UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

Martinez v. Wells Fargo Bank, N.A.
S.D. Fla. Case No. 1:09-cv-23834
D.N.M. Case No. 6:09-cv-01072-GBW-ACT

D. Gutierrez v. Wells Fargo Bank, N.A.
S.D. Fla. Case No. 1:09-cv-23685
D. Or. Case No. 3:09-cv-01329-ST

Zankich v. Wells Fargo Bank, N.A.
S.D. Fla. Case No. 1:09-cv-23186-JLK
W.D. Wash. Case No. C-08-1476-RSM

Garcia, et al. v. Wachovia Bank, N.A.
S.D. Fla. Case No. 1:08-cv-22463-JLK

Spears-Haymond v. Wachovia Bank, N.A.
S.D. Fla. Case No. 1:09-cv-21680-JLK
N.D. Cal. Case No. 3:08-cv-4610

ORDER GRANTING DEFENDANT'S MOTIONS TO DISMISS ALL CLAIMS OF UNNAMED CLASS MEMBERS IN FAVOR OF ARBITRATION

THIS CAUSE comes before the Court upon Defendant Wells Fargo Bank, N.A.'s Motions to Dismiss All Claims of Unnamed Class Members in Favor of Arbitration (D.E. 4388; D.E.

4389).[1] The parties fully briefed the motions and presented oral argument on July 24, 2019. The Court has carefully considered the Motions, responses, replies, and the oral argument of counsel. For the reasons that follow, the Court grants the Motions.

I. BACKGROUND

These five actions are among those transferred to the Court by the Judicial Panel for Multidistrict Litigation for pretrial purposes in MDL No. 2036, *In re: Checking Account Overdraft Litigation*. Each complaint seeks to pursue claims on a class basis, but at the time of transfer, no classes had been certified. The Court granted class certification in these cases on June 8, 2015. *See In re Checking Account Overdraft Litig.*, 307 F.R.D. 630, 655 (S.D. Fla. 2015) ("*Wells Fargo Class Certification Order*"); *In re Checking Account Overdraft Litig.*, 307 F.R.D. 656, 683 (S.D. Fla. 2015) ("*Wachovia Class Certification Order*"). Immediately thereafter, Wells Fargo moved to dismiss the claims of unnamed class members in favor of individual arbitration pursuant to each class member's contract with the bank.

Each of the complaints challenges certain alleged former practices of Wells Fargo Bank, N.A. or the former Wachovia Bank, N.A. relating to overdraft fees. Plaintiffs allege, *inter alia*, that these practices breached the covenant of good faith and fair dealing under the banks' contracts with their consumer checking account customers. Each complaint referred to and attached a copy of the Consumer Account Agreement ("Wells Fargo Agreement") or Deposit Agreement ("Wachovia Agreement") governing Plaintiffs' accounts.

[1] D.E. 4388 was filed in the actions involving the Wells Fargo Bank Consumer Account Agreement: *Martinez v. Wells Fargo Bank, N.A.*, S.D. Fla. Case No. 1:09-cv-23834; *Dolores Gutierrez v. Wells Fargo Bank, N.A.*, S.D. Fla. Case No. 1:09-cv-23685; and *Zankich, et al. v. Wells Fargo Bank, N.A.*, S.D. Fla. Case No. 1:09-cv-23186-JLK. D.E. 4389 addresses the actions involving the Deposit Agreement of the former Wachovia Bank: *Garcia, et al. v. Wachovia Bank, N.A.*, S.D. Fla. Case No. 1:08-cv-22463-JLK and *Spears-Haymond v. Wachovia Bank, N.A.*, S.D. Fla. Case No. 1:09-cv-21680-JLK. Wachovia was acquired by Wells Fargo as of January 1, 2009.

The Wells Fargo Agreement and the Wachovia Agreement used during the relevant period required individual, non-class arbitration of any disputes concerning the customer's account. In each contract, the arbitration terms were set off by a heading in large, highlighted or bolded type and were separately listed in the Table of Contents.

