

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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| JOAN HILL-RODRIGUEZ et al., | : | : |
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| Plaintiffs, | : | : |
| | : | : |
| v. | : | Civil Action No. WDQ 06-CV-750 |
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| BLUEHIPPO FUNDING, LLC, et al., | : | : |
| | : | : |
| Defendants. | : | : |
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFFS’ OPPOSITION TO DESIGNATION AS INTERIM
COUNSEL, PLAINTIFFS’ MOTION FOR RECONSIDERATION, AND
OTHER RELIEF REQUESTED IN THE ACCOMPANYING MOTIONS**

I. INTRODUCTION.

The Court’s August 30, 2006, Order should be reconsidered and vacated. The ruling that plaintiffs who never signed and returned an arbitration agreement, and who never received anything of value from defendants, must nevertheless arbitrate their claims, is unprecedented and without legal foundation. It was also rendered before plaintiffs had an opportunity to be heard on the issue. The Court’s apparent conclusion that they assented to the arbitration agreement simply by receiving the document is foreclosed by the applicable provisions of the Uniform Commercial Code and controlling Fourth Circuit precedent; the notion that they are estopped from denying the application of the arbitration provisions because their claims arise from the contract misconstrues plaintiffs’ allegations and their claims for relief. The estoppel notion is particularly extreme as applied to plaintiffs who never signed and returned the arbitration agreement and whose claims can hardly be said to arise from the provisions of that document.

The Court’s denial of plaintiffs motion for voluntary dismissal lacks factual support in

the record. The non-controverted evidence is that plaintiffs moved to join another lawsuit, and notified the defendants and that court of their intent to seek dismissal of this suit, before defendants filed their motion to compel arbitration. The motion therefore could not have been in response to defendants' motion. In any event, the mere filing of a non-dispositive motion cannot constitute the substantial prejudice required to deny plaintiffs motion for voluntary dismissal. Moreover, the defendants' motion was only directed at one of the plaintiffs; there was no ground whatsoever not to grant dismissal for the other five plaintiffs.

The Court's ruling cannot constitutionally be applied to bar absent class members from pursuing their claims in court. They have received no notice, nor any opportunity to opt out of the litigation. Moreover, once plaintiffs decided to seek voluntary dismissal, they and counsel could no longer adequately represent the interests of absent parties. In light of the fact that plaintiffs submitted no substantive opposition to defendants' two motions to compel arbitration, it can hardly be said that the interests of absent parties were protected in a full and fair litigation of the issues. Under Rule 23(e), the Court should have granted dismissal of all claims on behalf of putative class members, regardless of its ruling with respect to the plaintiffs individual claims.

Defendants took great pains to ensure that they would never have to face a class action, in either court or in arbitration, and they moved to strike the class allegations of the complaint (a request that plaintiffs did not contest). But they also want to bind absent parties, and to have plaintiffs' counsel appointed as their unwilling representatives, to any adverse rulings that defendants win. Defendants should not be able to have it both ways; their request for the unprecedented and radical relief of binding absent parties to a ruling on an issue of state law made in the face of plaintiffs request for voluntary dismissal should be rejected.

Finally, absent parties cannot be bound by the doctrine of equitable estoppel, because the particular pleading decisions of the named plaintiffs here cannot be ascribed to absent parties who had no opportunity to be heard here; since they can state claims that do not arise from any contract, they should be able to press those claims in court, regardless of the Court's ruling with respect to the claims of named plaintiffs.

II. BACKGROUND.

BlueHippo markets, finances and sells computers and other electronics merchandise to low-income consumers. Since its founding in 2003, more than 160,000 customers nationwide have ordered merchandise from the company. *See* "BlueHippo Funding Announces New Sales Practices (June 27, 2006)," attached hereto as Exhibit 1.

A. BlueHippo's Telephone Sales Calls.

BlueHippo's initial contact with a computer customer occurs when the consumer responds to an advertisement by telephoning the company's call center and speaking with a company sales representative. BlueHippo sales representatives follow a standard sales script in their telephone conversations with potential customers. During a successful sales call, the telephone salesperson takes the customer's order, obtains the customer's bank account information, and obtains the customer's authorization to make an initial debit to the customer's bank account, followed by weekly debits until the computer is paid off. BlueHippo Funding Sales Script, attached hereto as Exhibit 2, at BHF-FLA-00051 – 00054.¹ The sales

¹All materials cited herein that are numbered BHF-FLA-000001 – 00283, as well as excerpts from a 651-page spreadsheet labeled "Florida Customers," were obtained through public records requests directed to the Attorney General of the State of Florida. That office obtained the materials from BlueHippo in response to a civil investigative demand it issued in connection with an investigation of BlueHippo's business practices.

representative requires the customer to acknowledge that “this verbal agreement is legally binding.” *Id.* at BHF-FLA-00054.

It has been BlueHippo’s policy and practice to retain all moneys paid by a customer regardless of whether the company ever ships the customer a computer, even if the customer attempts to cancel his account prior to shipment. *See* Screenshot of Customer Refund Policy from BlueHippo Intranet, BHF-FLA-00238, attached and incorporated herein as Exhibit 3.²

BlueHippo’s sales representatives did not disclose this fact in their sales calls. At no time during the telephone calls did the sales representative explain to customers that they would forfeit all money they had paid to the company even if they never received a computer.

The sales representative did use the word “non-refundable,” but only once, and then at the very end of the sales call, when, following recitation of the payment schedule and computer specifications, the representative instructed the customer, “if you understand this verbal agreement is legally binding and payments are non-refundable please say the word O’-kay.” *Id.* at BHF-FLA-00054. This single utterance of the word “non-refundable,” which a reasonable consumer could take to mean only that he could not return unwanted or defective merchandise and get his money back, was the only mention of a corporate policy of keeping all money paid by the customer regardless of whether the company ever shipped a computer.

In their telephone conversations with customers, BlueHippo’s sales representative made no mention of an arbitration agreement. Nor did they tell customers that they were required to

²On June 27, 2006, after the filing of this lawsuit and other court and regulatory actions, BlueHippo issued a news release modifying this policy. The company now retains only \$175 of the customer’s money. *See* “BlueHippo Funding Announces New Sales Practices,” attached hereto as Exhibit 4.

waive their right to participate in class-action lawsuits. The sales script contained nothing about these subjects whatsoever, and they were not mentioned in the telephone conversations that the sales representatives told the customers were “legally binding” agreements.

The foregoing description accurately describes BlueHippo’s telephone sales calls with plaintiffs and putative class members because BlueHippo requires its telephone sales representatives to adhere strictly to the sales script. BlueHippo’s sales training manual instructs trainees that “[w]e absolutely require you to follow our script 100% verbatim,” and warns that it monitors sales calls to ensure adherence. BlueHippo Sales Training Manual (Dec. 23, 2005), attached hereto as Exhibit 5 at 9. “Our script is ... a perfect document,” the manual adds. “There isn’t a single word that isn’t practically divinely inspired. There is no way you should ever deviate even 1/1000 of an inch from it...” *Id.* at 22.³

B. Documents Containing an Arbitration Provision.

After the sales representative told the customer that he had entered into a “legally binding” agreement and the customer said “okay,” the BlueHippo representative informed the customer, “you’re going to be getting your shipping paperwork in the mail which will go over

³BlueHippo’s directs all aspects of its sales representatives’ interactions with customers, coaching them in high-pressure sales techniques, and even instructing them in the use of “proper business English” when speaking with the company’s customers, whom the company describes as “low and moderate income families” who are “not generally with a higher education.”

- a. “Axe” is not “ASK”
 - b. “Wif” is not “WITH”
 - c. “Ain’t” is not “IS NOT”
 - d. “I is” is not “I AM”
- ... You don’t have to sound ignorant.
You get the hint here, right?

BlueHippo Sales Training Manual, Ex. 5 at BHF-FLA-00130, 00143.

everything we discussed today.” Sales Script at BHF-FLA-00054. The representative did not tell the customer that the “shipping paperwork,” which would arrive by mail after BlueHippo had already begun debiting the customer’s bank account, would actually be a written contract containing terms that were altogether different from the terms discussed in the sales call. Neither the sales representative nor the documents that arrived in the mail notified the customer that the documents contained “additional contract terms” or constituted “the remainder of the deal,” or words to that effect. The “shipping paperwork” was comprised of two documents: a “Revolving Account Agreement Computer Terms & Conditions” document (“Terms & Conditions”) and a “Shipping Verification Form.” *See* Declaration of John P. Burcham (BlueHippo’s corporate counsel), attached hereto as Exhibit 6, ¶ 10 and Exs. A-C thereto.

