

No. 06-55162

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DIANE CERVANTES, individually, an on behalf of other persons similarly
situated, and on behalf of the general public,
Plaintiff – Appellee,

v.

PACIFIC BELL WIRELESS LLC, dba Cingular Wireless LLC,
Defendant – Appellant.

Appeal From an Order of the United States District Court
for the Southern District of California, No. CV-05-01469-JTM

BRIEF FOR THE APPELLANTS

DONALD M. FALK
MAYER, BROWN, ROWE & MAW LLP
TWO PALO ALTO SQUARE
3000 EL CAMINO REAL, SUITE 300
PALO ALTO, CA 94306-2112
TELEPHONE: (650) 331-2000
FACSIMILE: (650) 331-2060

EVAN M. TAGER
TIMOTHY C. LAMBERT
MAYER, BROWN, ROWE & MAW LLP
1909 K STREET, NW
WASHINGTON, DC 20006
TELEPHONE: (202) 263-3000
FACSIMILE: (202) 263-3300

MICHAEL J. STORTZ
DRINKER BIDDLE & REATH LLP
50 FREMONT STREET, 20TH FLOOR
SAN FRANCISCO, CA 94105-2235
TELEPHONE: (415) 591-7500
FACSIMILE: (415) 591-7510

SIOBHAN A. CULLEN
DRINKER BIDDLE & REATH LLP
550 WEST C STREET, SUITE 2050
SAN DIEGO, CA 92101
TELEPHONE: (619) 232-1070
FACSIMILE: (619) 232-1086

Attorneys for Appellant

CORPORATE DISCLOSURE STATEMENT

Cingular Wireless LLC has no parent company. Cingular Wireless LLC is indirectly owned by AT&T Inc. (the result of the acquisition of AT&T Corp. by SBC Communications, Inc.) and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC. Pacific Bell Wireless no longer exists; it formerly was owned by SBC Communications, Inc. Its assets were contributed by SBC Communications, Inc. to Cingular Wireless LLC in 2000.

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STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1332(d). Diversity of citizenship is satisfied because plaintiff Diane Cervantes and the members of the putative class are citizens of the State of California, while Cingular Wireless LLC is incorporated under the laws of the State of Delaware and has its principal place of business in the State of Georgia.¹ The amount-in-controversy is satisfied because Cervantes has alleged that the aggregate claims of members of the putative class exceed the sum or value of \$5,000,000, exclusive of interest and costs.

This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(A) and (B).

On January 10, 2006, the district court entered an Order denying Cingular's motion to compel arbitration and stay litigation. ER150-57. On January 19, 2006, Pacific Bell Wireless dba Cingular Wireless LLC (collectively "Cingular") filed a timely notice of appeal under Fed. R. App. P. 4(a)(1)(A). ER158-59.

ISSUE PRESENTED

Whether the district court erred in refusing to compel arbitration and stay litigation.

¹ Defendant Pacific Bell Wireless was owned by SBC Communications, Inc. ("SBC"). When SBC and BellSouth Corporation formed Cingular Wireless in October 2000, all U.S. wireless customers of SBC and BellSouth, and of entities owned by either of them (including Pacific Bell Wireless), became customers of Cingular.

STATEMENT OF THE CASE

In spite of her contractual agreement to arbitrate her disputes with Cingular, named plaintiff Diane Cervantes filed this putative class action against Cingular in United States District Court. Cingular moved to compel arbitration and stay the litigation pursuant to 9 U.S.C. §§ 3 and 4. The district court denied Cingular's motion, holding that Cingular's arbitration clause is unconscionable and thus unenforceable. Cingular timely appealed.

On March 8, 2006, the district court granted Cingular's motion to stay proceedings in the district court pending the outcome of Cingular's appeal from the denial of its motion to compel arbitration and stay litigation. ER160-62.

STATEMENT OF FACTS

Cervantes subscribed to wireless service with Cingular by entering four Wireless Service Agreements, each of which was comprised of a two-sided, fourteen inch form. She signed each agreement beneath the following statement: "I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT INCLUDING ALL CONTRACT PROVISIONS (including * * * Arbitration)." ER78-81. The Agreements further explain: "**CONTRACT PROVISIONS** – This Agreement includes all the provisions of Cingular's terms of service form * * *, incorporated herein by reference, including a binding arbitration clause * * *. I agree to all of these contract provisions." *Id.* The

introductory paragraph to the Terms and Conditions, found on the reverse side of each Agreement, admonishes: “PLEASE READ THIS AGREEMENT CAREFULLY TO ENSURE THAT YOU UNDERSTAND EACH PROVISION. This Agreement requires the use of arbitration to resolve disputes and otherwise limits the remedies available to you in the event of a dispute.” The arbitration provision itself begins by highlighting its importance: “ARBITRATION Please read this carefully. It affects your rights.” ER82.