As an example, the arbitration clause in the Wells Fargo Agreement attached to the *Martinez* complaint states:

> **Dispute Resolution Program: Arbitration Agreement**
>
> This section constitutes the Arbitration Agreement between you and the Bank.
>
> **Non-Judicial Resolution Of Disputes.** If you have a dispute with the Bank, and you are not able to resolve the dispute informally, you and the Bank agree that any dispute between or among you and the Bank, regardless of when it arose, shall be resolved by the following arbitration process. **You understand and agree that you and the Bank are each waiving the right to a jury trial or a trial before a judge in a public court.**
>
> **Disputes.** A dispute is any unresolved disagreement between or among you and the Bank … arising out of or relating in any way to your Account and/or Services. It includes any dispute relating in any way to your Accounts and Services; to your use of any Bank location or facility; or to any means you may use to access the Bank, such as an Automated Teller Machine (ATM) or Online Banking. It includes claims based on broken promises or contracts, torts (injuries caused by negligent, or intentional conduct) or other wrongful actions. It also includes statutory, common law, and equitable claims. A dispute also includes any disagreement about the meaning of this Arbitration Agreement and whether a disagreement is a "dispute" subject to binding arbitration as provided for in this Arbitration Agreement. A dispute does not include a claim that may be filed in small claims court. If you have a dispute that is within the jurisdiction of the small claims court, you should file your claim there.
>
> **Binding Arbitration.** Binding arbitration is a means of having an independent third party resolve a dispute without using the court system, judges, or juries. Either you or the Bank may require the submission of a dispute to binding arbitration at any reasonable time notwithstanding that a lawsuit or other proceeding has been

> commenced. If either you or the Bank fails to submit to binding arbitration following a lawful demand, the one who fails to submit bears all costs and expenses (including attorney's fees and expenses) incurred by the other compelling arbitration.
>
> **Neither you nor the Bank shall be entitled to join or consolidate disputes by or against others in any arbitration, or to include in any arbitration any dispute as a representative or member of a class, or to act in any arbitration in the interest of the general public or in a private attorney general capacity.**
>
> Each arbitration, including the selection of the arbitrator shall be administered by the American Arbitration Association (AAA), according to the Commercial Arbitration Rules and the Supplemental Procedures for Consumer Related Disputes (excluding the Optional Procedures for Large, Complex Commercial Disputes) and the Optional Rules for Emergency Measures of Protection of the AAA ("AAA Rules").

(emphasis in original).

The arbitration clause in the Wachovia Agreement attached to the *Spears-Haymond* complaint states:

> **Arbitration of Disputes/Waiver of Jury Trial and Participation in Class Actions.** If either you or we request, any dispute or claim concerning your account or your relationship to us will be decided by binding arbitration under the expedited procedures of the Commercial Financial Disputes Arbitration Rules of the American Arbitration Association (AAA), and Title 9 of the US Code. Arbitration hearings will be held in the city where the dispute occurred or where mutually agreed. A single arbitrator will be appointed by agreement of the parties, or, if the parties are unable to agree, by the AAA and will be a retired judge or attorney with experience or knowledge in banking transactions. Each party will pay its own costs and attorney's fees....
>
> The arbitration ... will be brought individually and not as part of a class action. If it is brought as a class action, it must proceed on an individual (non-class, non-representative) basis. YOU UNDERSTAND AND KNOWINGLY AND VOLUNTARILY AGREE THAT YOU AND WE ARE WAIVING THE RIGHT TO A TRIAL BY JURY AND THE RIGHT TO PARTICIPATE OR BE REPRESENTED IN ANY CLASS ACTION LAWSUIT.

(emphasis in original).

Wells Fargo did not move to compel arbitration against any of the named Plaintiffs at the outset of this litigation. However, it did plead its arbitration rights in its answer to each of the complaints and otherwise informed Plaintiffs and the Court that it was reserving its arbitration rights via-a-vis unnamed class members in the event any classes were certified in these actions. Immediately after the classes were certified, it filed motions (predecessors to the motions now pending) seeking to enforce its arbitration rights against unnamed class members. Based on these facts, the Eleventh Circuit held that Wells Fargo appropriately preserved its arbitration rights as to the unnamed class members and thus did not waive those rights. *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1239 (11th Cir. 2018).[2] The Eleventh Circuit held that Wells Fargo "did not act inconsistently with its arbitration rights as to the unnamed Plaintiffs[,]" because the Bank expressly reserved its arbitration rights prior to the Court's class certification order, and promptly moved to enforce those rights against the unnamed Plaintiffs following the Court's decision to certify the classes. *Id.* at 1235–37.

With the issue of waiver ruled on by the Eleventh Circuit in Wells Fargo's favor, the parties completed briefing and presented oral argument on Plaintiffs' other arguments against enforcement of the arbitration agreements against unnamed class members.

