09-10420

United State Court of Appeals
FOR THE FIFTH CIRCUIT

CATHRYN ELAINE HARRIS, MARIO HERRERA, and MARYAM HOSSEINY on behalf of themselves and all others similarly situated,
Appellees,

Appellee-Appellees

v.

BLOCKBUSTER, INC.

Appellant-Appellees.

On Appeal from the United District Court
For the Northern District of Texas

APPELLEES' BRIEF

THE COREA FIRM, P.L.L.C

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 5th Circuit Rule 28.2, the cause number and style number are as follows: *Cathryn Elaine Harris, Mario Herrera, And Maryam Hosseiny on behalf of themselves and all others similarly situated, v. Blockbuster Inc.,* No. 09-10420 in the United States Court of Appeals for the Fifth Circuit. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Appellant Blockbuster Inc. is a Delaware corporation headquartered in Dallas, Texas. Blockbuster Inc. does not have a parent corporation, and no publicly-held corporation owns 10% or more of its own stock

The following attorneys have appeared on behalf of Appellant either before this Court or in the district Court:

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Appellees Cathryn Harris, Mario Herrera, and Maryam Hosseiny are individuals residing in Dallas, Texas.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request oral arguments on the issues raised by this appeal. This appeal involves the enforcement of an arbitration agreement in the consumer class action context. Thus, it involves issues of substantial importance to both businesses and consumers. Appellees respectfully suggest that the Court's analysis of these issues will be aided by the back and forth questioning provided by oral argument.

For these reasons, Appellees contend that oral arguments would be helpful to the Court in resolving this appeal.

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Appellants, CATHERYN ELAINE HARRIS, MARIO HERRERA, AND MARYAM HOSSEINY, file their Appellees' Brief, as follows:

SUMMARY OF THE ARGUMENT

As the District Court correctly determined, Blockbuster simply failed to establish the existence of a valid agreement to arbitrate in this case. Under recently reaffirmed precedent of this Court, an arbitration agreement is illusory and unenforceable if it does not bind both parties to arbitrate. The purported agreement in this case simply lacked sufficient mutuality of obligations to be enforceable. Although Texas law has recognized that, in certain situations, a non-mutually binding arbitration agreement can be saved by the consideration contained in a larger agreement, those circumstances are not present because, in this case, the underlying contract completely absolves Blockbuster of any duty to perform.

Plaintiff's challenge in this case is not a challenge to the contract as a whole, but rather goes to issue of whether a valid agreement to arbitrate was ever formed, an inquiry specifically allowed under Supreme Court precedent. Because no valid agreement to arbitrate was formed in this case, the District Court correctly denied Blockbuster's Motion to Compel Individual Arbitration.

Although not addressed by the District Court, Blockbuster has also argued that Plaintiffs assented to the arbitration agreement and that it was not unconscionable under Texas law. Both of these assertions are incorrect. First, by merely establishing that Plaintiffs "clicked" on a button on Blockbuster's website, Blockbuster has failed to establish sufficient manifestation of Plaintiffs' assent to the arbitration agreement.

Second, the arbitration agreement in this case is unconscionable under Texas law, as it buried within twenty (20) pages of terms and conditions, is not highlighted in comparison to the other print on its page, is one-sided in its application, is subject to unilateral (and retroactive) amendment by Blockbuster, waives the class action device for Plaintiffs by not Blockbuster, and waives important federal statutory rights. These provisions make the agreement so one-sided that it is both procedurally and substantively unconscionable under Texas law.

For these reasons, the District Court was correct in concluding that the subject arbitration agreement was unenforceable. Appellees respectfully request that the District Court's Order be affirmed.

ARGUMENT AND CITATIONS OF AUTHORITY

The Federal Arbitration Act ("FAA") provides that agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[1] While the FAA expresses a "liberal federal policy favoring arbitration agreements,"[2] federal law "directs courts to place arbitration agreements on equal footing with other contracts."[3] Accordingly, under 9 U.S.C. § 2, "[a]rbitration agreements ... are subject to all defenses to enforcement that apply to contracts generally."

The trial court's determination of the arbitration agreement's validity is a legal question subject to *de novo* review.[4] If the trial court finds a valid agreement, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration.[5] In order to establish a valid contract to arbitrate, Blockbuster was required to prove (1) an offer and

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[1] 9 U.S.C. § 2 (2000).

[2] *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

[3] *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002).

[4] *In re Kellogg Brown & Root*, 80 S.W.3d 611, 615 (Tex.App.-Houston [1st Dist.] 2002, orig. proceeding).

[5] *Oakwood*, 987 S.W.2d at 573.

acceptance; (2) meeting of the minds; (3) communication that each party has consented to the terms of the agreement; and, (4) consideration. [6] As is discussed in more detail below, the District Court correctly held that Blockbuster failed to establish the existence of a valid contract to arbitrate.

A. The District Court did not Err in Determining that Blockbuster Failed to Demonstrate the Existence of a Valid Agreement to Arbitrate

1. The Purported Arbitration Agreement is Illusory

As Appellant describes in its Initial Brief, this lawsuit involves a purported agreement to arbitrate all disputes arising from or relating to Plaintiff's use of Blockbuster's website. In their Original Complaint,[7] Plaintiffs allege improper disclosures under the Video Privacy Protection Act ("VPPA"). [8] Plaintiffs are customers of Blockbuster Online, a video rental service which mails video materials to customers in exchange for a fee.[9] Plaintiffs allege that Blockbuster has been systematically violating the VPPA by routinely disclosing plaintiffs' video rental history to a company called

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[6] *See Veltmann v. Crowley Maritime Corp.*, 784 F. Supp. 366, 369 (E.D. Tex. 1992).

[7] *See* CR, pages 5-18 .

[8] 18 U.S.C. § 2710.

[9] *See* CR, pages 5-18 .

