the facts of his particular case—that the existence of the class action ban would prevent him (and others like him) from being able to effectively obtain redress for an alleged injury. Here, Mr. Homa submitted an extensive—and uncontroverted—evidentiary record establishing that enforcing the class action ban *would actually prevent him* from being able to vindicate his substantive statutory rights. Because neither *Concepcion* nor *Litman II* addressed a factual record even remotely like the one established in this case, and in the absence of any controlling state law, the New Jersey Supreme Court should be given an opportunity to address the impact that a robust evidentiary record would have on the enforceability of a class action ban.

[1] Unfortunately, the District Court provided no reason or basis for its second order compelling arbitration and dismissing the case. *See* A4-6.

1. *Concepcion* does not disturb the rule that, under the FAA, parties must be able to effectively vindicate their substantive statutory rights in the arbitral forum.

As an initial matter, the District Court's decision in this case, if left to stand without input from the New Jersey Supreme Court, would in effect overrule a longstanding limitation on the enforcement of arbitration clauses that was left undisturbed in *Concepcion*: that, under the FAA, courts may refuse to enforce arbitration agreements when, under the particular facts of the case, they prevent plaintiffs from effectively vindicating their statutory rights. The Supreme Court has consistently held that statutory claims are arbitrable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"—and that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 628, 637 (1985); *see Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000) ("[C]laims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum'") (citation omitted); *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer,* 515 U.S. 528, 540 (1995) (Kennedy, J.) (holding that, if an arbitration provision were to operate "as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy"); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*

Motors); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (holding open the possibility that an arbitration agreement could be invalidated if it "prevent[s] respondents from 'effectively vindicating' their 'statutory rights in the arbitral forum,'" but explaining that, because the issue had not been raised below, the Court would not "invalidate arbitration agreements on the basis of speculation"); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (statutory claims may be arbitrated as long as a party can vindicate her substantive rights) (citation omitted).

This principle has also been widely adopted by lower courts that are faced with determining whether to enforce class action bans. *See e.g., In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) ("[W]e have acknowledged that if a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement."); *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006) (noting that "the legitimacy of the arbitral forum rests on 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights'") (citation omitted). For authorities embracing the effective vindication of rights requirement in a variety of other contexts, *see also Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) ("As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from

effectively vindicating his or her statutory rights."); *Walker v. Ryan's Family Steak Houses, Inc.,* 400 F.3d 370, 388 (6th Cir. 2005) ("[A] court cannot enforce [an arbitration] agreement as to a claim if the specific arbitral forum provided under the agreement does not 'allow for the effective vindication of that claim.'") (citation omitted); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 205-06 (2d Cir. 1999) (finding "the substantive rights found in the statute are not in any way diminished by our holding that arbitration may be compelled in this case, since only the forum—an arbitral rather than a judicial one—is affected, and plaintiff's rights may be as fully vindicated in the former as in the latter."). Thus, it is inescapable that this principle is widely established and recognized as a core principle of FAA law.

AmEx, however, contends that this rule was also swept away by *Concepcion* and the District Court's decision in this case effectively adopts this position. But in order for the FAA to require enforcement of class action bans *even where enforcement would prevent the parties from vindicating their substantive statutory rights*, the Supreme Court would have had to overrule these prior decisions, and that did not happen. Indeed, there is no question that *Mitsubishi Motors* and *Gilmer* remain good law after *Concepcion* as Justice Scalia cites both cases (albeit for different reasons) with authority in *Concepcion*. *Concepcion*, 131 S. Ct. at 1748 (citing *Mitsubishi Motors*); *id.* at 1749 n.5 (citing *Gilmer*). And in the absence of a clear statement to the contrary, this principle remains intact. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts may not "conclude our more recent cases have, by implication, overruled an earlier precedent" and must

"leav[e] to this Court the prerogative of overruling its own decisions"); *Rodriquez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")

There is also little doubt that the principles embodied in the *Mitsubishi Motors* line of cases apply equally to cases involving state statutory rights. In *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005), then-Judge Roberts, in a case involving state law, struck down a provision in an arbitration clause that stripped a party of state statutory rights. The opinion cited *Green Tree Fin. Corp.-Alabama v. Randolph* and held that a party may "resist[] arbitration on the ground that the terms of any arbitration agreement interfere with the effective vindication of statutory rights." *Id.* at 81.

In short, the Supreme Court did *not* overrule this prior precedent. Instead, *Concepcion* demonstrates that only those broad categorical rules of state law that permit uniform invalidation of arbitration clauses pose a conflict with the FAA: "When state law prohibits outright the arbitration of *a particular type of claim*, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S. Ct. at 1747 (emphasis added, citation omitted). This conflict is no less evident when a state law that accomplishes the same goal (prohibiting arbitration of a type of claim) indirectly is also preempted. *Id.*; *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006).

However a rule that refuses to enforce a term in an arbitration clause under state law when the particular facts and circumstances of the case *prove* that the term prevents the parties from vindicating their substantive statutory rights is entirely consistent with the FAA. *Cf. Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. at 92 ("[A] party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs."); *Pyett*, 129 S. Ct. at 1474 (implying that a claim that an arbitration agreement prevents a party from effectively vindicating their rights requires more than mere "speculation").

Here, as discussed below, the facts in Mr. Homa's case *do* prove that AmEx's class action ban operates to prevent him from vindicating his substantive statutory rights. The District Court simply ignored this evidence, because it erroneously believed that, under *Concepcion* and *Litman II*, no set of facts could ever allow a court to refuse to enforce a class action ban.

2. Neither *Concepcion* nor *Litman II* overrule a state law that would invalidate class action bans only if the particular facts of a case demonstrate that the plaintiffs cannot effectively vindicate their substantive statutory rights on an individual basis.

As discussed above, *Concepcion* does not stand for the proposition that all state laws that would lead to the invalidation of an arbitration provision are preempted by the FAA. Instead, a state law that would allow courts to invalidate arbitration provisions—including class action bans—where a party could actually prove, under the particularized facts of his case, that the existence of the arbitration provision would prevent the party from effectively vindicating his substantive

statutory rights would pass muster under the reasoning of *Concepcion* and would not be preempted by the FAA. Such a rule is necessarily quite narrowly tailored; it would not allow parties to escape arbitration by simply making generalized claims about the "predictably small" amount of damages combined coupled with "a scheme to cheat consumers," *Concepcion*, 131 S. Ct. at 1750, but in cases with robust evidentiary records and certain types of factual circumstances, it would preserve the ability of courts to continue to ensure that arbitration agreements allow parties to effectively vindicate their statutory rights, consistent with the FAA and the Supreme Court's longstanding *Mitsubishi Motors* rule.

Before this Court ruled in *Litman II*, one might have thought that the New Jersey Supreme Court's rules set forth in *Muhammad* was just such a narrowly tailored state rule.[2] But even if *Muhammad* does not qualify as a sufficiently narrow rule of state law, this does not mean that there could be no state law that passes muster, and *Litman II* does not hold otherwise. In *Litman II*, the panel was presented with a virtually identical claim to the one made in *Concepcion* itself. The plaintiffs offered *no evidence* that the company's class action ban would actually deprive the plaintiffs from effectively vindicating their rights in arbitration. *See Litman v. Cellco P'ship*, 381 Fed. App'x. 140, 141 (3d Cir. 2010)

[2] Appellant disputes the conclusion of the panel in *Litman II* that *Muhammad* is no different that the *Discover Bank* rule in *Concepcion* and therefore is preempted. There are meaningful differences between the two states' rules that take *Muhammad* outside the scope of *Concepcion*. In *Litman II*, the panel was presented with no argument as to why this is so, and the plaintiffs in that case simply conceded that *Muhammad* was preempted by the FAA under the reasoning of *Concepcion*. Appellant understands that this panel is bound by the holding in *Litman II*, but preserves this argument for en banc review. *See infra* at Section II.

("*Litman I*"). Instead, the plaintiffs simply argued that because the class action ban was present in a "contract[] of adhesion that prohibit[ed] use of a class action mechanism for low-value claims," it was categorically unconscionable under *Muhammad*. *Id.* Because an earlier panel of this Court had agreed with this argument, the panel in *Litman II* viewed *Muhammad* as establishing a broad rule of state contract law virtually identical to California's *Discover Bank* rule. *See Litman II*, 655 F.3d at 228 n.2 (explaining that, in the panel's view, *Muhammad* would allow a court to invalidate a class action ban so long as it was merely "found in a consumer contract of adhesion in a setting in which disputes between the contracting parties *predictably* involve small amounts of damages").