As plaintiffs have alleged in their Complaint, the Terms & Conditions contradict or added to the purported verbal agreement in a number of ways. Complaint, ¶¶ 29 - 40, 43.⁴ Although the BlueHippo’s “shipping paperwork” has varied slightly over the course of the class period, all versions the company mailed to plaintiffs and putative class members contained an identical agreement to resolve disputes through binding, individualized arbitration, as well as an agreement not to participate in class-action lawsuits. *See* Burcham Decl., Ex. 6, ¶¶ 6, 7, 10 and Exs. B and C thereto. Every Terms & Conditions document that BlueHippo sent to plaintiffs and putative class members featured a signature box with the statement, “I have read and agreed to the terms and conditions on both sides of this document,” below which was a signature line with

⁴Plaintiffs described these terms in some detail in their Complaint. For instance, the Terms & Conditions document makes it clear that the company does not necessarily ship the customer’s computer in the time frame discussed in the sales call or company advertisements. Complaint, ¶ 29.

the customer's name and order number printed underneath, and the instructions in bold, "**Sign and Return.**" *Id.*, Ex. C. The Shipping Verification Form also required the customer to sign a statement that the customer "agree[d] to the enclosed Terms & Conditions." *Id.* The cover letter and fax cover sheet that accompanied these documents reiterated BlueHippo's request that the customer sign and return copies of the documents, which included the arbitration clause and class-action waiver, and informed the customer that the company would not ship his computer until it received the customer's signed agreements. *See* Sample cover letter and fax cover sheet for "Sam P. Sample," BHF-FLA-00043, 00047, attached hereto as Exhibit 7.

BlueHippo claims that it mailed the Shipping Verification Form and Terms & Conditions agreement to plaintiffs and every other computer customer following the placement of a telephone order. Burcham Decl., ¶ 10. This may or may not be true, but it is nonetheless clear that BlueHippo did not mail these documents in a timely or effective way, and that many customers never received the documents at all. The Illinois attorney general, which is suing BlueHippo for its business practices, has alleged that the company mailed the documents between two and eight weeks after receiving telephone orders, and that some customers never received them at all. *See Illinois v. BlueHippo Funding, LLC*, No. 2005CH 642 (Cir. Ct. Sangamon Co. filed Nov. 15, 2005), Complaint attached hereto as Exhibit 8, ¶ 23. The Better Business Bureau of Greater Maryland ("BBB") has also cited the failure to receive these documents as one of the main complaints it has received from BlueHippo customers. BBB Reliability Report, Ex. 17 at 2 of 9. This is consistent with Mr. Burcham's affidavit, which acknowledges that BlueHippo waited nearly five weeks to mail the sales documents to plaintiff Carlton Turner. Burcham Decl., ¶¶ 3-4.

C. Five Named Plaintiffs Did not Sign or Otherwise Assent to the Arbitration Agreement.

Regardless of whether BlueHippo mailed the Shipping Verification Form and Terms & Conditions document containing the arbitration agreement to its customers, or whether the customers ever received them, the great majority of plaintiffs *and* putative class members never signed and returned these documents, which BlueHippo specifically requested that they sign and return. For example, BlueHippo maintains that it mailed plaintiff Joan Hill-Rodriguez the documents containing the arbitration agreement, but does not claim that she signed and returned them. Burcham Decl., Ex. 6, ¶ 10 and Ex. C thereto. In fact, as Ms. Hill-Rodriguez wrote to the Maryland Attorney General's Office when she complained to that office about BlueHippo's refusal to return moneys it had debited from her bank account, she declined to sign and return the Terms & Conditions document specifically because she did not agree, *inter alia*, with "the arbitration section" or the "section regarding a class action lawsuit." *See* Letter from J. M. Hill-Rodriguez to State Attorney General (Apr. 22, 2005), attached hereto as Exhibit 9, at 3. *See also* Declaration of Joan M. Hill-Rodriguez, attached hereto as Exhibit 10. Like Ms. Hill-Rodriguez, none of the other plaintiffs except Carlton Turner signed and returned the agreement containing an arbitration clause. *See* the following:

- In an exchange of correspondence among plaintiff Vincent Humphries, the Maryland Attorney General and BlueHippo, attached hereto as Exhibit 11, Mr. Humphries complained that he had not understood from the sales call that he would not get his money back even if he canceled shortly after the call and prior to shipment. BlueHippo did not claim that Mr. Humphries had signed and returned the sales documents, and claimed instead that he was obligated to forfeit his payments merely because he said "okay" during the sales call, resulting in a "contract" that was "legally binding."
- Letter from B. Manley to M. Thorsen (Mar. 28, 2005), attached hereto as Exhibit 12 (Responding to Maryland Attorney General's inquiry about

plaintiff Moses Sabb's complaint, BlueHippo maintains that Mr. Sabb is not entitled to a return of moneys paid based on the initial sales call, but does not claim to have received a signed agreement from Mr. Sabb.).

- Complaint of P. Santiuste to New York City Dep't of Consumer Affairs (May 19, 2005), attached hereto as Exhibit 13 (plaintiff Pedro Santiuste stating that he received the "written contract," refused to sign it, and then called and demanded a return of his money from BlueHippo, which refused). *See also* Declaration of Pedro Santiuste, attached hereto as Exhibit 14.
- Correspondence between S. White and Maryland Attorney General, attached hereto as Exhibit 15 (plaintiff Serrenia White writing to attorney general's office complaining that BlueHippo refused to return her money, and stating that she has not returned the unsigned sales documents she received from the company, and the attorney general's office answering that BlueHippo had responded that Ms. White was bound by the terms agreed to verbally during the sales call).

Other than Carleton Turner, the named plaintiffs in this case thus never signed and returned to BlueHippo the document containing an arbitration agreement, which BlueHippo mailed to them and requested that they "Sign and Return" to signify their assent.⁵

⁵As these documents demonstrate, it is disingenuous for BlueHippo to blame plaintiffs for its inability to produce arbitration agreements signed by them, or even to determine whether plaintiffs ever ordered computers from the company. *See* Memorandum in Support of Motion to Compel Arbitration (ECF No. 21-2) at 5. BlueHippo corresponded with state consumer-protection officials about these customers' complaints, and clearly knows that none but Mr. Turner signed and returned their Terms & Conditions documents. In addition, BlueHippo never asked plaintiffs' counsel to provide the information that it now claims it needs in order to investigate plaintiffs' claims, and should not be heard to argue that it cannot locate them.

Plaintiffs' counsel are awaiting receipt of signed declarations from plaintiffs other than Mr. Turner, stating that plaintiffs did not sign and return BlueHippo's sales documents. Plaintiffs intend to submit these declarations as supplemental exhibits to this memorandum by September 14, 2006, which is the deadline for a motion for reconsideration of the Court's August 30 Order.

D. A Significant Majority of Putative Class Members Did not Sign or Otherwise Assent to the Arbitration Agreement.

Like most of the named plaintiffs in this case, a large majority of members of the putative class never signed and returned the Terms & Conditions document that contained an arbitration clause and an agreement not to participate in class actions. This fact is demonstrated in a spreadsheet of customer transaction information that BlueHippo produced to the Florida Attorney General's office in response to a civil investigative demand. BlueHippo's own spreadsheet, which contains the payment histories of all Florida consumers who ordered computers from BlueHippo from early May 3, 2003 through February 16, 2006, demonstrates the following facts:

- BlueHippo shipped computers or plasma televisions to only 34% of customers who ordered these products and paid money to the company through electronic debits from their bank accounts;
- The other 66% of BlueHippo's customers – the putative class in this case – paid money to the company and received nothing in return; and
- 65% of the members of the putative class never signed and returned to BlueHippo the Shipping Verification Form and Terms & Conditions document containing an arbitration clause and class action waiver, which BlueHippo purports to have mailed to them and asked them to sign and return.

See Declaration of David J. Marshall attached hereto as Exhibit 16.⁶

These consumers did not assent to BlueHippo's Terms & Conditions in any manner

⁶The named plaintiffs who did not sign the Shipping Verification Form or Terms & Conditions document containing the arbitration agreement and class-action waiver will be referred to hereinafter as the "Non-Signatory Plaintiffs," and those putative class members who did not sign will be referred to as the "Non-Signatory Class Members."

other than signing and returning the document. They neither received nor used the merchandise they ordered from the company. To the contrary, these plaintiffs and members of the putative class paid money to BlueHippo but received nothing of value in return. Complaint, ¶¶ 54, 59(c).

