

No. 06-55162

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

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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.*

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

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**REPLY BRIEF FOR THE APPELLANTS**

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Cervantes or, more aptly, her lawyers are desperate to avoid individual arbitration notwithstanding that, if her claim is meritorious, she would be able to receive 100 cents on the dollar plus an award of attorneys' fees within a short time after filing her arbitration. Instead, Cervantes contends that only a class action will suffice to ensure that small claims like hers can be vindicated, ignoring that class actions usually take years to complete and typically result in settlements in which the small percentage of class members who bother to fill out claim forms receive a few cents on the dollar. Notwithstanding her various arguments to the contrary, this outcome is not required by California law and is affirmatively precluded by federal law.

To begin with, Cervantes is mistaken that the doctrine of collateral estoppel requires this Court to hold that the class waiver in Cingular's arbitration provision is unconscionable. That doctrine is inapplicable both because the judgment below was final before the California state-court judgments with which Cervantes seeks to estop Cingular and because the issues are purely legal and thus properly subject to reexamination here.

Cervantes is equally off the mark when it comes to the merits. For example, although she, like the district court, insists that procedural unconscionability is established by the mere fact that her arbitration provision was contained within a take-it-or-leave-it contract, she cannot overcome the recent California cases

holding that there can be no “oppression” and hence (unfair “surprise” aside) no procedural unconscionability when, as here, there are realistic market alternatives that do not require acceptance of the disputed term.

Cervantes’ defense of the district court’s substantive unconscionability finding rests precariously on both a gross understatement of the availability of attorneys’ fees in individual arbitrations and a skewed comparison of the benefits of arbitration with the burdens of litigation. For everyone but the lawyers, most class actions provide a fraction of the full relief that is available quickly through arbitration, but to get even that fraction consumers must shoulder a burden in paperwork that is exacerbated by the delays that typically attend complex litigation. Under these circumstances, there can be no “exculpation” and hence no substantive unconscionability when a contract requires customers to choose between cost-free individual arbitration and small claims court.

In any event, Cervantes is far off base in suggesting that the district court’s interpretation of California unconscionability law is not preempted because that law purportedly applies equally to all contracts, not just those containing arbitration provisions. In light of the federal policy protecting the choice of arbitration, the doctrine of conflict preemption necessarily precludes any rule, judge-made or otherwise, that would impede the free use of arbitration by making

that informal process cumbersome and unduly risky—even if that same rule applies in the judicial forum as well.

Finally, Cervantes tries to carve out some of her claims from arbitration by asserting that California has exempted claims for public injunctive relief from any obligation to arbitrate, but the FAA clearly preempts that state-court effort to place some disputes beyond the reach of arbitration.

In short, Cingular’s arbitration clause is fully enforceable, and Cervantes should be compelled to honor her agreement to arbitrate under it on an individual basis.

**I. CINGULAR IS NOT COLLATERALLY ESTOPPED FROM PURSUING ITS ARGUMENTS ON APPEAL.**

In two Rule 28(j) letters dated June 6, 2006, and June 20, 2006, Cervantes asserts that Cingular is collaterally “estopped from arguing that its arbitration provision is not unconscionable.”<sup>1</sup> The letters were triggered by the Supreme Court’s denial of *certiorari* in *Cingular Wireless LLC v. Mendoza* and *Cingular Wireless LLC v. Wing* on June 5, 2006 and June 19, 2006, respectively. Cervantes is mistaken that the denial of *certiorari* in these cases precludes Cingular from contending that its arbitration provision is not unconscionable.

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<sup>1</sup> Cervantes does not contend in either letter that Cingular is estopped from pursuing its preemption arguments.

First, the district court’s order from which we appeal was “final” for purposes of collateral estoppel before *certiorari* was denied in the California cases, protecting this appeal from the preclusive effect of later judgments. In both federal and California courts, “the first case to reach final judgment is accorded preclusive effect.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 928 (9th Cir. 2006). The definition of a “final” judgment for collateral estoppel purposes differs, however, between California and federal law. A California court judgment is not “final” during the pendency of appeals, but a federal *district court* judgment is final even when on appeal. *See id.*<sup>2</sup> Thus, because *certiorari* was denied in cases arising from the California courts *after* the district court denied Cingular’s motion to compel arbitration, the district court’s judgment was the first to become final, shielding it from later judgments. *See id.* (denying preclusive effect where “[t]he district court \* \* \* reached the merits and entered judgment before the \* \* \* plaintiffs [in a state