Under these circumstances, *Litman II's* conclusion that *Muhammad* is preempted by the FAA is understandable in light of *Concepcion*. But this conclusion does not address whether a more narrowly-tailored law—one that allows courts only to bar enforcement of arbitration provisions where a party factually proves that it would deprive them of their ability to enforce a statutory right—would survive.

One example of how New Jersey law could be interpreted so that there it would be consistent with the FAA can be drawn from the California Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal. 4th 443, 466 (2007), a more refined approach that post-dated the *Discover Bank* rule. In *Gentry*, the California Supreme Court remanded to the trial court a challenge to the enforceability of a class action ban in an arbitration clause. *Id.* The *Gentry* Court required an evidentiary determination as to whether the class action ban would bar the

effective vindication of statutory rights, and required that the trial court reach its decision on remand based on evidence *beyond* the mere dollar value of the claims at issue. *Id*. at 463 (instructing the trial court to consider "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration").

As subsequent courts have recognized, *Gentry* analyzed the issue of whether a class action ban was enforceable under a drastically different approach than the *Discover Bank* rule, which was described by the U.S. Supreme Court as mechanically invalidating a class action ban whenever damages are "predictably small," *Concepcion*, 131 S. Ct. at 1750. *See e.g., Arguelles-Romero v. Superior Court*, 184 Cal. App. 4th 825, 842 (Cal. Ct. App. 2010) ("Despite the potential overlap of the two [*Discover Bank* and *Gentry*] doctrines, care should be taken not to conflate them unnecessarily."). As *Arguelles-Romero* explained, "*Gentry* did not establish an absolute four part test for the enforceability or unenforceability of class action waivers," 184 Cal. App. 4th at 841, but instead requires "a discretionary determination" based upon the evidence, which differentiates *Gentry* from *Discover Bank*. *Id.* at 842-43.

In the wake of *Concepcion*, a number of courts have recognized that the *Gentry* evidence-based approach, under which the enforceability of a class action ban depends on whether the ban is proven by competent evidence to prevent plaintiffs from effectively vindicating their rights in arbitration, is consistent with

Concepcion. *See Brown v. Ralph's Grocery Co*., 197 Cal. App. 4th 489 (Cal. Ct. App. 2011) (*Concepcion*'s striking down of the broad rule at issue in *Discover Bank* does not necessarily invalidate *Gentry*); *Plows v. Rockwell Collins, Inc*., 2011 WL 3501872 at *5 (C.D. Cal. Aug. 9, 2011) ("[T]he Court holds that, for the purposes of the present Motion to Compel Arbitration, *Gentry* is valid law. Plows thus may avoid arbitration if he can demonstrate that his arbitration agreement is unenforceable under *Gentry*."); *Lewis v. 24 Hour Fitness USA, Inc.*, 2011 WL 5223153 (Cal. Ct. App. Nov. 3, 2011) (analyzing claims under *Gentry* to determine whether the plaintiffs had demonstrated that the class action ban at issue was substantively unconscionable and therefore unenforceable).

Moreover, few, if any, courts have held explicitly to the contrary. For example, even in a case like *Cruz v. Cingular Wireless*, 648 F.3d 1205, 1214 (11th Cir. 2011), where the court enforced a class action ban even in the face of evidence that only an "infinitesimal percentage of ATTM subscribers," would have been able to pursue their rights in arbitration, the record did not establish as a matter of fact that the specific plaintiffs in the case would be unable to vindicate their rights.[3] Thus, citing the *Mitsubishi Motors* line of cases, the court did not reach "the question of whether *Concepcion* leaves open the possibility that in some cases, an arbitration agreement may be invalidated on public policy grounds where it

[3] Nevertheless, the idea that, so long as an "infinitesimal" number of consumers can pursue arbitration even where there are millions of potentially aggrieved consumers, the "vindication of substantive statutory rights" test is met is simply not credible. The *Cruz* court's conclusion that this is sufficient to enforce the arbitration agreement creates a completely illusory version of this rule.

effectively prevents the claimant from vindicating her statutory cause of action." *Id.* at 1215; *see id.* at 1214 (explaining that, "at least as applied to the facts of this case, . . . faithful adherence to *Concepcion*" requires the enforcement of the class action ban).

3. This case is not controlled by *Concepcion* because here—unlike in *Concepcion*—the plaintiff submitted extensive and uncontradicted evidence demonstrating that he could not effectively vindicate his substantive statutory rights on an individual basis.

Concepcion based its decision on a key factual premise that is not present in this case: that the Concepcions *could* effectively vindicate their claims on an individual basis. *Concepcion*, 131 S. Ct. at 1753 (finding that "the claim here was most *unlikely* to go unresolved" because, *inter alia*, AT&T's arbitration agreement contained sufficient incentives "for the individual prosecution of meritorious claims that are not immediately settled") (emphasis added).[4] Because the Supreme Court based its ruling in *Concepcion* on the premise that the plaintiffs there could

[4] The question presented in *Concepcion*—whether the FAA would preempt a state law that would invalidate a class action ban where classwide treatment is "*not necessary* to ensure that the parties to the arbitration agreement are able to vindicate their claims"—also reflected this assumption. Petition for Writ of Certiorari, *AT&T Mobility, LLC v. Concepcion*, No. 09-893 (U.S. Jan. 25, 2010), 2009 U.S. Briefs 893, at *i (emphasis added). Indeed, given that the Court ruled only on this question, it could not have resolved the issue posed by this case—whether a class action ban must be enforced even where an extensive factual record establishes as a matter of evidence that the plaintiffs would be unable to effectively vindicate their substantive statutory rights individually. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) ("We wait for cases to come to us, and when they do we normally decide only questions presented by the parties.") (internal quotation and citation omitted); *Seling v. Young*, 531 U.S. 250, 265 (2001) ("[W]e do not decide claims that are not presented below").

vindicate their rights, its holding does not authoritatively resolve the core issue in *this* case, because here, this question, *i.e.,* whether Mr. Homa and others like him could effectively vindicate their claims individually, was affirmatively proven in the negative, as the evidentiary record establishes, *as a matter of fact*, that AmEx's class action ban would operate to prevent Mr. Homa and others like him from effectively vindicating his substantive statutory rights.

The *Concepcion* Court's conclusion that the class action ban there was not exculpatory was understandable, given that there was no factual record to the contrary. In the absence of such evidence, the Court accepted AT&T's argument that its arbitration clause had beneficial features that made it possible for consumers to vindicate rights. *Concepcion*, 131 S. Ct at 1753. Indeed, the district court in *Concepcion* had opined that the incentives for individual arbitration in AT&T's clause would leave the Concepcions "better off . . . than they would have been as participants in a class action," and the Ninth Circuit "admitted that aggrieved customers who filed claims would be 'essentially guaranteed' to be made whole." *Id.* The Supreme Court thus concluded (based on nothing more than contract language itself) that the claim at issue in *Concepcion* was "most unlikely to go unresolved." *Id.*; *see also id.* at 1750 (predicting that "some [consumers] may well" pursue individual claims in arbitration).

Concepcion acknowledged in passing that, without a class action, some small-dollar claims against AT&T "*might* . . . slip through the legal system." *Id.* at 1753 (emphasis added). But the Court concluded that this unsubstantiated contingency was not sufficiently serious to permit states to "require a procedure"—

class arbitration—that is "inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* The rule of law set forth in *Mitsubishi Motors*, and not disturbed in *Concepcion*—that the legality of arbitration depends upon it allowing parties to effectively vindicate their substantive statutory rights—indicates that the balance shifts, however, where (as here) the factual record demonstrates that the certain result of banning a class action is that claims *will* go unresolved. A rule that allows a court to invalidate a class action ban under these very specific circumstances is not at odds with the Supreme Court's holding in *Concepcion*, because the class action ban at issue in *Concepcion* was not proven to bar the effective vindication of consumers' rights.

