

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008-SC-0789-D

MICHAEL SCHNUERLE, AMY GILBERT,
LANCE GILBERT and ROBIN WOLFF

APPELLANTS

v.

INSIGHT COMMUNICATIONS COMPANY, L.P.
and INSIGHT COMMUNICATIONS MIDWEST, LLC

APPELLEES

APPEAL FROM THE COURT OF APPEALS
NO. 2006 - CA - 2121-MR
AFFIRMING THE JUDGMENT OF THE JEFFERSON CIRCUIT COURT
ACTION NO. 06 - CI - 4267

APPELLANTS' RESPONSE TO APPELLEE'S MOTION FOR
LEAVE TO FILE SUPPLEMENTAL AUTHORITY

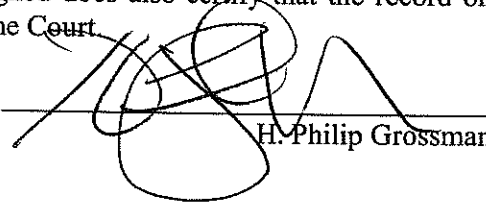
H. Philip Grossman
Jennifer A. Moore
GROSSMAN & MOORE, PLLC
401 West Main Street
Suite 1810
Louisville, KY 40202
(502) 657-7100
Co-Counsel for Appellants

Paul Bland
Melanie Hirsch
PUBLIC JUSTICE, P.C.
1825 K Street, NW
Suite 200
Washington, DC 20006
(202) 797-8600
Co-Counsel for Appellants

Leslie Bailey
PUBLIC JUSTICE, P.C.
555 12th Street
Suite 1620
Oakland, CA 94607
(510) 622-8203
Co-Counsel for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that copies of this Notice were served upon the following named individuals by U.S. Mail on May 9, 2011: Clerk, Supreme Court, Room 209, Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. McKay Chauvin, Jefferson Circuit Court, Jefferson Co. Judicial Center, 700 W. Jefferson Street, Louisville, KY 40202; Laurence J. Zielke, 1250 Meidinger Tower, 462 South 4th Street, Louisville, KY 40202; Byron E. Leet, Wyatt Tarrant & Combs, LLP, Suite 2800, PNC Plaza, 500 W. Jefferson Street, Louisville, KY 40202; Deborah J. LaFetra, Pacific Legal Foundation, 3900 Lennane Drive, Suite 200, Sacramento, CA 95834; John E. Spainhour, Suite One, Professional Bldg., 200 South Buckman Street, Shepherdsville, KY 40165, Kevin Burke, 125 S 7th Street, Louisville, KY 40202-2703; Kenneth W Zeller and Julie Nepveu, AARP, Foundation Litigation, 601 East Street, NW, Washington, DC 20049; and AG Jack Conway and Craig F. Newbern, Jr., Office of the Attorney General, 700 Capitol Avenue, Ste. 118, Frankfort, KY 40601. The undersigned does also certify that the record on appeal has not been removed from the Kentucky Supreme Court.


H. Philip Grossman

On April 29, 2011, Appellees Insight Communications Co, L.P. and Insight Communications Midwest, LLC (“Insight”), filed a motion with this Court seeking permission to file supplemental authority -- the decision of the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, No. 09-893 (Apr. 27, 2011) -- in regard to their pending petition for rehearing, modification, or extension. Pursuant to CR 76.34(2), Appellants, Michael Schnuerle, Amy Gilbert, Lance Gilbert, and Robin Wolff (“Appellants”), hereby submit their response to Insight’s motion. While Appellants do not oppose Insight’s submission, *Concepcion* is not relevant to Insight’s pending petition for rehearing, for several reasons.

In *Concepcion*, the U.S. Supreme Court struck down as preempted by the Federal Arbitration Act (“FAA”) California’s “*Discover Bank* rule,” which would mechanically invalidate a class action ban whenever three common factors are present: (a) a consumer contract of adhesion; (b) predictably small damages; and (c) an allegation that the defendant corporation has engaged in a scheme to cheat consumers. *Concepcion*, slip op. at 9. In so doing, the Court reversed an opinion by the U.S. Court of Appeals for the Ninth Circuit.

