NO. 09-893

IN THE
Supreme Court of the United States

AT&T MOBILITY LLC,
Petitioner,
v.
VINCENT AND LIZA CONCEPCION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CENTER FOR CLASS ACTION FAIRNESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CENTER FOR CLASS ACTION FAIRNESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Center for Class Action Fairness ("Center") respectfully submits this brief as *amicus curiae* in support of petitioner.[1]

INTEREST OF *AMICUS CURIAE*

The Center is a non-profit public-interest law firm that represents consumers *pro bono* in class action litigation across the United States by objecting to unfair class action settlements on their behalf. The Center's litigation on behalf of consumers has been covered by *Forbes*, the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, *see* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1624-25 (2009), the Center makes no effort to engage in *quid pro quo* settlements for profit. Instead, the Center — which has never settled an objection — represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from class action attorneys.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting petitioner's and respondent's blanket consent to the filing of *amicus curiae* briefs are on file with the Clerk of Court.

Accordingly, the Center can offer this Court a unique perspective on whether a waiver of class action treatment in an arbitration agreement is necessarily unconscionable. The Center's work makes it especially familiar with cases in which class settlements do not afford consumers meaningful access to justice. The unfair settlements the Center has fought are not isolated cases. Indeed, both economic theory and empirical evidence indicate that class actions in a significant number of cases leave consumers without meaningful relief. By contrast, in many cases individual arbitration provides consumers with efficient access to justice. Given its commitment to helping consumers, the Center has a strong interest in seeing the Court reverse the decision below, which rests upon an untenable assumption that class actions necessarily provide consumers with access to justice superior to that offered by alternative forms of dispute resolution such as arbitration.

SUMMARY OF ARGUMENT

Arbitration agreements "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). By holding that AT&T Mobility LLC's ("ATTM's") arbitration agreement is unenforceable because it does not allow class arbitrations, the Ninth Circuit's decision denies these benefits of arbitration to consumers even in the context of consumer-friendly arbitration agreements and effectively precludes individual arbitration agreements between companies around the country and their California customers. The Ninth Circuit's holding rests upon a belief in the exception-

alism of class actions, namely, that they are a uniquely superior form of dispute resolution the availability of which is necessary to vindicate consumer rights. But, as the Center's experience indicates, class actions are far from an exceptional vehicle for providing consumers with meaningful access to justice.

The Center concurs in petitioner's argument that the Federal Arbitration Act, 9 U.S.C. §§ 1-16, preempts States from conditioning the enforcement of an arbitration agreement on the availability of classwide arbitration when that procedure is not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims. The Center writes separately to address the Ninth Circuit's beliefs in the exceptionalism of class actions and in the need for courts to mandate their availability, which were critical to the court of appeals' holding. The Ninth Circuit, as well as the California Supreme Court, incorrectly presumes that class actions in practice must be available for the vindication of certain consumers' rights, and therefore that courts must strike down a clause requiring mandatory individual arbitration as exculpatory and thus unconscionable. Pet. App. 5a-6a & n.4 (*citing Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1109 (Cal. 2005)). Both economic theory and empirical evidence demonstrate that the Ninth Circuit's presumptions are incorrect for three reasons.

First, class treatment is neither the only means nor necessarily the best means of providing aggrieved consumers with meaningful relief. In fact, class action litigation suffers from several pathologies which often make it a poor vehicle for the vindi-

cation of consumer rights: it is expensive, raising costs to consumers in the long-run; it is slow-moving, bringing relief, if at all, long after class members have been harmed; even when class plaintiffs do succeed, class members face significant barriers to obtaining recovery; and class settlements often are a boon for class action attorneys but a bust for class members who recover little or nothing of value.

Second, arbitration is superior in many cases to class actions in vindicating consumer rights. Individual arbitration provides swift resolution of disputes; allows for easy and complete recovery; and does not pit the interests of consumers against an attorney tasked with representing their interests. Indeed, consumers consistently report that they prefer pursuing their claims in arbitration to class action litigation. Therefore, both for the individual complainant and for aggrieved individuals in the aggregate, a contract selecting individual arbitration often will afford consumers a better mechanism for obtaining meaningful relief than class action litigation.

Third, if class actions are a superior vehicle for vindicating consumer rights, then there is no need to mandate their availability with respect to small claims consumer class actions — market mechanisms will make them available to consumers. The marketplace includes a variety of mechanisms for addressing consumer complaints, and reflects consumer preferences among these various dispute resolution mechanisms. In addition, selecting efficient complaint resolution processes allows firms to pass cost savings along to consumers in the form of lower prices.