E. Criticism of BlueHippo's Sales Practices.

BlueHippo's business practices have drawn fire from a wide range of government regulators. The Federal Trade Commission is investigating the company's business practices, the attorneys general of Florida, West Virginia and Maryland have investigated or are investigating, and the attorney general of Illinois has filed an action against BlueHippo for multiple violations of that state's consumer protection laws. *See Illinois Complaint, Ex. 8.* BlueHippo's business practices are the subject of at least four class-action lawsuits as well. In addition, the Better Business Bureau of Greater Maryland, where BlueHippo is located, has received approximately 1,000 complaints, demonstrating a "pattern of consumer dissatisfaction" and resulting in an "unsatisfactory" rating by the Bureau. *See BBB Reliability Report, attached hereto as Exhibit 17, at 2.*

III. THE COURT SHOULD RECONSIDER ITS RULING ORDERING THE NON-SIGNATORY PLAINTIFFS TO ARBITRATE THEIR CLAIMS.

In the written document containing the arbitration clause, and in the correspondence accompanying that document, BlueHippo requested that customers indicate their acceptance of its provisions by signing the document and returning it to BlueHippo. Five of the six named plaintiffs in this action – Joan Hill-Rodriguez, Vincent Humphries, Moses Sabb, Pedro Santiuste, and Serrenia White – did not sign and return the document to BlueHippo. BlueHippo has presented no evidence to rebut this fact, and does not contend that these Non-Signatory Plaintiffs assented to the arbitration provisions in any other manner.

The Court ruled that the Non-Signatory Plaintiffs are nevertheless bound because they are presumed to have received the document, Order at 5-6, and because, under the doctrine of equitable estoppel, they may not deny assent to the arbitration provisions of a contract while simultaneously relying on the contract in their claims. *Id.* at 6-7. Plaintiffs respectfully request that the Court reconsider this ruling on the grounds that: A) plaintiffs did not have an opportunity to be heard on this issue; B) the Non-Signatory Plaintiffs are not bound by the mere receipt of the document under Maryland law and Fourth Circuit precedent; C) the doctrine of equitable estoppel does not apply here; and D) the Court erred in denying the Non-Signatory Plaintiffs' motion for voluntary dismissal on the grounds that they so moved to avoid an adverse ruling, as BlueHippo filed its motion to compel arbitration of *their* claims more than two and one-half months *after* they filed their motion for dismissal.

A. Plaintiffs Have Not Had an Opportunity to Be Heard on the Issue of Whether the Non-Signatory Plaintiffs Can Be Compelled to Arbitration.

Defendants' first motion to compel arbitration, filed on June 6, 2006, sought to compel arbitration only of the claims of Carleton Turner, the sole plaintiff who signed and returned the arbitration agreement, and the claims of putative class members who also signed or otherwise assented to the agreement.⁷ In their motion papers, defendants did not contend that customers might have assented other than by signing and returning the document. Defendants did not move

⁷ In their June 6 motion, defendants stated that they "seek individual arbitration of the claims of each named plaintiff who signed or otherwise assented to the arbitration clause," and requested that the Court "compel Carleton Turner to arbitrate his claims ...," Motion to Compel Arbitration (June 6, 2006) at 8. While defendants also sought to compel arbitration of the claims of putative class members "who signed or otherwise assented," *id.* at 9, they did not direct any part of their motion to the other five plaintiffs who had not signed the arbitration agreement.

the Court for an order compelling arbitration of the claims of the Non-Signatory Plaintiffs and Non-Signatory Class Members until August 23, 2006, when they filed their Motion to Compel Arbitration on the Basis of the Doctrine of Equitable Estoppel. Although plaintiffs' response to this motion was not due until September 11, 2006, the Court granted the relief defendants requested in its Order August 30, 2006, and ordered the case "closed." Plaintiffs respectfully request leave to respond to defendant's motion through this memorandum, and have filed a motion to that effect with the Court today.

B. In a Sale of Goods Transaction, Mere Receipt of Written Arbitration Provisions Does Not Establish Assent to Those Provisions.

The Court ruled that, because defendants presented evidence that the written document was sent to customers after they placed an order by telephone, it may be presumed that they received the documents. The Court noted that none of the Non-Signatory Plaintiffs presented evidence that they did not receive the documents. Based on receipt, the Court held that the Non-Signatory Plaintiffs were bound.

Plaintiffs respectfully submit that the Court incorrectly applied the law governing this issue, and that the Maryland Commercial Code and Fourth Circuit precedent mandate the opposite result: regardless of receipt, plaintiffs and putative class members who did not sign and return the arbitration agreement, as BlueHippo specifically requested, did not agree to arbitration, and therefore the FAA does not require that they arbitrate their claims.⁸ BlueHippo's

⁸As noted earlier, plaintiff Hill-Rodriguez not only withheld her assent to the Terms & Conditions document, but affirmatively rejected those terms, specifically including the arbitration agreement and class-action waiver, by contacting BlueHippo and trying to cancel her account. BlueHippo insisted that she was legally bound based on her *oral agreement*, and refused to honor her requests for cancellation and a refund of her money. She ultimately had to direct her bank to stop honoring BlueHippo's automated debits in order to prevent the company from

telephone sales script did not mention arbitration, and the arbitration provisions the company sent out after the call was an *additional* term to which they did not assent.

The Non-Signatory Plaintiffs do not contest receipt of the documents.⁹ But these plaintiffs respectfully submit that whether they did or did not receive the arbitration agreement is legally irrelevant to the issue before the Court. In fact, defendants themselves never contended that the Non-Signatory Plaintiffs and Non-Signatory Class Members could be bound by the mere receipt of the arbitration agreement, without any manifestation of assent.

1. *Plaintiffs' Assent Cannot Be Inferred from the Mere Receipt of Arbitration Provisions That Were Not Agreed to in Prior Communications.*

The FAA requires that arbitration provisions be enforced only if the parties have agreed to them. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002). Whether the parties

taking more money from her. *See* Hill-Rodriguez Decl., Ex. 10, ¶¶ 5-6; Hill-Rodriguez Letter, Ex. 9. BlueHippo responded similarly to Plaintiff Santiuste when he attempted to cancel. Santiuste Decl., Ex. 14, ¶ 5-6. The Better Business Bureau of Greater Maryland reports that this is a common complaint. BBB Reliability Report, Ex.17 a 2 (Consumers reported that BlueHippo “made unauthorized withdrawals from consumers’ bank accounts and once withdrawals began, consumers had difficulty getting them stopped.”).

⁹ However, the Better Business Bureau noted that BlueHippo customers complained of not having received the documents, Ex. 17 at 2, and the Illinois Attorney General has also alleged that some customers never received the documents. Ex. 8, ¶ 23. In any event, the Court’s finding that BlueHippo mailed these forms to customer “immediately” after taking their telephone orders, Order at 3, is not supported in the record: Mr. Burcham did not state this in his declaration. Ex. 6. To the contrary, in the two transactions he described regarding plaintiffs Turner and Hill-Rodriguez, the company sent the documents *five weeks* (Ex. 6, ¶¶ 3-4) and ten days (Ex. 6, Ex. C thereto) after the sales calls respectively. Given these facts, the Court should not even accept Mr. Burcham’s statement that the company mails the documents out pursuant to “policy.” Ex. 6, ¶ 10. *Compare Discover Bank v. Vaden*, 409 F. Supp. 632, 639 (D. Md. 2006) (Quarles, J.) (applying presumption when plaintiffs’ only evidence of non-receipt was her denial, defendants presented evidence of measures taken to ensure card members received arbitration provisions, and there was no evidence of defendants’ routine failure to mail the provisions in a timely manner).

have entered into a legally enforceable agreement to arbitrate their disputes is a question of state contract law. *Id.* at 501. When a purported agreement to arbitrate relates to a sale of goods, the state's commercial code governs. *See, e.g., Supak & Sons Mfg. Co., Inc. v. Pervel Industries, Inc.*, 593 F.2d 135, 136-37 (4th Cir. 1979) (applying § 2-207(2) of the New York U.C.C. to decide whether an agreement to arbitrate contained in an unsigned written document became part of a contract for the sale of goods); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92 (2d Cir. 2001) (applying 2-207(2) to determine whether arbitration clause became part of the contract); *Diskin v. J.P. Stevens & Co.*, 836 F.2d 47 (1st Cir. 1987).¹⁰

The issue in this case can be simply stated: under Section 2-207 of the U.C .C., does a written arbitration clause sent to a consumer after an oral sales call bind the consumer if he does not affirmatively assent to the clause? The very purpose of Section 2-207 is to provide a clear answer to this question, and the answer is “no.”