Facebook, an internet social-networking website.[10] While Blockbuster contends that it is simply disclosing plaintiffs' rental history directly to its customer, and that the consumer is *informed* of these disclosures (with an opportunity to opt-out), Plaintiffs contend that Blockbuster is actually disclosing this information directly to Facebook, a third party, without "informed, written consent of the consumer given at the time the disclosure is sought."[11]

The purported arbitration agreement is contained within "Terms and Conditions" on Blockbuster's website,[12] which Plaintiffs purportedly accepted by checking a box during the signup process. According to Blockbuster, this indicated that Plaintiffs accepted the "Terms and Conditions" (which were not displayed on that page, but rather could be accessed by hyperlink.)[13]

As Plaintiffs argued to the District Court, however, the arbitration provision is completely at the discretion of Blockbuster, who retains an absolute right to modify or eliminate it (even as to pre-existing disputes),

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[10] *See* CR, pages 5-18 .

[11] *See* CR, pages 5-18; *See also* 18 U.S.C. 2710 (b)(2)(B).

[12] *See* CR 75.

[13] *See* CR 68.

without prior notice to Plaintiffs. The District Court correctly determined that this unilateral right to modify the arbitration provision makes Blockbuster's obligations illusory.[14]

Texas has expressly adopted the generally held rule that an arbitration agreement is not valid if it can be unilaterally modified by one party.[15] The rationale for this rule is that if one party can unilaterally modify the arbitration agreement, that party is not bound to the agreement, making their obligations illusory. As the District Court correctly noted, this Court has recently evaluated a similar arbitration agreement and found it to be illusory.

In *Morrison v. Amway Corp., et al.*,[16] Amway informed its distributors

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[14] *See* CR 239 ("The Court concludes that the Blockbuster arbitration provision is illusory for the same reasons as that in *Morrison.* Here, as in *Morrison,* there is nothing in the Terms and Conditions that prevents Blockbuster from unilaterally changing any part of the contract other than providing that such changes will not take effect until posted on the website.").

[15] *In re Palm Harbor Homes, Inc.* 195 S.W.3d 672, 677 (Tex. 2006) ("We have recognized that an arbitration agreement may be illusory if a party can unilaterally avoid the agreement to arbitrate. See *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230 & n. 2 (Tex.2003). In *Davidson*, we remanded a case for the trial court to determine whether an ambiguous contract allowed an employer to modify or terminate an arbitration agreement at any time. *Id*. at 230-31. We noted that most courts which have considered the issue have held that if one party retains a unilateral, unrestricted right to terminate an arbitration agreement, the agreement is illusory.").

[16] *Morrison, et al. v. Amway Corp., et al.*, 517 F.3d 248 (5th Cir. 2008).

that it was amending its Rules of Conduct to include an arbitration agreement. The arbitration provision mandated arbitration for "any . . . claim or dispute arising out of or relating to [an] Amway distributorship. . . ."[17] Pursuant to the Rules of Conduct (into which the arbitration provision was added), every distributor agreed "to conduct [his or her] business according to the Amway Code of Ethics and Rules of Conduct, *as they are amended and published from time to time. . .*" [18] Thus, as in this case, Amway retained an overarching, unilateral right to amend its "Rules of Conduct" at any time. This overarching right to amend the Rules of Conduct also allowed it to amend the arbitration agreement at any time because the arbitration agreement was contained within the Rules of Conduct. Also, just as Blockbuster argues in this case, the arbitration agreement in *Amway* did not become effective until it was published. This Court, applying Texas law, held that the arbitration agreement was illusory and unenforceable.

This Court noted that "there [was] nothing to suggest that[,] once published[,] the amendment would be inapplicable to disputes arising, or arising out of events occurring, *before* such publication, and thus the

[17] *See id.*

[18] *See id.*

arbitration agreement [was] illusory."[19] Therefore, the Court held that because Amway could simply amend its arbitration agreement and apply that amendment retroactively, the agreement was illusory.

The arbitration agreement at issue in this case similarly reserves to Blockbuster the right to unilaterally modify or even eliminate it. The arbitration agreement in this case is contained in Blockbuster's "Terms and Conditions,"[20] The first paragraph, fifth sentence of those "Terms and Conditions" provides as follows: "*Blockbuster may at its sole discretion modify these Terms and Conditions of Use at any time and such modifications will be effective immediately upon being posted on this site.*"[21] Further down this same page, under the heading of "Changes to Terms and Conditions" the following language appears: "*Blockbuster may at any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy,* ***with or without notice****. Such modifications will be effective immediately upon posting.*[22] Blockbusters "Online Rental Terms and Conditions" contain the following language: *"These Online Rental*

[19] *Morrison.*, 517 F.3d at 254-57 (5th Cir. 2008).

[20] *See* CR 75.

[21] *See* CR 72 (emphasis added).

[22] *See* CR 72 (emphasis added).

Terms and Conditions are subject to change by Blockbuster at any time, in its sole discretion with or without advance notice."[23]

These provisions clearly allow for modification or elimination of the arbitration provision at issue in this case. Particularly troublesome is the second set of language quoted which states that the "Terms and Conditions" can be modified *without notice.* The arbitration provision in Blockbuster's "Terms and Conditions" purports to apply to "[a]ll claims . . . whether pre-existing, present or future."[24] Thus, should Blockbuster decide that it wishes to no longer be bound to this arbitration provision, it need only carve out the type of claim it wishes to pursue in Court and those changes to the policy would be binding at the time they are posted to Blockbuster's website. And the new provisions would apply to all claims, pre-existing, present, or future.

Just as was the case in *Morrison,* there is no indication than any such amendments could not have retroactive effect. Just as was the case in *Morrison*, should Blockbuster decide that it wishes to no longer be bound to this arbitration provision, it need only carve out the type of claim it wishes to pursue in Court and those changes to the policy would be binding at the time they are posted to Blockbuster's website, and would have *retroactive effect.*

[23] *See id.* CR 76 (emphasis added).

[24] *See id.* CR 75.

