IN THE SUPREME COURT OF THE UNITED STATES

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GREEN TREE FINANCIAL CORPORATION :

ET AL., :

Petitioners :

v. : No. 99-1235

LARKETTA RANDOLPH :

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Washington, D.C.

Tuesday, October 3, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Baltimore, Maryland; on behalf of the Petitioners.

JOSEPH M. SELLERS, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 99-1235, the Green Tree Financial Corporation v. Larketta Randolph.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice and may it please the Court:

The central flaw in the jurisdictional and the enforceability of holdings in the court of appeals in this case is the manifest hostility that court demonstrated towards arbitration. The view reflected in those holdings is, to use a phrase that this court used in similar circumstances, quote, far out of step with this Court's endorsement over the past 15 years of arbitration as an effective and an efficient method of dispute resolution of Federal statutory claims.

QUESTION: I can understand your characterization of the second holding that way about the possibility that the arbitration might entail costs, but the jurisdictional holding, do you think that manifests a hostility to arbitration?

MR. PHILLIPS: I do, Mr. Chief Justice, largely

because it's reasonably clear that had the Court treated that order as an interlocutory order, then this matter would have gone immediately to arbitration, and the arbitration process would have been allowed to go forward. By treating it as a final judgment, as the Court did, it then undertook to review the merits of arbitrability --

QUESTION: Well, Mr. Phillips, there was a crucial difference here. The Court purported to dismiss all the claims. It didn't just enter a stay order, as would typically be the case. It said everything else is dismissed, and I take it that would mean then that the statute of limitations might run before the case ever got back, or something like that, and isn't there a real difference between the entry of a stay order pending the arbitration versus a dismissal?

MR. PHILLIPS: There is no question, Justice O'Connor, that this case would have and probably should have been dealt with as a stay order.

QUESTION: Yes.

MR. PHILLIPS: Section 3 of the Federal Arbitration Act quite plainly states that the Court shall enter a stay. In this context I think he did this to clear his docket, although that was not specifically our request. That was his decision.

QUESTION: Well, why is that wrong,

Mr. Phillips, if what the district judge says is, gee, there's nothing before me, I think every single issue in this case belongs in the arbitral forum, so I'm going to dismiss, and I look at section 3. What I see that as telling me is, don't move forward. It's not stay versus dismissal, but it's stay versus letting the case continue.

Why should a district judge who says, there's nothing to come back to me, this is not a case where some issues are to be referred to other -- to the arbitral forum, and then there are other issues that I'll decide after the arbitration. Why isn't it perfectly proper for a district judge to say, there's nothing here for me to decide, everything is for the arbitrator?

MR. PHILLIPS: Well, I think at the end of the day this is still an embedded proceeding, and even though he ultimately dismisses everything, it is certainly available to come back to him at the end of the arbitration and have these issues reviewed, and it would certainly be much easier --

QUESTION: What issues?

MR. PHILLIPS: -- as a matter of judicial --

QUESTION: What issues? In this case, as I understand it, I understand the formal distinction. This is the plaintiff consumer suing rather than an action to order arbitration, but it seems to me even if you're right

that the district judge should have stayed, what in fact happened was the district judge dismissed, total, case gone, and that seems to me as final a judgment as there could be. You could argue, he shouldn't have done that.

MR. PHILLIPS: Right.

QUESTION: Just like erroneously entering summary judgment, we don't say it isn't the final judgment. Judge says, I award summary judgment to defendant. Plaintiff says, gee, judge, you shouldn't have done that, but it doesn't make the judgment any less final that the judge maybe should have done something other than dismiss.

MR. PHILLIPS: Well, if you take it to the flip side, though, Justice Ginsburg, what happens in the situation where you deny summary judgment but style it as formally a final judgment, even though it in fact isn't a final --

QUESTION: It doesn't matter how you style it. You've got something before you. You've held onto something. It doesn't matter what label you pin to it. If a district judge disassociates itself from the case, that's the classic definition of a final judgment.

MR. PHILLIPS: Well, I --

QUESTION: This district judge says, out. This case isn't here any more, gone, as distinguished from, I'm

entering an interlocutory order. It's not what's --

MR. PHILLIPS: Clearly that's not what the judge did here, and the question is, what should an appellate court do when it's presented with this particular problem, and my answer to you is to recognize that the dismissal in this context was an inappropriate way to proceed, treat it as a stay, and therefore conclude that it was not appropriate to go beyond that, and entertain the question of arbitrability, because to do that is to create a new class of problems under section 16 that otherwise wouldn't exist.

We know that if it's a true independent action and you order something to arbitration, then there's an appeal on that --

QUESTION: But when you say treat it as --

MR. PHILLIPS: -- but that's the only case like that.

QUESTION: When you say treat it as, you're already saying -- this district judge says, dismissed. Treat it as, district judge, your wrong, you should not have dismissed, we have to review and reverse at least that much to say, you should not have dismissed the case, you should have stayed it.

So I could see if you're right about that, that the proper result here is always stay, never dismiss, then

the court of appeals says, this judge was wrong in dismissing, we certainly have to review that, that's as final as it could be, and on the merits of that decision to dismiss, just as we would do with a summary judgment, we say, district judge, you're wrong, you had no authority to dismiss, you should have stayed. I don't know that courts of appeals treat dismissals that are wrong as if the judge had not dismissed.

MR. PHILLIPS: Well, the ultimate question, it seems to me, Justice Ginsburg, is going to be whether you treat form or substance in this context as the most important, because it's pretty clear to me that while the judge did, in fact, formally dismiss the action, what was both required under section 3 of the Federal Arbitration Act and what we asked for him to do was to stay this. This is the plaintiff's choice of forum.

There's no reason the case couldn't have stayed there. We can respond directly to the Chief Justice's and Justice O'Connor's concerns about judicial administration by retaining the case under those circumstances, and we can fulfill the overall purposes of the Federal Arbitration Act appellate review standards by insisting that matters, when all doubts are -- you know, when you can resolve all doubts in favor of making sure they go to arbitration, rather than go through what we are today,

which is having adjudicated this issue at three different levels of the Federal court system over 5 years, tens of thousands of dollars, and we're no closer today to resolving the merits of this dispute over the $15 charge and whether that's a finance charge or not --

QUESTION: Sure, but if you lose this case it won't take another 5 years and another case, because everybody will know pretty much where we stand.

MR. PHILLIPS: Well, there's no question --

QUESTION: I mean, the problem of the long litigation here is that you've got an unresolved question.