In relevant part, the arbitration provision states: “CINGULAR and you * * * agree to arbitrate all disputes and claims arising out of or relating to this Agreement, or to any prior or written agreement for Equipment or services between Cingular and you.” *Id.* The arbitration provision specifies that no arbitration may be conducted on a class-wide or representative basis. *Id.*

Cingular’s arbitration provision is designed to make arbitration free, convenient, and attractive to Cingular’s customers. Among other things, the provision specifies that Cingular will pay “all AAA [American Arbitration Association] filing, administration and arbitrator fees,” unless the arbitrator finds the claim or the relief sought to violate the substantive standards of Fed. R. Civ. P. 11.² Cingular’s arbitration provision also obliges Cingular to “reimburse [the

² If the arbitrator does find the claim to violate Rule 11(b), the customer still need not pay more than \$125 under Cingular’s arbitration provision because that is the maximum that a consumer ever has to pay under the rules of the American

customer] for [his or her] reasonable attorneys' fees and expenses incurred for the arbitration" if the arbitrator awards the customer the amount of his or her demand or more (whether or not the claim would otherwise support an award of attorneys' fees).³ In addition, the provision does not require that the arbitration be kept confidential, does not prohibit punitive damages, and specifies that arbitration will be conducted in the county of the customer's billing address. *Id.* Finally, it allows customers to pursue claims in small claims court as an alternative to arbitration. *Id.*

On July 22, 2005, Cervantes filed her complaint, alleging that Cingular had billed customers for non-communications services without their authorization. ER1-25.

Arbitration Association. *See Supplementary Procedures for Consumer-Related Disputes* (capping fees for claims that do not exceed \$10,000), available at <http://www.adr.org/sp.asp?id=22014>. This amount is dwarfed by a litigant's potential exposure for filing a frivolous claim in court: a fine, plus full costs and attorneys' fees. *See* Fed. R. Civ. P. 11(c)(2) ("A sanction imposed for violation of this rule * * * may consist of * * * an order to pay a penalty into court, or * * * directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.").

³ If the plaintiff receives less than the amount demanded, the arbitrator would be entitled to award attorneys' fees to the same extent as if the case had been brought in court. *See* ER75; <http://cingular.com/disputeresolution> (same); *Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip. op. at 2 (Mo. Cir. Ct. Nov. 28, 2005) (attached as Addendum 1) (observing that Cingular's arbitration provision "does not restrict the award of attorneys' fees if such fees are available under applicable federal or state law").

On October 5, 2005, Cingular moved the district court to compel arbitration and stay litigation pursuant to Sections 3 and 4 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 3-4. Cervantes opposed the motion, arguing that, because Cingular’s arbitration provision prohibits class arbitration, it is unconscionable under the California Supreme Court’s decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

On January 10, 2006, the district court denied Cingular’s motion. The court held that Cingular’s arbitration provision is unconscionable and thus unenforceable under California law, which requires the party challenging a contractual provision to establish that it is both procedurally and substantively unconscionable. ER151-55.

With respect to procedural unconscionability, the court determined that Cervantes “has not submitted any evidence that she lacked meaningful alternatives to Cingular,” and Cingular “has offered some evidence that [Cervantes] may have had the option of choosing a wireless service provider that did not require arbitration.” ER152. The court further found that “[t]he arbitration provisions are not buried in the terms and conditions of the Cingular contract” and, indeed, that “[t]he first paragraph of Cingular’s terms and conditions gives the consumer notice that the terms contain a mandatory arbitration provision.” ER153. The court explained that Cervantes’ “failure to show a lack of meaningful alternatives and

the absence of surprise point toward finding an absence of procedural unconscionability.” *Id.* On the other hand, the court observed: “The adhesive nature of the contract and the unequal bargaining power * * * weigh in favor of finding procedural unconscionability. These factors alone, at times, have been enough to tip the balance.” *Id.* This evidently was one of those times, as the court proceeded to “narrowly find[]” procedural unconscionability. *Id.*

The district court next held Cingular’s arbitration provision to be substantively unconscionable, reasoning that *Discover Bank* required it to consider only whether (1) the class waiver is “found in a consumer contract of adhesion”; (2) the “disputes between the contracting parties predictably involve small amounts of damages”; and (3) Cervantes had “alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” ER154. The court found the first two factors satisfied because “[t]he agreement is a contract of adhesion and the amount of damages are likely to be relatively small amounts.” ER155. The last factor is satisfied, according to the district court, because the “complaint contains allegations that Cingular engaged in a deliberate scheme to cheat large numbers of consumers out of small amounts of money (*i.e.*, the cost of non-communication services).” *Id.*

The court rejected Cingular's argument that the FAA expressly preempts any attempt to use *Discover Bank* to invalidate arbitration clauses by selectively rewriting California's law of unconscionability. ER155-56. The court did not address Cingular's argument that conditioning enforcement of an arbitration provision on the availability of class-wide arbitration frustrates the purpose of the FAA and hence is preempted under the doctrine of conflict preemption.

SUMMARY OF ARGUMENT

This case involves an arbitration provision that was expressly designed to make individual arbitration inexpensive and convenient. Nevertheless, the district court concluded that the arbitration provision is unenforceable under California unconscionability law solely because it prevents customers from pursuing claims on a class-wide basis. That holding is erroneous for several reasons.