Just as in *Morrision,* there is no savings clause limiting the application of such an amendment to disputes arising after posting of the amendment. This Court has specifically held that this type of arbitration agreement is unenforceable, and that holding is binding on this Court.[25]

Also contrary to Blockbuster's arguments in this case, the Court held that the arbitration agreement was illusory despite that fact that the right to unilaterally amend the arbitration agreement was contained in a separate provision of the overall agreement. The Court noted that "[t]here is no express exemption of the arbitration provisions from Amway's ability to unilaterally modify all rules." The Court concluded that because "[t]here [was] nothing in any of the relevant documents which precludes amendment to the arbitration program – *made under Amway's unilateral authority to amend its Rules of Conduct* – from eliminating the entire arbitration program or its applicability to certain claims or disputes so that once notice of such an amendment was published mandatory arbitration would no longer be

[25] *Lee v. Frozen Food Exp., Inc.* 592 F.2d 271, 272 (5th Cir. 1979) ("Once a panel of this Court has settled on the state law to be applied in a diversity case, the precedent should be followed by other panels . . . absent a subsequent state court decision or statutory amendment which makes this Court's decision clearly wrong.").

available even as to disputes which had arisen and of which Amway had notice prior to the publication."[26]

Thus, in this case, just as in *Morrison*, the arbitration agreement is illusory because Blockbuster, like Amway, has no limitations on its power to change or alter the contract. Blockbuster argues that the "Dispute Resolution" provision governing arbitration does not permit it to amend the arbitration provision or avoid its promise to arbitrate because the agreement explicitly provides that it applies to "[a]ll claims, disputes or controversies . . . whether pre-existing, present or future."[27] However, Blockbuster has left itself ample "wiggle" room by providing that it may modify "Terms and Conditions of Use," which include the arbitration agreement, as it sees fit and at its sole discretion. As the changes-in-terms provision is encompassing of *all* provisions under the Contract, including the "Dispute Resolution" provision, Blockbuster ultimately reserves the right to change the rules whenever it suits Blockbuster. And there is no prohibition against retroactive amendments, as there have been in other cases allowing this type of provision. As this Court has previously ruled, such unilateral language makes Blockbuster's promise to arbitrate illusory and invalidates its own "Dispute Resolution" provision.

[26] *See Morrison.*, 517 F.3d at 254-57 (5th Cir. 2008).

[27] *See id.* CR 75.

Appellant cites *In re Champion Technologies, Inc.* as authority for the proposition that a change-in-terms provision will not render an arbitration provision illusory when any changes to the arbitration provision would only have a prospective effect. That case, however, is easily distinguishable. In *In re Champion Tech.*, an employer entered into a stand-alone arbitration agreement with its employees. The stand-alone arbitration agreement specifically stated the following:

> "This [arbitration agreement] may be amended by [employer] at any time by giving at least 30 days' notice to current Employees. However, *no amendment shally apply to a Dispute for which a proceeding has been initiated pursuant to the Rules, unless otherwise agreed.* (emphasis added)
>
> [Employer] may amend the Rules at any time by serving notice of the amendment on AAA. However, *no amendment of the Rules shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules, unless otherwise agreed.*" (emphasis added)[28]

The second sentence provides that the Employer cannot unilaterally amend after arbitration has been initiated. The Court concluded that this provision in the contract establishes that changes to the agreement would only have a prospective effect.[29] The Court pointed out that there was an initial thirty-

[28] *In re Champion Techs., Inc.*, 222 S.W.3d 127, 131 (Tex. App.—Eastland 2006, no pet.).

[29] *Id.* at 132.

day period during which the employer could not have amended or terminated the arbitration agreement; and this initial thirty-day window of protection negates the illusory promise contention of the employees.[30]

In the instant case, the contract, arbitration agreement, and change-in-terms provision are devoid of such limiting language (and are more analogous to terms used in *Morrison*). Blockbuster's change-in-terms provision literally reads:

> "Blockbuster may *at any time*, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, *with or without notice*. Such modifications will be effective immediately upon posting." (emphasis added)[31]

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[30] The *In re Champion Tech.* court also points out that the employer's "Code of Conduct" and "Workplace Rules" included provision that the employer retains the right to amend, alter and terminate policies and procedures at any time. However, as part of the stand-alone arbitration agreement, the employer had each employee sign an acknowledgment pages that read, "I further recognize that [employer] may amend, change, or terminate the [arbitration agreement] *only* in accordance with [aforementioned amendment provision] and that policies, provisions, or statements contained in any document other than the [arbitration agreement], which address [employer's] right to amend, change, or terminate policies, procedures, or programs, shall not apply to the [arbitration agreement.]" The court concluded that since the employer's right to amend at any time provision was outside the arbitration agreement, the employer was bound by the change in term provisions within the arbitration agreement only. *Id.* at 133-34.

[31] *See id.* CR 72.

It is clear that without any limiting language on any retroactive effects, such as the provisions analyzed in *In re Champion Tech.*, any changes or amendments made by Blockbuster may, indeed, have the retroactive effect of no longer binding Blockbuster to arbitration, thereby making the agreement and contract illusory.

Appellant's reliance on *In re Halliburton Co.* is also misplaced. There, an employer sent notice to all of its employees that it was adopting a Dispute Resolution Program. The notice informed employees that, by continuing to work after a specified date, they would be accepting the new program. The employee at issue in that case did continue to work for his employer after the specified date, thus accepting the terms in the Dispute Resolution Program. The employer also included a change-in-terms provision that allowed it to retain the right to modify or discontinue the agreement. But there, as in *In re Champion Tech.*, the agreement also provided that "no amendment shall apply to a Dispute of which the [employer] had actual notice on the date of the amendment." Again, the court concluded that this supplemental provision shows that any changes can only have a prospective effect, therefore, negating claims of illusory promises.[32]

[32] *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002).

As the District Court correctly noted, Blockbuster does not include any limiting language in its contract or arbitration agreement that any amendments or changes are only prospective in nature.[33] Instead, Blockbuster simply asserts that since it has not actually amended its arbitration provision, that the *Morrison* case is distinguishable. This argument misses the mark, however, as any changes can easily be retroactive, as there is no language limiting retroactive application. As the District Court correctly noted, nothing in *Morrison* limited its application to cases where an arbitration provision is actually amended.[34] Thus, Blockbuster's promise to arbitrate is illusory and the arbitration agreement and contract, as a whole, are invalid.

In short, Blockbuster has simply retained too much authority to change this agreement at will for it to be enforceable. Blockbuster wants to have its proverbial cake and eat it too. This Court has previously held that a party cannot retain such expansive amendment rights so that it is not bound by the agreement.

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[33] *See* CR 239 ("The Blockbuster contract only states that modifications 'will be effective immediately upon posting,' and that natural reading of that clause does not limited the application of the modifications to earlier disputes.").

[34] *See* CR 240 (citing *Simmons v. Quixtar, Inc.*, No. 4:07cv389, 2008 WL 2714099 (E.D. Tex. July 9, 2008).