The significance of the unique terms of AT&T's arbitration clause, which are wildly more generous than the AmEx's arbitration clause's terms, is evident. Under AT&T's clause, the corporation pays all costs of arbitration, denies AT&T the right to seeks any reimbursement of its attorney fees and, in fact, provides that if the arbitrator grants an award higher than AT&T's last offer to the claimant, the claimant would be entitled to a minimum payment of $7,500 and twice the amount of the claimant's attorney fees. *See Concepcion*, 131 S. Ct. at 1744. Under AmEx's clause, by contrast, aside from the fact that there are no similar "premium" provisions, the customers who wish to pursue arbitration must pay filing fees of at least $150 per person, which could potentially escalate to $450, even though Mr. Homa's estimated damages were $354. A177. This may explain why, while AmEx has millions of cardholders, since 2006 only 14 arbitrations have been filed with AAA for *any* consumer dispute with the company, and only 9

were filed with JAMS in California. *See* A155-56. Compared to the number of AmEx cardholders, the number of consumer arbitrations reported is trivially small. Indeed, in *Cruz*, for example, the Eleventh Circuit placed great emphasis on the special features of AT&T's clause: "[T]he *Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result." 648 F.3d at 1215; *see also id.* at 1211 n.11 (comparing premiums offered to consumers by the AT&T arbitration clause at issue in *Cruz* with the premiums in *Concepcion*).

In the wake of *Concepcion,* at least one court has held that the Supreme Court's holding is limited to cases involving the extraordinary terms of AT&T's arbitration clause. *See Feeney v. Dell*, 2011 WL 5127806 at *8 (Mass. Sup. Ct. Oct. 4, 2011) (Dell's "arbitration agreement stands in stark contrast to the AT&T agreement in *Concepcion* . . . which had so many pro-consumer incentives that an individual consumer might be better off in arbitration than in a class action"). The Court in *Feeney* concluded that "the differences matter." *Id.* at *9. It noted that unlike *Concepcion*, the record in *Feeney* indicated that Dell's clause required arbitration of disputes "that could not possibly justify the expense in light of the amount in controversy." *Id.* at *8. The same could be said here, of course.

Here, the question of whether an AmEx cardholder would be able to vindicate his or her rights on an individual basis has been answered in the negative as a matter of fact. As explained in detail above, in a robust evidentiary record submitted to the District Court, Mr. Homa demonstrated that the presence of AmEx's class action ban would deprive him and others similarly situated from

effectively vindicating his substantive statutory rights. *See supra* at pp. 10-15. This record included affidavits from expert consumer attorneys practicing in New Jersey, and testimony from Mr. Homa himself. *See* A122-52.

B. Certification is Appropriate Where There is No Controlling State Law.

The federal courts of appeal have long emphasized the numerous benefits of certification and described it as a valuable tool for "sav[ing] time, energy, and resources, . . . [and] build[ing] a cooperative judicial federalism." *Delta Funding Corp. v. Harris*, 466 F.3d 273, 273 n.1 (3d Cir. 2006) ("*Delta Funding II*") (citations omitted). In particular, certification is appropriate where the appeal depends on resolution of questions of unsettled state law and will affect many other cases. *See Delta Funding I*, 426 F.3d at 675 (instructing that certification is warranted where "we cannot predict with confidence how the New Jersey Supreme Court would decide the issue presented by this appeal"); *see also Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1046 (3d Cir. 1997) (explaining that certification is desirable "for an early resolution of the question that is so critically important in many of the large number of diversity cases that are brought in . . . the Third Circuit"); *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 293 (3d Cir. 1995) (explaining that certification is warranted for a question that is unresolved and "is both difficult and important").

The issue presented by this case: whether, if a plaintiff actually proves he could not effectively vindicate his substantive statutory rights under the arbitration agreement, the agreement is unenforceable under New Jersey law remains

unanswered in the wake of *Concepcion*. Since *Concepcion* was decided, the New Jersey Supreme Court has not yet had the opportunity to decide whether New Jersey law would prohibit the use of contractual terms that are proven to deny *any* person the opportunity to obtain legal redress for an alleged harm. This case squarely presents that question, and it will remain unsettled until the state's high court resolves it. This is precisely the circumstance in which certification is warranted.

AmEx will surely say that this is a pointless exercise, on the theory that under *Concepcion* there is no conceivable state law that could ever prevent it from enforcing its class action ban, no matter what the facts are in a given case. However, as discussed *supra*, several courts in the post-*Concepcion* environment have disagreed with this view and distinguished between state laws that are not preempted and those that are preempted. *See supra* at pp. 30-33.

If this Court agrees that state laws that are evidence-based and limited in their application to cases where a clause would prevent parties from effectively vindicating their rights would not be preempted, but is not certain if New Jersey law would fall into this category, it should certify the issue to the New Jersey Supreme Court.

AmEx will also assuredly point to *Litman II* for support of its claim that there could be no New Jersey law that could possibly apply to invalidate its class action ban. But *Litman II* in fact augurs in favor of certifying this question because it has wiped any controlling New Jersey law off the books. Even though, as discussed infra at Section II, *Muhammad* could properly be construed to apply to

this type of case while at the same time being consistent with *Concepcion*, because *Litman II* swept away that decision, it created a vacuum in governing New Jersey authority. And because *Litman II* does not address the specific issue *in this case*, which is not whether a broad *Discover Bank*-like rule is preempted by the FAA, but rather whether an evidence-based state law that is limited in its application to cases where a clause would prevent parties from effectively vindicating their substantive statutory rights, it does not itself control the outcome in this case.

Indeed, faced with a similar lack of controlling precedent, this Court has in several recent appeals certified similar questions to the New Jersey Supreme Court—that, after the state Supreme Court answered the certified question, have then helpfully clarified courts' interpretations of New Jersey law. For example, in *Delta Funding I*, this Court certified to the New Jersey Supreme Court the question of whether, under New Jersey law, an arbitration provision was unconscionable under a specific state law, N.J. Stat. Ann § 12A:2-302. *Delta Funding I*, 426 F.3d at 675. In certifying this question, this Court explained that certification was appropriate where it could not "predict with confidence how the New Jersey Supreme Court would decide the issue[]," because there was no governing authority from New Jersey state courts. *Id.* at 675. Similarly, in *Salley v. Option One Mortgage Corp.*, 2005 WL 3724871 (3d Cir. Oct. 20, 2005), this Court certified to the Pennsylvania Supreme Court questions concerning the validity of an arbitration clause that required a borrower to arbitrate but permitted the lender to sue in court. The court determined that "[t]he question of law [was] one of first impression and [was] of . . . substantial public importance." *Id.* at *1.

Here, as in the above cases, the District Court's ruling below answers the question for New Jersey, but in the absence of any legitimate guidance—let alone controlling precedent—from that state's Supreme Court. Certification to the New Jersey Supreme Court is therefore warranted to resolve these discrepancies and arrive at a definitive answer.

C. This Case Presents an Important Question of State Policy that Will Impact a Large Number of Consumers and Employees.

Additionally, certification is particularly warranted where, as here, the appeal presents an important question of state policy that will affect a large number of cases or individuals. In *Delta Funding I*, another justification for certifying the arbitration question was that the question was "of such substantial public importance as to require prompt and definitive resolution" by the New Jersey Supreme Court. 426 F.3d at 675. As this Court explained in its post-certification opinion, the certified question procedure provides state supreme courts "an opportunity to elucidate an important issue of state law, thereby avoiding erroneous predictions that will confuse rather than clarify the issue." *Delta Funding II*, 466 F.3d at 273 n.1.

This has been an important factor in support of certification in many cases, both in this Court and in other circuits. *See, e.g.*, *Official Comm. of Unsecured Creditors v. PricewaterhouseCoopers, LLP*, 2008 WL 3895559 at *4 (3d Cir. July 1, 2008) (certifying question concerning the *in pari delicto* doctrine to Pennsylvania Supreme Court, and noting that "the question presented requires a policy judgment. . . . [I]t would be inappropriate for us to make this policy

judgment in the first instance, particularly in light of the magnitude and importance of this case to the Commonwealth."); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1279 (11th Cir. 2005) (certifying question concerning state gambling law to Florida Supreme Court and noting "the importance to the State of Florida of the integrity of its gambling regulatory scheme"); *Pogue v. Oglethorpe Power Corp.*, 82 F.3d 1012, 1017 (11th Cir. 1996) (certifying question with "significant public policy ramifications" to Georgia Supreme Court); *Jackson v. Johns-Manville Sales Corp.*, 757 F.2d 614 (5th Cir. 1985) (certifying to Mississippi Supreme Court questions that "require[] a careful weighing of competing state policies and potentially could affect a large number of people as well as have an enormous economic impact").