In sum, the decision below rests upon premises that are flatly inconsistent with economic theory and empirical evidence that show that class action litigation in many cases does not provide consumers with access to justice or meaningful relief. This Court should not deny consumers access to arbitration agreements such as ATTM's, which provide effective incentives for resolving small claims through individual arbitration without the inefficiencies of the class action process. For these reasons, as well as those stated by the petitioner, this Court should reverse the decision below.

ARGUMENT

I. CLASS ACTIONS FREQUENTLY DO NOT PROVIDE CONSUMERS WITH MEANINGFUL RELIEF

Class actions were designed to provide injured parties with a more efficient means of accessing justice by aggregating claims for violations of individual rights. *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 71, 77. Some commentators bill class actions as exceptional vehicles for vindicating consumer rights. *See* Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735, 1738 (2006) ("class action waivers in certain contexts . . . prevent plaintiffs from effectively vindicating their substantive rights"); Nat'l Ass'n of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 377 (1998) ("Consumer class actions . . . often provide the

only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class.").

In practice, however, class actions have three significant structural deficiencies that often prevent consumers from obtaining meaningful relief. *First*, even when the class members are awarded relief in some form, the average class action takes years to reach a resolution. Thus, class members typically must wait a long time before they benefit from a successful class action. *Second*, even when the class action results in a recovery for the class members, obtaining relief may require navigating byzantine procedures that impose significant transaction costs. *Third*, too often class actions end in settlements that reward class members with pennies on the dollar, if that. Taken together, these three problems result in many class actions that fail to provide consumers with meaningful relief for violations of their individual rights.

A. Class Action Relief Comes, If At All, Long After Class Members Have Been Harmed

The nature of even successful class actions leads frequently to long delays before class members receive relief. The "typical class action" is characterized by "procedural complexity and slow pace." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 710 (1986). A recent study of all class action settlements in federal courts

in 2006 and 2007 found that consumer class actions on average take more than three years from the inception of the litigation to settlement. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. (forthcoming 2010), *available at* http://ssrn.com/abstract=1442108 (manuscript at 11, 12 tbl.2). Data from the states show similarly slow class action litigation. In California, for example, class actions take more than two years on average to proceed from filing to settlement or verdict at trial. *See* Office of Court Research, Administrative Office of the Courts, Findings of the Study of California Class Action Litigation 2000-2006: First Interim Report 15-16 (Mar. 2009), *available at* http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf.

In some cases the wait is interminable, or nearly so. In his study of class action settlements in federal court, Professor Brian Fitzpatrick found a consumer class action that took 4,961 days, or over thirteen years, to settle, and, similarly, a commercial class action involving Exxon retail dealers that took 5,443 days, or nearly fifteen years, to settle. *See* Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) (manuscript at 11-12 & tbl.2). These studies may actually understate the delay, because class recovery could be further delayed by the appeal of the approval of a class action settlement. *See generally* Fitzpatrick, 62 Vand. L. Rev. at 1624.

Because a "dollar today is worth more than a dollar tomorrow," *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 384 (1998) (quotation marks omitted), the loss of the time value of money is an affirmative harm,

see Habitat Educ. Center v. U.S. Forest Serv., 607 F.3d 453, 457 (7th Cir. 2010). And to the extent delay increases the class attorneys' ability to claim greater fees vis-à-vis the settlement fund, the delay harms class members by reducing their compensation. It is difficult to conclude consumers receive meaningful relief when they receive it years after they have suffered harm.

B. Obtaining Relief From Class Actions Involves Significant Transaction Costs

Even when class actions reach a final resolution that is favorable to consumers, it is still difficult for them to obtain recovery. This difficulty follows from structural inefficiencies in the class action mechanism.

There are two significant practical difficulties involved in delivering compensation to consumers. *First*, the administrator of the class settlement fund or class damages award must identify the class members and notify them of the settlement or favorable judgment. *See* Fed. R. Civ. P. 23(c)(2); Martin Redish et al., Cy Pres *Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010). But even when individual class members are identifiable by name, it may not be feasible to find current addresses for most of them. *See* Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 730-31 (2008). And although in theory publication notice may compensate for lack of individual notice, in practice it too is often ineffective or prohibitively ex-

pensive. *See id.* at 731-32. Therefore, the available data indicate that identifying and notifying absent class members of their right to recovery "will often prove to be both difficult and inefficient." Redish, 62 Fla. L. Rev. at 618; *accord* Klonoff, 69 U. Pitt. L. Rev. at 748.