Contrary to Blockbuster's assertions in this Appeal, this challenge is not to the Contract as a whole, but rather to the arbitration agreement itself. Blockbuster had the burden of establishing the existence of a valid agreement to arbitrate. The arbitration provisions of its "Terms and Conditions," do not satisfy that burden. Just as this Court recognized in *Morrison*, this lack of mutuality of obligation renders the arbitration agreement illusory. For this reasons, Appellees request the District Court Order be affirmed.

2. The Underlying Contract is Also Illusory and Cannot Provide Consideration for the Arbitration Provision

While the Texas Supreme Court appeared to recognize the general invalidity of arbitration agreements, which do not bind parties equally in 2006,[35] other precedent has purportedly clarified how this rule is to be applied when dealing with cases of non-stand-alone arbitration agreements: "In the context of stand-alone arbitration agreements, binding promises are

[35] *In re Palm Harbor Homes, Inc.* 195 S.W.3d 672, 677 (Tex.,2006) ("We have recognized that an arbitration agreement may be illusory if a party can unilaterally avoid the agreement to arbitrate. See *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230 & n. 2 (Tex.2003). In *Davidson*, we remanded a case for the trial court to determine whether an ambiguous contract allowed an employer to modify or terminate an arbitration agreement at any time. Id. at 230-31. We noted that most courts which have considered the issue have held that if one party retains a unilateral, unrestricted right to terminate an arbitration agreement, the agreement is illusory.").

required on both sides as they are the only consideration rendered to create a contract. . . . But when an arbitration clause is part of an underlying contract, the rest of the parties' agreement provides the consideration."[36]

Under Texas law, arbitration agreements, like other contracts, must be supported by consideration.[37] Such consideration may take the form of bilateral promises to arbitrate.[38] As discussed above, Blockbuster has failed to demonstrate adequate consideration in this form. When an arbitration clause is part of a larger, underlying contract, however, Texas Courts have held the remainder of the contract *may* provide consideration for the arbitration clause. [39] Thus, for a non-standalone arbitration agreement to have sufficient mutuality of obligation to be enforceable, the underlying contract of which it is a part must have sufficient mutuality to be enforceable. In other words, the underlying contractual obligations must be sufficiently binding on Blockbuster to create enforceable legal obligations.

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[36] *In re AdvancePCS Health L.P.* 172 S.W.3d 603, 607 (Tex. 2005).

[37] *See* In re Palm Harbor Homes, Inc., 195 S.W.3d at 676-77 ("Arbitration agreements, like other contracts, must be supported by consideration"); *In re Advance PCS Health L.P.*, 172 S.W.3d 603, 607 (Tex. 2005) (per curiam); *In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002).

[38] *See In re Advance PCS*, 172 S.W.3d at 607.

[39] *Id.; see also In re FirstMerit Bank, N.A.*, 52 S.W.3d at 757.

Otherwise, the underlying contract is illusory and lacks the consideration required to make the arbitration agreement valid. It also has to be noted that Texas Courts have only said that the underlying contract "may" provide sufficient consideration. This is not an absolute rule, as Blockbuster's arguments presuppose. The only way for *Blockbuster* to establish sufficient consideration for the arbitration provision, is for *it* to establish that the remainder of the contract provides the necessary consideration. Blockbuster cannot meet its burden on this issue either.

Blockbuster's arguments about this being an issue for the arbitrator to decide, demonstrate its misunderstanding of its obligation in this respect. Blockbuster devotes a significant portion of its argument to the proposition that Plaintiff is challenging the contract as a whole and cites *Buckeye Check Cashing, Inc. v. Cardegna*.[40] Plaintiff, however, is merely putting Blockbuster to its proof of demonstrating why the remainder of its purported contract with Plaintiff constitutes sufficient consideration for the illusory arbitration provision. *Buckeye* dealt with an issue, fraudulent inducement, that might serve to void a contract. *Buckeye* specifically recognized that contract formation issues have to be addressed to resolve whether a valid agreement to arbitrate was ever formed. As the Texas Supreme Court

[40] 546 U.S. 440, 449 (2006).

recently recognized, such issues do not fall within *Buckeye,* as they involve whether a valid arbitration agreement was ever formed at all.[41] In order to address these issues, the Court must look at the remaining provisions of the purported contract.[42]

Blockbuster cites numerous cases in its Initial Brief which specifically hold that Blockbuster must first establish consideration for its purported arbitration agreement. For the reasons stated above, Blockbuster cannot rely on the arbitration provision itself to establish that consideration. As discussed below, the contract Blockbuster relies up on to establish this consideration is just as illusory as the arbitration provision itself. This issue is for this Court to determine, not the arbitrator.[43]

In examining this issue, a closer examination of Blockbuster's purported "contract" (supposedly contained in its "Terms and Conditions")

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[41] *In re Morgan Stanley & Co., Inc.* 2009 WL 1901635, (Tex. July 3, 2009) ("Given the overwhelming weight of authority, it is apparent to us that the formation defenses identified in Buckeye are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator.")

[42] *See id.* ("Despite casual assumptions to the contrary, Prima Paint does not merely preserve for the courts challenges that are "restricted" or "limited" to "just" the arbitration clause alone--this would be senseless; it preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question.")

[43] *See id.*

is in order. Such examination reveals that Blockbuster has completely absolved itself of any binding obligations. Texas Courts have held that where a party limits its liability to the point of being immune from performance of its contractual obligations, the contract is illusory. In *Sterling Computer Systems of Texas, Inc. v. Texas Pipe Bending Co.*,[44] the contract at issue contained a provision which stated that "SCS (Sterling) shall not be liable for its failure to profide (sic) the services herein and shall not be liable for any losses resulting to the client (Texas Pipe Bending) or anyone else by reason of such failure." The Court held that:

> "[u]nder the express terms of the contract in question Sterling would not be liable for an outright refusal to perform the data processing services. This fact renders its obligation a nullity. . . . As a matter of law the contract in question fails for want of mutuality. The trial court correctly granted summary judgment for the Plaintiff, Texas Pipe Bending Company."[45]

Examination of the language contained in the "Terms and Conditions" in this case reveals that Blockbuster is similarly not bound to any obligation. Blockbuster fully disavows any liability for any failure to adhere to the "Terms and Conditions" mandating that "[i]n no event shall Blockbuster . . . ***be liable*** for any direct, indirect, special, incidental, consequential, punitive

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[44] 507 S.W.2d 282, 282 (Tex.Civ.App., 1974).