There is no doubt that the issue raised in this appeal has significant public policy ramifications and will affect a large number of individuals and consumers. The legality of class action bans and arbitration clauses in consumer contracts is one of the most important and hotly-contested consumer-law issues in the courts today.[5] As one of the largest credit card companies in the U.S., AmEx has millions

[5] *See, e.g.*, Theodore Eisenberg, Geoffrey Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J. L. Reform 871, 871 (2008) (finding that three-quarters of consumer contracts in sample contained mandatory arbitration clauses); Peter Geier, *Arbitration Clauses Unsettled; Courts Mixed on Contracts Limiting Class Actions*, Nat'l L.J., May 16, 2005, at 1 (corporations "have increased their use of arbitration clauses in consumer contracts as courts around the country reach different conclusions about their legality"); Nathan Koppel, *Recent Rulings Bolster The Case For Class Actions*, Wall St. J., July 3, 2008, at B7 ("Widespread efforts by companies to prevent consumers from pursuing class-action suits against them are increasingly getting quashed by state courts."); *The*

of cardholders—many of whom presumably have the same class action ban in their contracts. Moreover, as parties to class actions are increasingly able to avoid litigating in state courts, the state courts have fewer opportunities to decide their own law, making it exceedingly important that the federal courts use certification to ensure the proper disposition of key questions of state legal policy. *See* Thomas E. Willging and Emery G. Lee III, Federal Judicial Center, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 2 (April 2007) ("In the sixteen months since CAFA went into effect . . . we find a substantial increase in class action activity based on diversity of citizenship jurisdiction."). Given that the enforceability of this class action ban under state law is such an important public policy issue, certification is appropriate.

II. TO THE EXTENT THAT THIS COURT FINDS *LITMAN II* TO CONTROL THE OUTCOME OF THIS CASE, IT IS WRONGLY DECIDED.

As discussed above, *Concepcion* struck down as preempted by the FAA California's *Discover Bank* rule, which the U.S. Supreme Court found would mechanically invalidate a class action ban in an arbitration clause—and force the parties into non-consensual class arbitration—whenever three common factors are present: (1) a consumer contract of adhesion; (2) predictably small damages; and

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Current State of Class Action Arbitration, 22 Alt. to High Cost Litig. 63 (May 2004) (according to law professor Thomas Stiponawich, class action bans are "the hottest issue today in consumer cases relating to arbitration").

(3) an allegation that the defendant corporation has engaged in a scheme to cheat consumers. *Concepcion*, 131 S. Ct. at 1746.

In *Litman II*, a panel of this Court concluded that this reasoning applies with equal force to this Court's opinion in *Homa I* and the New Jersey Supreme Court's decision in *Muhammad*. *See* 655 F.3d at 231. Specifically, the panel understood "the holding of *Concepcion* to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA." *Id.* Applying this holding to the New Jersey Supreme Court's decision in *Muhammad* and this Court's opinion in *Homa I*, the panel found that the rule established in *Muhammad* is preempted by the FAA and the opinion in *Homa I* abrogated. *Id.*

Unfortunately, that the panel in *Litman II* reached this conclusion is in many ways not surprising, given the circumstances of that case. The consumer plaintiff in *Litman II* had made no effort to create the kind of evidentiary record required by *Randolph*, and after *Concepcion* abandoned any argument that the class action ban was exculpatory (never even making an argument about effective vindication of rights). Instead, the plaintiff there argued before *Concepcion* that the arbitration clause should be stricken for reasons indistinguishable from the *Discover Bank* rule, i.e., because the case fell into the category of cases that involved predictably small sums. Indeed, while the plaintiff in *Litman II* argued that the defendant had agreed to follow state law even if it was preempted (an argument the Court rejected, after reviewing the language of the contract), he did "not dispute that the holding of *Concepcion* with respect to contract unconscionability under California

law applies to *Muhammad*." Appellants Supplemental Brief Regarding Effect of *AT&T Mobility LLC v. Concepcion*, *Litman v. Cellco P'ship,* No. 08-4103 at p. 14 (3d Cir., filed June 6, 2011). Unlike this case, the plaintiff in *Litman II*—who had never sought to *prove* that the class action ban there would bar individuals from effectively vindicating their rights—did not even attempt to defend the state's basic rules of contract law.

Even so, *Concepcion* did not overrule the two central holdings of either *Muhammad* or this Court's initial decision in *Homa I*: (1) that, under New Jersey law, AmEx's class action ban is unenforceable *only if* it would effectively preclude relief were a plaintiff's claims to be decided individually; and (2) that, under the FAA, courts may refuse to enforce arbitration agreements when, under the particular facts of the case, they prevent plaintiffs from effectively vindicating their statutory rights.

Concepcion's preemption holding does not affect this Court's analysis in *Homa I* of whether AmEx's class action ban violates New Jersey law because, unlike the *Discover Bank* rule at issue in *Concepcion*, New Jersey law allows a court to invalidate contract provisions like class action bans *only* when the individualized facts of the case demonstrate that the contract provision at issue exculpates a party from liability under the State's consumer protection statutes by effectively precluding relief were a plaintiff's claims to be decided individually.

In construing New Jersey law, this Court made clear that, under *Muhammad*, a determination of the enforceability of an arbitration provision involves a multi-factored, evidence-intensive, analysis, and requires a court to evaluate a number of

distinct elements in order to determine whether, in fact, a contractual provision exculpates a party from liability by effectively precluding relief. *Homa I*, 558 F.3d at 233. Thus, as Judge Weis observed in concurrence, the New Jersey Supreme Court's decision in *Muhammad* "relied on several factors in striking the class-action ban," including (1) "the consumer's ability to obtain representation," (2) counsel's incentive to undertake the litigation," (3) "the lawsuit's complexity," (4) "the amount of damages involved," and (5) "the availability of attorney's fees and statutory multipliers." *Id.* at 233 (Weis, J., concurring).

Litman II's insistence that there is no meaningful distinction between New Jersey and California law with regard to the unconscionability doctrine at issue, reflects a superficial misreading of the rule set out in *Muhammad*. If this were true, there would have been no need for this Court in *Homa I* to remand this case to the district court for a determination of whether AmEx's class action ban was unconscionable, because it found that the amounts at issue were "*predictably*" small; instead, the court would simply have reversed and permitted the case to proceed in court on a class-wide basis. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 859 (9th Cir. 2009) (affirming the district court's finding of unconscionability in the absence of an evidentiary record and permitting the case to proceed in court on a class-wide basis). But this Court did no such thing, and instead recognized that, under New Jersey law, more is required.

Indeed, were there any doubt, the New Jersey Supreme Court's decision in *Muhammad*—and more recent New Jersey decisions applying the New Jersey unconscionability rule—repeatedly demonstrate that mechanical invalidation of

class action bans will not suffice. *Muhammad* involved a low-value consumer claim alleging that a payday lender had violated various consumer protection statutes by imposing usurious interest rates and fees on short term loan agreements. *Muhammad*, 912 A.2d at 91. The gist of the illegal scheme involved the use of "complex financial dealings among out-of-state financial entities" by the payday lender in order to "evade" New Jersey's civil usury limits but the damages caused by these transactions were small, totaling "less than $600" in an individual case, even assuming the presence of statutory multipliers. *Id.* Moreover, this posture would make it virtually impossible for a plaintiff to "find an attorney willing to work on a consumer-fraud complaint involving complex arrangements between financial institutions of other jurisdictions when the recovery is so small." *Id.* at 100.