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<sup>2</sup> As Cervantes recognizes in her letters to the Court, a petition for *certiorari* to the U.S. Supreme Court is considered an “appeal” that forestalls a California state-court judgment from becoming “final.” *See also Mueller v. J.C. Penney Co.*, 173 Cal. App. 3d 713, 719 (1985) (collateral estoppel applied *after* petitions to the California and United States Supreme Courts were denied); *cf. Lumpkin v. Jordan*, 49 Cal. App. 4th 1223, 1231 n.5 (1996) (collateral estoppel afforded only to *final* decisions that no longer are “open to direct attack, e.g., by appeal”).

court case relied upon to estop appeal from the district court judgment] had exhausted their appeals”).<sup>3</sup>

Second, collateral estoppel should not be applied when, as here, there are conflicting judgments. Although *Mendoza* and *Wing* held Cingular’s class waiver to be unenforceable, a federal district court in this Circuit has enforced it. See Order Compelling Arbitration and Dismissing the Action Without Prejudice, *Shroyer v. New Cingular Wireless Servs., Inc.*, No. CV 06-1792-R (FMOx) (C.D. Cal. May 30, 2006) (“*Shroyer* Order”) (enforcing Cingular’s class waiver) (attached as Addendum I), *appeal pending* (No. 06-55964). A defendant should not be collaterally estopped when “the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979). Among equitable considerations that courts weigh in determining whether to give a judgment collateral estoppel effect, “[t]he existence of inconsistent prior judgments is perhaps the single most easily identified factor that suggests strongly that neither should be given preclusive effect.” 18A Charles Alan Wright et al., *Federal*

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<sup>3</sup> The “thorny issue” of what effect a later judgment may have on a subsequent *trial* in the district court following reversal and remand of the first judgment, not presented in *Sosa* (437 F.3d at 928 n.3 (affirming grant of motion to dismiss)), is not implicated here either. We ask this Court to reverse the district court’s order in its entirety, based on the undisputed factual record. This Court’s authority merely to *reverse* under these circumstances is unassailable.

*Practice and Procedure* § 4465.2, at 764 (2d ed. 2002). Thus, in such circumstances this Court repeatedly has refused to impose collateral estoppel “[b]ecause of the inconsistent judgments and therefore potential unfairness” to the defendant. *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 777 (9th Cir. 2003); *see also Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir. 1981).

Third, *Mendoza* and *Wing* are not entitled to collateral estoppel effect because the issue on which Cervantes seeks to estop Cingular—the meaning of *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)—is a pure question of law. The principle of collateral estoppel is inapplicable when “[t]he issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based.” Restatement (Second) of Judgments § 29(7). That is especially so “when the issue is of general interest and has not been resolved by the highest appellate court that can resolve it.” *Chicago Truck Drivers, Helpers & Warehouse Union (Indep.) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 531 (7th Cir. 1997) (internal quotation marks omitted); *cf. Segal v. AT&T*, 606 F.2d 842, 845 (9th Cir. 1979) (“Issue preclusion has never been applied to issues of law with the same rigor as to issues of fact.”); 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4425, at 647 (2d ed. 2002) (“There does not appear to be any

frequent difficulty in applying the rule that preclusion does not attach to pure questions of law, unmixed with any common elements of fact.”). Under these circumstances, “[t]he interests of courts and litigants alike can be protected adequately by the flexible principles of stare decisis.” *Id.* at 646-47.

While Cingular asserts that *Discover Bank* requires a case-by-case inquiry to determine whether its arbitration provision serves to insulate it from liability for wrongful conduct, Cervantes invokes *Mendoza* and *Wing* in support of her contention that *Discover* creates a simplistic, across-the-board rule that any class waiver in a consumer contract of adhesion is unconscionable if the claims involved are small. This is a straightforward disagreement as to the interpretation of a judicial decision, and one that this Court properly may and should revisit.