II. DISCUSSION

A. Existence of Agreements to Arbitrate

The Federal Arbitration Act establishes a public policy strongly favoring arbitration and requires courts to enforce arbitration agreements according to their terms. *AT&T Mobility LLC v.*

[2] As used in this Order, "unnamed class members" refers to members of the certified classes other than the named Plaintiffs who originally brought these suits. In a prior appeal, the Eleventh Circuit affirmed this Court's holding that the bank had waived arbitration as to the named Plaintiffs. *Garcia v. Wachovia Corp.*, 699 F.3d 1273 (11th Cir. 2012). The claims of the named Plaintiffs are therefore not at issue in the pending motions, and the Court's dismissal order does not extend to them.

Concepcion, 563 U.S. 333, 339 (2011); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983).

The Supreme Court has held that, when a contract contains an arbitration clause, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960). Once a party demonstrates the existence of an arbitration agreement, any doubts as to its applicability must be resolved in favor of arbitration. *Stone v. E. F. Hutton & Co., Inc.*, 898 F.2d 1542, 1543 (11th Cir. 1990) (citing *Moses H. Cone*, 460 U.S. at 24–25).

Under the FAA, the only issues for the Court to decide (and even then only to the extent they are not delegated to the arbitrator) are (i) whether there is an arbitration agreement between the parties and (ii) whether the dispute falls within the scope of the arbitration agreement. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777–78 & n.1 (2010). If these conditions are met, the Court is required to either stay or dismiss the lawsuit in favor of arbitration. *Lambert v. Austin Ind.*, 544 F.3d 1192, 1195 (11th Cir. 2008).

In granting class certification in these cases, the Court has already found, at Plaintiffs' urging, that all members of the plaintiff classes are subject to "common and materially uniform" contracts: the Wells Fargo Agreement and Wachovia Agreement. *Wells Fargo Class Certification Order*, 307 F.R.D. at 641; *Wachovia Class Certification Order*, 307 F.R.D. at 669. There is no dispute that those contracts contain arbitration clauses that would cover the claims in these cases.

Therefore, the Court concludes that Wells Fargo has carried its initial burden on this motion, and the burden shifts to Plaintiffs to demonstrate that a valid basis exists to refuse enforcement of

the arbitration agreements. *Lambert*, 544 F.3d at 1195. Plaintiffs advance three arguments as to why these agreements should not be enforced, claiming (1) that the Wells Fargo Agreement required the bank to affirmatively initiate arbitrations against the unnamed class members and the bank waived its rights by failing to do so; (2) that both agreements are illusory; and (3) that both agreements are unconscionable.

B. Delegation

For the cases involving the Wells Fargo Agreement, the first question presented is whether Plaintiffs' other arguments are for the Court to decide or are instead delegated to the arbitrator. The Court notes it has already decided this question in another case in this MDL involving an identically-worded Wells Fargo arbitration agreement. *Kennedy v. Wells Fargo Bank, N.A.*, Case No. 1:09-md-02036-JLK, D.E. 3627. As the Court held in *Kennedy*, "the delegation clause [in the Wells Fargo arbitration provision] is enforceable" and thus "obviates the need to reach the question of unconscionability or any other argument concerning the enforceability of the arbitration agreement." *Id.* (citations and quotations omitted).

The same reasoning applies here, as the Wells Fargo Agreement is the same. Plaintiffs have offered no new evidence or authority to suggest that *Kennedy* was wrongly decided. The Court thus finds no reason to depart from its earlier ruling that "the delegation clause [in Wells Fargo's arbitration agreement] is enforceable" and that this is "dispositive" of Plaintiffs' arguments concerning the enforceability of the Wells Fargo Agreement. *Id.* at 2.

Even if the Court had not already decided the question, authority from the Eleventh Circuit and Supreme Court subsequent to the Court's decision in *Kennedy* confirms that the delegation clause in the Wells Fargo Agreement assigns all of Plaintiffs' arguments to an arbitrator. As the Supreme Court confirmed earlier this year, when an arbitration agreement evidences a "clear and unmistakable" intent by the parties to arbitrate threshold questions of arbitrability, the court

"possesses no power to decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529–30 (2019); *see also JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018). Upon finding that an arbitration agreement delegates these determinations to the arbitrator, a court must refer to the arbitrator *all* defenses to the enforcement of the arbitration provision, including issues involving scope and validity. *Rent-A-Center*, 561 U.S. at 68–69; *Given v. M&T Bank Corp.*, 674 F.3d 1252, 1256–57 (11th Cir. 2012).