Concepcion does not call into question this Court’s well-reasoned decision striking down the class action ban in Insight’s consumer contract. First, *Concepcion*’s holding does not apply to cases in state court. Second, *Concepcion* does not apply where, as here, Kentucky law is consistent with the FAA and does not stand as an obstacle to any congressional purpose. Third, *Concepcion* also does not alter ordinary principles of law like waiver, and -- as Appellants have previously noted -- Insight has long since waived

any argument that federal law preempts Kentucky law in this case or that it objects to arbitration on a classwide basis.

I. CONCEPCION'S HOLDING DOES NOT APPLY TO CASES IN STATE COURT.

The 5-4 holding of *Concepcion* -- that California's *Discover Bank* rule stands as an obstacle to the purposes of the FAA and is thus preempted -- is limited to cases which, like *Concepcion* itself, arose in federal court. Had the issue in *Concepcion* reached the U.S. Supreme Court from a state court, there could not have been five votes for preemption. We know this because Justice Thomas -- who provided the crucial fifth vote for the *Concepcion* majority -- has consistently maintained that the FAA does not apply to cases in state court.

Since the 1995 case of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 285 (1995), Justice Thomas has been adamant that the FAA in general, and § 2 in particular, simply “does not apply in state courts.” *Id.* at 285 (Thomas, J., dissenting). In *Allied-Bruce*, the Court held that the FAA preempted a state law making written, predispute arbitration agreements unenforceable. *Id.* at 269. Justice Thomas, however, dissented, on the grounds that Congress intended for the FAA to apply only to federal courts. As he explained, at the time of the FAA's passage in 1925, “laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance,” and as such it “would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts.” *Id.* at 286, 288–29 (emphasis in original). To the contrary, as the 1925 Congress understood matters, “state arbitration statutes prescribed rules for the state courts, and the FAA

prescribed rules for the federal courts.” *Id.* at 289. In Justice Thomas’s view, this federal-court limitation on the FAA applies to § 2 no less than it applies to provisions that specifically refer to the federal courts, because the text of the statute as a whole “makes clear that § 2 was not meant as a statement of substantive law binding on the States” but is instead “a purely procedural provision.” *Id.* at 291.

Since Justice Thomas was appointed to the U.S. Supreme Court in 1991, the Court has on five occasions -- *Allied-Bruce, Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Preston v. Ferrer*, 552 U.S. 346 (2008) -- confronted the question of whether the FAA applies to cases arising in state court. In every single one of those cases, Justice Thomas reiterated his view that it does not. In *Doctor’s Associates*, for example, the Court held that the FAA preempted a Montana law that refused to enforce an arbitration clause unless the contract contained a notice, in underlined and capital letters on the first page, that the contract is subject to arbitration. 517 U.S. at 683. Justice Thomas dissented on the grounds that “§ 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to proceedings in state courts.” *Id.* at 689 (Thomas, J., dissenting). Similarly, in *Preston*, the Court held the FAA preempted a California statute that would refer certain disputes first to an administrative agency, 552 U.S. at 349-50; Justice Thomas’s dissent hinged on his view that because the FAA does not apply in state court, “in state-court proceedings, the FAA cannot displace a state law that delays arbitration until administrative proceedings are completed.” *Id.* at 363 (Thomas, J., dissenting). *See also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S.

440, 449 (2006) (Thomas, J., dissenting) (because the FAA does not apply in state courts, “in state-court proceedings, the FAA cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law”); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting) (because FAA does not apply in state courts, FAA cannot preempt state court’s interpretation of arbitration agreement).

In short, Appellants urge this Court to consider the issue in terms of this hypothetical: If the FAA preemption issue had reached the U.S. Supreme Court in *this* case, and not *Concepcion*, would the Court have held preempted this Court’s ruling based solely in Kentucky law? The only way that this Court could conclude that the answer for this case is “Yes” would be if the Court guessed that Justice Thomas did not mean the statements he made in five different opinions.

The Court in *Concepcion* also had no occasion to consider the extent to which its rule would apply in a state-court proceeding. When the Court makes a “judicial pronouncement,” that pronouncement’s value comes from “the settling of some dispute which affects the behavior of the defendant towards the plaintiff.” *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Put another way, the *Concepcion* decision should be understood as a pronouncement that extends only to the context of that case -- a case litigated in federal court. As a result, Justice Thomas’s statement in *Concepcion*, which arose in federal court, that the “*Discover Bank* rule is pre-empted” by the FAA can properly be understood to mean only that the *Discover Bank* rule is preempted by the FAA in federal courts. So long as one takes Justice Thomas at his consistent and repeated word, it

follows that he would not have voted the way he did had *Concepcion*, like this case, arisen in a state court. *Cf. United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam) (examining Supreme Court plurality opinion to predict outcomes based on likely vote of Justice Kennedy); *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 664 n.2 (9th Cir. 1992) (counting votes to consider whether “the Supreme Court would have five votes for holding a post office is a nonpublic forum”).