MR. PHILLIPS: There's no question about that, Justice Souter.

QUESTION: Yes. You --

MR. PHILLIPS: What we need is an answer.

QUESTION: You said the -- we should see this as a choice of form versus substance. Haven't we got a form versus substance problem, in effect, whichever way we go? I understand your form and substance argument here, but if we follow the embedded-independent distinction we've got a form and substance problem, too, and it seems to me that if we follow the embedded-independent distinction we are in effect going to be leaving it up to a matter of pleading in a great many instances as to what the appealability may be, and let me just throw out the

suggestion that we might be better off to let district judges, in effect, make the form-substance distinction and decide the appealability question than leave it to parties who are pleading to make that distinction for us.

MR. PHILLIPS: I think where we ought to look for the appropriate legal standard is the statutory scheme, and I think Congress clearly incorporated embedded versus independent into the subcomponents of section 16. They clearly recognize there are independent proceedings and there are embedded proceedings, and it has specific rules about how appeals ought to be followed in that course.

So to be sure, there may be some potential for manipulation by the parties, but I don't know of much evidence to reflect that that's any kind of a problem, and Congress essentially bought into that distinction in 1988 when it adopted the statute in the form that it did.

QUESTION: Well, it did set forth specific rules, but it certainly didn't adopt the embedded-nonembedded criterion as a test for anything else, and the word it used for appealability was a classic word that has nothing to do with embedded versus nonembedded. I mean, if that's what they meant by final, you know, final decision, they should have said something else. It's a very strange word to use to convey embedded versus

nonembedded.

MR. PHILLIPS: To be sure, Congress could have been clearer here, and I think what the Court said in Cortez-Byrd last term applies equally here, that enlightenment is not going to come from parsing the language of this particular statute.

At the end of the day what we know is that the final decision language in section 16(a)(3) covers the classic situation involving an independent proceeding. Whether it should be extended beyond that to a new class of claims that will interfere with the implementation of the goals of arbitration is the issue before this Court.

I find it difficult to get passionate about this because I believe Justice Souter is right, at the end of the day what really matters is that we have a rule. Once we have a rule, the rest of us will presumably --

QUESTION: What did they mean --

MR. PHILLIPS: -- be able to line up behind that rule.

QUESTION: What did the -- the only -- I'm totally puzzled, frankly, by this statute, and I did notice the only people who seem to understand it, because I guess they wrote it, was the judicial conference, and they put in the legislative history that it would allow appeals from final judgments, including the final judgment

in an action to compel arbitration, or a final action dismissing an action in deference to arbitration, so I didn't see that last -- what could that last statement mean, other than this case?

MR. PHILLIPS: I think that last statement could be read directly to apply to this case. Whether or not it was meant, and whether Congress adopted that, I've no idea.

QUESTION: I mean, it's not a -- an obvious thing that you would want to allow an appeal in this kind of a case.

MR. PHILLIPS: Exactly.

QUESTION: And it's not obvious that you wouldn't.

MR. PHILLIPS: Oh, I think it's quite obvious you would not want --

QUESTION: Why not?

MR. PHILLIPS: -- to appeal in this -- no, Justice Breyer -- that's wrong. It is clear to me that you would not want to go through the delay and forestalling, allowing these matters to go to arbitration. That's what the parties voluntarily agree to.

QUESTION: But you do the other way. You see, there's situation A, where a plaintiff -- a plaintiff wants arbitration, and the defendant doesn't.

MR. PHILLIPS: An independent action you're talking about.

QUESTION: That's right. Well, the plaintiff would love to go to arbitration, defendant doesn't.

MR. PHILLIPS: Right.

QUESTION: So what is he supposed to do? The defendant won't show up in the room, won't set it up.

MR. PHILLIPS: Right.

QUESTION: He goes to court and asks the judge, judge, send him to arbitration, and the judge does or he doesn't. Either way, he gets an appeal.

MR. PHILLIPS: That's correct.

QUESTION: Either way.

MR. PHILLIPS: No question.

QUESTION: Now, the converse case, the plaintiff does not want arbitration, but the defendant does.

MR. PHILLIPS: Right.

QUESTION: The plaintiff runs into court and brings his case. The defendant says, judge, send me to arbitration. If the judge doesn't send him to arbitration, there's an immediate appeal, and if he does send him to arbitration, on your view he's out to lunch, stuck.

MR. PHILLIPS: Right, because --

QUESTION: On their view it's at least --

MR. PHILLIPS: Right.
QUESTION: -- consistent. You know, both ways --
MR. PHILLIPS: Well --
QUESTION: -- you get an appeal under both situations.
MR. PHILLIPS: It's not consistent in the sense that if you look at the way 16(a) and 16(b) are set up, they really are designed basically to say if you have an ultimate order that says arbitrate you don't want to go to appeal, and if you don't --
QUESTION: But you can do it where it's --
MR. PHILLIPS: There is -- there is a --
QUESTION: -- where's the --
MR. PHILLIPS: -- there's a single exception, that's true, Justice Breyer.
QUESTION: Well, that's a big exception.
MR. PHILLIPS: And all I'm saying is, the question is, do you want to drag in another exception under these circumstances where it's a perfectly sensible to say, what should have been entered in here in this context was a stay that's not appealable, and in the future, go on forward in other cases.
QUESTION: Well, if we look at the language of the statute dealing with the final decision, we look at

the fact that it was a dismissal, so we say, okay, there's jurisdiction. Now are you going to talk about question 2?

MR. PHILLIPS: I'd love to talk about question 2. Thank you, Justice O'Connor.

(Laughter.)

MR. PHILLIPS: Obviously, if the Court finds that there is jurisdiction, the hostility that I mentioned at the outset of my argument applies with particular force with respect to the presumption that the court of appeals employed in deciding --

QUESTION: May I ask a question, to be sure I get it in before the hour goes by, on question 2. Do you think there are -- let's assume you're dead right, that the arbitration clause does not have to specify the costs in detail and so forth. Now, are there cases, and I'm wondering in -- take care of this one -- in which an arbitration clause could be so one-sided that it's not enforceable?

This clause, as I read it, preserves the company's right to judicial remedy. It says the arbitration clause shall not interfere with their right to use the judicial process to secure relief, but it does interfere with the other side's right. Now, I don't know whether that's sufficiently one-sided to raise a question or not, but are there clauses that are so one-sided that

it might not be enforceable?