Second, class members may have to decipher and complete a complex settlement notice and claim form in order to receive compensation under the class settlement. *See* Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 2, 119 Stat. 4, 4 (Feb. 18, 2005); *see also* S. Rep. No. 109-14, at 4 (2005) (Senate Report on CAFA). For example, the Federal Trade Commission ("FTC") objected to a recent class action settlement that not only "release[d] the claims of some 500,000 class members for, at best, pennies on the dollar," but also did so in a way that required consumers to fill out a detailed and confusing questionnaire to obtain relief and thus "appear[ed] purposefully designed to make it difficult for consumers to make claims." Intervener FTC's Mot. for Stay 1, 17-18, *Cass v. AmeriDebt, Inc.*, No. 01-CH-20350 (Ill. Cir. Ct. 2004), *available at* http://www.ftc.gov/os/2004/04/040412motion4stay.pdf.

Indeed, the incentives for class action attorneys and defendants encourage the creation of claims processes that make it prohibitively difficult for class members to make successful claims. As described further *infra* Part I.C, the structure of class actions encourages tacit collusion between class attorneys, who are trying to maximize the apparent value of the class settlement and thus their claim to fees, and defendants, who seek to minimize the costs of settlement. *See generally* John C. Coffee, Jr., *The Regu-*

lation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 883-84 (1987) ("The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery."). By agreeing to a settlement process that appears to provide meaningful relief, but in operation imposes obstacles to actual relief, class attorneys and defendants can maximize attorneys' fees and minimize settlement costs to their mutual benefit at the expense of the class members.[2] The creation of artificial obstacles to relief is all too common because "[t]he award to the class and the agreement on attorney fees represent a package deal" to defendants in class actions. *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (describing class settlement).

Such transaction costs may explain the "modest to negligible" claims rates in small-claims class actions where the settlement requires class members affirmatively to file claims. *See, e.g.*, Deborah R.

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[2] In some cases, the complexity of a proposed settlement could lead to consumer harm. The FTC objected to the proposed settlement in *Chavez v. Netflix, Inc.* on this very ground, because the proposed relief was a "free one-month upgrade" combined with a "negative option plan" that meant that "new or upgraded service will continue automatically, and the member will be billed accordingly, unless he or she takes steps to cancel or modify the subscription." FTC's Mem. of Law as *Amicus Curiae* 2, No. CGC-04-0434884 (Cal. Super. Ct. Jan. 5, 2006), *available at* http://www.ftc.gov/os/2006/01/netflixamicusbrief.pdf. As the FTC explained, the negative option was "more of a promotional vehicle for Netflix than compensation for consumers." *Id.* at 10.

Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 459 (RAND Institute for Civil Justice 2000); Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 747 (1988) (class action "claims procedures are ill-suited" to ensuring class members obtain compensation); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008) (2,676 out of 10 million class members made claims); *Palamara v. Kings Family Rests.*, No. 07-317, 2008 WL 1818453, at *1-*3 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement). For many consumers in such circumstances, it is simply not worth the hassle to pursue their claims.

C. The Relief Provided In Class Actions Often Does Not Provide Meaningful Compensation To Class Members

Although most successful class action litigation under Rule 23 is resolved in the form of a class settlement, *see* Fitzpatrick, 62 Vand. L. Rev. at 1628 ("vast majority" of successful class actions "are terminated by settlement"), such class settlements frequently provide little or no meaningful compensation to consumers. Indeed, a significant number of consumer class settlements do not provide consumers with any monetary relief whatsoever. This systematic under-compensation is the product of two structural problems in class actions. *First*, because class attorneys' fees generally come from the same pool as the class members' compensation, class attorneys

settling class claims have a fundamental conflict of interest. *Second*, to the extent class attorneys exploit that conflict of interest, judges lack the necessary information to rectify self-dealing in most cases.

1. The principal reason for the failure of many class settlements to provide meaningful compensation is obvious: class attorneys have incentives to engage in self-dealing during the negotiation of class settlements, which often occur simultaneously with the negotiation of attorneys' fee payments. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1347-48 (1995); Coffee, 54 U. Chi. L. Rev. at 883-84; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7-8 (1991). Because class members, especially those in a small-claims consumer class action, have small stakes in the case and therefore usually do not closely monitor their attorneys' conduct, class attorneys often are able to obtain high fees without obtaining meaningful compensation for class members.[3] *See, e.g.*, Coffee, 54 U. Chi. L. Rev. at 883-84.