Given these facts, the New Jersey Supreme Court invalidated the class action ban at issue in *Muhammad*. In so doing, the Court explained that, under New Jersey law, in order to invalidate an arbitration provision, a court must undertake a "careful fact-intensive examination" of the various factors discussed above, which "may require the development of some proofs by a putative class plaintiff and fact-finding on the court's part." *Id.* at 97 (instructing that the "multi-factor analysis generally conforms to [a] case-by-case approach"); *id.* at 100. Thus, only where a court is satisfied that, as a specific matter of fact based on the above factors, the "the effect of the class-arbitration bar is to prevent [a] plaintiff from pursuing her statutory consumer protection rights and thus to shield defendants from compliance with the law of this State," may it then invalidate the

provision. *Id.* at 99; *see also Davis v. Dell, Inc.*, 2008 WL 3843837, at *5 (D. N.J. Aug. 15, 2008) ("The analysis of whether a class action waiver is unenforceable is fact-intensive, and contracts must be looked at on a case by case basis to determine if they are unconscionable because they release a party from a statutorily-imposed duty.").

In this way, both this Court's decision in this case and the New Jersey Supreme Court's opinion in *Muhammad* are entirely consistent with the U.S. Supreme Court's decision in *Concepcion*. In *Concepcion*, the key element of California's standard for refusing to enforce a class action ban—that damages be "predictably small"—was deemed "toothless and malleable." *Concepcion*, 131 S. Ct. at 1750. In contrast, the enforceability of a class action ban under New Jersey law depends upon the particular individualized facts and circumstances of the case, and whether a plaintiff can demonstrate that those individualized facts and circumstances render class treatment necessary to vindicate the plaintiff's rights.

Contrary to *Litman II's* insistence, that New Jersey is categorically different from how the Supreme Court interpreted the *Discover Bank* rule in *Concepcion* is confirmed simply by looking at how this Court handled this case. In *Homa I*, the court held that New Jersey law would invalidate a class action ban only if the facts in a particular case demonstrated that plaintiffs could not effectively vindicate their rights. Thus, although the court acknowledged that, on the allegations of the complaint, it *appeared* "that the claims at issue are of low monetary value," *Homa*, 558 F.3d at 231, the court declined to hold as a matter of law that AmEx's class action ban was unenforceable. Instead, it remanded for a factual determination of

whether, in fact, "the claims at issue are of such low value as effectively to preclude relief if decided individually." *Id.* at 233; *see also id.* (Weis, J., concurring) ("[T]he question of unconscionability under New Jersey law remains open for consideration on remand."). This holding makes clear that this Court understood New Jersey to *not* mechanically require the invalidation of class action bans based merely on the standard that damages be "predictably small," but, rather, on a particularized set of factual findings establishing that the plaintiffs in a specific case could not effectively vindicate their rights on an individual basis.[6]

In short, as this Court found in *Homa I*, New Jersey law is fact-specific and nuanced, unlike the U.S. Supreme Court's characterization of the mechanical *Discover Bank* rule that was held to frustrate the FAA's purposes in *Concepcion*. Given the Supreme Court's clear mandate that arbitration must permit parties to vindicate their statutory rights, an arbitration clause that is proven to *deny* a party that ability would be inconsistent with the FAA—and any state law that would invalidate the clause on that ground would not "stand[] as an obstacle to the accomplishment" of any Congressional purpose. *Concepcion*, 131 S. Ct at 1753. *Concepcion*'s preemption analysis speaks to cases involving broad, categorical rules of state law like the Supreme Court's reading of the *Discover Bank* rule in

[6] Judge Weis's concurrence expands this point. He explained that the panel's ability to determine whether the class action ban was, in fact, unconscionable was substantially limited, and did not take account of "all of the factors bearing on that issue." *Id.* But, because, under New Jersey law, a finding of unconscionability required the consideration of a host of fact-specific questions, he provided guidance to the district court on how to proceed.

California—not to bodies of law (such as New Jersey's) where a plaintiff must present a substantial factual record particular to the individualized facts of the case to demonstrate that a corporate defendant has devised a system to prevent consumers from vindicating their rights in the arbitral forum. Accordingly, this case—and New Jersey law—stand on a very different footing from *Concepcion* and the Supreme Court's reading of the *Discover Bank* rule at issue there, and thus neither *Concepcion* nor *Litman II* should control this Court's analysis.

CONCLUSION

For the foregoing reasons, this Court should certify to the New Jersey Supreme Court the question of whether, under New Jersey law, if a plaintiff actually proves that he could not effectively vindicate his substantive statutory rights under the arbitration agreement, the arbitration agreement is unenforceable. In the alternative, the decision of the District Court granting AmEx's motion to compel arbitration and dismissing this case should be reversed.

Respectfully Submitted,

Dated: December 21, 2011

Respectfully Submitted,

/s/ Matthew W.H. Wessler_____

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CERTIFICATES OF COMPLIANCE

1. With respect to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), this brief contains 12,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2007 for Windows in Times New Roman 14-point font.

3. **L.A.R.31.1(c) Certification:** The text of the electronic version of this brief is identical to the text in the paper copies of this brief. A virus detection program (ESET NOD32 Antivirus) has been run on the file of this brief and no virus was detected.

Dated: December 21, 2011

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CERTIFICATE OF ADMISSION

I certify that Matthew W.H. Wessler and F. Paul Bland are members of the bar of this Court.

/s/ Matthew W.H. Wessler
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CERTIFICATE OF SERVICE

I hereby certify that, on this date, this Brief and Appendix Volume I was filed electronically through the Third Circuit's CM/ECF system and served via CM/ECF system, and ten copies were mailed to:

Office of the Clerk
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In addition, one copy was served by Express Mail, on the following counsel of record:

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APPENDIX VOLUME I

CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

G.R. HOMA, individually and on behalf of all others similarly situated,	§	
Plaintiff,	§	
	§	Hon. Joel A. Pisano, U.S.D.J.
vs.	§	
AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS CENTURION BANK,	§	Civil Action No. 3:06-cv-02985 (JAP)
Defendants.	§	

NOTICE OF APPEAL

Notice is hereby given that G.R. Homa, individually and on behalf of all others similarly situated, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from a Final Order of the Court dated August 30, 2011 granting defendant's motion to reinstate the Court's May 31, 2007 Order compelling arbitration and reinstating the Court's May 31, 2007 Order compelling arbitration on an individual basis and dismissing Plaintiff's complaint with prejudice.

September 22, 2011
Montvale, New Jersey

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

G.R. HOMA, individually and on behalf of all others similarly situated, Plaintiff, v. AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS CENTURION BANK, Defendants.	Civil Action No. 3:06-cv-02985-JAP-DEA **CLASS ACTION**

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2011, I electronically filed a true and correct copy of the *Notice of Appeal* with the Clerk of the Court using the CM/ECF system which will send notification to those attorneys who are duly registered with the CM/ECF System.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

G.R. HOMA, individually and on behalf of all others similarly situated, Plaintiff, v. AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS CENTURION BANK, Defendants.	Civil Action No.: 06-cv-02985 (JAP) (DEA) **ORDER**

This matter having come before the Court upon the motion of Defendants American Express Company and American Express Centurion Bank (collectively, "Defendants") for an Order reinstating this Court's May 31, 2007 Order Compelling Arbitration, and the Court having reviewed the papers submitted by Defendants in support of their motion and the papers submitted by Plaintiff in opposition, and the Court having considered the matter and good cause having been shown,

IT IS on this 30th day of August, 2011 hereby

ORDERED that Defendants' motion be, and hereby is GRANTED; and it is further

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ORDERED that this Court's May 31, 2007 Order compelling arbitration on an individual basis be, and hereby is, REINSTATED.

Case closed.

Hon. Joel A. Pisano, U.S.D.J.

NOT FOR PUBLICATION **CLOSED**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

G.R. HOMA, individually and on behalf of all others similarly situated, Plaintiffs, v. AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS CENTURION BANK, Defendants.	Civil Action No. 06-2985 (JAP) **ORDER**

Currently before the Court is Defendants' Motion to Compel Arbitration and Dismiss Action in Favor of Arbitration, or Alternatively, Stay Action Pending Arbitration. For the reasons stated in the Court's accompanying Opinion, Defendants' motion is hereby GRANTED. Accordingly, **IT IS**

ON this 31st day of May 2007,

ORDERED that Defendants' motion is GRANTED; and it is further

ORDERED that Plaintiff's Complaint is DISMISSED in favor of arbitration; and it is further

ORDERED that Plaintiff is compelled to assert his claim against Defendants on an individual basis in an arbitration proceeding consistent with the terms of the parties' agreement.