Under Section 2-207,¹¹ the fact that a purported written confirmation contains terms that

¹⁰ Plaintiffs assume *arguendo* that Maryland law applies to this issue of contract formation. Although Maryland's *lex loci* conflict-of-laws rule would apply the law of the state in which each class member resided when they called BlueHippo and when BlueHippo debited their bank accounts, plaintiffs are not aware of any conflict between the law of Maryland and that of other jurisdictions regarding contract formation. All appear to apply the Uniform Commercial Code Section 2-207 to the issue.

¹¹ Md. COMMERCIAL LAW Code Ann. § 2-207 (2006) provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms;

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

are different from or additional to a prior oral negotiation or agreement does not preclude the formation of a contract, as it might have under the traditional mirror-image acceptance rule of the common law, but neither do these terms become part of the contract. Section 2-207(2). The additional terms “are to be construed as proposals for additions to the contract.” *Id.* Since the Non-Signatory Plaintiffs did not sign and return the documents, they did not accept the additional terms in the mode of acceptance specified by BlueHippo, and thus did not legally assent to those additional terms.

The Non-Signatory Plaintiffs maintain that they did not enter into binding contracts with BlueHippo. They did not enter into contracts during the telephone sales calls, as BlueHippo intentionally misled them into agreeing to terms, such as the forfeiture of all moneys paid in the event of default, which the telephone sales representatives did not reasonably explain or disclose. Alternatively, if there was a contract, it was an *oral* one, as these plaintiffs never signed a writing. Indeed, BlueHippo itself told each customer that “this verbal agreement is legally binding,” and took the same position when customers or regulators questioned the company’s

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of Titles 1 through 10 of this article.

refusal to provide refunds.¹²

The result under Section 2-207 is the same in either case. If no agreement was entered into orally, then the sales documents BlueHippo sent to the Non-Signatory Plaintiffs were merely offers which, like any other contract offer, required an affirmative manifestation of assent to be accepted. Silence is not acceptance. *See* Farnsworth, *Contracts* (2d ed. 1990) at 157 (“So fundamental is the tenet that mere silence is not acceptance that, even as the master of the offer, the offeror is powerless to change the rule.”). Because BlueHippo further prescribed a particular mode of acceptance – “Sign and Return” – the customer could accept only in this way. *See* Farnsworth, *supra* at 143-44 (the offeror is “master of the offer” and can prescribe manner of acceptance). Since the Non-Signatory Plaintiffs did not sign and return the agreement containing arbitration provisions, they are not legally bound by them under § 2-207.

Alternatively, if, as defendants claim, the Non-Signatory Plaintiffs entered into a “legally binding” contract in the telephone sales call, then the arbitration provisions and other terms that BlueHippo mailed to them constituted a written “confirmation” of a prior oral agreement under § 2-207. The arbitration provisions, which were not part of the sales call, were in addition to whatever had been agreed to orally, and did not become part of the contract unless the recipients affirmatively assented to them. *See Supak, supra; Diskin v. Stevens, supra*, 836

¹²Even if this sales call resulted in an otherwise binding agreement, it could not be enforced because: 1) it violates the Maryland Statute of Frauds requiring that any contract for the sale of goods for over \$500 must be in writing and signed by the party against whom enforcement is sought, Md. Comm. Code § 2-201; 2) it is voidable under the doctrine of mistake or misrepresentation because BlueHippo knew or should have known that plaintiffs did not understand BlueHippo’s “non-refundable” provision, *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112 (4th cir. 1983); and 3) it violates Maryland’s RISA, which requires such installment sales agreements to be in writing. In addition, plaintiffs contend that any oral agreement failed to make the written disclosures required by TILA.

F.2d at 51 (The buyer “received and retained appellee's confirmation form without signing it. ... [Under 2-207(2)] this behavior alone fell short of consent to arbitration.”); *In re: Cotton Yarn Antitrust Litigation*, 406 F.Supp. 2d 585 (M.D.N.C. 2005) (plaintiff buyers who received but did not sign written sales confirmations containing arbitration clauses were not bound under Section 2-207, even after they accepted delivery of goods, when prior oral discussions did not include mention of arbitration).

Controlling Fourth Circuit precedent requires that the Court apply this Section 2-207 analysis be applied to the instant case. In *Supak, supra*, the parties orally agreed to a sale of goods. Later, the seller sent the buyer a document purporting to confirm the sale but containing an arbitration clause that the parties had not discussed. Because both parties were merchants, the Court held that, under Section 2-207, additional terms could become part of the contract if they did not materially alter the agreement, but that, under New York law, an arbitration provision is considered *per se* a material change, and thus the arbitration clause did not bind the buyer. 593 F.2d at 136-37. In cases like the present one, involving a transaction that is not “between merchants,” no materiality determination is required. Additional terms may not become part of the contract unless affirmatively assented to. § 2-207(2).

2. *The Failure-to-Object Cases Do Not Apply Here.*

In some contexts, courts have held that a party can be bound by receiving notice of an arbitration provision and failing to object, if the party continues using the service being provided. For example, a credit card holder can be bound when a bank mails notice of arbitration provisions to the cardholder. *See, e.g., Discover Bank v. Vaden*, 409 F. Supp.2d 632 (D. Md. 2006) (Quarles, J.), and cases cited therein.

The failure-to-object cases do not apply here for a number of reasons. First, because this case involves the sale of goods, the UCC governs, and there is no judicial disagreement that additional terms cannot become part of an agreement involving a consumer without an affirmative manifestation of assent. Md. Comm. Code § 2-207(2). Second, in cases finding that a party was bound if he failed to object, the parties had originally agreed that their agreement could be modified later, and the original agreement provided a way to manifest assent or to object. For example, in *Vaden*, 409 F.Supp. 2d at 637, the original agreement provided that “the use of your Account or the Card on or after the effective date of the change means that you accept and agree to the change.” Here, by contrast, BlueHippo specified the means of acceptance – “Sign and Return” the document – did not even purport to provide any way to accept.¹³ Moreover, while customers in the credit card cases could reject the provisions by not using their cards or closing their accounts, BlueHippo openly refused to honor its customers’ requests to cancel their accounts. Instead, BlueHippo insisted that non-signing customers were contractually bound by *oral agreements*, and continued debiting their accounts.

Unlike the failure-to-object cases, the Non-Signatory Plaintiffs here did not receive and retain benefits under the contract after being notified of arbitration provisions. They received no benefit whatsoever at any time from BlueHippo, and therefore could not reject the arbitration provisions by simply returning merchandise or ceasing to accept a benefit under the contract.

¹³ When an agreement specifies the terms under which arbitration provisions and other new terms can become binding, the provisions do not become binding until those terms are satisfied. See *DirectTV v. Mattingly*, 2003 Md. LEXIS 463 (Court of Appeals 2003) (holding that arbitration provisions sent out to customers did not become binding because the original agreement stated that such terms would only be binding if notice were provided, and the company merely included the provisions in a billing statement but did not provide separate notice of them).

This case is also easily distinguishable from *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149-50 (7th Cir. 1997); *see also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that terms contained inside a box of software that invite acceptance by retaining and using the software bind buyers who use the software after an opportunity to read the terms and to reject them by returning the product). In *Hill*, the customer received a computer he had ordered by telephone, the box contained a terms and conditions document containing an arbitration clause, and the document stated that if the customer did not return the computer within 30 days, he would be deemed to have assented to the terms. In Judge Easterbrook's view, following *ProCD, supra*, the case involved a "rolling contract" that had not been consummated in the telephone call. The Court therefore treated the terms and conditions contained in the box as an offer to contract on those terms, held that the offer invited acceptance by means of keeping the computer for thirty days, and that the buyer accepted by doing so: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened." *Hill*, 105 F.3d at 1452 (*quoting ProCD*).

