No. 11-282

IN THE

Supreme Court of the United States

BRANCH BANKING AND TRUST CO.,

Petitioner,

v.

FAITH GORDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT C. GILBERT
GROSSMAN ROTH, PA
2525 Ponce de Leon Blvd.
11th Floor
Coral Gables, Florida 33134
(305) 442-8666

E. ADAM WEBB
G. FRANKLIN LEMOND, JR.
WEBB, KLASE & LEMOND, LLC
1900 The Exchange, S.E.
Suite 480
Atlanta, Georgia 30339
(770) 444-9325

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, PA
500 East Broward Blvd.
Suite 1930
Fort Lauderdale, Florida 33394
(954) 767-8909
brogow@rogowlaw.com

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

STATEMENT

I. OVERVIEW OF THE CASE

Respondent Faith Gordon ("Ms. Gordon") filed suit against Petitioner Branch Banking and Trust Company ("BB&T"), alleging that BB&T improperly assessed overdraft fees against Ms. Gordon's checking account. (Pet. App. 34a). After removing the case to federal court, BB&T filed an answer along with a motion to compel arbitration. (Pet. App. 3a). The district court denied arbitration, finding that the arbitration clause was unconscionable under Georgia law. (Pet. App. 15a-31a).

The Eleventh Circuit Court of Appeals affirmed. (Pet. App. 1a-14a). BB&T filed a petition for rehearing and/or rehearing en banc, which was denied by the Eleventh Circuit even though the bank argued that the decision in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), warranted rehearing. (Pet. App. 15a-16a). BB&T also filed a motion to stay the mandate, arguing that *Concepcion* required a different result. The Eleventh Circuit denied this motion as well. *See* July 1, 2011 Order (available on PACER).

II. FACTUAL BACKGROUND OF THE CASE

Ms. Gordon had a checking account with BB&T and relied on BB&T to properly maintain the account and to safeguard her funds. (Pet. App. 36a). Instead, BB&T assessed overdraft charges in an unfair manner. *Id.* In particular, BB&T routinely enforces a policy where debit card transactions are

posted to consumers' accounts in order of largest to smallest dollar amounts, even when larger charges occur days after smaller charges. (Pet. App. 37a). The result is increased overdraft fees with no benefit to the customer. *Id.* BB&T also assesses overdraft fees even when the actual funds in the customer account are sufficient to cover all debits that have been submitted to the bank for payment. *Id.* As a result of improper overdraft fees, BB&T has deprived Ms. Gordon of significant funds. *Id.*

Ms. Gordon's account is governed by the Bank Services Agreement ("BSA"). By the bank's own admission, however, the BSA was provided to Ms. Gordon ***after*** she became a customer of BB&T. *See* Decl. of S. Byerly, ¶¶ 4-5 (Dkt. No. 6 in Case No. 09-cv-23067-JLK (S.D. Fla.)). The BSA includes an arbitration clause. BSA, pp. 14-15. The clause bears no resemblance to the one at issue in *Concepcion*, however, and, if enforced, would preclude Ms. Gordon from pursuing her claims. For example, the costs of arbitration are not paid by the bank and Ms. Gordon would be liable for all of BB&T's legal fees and costs. *E.g.,* BSA, p. 14, ¶ 28.

III. PROCEEDINGS BELOW

On May 22, 2009, Ms. Gordon filed her complaint against BB&T in the Superior Court of Fulton County, Georgia alleging that BB&T improperly assessed overdraft fees. (Pet. App. 17a). On June 29, 2009, BB&T removed the case to the District Court for the Northern District of Georgia. (Pet. App. 19a). On July 7, 2009, BB&T filed its motion to compel arbitration along with its answer.

Id. Plaintiff's opposition was filed on July 24, 2009, and the bank replied. *Id.*

On October 2, 2009, District Judge Charles Pannell entered an order denying BB&T's motion to compel arbitration. *See* 666 F. Supp. 2d 1347 (N.D. Ga. 2009) (Pet. App. 17a-31a). Relying largely on the Eleventh Circuit's decision in *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007), the court found BB&T's arbitration clause to be substantively unconscionable and unenforceable. 666 F. Supp. 2d at 1351-53 (Pet App. 26a-29a).

On July 16, 2009, the Judicial Panel on Multidistrict Litigation conditionally transferred *Gordon* to MDL No. 2036, *In re Checking Account Overdraft Litigation*. On August 14, 2009, BB&T objected to transfer. On October 13, 2009, the MDL panel denied BB&T's motion to vacate and ordered that *Gordon* be included in MDL No. 2036.

Following transfer, BB&T moved for reconsideration of Judge Pannell's order as to arbitration. (Pet. App. 32a). On November 6, 2009, Judge James Lawrence King of the Southern District of Florida denied reconsideration. (Pet. App. 32a-33a). BB&T appealed the initial order and the order denying reconsideration. (Pet. App. 4a).