MR. PHILLIPS: There may well be. My -- let me answer the first part which is that we know -- is that -- is the particular imbalance in this clause sufficient to render this unenforceable. I don't -- I don't understand the other side to have argued that. If they did argue it below, they -- clearly that was rejected because the district court analyzed and dealt with all of the unconscionability issues, so I don't think that issue's on the table.

With respect -- I mean, is it possible to have an arbitration clause that says in order to get entry into arbitration you -- you know, the plaintiff would have to file a million dollars, I think obviously a clause like that would be unenforceable under those circumstances because it would interfere with the ultimate enforcement of the statutory right, and that is one of the conditions of allowing arbitration of general statutory claims, and I don't have any problem with that.

The problem is that if you have a clause like the one we have in this case, which is silent on these issues, the clear presumption, then, must be that you would favor arbitration. You would not assume all of the costs are going to be extreme or excessive.

QUESTION: You're saying in effect that the

burden is on the person challenging the fairness of the clause to show some unfairness --

MR. PHILLIPS: That --

QUESTION: -- and that the, what, the Eleventh Circuit here just, without any showing on the part of the -- that party simply said because it might --

MR. PHILLIPS: That is exactly right, Mr. Chief Justice. The Eleventh Circuit said we will presume all of the potential costs, large filing fees, pay for the costs of the arbitrator and pay for everything else, without any showing being made by the plaintiff under the circumstances of this case, and therefore we're going to say that there is an inherent conflict.

What I suggest to you is that the language, inherent conflict, doesn't remotely entertain that kind of an analysis.

QUESTION: Is the relief you're asking for on that ground that we send it back and give the plaintiff the opportunity to make that showing?

MR. PHILLIPS: No. The plaintiff had the opportunity to make that showing. She had a full and fair opportunity to engage in all of the discovery she wanted to. She chose, on a motion to reconsider, to throw some materials from the American Arbitration Association over the transom to try to make some kind of a showing.

The answer is, she should go to arbitration, ascertain whether the arbitrator -- whether the fees for arbitration would be waived, what the costs of the arbitrator will be, and then, if it turns out at the end of the day that either those costs are unconscionable as a matter of state law --

QUESTION: Mr. Phillips, from what you just said I take it you disagree with the D.C. Circuit. The D.C. Circuit said, plaintiffs, employees -- and I take it consumers would fall in that same boat. They're going to not go to an arbitration if they're gong to face the possibility, which they never face in court -- in court, they don't have to pay the judge.

Arbitrators sometimes charge a lot of money per hour of their time, so unless the contract says, or unless the court reads into the contract that the seller in this case, or the finance company, the employer in that case, pays at least for the judge, then this would be an unconscionable arrangement. You can't require the consumer or the employee to pay the judge, and that has to be clear.

MR. PHILLIPS: I think that the decision of the court in Cole is completely premature for this Court to entertain at this point in time, because we don't know what kinds of costs we're talking about. In the record

before the D.C. Circuit in Cole, they had some evidence about what they thought the costs would be, given the nature of those claims. Here, we have no evidence like that.

Is it possible in a particular case that the court could declare something unenforceable because the costs are too great?

QUESTION: Well, but --

MR. PHILLIPS: As I say, yes, I think you could but --

QUESTION: Mr. Phillips, supposing that, unlike the case here, the person objecting to arbitration had made a significant showing in the district court, not going to arbitration but saying, look, here are some figures from past arbitrations; we think this is going to be just like this one; the party who wanted to go to arbitration doesn't contradict that; the district court says yes, these kind of costs are going to be incurred in the arbitration, and therefore it's unconscionable. I don't see why the -- that party should have to go to arbitration if they can make a persuasive showing to the court.

MR. PHILLIPS: I don't disagree with that, Mr. Chief Justice. I think that you have either of two ways to try to prove up your case, either through

discovery, which she had a full and fair opportunity to do, and didn't present any evidence with respect to that, or, assuming that there's going to be doubts -- and I think all doubts, again, ought to be resolved in favor of pushing toward arbitration in order to ascertain this.

Remember, if you read the American Arbitration Association's amicus brief it says that they consistently waive their filing fees, they often reduce arbitrator's fees, and we know -- and it's the reason why I think it makes much more sense for the court to entertain these issues after an arbitration rather than before an arbitration -- is that we may find out at the end of the day, if the plaintiff prevails, that all of those costs go back to her, and so she's really out of pocket nothing except for the marginal costs during the pendency of the proceedings.

QUESTION: But supposing the arbitration, say, goes on for a week, and the arbitrator's time is consumed, and the plaintiff's, and the defendant's, and then it turns out that a court is going to find the arrangements were unconscionable, that the plaintiff was required to put up thousands of dollars, or the party objecting, and so you've basically spun your wheels in the arbitration proceeding.

MR. PHILLIPS: Well, hopefully that wouldn't

happen, obviously, and you wouldn't expect it to happen very often, but again I don't disagree with you, Mr. Chief Justice.

If what you're saying is, should the plaintiff have an opportunity to prove unconscionability at the outset of the process, I don't have any problem with that, assuming she does more than what she did here, which was to say, I'm not going to arbitration, I'm not going to do anything, I'm simply going to put in a study from the AAA which may or may not apply to the circumstances of this case. I'm not even going to ask Green Tree whether or not they're willing to pay for the fees in the circumstances a la what the D.C. Circuit required in the Cole case.

QUESTION: Well, she had other reasons, too, and one the Eleventh Circuit didn't deal with because they didn't have to, and that is, she said, I don't have to go to arbitration because under the Truth-in-Lending Act I have a right to make this a class action and I'm not going to get the class action.

The Eleventh Circuit, as I understand it, said we're not going to address that issue because we've already decided she has to have security that she's not going to have to pay for the arbitrator under any circumstances.

MR. PHILLIPS: They make that argument, and they

ask the Court in this case to affirm on that alternative ground, and our position here is that there is no distinction between this case and Gilmer with respect to the treatment of class action. There is no greater right to a class action --

QUESTION: Yes, but we can't address that as a matter of first view. I mean, the --

MR. PHILLIPS: As a matter, I'm sorry, of what?

QUESTION: First view.

MR. PHILLIPS: Oh, first view.

QUESTION: The Eleventh Circuit didn't address it at all. It said, that's a question we leave open. We don't have to get to it on our theory of the case. Our theory of the case is that the party seeking arbitration has to pay the arbitrator, period.

MR. PHILLIPS: Right.

QUESTION: So we -- so at least I feel that the class that question, whether there could be arbitration at all because of the class action provision of the Truth-in-Lending Act, we can't address that in this proceeding because it hasn't been aired below.