[45] *See id.*

or aggravated damages . . .or any other damages of any kind, arising out of or in connection with: this site. . . . This ***exclusion of liability*** shall apply to the fullest extent permitted by law.[46] Interestingly, Blockbuster titled this section "***Limitation of Liability***" while surreptitiously inserting language at the end of the paragraph *excluding all liability*. This provision goes far beyond the normal limitation of liability. Blockbuster has essentially made itself immune from compliance with its own "Terms and Conditions." This fact alone is sufficient to determine that Blockbuster's overall "contract" fails for want of mutuality under *Sterling*.

Blockbuster is also in no way bound to continue offering an "account" to Plaintiffs as Blockbuster, on page five of the "Terms and Conditions," states that it "may at any time *and at its sole discretion* terminate your [Appellee's] right to use this Site."[47] Blockbuster also "may suspend or cancel a BLOCKBUSTER Online membership account, or otherwise restrict [Appellees'] use of BLOCKBUSTER Online, *in Blockbuster's sole discretion, with or without cause.*"[48] Blockbuster "reserves the right to suspend or end the BLOCKBUSTER Online service (including, without

[46] *See* CR 75.

[47] *See* CR 76.

[48] *See* CR 83.

limitation, ceasing to offer one or all of BLOCKBUSTER Online membership plans, BLOCKBUSTER Total Access, promotional offers or free trials) *without prior notice, in Blockbuster's sole discretion.* Blockbuster also reserves the right to suspend or end the BLOCKBUSTER Online service or certain aspects thereof such as BLOCKBUSTER Total Access in certain geographic areas *without prior notice, in Blockbuster's sole discretion*."[49] Blockbuster also disavows any warranties regarding not only the quality of its products but also the truthfulness of any assertions contained on its website.[50] Of course, all of these provisions must also be considered alongside Blockbuster's complete and unfettered, unilateral rights, as discussed above, to completely modify or eliminate the "Terms and

[49] *See* CR 83.

[50] THIS SITE, ITS CONTENTS, AND ANY SOFTWARE, PRODUCTS, AND SERVICES OFFERED OR CONTAINED HEREIN ARE PROVIDED ON AN "AS IS" BASIS . . .. BLOCKBUSTER INC. MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO THIS ITS CONTENTS, OR SUCH SOFTWARE PRODUCTS AND SERVICES, AND DISCLAISM ALL SUCH REPRESENTATIONS AND WARRANTIES . . . IN ADDITION, BLOCKBUSTER DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION ACCESSIBLE VIA THIS SITE IS ACCURATE, COMPLETE OR CURRENT. PRICE AND AVAILABILITY INFORMATION IS SUBJECT TO CHANGE WITHOUT NOTICE.

Conditions" at will, without notice, and with the changes being effective as soon as Blockbuster posts them to its website.

These contract provisions make it clear that Blockbuster has absolved itself of any obligations regarding its relationship with Plaintiffs. The "exclusion of liability" for its failure to perform any of the supposed "contractual" duties is indistinguishable from the exclusion found in the contract provided in *Sterling Computer*. Nothing about the provision "to the fullest extent permitted by law" saves this provision. None of the cases cited by Blockbuster on this issue are applicable to these specific facts. This exclusion of liability, particularly when coupled with the broad and sweeping reservations to Blockbuster contained in this agreement clearly make this agreement illusory on Blockbuster's end. Blockbuster is under no obligation to do anything and can completely change the terms of its supposed agreement with Plaintiffs at its sole discretion *and the changes take effect immediately* and can be retroactive. Furthermore, these changes can be made *with or without notice* to Plaintiffs.

It is true the Blockbuster attempts to impose on Plaintiffs a duty to monitor its website and to discontinue using the site if they do not agree with any changes, but this does not alter the fact that Blockbuster asserts that any changes are effective immediately upon being posted to its website, before

Plaintiffs have even had a chance to review the changes. These changes can also clearly be made retroactive in any event. As the District Court noted, "the natural reading of that clause does not limit application of the modifications to earlier disputes."[51]

Blockbuster is also under no obligation to highlight any changes to its policy in any way. Thus, Plaintiffs presumably have a duty, each time they use Blockbuster's website, to re-read over twenty pages of terms and conditions and compare them the previous terms and conditions (hopefully Plaintiffs kept a copy) to see if their agreement has been altered in any way.

Combined, these provisions simply inure too much power to Blockbuster to alter them at will to constitute sufficient consideration for a binding contract. Appellant's admonitions about not interpreting contracts in such a way as to reach absurd results or in ways that would render them illusory do not apply when the contract is subject to only one interpretation. Despite the clear contractual terms outlined above, Blockbuster is essentially suggesting that this contract be completely re-written by this Court so as to make it binding on Blockbuster. This Court has no obligation to make such drastic alterations to Blockbuster's written contract, for the sole purpose of making it more enforceable against Blockbuster, so that it can also be

[51] *See* CR 239.

enforced against Plaintiffs. The District Court did not "reach out" to invalidate this contract. It simply interpreted the contract in a way consistent with its language. Blockbuster, who drafted the contract, should not be allowed to now claim that it should not be interpreted as it is written.

Nor can these provisions simply be severed, as Blockbuster suggests. There are multiple provisions scattered throughout the contract that suggest that Blockbuster intended to not be bound by this agreement. For Blockbuster to now suggest that those provisions were really not what it intended (or are not integral to the contract) and can simply be severed is disingenuous. Severing these provisions would result in a complete re-writing of the document and is neither warranted nor required.

Nor does any purported "part performance" save this contract. First, as this argument was only brought to the District Court's attention in a footnote on the last page of Blockbuster's reply brief,[52] it was not properly preserved for review by this Court.[53] This issue should have addressed head

[52] CR 126, n.12.