1. Under California unconscionability law, a court may declare a contractual provision unenforceable only if that provision is both procedurally and substantively unconscionable. Cervantes proved neither.

The district court held that Cervantes' agreements with Cingular are procedurally unconscionable because they are non-negotiable form contracts entered into by parties with unequal bargaining power. But as the California Court of Appeal has recently held on several occasions, a party claiming unconscionability must establish something more than adhesiveness—*e.g.*, (i) that

he or she could not have obtained a contract without the challenged term from a competitor; (ii) that the subject of the contract involved a necessity of life; or (iii) that the challenged term was imposed upon the weaker party after he or she already had become dependent on the relationship. None of these circumstances is present here. Accordingly, under these recent California decisions, the district court erred in holding that Cervantes' agreements to arbitrate with Cingular are procedurally unconscionable.

2. The district court also was mistaken in concluding that Cingular's arbitration provision is substantively unconscionable merely because it requires that arbitration be conducted on an individual, non-class basis. Although the California Supreme Court held in *Discover Bank* that class waivers are substantively unconscionable when they have the effect of insulating the defendant from liability for fraudulent or willful misconduct, *Cingular's* arbitration provision does not have that effect. That is because Cingular has gone out of its way to ensure that individual arbitration is a realistic means of obtaining redress for small claims by agreeing to pay the full cost of arbitrating any non-frivolous claim and to reimburse prevailing customers for their reasonable attorneys' fees even for claims that would not otherwise support a fee award. To hold an arbitration provision like this one to be unconscionable is to turn *Discover Bank* into an across-the-board prohibition against class waivers in consumer contracts.

3. If this Court nonetheless concludes that *Discover Bank* creates a blanket rule under which even Cingular's arbitration provision cannot survive, then *Discover Bank* is preempted by the FAA. That is because conditioning the enforceability of arbitration provisions on the defendant's amenability to class-wide arbitration drastically alters the risk-benefit calculus in a way that is certain to result in the wholesale abandonment of arbitration in consumer contracts. To begin with, the superimposition of class-action procedures onto arbitration inevitably converts arbitration into litigation, eliminating all of the cost-savings and efficiencies associated with conventional, individual arbitration. Moreover, the stakes of a class arbitration are hundreds of thousands if not millions of times the stakes in an individual arbitration. The narrow standard of review that was developed for individual arbitration ("manifest disregard of the law") is the coup de grace. Applying this standard prevents the kind of expansive review of class certification and merits determinations that is available in court. Under these circumstances, few companies would be likely to continue providing an arbitration provision in their consumer contracts. Because nothing could more thoroughly frustrate the pro-arbitration policy and purposes of the FAA, the district court's interpretation of *Discover Bank* is preempted.

STANDARD OF REVIEW

The district court's denial of a motion to compel arbitration and stay litigation is reviewed *de novo*. See *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1009 (9th Cir. 2005) (motion to compel); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (motions to stay and compel). Factual findings underlying the district court's decision are reviewed for clear error. See *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 888 (9th Cir. 2001).

ARGUMENT

I. The District Court Erred In Striking Down Cingular's Consumer-Friendly Arbitration Provision Under California Unconscionability Law.

Under California law, a contractual provision must be *both* procedurally *and* substantively unconscionable in order to be unenforceable. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1533 (1997). Thus, if this Court concludes that Cervantes failed to prove procedural unconscionability, there is no need to reach the question whether the class waiver in Cingular's arbitration provision is substantively unconscionable. See *Crippen v. Central Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1167 (2004) (rejecting unconscionability challenge to arbitration provision without analyzing its class waiver for substantive unconscionability because agreement was not procedurally unconscionable).

In determining whether any particular provision is unenforceable, California courts employ a “sliding scale”: “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Armendariz*, 6 P.3d at 690 (internal quotation marks omitted). In other words, if “the procedural unconscionability, although extant, [is] not great,” “a greater degree of substantive unfairness” is necessary before a contractual provision can be struck down as unconscionable. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 89 Cal. App. 4th 1042, 1056 (2001).

Procedural unconscionability involves the manner in which the agreement came into existence, focusing on whether there has been “oppression” or “surprise.” *Armendariz*, 6 P.3d at 690 (internal quotation marks omitted). Substantive unconscionability, by contrast, focuses on whether the term in question is so “overly harsh” or “one-sided” (*id.*) as to “shock the conscience.” *Coast Plaza Doctors Hosp. v. Blue Cross*, 83 Cal. App. 4th 677, 689 (2000). Put another way, the provision must be one that “***no man in his senses, and not under delusion*** would make on the one hand, and [that] no honest and fair man would accept on the other.” *Herbert v. Lankershim*, 71 P.2d 220, 257 (Cal. 1937) (emphasis added) (quoting 1 *Story’s Equity Jurisprudence* § 244 (14th ed. 1918)); *California Grocers Ass’n v. Bank of Am.*, 22 Cal. App. 4th 205, 214 (1994); *see also Swanson v.*

Hempstead, 64 Cal. App. 2d 681, 688 (1944) (“the authorities are agreed” on this point).