## **II. THE CLASS WAIVER IN CERVANTES’ ARBITRATION PROVISION IS NOT UNCONSCIONABLE.**

### **A. Cervantes’ Arbitration Agreements Were Not Oppressive Because She Had Meaningful Alternatives.**

In insisting that all non-negotiable form contracts are oppressive and hence procedurally unconscionable, Cervantes relies principally on cases that do not

support her. Moreover, she cannot and does not distinguish the contrary California authority.<sup>4</sup>

She looks for support first from *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003). *Ting* is no answer to the later California decisions we cited; rather, to the extent it is inconsistent with them, *Ting* no longer is a binding interpretation of California law. In any event, *Ting*'s procedural-unconscionability holding did not turn solely or even predominantly on whether AT&T's arbitration provision was part of a non-negotiable form contract. See Opening Br. 13 n.5. To the contrary, this Court emphasized that the arbitration provision had been imposed on existing customers in a bill insert and that AT&T "intentionally dissuaded its own customers from seeking" other options by telling them that "all other major long distance carriers have included an arbitration provision in their services agreement." *Ting*, 319 F.3d at 1149. Cervantes recognizes that *Ting* turned on "other procedurally unconscionable characteristics of the contract." Br. 17. The same is true of *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (2002). In both cases, a customer who "did not wish to accept the amendment [to the contract

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<sup>4</sup> Cervantes does not contest that Cingular's "arbitration provision was not a 'surprise'" (Brief of Appellee ("Br.") 21), leaving "oppression" as the only possible ground for procedural unconscionability.

had] to close his account.” Br. 17 (quoting *Szetela*).<sup>5</sup> In contrast, Cervantes concedes that she “was presented with the first \* \* \* arbitration agreement at the outset of her relationship with Cingular.” Br. 20. Although two district judges in California have adopted Cervantes’ reading of *Ting* (Br. 16), a third has reached the opposite conclusion. *See Shroyer Order*.<sup>6</sup>

To be sure, one of Cervantes’ cases begins its discussion of procedural unconscionability by inquiring whether the contract was “one of adhesion,” defined as “a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Armendariz v. Found. Health Psychcare*

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<sup>5</sup> Other cases cited by Cervantes have still less pertinence. *See Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1173 & n.10 (N.D. Cal. 2002) (observing that relevant class of consumers was unsophisticated and unlikely to shop around, “there is at least a factual dispute” as to whether market alternatives existed, and many consumers would “not have any meaningful alternatives available to them”); *Acorn v. Household Int’l, Inc.*, 211 F. Supp. 2d 1160, 1169 (N.D. Cal. 2002) (allegedly predatory loans were marketed to “consumers [who] are unlikely to refuse one of their few sources of credit” because of their “limited credit histories, modest income, high debt to income ratios, or \* \* \* credit problems”).

<sup>6</sup> Cervantes also cites *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (Br. 17) and *Gatton v. T-Mobile, Inc.*, 2003 U.S. Dist. LEXIS 25922, \*31 (C.D. Cal. Apr. 21, 2003) (Br. 16) which rely upon this Court’s earlier decision in *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778 (9th Cir. 2002) in holding certain agreements to arbitrate employment disputes unenforceable. Insofar as *Ingle* and *Ferguson* found the availability of market options irrelevant in analyzing “oppression,” the later and contrary decisions of the California courts must be followed. *See Opening Br. 15 n.6*.

*Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000). Another states that “[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability.” *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001).

In both cases, however, the courts considered whether the plaintiffs had no realistic option other than to agree to arbitration. *See Armendariz*, 6 P.3d at 690 (finding oppression inherent “in the case of preemployment arbitration contracts, [where] the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement”); *Flores*, 93 Cal. App. 4th at 853-54 (“take it or leave it” basis of contract was established because defendant was “the only company in California offering reverse mortgages, thereby indicating that plaintiffs had no real choice of alternate lenders”). Moreover, the California Court of Appeal recently explained that, even though a non-negotiable form contract signed by an unsophisticated plaintiff is “an adhesion contract as defined in *Armendariz*,” this “heralds the beginning, not the end, of [the] inquiry into its enforceability” because “[o]ppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of

reasonable market alternatives.” *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1319-20 (2005).

Cervantes responds to *Morris* and other California cases in accord with it by asserting that *Discover Bank* changed California law in this regard. Although *Discover Bank* contains some preliminary boilerplate to the effect that “[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion” (113 P.3d at 1108), the court had no occasion to address the effect of a showing that the plaintiff could have obtained comparable goods or services from another source without having to accept the disputed contractual provision. That is because the actual basis for the court’s finding that “an element of procedural unconscionability is present” was that Discover Bank had imposed its arbitration provision on *existing customers* “in the form of a ‘bill stuffer’ that [they] would be deemed to accept” unless they immediately closed their accounts and stopped using their credit cards. *Id.* That is a far cry from presenting a *potential* customer like Cervantes with a take-it-or-leave-it contract at the outset of the relationship when the customer has the option of obtaining similar service without having to accept the disputed term.<sup>7</sup>

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<sup>7</sup> The parties in *Aral v. Earthlink, Inc.*, 134 Cal. App. 4th 544 (2005) (cited at Br. 21), do not appear to have raised the issue of market alternatives, giving the court no occasion to address it.