Following oral argument, the Eleventh Circuit held that the BB&T arbitration clause was unconscionable under Georgia law. 419 Fed. Appx. 920, 922-23 (11th Cir. March 28, 2011) (Pet. App. 1a-14a). In reaching this conclusion, the court reaffirmed its ruling in *Dale*, stating that under

Georgia law unconscionability is weighed "on a case-by-case basis, considering the totality of the facts and circumstances." *Id.* (also noting that in "addressing the enforceability of a class action waiver" under Georgia law the courts have "not adopted a bright-line rule") (Pet. App. 5a). *Gordon* restated some of the factors that courts should consider in applying Georgia's case-by-case unconscionability analysis. *Id.* at 923 (Pet. App. 5a). These factors will be addressed below.

BB&T petitioned for rehearing. While the petition was pending, this Court issued its decision in *Concepcion*. Thereafter, BB&T filed several notices of supplemental authority arguing that *Concepcion* precluded a finding that the arbitration clause was unconscionable and unenforceable and invited the court to vacate its decision. The Eleventh Circuit denied rehearing. (Pet. App. 15a-16a). Not a single judge requested a poll of the Court. (Pet. App. 16a). Subsequently, BB&T sought to stay the issuance of the mandate by filing a motion to stay that relied almost exclusively on *Concepcion*. This motion was also denied by the Eleventh Circuit. *See* July 1, 2011 Order.

REASON FOR DENYING THE PETITION

The Georgia law of unconscionability and the terms of BB&T's BSA are so completely unlike the California law and AT&T arbitration clause at issue in *Concepcion* that a reexamination of this case is unwarranted. There is no *per se* or bright line rule that requires that arbitration clauses be found unconscionable under Georgia law. Rather, as the

Eleventh Circuit emphasized in its recent decision in *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1124-27 (11th Cir. 2010), Georgia law requires a case-by-case determination based on a multitude of factors. Indeed, in *Cappuccitti*, the Eleventh Circuit found an arbitration provision enforceable even though the plaintiff brought a small value claim against a corporate defendant and class actions were precluded. *Id.* at 1125-27. Further, the BSA's arbitration clause is at the polar extreme from AT&T's consumer-friendly provision. Thus, the Eleventh Circuit correctly concluded that *Concepcion* did not require it to vacate its decision. BB&T's petition should be denied.

I. MATERIAL DIFFERENCES BETWEEN THIS CASE AND *CONCEPCION* EXIST SUCH THAT *CONCEPCION* DOES NOT COMPEL A REEXAMINATION HERE.

BB&T's Petition is based on the faulty premise that *Concepcion* "involved facts materially indistinguishable from those of this case." *See* Petition, p. 8. Even a cursory review of Georgia law, however, reveals that BB&T is wrong.

As noted by Justice Scalia at the outset of *Concepcion*, the sole issue before the Court in that case was whether the "*Discover Bank* rule" under California law, which held that class action waivers were *per se* unconscionable, was preempted by the FAA. 131 S. Ct. at 1746. As the Court repeatedly noted throughout *Concepcion*, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The

conflicting rule is displaced by the FAA." *Id.* at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). Furthermore, the Court emphasized that "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" 131 S. Ct. at 1747. Thus, a court may not create a special set of rules aimed solely at arbitration clauses.

The *Discover Bank* rule "requir[ed] the availability of class-wide arbitration," without reference to evidence that the particular arbitration provision at issue interfered with the consumer's ability to vindicate their rights in an arbitral forum. The rule automatically allowed the invocation of class-wide arbitration when (1) the contract was one of adhesion, something the Court recognized applies to all modern consumer contracts, (2) involved "small" damages, a requirement that California courts had rendered "toothless and malleable," and (3) the consumer merely *alleged* a scheme to cheat consumers. *Id.* at 1750. The *Discover Bank* rule thus made "manufactured" class arbitration, "inevitable," despite the defendant's consent to no more than bilateral arbitration. *Id.* at 1750-51. This Court found the *Discover Bank* rule burdened arbitration in violation of the purposes of the FAA.

Far from a blanket rule like that imposed in *Discover Bank*, the Eleventh Circuit has explicitly recognized that there is no *per se* rule that targets arbitration clauses under Georgia law. *E.g.*, *Gordon*, 419 Fed. Appx. at 922 (noting that in "addressing the

enforceability of a class action waiver" under Georgia law the courts have "not adopted a bright-line rule"); *Cappuccitti*, 623 F.3d at 1124-25 (requiring consumer to arbitrate); *Dale*, 498 F.3d at 1219-20. Rather than impose a judicially created rule specific to arbitration agreements, the appropriate test under Georgia law is to examine each clause on a case-by-case basis and evaluate a wide variety of circumstances, such as the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation, and the company's ability to engage in unchecked market behavior. *E.g., Cappuccitti,* 623 F.3d at 1124-25; *Dale*, 498 F.3d at 1224; *Jones v. DirecTV, Inc.*, 381 Fed. Appx. 895, 896-97 (11th Cir. June 3, 2010).