A. Cervantes’ arbitration agreements are not procedurally unconscionable.

The district court expressly found that Cervantes did not establish the “surprise” prong of procedural unconscionability. ER153. Accordingly, the only remaining basis for procedural unconscionability is “oppression.”

The district court “narrowly” found Cervantes’ agreements with Cingular to be “oppressive” and hence procedurally unconscionable because of “[t]he adhesive nature of the contract and the unequal bargaining power” between Cingular and Cervantes. *Id.* While acknowledging that “[c]ourts * * * have not explicitly held that a non-negotiable form contract is, *per se*, procedurally unconscionable” (ER152), the district court construed this Court’s decision in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), as holding that, under California law, wireless service contracts are “procedurally unconscionable because of * * * unequal bargaining power and [the] lack of opportunity to negotiate.” ER153; *see also id.* (citing *Gatton v. T-Mobile USA, Inc.*, 2003 U.S. Dist. LEXIS 25922, at *31 (C.D. Cal. Apr. 21, 2003) and for the same proposition).⁴

⁴ The district court also case cited *Lozano v. AT&T Wireless*, 2003 U.S. Dist. LEXIS 21794 (C.D. Cal. Aug. 29, 2003) (*appeal pending*, No. 03-56677). But *Lozano* actually undermines the district court’s reasoning because it, like the cases we cite below, ties procedural unconscionability to the absence of “evidence that

Whether or not *Ting* construed California law to establish a categorical rule that all adhesion contracts entered into by parties of unequal bargaining power are procedurally unconscionable, in the intervening years the California Court of Appeal repeatedly has held otherwise.⁵ As that court recently explained:

There can be no “oppression” establishing procedural unconscionability, even assuming unequal bargaining power and an adhesion contract, when the customer has meaningful choices: “[A]ny claim of ‘oppression’ may be defeated if the complaining party has reasonably available sources of supply from which to obtain desired goods or services free of the terms claimed to be unconscionable.”

Wayne v. Staples, Inc., 135 Cal. App. 4th 466, 482 (2006) (quoting *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 768 (1989)). Thus, “[o]ppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.” *Crippen*, 124 Cal. App. 4th

an ordinary consumer * * * could have obtained the same services elsewhere, without otherwise entering a similar arbitration agreement.” *Id.* at *10.

⁵ It merits mention that *Ting* involved a situation in which *existing* customers were presented with a take-it-or-leave-it contract. Were a customer to desire a contract with different terms, he or she would have had to undergo the burden and disruption of switching carriers in midstream. Moreover, as the Court pointed out, AT&T evidently affirmatively informed customers that there were no other options because all other long-distance carriers also required customers to arbitrate disputes. 319 F.3d at 1149. Finally, in *Ting*, unlike here, the “surprise” element of procedural unconscionability had been established because “AT&T mailed [the agreement] in an envelope that few customers realized contained a contract.” *Id.* Accordingly, it is far from clear whether the Court would have declared the AT&T agreement to be procedurally unconscionable merely because it was a contract of adhesion between parties of unequal bargaining power.

at 1165. That is, at the time of contracting, the party claiming oppression must lack “*any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or forego [sic] the needed service.*” *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1320 (2005) (internal quotation marks omitted; emphasis in original). As the district court found, Cervantes failed to show that she lacked “meaningful alternatives” to Cingular’s offer to provide her wireless service subject to an agreement to arbitrate disputes on an individual basis. ER153.

To be sure, procedural unconscionability may also be found in contracts involving necessities of life, when “[f]or example, a sick patient seeking admittance to a hospital is not expected to shop around to find better terms on the admittance form.” *Morris*, 128 Cal. App. 4th at 1320. But this exception is a limited one. For example, the California Court of Appeal recently found no procedural unconscionability in the context of a contract for the purchase of a home, explaining that the purchase of a home

does not involve the same concerns [another] court had about hospital admissions which compelled it to find the arbitration provision should have been explained—while home buying may be stressful, it is not a traumatic experience like being admitted to the hospital, and no one is directing a home buyer to purchase a particular home like a doctor directs a patient to a particular hospital.

Trend Homes, Inc. v. Superior Court, 131 Cal. App. 4th 950, 960 (2005).⁶ If the purchase of a home does not entail the kind of compulsion that would give rise to the “oppression” element of procedural unconscionability, then surely the purchase of wireless service does not either. That is all the more true when, as here, the customer was presented the arbitration provision at the outset of her contractual relationship and hence was not already dependent on the service. *Cf. Discover Bank*, 113 P.3d at 1108 (existing customer was presented with arbitration provision and had to either accept it or immediately close his account); *Provencher v. Dell Corp.*, 409 F. Supp. 2d 1196, 1205 n. 12 (C.D. Cal. 2006) (observing that plaintiff in *Discover Bank* had been a cardholder in good standing for 13 years before bank amended his cardholder agreement to require arbitration).