Cervantes' further attempt to distinguish the recent California cases on their facts (Br. 19-21) is unavailing. Her only basis for distinguishing *Morris* is that it "did not concern an agreement to arbitrate or a class action waiver" (Br. 19 n.6), contradicting her claim that she is applying a *generally applicable* state-law defense to enforcement of Cingular's agreement.<sup>8</sup>

She argues that *Crippen v. Central Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1164 (2004), is concerned only with whether a contract is negotiable (Br. 19 n.6), ignoring that the Court of Appeal expressly identified "lack of meaningful choice" as relevant to the procedural unconscionability inquiry and concluded that "there is no general rule that a form contract used by a party for many transactions is procedurally unconscionable" (124 Cal. App. 4th at 1165).

Cervantes suggests that in *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 480 (2006), the fact that the defendant's competitors offered service without the challenged provision was meaningless to the court and that, instead, all that mattered was that the defendant itself did not uniformly require customers to

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<sup>8</sup> The FAA expressly preempts any state-law rule that applies to arbitration agreements but not other contracts. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.' \* \* \* A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.") (citation omitted; emphasis in original) (quoting 9 U.S.C. § 2).

accept the challenged term. Br. 19-20. But the Court of Appeal identified both circumstances without exalting one over the other in holding that the existence of alternatives defeated the plaintiff's procedural unconscionability argument. *See* 135 Cal. App. 4th at 480.

Finally, although Cervantes seeks to distinguish *Trend Homes, Inc. v. Superior Court*, 131 Cal. App. 4th 950 (2005), on the ground that it did not involve an arbitration provision (a forbidden rationale (*see* note 8, *supra*)), she does not deny that it strongly supports our contention that purchasing a house—like choosing a wireless carrier—is not the kind of pressing need that forces a customer to agree to unwanted terms without shopping around.

In short, as a different district judge in this Circuit recently held, because customers could obtain wireless service without agreeing to arbitrate or without a class waiver, the “oppression” element of procedural unconscionability is absent. *Shroyer Order* at 4.<sup>9</sup>

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<sup>9</sup> Cervantes argues that “[t]he second of the three agreements (ER 84-98)” is procedurally unconscionable for the additional reason that “it was merely incorporated by reference into the wireless service agreements signed by Ms. Cervantes.” Br. 16 n.3. She misapprehends the undisputed facts. All four (not three) of Cervantes’ wireless service agreements comprise two sides of a single 14-inch page that contain Cingular’s terms and conditions of service, including its arbitration provision, on the *reverse side of the agreement*. ER 74. Cervantes concedes that she received Cingular’s arbitration provision in this manner. *See* Br. 20. Accordingly, *Harper v. Ultimo*, 113 Cal. App. 4th 1402 (2003) (cited at Br. 16 n.3), is inapposite.

**B. Cingular’s Arbitration Provision Is Not Substantively Unconscionable.**

In arguing that the class waiver in her arbitration provision is substantively unconscionable, Cervantes offers two contradictory interpretations of California law. Neither is valid.

First, she asserts that all class waivers in contracts between businesses and their customers are “unfairly one-sided” and hence substantively unconscionable because businesses never bring class actions against their customers. Br. 22. But the California Supreme Court made clear in *Discover Bank* that not “all class action waivers are necessarily unconscionable” (113 P.3d at 1110), and, in particular, that substantive unconscionability turns on whether the class waiver serves to “insulate a party from liability that otherwise would be imposed under California law” (*id.* at 1109). Accordingly, that Cingular generally does not bring class actions against its customers is a plainly insufficient basis upon which to declare the class waiver in its arbitration provision unconscionable.<sup>10</sup>

Second, Cervantes contends that under *Discover Bank* a class waiver is substantively unconscionable so long as the complaint alleges that the defendant carried out a scheme to defraud customers out of small amounts of money. Br. 23-

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<sup>10</sup> To the extent it relies on this rationale, *Ingle, supra* (cited at Br. 22) does not accurately reflect current California law and hence is not binding on this panel.

24. But the underlying concern in *Discover Bank* is whether the class waiver serves to “insulate a party from liability that otherwise would be imposed under California law.” 113 P.3d at 1109. That question in turn requires an analysis of the specific arbitration provision at issue to determine whether customers can realistically vindicate their claims by means of individual arbitration.