Here, the Wells Fargo Agreement explicitly incorporates the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), which provide: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." AAA Commercial Arbitration Rule R-7(a). Moreover, the Eleventh Circuit has consistently held that "[b]y incorporating the AAA Rules" into an arbitration agreement, "parties clearly and unmistakably agree[] that the arbitrator should decide whether the arbitration clause is valid." *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *see also JPay*, 904 F.3d at 923.

Despite Plaintiffs' arguments, the Eleventh Circuit did not limit its holding in *Terminix* to agreements involving sophisticated commercial entities. This was confirmed by the recent decision in *JPay*, in which the Eleventh Circuit applied *Terminix* to hold that the incorporation of AAA rules in an agreement between consumers and a provider of fee-for-service prison amenities signaled "clear and unmistakable intent to delegate questions of arbitrability to the arbitrator." 904 F.3d at 938. Similarly, the court in *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233–34 (11th Cir. 2018) held that *Terminix*'s delegation holding applied equally to an agreement between an airline and consumers (members of a cost-savings club) because "[t]he parties' agreement plainly chose AAA rules."

Plaintiffs argue that the delegation is ineffective because the Wells Fargo Agreement incorporates the AAA's Commercial Rules, whereas, they assert, the AAA's Consumer Rules would apply to any arbitration of these claims. Nevertheless, the Commercial Rules and the Consumer Rules share an identical delegation provision that uniformly assigns "any objections with respect to the existence, scope, or validity of the arbitration agreement" to the arbitrator. Furthermore, the Eleventh Circuit has confirmed that the parties need not identify the precise set of AAA rules to be used in order to establish delegation. *See JPay,* 904 F.3d at 936–38 (confirming that incorporation of any AAA rules containing delegation language "*alone* serves as a clear and unmistakable delegation of questions of arbitrability to an arbitrator") (emphasis added) (citing *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1309–10 (11th Cir. 2014)).

Finally, Plaintiffs argue that the delegation clause is part of an unconscionable contract and should therefore not be enforced. However, where, as here, an arbitration agreement contains a delegation clause, a court "only retain[s] jurisdiction to review a challenge to that *specific* provision" of the agreement. *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1144 (2015) (emphasis added; citing *Rent-A-Center*, 561 U.S. at 72). Plaintiffs do not identify any specific defect in the delegation clause and instead argue only that it is unconscionable "for the same reasons" as the contract more generally. Plaintiffs' argument is thus an "attack [on] the allegedly [unconscionable] nature of the entire agreement, of which the delegation provision [is] one part." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1265 (11th Cir. 2017). Given the presence of an express delegation clause, plaintiffs' "challenge to the contract *as a whole*" is "committed to the power of the arbitrator[,]" and not the Court. *Parnell*, 804 F.3d at 1146.

Thus, because the Wells Fargo Agreement contains a delegation clause that the Court has already found to be enforceable, and because Plaintiffs have not provided a basis for revisiting that

decision, all of Plaintiffs' challenges to the enforceability of that agreement must be assigned to the arbitrator.

C. Waiver

The Eleventh Circuit has held that Wells Fargo properly reserved and did not waive its arbitration rights as to the unnamed class members in both of the certified classes. *Gutierrez*, 889 F.3d at 1230. Plaintiffs argue in opposing these motions that Wells Fargo waived its right to compel arbitration against the unnamed Plaintiffs who were subject to the Wells Fargo Agreement because it failed to send notices demanding arbitration to class members on an *ex parte* basis and to "initiate arbitration proceedings" against them following the Court's order granting class certification. This is one of the waiver arguments that Plaintiffs presented to the Eleventh Circuit in the recent appeal. *See Gutierrez*, Br. of Appellees at 48–51 (arguing that Wells Fargo waived its arbitration rights because it "failed to timely demand arbitration under the terms of its own permissive arbitration clauses" and "has made it clear that it is not going to initiate any individual arbitrations with class members"). However, the Eleventh Circuit rejected this argument, along with the others Plaintiffs advanced, when it held that Wells Fargo had adequately preserved its arbitration rights as to the unnamed class members.