Indeed, the Eleventh Circuit, applying Georgia law, has on numerous occasions enforced arbitration clauses, even in cases where the clause contained a class action waiver and the underlying claim involved small damages. *E.g., Cappuccitti*, 623 F.3d at 1125-27; *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1377-79 (11th Cir. 2005); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 873 (11th Cir. 2005); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 816-18 (11th Cir. 2001). In each of these cases, the Eleventh Circuit emphasized that under Georgia law "unconscionability is a 'flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process.'" *E.g., Cappuccitti*, 623 F.3d at 1124-25.

At other times, based on the applicable Georgia factors, the Eleventh Circuit has held arbitration clauses unconscionable. *E.g.*, *Dale*, 498 F.3d at 1122-24; *Gordon*, 419 Fed. Appx. at 922-24; *Jones*, 381 Fed. Appx. at 896-97. Since Georgia law does not contain a rule that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," *Concepcion* provides no basis to vacate.

This reality is demonstrated by Petitioner's own briefing to the Eleventh Circuit. In its Brief of Appellant, BB&T argued that the district court's order was "directly contrary to the seminal Georgia Supreme Court authority regarding unconscionability." *See* Brief of Appellant, pp. 19-20 (available on PACER). Furthermore, BB&T claimed below that the leading cases under Georgia law "uniformly refuse to find unconscionability, and exemplify the heavy burden required to invalidate a contract of unconscionability." *Id.* at 21. Thus, BB&T's current suggestion to this Court that a rule exists under Georgia law that is indistinguishable from California's *Discover Bank* rule is fatally undermined by its own assertions below. Simply put, there is no rule of Georgia law that is hostile to arbitrations so as to warrant reversal or remand of the Eleventh Circuit's decision based on *Concepcion*.

Also unpersuasive is BB&T's suggestion that this Court's decision to grant certiorari, vacate, and remand in *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. 2010), *Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010), *Litman v. Cellco Partnership*, 381 Fed. Appx. 140 (3d Cir. 2010), and *Fensterstock*

v. Education Finance Partners, 611 F.3d 124 (2d Cir. 2010), supports a similar finding here. *See* 131 S. Ct. 2875 (2011) (*Brewer*); 131 S. Ct. 2872 (2011) (*Herron*); 131 S. Ct. 2872 (2011) (*Litman*); 131 S. Ct. 2989 (2011) (*Fensterstock*). Each of the state law rules at issue in those cases resembled the *Discover Bank* rule at issue in *Concepcion*, not the Georgia law at issue here.

In *Brewer*, for example, the Missouri Supreme Court relied on previous decisions that established that class action waivers in arbitration agreements were unenforceable under Missouri law. *E.g.*, *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856-61 (Mo. 2006) (*en banc*); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308-14 (Mo. Ct. App. 2005). After reviewing these previous decisions, the court concluded "[t]he net result of class arbitration waivers in consumer contracts involving small amounts of money is that '[a] company [that] wrongfully exacts a dollar from each of millions of customers will reap a handsome profit [and] the class action is often the only effective way to halt and redress such exploitation.'" *Brewer*, 323 S.W.3d at 23 (quoting *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1105 (Cal. 2005)). Given the clear enunciation of a rule of law hostile to class waivers in *Brewer* and the court's reliance upon *Discover Bank* as the basis for that rule of law, it is no wonder that this Court decided to vacate the decision and remand based on *Concepcion*. Since no such rule of law exists in Georgia, however, *Brewer* does not support BB&T's Petition.

Similarly, BB&T's reliance on *Herron* is unpersuasive. There, the South Carolina Supreme Court relied upon the Dealers Act to find that the class action waiver at issue was unenforceable because it violated state public policy. 693 S.E.2d at 399-400 ("We therefore hold this provision is unenforceable on public policy grounds") (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution)). This Court's rejection of relying upon state public policy concerns as a basis for invalidating class action waivers in *Concepcion* – *see* 131 S. Ct. at 1746 – required the decision in *Herron* to be vacated and remanded. However, as neither the district court, nor the Eleventh Circuit, relied upon a Georgia statute or public policy as a basis to find BB&T's arbitration clause unenforceable, Petitioner's reliance upon *Herron* is mislaid. Ms. Gordon has always pursued an unconscionability challenge as specifically authorized by the FAA. *Concepcion*, 131 S. Ct. at 1746 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), and *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987)). The Eleventh Circuit has recently clarified this distinction. *Cruz v. Cingular Wireless, LLC*, 2011 WL 3505016, *6 (11th Cir. Aug. 11, 2011) ("the *Concepcion* Court specifically rejected this public policy argument"); *accord Community State Bank v. Strong*, 2011 WL 3715769, n.28 (11th Cir. Aug. 25, 2011) ("The ability of such contractual defenses to invalidate arbitration agreements is not affected by the Supreme Court's decision"). *Herron* is inapposite.