In support of her premise that Cingular’s arbitration provision exculpates it from liability, Cervantes asserts that customers predictably would not be willing to invest the “time and trouble” necessary to redress their particular grievances in individual arbitration. Br. 25. She cites *Discover Bank* for support of this proposition, but it merely mentions the disincentives that consumers *may* face in bringing an individual action. *Id.* (quoting *Discover Bank*, 113 P.3d at 1105). Those disincentives are mitigated, if not wholly eliminated, by Cingular’s arbitration provision, under which customers pay nothing to arbitrate non-frivolous claims, have no limitations on the damages they can receive, and are entitled to an award of attorneys’ fees in a broader range of circumstances than if they were to proceed in court.<sup>11</sup>

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<sup>11</sup> Cervantes’ cases discussing the problems associated with trying to *litigate* individual small-dollar claims in the *judicial* system have no relevance to Cingular’s offer of costless and rapid *arbitration* of any claim, regardless of the amount of the demand.

Cervantes responds that it would be a “fool’s game” to “retain counsel at a cost disproportionate to the amount demanded” (Br. 25), ignoring that under California law attorneys’ fees are awarded according to “the fair market rate for such services.” *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001). “[T]he primary method for establishing the amount of ‘reasonable’ attorney fees is the lodestar method,” under which the court “multipl[ies] the number of hours reasonably expended by counsel by a reasonable hourly rate \* \* \* increase[d] or decrease[d]” by a “‘multiplier’ to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.” *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000). For this reason, “[t]he provision for recovery of attorney’s fees allows consumers to pursue remedies in cases \* \* \* where the compensatory damages are relatively modest.” *Hayward v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2003) (awarding attorneys’ fees of approximately twice the recovery); *see also Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1508 (1987) (affirming attorneys’ fees “award [that] is large in proportion to the amount of damages awarded”).

Not only may arbitrators award prevailing plaintiffs the full lodestar, plus possibly a risk multiplier, but they may do so in a broader range of cases than may

a court. That is because Cingular's arbitration provision allows plaintiffs who receive the full amount of their demands to recover attorneys' fees even if their claims are solely for breach of contract or some other common-law cause of action for which fee shifting is unavailable under the "American rule."<sup>12</sup> Accordingly, Cingular's arbitration provision enhances a customer's ability to obtain representation to arbitrate a small claim (assuming that the customer concludes that she needs representation). *See, e.g., Jenkins v. First Am. Cash Advance*, 400 F.3d 868, 878 (11th Cir. 2005) ("when the opportunity to recover attorneys' fees is available, lawyers will be willing to represent [debtors with small claims] in arbitration"), *cert. denied*, 126 S. Ct. 1457 (2006); *Taylor v. Citibank USA, N.A.*,

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<sup>12</sup> Cervantes is mistaken in asserting that Cingular's fee-shifting provision "is much more restrictive than traditional 'prevailing party' requirements for fee-shifting statutes" (Br. 26 n.10). As we pointed out in our opening brief (at 4 n.3) and Cervantes ignores, Cingular's fee-shifting provision supplements, rather than displaces, any right to attorneys' fees that a customer might have under applicable law. To the extent there is any doubt on that score, the question would be for the arbitrator to resolve. *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 763-64 (Wash. 2004) ("where parties dispute the potential but unknown effect of a particular provision in an arbitration agreement," the provision cannot be declared unconscionable on the basis of speculation as to how the arbitrator might interpret it); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1030-33 (11th Cir. 2003) (the arbitrator, not the court, should address the enforceability of a limitation on remedies in an otherwise enforceable arbitration agreement).

In any event, Cervantes is simply wrong that an arbitrator could refuse to award attorneys' fees if she were to receive the full amount of her demand, but fail to get complete injunctive relief. It is obvious from the structure of the arbitration provision that the availability of attorneys' fees for non-statutory claims turns on whether the customer received the amount of her *monetary* demand or more.

292 F. Supp. 2d 1333, 1344 (M.D. Ala. 2003) (rejecting unconscionability challenge to class waiver and noting that “the central purpose behind statutory attorneys fees is to encourage lawyers to accept cases in which damages may be small or nominal”).<sup>13</sup>

Cervantes also exaggerates the amount of time an attorney would likely devote to arbitrating her claim. As she describes her claim, in response to requesting that unauthorized charges be removed from her bill, Cingular agreed to credit her account but did not promise to remove any future unwanted charges. Br. 6. This sort of consumer dispute hardly can be compared to the “complex anti-trust action” (Br. 26 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974)) she cites to show that her claim must “proceed as a class action or not at all.” *Id.* In fact, Cingular resolves many claims even before an arbitration demand is filed or, if one is filed, before an arbitrator gets involved. ER75.