II. THIS COURT’S APPLICATION OF KENTUCKY LAW IS NOT PREEMPTED UNDER *CONCEPCION* BECAUSE KENTUCKY LAW IS CONSISTENT WITH THE FAA.

Even if *Concepcion* did apply in state court, its preemption holding should not disturb this Court’s decision striking down Insight’s class action ban for at least two reasons. First, Kentucky law as articulated by this Court is fundamentally different from the California rule invalidated in *Concepcion*. *Concepcion* struck down as preempted by the FAA California’s *Discover Bank* rule, which would formulaically invalidate a class action ban and force the parties into non-consensual class arbitration whenever there was (a) a consumer contract of adhesion; (b) predictably small damages; and (c) an allegation that the defendant corporation has engaged in a scheme to cheat consumers. *Concepcion*, slip op. at 9. In contrast, the rule of Kentucky law announced by this Court prohibits class action bans only on the occasions when the admissible evidence before the court in an individual case demonstrates that parties would be unable to vindicate their rights on an individual basis in that particular case, as opposed to a generic category of cases. In that critical way, Kentucky law is consistent with the FAA, which the U.S. Supreme Court has repeatedly emphasized must permit parties to vindicate their statutory rights, in a way that the California rule is not.

Second, *Concepcion*'s refusal to force parties into non-consensual arbitration on a classwide basis does not apply where, as here, the parties have consented to classwide arbitration.

A. Under *Concepcion*, Kentucky Law Is Not Preempted Because it Would Invalidate Only Class Action Bans that Prevent Parties from Vindicating Their Statutory Rights.

The Kentucky law as applied by this Court -- unlike the California rule at issue in *Concepcion* -- holds class action bans unenforceable only when the “individualized facts of th[e] case” show that the class action ban exculpates a company from liability. *Schnuerle v. Insight Commc'ns Co., L.P.*, Nos. 2008-SC-000789-DG, 2009-SC-000390-DG, slip op. at 9 (Ky. Dec. 16, 2010). As Appellants *demonstrated* through admissible evidence (both in terms of testimony and admissions about the lack of individual arbitrations), as opposed to arguing based upon some categorical abstract presumption along the lines of the *Discover Bank* rule, the small dollar values at issue in this case would prevent them from being able to vindicate their rights on an individual basis. *See* Appellants' Opening Br. 4–5, 16–17. In fact, only one Insight customer has ever pursued a claim against the company in arbitration. *Id.* at 17. This result is not surprising, given that the average Insight monthly broadband charge is \$40, but the American Arbitration Association fee for consumer disputes is \$125, in addition to attorneys' fees and the investment of time and effort. *Id.* at 4. Insight presented no evidence to the contrary. In *Concepcion*, in contrast, the U.S. Supreme Court assumed from the beginning that AT&T's arbitration clause would *not* prevent the plaintiffs in that case from vindicating their claims.

Crucially, in order to rule that the FAA required enforcement of AT&T's class

action ban even *if the evidence established that enforcement would prevent the parties from vindicating their claims*, the Court would have had to overrule prior precedent; the 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, 637, 628 (1985); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, (1991) (quoting *Mitsubishi Motors*). There is no question that *Mitsubishi Motors* and *Gilmer* remain good law after *Concepcion*; indeed, Justice Scalia cites both cases with authority in *Concepcion*. Slip op. at 8 (citing *Mitsubishi Motors*); *id.* at 9 n.5 (citing *Gilmer*).¹

The U.S. Supreme Court’s opinion in *Concepcion* makes clear that the Court was worried about broad categorical rules of state law. “When state law prohibits outright the

¹ Notably, in the U.S. Supreme Court’s prolific discussions of the purposes of the FAA, exculpation of a party to an arbitration clause from liability has not once made the list. *See, e.g., id.* at 10 (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010) (“[W]e have said on numerous occasions that the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.”) (collecting cases) (internal quotations omitted); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (“fair and expeditious resolution of the underlying controversy [is] a goal of arbitration systems and judicial systems alike”); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (purpose of the FAA was to reverse judicial hostility to arbitration and “place arbitration agreements upon the same footing as other contracts”); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) (“the basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”); *Southland Corp. v. Keating*, 465 U.S. 1, 8 (1984) (“the core purpose of a contract to arbitrate” is avoiding delay).