2. Indeed, all three branches of government have recognized this economic reality. In enacting the

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[3] In a now-classic study, Andrew Rosenfield demonstrated that a class attorney that settles a class action enjoys a "settlement premium" above the average attorney's fee awarded in a class action that proceeds to judgment. *See An Empirical Test of Class-Action Settlement*, 5 J. Legal Stud. 113, 115-17 (1976). This premium is consistent with the hypothesis developed above, *viz.*, that class attorneys will maximize their fees at the expense of the class members' compensation.

Class Action Fairness Act, Congress found that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while . . . class members [are left] with coupons or other awards of little or no value." CAFA, Pub. L. No. 109-2, § 2, 119 Stat. at 4; *see also* S. Rep. No. 109-14, at 33.

Similarly, the FTC has recognized that "[e]xcessive class action attorney fee awards represent a substantial source of consumer harm." R. Ted Cruz, Dir., Office of Policy Planning, FTC, Friend of the Court: The Federal Trade Commission's *Amicus* Program, Remarks Before the Antitrust Section of the American Bar Association 13 (Dec. 12, 2002), *available at* http://ftc.gov.speeches/other/tcamicus; *see also* Deborah Platt Majoras, Chairwoman, FTC, *Comments at the FTC Workshop: Protecting Consumer Interests in Class Actions* (Sept. 13, 2004), *in* 18 Geo. J. Legal Ethics 1161, 1162-63 (2005) (class actions may not "truly serve consumers' interests by providing them appropriate benefits"; encouraging "consumers to carefully scrutinize opt-out notices and class action settlement terms and particularly attorney fee awards that may reduce the total compensation available to consumers"). Indeed, the FTC has objected to class settlements that it has concluded do not adequately protect consumers from self-dealing by the class attorneys. *See* Cruz, Friend of the Court, at 13 ("Not infrequently, the interests of a private class action attorney may substantially diverge from the interests of the class.").

Courts also have recognized the harm to consumer welfare caused by the class attorney's conflict

of interest. *See generally* Fed. R. Civ. P. 23(e). As Judge Friendly put it, "a juicy bird in the hand is worth more than the vision of a much larger one in the bush." *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting). Or, in other words, "the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals" given the possibility that he may trade a small class award for the relative certainty of a high fee award. *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987).

3. The empirical evidence indicates that in a significant number of cases this conflict of interest leads to an inadequate class settlement. For example, the Senate Report to CAFA canvassed a number of cases that illustrate that "state court judges . . . readily approv[e] class action settlements that offer little — if any — meaningful recovery to the class members and simply transfer money from corporations to class counsel." S. Rep. No. 109-14, at 4, 33; *see also* John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1447-50 (2005) (presenting list of "abusive" class settlements). And the RAND study found that the class attorneys' fee awards were greater than the total cash payment to class members in the state-court consumer class actions that were examined. *See* Hensler, Class Action Dilemmas, at 14 (profiling case studies), 23 (presenting comparison of attorneys' fees with total cash payments). Although the same study cautioned that there is little evidence "that damage class actions *invariably* produce little

for class members," it also indicated that "class counsel were sometimes simply interested in finding a settlement price that the defendants would agree to" accept regardless of whether it adequately compensates the class members. *Id.* at 427 (emphasis added).

This risk of under-compensation may be particularly acute in consumer class actions. The Fitzpatrick study of federal class action settlements indicates that a higher proportion of consumer class actions than class actions in general are (i) certified as settlement classes or (ii) involve nonmonetary relief in whole or in part. Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) at 11, 15-16. More particularly, the study indicates that federal consumer class actions "were nearly three times as prevalent among settlement classes (15.9%) as non-settlement classes (5.9%)." *Id.* at 11. Settlement classes increase the risk of a "reverse auction" in which plaintiffs' attorneys compete to offer a defendant the lowest settlement price. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Penn. L. Rev. 1593, 1606 (2008); Coffee, 95 Colum. L. Rev. at 1370 (defining "reverse auction").[4]

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[4] This is not to say that class settlements always leave consumers without meaningful relief. A study of 688 federal class action settlements from 2006 to 2007 indicates that the mean and median attorneys' fees in such cases is generally around 25% of the settlement. Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) at 1. Similar figures have been cited to support the proposition that agency costs are not significant, and therefore there is not a significant risk of under-compensation for the class. *See, e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Penn. L. Rev. 103, 131-32

In addition, the Fitzpatrick study indicates that nonmonetary relief, which is less likely to compensate class members, may be more prevalent in consumer class actions. The study found that 26% of consumer class actions in the data set provided for no cash relief at all; 30% included in-kind relief, in the form of coupons, vouchers, and the like, as at least part of the relief granted; and 37% involved injunctive or declaratory relief of some sort. Fitzpatrick, 7 J. Empirical Legal Stud. (forthcoming 2010) at 16 tbl.3. These data are particularly troubling because consumers are far less likely to be adequately compensated by in-kind or injunctive relief. Two prominent examples of this problem are coupon and *cy pres* settlements.