MR. PHILLIPS: Well, Justice Ginsburg, you know as well as I do that it's largely a matter of the court's discretion what alternative grounds which are asserted by a party in litigation to defend a judgment the court will

entertain.

They have raised a class action issue. We have responded to the class action issue. The Court of Appeals for the Third Circuit in a recent decision in Johnson, which we filed a supplemental brief on, has exhaustively analyzed the class action issue, and the bottom line is there is nothing in TILA that is any more pro-class action than there was in the Age Discrimination in Employment Act, which this Court held in Gilmer did not prevent enforceability of the arbitration clause in that context and, indeed, TILA has provisions that clearly envision providing significant opportunities for plaintiffs to recover in these kinds of cases.

There are statutory damages provisions that give significant moneys even without showing of injury --

QUESTION: The -- you're saying there's enough in here --

MR. PHILLIPS: -- and there are attorney's fees and reasonable costs.

QUESTION: -- for us to deal with the class action issue, but you've mentioned Gilmer more than once, and one of the things about Gilmer that struck me is that the securities industry said, unlike what you're saying -- you say, wait and see. Let's see what the arbitrator does. We're not going to tell you one way or the other.

The securities industry said, we pay for the judge, and so that was out of the case.

When Gilmer came to this Court it was presented with a situation where the employee was not going to have to pay the cost of the arbitrator because the party seeking arbitration, the securities industry, said, what -- don't worry about that. We pay the arbitrator.

MR. PHILLIPS: But the problem with the situation is that you don't presume, in the face of silence, that there's going to be a problem with going to arbitration.

This Court has said consistently for 15 years, in interpreting the relationship between the Federal Arbitration Act and Federal statutes, that we presume they should go to arbitration and, if there are gaps, we assume that the arbitrator will provide for them and we know, as this case comes to the Court at this point based on both what was in the record below and what the amici briefs have shown, is that this does not need to be an expensive enterprise. It may not cost her anything with respect to either filing fees or arbitrator's fees.

QUESTION: In taking this position you have to be saying the D.C. Circuit not only was premature, but it was just wrong.

MR. PHILLIPS: No.

QUESTION: Because as I read the D.C. Circuit they said, to make this contract fair and enforceable, it must be not the arbitrator's decision, it must be, as a matter of law, that the party seeking arbitration pays for the arbitrator, as a matter of law, not for the individual arbitrator to decide in each arbitration.

MR. PHILLIPS: I am troubled, Justice Ginsburg, by the idea that you would adopt a rule judicially that, as a matter of law, one party must always front the costs regardless of the circumstances of the particular case, and I agree with you, to that extent I think the D.C. Circuit's opinion is overbroad.

I don't know whether it would necessarily be applied as broadly as the language seems to suggest, but what I do know is that the problems inherent in that kind of a rule, which has not been tested particularly, are such that it's completely premature for this Court to go down that path. Where this Court ought to focus is, what was before the district judge when that court decided to send it to arbitration, and what was before that judge at that time was, silence, which you construe favorably to arbitration and therefore send the matter to arbitration with no further judicial review.

QUESTION: Did your client makes its position on this issue known to the district court, what the -- how

the costs would be allocated and so forth, or did they just say, we'll fight it out when we get to the arbitrator?

MR. PHILLIPS: We said -- we were never asked specifically our views with respect to this.

QUESTION: You didn't volunteer them, of course.

MR. PHILLIPS: Well, the issue came up in a motion to reconsider, Justice Stevens. That was the first time they suggested that these costs were excessive.

They did raise the class action earlier in the process, but they didn't raise the question of costs specifically and, frankly, even in the Eleventh Circuit the cost question was more of a second thought than it was a primary portion or focus of the attention of the court.

If you're asking me, would we pay those costs in most cases, I can tell you that I know that Green Tree does pay those costs in a lot of instances, but that's the whole point. The plaintiff has the obligation --

QUESTION: Even if they --

MR. PHILLIPS: -- at least to ask that question.

QUESTION: They pay the costs even if they didn't lose?

MR. PHILLIPS: Even if we didn't lose. We front the costs at a minimum, and oftentimes we can't get those costs back.

If there are no questions, further questions, I'd reserve the balance of my time.

QUESTION: Very well, Mr. Phillips.

Mr. Sellers, we'll hear from you.

ORAL ARGUMENT OF JOSEPH M. SELLERS

ON BEHALF OF THE RESPONDENT

MR. SELLERS: Mr. Chief Justice, may it please the Court:

I am happy to address the first issue briefly, and then turn to the second issue, second question.

Very importantly, the Federal Arbitration Act did not divest the district courts of discretion to dismiss cases, as the district judge did here, as opposed to staying a case. Therefore, the district court had that discretion, exercised the discretion and, as Justice Ginsburg observed, I think once the decision was made to dismiss with prejudice there was nothing else left for the Court to do, and that satisfied the classic standard of finality that made it subject to immediate appellate review.

QUESTION: But Mr. Sellers, if you took the position that I thought Mr. Phillips -- he will straighten us out on it -- was embracing at this argument, although not in his brief, that Alabama -- the amici, The Housing Institute took, they said, yeah, you could say this was a

dismissal in the final judgment, but the Eleventh Circuit should say, district judge, you're wrong, because you don't have any authority to dismiss. You must stay, because section 3 says must stay.

MR. SELLERS: Actually, Justice Ginsburg, I don't think that's a fair reading of the Federal Arbitration Act. Section 3 says you must stay, but there's nothing inconsistent about section 3, as the majority of the circuit courts have recognized, and ultimate dismissal.

Section 3 was designed to ensure that there would be no further pursuit of the merits of the action, that that would be the end of the litigation of the action in that court until the arbitration concluded. There's nothing improper, however, about a dismissal following that and, by the way, if I might just add, Green Tree did ask to dismiss this case. They --

QUESTION: They alternately --

MR. SELLERS: -- requested --

QUESTION: Alternately they --

MR. SELLERS: Alternately, that's correct, and the district court, if nothing else in responding to Green Tree's request for relief, was properly -- acted properly in granting that request.

But even if Green Tree had not requested the

dismissal, there's nothing impermissible about a dismissal. Again, I must add, I don't think the Federal Arbitration Act in any respect divested the district courts of a fundamental aspect of the discretion --

QUESTION: Well, even if there is something improper about a dismissal, it's nonetheless a dismissal --

MR. SELLERS: That's correct, Your Honor.

QUESTION: -- isn't it? I don't think we're in the habit of looking into whether the dismissal was correct or not and deciding whether something was appealable.