arbitration of a *particular type of claim*, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Id.* at 6–7 (emphasis added, citation omitted). The Court goes on to note that a state law that accomplishes the same thing (prohibiting arbitration of a type of claim) indirectly is also preempted. *Id.* at 7. This case does not involve a bright-line rule drawn from abstract reasoning, but rather a case where there is admissible evidence specific to the facts and circumstances of this particular case. This case stands on a very different footing from *Concepcion*, where the key element of the standard for refusing to enforce a class action ban -- that damages be “predictably small” -- was deemed “toothless and malleable. *Id.* at 8–9. The Kentucky rule at issue here, which is dependent on the “individualized facts of th[e] case,” *Schnuerle*, slip op. at 9, creates nothing like the class-action on demand rule that the U.S. Supreme Court found to frustrate the FAA’s purposes in *Concepcion*.

The *Concepcion* Court’s assumption that the class action ban there was not exculpatory was understandable, given that there was no factual record to the contrary. There was no evidence, for example, that the *Concepcions* would have to advance and pay an arbitration fee larger than their individual claim, or that no AT&T customers had ever pursued the claims at issue in arbitration.² In the absence of such evidence, the only “fact” on which the Court could rely was the language of the arbitration clause itself. And on its face, AT&T’s clause seemed eminently fair: as Justice Scalia noted in the

² The question presented in *Concepcion* -- whether the FAA would preempt 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).

majority opinion, the clause “specifies that AT&T must pay all costs for nonfrivolous claims,” “denies AT&T any ability to seek reimbursement of its attorney’s fees” from consumers, and, “in the event that a customer receives an arbitration award greater than AT&T’s last written settlement offer, *requires AT&T to pay a \$7,500 minimum recovery and twice the amount of the claimant’s attorney’s fees.*” *Concepcion*, slip op. at 2 (emphasis added). Indeed, the district court below 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.* at 13 (quoting *Laster*, 584 F.3d at 856, n.9). The Court thus concluded (based on nothing more than contract language) that the claim at issue in *Concepcion* was “most unlikely to go unresolved.” *Id.*; *see also id.* at 9 (predicting that “some [consumers] may well” pursue individual claims in arbitration).

Provisions like the ones cited above in *Concepcion* are nowhere to be found in this case. Here, in contrast, the question of whether consumers will vindicate these claims on an individual basis has been answered in the negative as a matter of fact, as Insight conceded that only one of its customers has *ever* filed an arbitration action against it. Appellants’ Opening Br. 17. Moreover, the only evidence before this Court made plain that Insight’s class action ban would prevent these plaintiffs from vindicating their rights if they were forced to proceed on an individual basis. Appellants testified that they would not be able to pursue their claims on an individual basis and also submitted expert

affidavits demonstrating that, even if they could have pursued their claims individually, they would be unable to obtain counsel. *Id.* at 4–5.

The *Concepcion* Court acknowledged in passing that, without a class action in *Concepcion*, some small-dollar claims against AT&T “might . . . slip through the legal system.” *Id.* (emphasis added). But the Court concluded that this unsubstantiated contingency was not sufficiently serious to permit states to “require a procedure,” such as 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* and *Gilmer*, and not disturbed in *Concepcion* -- that the legality of arbitration depends upon it allowing parties to effectively vindicate their rights -- indicates that the balance shifts, however, where, as here the factual record in a case demonstrates that the certain result of banning a class action is that claims *will* go unresolved. Nothing in this Court’s refusal to enforce Insight’s exculpatory class action ban is at odds with the U.S. 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.

Given the U.S. Supreme Court’s clear rule that arbitration must permit parties to vindicate their rights, an arbitration clause that *denies* 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*, slip op. at 13.

B. Under *Concepcion*, Kentucky Law Is Not Preempted By the FAA Because It Does Not Impose Class Arbitration On Parties Without Their Consent.