[53] *Paese v. Hartford Life Accident Ins. Co.* 449 F.3d 435, 446 (C.A.2 (N.Y.),2006) ("This statement in a footnote was insufficient to preserve the argument that the district court could only consider disability benefits under the own occupation standard. *See Caiola v. Citibank, N.A.,* 295 F.3d 312, 328 (2d Cir.2002) (argument raised in a footnote in a brief to the district court insufficient to preserve the issue for appellate review); *see also Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 445 (2d Cir.2001) ("[W]e have repeatedly ruled that arguments presented to us only in a footnote are not

on in the District Court. The failure to property raise the argument below should bar this Court from considering it now. Second, as an equitable remedy, Blockbuster has not presented any persuasive authority that this issue should be applied in this context. None of the cases cited explicitly apply this doctrine in this context. The Court should not expand Texas law in this area to validate an otherwise invalid arbitration agreement.

In short, the arbitration itself lacks mutuality of obligation. Thus, the only way to for Blockbuster to establish sufficient consideration for the agreement is to look to the underlying contract. Thus, it is entirely proper to consider whether the underlying "Terms and Conditions" provide sufficient mutuality of obligation to save the arbitration agreement. They do not. The arbitration agreement is illusory because Blockbuster retains the absolute, unilateral right to modify it, at its sole discretion. If it is to be considered a valid agreement, it must be because of some non-illusory obligation of Blockbuster pursuant to the underlying contract. As was just discussed, however, the entire agreement is illusory as to Blockbuster and does not

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entitled to appellate consideration."); *United States v. Restrepo,* 986 F.2d 1462, 1463 (2d Cir.1993) ("We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review.").

provide the necessary consideration to validate the arbitration agreement. For this reason, no valid agreement to arbitrate was ever formed in this case.

For these reasons, Blockbuster has failed to meet its initial burden of demonstrating the existence of a valid arbitration agreement. And the District Court was correct in recognizing this fact. For these reasons, Plaintiffs respectfully request that the District Court's Order be affirmed.

3. Blockbuster Has Not Showed Sufficient Manifestation of Assent.

A second reason there is no valid contract (and one not addressed by the District Court) is that Blockbuster has failed to demonstrate that Plaintiffs actually agreed to the "Terms and Conditions." Blockbuster argues that the "clickwrap" agreement is valid under Texas law to create a binding contract because Plaintiffs were required to click on a box on their computer screen indicating their acceptance of the "Terms and Conditions" which, although available to be viewed by Appellees, were not actually on the screen at the time. Blockbuster presents a single case from a Texas state court holding that "clickwrap" agreements can constitute a valid contract. Unlike the agreements in those cases, however, the click-through promulgated by Blockbuster did not require the user to scroll through the

agreement before clicking through.[54] Thus, this case is not applicable. Blockbuster has not cited any other Texas state court upholding such "clickwrap" agreements. The district court opinion presented is obviously not binding on this court. There has been no evidence that Plaintiffs manifested assent to this agreement in any way other than by virtue of their clicking on a box on their computer. Since Plaintiffs were not required to scroll through the "Terms and Conditions" or to even click on the link to them, there has been no evidence that Plaintiffs assented to them. For these reasons, Blockbuster has failed to demonstrate that Plaintiffs actually agreed to the "Terms and Conditions" in the first place.[55]

For all of the above reasons, Blockbuster has simply failed to meet its burden of establishing the existence of a valid agreement to arbitrate in this case. For these reasons, Appellees respectfully request that this Court affirm

[54] *See Recursion Software, Inc. v. Interactive Intelligence, Inc.,* 425 F.Supp.2d 756, 781 (N.D. Tex. 2006) (user required to scroll to bottom of web page before agreeing to license terms); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App.—Eastland 2001, pet. denied)("By the very nature of the electronic format of the contract, Barnett had to scroll through that portion of the contract containing the forum selection clause before he accepted its terms.").

[55] *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 31-35 (2d Cir. 2002) (holding that under California law, the plaintiff did not accept any software-download contract terms despite clicking on a "Yes" icon because the terms were only visible on a separate screen below the "Yes" icon, and a reasonably prudent offeree would not have scrolled down and noticed the terms before clicking "Yes.")

the District Court's ruling that this arbitration agreement is illusory and enforceable.

B. The Arbitration Provision is Unconscionable.

Even though the District Court did not reach the issue of unconscionability, Blockbuster devotes a significant portion of its brief to this issue. Thus, Appellees, out of an abundance of caution, address this issue as well.

***1.* The Arbitration Agreement Is So One-Sided That It Is Unconscionable.**

Even if the Court concludes that a valid arbitration agreement exists, the agreement is unconscionable. Under Texas law, in the arbitration context, the Court can consider substantive unconscionability as well as procedural unconscionability.[56] Appellees can establish both.

Under Texas law "the test for substantive unconscionability is whether, "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." [57] In fact, this Court has upheld a lower court

[56] *See In re Halliburton,* 80 S.W.3d at 572 (clarifying that courts may address claims that an arbitration clause is substantively unconscionable).

[57] *In re Palm Harbor Homes, Inc*. 195 S.W.3d 672, 678 (Tex.,2006) (citing *In re FirstMerit Bank,* 52 S.W.3d at 757).

ruling in Louisiana that an arbitration agreement which only bound the consumer was unconscionable due to its one-sidedness.[58] This holding is in line with a number of state and federal courts around the country.[59] Furthermore, the terms and conditions constitute a contract of adhesion under Texas law where they constitute a "standardized contract form[ ] offered to consumers of goods and services on an essentially 'take it or leave it' basis ... limit[ing] the duties and liabilities of the stronger party."[60] Once again, this issue is for the Court to decide, not the arbitrator.[61]

This arbitration provision is procedurally unconscionable because it is presented on a "take it or leave it" basis by a party with far superior bargaining power. The arbitration provision is also buried on the fourth page

[58] *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC* 379 F.3d 159, 168 (5th Cir. 2004)

[59] *See, e.g. Zuver v. Airtouch Communications, Inc.* 153 Wash.2d 293, 318, 103 P.3d 753, 767 (Wash. 2004)("Rather, she contends that the *effect* of this provision is so one-sided and harsh that it is substantively unconscionable. We agree.").

[60] *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex.1987).