Whatever the merits of the *Hill* analysis, it does not apply here. The premise of *Hill* analysis was that no prior oral agreement had been made, and therefore the document containing the arbitration provisions was not a "written confirmation" of a prior agreement under § 2-207. Instead, the Court treated the document as an offer to contract, to be accepted by the means the offeror requested. The only issue, therefore, was whether a particular mode of acceptance specified by the seller, the retention of merchandise already delivered, could be imposed on the offeree, and the court held that it could. *Id.*

Here, in contrast, BlueHippo has consistently maintained that it is entitled to keep the money of people who never signed and returned the written agreement, and who never received anything of value from the company, because a “legally binding” *oral agreement* was entered into in the sales call between plaintiffs and BlueHippo. BlueHippo is estopped from now denying that such an agreement existed. Accordingly, there is no doubt here that, as in *Supak*, the arbitration provision constituted an additional term contained in a “written confirmation” under § 2-207, which cannot become part of the agreement without an affirmative manifestation of assent. In addition, in *Hill* the seller specified that keeping the merchandise for over thirty days was the way to manifest assent to the terms, whereas BlueHippo directed customers to “**Sign and Return**” the documents to signify their assent. Accordingly, customers who did not do so are not bound, even under the controversial *Hill* analysis.¹⁴

C. Plaintiffs Do Not Seek Direct Benefit from the Written Document Containing the Arbitration Clause, and Accordingly Non-signatories Are Not Estopped from Denying Their Assent to the Arbitration Clause.

The Court ruled that the Non-Signatory Plaintiffs are estopped from denying their assent to the arbitration clause under the doctrine of equitable estoppel on the ground that their claims arise under a written contract with BlueHippo. Order at 6-7. The Court similarly suggested that, by asserting claims under TILA and RISA, non-signatory plaintiffs admitted that they assented to the written document containing the arbitration provisions, as both claims assume a

¹⁴In *Jones v. Genus Credit Mgt. Corp.*, 353 F.Supp. 2d 598 (D.Md. 2005), cited by the Court at page 6 of its Order, Judge Motz did not hold that mere receipt of an arbitration clause made it binding; instead, the court found that the plaintiff had in fact assented because the arbitration provision “was incorporated by reference” into a separate agreement he had signed. *Genus Credit* is inapplicable to this case because there is no evidence that the Non-Signatory Plaintiffs signed a separate document incorporating BlueHippo’s arbitration agreement.

contractual agreement to extend credit. *Id.*

Plaintiffs respectfully submit that the Court has misconstrued their claims. To the extent that the Non-Signatory Plaintiffs asserted claims relating to a contract, the contract to which they refer is the possible *oral contract* for the extension of credit entered into during the sales call, not the written document that they never signed and returned.. In any event, plaintiffs' claims cannot be said to "arise from" an agreement when none of their claims rest on allegations that defendants breached any duties *created by the agreement*. To the contrary, all of plaintiffs' claims are based on breaches of duties that apply *regardless of contract* because they are imposed by legislation and the common law.

Plaintiffs respectfully submit that the Court's ruling that the assertion of TILA and RISA claims presupposes assent to a written agreement, because those statutes only apply if there has been a written contract, is plainly erroneous. Claims under TILA and RISA require that a credit transaction be "consummated," but they in no way require that they be "consummated" in a *written contract*. *See, e.g. Fairley v. Turan-Foley Imports*, 65 F.3d 475, 481 (5th cir. 1995) (finding TILA violations based either an oral contract or a contract created through conduct). In fact, such a requirement would create a logical absurdity, since the failure to provide to the consumer a written version of a credit transaction is itself a violation of TILA and RISA.. If consummation could only occur when a written contract was entered into, creditors could never violate TILA¹⁵ and RISA¹⁶ by failing to provide borrowers with a written version of the

¹⁵TILA requires that disclosures must be made "before the credit is extended." 15 U.S.C. § 1638 (b)(1). Regulation Z provides that a creditor must "make disclosures before consummation of the transaction." 12 C.F.R. § 226.17(b) (emphasis added). "Consummation" in turn is defined to occur at the "time that a consumer becomes contractually obligated on a credit

agreement because, by definition, the statutes would not come into play unless a written contract had been consummated.

In any event, even if TILA and RISA claims could not be predicated on an *oral* agreement, the appropriate action would be to dismiss those claims upon defendants' motion, rather than to presume that plaintiffs were actually claiming a benefit from a written agreement that they did not sign. It simply does not follow from a party's mistaken assertion that oral agreements for the extension of credit violate TILA and RISA that, by even asserting such claims, they implicitly admit assent to a written document that they did not sign and return.

The Court's ruling that the doctrine of equitable estoppel applies because several of plaintiffs' "claims clearly arise from the Contract," Order at 7, is also erroneous. Plaintiffs do

transaction." Id. § 226.2 (emphases added). State law determines whether a contract has been entered into. 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981). TILA and its related regulations nowhere limit the law's application to written agreements to extend credit.

The Court cites *Gibson v. LTD, Inc.*, 434 F.3d 280 (4th Cir. 2006) for the proposition that TILA applies "only when the purchaser signed the retail installment agreement." Order at 8. The *Gibson* opinion nowhere contains such a proposition. In considering whether TILA applied to a contract in which a consumer was bound but the lender was not, the *Gibson* court explained that disclosures must be made under TILA "before *consummation* of the transaction" under 12 C.F.R. 226.17(b), and that "[c]onsummation" in turn is defined to occur at the "time that a consumer becomes *contractually obligated* on a credit transaction," *quoting* Regulation Z. The Court nowhere limited its interpretation to written rather than oral contracts, an issue that was not present in the case in that the particular consumer had in fact signed.

¹⁶RISA applies to "installment sales agreements," but the statute nowhere suggests that it applies only to written agreements. Md. Comm. Code §12-601 (1). The Court cites *State v. Action TV Rentals, Inc.*, 467 A.2d 1000, 1004-12 for the proposition that RISA only applies "when the buyer is under a binding obligation to make certain payments." That case, which has nothing to do with the question of RISA's applicability to oral agreements, does not support the proposition that plaintiffs' assertions of RISA claims presuppose assent to the written document containing the arbitration provisions. The issue in the case was whether a "rent-to-own contract" qualified as an installment sales agreement.

not dispute the principle that a party cannot have it both ways by seeking to recover damages for breach of a contract while at the same time denying that an arbitration provision *in the same contract* governs. “[A] party may be [equitably] estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000). As the Fourth Circuit explained in *International Paper*, plaintiffs there were estopped from denying assent to an arbitration clause contained in the same written contract on which rested their claims for “breach of contract and breach of warranty,” *id.* at 414:

The Wood-Schwabedissen contract provides part of the factual foundation for every claim asserted by International Paper against Schwabedissen International Paper alleges that Schwabedissen failed to honor the warranties in the Wood-Schwabedissen contract and it seeks damages, revocation, and rejection "in accordance with" that contract. International Paper's entire case hinges on its asserted rights under the Wood-Schwabedissen contract; it cannot seek to enforce those contractual rights and avoid the contract's [arbitration] requirement.

Id. at 418.

In *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 Fed. 3d 157 (4th Cir. 2001), cited by the Court at pages 6-7 of its Order , the Fourth Circuit applied *International Paper* where the plaintiff, a non-party to a written arbitration agreement, asserted claims against the builder for negligence and breach of warranty. The Court held that the relevant inquiry was whether the duties that the plaintiff claimed were breached were rooted in the contract, as opposed to in legal duties imposed independent of the contract. In found that the doctrine of equitable estoppel did not apply because the plaintiff’s claims were “premised on violations of legal duties imposed on builders by South Carolina common law, not by its duties under the

general contract.” The court found that the plaintiff, “in asserting its claims, is not seeking a direct benefit from the provisions of the general contract it did not sign, and the doctrine of equitable estoppel cannot be used to force the Association to arbitrate.” *Id.* at 163-64.¹⁷

Under this controlling precedent, it is obvious that the doctrine of equitable estoppel does not apply to plaintiffs’ claims. Plaintiffs’ Complaint does not assert a claim that BlueHippo breached a contract, or any duty created by contract. All of plaintiffs’ claims are based on duties created by law independent of any contract between the parties. For example, the duties imposed by TILA and RISA are not “created by the contract” but rather imposed by legislation. The duties imposed by the Maryland CPA not to engage in unfair or deceptive trade practices are not created by any contract but by the legislation. And the duties imposed by the common law of unjust enrichment have no relation to any contractual duties at all.