MR. SELLERS: That's correct, and the Eleventh Circuit permit -- was legitimately entitled to rely on the dismissal as a basis for appeal --

QUESTION: Well, suppose that you -- this is what's bothering me a lot. You have a plaintiff bringing a claim. Count 1, nothing to do with arbitration. Count II, nothing to do with arbitration, III, nothing to do with it, count IV, arbitration's at issue.

The judge, instead of staying it, dismisses it.

MR. SELLERS: That --

QUESTION: Appeal?

MR. SELLERS: That I think would be reversible error, Your Honor, because I think it's clear that that

would not be an interlocutory -- that would be an interlocutory --

QUESTION: So you'd have to -- the other side would have to cross-appeal. They would say -- what they would say is, this should have been stayed and not dismissed.

MR. SELLERS: That's correct.

QUESTION: All right. Now, what's bothering me about accepting your position, which is very logical and may be absolutely the right one, but we're going to create now a whole spin-off web of law, and the web of law is going to be -- because the first thing that's going to happen every time, you see -- not every time, but what will happen is the judge -- the plaintiff brings a case. Judge dismisses it. Aha, says the plaintiff, now I can appeal, and there will be a cross-appeal, and the claim will be that in fact this is a case where there should have been a stay, and not a dismissal.

MR. SELLERS: But --

QUESTION: And pretty soon rules of law will develop as to just when it's the one, and when it's the other, and all that means, delay, delay, delay, the very opposite of what the Arbitration Act is designed to do.

MR. SELLERS: Justice Breyer, I think the rules could be articulated fairly clearly that will avoid the

multiplicity of appeals that concern you. If there is a -- in the hypothetical you gave, where the referral to arbitration did not refer all claims that were pending before the court --

QUESTION: Mm-hmm.

MR. SELLERS: -- I think it would be reversible error to dismiss the case, or if it was dismissed it would be treated as an interlocutory and the court of appeals could legitimately direct the court to reinstate the case, and --

QUESTION: And you don't think you as a lawyer will be capable, even in my imaginary case, of arguing that, although the judge thought it had nothing to do with it, or it really did, or the judge thought it did but it really didn't, et cetera?

MR. SELLERS: I don't think so, Your Honor. I think that the law is pretty clear, and the choices that Congress made in enacting section 16(a)3 are pretty clear, and that kind of scenario would not ordinarily give rise to an appealable order and I think, as Justice Souter observed, once the rules are set out here, I think we will all be able to follow them. Right now there's some confusion.

QUESTION: I don't understand what you mean by saying, if it's dismissed it would be treated as

interlocutory.

MR. SELLERS: I'm sorry. What I meant was, it would be reversible error.

QUESTION: And the court of appeals would then instruct the district judges, when there's something left over, of course you don't enter a final dismissal.

MR. SELLERS: That's correct.

QUESTION: And that would be -- and that would be the end of it.

MR. SELLERS: That would be the end of it.

QUESTION: The -- so the court of appeals would take it to final judgment and then say, if there are issues left over, you must stay, not dismiss. If there are no issues left over, then it was perfectly proper to dismiss.

MR. SELLERS: Right. If there are no issues left over, the court may have some discretion, but it certainly is permissible to dismiss, as the district court did here, and I would ordinarily think most district courts would dismiss under those circumstances, because there'd be nothing left for the district court to do.

QUESTION: What is your take on the argument that was made in that amicus brief that under section -- is it 3?

MR. SELLERS: 16(a)3, Your Honor.

QUESTION: 16(a)3, the words say, must stay. It doesn't say --

MR. SELLERS: Oh, I'm sorry, section 3.

QUESTION: Yes. Section --

MR. SELLERS: Section 3.

QUESTION: Section 3.

MR. SELLERS: Forgive me.

QUESTION: Yes.

MR. SELLERS: The term, must stay, we read to mean that it may not permit. It is nondiscretionary, but the key is what it's nondiscretionary as to. It may not -- the district court must stay any litigation of the merits of the underlying claims. That does not speak to the question of whether the district court has discretion, if it refers the entirety of the claims to arbitration, to ultimately dismiss.

QUESTION: Okay. I didn't want to detain you on that. I just wanted to make sure that you recognized --

MR. SELLERS: Certainly. Thank you.

QUESTION: Stay means nothing but not go forward with.

QUESTION: Right.

MR. SELLERS: Correct.

QUESTION: Period.

MR. SELLERS: Correct, and I think that's

consistent with the way Congress would have viewed it in 1925, when it was originally put in place.

May I turn to the second issue that I understand is also of central concern to the Court. I think that Mr. Phillips, in using a hypothetical, or responding to a hypothetical of the Court, illustrates the problem with costs, and the reason why the circuit court was correct in holding the agreement unenforceable because of the risk of the imposition of large costs.

The example given, well, suppose the plaintiff was expected to put up $1 million in costs, or, if we can be a little more realistic, suppose the cost of arbitration were $5,000, just the initial arbitration-specific costs, the costs of filing, the cost of the arbitrator, because he or she's setting aside a day or two to come out, they want to check in advance, which often happens, suppose that they have to rent a room, suppose there's a stenographer, and they want all that payment up front.

QUESTION: Well, but you -- you're necessarily requiring -- required to say suppose, Mr. Sellers, because your client made no showing below.

MR. SELLERS: Well --

QUESTION: And it seems to me that unless we're to say that, contrary to our other statements about

arbitration agreements, that an arbitration agreement is suspect, and unless the party can come in and defend its reasonableness -- why didn't your client make any showing?

MR. SELLERS: Well, Mr. Chief Justice, in fact, she tried and she was unsuccessful, but not through any fault of her own.

I might begin by noting that she -- that Ms. Randolph did request, and did mention costs, well before this time of reconsideration was --

QUESTION: But the court of appeals doesn't rely on any showing. The court of appeals just speculated.

MR. SELLERS: Well, the court of appeals is relying on the showing that Ms. Randolph made of the average cost from a AAA survey because, notwithstanding her request for discovery, and she filed a motion for discovery, I might add, which is found -- it's docket number 11 in the --

QUESTION: And this is discovery going to the costs of the arbitration?

MR. SELLERS: It was discovery with respect to arbitration procedures. It was not -- it was procedures which I think is fairly -- could be fairly construed to include costs.

That motion, pursuant to that motion she eventually took a deposition pursuant to rule 30(b)(6).