Coupon settlements. It is easy to see why class attorneys and defendants may prefer coupon settlements. They can use coupons to inflate the apparent value of the proposed settlement by claiming that the coupons' nominal value is the actual value to the class members. *See* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & Contemp. Probs. 97, 108 (1997); *cf.* Daniel Fisher,

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(2006). But these data do not establish that proposition. That is because the "incentive problem arises from an asymmetry or inequality between (1) class counsel's effective share of a settlement he negotiates, and (2) his effective share of what the class members would receive if he did not negotiate a class settlement." Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 Hastings L.J. 479, 481 (1997). Accordingly, a "fee award that appears to be reasonable in absolute terms" may nevertheless "have the effect, ex ante, of encouraging the lawyer to agree to a settlement in the first place that is far smaller than what would be recovered (in expected terms) at trial." *Id.* at 482.

St. Louis Judge Hands Lawyers $21 Million For Coupons, Forbes.com On the Docket (June 23, 2010), *available at* http://blogs.forbes.com/docket/2010/06/23/st-louis-judge-hands-lawyers-21-million-for-coupons (Missouri class action settlement of $21 million for lawyers compared to $5 million in cash and $34 million in coupons for class).

Coupon settlements, however, suffer from several flaws, including that "they often do not provide meaningful compensation to class members." *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007); *see also In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001). Indeed, in general, "[c]ompensation in kind is worth less than cash of the same nominal value," *In re Mex. Money Transfer Litig.*, 267 F.3d at 748, particularly in the case of nontransferable coupons, *see, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 221 n.58 (D. Me. 2003). Moreover, coupons often include "restrictions intended to make redemption difficult." *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. Rev. 991, 995 (2002). Unsurprisingly, therefore, the redemption rate for a coupon without a secondary market is a miniscule 1% to 3%, and cases abound in which few class members redeem their coupons. *See, e.g.*, James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 572, 574 (N.C. App. 2008) (317 valid claims filed out of 1,500,000 member class, for total of $2,402 in total redemption of coupons as compared

to more than $1,000,000 in attorneys' fees and costs); *Union Fidelity Life Ins. Co. v. McCurdy*, 781 So.2d 186, 188 (Ala. 2000) (113 redemptions out of 104,000 member class); Jeff Feeley & Myron Levin, *Ford Accord Garners Less Than 1 Percent Participation*, Bloomberg (July 7, 2009) (75 coupons redeemed out of class of 1 million, while class attorneys received $25 million in fees and costs).

Although CAFA was in part designed to discourage the use of valueless coupons, *see* CAFA, Pub. L. No. 109-2, §§ 2-3, 119 Stat. 4, it does not apply to all class actions, and recent coupon settlements indicate that the problem persists. In the District of Columbia, a court recently approved a coupon settlement involving Envision EMI, an organizer of 2009 inauguration conferences. *See Radosti v. Envision EMI, LLC*, No. 09-887, 2010 WL 2292343 (D.D.C. June 8, 2010). According to the class complaint, 15,000 students paid more than $2,300 dollars to attend the conferences, but Envision EMI did not deliver what it promised. *Id.* at *2. The class settlement provides the class members with two $625 coupons to attend future Envision EMI conferences — with the possibility that class members will not be able to use their coupons to attend the conference of their choice, given that only 10% of seats at any given conference will be allowed to redeem coupons. *Id.* at *4. The court approved the settlement over the objection of several state attorneys general. *Id.* at *22. Thus, the coupons help Envision EMI stay in business and force the class members to deal with the same firm they allege failed to deliver a conference worth the more than $2,300 they paid to attend it.

Cy pres. To the extent that CAFA has undermined the use of coupon settlements as a means for class attorneys to increase their fees at the expense of consumers, new tactics have taken the place of coupons. Thus, although CAFA addresses some self-dealing, it has also created a game of "Whac-a-Mole" in which class attorneys have created new methods for collusion. *Cf.* Erichson, 156 U. Penn. L. Rev. at 1607 ("CAFA's Whac-a-Mole effect manifests itself in several ways.").