It is true that plaintiffs’ Complaint describes BlueHippo’s sales practices in as much detail as was possible at the time it was drafted. It describes the practices in reference both to plaintiffs who may have signed the written documents containing the arbitration clause and to plaintiffs who did not sign, and accordingly the Complaint also describes the written documents that Carleton Turner and *some* putative class members signed. All but two of the twenty-four paragraphs of the Complaint that the Court cites are included in the *factual* allegations of the Complaint, which purport only to describe BlueHippo practices, not to make any claims for relief under the terms of the Shipping Verification Form or Terms & Conditions document. The overwhelming majority of the paragraphs cited by the Court to show that “Plaintiffs’ claims

¹⁷The Court explained that if plaintiff that it “had contracted ... for blue paint but instead received brown,” it would then be alleging the violation of a duty “created solely by contract.” *Id.* (*citations and internal quotations omitted*).

clearly arise from the Contract,” Order at 7, point to the Shipping Verification Form and the Terms & Conditions document only as evidence of BlueHippo’s actual practices, which vary from the practices the company describes in its marketing materials and the representations of telephone sales representatives. These allegations support various the various statutory and common-law claims that plaintiffs state in the Complaint, but have nothing to do with breach of contract or otherwise claiming a benefit, direct or otherwise, from the written documents.¹⁸

Plaintiffs do not claim, for example, that BlueHippo is liable for failing to deliver computers as promised, or for failing to refund money as promised. Rather, plaintiffs claim that the refusal to return plaintiffs’ money when no merchandise has been received violates duties that are imposed by law, in direct contradiction to the right to retain the money that BlueHippo claims under the contract. In fact, far from claiming any benefit from either the written or oral agreements, plaintiffs ask the Court to declare that the “purported agreements between BlueHippo and each named plaintiff and each member of the Class, are null and void and create no legally enforceable obligations.” Complaint, Prayer for Relief, ¶3. It is the defendants who seek the benefit of rights purportedly arising from the purported oral and written contract – i.e., the right to retain plaintiffs’ money without providing anything of value. Plaintiffs seek relief based on duties that are imposed *despite* the terms of these purported agreements. For this reason, the doctrine of equitable estoppel simply does not apply in these circumstances.

As is explained below, moreover, even if the Non-Signatory Plaintiffs in this case

¹⁸Plaintiffs’ TILA and RISA claims do not presume the existence of a written agreement except for the lone plaintiff and putative class members who signed the Terms & Conditions document. For the Non-Signatory Plaintiffs and Non-Signatory Class Members, these claims are based on BlueHippo’s failure to make disclosures regarding the “legally binding” credit agreements it claims to have entered into with these customers.

mistakenly included allegations that have properly estopped them from denying their assent to the arbitration clause (which plaintiffs maintain that they did not), the larger issue before the Court is whether it should extend its ruling to deprive the many Non-Signatory Class Members, who might assert valid claims against BlueHippo without any mention of the written documents, of their right to bring their claims in court. Plaintiffs respectfully submit that the Court should reconsider the effect of its ruling on the estoppel issue in light of the effect that its extension would have on these many absent class members.

D. Plaintiffs' Motion for Voluntary Dismissal Should Have Been Granted as to the Non-Signatory Plaintiffs, as Defendants Had Not Filed a Motion to Compel Them to Arbitrate Their Claims When They Requested Dismissal.

The Court denied plaintiff's motion for voluntary dismissal on the sole grounds that it was filed to avoid an adverse ruling on defendants' motion to compel arbitration. The Court's reasoning cannot justify denying voluntary dismissal to the Non-Signatory Plaintiffs because defendants' June 6, 2006, motion to compel arbitration was directed only to plaintiff Carleton Turner, who signed the arbitration agreement, and to putative class members who "signed or otherwise assented" to that agreement. With respect to the claims of the Non-Signatory Plaintiffs, defendants had done nothing in the case that could possibly lead to the conclusion that they would be substantially prejudiced when plaintiffs requested voluntary dismissal. Defendants only sought arbitration of the Non-Signatory Plaintiffs' claims on August 30, 2006, some two and one-half months after plaintiffs' filed their motion for voluntary dismissal.

IV. THE COURT SHOULD RECONSIDER ITS RULING THAT PLAINTIFF CARLETON TURNER MUST ARBITRATE HIS CLAIMS.

Plaintiffs argued above that the Court had no reasonable basis for denying the motion to dismiss as to the Non-Signatory Plaintiffs because no motion had been filed to compel them to arbitration at the time they filed their motion. Plaintiffs respectfully submit that the Court erred in denying that motion as to plaintiff Carleton Turner as well.

The Court denied the Plaintiffs' motion for voluntary dismissal on the ground that dismissal was sought to avoid an adverse ruling on defendants' motion to compel arbitration. Order at 4. However, as plaintiffs explained in their brief and reply brief in support of their motion for voluntary dismissal, plaintiffs decided to seek dismissal prior to defendants filing their motion, and so notified defendants and the *Ray* Court, one week before defendants filed their motion to compel arbitration in this case. Moreover, there is no precedent or authority for denying plaintiffs a voluntary dismissal without prejudice on the basis of a pending motion that is not *dispositive*, and which will not conclude the case *on the merits*, such as a motion for summary judgment.

A. Plaintiffs Did Not Seek Dismissal in Response to the Filing of Defendants' Motions.

Plaintiffs' briefs to this court in support of their motion for voluntary dismissal, and the accompanying declaration of counsel Gary Peller, make it clear that plaintiffs informed defendants of their intent to seek voluntary dismissal of this action on May 30, 2006. On May 31, plaintiffs sought to join the *Ray* action, and on that date informed the *Ray* court and defendants of their intent to seek voluntary dismissal of this lawsuit. Plaintiffs' decision was based on the desire to consolidate related cases against BlueHippo in California, not on any

attempt to avoid an adverse ruling on a pending motion, as no motion was pending at the time.

B. Since a Motion to Compel Arbitration is not a Dispositive Motion on the Merits, Defendants Cannot Be Not Substantially Prejudiced by Voluntary Dismissal.

The authority cited by the Court does not support dismissal because a motion to compel arbitration is not *dispositive* of the *merits* of the case. The Fourth Circuit has made clear that even the loss of a statute of limitations defense as the result of a voluntary dismissal without prejudice does not constitute sufficient legal prejudice to justify denying the plaintiffs voluntary dismissal. *Gross v. Spies*, 1998 U.S. App. LEXIS 471 (4th Cir. 1998). As the Court in *Gross* explained, defendants can be substantially prejudiced if plaintiffs seek voluntary dismissal after defendants have invested substantial time and effort in the case, and the litigation has progressed to the stage where defendants have moved for summary judgment. *Id.*

In *Phillips USA, Inc. V. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir. 1996), cited by the Court at page 4 of its Order, the defendants had completed discovery, a summary judgment motion had been pending for four months, and plaintiffs provided little reason for seeking dismissal. The Tenth Circuit stated that “a party should not be permitted to avoid an adverse decision *on a dispositive motion* by dismissing a claim without prejudice.” *Id.* at 10 (*emphasis added*), citing *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969) (upholding denial of voluntary dismissal without prejudice when it was apparent the defendant was entitled to *summary judgment*).

Mr. Turner respectfully submits that the Court did not follow Fourth Circuit law on this issue, which makes it clear that voluntary dismissal is favored, and that a plaintiff's motion to dismiss pursuant to Rule 41(a)(2) "should not be denied absent substantial prejudice to the

defendant." *S.A. Andes v. Versant Corp*, 788 F.2d 1033, 1036 (4th Cir. 1986); *see also Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987) ("The purpose of Rule 41(a)(2) is freely to allow voluntary dismissals unless the parties will be unfairly prejudiced."). This is not a case where plaintiffs have filed "a dismissal motion on the night before trial in a case which has been pending for years or with evidence of 'undue vexatiousness' on the part of the plaintiff. *Wallace v. Acufex Microsurgical, Inc.*, 1994 U.S. DIST. LEXIS 5126 (W.D.Va.).

In *Toppings v. Meritech Mortgage Services, Inc.*, 209 F.R.D. 375, 2001 U.S. Dist. LEXIS 24751 (S.D.W.Va.), the Court granted a motion for voluntary dismissal despite the fact that a motion to compel arbitration had been pending, the parties had conducted extensive discovery, and the case had been instituted some ten months earlier, noting that "it seems peculiar to order arbitration in a federal case where Plaintiffs have no intention of pursuing their claims any further." *Id.* At 7. The court granted plaintiff's motion for voluntary dismissal and denied defendant's motion to compel arbitration as moot.

Plaintiffs respectfully submit that a fair application the law and of the factors relevant to voluntary dismissal should lead to the same result here, and request that the Court reconsider its decision denying plaintiffs' motion for voluntary dismissal.

V. THE DUE PROCESS CLAUSE PREVENTS THIS COURT FROM ORDERING PUTATIVE CLASS MEMBERS TO PURSUE THEIR CLAIMS THROUGH INDIVIDUALIZED ARBITRATION BY APPOINTING PLAINTIFFS' COUNSEL AS INTERIM COUNSEL UNDER FED. R. CIV. P. 23(g).