That was taken in December of 1996. It is not in the record, and in that deposition testimony was elicited about whether Green Tree was prepared to -- the question specifically was posed as to the cost of arbitration.

QUESTION: Well now, are you -- if it's not in the record, is it properly before us?

MR. SELLERS: It is not properly before the Court, and I want to explain why it was not put in the record.

QUESTION: Well, but if it isn't in the record, and it's not properly before the Court, I should think that would be the end of it.

MR. SELLERS: Very well, Mr. Chief Justice. I merely want to note its existence, because I think if the Court is not satisfied with the showing that was made on costs, I would like it to entertain the request, or the question that Justice Stevens put to my colleague, and that is that a remand be permitted so that the record may be more fully substantiated.

I might add that Green Tree, during the course of this litigation, was asked -- was -- there was litigation over the issue of costs both at the district court and the court of appeals. Green Tree was asked at oral argument, as is apparent from the appeal -- from the opinion from the Eleventh Circuit about the costs, and it

was unprepared to say that there were specific costs, or, as Mr. Phillips has now allowed, that they might very well allow costs in the outset.

QUESTION: The court of appeals, as I understand its opinion, didn't talk about actual costs. It simply said that because these might -- these things might happen.

MR. SELLERS: Well, Mr. Chief Justice, I think --

QUESTION: You know, you've put the burden --

MR. SELLERS: I understand --

QUESTION: -- basically on the parties seeking arbitration, rather than on the party challenging the arbitration.

MR. SELLERS: I --

QUESTION: I question the propriety of that.

MR. SELLERS: I understand, Mr. Chief Justice. I refer now to the section of the opinion that's found at appendix 17(a) and (b) -- I'm sorry, 17(a) and 18(a), where the Eleventh Circuit refers to some questions and answers given to it by the -- by Green Tree's counsel at argument, and they asked about whether AAA rules are normally used. They say, we don't typically do that.

Then it says, the opinion on top of page 18(a) says, Green Tree also asserted at oral argument the

arbitrator may apportion the fees of the arbitration in his award, but that provides no guarantee that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive cost order, and it goes on.

They were asked and given an opportunity, apparently, to indicate what are the costs for --

QUESTION: Why should the burden be on them?

MR. SELLERS: Well, I think that the -- there was --

QUESTION: They weren't challenging the arbitration agreement. Your client was.

MR. SELLERS: I understand, but I think that's part of the record that we have here as to what those -- there was a consistent difficulty in pinning down Green Tree as to what the costs were.

QUESTION: Why doesn't Alabama law cover that? I mean, maybe it -- I found, or my law clerk found a case here involving Green Tree where the Alabama supreme court says, where a clause in a contract is silent on a particular question, notions of fairness and settled principles of Alabama law prevent us from deciding the question by indulging in assumption that the proof would support a worst-case scenario. It's a rather --

MR. SELLERS: I understand.

QUESTION: So why, following just Alabama law,

wouldn't you say, well, what we're going to do is assume that it will be interpreted in a reasonable way that would support the arbitration --

MR. SELLERS: Because -- because, Justice Breyer, that would put Ms. Randolph in the untenable position where, in the pursuit of a claim that had economic damages of about $15, she would be forced to go forward with an arbitration on the presumption that the fees and costs would ultimately be allocable in a fair way without knowing what that would be --

QUESTION: I don't think that --

MR. SELLERS: -- and challenge it later.

QUESTION: I don't think that's necessarily correct, Mr. Sellers. Conceivably some, you know, proof could be offered in the district court, before the arbitration, that the fees would be, you know, way, way out of proportion, but it just wasn't done here.

MR. SELLERS: Well, Mr. Chief Justice, what they did offer was information that was taken from the AAA survey. There was information in the record. It is true that it was not taken from this case, and I have explained the reason for that, but that is evidence in the record before the district court as to the average costs of arbitration and filing fees.

QUESTION: But that's either fair or not. You

said, it will make her go forward on an assumption the costs would be allocated in a fair way. Well, what's wrong with going forward on an assumption that they'll be allocated in a fair way? How could anybody object to that?

MR. SELLERS: Because -- because, Justice Breyer, nobody knows what that means, and the -- it would cause her to go for --

QUESTION: Well --

MR. SELLERS: I'm sorry, if I could just finish. It would cause her to go forward in pursuit of a claim of very limited economic value on the possibility at the end -- let's suppose that the fair way in the mind of the arbitrator was to split the costs, regardless of outcome. Each side bears its own -- bears half the cost of the arbitration, and if the arbitration was $5,000, and her share was $2,500, she might very well not go forward under those circumstances.

QUESTION: Then that wouldn't be very fair, would it?

MR. SELLERS: No, I don't think it would be, but that might be in the eye of the arbitrator, the result that is awarded, and we won't know that unless it's determined or ascertainable at the beginning.

We don't take the position that the costs have

to be set forth specifically in the arbitration agreement, but that they be ascertainable, and in fact the American Arbitration Association last year adopted new rules pursuant to a consumer protocol which set forth the provision that a maximum of $125 must be borne by the consumer and the rest would be borne by the company for smaller claims.

That is a -- had this agreement simply said, we will follow that kind of rule, or refer to it an outside source of that kind of rule, that would have been fine. But complete silence. It was even silent as to whether there were costs. There was not even an indication that somebody who went forward with an arbitration would have to bear costs.

She'd have to be -- have to know that, and have confidence that in going forward there would be a reasonable -- there'd be an expectation of an allocation that is fair, whatever that means.

We submit that that kind of uncertainty creates a disincentive to go forward and enforce the rights under the Truth-in-Lending Act that this Court in Mitsubishi and in Gilmer made clear is the basis either to decline to enforce the agreement altogether or, as was asked about the Cole decision -- if I may address it for a moment.

We understand there's a split in the circuits as

to whether, under section 4 of the Federal Arbitration Act, there is any authority that the district courts have to insert provisions into an agreement to have it conform with the law as they view it.

Whether or not that authority exists, ultimately the outcome ought to be that the district court should tell the parties, I won't permit this to go forward unless you spell out costs or give the party against whom the arbitration agreement is being enforced the opportunity to be assured that they're not going to bear costs beyond those that would be -- they would ordinarily expect if they went forward in court.

That is the forum that they chose. If the -- if judicial and arbitral forums are to be comparable, you can't impose on one party costs well in excess, or create the risk that they would bear those costs --

QUESTION: Why can't you just ask the arbitrator to make that decision at the outset?

MR. SELLERS: I'm sorry, Justice Kennedy.