* * * *

In sum, Cervantes established neither oppression nor surprise and the district court therefore erred in finding her agreements with Cingular to be procedurally

⁶ Insofar as *Ting* is inconsistent with *Wayne*, *Trend Homes*, *Crippen*, and *Morris*, the Court must follow these more recent California Court of Appeal decisions “absent **convincing** evidence that the California Supreme Court would reject the[ir] interpretation” of California unconscionability law. *In re Watts*, 298 F.3d 1077, 1082 (9th Cir. 2002) (emphasis added); *see also Stephan v. Dowdle*, 733 F.2d 642, 642 (9th Cir. 1984) (concluding that an earlier panel decision was “no longer binding * * * and must be overruled” because the Arizona Court of Appeals had subsequently interpreted the relevant Arizona statute to the contrary); *FDIC v. McSweeney*, 976 F.2d 532, 535-36 (9th Cir. 1992) (examining intervening California appellate and supreme court opinions in deciding whether current state law was at odds with a prior panel decision).

unconscionable. And because Cervantes failed to establish procedural unconscionability, California law requires enforcement of her agreements without regard to whether the class waiver in those agreements is substantively unconscionable. *See Crippen*, 124 Cal. App. 4th at 1167. But even if this Court were to hold that *Wayne*, *Trend Homes*, *Crippen*, and *Morris* do not accurately reflect California law and conclude that adhesiveness and unequal bargaining power are by themselves sufficient to make Cervantes' agreements procedurally unconscionable, surely these facts, which are common to tens of millions of consumer contracts, make them only barely so. Accordingly, under California's sliding-scale approach, Cervantes can avoid arbitration only by showing that Cingular's arbitration provision rises high on the spectrum of substantive unconscionability.

B. The prohibition against class-wide arbitration in Cervantes' arbitration provisions is not substantively unconscionable.

The overwhelming majority rule around the country is that arbitration provisions that prohibit class-wide arbitration are not unconscionable.⁷ Though

⁷ *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law), *pet. for cert. pending*, No. 05-959 (filed Jan. 30, 2006); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (Georgia law), *cert. denied*, 126 S. Ct. 1457 (2006); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (Maryland law); *Lloyd v. MBNA Am. Bank, N.A.*, 27 F. App'x 82, 84 (3d Cir. 2002) (Delaware law); *Forness v. Cross County Bank, Inc.*, 2006 WL 726233, at *2 (S.D. Ill. Mar. 20, 2006) (Delaware law); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1204-06 (C.D.

most courts have so held categorically, several have confined their holding to circumstances in which the consumer is not required to pay greater costs than he or

Cal. 2006) (Texas law); *Dambrosio v. Comcast Corp.*, 2005 WL 3543794, at *14-*16 (E.D. Pa. Dec. 27, 2005) (Pennsylvania and Illinois law); *Copeland v. Katz*, 2005 WL 3163296, at *4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) (Oklahoma law); *Lux v. Good Guys*, 2005 WL 1713421 (C.D. Cal. July 11, 2005) (Nevada law); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 & n.11 (S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005) (Maryland law); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004) (Alabama law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004) (Alabama law); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, at *15 (D. Del. Sept. 28, 2001) (Delaware law); *Zawikowski v. Beneficial Nat'l Bank*, 1999 U.S. Dist. LEXIS 514, at *5 (N.D. Ill. Jan. 11, 1999) (Illinois law); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-67 & n.23 (Haw. 1996) (Hawaii law); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494-95, (Ill. App. Ct. 2003) (Illinois law); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894-96 (Ill. App. Ct. 2003) (Arizona law); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 125-26 (Ill. App. Ct. 2005) (Texas law); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at *7 (Kan. Ct. App. 2005) (Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-43 (Md. 2005) (Maryland law); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001) (New Jersey law); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (New York law); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (North Dakota law); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (Texas law). *But see Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (affirming conclusion that class waiver was unconscionable). Because this Court was merely attempting to predict the views of the California Supreme Court, *Ting* is no longer relevant. *See note 7 supra*.

she would have to bear in court and the arbitrator is not prohibited from awarding a prevailing plaintiff his or her attorneys' fees under applicable fee-shifting statutes. Here, both of these conditions are satisfied. Indeed, in order to ensure that customers find arbitration to be a realistic means of resolving disputes, Cingular has gone two steps beyond what any of the cited decisions has required, specifying in its arbitration provision that it will (i) pay the *full* cost of arbitrating any dispute that is not frivolous or brought for an improper purpose, and (ii) reimburse customers for their reasonable attorneys' fees if the arbitrator awards them the amount of their demand or more—even if their claim would not otherwise qualify for a fee award under governing law.