The Court's Order of August 30, 2006, directed the parties to address the issue of whether the Court should appoint plaintiffs' counsel as interim counsel for the putative nationwide class. Order at 9-10. The Court has further held that, "[i]f Plaintiffs' counsel is

designated interim counsel, the Court's ruling, would be binding on any unnamed class members." *Id.* at 9.

Plaintiffs respectfully submit that this Court may not constitutionally apply its adverse ruling to absent class members unless a class is properly certified under Fed. R. Civ. Pro. 23(b). In addition, Rule 23(g)(2) was never intended for this purpose, and the appointment of interim class counsel cannot replace proper class certification.

A. The Due Process Rights of Absent Parties Prevent the Court from Binding Them by its Rulings.

Under the due process clauses of the Fifth and Fourteenth Amendments, absent parties may not be bound by the Court's Order because they have received no notice and no opportunity to opt-out of the case. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). In order for a Court to acquire personal jurisdiction over absent parties, the absent parties must be accorded:

minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. .. [D]ue process also requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

472 U.S. at 811-12 (citations omitted). In other words, in a federal court, the only procedural mechanism for binding absent parties is the certification process of Fed. R. Civ. Pro. Rule 23(b), which ensures that absent parties' due process rights are protected.

Plaintiff submits that the due process rulings of *Shutts* are binding on this Court, and accordingly the Court may not bind putative class members. The Court's citation to *In re: Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), *see*

Op. at 8, suggests that the Court may believe that absent class members in this case can be bound on the basis of collateral estoppel, even without providing them notice and an opportunity to opt-out of the lawsuit. Plaintiffs respectfully submit that, if *Bridgestone/Firestone* is to become the law of the Fourth Circuit as well as the Seventh, it cannot occur through this litigation. *Bridgestone/Firestone* represents a significant departure from the Supreme Court rulings represented by and re-affirmed in *Shutts*. But whatever the merits of *Bridgestone/Firestone*, it represents a narrow exception to the general requirement of notice and opt-out rights.

An order compelling absent parties to arbitrate any claims they might have against defendants would foreclose to them all access to a judicial forum. Such a result would constitute a broad expansion of the *Bridgestone/Firestone* ruling because estoppel in this context is vastly different from the estoppel applied in *Bridgestone/Firestone*, which was *only* to prevent re-litigation of an issue of federal procedural law – i.e., whether a nationwide class should be certified.

Since the critical issue in this case turns on *state* law – whether parties agreed to arbitrate their claims – the broad estoppel applied in *Bridgestone/Firestone* should not be deemed to apply to this case. In any event, as the next section discusses, the *Bridgestone/Firestone* analysis does not apply in this context on its own terms because there is no doubt that the named plaintiffs were not and are not adequate representatives of absent parties, and there is no doubt that, once they decided to seek dismissal, the named plaintiffs did not adequately represent the absent parties' interests in this litigation.

B. The Named Plaintiffs Were Not Adequate Representatives of Absent Parties Once They Decided to Seek Voluntary Dismissal.

Even under the *Bridgestone/Firestone* analysis, “[a] decision with respect to the class is conclusive only if the absent members were adequately represented by the named litigants and class counsel.” *Id.*, 333 F.3d at 768. The named plaintiffs and their counsel here did not adequately represent absent parties. Whatever the merits of *Bridgestone/Firestone*, this is the wrong case in which to apply it.

Once the named plaintiffs in this lawsuit moved for voluntary dismissal, they could no longer adequately represent absent parties because they had determined that they did not want to pursue the litigation. Whatever the merits or shortcomings of the Court’s Order denying voluntary dismissal to the named plaintiffs, it is obvious that parties who have decided not to prosecute their claims in a lawsuit are not adequate representatives for absent parties who may wish to pursue their claims. Once the named plaintiffs decided to seek voluntary dismissal, they were no longer committed to the vigorous prosecution of their claims – and by extension the claims of putative class members—because they were committed instead to ending the litigation.

The procedural history of this case bears this analysis out: once the named plaintiffs moved for voluntary dismissal, they no longer had in undivided interest in vigorously pressing the interests of putative class members because they wished to terminate the litigation. Consequently, plaintiffs did not submit substantive arguments and authorities in opposition to defendants’ first motion to compel arbitration because they did not wish to engage in substantive litigation that might prejudice their motion for voluntary dismissal. As described above, rather than submit substantive papers, plaintiffs decided to seek leave of the court to submit such papers only in the event that their motion for voluntary dismissal was denied. Plaintiffs found

themselves in a quandary, and they resolved that quandary by trying to protect their interests in obtaining voluntary dismissal. Had they not sought voluntary dismissal, they would have instead submitted vigorous substantive opposition to the motion to compel arbitration.

It would be unfair to bind absent parties to the strategic decisions made by plaintiffs whose interests diverged from the absent parties' interests when they began trying to terminate the litigation rather than prosecute it. This potential unfairness is reflected in the requirement that named plaintiffs adequately represent absent members before any ruling as to named plaintiffs can be applied more generally.

It is obvious that the interests of absent class members were not adequately represented in this litigation; plaintiffs did not even submit substantive opposition papers in response to either of defendants' motion to compel arbitration. By denying plaintiffs leave to submit their substantive opposition to defendants' first motion to compel, and by granting the defendants' second motion to compel without even according plaintiffs an opportunity to be heard, the Court's ruling rests on little more than a kind of default judgment.

Rendered without the benefit of opposing argument, the Court's rulings are more or less advisory, since they are not the result of full and fair litigation of the issues, but instead are based on the Court's decision to preclude of plaintiffs from submitting substantive opposition to the motions. In *Bridgestone/Firestone*, the Court emphasized how thoroughly the issue upon which absent parties would be precluded was litigated: the denial of the certification of a nationwide class "was the result of focused attention by counsel in both the district court and this court; both courts addressed the issue exhaustively in published decisions and brought the debate to a conclusion; certiorari was sought and denied ..." 333 F.3d at 767. In contrast, the Court's ruling

with respect to whether to compel individualized arbitration was reached without the benefit of opposing argument on any of the substantive issues involved, because plaintiffs did not wish to prosecute this suit, and took a risk – one that materialized – that the Court would not grant them leave to submit opposition papers at a later time. This risk was weighed against the risk that responding substantively to the motion to compel arbitration would prejudice their application for voluntary dismissal. This factor was an important factor for the named plaintiffs, but it was not a factor that reflected the interests of absent parties. To be sure, Plaintiffs misjudged the Court's inclinations on all counts – but the point here is that the plaintiffs' calculation, once they decided to seek dismissal, were no longer in line with the interests of absent parties.

The situation that plaintiffs faced could be described as a conflict of interest: once plaintiffs decided to seek voluntary dismissal, their interests no longer coincided with those of putative class members. But the fact is that the applicable class action rules resolve this possible conflict: the new Rule 23(e) makes clear that class action lawsuits may be dismissed without court approval at any time prior to class certification. When a named plaintiff in a putative class action decides to seek voluntary dismissal, no court approval or leave is required under Rule 23. Reading Rule 23 in conjunction with Rule 41(a)(2), when a named plaintiff moves for voluntary dismissal, he must seek leave of the Court to dismiss his individual claims, but no such leave is required for dismissal of the class claims. The Rules recognize, and are designed to avoid, the potential for conflicts of interest that would otherwise develop for counsel trying to represent both his clients and the interests of putative class members.

Accordingly, under Rule 23(e), once the named plaintiffs seek dismissal, they must satisfy only the requirements of Rule 41(a), because under Rule 23(e), their class allegations are

to be dismissed without court approval, and thus, upon moving for dismissal, they by definition are no longer pursuing class certification, and no longer are required to represent the interests of absent parties, because there is, at that point, no putative class at all. The motion of a named plaintiff for voluntary dismissal ends any question of possible class certification, a result which makes good sense when one considers the conflicts that would otherwise exist between plaintiffs who desired dismissal and absent parties interests in the vigorous prosecution of their interests.

C. The Courts' Estoppel Ruling Cannot Apply to Absent Parties

In light of the Court's ruling that plaintiffs' claims "arise from" the Terms & Conditions document containing the arbitration agreement, plaintiffs' claims are no longer typical of the claims of absent parties because absent parties can assert claims that do not arise from or have anything to do with that agreement, and therefore they should not be estopped by the manner in which the named plaintiffs here happened to have stated their claims.