Cervantes’ speculation that many customers would be unwilling to devote

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<sup>13</sup> Cervantes misses the mark in contending that *Discover Bank* “soundly rejects the ‘rationale stated by some courts that the **potential** availability of attorney fees to the prevailing party in arbitration or litigation ameliorates the problem posed by such class action waivers.’” Br. 26 (quoting *Discover Bank*, 113 P.3d at 1109-10 (emphasis added)). Cingular’s arbitration provision offers far more than the **possibility** of attorneys’ fees by **obligating** Cingular to reimburse customers for their reasonable attorneys’ fees if they are awarded the amount of their demands or more—even for claims that would not otherwise support an award of attorneys’ fees.

the time and effort to pursuing an individual arbitration (Br. 25) also ignores the realities of class actions. In a class action, absent class members cannot simply sit back, do nothing, and wait for a check to arrive in the mail. Instead, once a class action is settled (as they almost invariably are), class members are often required to fill out a claim form, necessitating a thorough search of their records years after the underlying events took place. See Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal Forum 71, 103 (“in many situations individual plaintiffs are able to recover their awards only upon the filing of complex claim forms”).

There is no reason to suppose that a customer who is unwilling to take the time to pursue a cost-free arbitration would be any more willing to take the time to file a claim after a class action has settled. To the contrary, available data reflect that, when the amount that a consumer can expect to receive is small, the percentage of class members who submit claim forms is low.<sup>14</sup> The reason that so

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<sup>14</sup> See, e.g., Hillebrand & Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 753 (1988) (discussing three settlements in which claim rates were 3%, 10.5%, and 18%); Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary*, at 20-21 (RAND Inst. for Civ. Justice 2000), available at [http://www.rand.org/pubs/monograph\\_reports/2005/MR969.1.pdf](http://www.rand.org/pubs/monograph_reports/2005/MR969.1.pdf) (study of six consumer class actions finding that “class members claimed one-third or less of the funds set aside for compensation” in three cases, less than half the funds in a fourth, and in a fifth case all funds were claimed only because the settlement required dispersion of all funds, even though only 20-30% of class members filed

few class members bother to file claim forms is not hard to discern: generally, these cases are settled for a fraction of the amount claimed, making it both exasperating and economically irrational for most claimants to research their records and fill out the necessary forms. For example, in a recent class action settlement with Sprint, the most handsomely rewarded class members were offered a choice between (i) \$19 in bill credits to be credited in eight installments *over the following two years*; (ii) a \$15 credit upon their agreement to a new *two-year contract*; or (iii) a \$14 calling card. Other class members were offered as little as a \$1.50 calling card. See Sprint Class Action Settlement Info, Class Benefits, available at <http://www.sprintclassactionsettlement.com/Benefits.htm>.

At the same time, Cervantes mistakenly assumes that pursuing an individual arbitration would be prohibitively time-consuming. She overlooks that the relevant AAA rules allow for a brief, in-person hearing, a telephonic hearing, or a “desk” arbitration based on the submission of documents alone. See AAA, *Consumer Due Process Protocol*, Principle 12(1) & cmt., available at <http://www.adr.org/sp.asp?id=22019>. A desk arbitration or telephonic hearing might take no longer

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and more than 40% of their claims were rejected due to insufficient documentation); *Greenhaw v. Lubbock County Beverage Ass’n*, 721 F.2d 1019, 1031-32 (5th Cir. 1983) (class members claimed only \$17,482 of a \$2,000,000 class recovery), *overruled on other grounds*, *Int’l Woodworkers of Am., AFL-CIO v. Champion Int’l Corp.*, 790 F.2d 1174 (5th Cir. 1986).

than it takes for a class member to research his or her records and submit a claim (but potentially could have materially greater rewards).

In sum, far from exculpating Cingular from liability, Cingular's arbitration provision offers customers relief that in many ways is *superior* to that available through class actions.