The district court found neither of these features of Cingular's arbitration provision to be relevant. It instead interpreted *Discover Bank* to create a categorical rule that no class waiver can be upheld (no matter how consumer-friendly the arbitration provision otherwise may be) so long as the class waiver is contained in a "contract of adhesion," the claims are small, and the plaintiff alleges "a deliberate scheme to cheat large numbers of consumers out of small amounts of money," with such a "scheme" defined so broadly as to include Cervantes' claims that she was improperly charged for non-communications services. ER155. This is neither a valid nor a reasonable construction of *Discover Bank*. Although the California Supreme Court did hold in *Discover Bank* that a class waiver in a

consumer arbitration provision in may “some” circumstances be unconscionable, at the same time it emphasized that it was “*not* hold[ing] that *all* class action waivers are necessarily unconscionable.” 113 P.3d at 1110 (emphasis added). In distinguishing between valid and invalid class waivers, the *Discover Bank* court focused on whether the challenged class waiver serves “to insulate a party from liability that otherwise would be imposed under California law” and “becomes *in practice* the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’” *Id.* at 1109, 1110 (quoting Civ. Code § 1668) (emphasis added; alteration in original).

Cingular’s arbitration provision does not run afoul of that standard. By contrast with the fee-sharing provision in Discover Bank’s arbitration clause, Cingular’s arbitration provision obligates it to pay the *full cost* of arbitration so long as the claim is not unwarranted or improper (as measured by the standards articulated in Rule 11(b) of the Federal Rules of Civil Procedure). This distinction makes a world of difference. Under Discover Bank’s arbitration clause, it would cost between \$100 and \$125 for an individual credit-card customer to arbitrate a \$29 late-fee claim.⁸ In other words, a Discover Bank customer would face a

⁸ Discover Bank’s arbitration provision states that the claimant has the option to choose arbitration before JAMS/Endispute or the National Arbitration Forum (“NAF”). *See* ER31 (Discover Bank’s arbitration provision). JAMS sets the cost of consumer arbitration at \$125. *See* ER33. To pursue a “participatory” hearing

significant net loss—between \$71 and \$96—to pursue his or her individual claim in arbitration. Under those circumstances, the California Supreme Court held that individual consumers would be deterred from vindicating their rights through arbitration. 113 P.3d at 1108.

Cingular’s arbitration provision, on the other hand, requires Cervantes to pay nothing to arbitrate individually. Moreover, Cingular’s arbitration provision affirmatively obliges Cingular to reimburse customers for their reasonable attorneys’ fees if the arbitrator awards them an amount equal to or greater than demands—even when the customers would not otherwise be entitled to a fee award under applicable state or federal law. At the same time, the provision does not limit the authority of the arbitrator to award fees to customers who receive less than their demands if there is a statutory basis for doing so. *See* note 3, *supra*. Hence, even customers with breach-of-contract claims for a few dollars would receive attorneys’ fees if they were to win that amount or more in arbitration. And someone with a small statutory claim could receive attorneys’ fees even if the arbitrator awards less than the full amount of the claim.

Indeed, customers who provide Cingular with notice of their disputes before beginning an arbitral proceeding (as Cingular’s arbitration provision requires)

before NAF, a consumer with a claim under \$2,500 must pay \$100 (a \$25 filing fee, plus half of the \$150 hearing fee). *See* ER37-38.

often obtain even more expeditious redress for their complaints through informal dispute resolution processes without the need for arbitration. *See* ER75. Under such circumstances, Cingular’s arbitration provision does not deter customers from resolving disputes involving small-dollar claims and hence is **not** an “exculpatory” clause that “operate[s] to insulate [Cingular] from liability.” *Discover Bank*, 113 P.3d at 1109. It therefore is not substantively unconscionable under *Discover Bank*.

The district court nevertheless held that, although Cingular’s arbitration provision may be “consumer friendly,” “the California Supreme Court did not carve out exceptions” to its “categorical rule” that class waivers are substantively unconscionable when they are part of “contract[s] of adhesion and the amount of damages are likely to be relatively small amounts.” ER155. In so holding, the district court neglected the principle upon which *Discover Bank* is premised—that “exculpatory” contracts are unconscionable “**to the extent** they operate to insulate a party from liability that otherwise would be imposed under California law.” 113 P.3d at 1109 (emphasis added). Cingular has demonstrated that it provides customers with rapid and efficient dispute resolution in many ways **superior** to the class-action device that is particularly ill-suited to providing swift and complete relief to individuals with small claims. As another federal district court within this Circuit recently observed in upholding a class waiver that is **less** consumer-friendly

than Cingular's, "[i]n contrast to the arbitration provision and class action waiver involved in *Discover Bank*, the parties' arbitration provision and class action waiver here do not exempt [the company] from the consequences of its alleged wrongdoing." *Provencher*, 409 F. Supp. 2d at 1203. That conclusion—which is all the more applicable here—precludes a finding of substantive unconscionability under *Discover Bank*.