The effect of the an expansion of the Court's ruling is particularly startling with respect to absent class members who never signed and returned the arbitration agreement. The application of the Court's ruling to putative class members would not only force the 35% of putative class members who signed the arbitration agreement to pursue their claims through arbitration, but would also force the other 65% of the class to do so as well. BlueHippo's own records indicate "signature not on file" for these 70,000¹⁹ customers, who did not sign and return

¹⁹BlueHippo claims to have "more than 160,000 customers," Ex. 4, of whom, according to the company's records, approximately 66% paid money to the company but never received the merchandise they ordered. These 106,000 or more customers make up the putative class. The company's records also indicate that 65% of these customers, or close to 70,000 customers, never signed never signed the document containing the arbitration agreement and class action waiver.

the Terms & Conditions document that contained the arbitration agreement and class-action waiver. Nor did these consumers assent to the arbitration agreement in any manner, express or implied, as they took no action that would be consistent with an agreement to be bound by the Terms & Conditions document or the arbitration clause. Plaintiffs submit that an order compelling these 70,000 absent class members to participate in individualized arbitration, an order that defendants did not even request in the motion that the Court has granted,²⁰ would be manifestly unfair.

The Court has ruled that those plaintiffs who did not sign the Terms & Conditions document – the Non-Signatory Plaintiffs – are nonetheless bound by the arbitration agreement because their complaint referred to provisions of the Terms & Conditions document, their claims thus “arose” from that contract, and they are thereby estopped from denying the applicability of the arbitration clause. Order at 8-9. As argued above, Plaintiffs respectfully disagree with the Court’s ruling. Even if plaintiffs’ claims were correctly barred by estoppel, however, that fact would provide no basis for estopping putative class members from denying the enforceability of an agreement they never signed, and which they have not made the subject of any pleadings in court.

Putative class members who ordered computers from BlueHippo but received nothing in

²⁰By its terms, the Court’s Order of August 30, 2006, granted only defendants’ first motion to compel arbitration (ECF No. 21), even though that motion requested only that the Court issue an order binding putative class members who had signed or otherwise assented to the arbitration agreement. The Order did not expressly grant or deny defendant’s second motion to compel arbitration based on estoppel (ECF 47, 47-2), which first requested that the Court bind even those putative class members who did not sign or otherwise assent, and to which plaintiffs had no opportunity to respond. The Court’s memorandum opinion nonetheless indicates that its order compelling arbitration will extend to these putative class members as well if plaintiffs’ counsel are designated interim counsel.

return, and who did not sign the Terms & Conditions document, hold strong legal claims against the company that have nothing to do with the terms set forth in that document. Any or all of these consumers could file individual or class-action complaints that alleged the following:

- 1) In telephone sales calls that followed a strict script, BlueHippo obtained bank account information, took class members's computer orders, and debited moneys belonging to them from their bank accounts;
- 2) Even if they said "okay" in response to a litany of terms that included the word "non-refundable," class members did not agree to forfeit all moneys paid to BlueHippo in the event they ceased paying, defaulted, or cancelled their order prior to shipment;
- 3) When class members ceased paying, defaulted and/or cancelled their accounts prior to shipment of their computers, BlueHippo converted their property by wrongfully retaining or disposing of all moneys debited from class members' bank accounts; and
- 4) Plaintiffs have suffered harm as a result.

The foregoing allegations, which do not rely in any way on the Terms & Conditions document that class members may have received, but did not sign and return as requested, would support common-law claims of conversion or unjust enrichment, as well as statutory claims under consumer-protection laws, in practically every state. *See, e.g., Burlesci v. Petersen*, 68 Cal.App.4th 1062, 1066 (1998) (conversion); Md. Code Ann., Com. Law § 13-301(9) (obtaining consumers' funds by deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact).

Some 70,000 consumers who did not enter into arbitration agreements with BlueHippo hold these claims against the company. BlueHippo has not shown that these customers have engaged in conduct that would constitute assent to the arbitration agreement. For this reason, and because these customers could assert claims against BlueHippo in court without making

allegations which, under the Court's ruling, would estop them from denying the applicability of the arbitration clause, there is no basis for ordering them to bring their claims in arbitration.

If the Court decides nonetheless to enjoin absent class members from bringing claims in court rather than in an arbitral forum, plaintiffs submit that the Court should enjoin those putative class members who signed the Terms & Conditions only from asserting claims in court that the Court has held to "arise from" the Terms & Conditions document, and not claims which, like those set forth above, have nothing to do with that document. Plaintiffs further submit that the Court cannot extend its order compelling plaintiffs to individualized arbitration to those putative class members who reside in Alabama, California, Florida, Michigan, Missouri, Ohio, New Jersey, Washington, or West Virginia, as the laws of those states prohibit the enforcement of class-action bans in consumer contracts such as the one at issue in this case.²¹

D. The Court Should Not Appoint Plaintiffs' Counsel as Interim Counsel.

The 2003 amendments to Rule 23 allow the Court to appoint "interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(2)(A). Both the language used in Rule 23(g)(2)(B) and the Advisory Committee Notes to the 2003 amendments suggest that the purpose of the new rule is to allow the court to select interim counsel from among "applicants to be class counsel" based on who

²¹See *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002); *Janda v. T-Mobile USA, Inc.*, 206 WL 708936 (N.D.Ca. 2006) (applying Ca. Law); *Powertel v. Bexley*, 743 So. 2d 570 (Fla. Ct. App. 1999); *Wong v. T-Mobile USA, Inc.*, No. 05-73922 (E.D. Mich. July 20, 2006) (applying Mich. law); *Whitney v. Alltel Comm., Inc.*, 173 S.W. 3d 300 (Mo. App. 2005); *Muhammad v. County Bank of Rehobeth Beach*, 2006 WL 2273448 (N.J. Aug. 9, 2006); *Schwartz v. Alltel Corp.*, No. 86810 (Ohio Ct. App. June 29, 2006); *Al Safin v. Circuit City Stores*, 394 F.3d 1254 (9th Cir. 2005) (applying Wash. law); *Dunlap v. Berger*, 567 S.E. 2d 265 (W.Va.), *cert. denied*, 5637 U.S. 1087 (2002).

will best honor class counsel's "obligation to represent the interests of the class." There is nothing in the rule, the reports and notes of its drafters, or case law that indicates an intent to allow defendants to use the new rule as a tool to impose on an entire class every adverse ruling they obtain against a named plaintiff..

Plaintiffs' counsel meet the knowledge and experience requirements set forth in Rule 23(g)(1)(C). However, plaintiffs' counsel are not applying to be interim counsel in this case, and decline to accept that appointment, specifically because they cannot do so and at the same time vigorously represent the interests of the class. By applying for and accepting appointment as interim counsel when the Court has stated clearly that their appointment will automatically result in a ruling barring putative class members (including 70,000 Non-Signatory Class Members) from bringing their claims in Court, plaintiffs' counsel would be harming rather than advancing the interests of a significant majority of the putative class. This we will not do, as it would violate our ethical responsibilities to the class. Even if accepting appointment as interim counsel did not pose an ethical dilemma, plaintiffs' counsel would have a real or potential conflict in representing plaintiffs while also acting on behalf of non-signing class members, to the extent that these consumers have different interests as described above.

E. The Court Should Either Grant Plaintiffs' Renewed Motion for Voluntary Dismissal or Stay All Proceedings in this Case.

As argued above, the Court should have granted plaintiffs' motion for voluntary dismissal. This is especially true in light of the new Rule 23(e)(1)(A), which requires court approval of voluntary dismissal only where the court has certified a class. The Advisory Committee Notes regarding that rule demonstrate that intent of the drafters was to end the former practice in which some courts denies motions such as the motion for voluntary dismissal that

plaintiffs brought and the Court denied:

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be – and at times was – read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Fed. R. Civ. P. 23, Advisory Committee's Note. Plaintiffs are renewing their motion for voluntary dismissal concurrently herewith, and respectfully request that the Court grant that motion on the grounds they advanced in their first such motion and on the new Rule 23(e) above.

If the Court denies plaintiffs' motion for voluntary dismissal, plaintiffs request, in the alternative, that the Court stay all proceedings in this action pending the outcome of arbitration. Section 3 of the Federal Arbitration Act ("FAA") states, in pertinent part, that "the court ..., upon being satisfied that the issue involved ... is referable to arbitration under ... an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...." 9 U.S.C. § 3 (emphasis supplied). The FAA thus gives the Court no discretion to continue with these proceedings if it denies plaintiffs' motion for voluntary dismissal, and mandates that the Court grant plaintiffs' motion to stay.

V. CONCLUSION.

For the foregoing reasons, the Court should reconsider and vacate its August 30, 2006, Order, grant plaintiffs' motion for voluntary dismissal, and deny as moot defendants' motions to compel arbitration.

DATED: September 11, 2006

Respectfully submitted,

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