**III. IF CONSTRUED TO RENDER THE CLASS WAIVER IN CINGULAR'S ARBITRATION PROVISION UNENFORCEABLE, DISCOVER BANK IS PREEMPTED BY THE FAA.**

In response to our conflict preemption argument, Cervantes relies upon this Court's statement in *Ting*, which we do not contest, that the FAA allows for "generally applicable contract defenses, such as fraud, duress, or unconscionability, [to] be applied to invalidate arbitration agreements without contravening § 2." Br. 28-29 (internal quotation marks and alteration omitted).<sup>15</sup>

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<sup>15</sup> We *do* dispute, however, that the California courts, in holding class waivers unconscionable, have truly applied a "generally applicable state law contract defense." Although *Discover Bank*, on its face, bars class waivers in both litigation and arbitration, the overwhelming majority of class waivers are contained in arbitration provisions. See Opening Br. 28 n.12. That is because class actions are inherently inconsistent with arbitration: to superimpose class-action procedures onto arbitration is to convert arbitration into litigation. The California Supreme Court's heavy reliance upon "public policy" favoring class actions over individual arbitration (*e.g.*, 113 P.3d at 1105-08, 1112, 1115-16) amounts to an assertion of state judicial veto power over the FAA. The California courts have often distorted state unconscionability law in order to thwart arbitration agreements, and the California Supreme Court's decision in *Discover Bank* is merely the latest example of that practice. See Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the*

Instead, our argument is that, *as applied to arbitration provisions*, California’s putatively neutral limitation on class waivers is preempted because it will discourage the use of arbitration and thereby frustrate the purposes of the FAA.<sup>16</sup>

Cervantes claims that our argument would place “arbitration clauses on *different* footing as [sic] other contracts.” Br. 30 (emphasis in original). True enough, but Congress’s purpose in enacting the FAA was to encourage arbitration by ending *discrimination against* arbitration provisions. *See Equal Employment Opportunity Comm’n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (FAA was enacted to “reverse the longstanding judicial hostility to arbitration agreements”) (internal quotation marks omitted). It is wholly inimical to that purpose to allow states to condition enforcement of arbitration provisions on acquiescence in procedures that would discourage businesses from entering into arbitration agreements in the first place.

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*Federal Arbitration Act*, 2 Hastings Bus. L.J. \_\_\_ (forthcoming 2006) (attached as Addendum II) (unconscionability found in 47% of arbitration cases as compared with 11% of non-arbitration cases in which issue was presented in California Court of Appeal in past two decades). Hence, the California Supreme Court’s rule is even-handed only in the most trivial sense; in purpose and practical effect, it discriminates against arbitration. Cervantes’ implicit concession that, in holding class waivers in arbitration provisions unconscionable, California deviates from the overwhelming majority rule (Br. 23 n.8) supports this conclusion.

<sup>16</sup> Because *Ting* does not address conflict preemption, Cervantes is left with no reason why this Court should decline to follow courts from other jurisdictions that have expressly or implicitly adopted our argument. *See* Br. 31 n.13.

To put it simply, when a business is deciding whether to include an arbitration provision in its agreements with its customers, it undertakes a risk-benefit analysis. The benefits of arbitration are that it is fast, easy, and inexpensive. The risks are that the arbitrator will get it wrong and that the decision will be essentially unreviewable. Many businesses are willing to take that risk because of the cost savings and the desire to have a less adversarial way of resolving disputes with customers.

But the risk-benefit calculus changes dramatically if the business must bear the risk of a class arbitration as the price of admission. A class arbitration would eliminate all of the cost savings and efficiencies of individual arbitration. At the same time, the stakes would be multiplied exponentially. Yet the arbitrator's decision would remain reviewable only under the very narrow standard of review set forth in the FAA. Under those circumstances, very few companies would be willing to include arbitration provisions in their agreements with customers. Because this outcome is inconsistent with the central purpose of the FAA, which is to encourage arbitration, it is preempted.

In an analogous context, this Court recently held that California state ethics standards are impliedly preempted by the Securities and Exchange Act of 1934 ("Exchange Act"). *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119,

1135-36 (9th Cir. 2005). The Court reasoned that imposition of those state standards on NASD arbitrators would frustrate the purpose of the Exchange Act by “making arbitration more costly for investors and employees,” potentially “deter[ing] well-qualified individuals from serving as NASD arbitrators,” and increasing the “complexity, cost, and uncertainty” of arbitration. *Id.* at 1135 (footnote and internal quotation marks omitted).<sup>17</sup>

Our conflict-preemption argument may well result in putting “arbitration clauses on [a] *different* footing” from other contracts in California, but that outcome is fully consonant with the powerful federal policy favoring arbitration. Any other result would be the death knell for consumer arbitration in California.