Accordingly, this case is **CLOSED**.

/s/ Joel A. Pisano
JOEL A. PISANO, U.S.D.J.

NOT FOR PUBLICATION **CLOSED**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

G.R. HOMA, individually and on behalf of all others similarly situated, Plaintiff, v. AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS CENTURION BANK, Defendants.	Civ. No. 06-2985 (JAP) **OPINION**

PISANO, District Judge.

Plaintiff G.R. Homa ("Homa" or "Plaintiff"), a holder of an American Express Blue Cash Card (the "Blue Cash Card") purporting to represent a class of cardholders from the State of New Jersey, brought this action against American Express Company ("AEC") and American Express Centurion Bank ("AECB") (together "Defendants") alleging violation of the New Jersey Consumer Fraud Act arising out of the Blue Cash Card "cash back" rewards program. Currently before the Court is Defendants' Motion to Compel Arbitration and Dismiss Action in Favor of Arbitration, or Alternatively, Stay Action Pending Arbitration. The Court has jurisdiction under 28 U.S.C. § 1332 and decides the matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons stated below, the Court grants Defendants' motion and dismisses Plaintiff's Complaint in favor of arbitration which is to proceed on an individual basis in accordance with the terms of the parties' contract.

I. BACKGROUND

The dispute presently before the Court does not concern the substance of Plaintiff's allegations; instead, the parties raise the threshold question of whether Plaintiff's claims are subject to a valid and enforceable arbitration provision. Nevertheless, the Court sets forth the following brief summary of the facts giving rise to this action. In or about September of 2003, AEC unveiled a promotional rewards program called "Blue Cash" in which users of the Blue Cash Card could earn up to 5% cash back on purchases made with the Blue Cash Card. (*See* Amended Complaint ("Compl.") ¶¶ 1-2, 12). Under the terms of the rewards program, Defendants used a tiered structure to calculate the cash rebate that each cardholder received. (*See* Compl. ¶ 16-17). In accordance with that structure, a cardholder's eligibility for the full 5% cash back reward depended upon the total amount of qualifying purchases the cardholder made with the Blue Cash Card. (*Id.*)

On February 8, 2004, AECB issued a Blue Cash Card to Homa, a resident of Essex County, New Jersey. (*See* Compl. ¶ 9). AECB is a Utah industrial bank engaged in the business of, *inter alia*, issuing American Express credit cards. (Compl. ¶ 11). AEC is a New York corporation and the ultimate parent of AECB. (Compl. ¶ 10). Upon issuance of Plaintiff's Blue Cash Card, Defendants mailed Plaintiff a copy of the Agreement Between American Express Credit Cardmember and American Express Centurion Bank (the "Cardmember Agreement"), which set forth the terms and conditions that govern each cardholder's account. (Declaration of Gillen Clements ("Clements Decl.") ¶ 4, Ex. A). The Cardmember Agreement, as originally provided to Plaintiff, included an arbitration provision (the "Arbitration Provision") requiring arbitration of any claims arising out of the Cardmember Agreement or Plaintiff's account upon

the election of either Plaintiff or Defendants: "Any Claim shall be resolved, upon election by you or us, by arbitration pursuant to this Arbitration Provision . . . ." (Clements Decl., Ex. A at 2-3).

The Cardmember Agreement further provided that there would be no class-action mechanism available to resolve arbitrated claims:

> If either party elects to resolve a Claim by arbitration, that Claim shall be arbitrated on an individual basis. There shall be no right or authority for any Claims to be arbitrated on a class action or on bases involving Claims brought in a purported representative capacity on behalf of the general public, other Cardmembers or other persons similarly situated.

(*Id.*) The Cardmember Agreement also included a choice-of-law provision designating Utah state law as the law applicable to disputes arising out of the Cardmember Agreement:

> This Agreement and your Account, and all questions about their legality, enforceability and interpretation, are governed by the laws of the state of Utah (without regard to internal principles of conflicts of law), and by applicable federal law. We are located in Utah, hold your Account in Utah, and entered into this Agreement with you in Utah.

(Clements Decl., Ex. A at 3).

Pursuant to a clause in the Arbitration Provision that permitted Defendants to "change the terms or add new terms to [the Cardmember] Agreement at anytime, in accordance with applicable law," (Clements Decl., Ex. A at 3), Defendants included a "Notice of Changes to Your Agreement" in Plaintiff's March 1, 2005 billing statement. The Notice indicated that Defendants were making "important changes" to the Cardmember Agreement. (Clements Decl., Ex. B at 5, 6). In one such change, Defendants amended the first sentence of the "Definitions" subsection of the Arbitration Provision to read as follows: "As used in this Arbitration Provision, the term 'Claim' means any claim, dispute, or controversy between you and us arising from or relating to

you Account . . ., except for the validity, enforceability or scope of this Arbitration Provision or the Agreements." (Clements Decl., Ex. B at 6).

Purporting to represent a class of New Jersey consumers who obtained a Blue Cash Card on or after September 30, 2003, as well as a subclass of New Jersey cardholders who carried a monthly balance on their cards, Plaintiff alleges that Defendants misrepresented the actual terms of the rewards program and failed to credit his account with the promised amount of cash back. (Comp. ¶¶ 28-29).[1] Citing the above clauses from the Arbitration Provision, Defendants argue that the Cardmember Agreement requires Plaintiff to submit his claims to arbitration and that such arbitration be conducted on an individual basis. Accordingly, Defendants request that the Court issue an order compelling Plaintiff to arbitrate his claims on an individual basis. Further, Defendants seek a dismissal of Plaintiff's action, or a stay of the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Plaintiff argues that New Jersey state law applies to this dispute because the application of Utah law—to the extent it would result in the enforcement of the Arbitration Provision—would violate a fundamental public policy of New Jersey and that the Arbitration Provision, and in particular the class-arbitration waiver, is unenforceable under New Jersey law. In the alternative, and in the event that Utah law applies to this dispute, Plaintiff contends that the class-arbitration waiver is unconscionable and thus unenforceable. To the extent that the Court finds the class-arbitration waiver invalid and the remainder of the Arbitration Provision

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[1] Initially, Plaintiff alleged multiple claims for relief and purported to represent a nationwide class of cardholders. On December 1, 2006, however, Plaintiff filed an Amended Complaint in which he redefined the class, limiting it to residents of New Jersey, and asserted a single claim under the New Jersey Consumer Fraud Act. (Compl. ¶¶ 28-29; 37-47).

enforceable, Plaintiff requests that the Court direct the arbitrator to adjudicate this case on a class-wide basis.[2]

II. DISCUSSION

A. Standard of Review under Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a court may grant a motion to dismiss if the complaint fails to state a claim upon which relief can be granted. A motion to dismiss should be granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Lum v. Bank of America*, 361 F.3d 217, 223 (3d Cir. 2004). Although the Court must accept the allegations in the Complaint as true and draw all reasonable inferences in favor of the plaintiff, *see Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir. 2000), the Court is not required to accept as true mere "unsupported conclusions and unwarranted inferences," *Doug Grant, Inc. v. Greate Bay Casino, Corp.*, 232 F.3d 173, 184 (3d Cir. 2000) (quotation omitted). The parties agree that their dispute regarding the validity of the Arbitration Provision presents a threshold legal issue that is appropriate for resolution under Rule 12(b)(6).

B. Analysis

The ultimate issue before the Court is whether the Arbitration Provision, including the class-arbitration waiver, is enforceable thereby requiring Plaintiff to pursue his claim against

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[2] Plaintiff argues in passing that the Arbitration Provision does not apply to his claims because he asserts only statutory claims. Plaintiff fails to recognize, however, that the Arbitration Provision, by its very terms, applies to any claims concerning Plaintiff's Blue Cash Card account, including statutory claims, and that there is no exception in the FAA for statutory claims. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.").

Defendants in arbitration on an individual basis. To resolve that ultimate issue, however, the Court must determine (1) whether the Arbitration Provision is valid and enforceable under the FAA; (2) which interested state's law—New Jersey's or Utah's—applies to this dispute; and (3) whether the Arbitration Provision is valid and enforceable under the applicable state law. The Court's findings, discussed below in greater detail, are as follows.