Plaintiffs' argument rests on a provision of the Wells Fargo Agreement that requires both parties "to take all steps and execute all documents necessary for the implementation of arbitration proceedings." Plaintiffs suggest that, even though Wells Fargo does not seek to assert any claims against the unnamed class members, this language nonetheless obligated the bank to initiate arbitration proceedings against each unnamed class member, and that its failure to do so constituted a waiver of its arbitration rights. Defendant disputes this interpretation of the contract, for which Plaintiffs offer no legal authority, pointing out that the language in question is merely a standard provision obligating the bank to cooperate in the implementation of any arbitration proceedings

that a claimant may choose to initiate. Regardless, the Court concludes it would need to refer any dispute of interpretation to the arbitrator, as the contract expressly provides that a "dispute" subject to arbitration includes "any disagreement about the meaning of this Arbitration Agreement." *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 569 (1960) (claim that defendant company had "violated a specific provision of the contract ... was [] a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement" that was delegated to the arbitrator).

D. Enforceability and Scope of the Arbitration Agreement

Because the Wachovia Agreement contains no delegation provision comparable to that contained in the Wells Fargo Agreement, the Court must rule on Plaintiffs' other arguments about the enforceability of the Wachovia Agreement.

1. Illusory Contract

Plaintiffs argue that the Wachovia Agreement lacks consideration and is therefore illusory because the bank retains the right to amend the contract—a right that, they assert, could theoretically be invoked to eliminate the bank's obligation to arbitrate. However, while the Wachovia Agreement authorizes the bank to change the terms of the agreement, it specifically provides that the bank "will notify [the customer] in writing at least thirty calendar days before the change will take effect if the change is not in your favor." Thus, no change can be made in the agreement to the customer's disadvantage without the customer first receiving advance written notice and an opportunity to reject the change by closing his account. If the bank were to seek to eliminate the arbitration provision, this thirty-day period would also give the customer an opportunity to initiate an arbitration before the change took effect.

Consistent with this, in another decision from this MDL, the Eleventh Circuit held that similar notice protections defeated arguments that another bank's arbitration agreement was

illusory. *See Larsen v. Citibank FSB*, 871 F.3d 1295, 1320–21 (11th Cir. 2017). Given language "specifically obligat[ing] [the bank] to provide consumers with notice prior to making any amendment," the bank's "power to amend the Provision [was] therefore not unfettered, unlimited, or absolute." *Id.* Plaintiffs attempt to distinguish *Larsen* on the grounds that the Eleventh Circuit interpreted the notice requirement as containing an implied duty of good faith and fair dealing. But Plaintiffs have offered no reason why the same duty of good faith and fair dealing would not also be implicit in the Wachovia Agreement. After all, Plaintiffs' primary cause of action in these cases is an alleged breach of the covenant of good faith and fair dealing with respect to other provisions of the same contract. The Wachovia Agreement, like the one at issue in *Larsen*, provides for "appropriate notice" prior to any changes to the consumer's account. Indeed, it offers more stringent protections than the notice provision in *Larsen*, requiring the bank to provide written notice at least thirty calendar days before the change takes effect. Under *Larsen*, therefore, the modification provisions in the Wachovia Agreement do not render the contract illusory.

Precedent from the relevant states confirms this conclusion. At least one state appeals court has held that the very same Wachovia Agreement, with an identical modification provision, was not illusory. *See Harby ex rel. Brooks v. Wachovia Bank*, N.A., 172 Md. App. 415, 429 (2007). There, as here, the Wachovia Agreement required the bank to "notify [the consumer] in writing at least thirty calendar days before the change will take effect if the change is not in your favor….." *Id.* at 425. In that case, as here, the plaintiffs argued that the promise to arbitrate was illusory. However, the Maryland appellate court found that the Wachovia Agreement contained "a promise to adhere to the terms of the original arbitration clause and to give 30 days' notice of any change in that provision." *Id.* at 428. Because "Wachovia was obligated to arbitrate on the terms set forth in the Deposit Agreement for at least 30 days following [the plaintiff's] opening of the Wachovia

account[,]" the promise to arbitrate "constitute[d]" mutual consideration" under Maryland law. *Id.* at 429. Other state courts have similarly found that "the right to accept or reject [a] change" in the arbitration agreement would prevent any finding that a contract was illusory. *See, e.g.*, *Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 1021, 1034 (D. Colo. 2012).[3]