#### **IV. CERVANTES’ CLAIMS FOR PUBLIC INJUNCTIVE RELIEF ARE ARBITRABLE.**

To divert a subset of her claims away from the arbitration process to which she agreed, Cervantes argues (Br. 27 n.11) that, whatever this Court concludes on

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<sup>17</sup> See also *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (federal law’s promise of flexibility to ERISA plans preempts “state law [that] might produce \* \* \* acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage”); *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 157 (1989) (Florida protection of unpatentable inventions was preempted because it “could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years”); *Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982) (Illinois regulation of tender offers was preempted by more expeditious federal securities disclosure requirements in part because “Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay”).

the unconscionability issue, her claims for public injunctive relief under the UCL and CLRA are non-arbitrable under *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999), and *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003). In *Broughton*, the California Supreme Court declared that CLRA claims for public injunctions are not arbitrable, and in *Cruz* extended that holding to UCL claims for public injunctions. The court reasoned in both cases that arbitration is incompatible with the pursuit of public injunctions.

*Broughton* and *Cruz* are clearly preempted by the FAA. Although *Congress* will be deemed to have rendered a *federal* statutory claim non-arbitrable if there is an “inherent conflict” between the “underlying purposes” of that claim and arbitration (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)), there is no basis whatever for the California Supreme Court’s assumption that states may declare state-law claims off limits to arbitration. To the contrary,

[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.

*Gonzales v. Raich*, 125 S. Ct. 2195, 2212 (2005) (internal quotation marks omitted).

Consistent with this principle, the Supreme Court frequently has rejected the

argument that state legislatures have a free hand in cutting back the scope of the FAA. For example, after the California Supreme Court construed the California Franchise Investment Law to render claims under that law non-arbitrable (*Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982)), the Supreme Court reversed, declaring that “[s]o interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

Shortly thereafter, the Supreme Court again reversed a decision of the California Supreme Court holding that the California legislature has the power to declare a claim non-arbitrable—this time one to collect wages under the California Labor Code. *See Perry v. Thomas*, 482 U.S. 483 (1987). Explaining that California’s “requirement that litigants be provided a judicial forum for resolving wage disputes” was in “unmistakable conflict” with Section 2 of the FAA and its underlying policy, the Court held that, “under the Supremacy Clause, the state statute must give way.” *Id.* at 491.

More recently, the Court explained that the arbitrability of claims depends on “whether *Congress* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (emphasis added). The following year, the

Court refused to include California's Fair Employment and Housing Act under *Gilmer*'s "inherent conflict" exception, thus rejecting the very reasoning applied by the California Supreme Court in *Broughton*. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-24 (2001) ("[T]he argument here is that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland* and *Allied-Bruce [Terminix Cos. v. Dobson]*, 513 U.S. 265 (1995)], and we do not revisit the question here."); *see also Buckeye Check Cashing v. Cardegna*, 126 S. Ct. 1204, 1209 (2006) (*Southland* "rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 623 n.10 (1985) ("the Federal Arbitration Act 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration'") (citation omitted).

In part because *Broughton* and *Cruz* are far out of step with U.S. Supreme Court case law, few if any courts have followed them. To the contrary, one district court in this Circuit has expressly held that the FAA preempts *Broughton*. *See Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1198-99 (S.D. Cal. 2001)

(“If it were enough for a state legislature to declare, through the nature of the remedies it offers in a statute, that it did not wish to have certain claims subjected to arbitration, states would essentially be allowed to undercut the FAA in an area in which Congress is supreme (i.e., interstate commerce).”), *overruled on other grounds by Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).

Commentators have come to the same conclusion. *See, e.g.,* Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 416 (2004) (“*Broughton* and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date. The difference between the federal and state source of rights is not mere happenstance, but is the centerpiece of federal preemption doctrine under the Supremacy Clause.”); Manakides, Note, *Arbitration of “Public Injunctions”*: *Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. Cal. L. Rev. 433, 481 (2003) (“A state legislature cannot prevent a valid arbitration clause from being enforced, even if this results in the arbitration of a ‘public injunction.’ The U.S. Supreme Court has held that only Congress and not state legislatures can prevent the enforcement of arbitration clauses.”).

Accordingly, if the Court were to reach the issue, it should hold that *Broughton* and *Cruz* are preempted by the FAA.

## CONCLUSION

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

DATED: July 21, 2006

Respectfully submitted,

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**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:

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 6,971 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;

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   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**

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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
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- 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: July 21, 2006

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By \_\_\_\_\_  
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# **Addendum I**

# **Addendum II**

## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2006, I filed the original and 15 copies of the foregoing brief 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 by third-party commercial carrier for delivery within 3 calendar days on the party herein, at the following address:

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