First, the Arbitration Provision and class-arbitration waiver are enforceable under the FAA, which reflects a strong policy in favor of enforcing arbitration agreements. Second, the parties' contractual selection of Utah law is controlling, and thus Utah law applies to the instant dispute, because (1) Utah has a substantial relationship to the parties and the transaction, and (2) the application of Utah state law does not violate a fundamental public policy of the State of New Jersey. Third, despite Plaintiff's contention that the class-arbitration waiver is unconscionable under Utah law, the Court finds that it is valid and enforceable under Utah law. Therefore, the Court grants Defendants' motion, dismisses Plaintiff's action in favor of arbitration, and orders Plaintiff to pursue his claim in arbitration on an individual basis in accordance with the terms of the parties' contract.[3]

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[3] Plaintiff's argument that his claim for misrepresentation is beyond the scope of the Arbitration Provision is without merit. The Arbitration Provision covers "any claim, dispute or controversy between you and us arising from or relating to your Account [or] this Agreement." (Clements Decl., Ex. B at 2). In the Court's view, the scope of that clause is sufficiently broad to cover Plaintiff's claim. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) ("[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurances that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (noting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

1. The Arbitration Provision Is Enforceable Under the FAA

Section 2 of the FAA provides that arbitration agreements "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Cost Bros., Inc. v. Travelers Indem. Co.*, 760 F.2d 58, 60 (3d Cir. 1985). "The purpose of the Act was to abolish the common law rule that arbitration agreements were not judicially enforceable." *Cost Bros., Inc.*, 760 F.2d at 60. The FAA, therefore, "preempts state law that might 'undercut the enforceability of arbitration agreements.'" *Id.* (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

The United States Supreme Court has recognized that there is a "federal policy favoring arbitration" and has mandated that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (stating that arbitration agreements falling within the scope of the FAA "must be rigorously enforce[d]"); *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 228 (3d Cir. 1997). The FAA requires courts to enforce private arbitration agreements "according to their terms," *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), and "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The United States Supreme Court, as well as the Courts of Appeals, routinely enforces arbitration provisions contained in standard form contracts, including consumer contracts and

consumer credit agreements.[4] Further, several courts, including the United States Supreme Court, have enforced arbitration agreements despite an express waiver of class-action arbitration procedures.[5] Plaintiff does not argue that the Arbitration Provision is unenforceable under the FAA, nor could he. In light of the strong federal policy favoring arbitration and the long line of cases in which federal courts have enforced arbitration agreements, there is no doubt that the Arbitration Provision is enforceable as a matter of federal law.

2. Utah State Law Applies to the Parties' Dispute

Notwithstanding the fact that the Arbitration Provision is enforceable under the FAA, the Court must determine whether any state law contract defenses invalidate the agreement. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to invalidate arbitration

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[4] *See, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003); *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302 (4th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

[5] *See Gilmer*, 500 U.S. at 32 (stating that lack of class-action relief in arbitration did not preclude enforcement of the arbitration agreement); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005) ("[P]recluding class action relief will not have the practical effect of immunizing [defendants]. The Arbitration Agreements permit [plaintiff] and other consumers to vindicate all of their substantive rights in arbitration."); *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 180 n.9 (2d Cir. 2004) (noting that federal courts have "consistently" enforced arbitration provisions in the context of class action lawsuits); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (rejecting challenge to arbitration agreement based on inability to arbitrate on a class basis); *Livingston*, 339 F.3d at 558-59 (holding that an arbitration agreement precluding class claims must be enforced according to its terms); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("[Plaintiff's] inability to bring a class action . . . cannot by itself suffice to defeat the strong congressional preference for an arbitral forum."); *W. Suburban Bank*, 225 F.3d at 377-79 (holding that federal statutory claims are arbitrable even if class-action mechanism is unavailable).

agreements without contravening § 2."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . ., courts generally . . . should apply ordinary state law principles that govern the formation of contracts."); *Perry*, 482 U.S. at 492 n.9 (noting that contract defense, such as unconscionability, to enforceability of arbitration agreement is matter of state law). In order to make that determination, however, the Court first must decide which state's law applies to this dispute.

The Cardmember Agreement governing Plaintiff's account includes a Utah choice-of-law provision. In evaluating whether a contractual choice-of-law clause is enforceable, federal courts sitting in diversity apply the choice-of-law rules of the forum state. *See Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 131 (3d Cir. 2002). Under New Jersey law, which mirrors the choice-of-law rules set forth in the Restatement (Second) of Conflict of Laws § 187,

> [A] choice of law provision will not be honored: (1) if the state chosen has no substantial relationship to the parties or the transaction [and there is no other reasonable basis for the parties' choice]; or (2) application of the law chosen would conflict with a fundamental public policy of a state having a greater interest in a determination of a particular issue and [the law] of such state would be applicable in the absence of the choice of law provision under the governmental-interest analysis.

Prudential Ins. Co. of Am. v. Nelson, 11 F. Supp. 2d 572, 578 (D.N.J. 1998); *see also* Restatement (Second) of Conflict of Laws § 187 (1971).

There is no dispute that the parties' contractual choice of law satisfies the first prong of the test. AECB is a Utah industrial bank, conducts all business in the State of Utah, and maintains no out-of-state branches. (Clements Decl., ¶ 2). Further, pursuant to the terms of the Cardmember Agreement, Utah is the place of contracting and AECB holds Plaintiff's account in Utah. Accordingly, Utah has a substantial relationship to the parties and the transaction, and

there is a reasonable basis for the parties' choice of law. *See* Restatement (Second) of Conflict of Law § 187, cmt. f (1971) ("When the state of the chosen law has some substantial relationship to the parties or the contract, the parties will be held to have had a reasonable basis for their choice. This will be the case, for example, when this state is that where performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business.").

Turning to the second prong, Plaintiff argues that the choice-of-law provision is unenforceable because the application of Utah law would violate New Jersey's public policy against enforcing class-arbitration waivers in contracts of adhesion.[6] In support of this argument, Plaintiff cites *Muhammad v. County Bank of Rehoboth Beach, Del.*, 189 N.J. 1, 912 A.2d 88, 101 (N.J. 2006), in which the Supreme Court of New Jersey held that a class-arbitration waiver in a consumer arbitration agreement was unconscionable. Before addressing Plaintiff's fundamental public policy argument, the Court notes that the Restatement test does not necessarily require the Court to determine whether the choice-of-law provision contravenes a fundamental public policy of New Jersey. Instead, the test obligates the Court to assess whether the parties' choice of law violates a fundamental public policy of the state whose law would apply "in the absence of an effective choice of law by the parties." Restatement (Second) Conflict of Laws § 187 (1971). Though the parties agree that the principles set forth sections 6 and 188 of the Restatement should guide the Court's governmental-interest analysis, they disagree as to the correct result of that analysis: Plaintiff contends that relevant principles point to New Jersey law, while Defendants argue that those principles favor application of Utah law.

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[6] In making this argument, Plaintiff assumes, but does not concede, that the class-arbitration waiver is enforceable under Utah state law.

Even assuming that New Jersey state law would apply in the absence of an effective choice-of-law provision, however, the parties' choice of Utah law controls because application of that law does not violate any fundamental public policy of New Jersey. Although the *Muhammad* Court deemed unconscionable a class-arbitration waiver in a consumer arbitration agreement, the *Muhammad* decision does not establish a fundamental public policy against the enforcement of class-action waivers in arbitration agreements. In fact, *Muhammad* confirms that class-arbitration waivers are not "per se unenforceable" under the public policy of New Jersey. *Id.* at 101; *see also Delta Funding Corp. v. Harris*, 189 N.J. 28, 912 A.2d 104, 110 (2006) ("New Jersey's public policy . . . favors enforcement of valid agreements to arbitrate."). Further, as the New Jersey Supreme Court has recognized, a finding of unconscionability requires a "fact-sensitive analysis in each case" and is necessarily limited to the particular arbitration agreement at issue. *Delta Funding Corp.*, 912 A.2d at 111; *Muhammad*, 912 A.2d at 98-101 (applying the *Rudbart* factors to class-arbitration waiver). As such, *Muhammad* does not stand for the proposition that there is a fundamental public policy in New Jersey against the enforcement of class-arbitration waivers. Therefore, the parties' choice of law provision is controlling and Utah state law applies to this dispute.