Finally, Plaintiffs' argument that the Wachovia Agreement is illusory for lack of consideration suffers from the additional fatal flaw that the amendment provision on which it rests is not specific to the arbitration clause but instead applies to the contract as a whole. Thus, Plaintiffs' argument would require the Court to find that the Wachovia agreement *as a whole* was illusory for lack of consideration. *See, e.g.*, *Larsen*, 871 F.3d at 1320. But as discussed above, the Court has already concluded that all members of the class are subject to "common and materially uniform" contracts—the same contracts on which Plaintiffs' claims in this litigation are based. It would be inconsistent for Plaintiffs to rest on these contracts as a basis for their claims while also asserting that there are no contracts at all because the agreements are illusory. *See Rampersad v. Primeco Personal Commc'ns, L.P.*, 2001 WL 34872572, at *1 (S.D. Fla. Oct. 16, 2001) (plaintiff "cannot claim the contract was not formed to avoid arbitration and concurrently sue for breach of that contract").

2. Unconscionability

In their brief, Plaintiffs argue that the Wachovia Agreement was unenforceable on grounds of unconscionability. All of the arguments Plaintiffs have presented on unconscionability have been rejected by this Court and/or the Eleventh Circuit in other cases in this MDL. All of these

[3] Plaintiffs have not argued that any state laws provide unique rules on this issue that deviate in material respects from the Maryland law addressed in *Harby*. In their brief plaintiffs identified Maryland law as typical, although they cited earlier Maryland cases that the *Harby* court distinguished in evaluating the Wachovia Agreement. The only variation in state laws that Plaintiffs identified in their brief involved state laws that Plaintiffs concede would not invalidate this contract, including the laws of Washington, Ohio, and Georgia.

issues are matters of state law (to the extent not preempted by the Federal Arbitration Act), *see Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367–68 (11th Cir. 2005), but Plaintiffs have not asserted that the state laws that would apply here differ in any material respect from those addressed in those prior decisions. To the contrary, Plaintiffs' limited discussion of individual state laws of unconscionability portray them as applying substantially similar standards, with the only differentiating factor identified by Plaintiffs being whether a state requires proof of procedural unconscionability, substantive unconscionability, or both. Neither has been demonstrated to exist here.[4]

Under precedent binding on this Court, the Wachovia Agreement cannot be deemed procedurally unconscionable merely because it is a contract of adhesion. As the Supreme Court has observed, "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346–47. *See also Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011) (observing that consumer contracts are almost universally "adhesive"). The Eleventh Circuit has confirmed in other cases from this MDL that "an adhesion contract is not per se unconscionable." *Hough v. Regions Fin. Corp.*, 672 F.3d 1224, 1229 (11th Cir. 2012); *see also Larsen*, 871 F.3d at 1310 (same); *Buffington v. SunTrust Banks, Inc.*, 459 F. App'x 855, 859 (11th Cir. 2012) (same). The Eleventh Circuit has also rejected Plaintiffs' argument that an arbitration clause is procedurally unconscionable if consumers were not given the opportunity to opt out of arbitration. *See Larsen*, 871 F.3d at 1312.

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[4] Plaintiffs' generalized arguments also fail to address the fact that procedural unconscionability is fundamentally a fact-dependent question that is unique for each person. *See Golden v. Mobil Oil Corp.*, 882 F.2d 490, 493 (11th Cir. 1989); *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1124 (11th Cir. 2010). Thus, plaintiffs' procedural unconscionability arguments could be considered only on an individual basis for each class member. *See Collinge v. IntelliQuick Delivery, Inc.*, 2015 WL 1292444, at *13 (D. Ariz. Mar. 23, 2015) (claim of procedural unconscionability relies on individualized inquiries unsuitable for class-wide resolution).

Plaintiffs' assertion that the arbitration agreement is procedurally unconscionable because it is given insufficient prominence in the Wachovia Agreement is also inconsistent with the Eleventh Circuit's holdings in reviewing similar provisions of other banks in this MDL. *See Larsen*, 871 F.3d at 1311; *Hough*, 672 F.3d at 1229; *Buffington*, 459 Fed. App'x at 859. The FAA preempts any state law that would purport to invalidate an arbitration provision because it fails to satisfy formatting or other notice requirements not applicable to contracts generally. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683–87 (1996).