Litman provides BB&T with no refuge either. There, the Third Circuit applied the New Jersey rule against class action waivers to reverse the lower court's finding that the arbitration agreement at issue was unenforceable under New Jersey law. 381 Fed. Appx. at 141. In doing so, the Third Circuit applied the holding of the New Jersey Supreme Court in *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006), which established a bright line rule that "the presence of the class-arbitration waiver in [plaintiff's] consumer arbitration agreement renders that agreement unconscionable." 381 Fed. Appx. at 141. The court held that the FAA did not preempt the New Jersey rule. *Id.* at 143. *Concepcion*'s holding undoubtedly required a finding that the Third Circuit's decision must be reexamined. Here, however, there is no ruling regarding preemption that is contrary to the holding of this Court in *Concepcion*. Indeed, Petitioner's submissions in this case were completely devoid of any argument regarding FAA preemption until it filed a Federal Rule of Appellate Procedure 28(j) notice with the Eleventh Circuit regarding *Concepcion*. *See generally* Motion to Compel Arb. (Dkt. No. 7 in Case No. 09-cv-23067-JLK (S.D. Fla.)); Reply Br. (Dkt. No. 13 in Case No. 09-cv-23067-JLK (S.D. Fla.)); Brief of Appellant to 11th Cir.; Reply Brief of Appellant to 11th Cir.

Finally, this Court's decision to vacate and remand in *Fensterstock* has no application here, given that the Second Circuit's decision was based entirely upon *Discover Bank*. 611 F.3d at 137-39. Thus, this Court's decisions to vacate and remand in the four cases cited by Petitioner are inapposite.

BB&T's Petition should also be denied given the stark differences between the ultra-consumer friendly arbitration provision in *Concepcion* and BB&T's arbitration clause. In *Concepcion*, this Court referenced five salient features of the AT&T clause: (1) the customer paid no costs of arbitration; (2) the customer was guaranteed $7,500 if the arbitration result was better than AT&T's last offer; (3) the customer was reimbursed for double their legal fees; (4) the customer's expert fees and costs were paid; and (5) AT&T could never seek any payment from the complaining customer. *Concepcion*, 131 S. Ct. at 1753; *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.10 (9th Cir. 2009).

In contrast, under BB&T's arbitration clause customers do pay the costs of arbitration. BSA, p. 14. Pursuant to the BSA "[a]ll fees and costs are allocated pursuant to the rules of the AAA." *Id.* Unlike AT&T's clause, the BSA offers customers no minimum recovery and customers in arbitration can obtain only their direct, proven losses. BSA, p. 14, ¶ 28 ("IN NO EVENT AND UNDER NO CIRCUMSTANCES SHALL ANY PARTY BE LIABLE FOR SPECIAL, PUNITIVE, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES"). Instead of paying for a customer's legal fees in arbitration, BB&T demands that the customer reimburse it for all the bank's legal fees and costs and empowers the bank to seize such funds from a customer's account without notice. *See* BSA, p. 14, ¶ 28 ("You agree to be liable to the Bank for any loss, costs or expenses, ***including, without limitation, reasonable attorneys' fees*** . . . that the Bank incurs ***as a result of any dispute involving your***

account, and ***you authorize the Bank to deduct any such loss, costs or expenses from your account without prior notice to you***") (emphasis added); *also* BSA, p. 12, ¶ 18. Thus, the arbitration clauses of AT&T and BB&T are wholly unalike.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED this 3rd day of October, 2011.

Respectfully submitted,

BY: Bruce S. Rogow
Counsel of Record
BRUCE S. ROGOW, PA
500 East Broward Blvd., Suite 1930
Fort Lauderdale, Florida 33394
(954) 767-8909

E. Adam Webb
G. Franklin Lemond, Jr.
WEBB, KLASE & LEMOND, LLC
1900 The Exchange, S.E., Suite 480
Atlanta, Georgia 30339
(770) 444-9325

Robert C. Gilbert
GROSSMAN ROTH, PA
2525 Ponce de Leon Blvd., 11th Floor
Coral Gables, Florida 33134
(305) 442-8666

Counsel for Respondent