II. As Interpreted By The District Court, *Discover Bank* Is Preempted By The FAA.

If this Court concludes that *Discover Bank* broadly prohibits the inclusion of class-action waivers in consumer arbitration provisions, no matter how consumer-friendly those provisions may otherwise be, that across-the-board ban would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA and therefore would be preempted under the Supremacy Clause. *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted).⁹

⁹ Cingular argued in the district court that *either* express preemption *or* conflict preemption would prevent the court's adoption of a sweeping interpretation of *Discover Bank* that would invalidate Cingular's arbitration provision. The district court responded exclusively to Cingular's express preemption argument, holding that *Discover Bank* established a generally applicable contract defense that falls within the FAA's Section 2 savings clause. ER155-56. Cingular's conflict preemption challenge to the district court's broad reading of *Discover Bank* does not depend upon the express preemption language in Section 2. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)

Congress enacted the FAA because “arbitration saves time, saves trouble, saves money.” *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce). Arbitration usually is “cheaper and faster than litigation,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling.” H.R. Rep. No. 97-542, at 13 (1982). The Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Class-action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the hallmark of arbitration. While the average length of an AAA arbitration from filing to award is less than six months (*see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-81 (1995)), class actions can take years. These complex matters invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including depositions of all class representatives (and often other witnesses) for purposes of determining such statutory prerequisites as typicality and adequacy of the class representatives and

(express preemption provision does not “bar the ordinary working of conflict preemption principles”).

commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and very often (v) an interlocutory appeal initiated by the losing party pursuant to Fed. R. Civ. P. 23(f).

If, after all of that, a class is certified, there would have to be full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would then begin and likely continue for years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide trial—one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses.

Whether conducted by a court or by an arbitrator, all of the procedures necessary to the fair administration of a class action make arbitration more expensive and more time consuming—and, in the process, eradicate the distinction between arbitration and litigation.¹⁰ In fact, some commentators believe that “class

¹⁰ See Jonathan Bunch, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. Disp. Resol. 259, 272 (“[W]hen class-

arbitration may actually prove *more* burdensome than class litigation.” Jack Wilson, “*No-Class-Action Arbitration Clauses*,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 *Quinnipiac L. Rev.* 737, 774 (2004) (emphasis added).¹¹

The procedures for class arbitrations promulgated by the AAA bear this out. Those rules require the arbitrator to make a written “class determination award” addressing a lengthy list of criteria equivalent to those identified in Federal Rule of Civil Procedure 23, provide for a proceeding in court to confirm or vacate that award, provide for the arbitrator to preside over the notification of class members,

wide arbitration is chosen as the means to resolve many similar claims, the many benefits of the arbitration process are lost in favor of a procedural device which brings the burdens of litigation into the arbitral forum. It is somewhat ironic that the greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration * * * lessens the distinction between the two processes.”); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *Wm. & Mary L. Rev.* 1, 44-45 (2000) (“[S]everal attorneys who have actually participated in classwide arbitrations have found that the procedure, at least as used to date, differs very little from litigation and thus offers few, if any, advantages.”); Elizabeth P. Allor, Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 *Cal. L. Rev.* 1239, 1253 (1983) (“[W]hen conducted on a classwide basis, arbitration is unlikely to remain inexpensive and efficient.”).

¹¹ See also Lindsay R. Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 *U. Chi. Legal F.* 631, 649 (hybrid class arbitration “subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration”).

and then anticipate full-blown proceedings on the merits and a carefully reasoned “final award” once the class determination award becomes final and class members have been given notice and an opportunity to opt out. Like a federal court, the arbitrator also is given strict standards for reviewing and approving any settlement once a class has been certified. *See* AAA, *American Arbitration Association Policy on Class Arbitrations* (July 14, 2005), available at <http://www.adr.org/Classarbitrationpolicy>. In short, the process is every bit as burdensome as a judicial class action.

Not only would engrafting time-consuming and expensive class-action procedures onto an arbitral proceeding essentially eliminate the distinction between arbitration and litigation, it also presents businesses with a “worst-of-all-worlds” scenario. While the stakes would be increased exponentially over an individual arbitration, any class-wide arbitral award would remain reviewable only for fraud, bias, or “manifest disregard” of the law. *See* 9 U.S.C. § 10; *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc*, 490 U.S. 477 (1989)).

If the distinctions between litigation and arbitration are blurred to the point where the costs are essentially the same and the only substantive difference is the standard of review, businesses will necessarily conclude that the risks of arbitration are too high. Thus, the consequence of conditioning the enforcement of consumer

arbitration provisions on the business subjecting itself to class-wide arbitration would not be fairer or more efficient arbitration—but rather *more litigation* and *less arbitration*. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA. Accordingly, *Discover Bank* is impliedly preempted by the FAA.¹²

Several courts around the country have expressly or implicitly held that the FAA preempts state-law rules superimposing class actions on arbitration. For example, the Tennessee Court of Appeals has expressly held that, regardless of any state-law concern about “the unavailability of class action relief,” “the Supremacy Clause of the Federal Constitution * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action.” *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001). Similarly, a federal district court in West Virginia recently declined to apply the state supreme court’s holding that

¹² Indeed, although the California Supreme Court claimed that the rule it articulated in *Discover Bank* “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements” (113 P.3d at 1112), in practical effect it discriminates against arbitration. Because class procedures destroy the benefits of arbitration while unacceptably increasing the risks, virtually all consumer arbitration agreements either expressly or implicitly prohibit class arbitration. By contrast, very few contracts that do not require arbitration prohibit judicial class actions. In substance then, *Discover Bank* disproportionately burdens arbitration and hence violates Section 2 of the FAA. *Cf. Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) (“The commerce clause forbids discrimination, whether forthright or ingenious.”).

arbitration provisions containing class waivers are unconscionable when the damages sought are small, finding that holding to be preempted by the FAA. *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005).