QUESTION: Why can't the claimant simply ask the arbitrator to please make the determination at the outset as to what the fees are going to be? You'd have a filing fee and you'd say, for your first hour, first half-a-day, tell me what's involved, I might want to get out of here.

MR. SELLERS: And of course if the plaintiff did

that, she -- Ms. Randolph would have already incurred costs going forward --

QUESTION: I know there'd be a filing fee --

MR. SELLERS: -- even if she later wanted to back out.

QUESTION: -- an initial fee, but --

MR. SELLERS: Well, and maybe the costs -- you'd have part of the costs of the arbitrator, and again, I must add, the arbitrator said, as again, people who are busy and expected to arbitrate cases are often called upon to do, I'm going to have to bill you for a day because I've set aside all my other work in order to attend to this arbitration, so if you take 10 minutes or 10 hours, that's the time I'm charging you for. That is a cost -- that is a risk that a prudent person I don't think ought to be expected to --

QUESTION: Well, if the parties agree on arbitration, and the arbitrator has to be fair not only in the decision but in the allocation of costs and expenses, it seems to me that that's for the arbitration.

MR. SELLERS: Well, again, I -- we submit that -- we understand that that determination may and properly should ultimately be made by an arbitration, but costs are really unique, and --

QUESTION: Could you do this in respect to

costs --

MR. SELLERS: I'm sorry.

QUESTION: Could you do the following? I'm not sure you can.

MR. SELLERS: Okay.

QUESTION: But I see that Alabama says customer usage is used to interpret the silent contract, and there are a lot of associations like the American Arbitration Association that have gone to enormous trouble to figure out how to structure costs and procedures so as to be fair to consumers or others who don't have the money, and they might be frightened of the costs.

MR. SELLERS: Uh-huh.

QUESTION: Well, could you read that customs or usage in Alabama as embodying some such system, or the like, not necessarily the --

MR. SELLERS: I understand.

QUESTION: -- arbitration one, but --

MR. SELLERS: Right.

QUESTION: -- some such system that would avoid the problem of later unconscionability, and would therefore make the thing valid, and both valid and fair?

MR. SELLERS: Justice Breyer, I certainly think you could do that, but I think the key to it is that it be established at the outset, and not at the end of the

arbitration.

QUESTION: All right, then couldn't the court in this instance have said, look, we have a silent contract here. Alabama tells us to use customer usage. By that, they mean customer usage that will make the provision valid if it exists, and here is a body that does that, and so we assume something like that will be.

MR. SELLERS: Yes, I think the district court had that authority, and could and should have exercised some additional authority in telling the parties at that juncture, before it sent them off to arbitration, I am concerned about the silence on costs. I believe -- I want to give effect to this agreement. I believe that's the intention of the parties. But I am also concerned about the potential imposition of excessive costs.

In Alabama there's a customer usage provision, and I want to establish, before I send this off to arbitration, or have a initial conference with the arbitrator to determine at no expense to the parties what cost is going to be assessed, and how it's going to be allocated, and at that point go forward and arbitrate. That would satisfy us.

But it's got to be done at the outset, not at the end, because at that point you bear the costs, you're stuck with them, or, as in the case of Ms. Randolph,

you're so deterred by the possibility of excessive costs that you won't go forward, and that's the prospective waiver of the TILA claims that this Court has expressed concern if it were to arise.

QUESTION: So you're saying if --

MR. SELLERS: We don't want that to happen either.

QUESTION: Mr. Sellers, that if the Eleventh Circuit had taken the D.C. Circuit route, that is, not tossed out this arbitration, which would allow your client -- as I understand the posture now, your client can go into court with a Truth-in-Lending Act suit and is freed from the yoke of arbitration, is that correct?

MR. SELLERS: I'm sorry, I misunder -- I didn't understand the question.

QUESTION: As I understand the Eleventh Circuit decision --

MR. SELLERS: Oh, yes.

QUESTION: -- this contract is no good.

MR. SELLERS: Right.

QUESTION: Therefore, your client can go to court --

MR. SELLERS: Correct.

QUESTION: -- and bring a Truth-in-Lending Act --

MR. SELLERS: Correct.

QUESTION: -- action, class action and the works.

MR. SELLERS: Correct.

QUESTION: You have indicated that you would have found acceptable the D.C. Circuit solution, which is the arbitration agreement is preserved, we just read in the provision that we think is necessary to make it enforceable.

MR. SELLERS: That's -- either -- either, Justice Ginsburg, either the D.C. Circuit and Cole's approach is acceptable, or the approach I was suggesting to Justice Breyer, which is that the Court convene the parties, say to them, you have to pencil in this cost rather than the court doing it, and -- because I'm not -- I want to enforce this agreement, and I understand you both agree to it, but we need to spell out these costs.

So it's either the district court does it as the Cole court endorsed at the outset, or, instead, the parties are directed to do it. But it's always at the outset, before they're compelled to go to arbitration.

QUESTION: Now, did you argue that to the Eleventh Circuit?

MR. SELLERS: The specific course?

QUESTION: Yes.

MR. SELLERS: The --

QUESTION: You can answer yes or no, can't you?

MR. SELLERS: No, not in those words, but yes, insofar as we are -- forgive me for -- I feel a need to explain my answer.

Yes, insofar as we argued to the Eleventh Circuit that there -- they had an option that was other than simply to invalidate the agreement in its entirety, that the cost had to be established up front.

QUESTION: And no --

MR. SELLERS: No, I didn't present the options in the way I've just presented to the Court today, but I think that it's reasonable to infer that if the district court regarded itself as lacking authority to pencil in anything as the Cole court allowed in the D.C. Circuit.

That's clear, and it is also clear that there was issue about the cost presented to the district court, and about their being excessive, and the record was developed. Whether it was sufficient on the costs in that case or not to satisfy the court, I think we may have a difference of opinion, but I think it's fair to say that the issue of costs was raised early, and it was raised several times. It was not a last-minute concern, and it was raised to the court of appeals in the same fashion.

And if I might add, if I can turn for just a

moment to the class action issue, which I understand was not decided by the court of appeals, because it apparently didn't feel it needed to reach the issue, but I think at least I want to make clear that much the same kind of approach we advanced here could be taken with respect to the class action issue.

Ms. Randolph has taken the position here that, not that class actions under Truth-in-Lending Act are always exempt from arbitration. Any time a lawyer styles a case as a class action it's exempt from arbitration. That is not the position that we've taken here.