[61] *Nagrampa v. MailCoups, Inc.* 469 F.3d 1257, 1264 (9th Cir. 2006) (holding that unconscionabilility of arbitration agreement can still be evaluated after *Buckeye* and that Court must sometimes look at the entire agreement in doing so); *In re Morgan Stanley & Co., Inc.* 2009 WL 1901635, (Tex. July 3, 2009) ("Given the overwhelming weight of authority, it is apparent to us that the formation defenses identified in Buckeye are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator.")

of over twenty pages of terms and conditions.[62] There is no bold print or other indication to make this particularly important term stand out in the "Terms and Conditions."[63] Interestingly, Blockbuster places language in two places on the first page of the "Terms and Conditions" regarding its unilateral ability to amend or alter the agreement, but chooses to place the arbitration provision on page four of the agreement. In fact, the "Disclaimer of Warranties" and "Limitation of Liability" provisions of the "Terms and Conditions" (also on page 4) are written entirely in uppercase lettering immediately before the arbitration agreement, almost as though they were designed to distract the reader from the "Dispute Resolution" provision. Over half of the typeface on page 4 is in uppercase typeface, yet the arbitration provision is not. Despite this, Blockbuster contends that its arbitration agreement is "conspicuously identified." This is certainly not the case. "Conspicuously identified" would be all capitalization or bold typeface like the other provisions on page 4 (which are apparently more important to Blockbuster).

Finally, the arbitration agreement was part of a "Terms and Conditions" screen which was not even visible when Appellees checked a

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[62] *See* CR 75.

[63] *See generally* CR 72-92

box indicating their agreement to it.[64] To see the "Terms and Conditions" Appellees would have been required to go to another page on Blockbuster's website.[65] Although Texas state courts have upheld these types of "clickwrap" agreements, the cases involved a situation where the plaintiff was required to scroll through the terms and conditions and after scrolling to the end was asked whether they agreed. The absence of such a scroll feature, along with the other infirmities described above, further contribute to the unconscionability of the arbitration provision at issue.[66] This renders it procedurally unconscionable. However, it is the provisions contained in the arbitration provision that make it substantively unconsctionable.[67]

As noted above, the arbitration provision at issue inures only to Blockbuster's benefit, who retains unilateral discretion to modify or

[64] *See* CR 68.

[65] *See* CR 68.

[66] *See Recursion Software, Inc. v. Interactive Intelligence, Inc.,* 425 F.Supp.2d 756, 781 (N.D. Tex. 2006) (user required to scroll to bottom of web page before agreeing to license terms); *Barnett v. Network Solutions, Inc*., 38 S.W.3d 200, 204 (Tex. App.—Eastland 2001, pet. denied)("By the very nature of the electronic format of the contract, Barnett had to scroll through that portion of the contract containing the forum selection clause before he accepted its terms.").

[67] *See Holeman v. Nat'l Bus. Inst., Inc.,* 94 S.W.3d 91, 99 (Tex.App. 2002) (noting that disparate bargaining power is not enough to render a contract unconscionable, and stating that "it is the unfair use of, not the mere existence of," disparity in bargaining power that renders a contract unconscionable).

eliminate this provision at will. This combined with the fact that Blockbuster has reserved to itself the right to modify any contract provision makes this agreement unconscionable. When the "exclusion of liability" provisions are considered, the question begins to emerge: what exactly is left to arbitrate anyway? The next sections of this argument will discuss in detail the fact that this arbitration provision also contains a completely one-sided class action ban and waive important federal statutory rights. Under these circumstances, however, this arbitration provision is onerous and unfair. It is so one-sided that it should not be enforceable.

While Blockbuster has done a good job of presenting cases which hold that any one of these scenarios in isolation are insufficient to hold an arbitration agreement to be unconscionable, none of the cited cases consider all of these issues together. Appellees urge this Court to consider the totality of the circumstances presented. Together these issues all lead to the same conclusion: A very large company pushing the envelope on what is considered acceptable in an arbitration agreement. Appellees contend that Blockbuster simply pushed the envelope too far and that it is unenforceable under Texas law. Thus, should the Court reach this issue, Appellees ask that the Court rule that this agreement is unconscionable under Texas law.

2. The Arbitration Agreement is Unconscionable Because it Contains a One Sided Class Action and Class Arbitration Prohibition.

The purported agreement also contains a class-action and class arbitration waiver which by its express terms only applies to Appellees, not Blockbuster. This provision, which is part of the purported arbitration agreement, further contributes to the one-sided (and therefore unconscionable) nature of this agreement. Blockbuster is correct that Texas Courts have found that class action waivers are permissible.[68] Texas Courts have not considered, however, the validity of a one-sided class action waiver, combined with all of the other one-sided elements of this agreement. Texas Courts have also noted that class-action waivers may be invalid in certain circumstances.[69] This should be one of those circumstances.

Just last year, the New Mexico Supreme Court ruled that class action waivers are against public policy in the State of New Mexico and refused to apply a choice of law provision mandating application of Texas law because,

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[68] *AutoNation USA Corp. v. Leroy,* 105 S.W.3d 190, 199-201 (Tex.App.2003) (contractual prohibition of class actions not fundamentally unfair or violative of public policy).

[69] *AutoNation USA Corp. v. Leroy* 105 S.W.3d 190, 200 (Tex.App.-Houston [14 Dist.],2003) ("[t]here may be circumstances in which a prohibition on class treatment may rise to the level of fundamental unfairness.").

to do so would likely require upholding the class action wavier.[70] According to the New Mexico Supreme Court:

> The opportunity to seek class relief is of particular importance to the enforcement of consumer rights because it provides a mechanism for the spreading of costs. The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim. See, e.g., 1 ALBA CONTE & HERBERT B. NEWBERG, Newberg on Class Actions § 1.6, at 26 (4th ed.2002). "In many cases, the availability of class action relief is a *sine qua non* to permit the adequate vindication of consumer rights." *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265, 278 (2002). "The class action is one of the few legal remedies the small claimant has against those who command the status quo." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (Douglas, J., dissenting in part).