One such tactic is the use of *cy pres* class settlements. In its original context, courts used *cy pres* to "give effect to a testator's intent" when a specified charitable gift "had been rendered impossible or impracticable because of exigent circumstances" because *cy pres* allows the court to "put[] the funds to the next closest use." Redish, 62 Fla. L. Rev. at 625. In theory, *cy pres* is a solution to the problem that occurs when class members do not receive compensation because few members make a claim on the settlement fund or when allowing direct claims would be prohibitively expensive. *See id.* at 618-19; Theodore H. Frank, Cy Pres *Settlements*, Class Action Watch (Mar. 2008), at 1.

But in practice *cy pres* "creates the illusion of class compensation." Redish, 62 Fla. L. Rev. at 623. For example, the court may order the defendant to make a payment of goods or services to a third party charity while paying the class attorneys a fee — and the resulting benefits may redound only to the class attorney, the defendant, and the charity. *See, e.g.*, Coffee, 95 Colum. L. Rev. at 1368 (discussing *cy pres* settlement *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600 (D.N.J. 1994), which seemed a clever "way of"

allowing the defendant food producer "simultaneously" to "dispos[e] of both stale matzos and a difficult litigation"). Like coupon settlements, *cy pres* may be used to "disguis[e] the true cost of a settlement to a defendant to maximize the share of the actual recovery received by the plaintiffs' attorneys." Frank, Class Action Watch at 21.

Courts frequently enforce *cy pres* settlements, which is particularly troubling given that class attorneys "have recently shown renewed interest" in making use of them. Frank, Class Action Watch at 1; *see also* Coffee, 95 Colum. L. Rev. at 1369 ("courts have regularly accepted . . . *cy pres* settlements"). For example, the Center is currently litigating its appeal on behalf of class members in *Nachsin v. AOL*, in which the class members received no monetary benefit from the approved settlement, but there were $75,000 in *cy pres* awards and another $35,000 in separate donations to charities that are neither class members nor that have suffered any injury. *See* Br. for Objectors-Appellants 7-8, *Nachsin v. AOL*, No. 10-55129 (9th Cir. July 20, 2010), *available at* http://centerforclassactionfairness.blogspot.com/2010/07/ninth-circuit-appeal-over-cy-pres.html. In addition, one of the charities is an employer of one of the named plaintiffs, and the husband of the district court judge sits on the board of directors of another of the charities. *Id.*

In the Center's experience many class actions involve settlements in which the class attorneys receive fees that are disproportionate to the relief purportedly designed to benefit the class members. The Center represents consumers who have objected to the settlement *In re Bluetooth Headset Products Li-*

ability Litigation, which does not afford class members any monetary benefit but does provide for $100,000 in *cy pres* awards to charities and $850,000 in attorneys' fees. *See* Br. for Objectors-Appellants 6, *In re Bluetooth Headset Prods. Liab. Litig.*, No. 09-56683 (9th Cir. Apr. 26, 2010), *available at* http://centerforclassactionfairness.blogspot.com/2010/04/ninth-circuit-appeal-in-bluetooth.html; *see also* Daniel Fisher, *A Lawyer Who Tries to Block Settlements*, Forbes (Sept. 21, 2009). This type of rent-seeking by class attorneys is all too common and does not benefit class members.

Indeed, in some cases the problems of under-compensation and self-dealing are so severe that class settlements actually harm class members by putting them in a worse position than they were in before the litigation began. The CAFA Senate Report discusses two such cases, including the "infamous Bank of Boston class action settlement," in which an Alabama state court approved a settlement in which the attorneys' fees were subtracted from class members' escrow accounts, leading in many cases to class members losing money to pay the class attorneys' $8.5 million fee. S. Rep. No. 109-14, at 14 (citing *Kamilewicz v. Bank of Bos. Corp.*, 92 F.3d 506 (7th Cir. 1996)).

4. The problems arising from the class attorney's conflict of interest are inevitable, but courts do not have any effective means to police all abusive class settlements. Although courts are tasked with ensuring that class attorneys act as fiduciaries for the class as a whole, *see* Fed. R. Civ. P. 23(e), they often do not have the information necessary to measure whether the class attorney and defendant have ar-

rived at a fair settlement and accordingly cannot easily act to prevent attorney self-dealing. *See, e.g.*, Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 699 (1994); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. Rev. 1435, 1445 (2006). A court's comparative lack of information may explain the weight courts afford in reviewing class settlements to the "judgment of the parties," as presented by the attorneys, as to whether the settlement "is fair and reasonable." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). Given their conflict of interest, however, class attorneys' judgment cannot be expected to represent the class members' interests fairly in all cases. Therefore, there is a significant risk that judges will approve class settlements that do not provide meaningful relief to class plaintiffs, particularly when the class relief comes in the form of in-kind or injunctive remedies that are difficult to value.