Moreover, two federal courts of appeals, while not using the term “preemption,” have expressed the view that a state-law rule conditioning the enforceability of an arbitration provision on the availability of class-wide arbitration is incompatible with the objectives of arbitration. Most significantly, the Fifth Circuit rejected a claim that the class-arbitration prohibition in Cingular’s original arbitration provision was unconscionable, explaining that “the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.” *Iberia Credit Bureau Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)); *see also id.* at 176 (for parties to demand “all of the procedural accoutrements that accompany a judicial proceeding” would undermine “the point of arbitration”). More recently, the Eleventh Circuit explained that a prohibition of class arbitration is “consistent with the goals of ‘simplicity, informality, and expedition’ touted by the Supreme Court in *Gilmer.*” *Caley v.*

Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (quoting *Gilmer*, 500 U.S. at 31), *pet. for cert. pending*, No. 05-959 (filed Jan. 30, 2006).

To say that a prohibition of class arbitration is consistent with the goals of the FAA is the same thing as saying that a state-law rule that bans such provisions, despite the parties' agreement to them, is inconsistent with the goals of the FAA and hence is preempted.

CONCLUSION

The district court's order denying Cingular's motion to compel arbitration and stay litigation should be reversed.

DATED: May 8, 2006

Respectfully submitted,

DONALD M. FALK
MAYER, BROWN, ROWE & MAW LLP
TWO PALO ALTO SQUARE
3000 EL CAMINO REAL, SUITE 300
PALO ALTO, CA 94306-2112
TELEPHONE: (650) 331-2000
FACSIMILE: (650) 331-2060

EVAN M. TAGER
TIMOTHY C. LAMBERT
MAYER, BROWN, ROWE & MAW LLP
1909 K STREET, NW
WASHINGTON, DC 20006
TELEPHONE: (202) 263-3000
FACSIMILE: (202) 263-3300

MICHAEL J. STORTZ
DRINKER BIDDLE & REATH LLP
50 FREMONT STREET, 20TH FLOOR
SAN FRANCISCO, CA 94105-2235
TELEPHONE: (415) 591-7500
FACSIMILE: (415) 591-7510

SIOBHAN A. CULLEN
DRINKER BIDDLE & REATH LLP
550 WEST C STREET, SUITE 2050
SAN DIEGO, CA 92101
TELEPHONE: (619) 232-1070
FACSIMILE: (619) 232-1086

Attorneys for Appellant

STATEMENT OF RELATED CASES

Counsel for Cingular are aware of the following related cases:

Ford v. Verisign, Inc., No. 06-55086: Cingular's appeal from the denial of its motion to compel arbitration and stay litigation that raises closely-related issues.

Ford v. T-Mobile USA, Inc., No. 06-55082: T-Mobile's appeal arising out of the same case in the district court as No. 06-55086.

Ford v. Verisign, Inc., No. 06-55118: Verisign's appeal arising out of the same case in the district court as No. 06-55086.

Laster v. T-Mobile USA, Inc., Nos. 06-55008, 55010: Cingular and T-Mobile's consolidated appeals from the denial of their motions to compel arbitration and stay litigation in the same case in the district court that raise closely-related issues.

Lozano v. AT&T Wireless Servs., Inc., No. 03-56677: Appeal from the denial of a motion to compel arbitration that raises closely-related issues.

DATED: May 8, 2006

MAYER, BROWN, ROWE & MAW LLP

By _____
EVAN M. TAGER
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.
32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 06-55008**

I certify that:

X. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

- Proportionately spaced, has a typeface of 14 points or more and contains 7,218 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

- This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;
- This brief complies with a page or size-volume limitation established by separate court order dated _____ and is
 - Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

- Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

 3. *Briefs in Capital Cases*

- This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**
 - Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

or is

- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

4. Amicus Briefs

- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, or is
- Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

or is

- Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

DATED: May 8, 2006

MAYER, BROWN, ROWE & MAW LLP

By _____
EVAN M. TAGER
Attorney for Appellant

Addendum 1

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2006, I filed the original and 15 copies of the foregoing brief and five copies of the Excerpts of Record with the Clerk of the Court by third-party commercial carrier for delivery within 3 calendar days, and I served two copies of the foregoing brief and one copy of the Excerpts of Record by third-party commercial carrier for delivery within 3 calendar days on the party herein, at the following address:

Frances M. Gregorek, Esq.
Francis A. Bottini, Jr., Esq.
Rachele R. Rickert, Esq.
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Symphony Towers
750 B Street, Suite 2770
San Diego, CA 92101
Telephone: (619) 239-4599
Facsimile: (619) 234-4599

Attorneys for Plaintiff

DATED: May 8, 2006

MAYER, BROWN, ROWE & MAW LLP

By _____
EVAN M. TAGER
Attorney for Appellant