3. The Arbitration Provision is Enforceable Under Utah State Law

Under Utah law, a credit agreement is enforceable if:

> (i) the debtor is provided with a written copy of the terms of the agreement; (ii) the agreement provides that any use of the credit offered shall constitute acceptance of those terms; and (iii) after the debtor receives the agreement, the debtor, or a person authorized by the debtor, requests funds pursuant to the credit agreement or otherwise uses the credit offered.

Utah Code Ann. § 25-5-4(2)(e). Amendments to credit card agreements, including the addition

or modification of arbitration provisions, made pursuant to change-in-terms notices are also valid and enforceable. *See* Utah Code Ann. § 70C-4-102(2)(b) ("A creditor may change an open-end consumer credit contract in accordance with this section to include arbitration or other alternative dispute resolution mechanism."); Utah Code Ann. § 70-C-4-102(1) ("For purposes of this section, 'change' includes to add, delete, or otherwise change a term of an open-end consumer credit contract."). Further, Utah law permits the inclusion of class-action waivers in consumer credit agreements. *See* Utah Code Ann. § 70-C-4-105 ("[A] creditor may contract with the debtor of an open-end consumer credit contract for a waiver by the debtor of the right to initiate or participate in a class action related to the open-end consumer credit contract"); *see also* Utah Code Ann. § 70-C-3-104 (allowing class-action waivers in closed-end agreements).

Plaintiff does not dispute that the original Cardmember Agreement, including the Arbitration Provision, and the amendments thereto comply with Utah state law. Nor does Plaintiff dispute that he accepted the terms of the Cardmember Agreement and its amendments. Indeed, Plaintiff's use of the Blue Cash Card after receiving the Cardmember Agreement constituted an acceptance of its terms, notwithstanding the fact that he never signed the Cardmember Agreement. (Clements Decl., Ex. A at 1 ("When you keep, sign or use the Card issued to you . . . you agree to the terms of this Agreement."); *see also* Compl. ¶ 18; Clements Decl., ¶ 5, Ex. B at 1, Ex. C at 1). Similarly, Plaintiff accepted the terms in the amended Cardmember Agreement by continuing to use his Blue Cash Card after receiving the change-in-terms provision. *See Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410, 1418 (M.D. Ala. 1998) (applying Utah law and enforcing an arbitration provision contained in an amendment to a credit card agreement because plaintiff maintained account after the effective date of the

arbitration clause).

Plaintiff argues, however, that the class-arbitration waiver contained in the Arbitration Provision is unconscionable under Utah law and, thus, unenforceable. The crux of Plaintiff's argument is that Utah courts, which have not addressed the issue of whether class-arbitration waivers are unconscionable, would rely on cases from related state and federal jurisdictions, such as the United States Court of Appeals for the Ninth Circuit and the California Supreme Court. Plaintiff further contends that because courts in those jurisdictions have found similar waivers in adhesion contracts unconscionable, so too would the Utah courts. This argument is flawed for many reasons.

First, although Utah courts occasionally look to other jurisdictions for guidance on issues where there is a lack of relevant Utah caselaw, that approach is limited to situations in which a Utah court is construing a Utah rule or law to which there is an analogous rule or law in a related jurisdiction. For instance, it is not uncommon for Utah courts, faced with a novel evidentiary issue, to rely on federal caselaw applying a federal counterpart to one of the Utah Rules of Evidence. *See State v. Gomez*, 63 P.3d 72, 79 n.5 (Utah 2002) ("Although the Federal Rules of Evidence are a separate body of law from the Utah Rules of Evidence, if the reasoning of a federal case interpreting or applying a federal evidentiary rule is cogent and logical, we may freely look to that case, absent a Utah case directly on point, when we interpret or apply an analogous Utah evidentiary rule.") (quotation omitted). Although most states, if not all, recognize the contract defense of unconscionability and the elements of the defense may not differ greatly by jurisdiction, the determination of whether the class-arbitration waiver is unconscionable requires the Court to look no further than Utah caselaw on unconscionability.

Second, as discussed above, there is Utah statutory law that directly addresses the issue presented here. Third, there is no lack of Utah state law concerning the contract defense of unconscionability. Indeed, the lack of Utah caselaw on whether the particular type of clause at issue here is unconscionable does not preclude this Court from applying Utah unconscionability law to the Arbitration Provision and class-arbitration waiver. For these reasons, the Court finds no merit in Plaintiff's argument that Utah courts would look to the law of other jurisdictions to resolve the issue presented here.

Under Utah law, "[a] party claiming unconscionability bears a heavy burden." *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998). Indeed, Utah law "enables parties to freely contract, establishing terms and allocating risks between them . . . [and] even permits parties to enter into unreasonable contracts or contracts leading to a hardship on one party." *Id.* Utah courts will find a contract unconscionable where there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (quotation omitted). Utah courts use a two-pronged analysis to determine whether a contract is unconscionable. *Id.*

The first prong, substantive unconscionability, "focuses on the contents of an agreement, examining the relative fairness of the obligations assumed." *Id.* (quotation omitted). The substantive unconscionability inquiry requires an assessment of whether the terms of the challenged contract are "so one-sided as to oppress or unfairly surprise an innocent party or whether there exists an overall imbalance in the obligations and rights imposed by the bargain . . . according to the mores and business practices of the time and place." *Id.* (quotation omitted). "Even if a contract term is unreasonable or more advantageous to one party, the contract, without

more is not unconscionable—the terms must be so "one-sided as to oppress . . . an innocent party." *Id.* (quotation omitted). The second prong, procedural unconscionability, concerns the "negotiation of the contract and the circumstances of the parties." *Id.* at 403. The relevant inquiry is whether there is an "overreaching by a contracting party occupying an unfairly superior bargaining position." *Id.* Under Utah law, the existence of substantive unconscionability alone is sufficient to render a contract unconscionable, but "procedural unconscionability without any substantive imbalance" generally will not support a finding of unconscionability. *Id.* at 402.

Plaintiff fails to show, or even argue, that the Arbitration Provision suffers from procedural or substantive unconscionability under Utah law. Notwithstanding Plaintiff's apparent concession, two points on this issue deserve mention. First, although the boilerplate terms of the Cardmember Agreement, including the class-arbitration waiver, were presented in the context of a take-it-or-leave-it transaction, Plaintiff was free to reject Defendants' offer and open a credit account with one of any number of credit card issuers. Further, Plaintiff had ample opportunity to read and understand the terms of the Cardmember Agreement, including the class-arbitration waiver, which appeared in large bold font, prior to opening his Blue Cash Card account. Thus, it cannot be said that Plaintiff lacked a meaningful choice or was "compelled to accept the terms of the agreement." *Id.* at 403. Second, although class arbitration would likely be the most advantageous strategy for the purported class to pursue its claims against Defendants, the class-arbitration waiver does not preclude Plaintiffs from seeking relief against Defendants for the claims they now assert. Nor does the waiver exculpate Defendants for any potential liability. Thus, the terms of the parties' contract is not "so one-sided as to oppress" Plaintiff. *Id.* at 402.

Moreover, it cannot be said that the enforcement of the class-arbitration waiver would be so unconscionable that "no decent, fairminded person would view the results without being possessed of a profound sense of injustice," or that enforcement of the waiver would "shock the conscience." *Woodhaven Apts. v. Washington*, 942 P.2d 918, 925 (Utah 1997). At most, the class-arbitration waiver creates an advantage for Defendants and imposes a hardship on Plaintiff. That, however, is insufficient to support a finding of unconscionability. *Ryan*, 972 P.2d at 403. Therefore, the Court finds that the class-arbitration waiver is enforceable under Utah law and dismisses this action in favor of arbitration, which is to proceed on an individual basis.

III. CONCLUSION

For the reasons expressed above, the Court grants Defendants' motion and dismisses Plaintiffs' Complaint with prejudice pursuant to Rule 12(b)(6). An appropriate order accompanies this opinion.

/s/ Joel A. Pisano
JOEL A. PISANO, U.S.D.J.

Dated: May 31, 2007