* * *

In sum, class actions are far from an exceptional means of affording consumers meaningful relief. Relief via class action is almost always untimely, recovering it involves significant transaction costs, and when consumers do obtain such relief, it is often less than they deserve. Thus, in many cases class actions prove particularly inadequate to the task of affording consumers access to meaningful relief.

II. INDIVIDUAL ARBITRATION MAY IN MANY CASES AFFORD CONSUMERS GREATER ACCESS TO MEANINGFUL RELIEF

While class actions are inefficient, typically involving protracted litigation over collateral issues, such as discovery and class certification, arbitration provides for a speedy resolution of claims and benefits consumers with small claims by reducing the costs of dispute resolution below their potential expected return. Thus, by comparison class actions are not exceptional and indeed in many cases are less effective than arbitration in providing consumers with meaningful relief.

A. The comparative efficiency of arbitration over class remedies and litigation is borne out by empirical evidence. "Virtually every study considering the issue has concluded that results in arbitration are far swifter than those in litigation." Peter Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 571 (2008) (reviewing empirical studies). For example, a recent study by the Searle Center found that "the average time from filing to final award for the consumer arbitrations studied was 6.9 months." Searle Civil Justice Center, Consumer Arbitration Before the American Arbitration Association: Executive Summary (Mar. 2009), *available at* http://www.searle arbitration.org/report/exec_summary.php. By contrast, federal class actions take more than 3 years on average to reach settlement. *See supra* 7. The cost of this delay is borne by the injured class members. *See supra* Part I.A; *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (recognizing that arbitration benefits "typical

consumer" because "costs and delays of" pursuing court remedy "could eat up the value of an eventual small recovery").

B. In addition to being more efficient, arbitration offers consumers rates of recovery that are comparable, and perhaps superior, to class actions. A survey of the empirical literature shows that "most measures — raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed — do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation." Rutledge, 6 Geo. J.L. & Pub. Pol'y at 560 (survey of empirical literature). Indeed, in many cases recovery rates in arbitration are likely to be more favorable to consumers than recovery rates in class actions. A 2007 report by the American Arbitration Association showed that approximately 60% of its consumer arbitrations were settled by mutual agreement or withdrawn; of the cases that reached decision, consumers prevailed 48% of the time when they brought the action. *See* American Arbitration Association, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload* (2007), *available at* http://www.adr.org/si.asp?id=5027. By contrast, 80% of putative consumer-initiated class actions are never certified, leaving the putative class in those cases with no recovery. Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 Notre Dame L. Rev. 591, 635-36 (2006). Of the remaining 20% of putative class actions that are certified, the vast majority settle. *See supra* 11. Class settlements, moreover, in many cases offer a particularly

ineffective vehicle for consumer recovery given the barriers to recovery and the dead-end problems discussed *supra* Part I. Arbitration agreements like ATTM's have multiple features that are designed to avoid these types of problems and thus to provide consumers with a more realistic opportunity at recovery than class actions.

C. Consumers unsurprisingly prefer arbitration over litigation. In 2005, Harris Interactive surveyed 609 adults who had participated in some type of arbitration, finding that they reported several advantages of arbitration over litigation: 74% said it was faster, 63% said it was simpler, and 51% said it was cheaper than litigation. Harris Interactive, Arbitration: Simpler, Cheaper, and Faster Than Litigation ("Harris Interactive Survey") 5 (Apr. 2005), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf; *see also* Rutledge, 6 Geo. J.L. & Pub. Pol'y at 561. Nearly two-thirds of those surveyed reported that it was likely they would arbitrate again, including one-third of those who had lost their claims. Harris Interactive Survey at 5. And a 2003 study by the American Bar Association of approximately 700 lawyers in its litigation section found that over 86% believed that arbitration was as or more cost-effective than litigation, with 75% reporting that the outcomes in arbitration were equal to or better than the outcomes in litigation. *See* ABA Section on Litigation Task Force on ADR Effectiveness, *Survey On Arbitration* Q9, Q13 (Aug. 2003), *available at* http://www.abanet.org/litigation/taskforce/adr/surveyreport.pdf; *see also* Rutledge, 6 Geo. J.L. & Pub. Pol'y at 561.