New Mexico is clearly aligning itself with an emerging trend in the law to disfavor class action waivers. The Washington Supreme Court has also noted the "increasing number of courts have found class action waivers in arbitration clauses substantively unconscionable" noting that "there is a

[70] *Fiser v. Dell Computer Corp.* 188 P.3d 1215, (N.M. 2008).

clear split of authority."[71] New Mexico, along with other states[72] has recognized the importance of the class action device to resolve these types of consumer disputes. These Courts have also recognized that allowing the waiver of the class action device effectively prevents litigants from seeking

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[71] *Scott v. Cingular Wireless* 160 Wash.2d 843, 850-851, 161 P.3d 1000, 1004 (Wash.,2007)(citing *E.g., Ting v. AT & T*, 319 F.3d 1126, 1150 (9th Cir.2003); *Skirchak v. Dynamics Research Corp*., 432 F.Supp.2d 175, 181 (D.Mass.2006); *Edwards v. Blockbuster Inc*., 400 F.Supp.2d 1305, 1309 (E.D.Okla.2005); *Luna v. Household Fin. Corp. III*, 236 F.Supp.2d 1166, 1178 (W.D.Wash.2002); *Lozada v. Dale Baker Oldsmobile, Inc.,* 91 F.Supp. 2d 1087, 1105 (W.D.Mich.2000); *Leonard v. Terminix Int'l Co., L.P.,* 854 So. 2d 529, 538 (Ala.2002); *Discover Bank v. Superior Court of Los Angeles,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005); *Powertel, Inc. v. Bexley, 743 So.2d 570*, 576 (Fla.Dist.Ct.App.1999); *Kinkel v. Cingular Wireless*, L.L.C., 223 Ill.2d 1, 47, 857 N.E.2d 250, 306 Ill.Dec. 157 (2006); *Whitney v. Alltel Commc'ns, Inc*., 173 S.W.3d 300, 314 (Mo.Ct.App.2005); *Muhammad v. County Bank of Rehoboth Beach*, 189 N.J. 1, 20-21, 912 A.2d 88 (2006); Schwartz v. Alltel Corp., 2006-Ohio-3353 ¶ 36, 2006 WL 2243649 (Ohio Ct.App.); *Vasquez-Lopez v. Beneficial Or., Inc*., 210 Or.App. 553, 572, 152 P.3d 940 (2007); Thibodeau v. Comcast Corp., 2006 PA Super. 346, ----, 912 A.2d 874, 886; see also *Kristian v. Comcast Corp*., 446 F.3d 25, 64-65 (1st Cir.2006) (struck class action waiver for preventing vindication of *851 statutory rights); *Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶ 73, 290 Wis.2d 514, 714 N.W.2d 155 (questioning whether class action waiver in arbitration clause would be enforceable).

[72] *Cooper v. QC Financial Services, Inc.* 503 F. Supp.2d 1266, 1286 (D. Ariz. 2007)(holding class action wavier to be unconscionable) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device) *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (Cal.Ct.App.

redress for small dollar consumer claims such as the claims brought in this lawsuit.

Appellees submit that, should the Texas Supreme Court be presented with such a one-sided waiver of the class action device presented in this case, (especially in combination with the "exclusion of liability" and "change of terms" provisions of the agreement) it would recognize the important policy implications of allowing such waivers to stand. This is especially true in the context of Video Privacy Protection Act cases, where the legislative goals of that statue would be thwarted by allowing class action waivers. This class action waiver, incidentally, also purports to waive any class arbitration. Thus, even if the American Arbitration Association allowed class arbitrations, those too would be waived. One-sided class action and class arbitration waivers are contrary to public policy and, as recognized by the New Mexico Supreme Court and numerous others, should be considered unconscionable. This is particularly true where, as here, Appellees seek to represent a nationwide class of Blockbuster customers. Given the large number of states to hold that waiver of the class action device renders an arbitration agreement unconscionable, Appellees ask this Court to clarify that prior Texas jurisprudence on this issue does not allow

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2002), and *Powertel v. Bexley*, 743 So.2d 570 (Fla.Dist.Ct.App.1999).

such a one-sided class action and class arbitration waiver, particularly in consumer rights litigation. Because the class action waiver is so intertwined with the arbitration agreement in this case, it cannot be severed.[73]

3. The Agreement Agreement Is Also Unconscionable Because It Waives Important Federal Statutory Rights.

Texas law also recognizes that an arbitration agreement can be unconscionable where it waives important statutory rights.[74] This decision is in accord with other States' decisions as well.[75] This lawsuit involves repeated and systematic violations of the Video Privacy Protection Act.[76] Not only does Blockbuster attempt to limit the remedies available to Appellees, it also purports to disavow any liability for any action (or inaction) on its part. Blockbuster's "exclusion of liability" provision completely thwarts the purpose of the Video Privacy Protection Act, which specifically provides for liquidated damages because Congress anticipated

[73] *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008).("Here, the class action ban is part of the arbitration provision and is central to the mechanism for resolving the dispute between the parties; therefore, it cannot be severed.").

[74] *In re Poly-America, L.P.* 262 S.W.3d 337 (Tex. 2008)(holding that provisions of arbitration agreement, eliminating two types of remedies available under anti-retaliation provisions of Texas Workers' Compensation Act, were substantively unconscionable).

[75] *Powertel v. Bexley*, 743 So.2d 570 (Fla.Dist.Ct.App.1999).

[76] 18 U.S.C. § 2710.

that many people would be unable to demonstrate actual damages as a result of violations of this important privacy interest.

This has to be coupled with the class action waiver in this case. Together these clauses effectively cut off any meaningful redress of Appellees' grievances under federal law, rendering the arbitration clause unconscionable.[77] Thus, should the Court reach this issue, Appellees respectfully request that the Court conclude that the arbitration agreement in this case is unconscionable and affirm the District Court.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the District Court in all respects.

Respectfully submitted,

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[77] *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274-274, 181 (Ill. 2006)(discussing *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App. 2003) ("While there may be circumstances in which a prohibition on class treatment may rise to the level of fundamental unfairness, [Plaintiff's] generalizations do not satisfy her burden to demonstrate that the arbitration provision is invalid here") and stating that "[I]f there is a pattern in these cases it is this: a class action waiver will not be found unconscionable if the Plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the Plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner. If the agreement is so burdened, the "right to seek classwide redress is more than a mere procedural device.")).

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CERTIFICATE OF SERVICE

I certify that on October 27, 2009, the foregoing Appellees' Brief is being served this day on all counsel of record in the above styled appeal by U. S. mail, as listed in the attached service list.

/s/ Jeremy R. Wilson
Jeremy R. Wilson

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,132 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

/s/ Jeremy R. Wilson
Jeremy R. Wilson