Plaintiffs' arguments about substantive unconscionability fare no better. Plaintiffs' assertions about the allegedly prohibitive fees required to arbitrate an unnamed class member's claim are unsupported by the record and insufficient under applicable Supreme Court and Eleventh Circuit decisions. The AAA charges no filing fee at all for consumers to arbitrate monetary claims against a company, and it caps its only other fee (to pay the arbitrator) for consumers in consumer cases at $125. This is less than the $150 fee approved by the Eleventh Circuit in *Larsen*. *See* 871 F.3d at 1315–16. In any event, Plaintiffs have offered no evidence that unnamed class members would be unable to afford the minor fees or costs they would incur for arbitrating their claims. *See Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 554 (11th Cir. 2016) (party opposing arbitration required to provide specific evidence of prohibitive expenses).

Plaintiffs also contend that the arbitration agreements are substantively unconscionable because it would be an "economically losing proposition" for class members to arbitrate low-value claims in a non-class setting. The Supreme Court has now repeatedly and emphatically rejected this argument. *See Concepcion,* 563 U.S. at 351; *American Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 n.5 (2013). As the Court pointed out in a prior ruling in this MDL, "[i]t would thus appear that despite the availability of an unconscionability defense under state law, such a defense

is no longer available if premised on the idea that the offending provisions discourage low-value claims by making them prohibitively costly to litigate." *Given v. M&T Bank Corp.*, 2013 WL 11319399, at *2 (S.D. Fla. Aug. 6, 2013).

Plaintiffs' other substantive unconscionability arguments have also been rejected in prior cases in this MDL. For example, the Eleventh Circuit has repeatedly rejected the argument that the bank's right of set-off (the right to deduct amounts owed directly from a customer's account) is a basis for an unconscionability finding. *Buffington*, 459 Fed. App'x at 858; *Powell-Perry v. Branch Banking & Trust Co.*, 485 Fed. App'x 403, 407 (11th Cir. 2012); *Hough*, 672 F.3d at 1229. Plaintiffs' assertion that the Wachovia Agreement contains an improper fee-shifting provision is easily rejected in light of the fact that the arbitration provision expressly states that "[e]ach party will pay its own costs and attorney's fees." A similar provision was approved in *Larsen*. *See* 871 F.3d at 1316.

Finally, Plaintiffs have failed to demonstrate that any element of the arbitration agreement that they challenge could not be severed from the agreement if necessary. The Eleventh Circuit has made clear that if any part of an arbitration agreement is found to be unconscionable, the proper remedy is not to invalidate the entire agreement but rather to sever the offending provision and enforce the remainder. *See Larsen*, 871 F.3d at 1319–20; *Barras v. Branch Banking & Trust Co.*, 685 F.3d 1269, 1283 (11th Cir. 2012); *Powell-Perry*, 485 Fed. App'x at 407. The Wachovia Agreement contains an unambiguous severability clause.

III. CONCLUSION

Having found that unnamed class members are subject to contracts that require them to arbitrate, on an individual basis, the disputes asserted on their behalf on this litigation, and finding no basis to refuse enforcement of those contractual commitments, the Court finds that the contracts

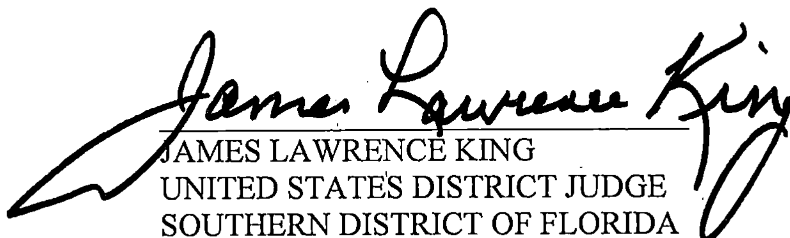
must be enforced according to their terms. Accordingly, it is

ORDERED, ADJUDGED and DECREED:

1. Defendant's Motions to Dismiss All Claims of Unnamed Class members in Favor of Arbitration **(D.E. 4388; D.E. 4389)** be, and the same are hereby, **GRANTED**.

2. The claims of unnamed class members—*i.e.*, all members of the certified classes *other than* the named Plaintiffs—are hereby **DISMISSED.** Such dismissal is without prejudice to the right of any unnamed class member to bring his or her claim in an individual arbitration according to the terms of the applicable contract and as otherwise provided by law.

DONE and ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, on this 26th day of September, 2019.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: All Counsel of Record