D. Thus, the Ninth Circuit's belief that consumers will not file claims in individual arbitration is incorrect. *See* Pet. App. 6a; *see also Discover Bank*, 113 P.3d at 1106. The Ninth Circuit failed to appreciate that individual arbitration can be structured in a way to encourage individuals with small claims to bring claims. *See* Jason Scott Johnson, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 Mich. L. Rev. 857, 895 (2006) (arbitration provides a "realistic alternative" to class actions for resolving the "small loss" problem while "creat[ing] better incentives for firms to bargain to establish and maintain lasting, cooperative relationships with consumers and employees"). And ATTM's arbitration agreement accomplishes this goal by making the initiation of the arbitration process convenient; by absolving the customer of all arbitration fees for non-frivolous claims; by disclaiming ATTM's right to seek attorneys' fees against the customer, which eliminates another potential cost for customers seeking to bring a claim; and by including a clause guaranteeing the consumer a $7,500 minimum recovery if the arbitrator awards a customer relief that is greater than ATTM's last written settlement offer made before an arbitrator was selected. This last clause provides the customer with some assurance that the arbitration process will yield meaningful results. By contrast, class actions provide no such assurances. Thus, far from being exceptional, class actions are inferior to consumer-friendly individual arbitration in providing consumers with meaningful relief.

III. THE MARKET PRICES COMPANIES' ATTEMPTS TO ADDRESS CONSUMER COMPLAINTS, SUCH AS THROUGH ARBITRATION AGREEMENTS, AS AFFILIATED SERVICES

Even assuming that class actions are in fact an exceptional remedy for consumers, there is no need for courts to prohibit consumer-friendly individual arbitration agreements. If class actions are more efficient at providing consumer relief than ATTM's arbitration agreement, then the market will make them available for two reasons. *First*, the perceived quality of a company's process for resolving customer complaints is reflected in brand image and loyalty, and thus a more efficient process leads to increased demand and the ability to command above-market prices. *Second*, the efficiency of complaint resolution processes results in cost savings that are passed along to consumers in the form of lower prices.

Customers implicitly take complaint resolution mechanisms into account when making purchasing decisions. Successful complaint resolution creates positive feelings in individuals towards a company, fostering loyalty and increasing the likelihood of repeat or continued business in individuals who otherwise had a negative experience. *See, e.g.*, Tor Wallin Andreassen, *What Drives Customer Loyalty with Complaint Resolution?*, 1 J. of Serv. Research 324, 329 (1999). Moreover, the quality of a company's complaint resolution is reflected in brand image and reputation, as customers share their experiences through positive recommendations or denigration. *See, e.g.*, Eugene W. Anderson, *Customer Satisfaction and Word of Mouth*, 1 J. of Serv. Research 5,

6, 15 (1998). Brand image and customer loyalty are significant drivers of purchasing decisions, allowing firms with loyal customers and positive brand image to charge a premium over their competitors. Frederick F. Reichheld & W. Earl Sasser, Jr., *Zero Defections: Quality Comes to Services*, 68 Harv. Bus. Rev. 105, 107 (1990).[5] Customers are thus, in effect, willing to pay a premium to purchase products and services from companies with effective complaint resolution mechanisms.

Moreover, to the extent that efficient complaint resolution processes reduce transaction costs for businesses in resolving complaints, these savings are passed along to consumers. *See, e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Dispute Resolution 89, 91 (2001); Rutledge, 6 Geo. J.L. & Pub. Pol'y at 579-81. This Court and other courts have recognized as much. *See, e.g.*, *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991); *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002). To the extent that individual arbitration can lower transaction costs compared to class action litigation and arbitration, customers will directly benefit. Customers may therefore choose companies offering efficient complaint resolution mechanisms in order to capture these cost savings.

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[5] Customer loyalty is a particularly strong predictor of firm success. Because existing customers bring increased business at lower costs, customer retention rates have a dramatic impact on a firm's bottom line. Reichheld & Sasser, 68 Harv. Bus. Rev. at 105 (finding that businesses retaining 5% more customers see 100% increase in profit).

The market already reflects complaint resolution through customer loyalty and pricing. Customers make purchasing decisions based on their personal preferences as to the balance of cost and quality of customer service, and reward companies that provide them with better service at lower prices. Allowing customers to select providers based on their preferences is not substantively unconscionable.

Thus, if class actions provide more efficient mechanisms for resolving consumers' complaints than ATTM's arbitration agreement, the market will take that into account when pricing ATTM's products. If, however, ATTM's consumer-friendly agreement is efficient, then ATTM will be able to pass the cost-savings along to consumers in the form of lower prices. In either instance, the market will, without aid from the courts, protect consumer welfare.

CONCLUSION

For the foregoing reasons, as well as those stated by the petitioners, the Court should reverse the decision of the court of appeals.

Respectfully submitted,

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