Second, the basis for the conflict between federal and state law in *Concepcion* -- a

state-law scheme that requires the availability of classwide arbitration whether or not the parties consent to it -- need not be present under Kentucky law. The *Concepcion* majority's preemption holding is based on two premises: (1) that non-consensual classwide arbitration is inconsistent with the FAA; and (2) that California's *Discover Bank* rule would subject parties to classwide arbitration without their consent. See, e.g., slip op. at 8 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *id.* at 9 ("Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post."); *id.* at 10 ("[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."). Indeed, Justice Scalia's opinion devotes several pages to explaining in great detail the ways in which classwide arbitration is incompatible with the FAA. See *id.* at 10 (class arbitration is inconsistent with the FAA because it "sacrifices the principal advantage of arbitration -- informality -- and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"); *id.* at 11 (class arbitration is inconsistent with the FAA because it "requires formality" such as notice, an opportunity to be heard, and a right to opt out); *id.* at 12 (class arbitration is inconsistent with the FAA because it "greatly increases risks to defendants" by raising the stakes while providing "no effective means of review").

This Court is in a position to declare that under Kentucky state law, in contrast, no party would be required to undergo classwide arbitration without its consent. Instead, this Court should make clear, in those instances where the evidence shows that a class action

ban would bar individuals from effectively vindicating their statutory claims, the trial court should permit the defendant to choose whether to proceed in arbitration or in litigation, with the possibility that the decision-maker may subsequently permit the case to proceed as a class action should it qualify.

Indeed, the facts of this appeal demonstrate that class arbitration would *not* be something forced upon Insight in the absence of its consent. Insight has repeatedly argued that this Court should sever the class action ban from its arbitration clause and has indicated that it would consent to arbitration on a classwide basis. *See* Insight's Combined Br. 55 (“[I]f the class action ban was severed, the arbitration clause would continue in effect . . . Appellants would have to move an arbitrator for class certification.”); Insight's Reply Br. 8 (“in the event this Court reverses the Court of Appeals' enforcement of the class action waiver, the agreement to arbitrate is binding,” resulting in class arbitration). *Concepcion* addressed only class arbitration as imposed on nonconsenting parties. In contrast, *consensual* class arbitration, as would be the case here, is wholly consistent with the FAA and therefore not preempted. *See Concepcion*, slip op. at 13.

III. CONCEPCION DOES NOT CHANGE THE FACT THAT INSIGHT HAS WAIVED ANY ARGUMENT BASED ON FEDERAL PREEMPTION.

From the inception of this case until this Court's decision in December 2010, Insight litigated on the premise that the legality of the class action ban in its arbitration clause was a matter of *state law*. *See, e.g.*, Insight's Combined Br. 2 (“in deciding whether an arbitration clause is unenforceable *the Court must apply the specific state law*”) (emphasis added); DVD of Oral Argument at 11:52:15 to 11:52:50; 11:59:19 to

12:01:00 (advocating a case-by-case approach rooted in Kentucky law). Only after this Court held that Insight's ban on class actions violated Kentucky's generally applicable law forbidding exculpatory contracts did Insight change course and argue, for the first time, that federal law governs here. Accordingly, Insight has long since waived any argument that the FAA preempts state law in this case. *See Combs v. Knott County Fiscal Court*, 141 S.W.2d 859, 860 (Ky. 1940) (“[A] question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.”).

Even if *Concepcion* were otherwise applicable to this case, Insight's failure to mention FAA preemption until it lost before this Court means that Insight is barred from relying on preemption arguments in *Concepcion* at this late date.

CONCLUSION

In conclusion, while Appellants do not oppose Insight's motion for permission to file supplemental authority, *Concepcion* does not alter this Court's well-reasoned decision in this case.

REQUEST FOR ORAL ARGUMENT

In the event that this Court would find it useful, Appellants respectfully request oral argument to discuss the new issues raised by *Concepcion* with respect to Insight's pending petition for rehearing. If this Court were to consider vacating its earlier well-reasoned holding about Kentucky law on the theory that federal law required the enforcement of contract terms that were proven to gut Kentucky's consumer protection statutes, given that federal preemption issues were only touched upon in the original oral

argument, Appellant respectfully requests that oral argument about this expansive theory would be helpful to address that question.

Respectfully submitted,



H. Philip Grossman
Jennifer A. Moore
Grossman & Moore, PLLC
401 West Main Street
Suite 1810
Louisville, KY 40202
(502) 657-7100

Paul Bland
Melanie Hirsch
Public Justice, P.C.
1825 K Street, NW, Suite 200
Washington, DC 20006
(202) 797-8600

Leslie Bailey
Public Justice, P.C.
555 12th Street, Suite 1620
Oakland, CA 94607
(510) 622-820

Counsel for Appellants