The position is likewise, the agreement was silent on class actions. The district court viewed it as silence meant it's excluded. That's the end of the discussion, even though the district court expressed some sympathy for Ms. Randolph's concerns about aggregating small consumer claims in the absence of that, the parties being left with no recourse, and I submit that once again the district court could have and should have been able to say to the parties, I see also that Ms. Randolph has styled this case as a class action.

I believe that the Truth-in-Lending Act, while the language of the statute itself contemplates class actions, but more importantly, Congress made it clear, echoing the views of the Federal Reserve Board, that there

was great importance attached to the enforcement of the statute through class actions.

And the district judge could have said and should have said, I think that the view -- I don't know whether you intend to include class actions here, although Green Tree had already made its position clear by opposing class certification, that it presumably didn't want it and may very well have hoped that it would never see another class action again and these kinds of boiler plate agreements.

But that I'm going to send this to arbitration, but I want you to understand that I regard -- the district court says this, I regard class action to be an option, either left to the arbitrator to determine whether to certify the class, or for the district court itself to determine whether to certify the class, and then, upon review at the end, to satisfy itself that the interests of absent class members have been adequately protected.

I think the district court viewed its role in a way that was much too passive for the circumstances of the Federal Arbitration Act, but we do not take the position, and I want to be very clear about it, that we do not take the position that all TILA claims should be exempt from arbitration, or even all TILA class actions should be exempt from arbitration, nor that the district court was

without recourse to have the parties put in place some assurances about cost, or to actually insert a provision about cost, as the Cole court seems to have contemplated.

QUESTION: Well, why should the district court do that? I mean, if you're right, why not say, we construe the contract against the drafter, the drafter didn't put it in, so the contract is no good?

MR. SELLERS: Well, certainly Mastrobuono allows for that possibility, this Court's decision in Mastrobuono.

We also recognize, however, that there's a strong policy favoring the enforcement of appropriate arbitration agreements, and all we are saying here is that either there has to be, as the Eleventh Circuit did, a conclusion that the agreement is not enforceable, or the district courts could have some discretion to ensure that the parties put in place at the outset, not at the end of the arbitration process, but at the outset, mechanisms to ensure that these kinds of protections --

QUESTION: The class -- I don't -- the class action issue seems harder to get a hold of to me at the moment because it's -- seems like a pure State law issue. They're interpreting the contract, and they simply interpret the contract, perhaps wrongly, so that the class action in this case, in this contract, is not excluded

from the arbitration.

The other questions, of course, are also State law questions, but they basically are questions of State law that are made Federal because of the policy of the arbitration act, contrary to hostility by the State law.

MR. SELLERS: Justice Breyer, it would be -- might be State law, but the district court treated -- interpreted the question in the context of section 4 of the Federal Arbitration Act.

QUESTION: The class action --

MR. SELLERS: The class action issue. It never got to the question of whether class certification was warranted under State law. It stopped at the issue of, it's silent, therefore I have no discretion to consider it, and then expressed some sympathy for the plaintiff's view that class action might be appropriate here, but I have no authority to interpret this silent -- this agreement that was silent on this as permitting class actions.

That, I think, is a view of its role, the district court's role that is too passive, given this statute.

Unless there are any further questions, I'll --

QUESTION: Thank you, Mr. Sellers.

Mr. Phillips, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice. Unless you have further questions on the jurisdictional issue, I'm going to focus on the question of enforceability.

It was only at the very tail end of Mr. Sellers' remarks that he identifies the fact that there is a national policy favoring arbitration, and I don't think we should lose sight of the fact that in this context there was a voluntarily entered into arbitration clause that ought to be enforced under these circumstances, and there are no guarantees, when you go down arbitration as opposed to litigation.

We are in a situation now where we have litigated this issue in three different jurisdictions and levels of this court. I don't think anybody going in anticipated any of those costs, and certainly no one is in a position to give a guarantee that any process of dispute resolution is going to be cost-free or have cost constraints and, indeed, the plaintiff never asked the district court for any of the specifics that counsel has identified in the context of this particular case.

What she said is, plaintiff does not have the resources to arbitrate, notwithstanding her agreement.

Therefore, plaintiff's only option is to forego any claims against this company. That is the sum and substance of her position with respect to costs, not some kind of more restrained action, and that's why the district court rejected the notion --

QUESTION: What about the notion that she wanted to have --

MR. PHILLIPS: -- that those costs were unconscionable.

QUESTION: -- discovery into what the arbitration proceeding would be, and why couldn't one assume that that discovery would inevitably involve issues about the costs of arbitration?

MR. PHILLIPS: There's no problem with seeking discovery. The question is, did she --

QUESTION: But I thought that she was told she couldn't have discovery in the district court.

MR. PHILLIPS: It's not in the record in this case. She sought some discovery. She didn't seek additional discovery. Those are reasonable choices litigants make every day, and the point is, it's certainly not appropriate for this Court in a case in which the Eleventh Circuit quite clearly handled all of this as a matter of law.

The Chief Justice is absolutely right. You read

17(a) and 18(a) and it says, presume everything adverse to the lender in this case, and only then can you come to the conclusion that this arbitration clause should be enforced. That's clearly wrong, as an approach to this particular case, and that's the judgment that ought to be reversed.

The rest of these issues I think legitimately ought to be considered somewhere down the line.

QUESTION: Including whether --

MR. PHILLIPS: But Cole and reasonableness and unconscionability are questions that need to be resolved in a framework that is fundamentally different from a litigant who throws up her hands and says, I'm not going to participate in this particular process.

QUESTION: But you are asking us to reject the D.C. Circuit solution. That is, in contrast to the Eleventh Circuit that said, no arbitration, you can have your suit in court, the D.C. Circuit said, you must go to arbitration but we're going to relieve the party resisting arbitration, relieve her of the anxiety of thinking she's going to have to pay costs by telling her that's a term of law that we -- not asking the district court to do it, the court of appeals saying we write that into the contract.

What is -- you said it was premature. Is it wrong?

MR. PHILLIPS: It may be wrong, if we have the right facts. I think it is a mistake to say categorically that the lender will always pay the fees, regardless of the circumstances in a particular case.

Now, you know, if the case came up in the right context, I could well imagine the court might adopt a view like that. I could also imagine it might adopt the dissenting opinion in Cole and say, no, it still requires more of a case-by-case analysis in order to properly balance the interests of both sides, but the clear thing you shouldn't do is reject sending this case to arbitration on a record where the plaintiff had a full and fair opportunity and chose simply to say she's not going to play in that particular ball park.

If there are no other questions, thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Phillips. The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)