

No. D047603

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

In re CINGULAR CASES

J. MARVIN CAMPBELL and JAMES GIANNOIT,

Plaintiffs-Respondents,

vs.

PACIFIC BELL WIRELESS LLC and CINGULAR WIRELESS LLC,

Defendants-Appellants.

From the Order of the San Diego County Superior Court
Case No. JCCP4348
Honorable Jeffrey B. Barton

REPLY BRIEF FOR THE APPELLANTS

Service on Attorney General and District Attorney required
by Bus. & Prof. Code §§ 17209 & 17536.5

MAYER, BROWN, ROWE & MAW LLP
Donald M. Falk (SBN 150256)
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Telephone: (650) 331-2000
Facsimile: (650) 331-2060

John Nadolenco (SBN 181128)
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Attorneys for Defendants-Appellants
Pacific Bell Wireless LLC and Cingular Wireless LLC

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs J. Marvin Campbell and James Giannoit admit that they agreed to arbitrate their disputes with Cingular on an individual basis. They nevertheless attack Cingular's arbitration provision as unconscionable because it bars them from bringing their claims as class actions, asserting that the California Supreme Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 announced a novel unconscionability rule that would in essence prohibit *all* class waivers in consumer contracts.

But that is not what *Discover* says. *Discover* held that only those class waivers that both are procedurally unconscionable and improperly insulate companies from liability for "small" consumer claims are unenforceable. Here, Campbell and Giannoit satisfy neither prerequisite. First, the manner by which they agreed to arbitrate was entirely fair. Second, their individual claims—which are for as much as \$2,000—are not so trifling that only a class action could give them sufficient inducement to pursue them. Indeed, Cingular's arbitration provision permits them to arbitrate for free and vests them with a greater entitlement to attorneys' fees than they would enjoy in court. These features led a federal court in California recently to reject an identical unconscionability challenge because, "[u]nlike the arbitration provision deemed troublesome in *Discover*, Cingular's arbitration provision couples its class waiver with other features that ensure that arbitration will provide customers with a realistic means of resolving disputes that more than adequately substitutes for the class-action mechanism." *Shroyer v. New Cingular Wireless Servs., Inc.* (C.D. Cal. May 30, 2006) No. CV 06-1792-R, slip op. at 3–6 (attached), appeal pending, No. 06-55964 (9th Cir.). In fact, plaintiffs have not explained how they would

be better off as class representatives than in individual arbitration in *any* way.

Finally, if *Discover* were interpreted in the manner that plaintiffs advocate, the Federal Arbitration Act (“FAA”) would preempt its application to Cingular’s arbitration provision—a point that plaintiffs fail to confront. Accordingly, they have failed to carry their burden of proving that, as applied to them, their arbitration provisions are unconscionable. See *Engalla v. Permanente Med. Group, Inc.* (1997) 15 Cal.4th 951, 972.

ARGUMENT

I. CINGULAR’S ARBITRATION PROVISION IS FULLY ENFORCEABLE

A. Campbell’s And Giannoit’s Arbitration Agreements Are Not Unconscionable Under California Law.

1. Plaintiffs’ Arbitration Agreements Are Not Procedurally Unconscionable.

As we explained in our opening brief, because neither aspect of procedural unconscionability—oppression or surprise—tainted the manner by which Campbell and Giannoit agreed to arbitrate, the superior court’s order may be reversed on that ground alone. Plaintiffs retort that, in a marked deviation from precedent, *Discover* held that all contracts offered on a take-it-or-leave-it basis are procedurally unconscionable, contend that Giannoit’s contract inadequately disclosed the arbitration provision, and claim that the fact that neither plaintiff was specifically told about arbitration supports a finding of procedural unconscionability. They are mistaken on all counts.

a. ***Discover* Does Not Depart From Normal Procedural Unconscionability Principles.**

Plaintiffs insinuate that *Discover* replaces normal procedural unconscionability principles—which evaluate the contracting process for indicia of “oppression” and “surprise”—with a categorical rule that any arbitration provision contained in a contract of adhesion is procedurally unconscionable. See RB 14. This interpretation of *Discover*, however, is erroneous.

Although *Discover* 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” (36 Cal. 4th at 160), the court had no occasion to address the effect of a showing (like the one made by Cingular) 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.*¹ That is a far cry from presenting *potential* customers like Campbell and Giannoit with a take-it-or-leave-it contract at the outset of the relationship—long before they had become reliant upon the service—when the customer has the option of obtaining similar service without having to accept the disputed term.

¹ As one court has observed, Discover Bank sent the arbitration provision to its customers in 1999—13 years after it first issued a credit card to the plaintiff. *Provencher v. Dell Corp.* (C.D. Cal. 2006) 409 F.Supp.2d 1196, 1205 fn.12.

That a contract is non-negotiable has *some* relevance to the procedural unconscionability inquiry. But as Division 3 of this Court recently put it, “recognition of [an] agreement as an adhesion contract * * * heralds the *beginning*, not the end, of [the] inquiry” into procedural unconscionability. *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1319 (emphasis added); see also *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 480. To “reflexively conclude” that “the finding of an adhesion contract alone satisfies the procedural prong”—as plaintiffs urge—would constitute “analytical myopia” that “obscur[es] the larger unconscionability picture.” *Morris*, 128 Cal.App.4th at 1318.² That view of procedural unconscionability cannot be correct because it would condemn virtually *all* contracts. To the contrary—as the *Discover* Court recognized—“adhesive contracts are generally enforced” (36 Cal.4th at 160–61).

b. Plaintiffs’ Arbitration Agreements Are Not Oppressive.

As we explained in our opening brief (at 15–17), Campbell and Giannoit cannot show that their agreements to arbitrate were “oppressive” because they had meaningful alternatives to obtaining wireless service from Cingular or its predecessor. Although the burden was squarely on plaintiffs

² Plaintiffs cite *Parr v. Superior Court* (1983) 139 Cal.App.3d 440 to support their contention that “[t]he *only* relevant issue is whether the customer is free to negotiate the terms of the agreement.” RB 15 (emphasis added). *Parr* has been overtaken by more recent cases squarely holding that “take-it-or-leave-it” provisions are *not* per se procedurally unconscionable. See *Wayne*, 135 Cal.App.4th at 482; *Morris*, 128 Cal.App.4th at 1320; *Crippen v. Cent. Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1165; *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 768.

to demonstrate procedural unconscionability, they failed to prove that they could have obtained cellular service only by agreeing to arbitrate disputes on an individual basis.³ To the contrary, the uncontradicted evidence before the superior court was that Campbell and Giannoit *did* have available alternatives. See AA 624, 629–41, 644–706. Relying on similar evidence, the federal district court for the Central District of California has noted that a number of other California carriers “offered wireless service without the need to arbitrate disputes or without a class waiver” in their terms and conditions. *Shroyer*, slip op. at 4.

Plaintiffs attempt to avoid the impact of two cases we cited holding that a contract cannot be procedurally unconscionable unless there is an absence of meaningful alternatives. See AOB 15–16 (discussing *Wayne*, 135 Cal.App.4th at 482, and *Crippen*, 124 Cal.App.4th 115). First, they claim that *Wayne* does not apply because in that case the plaintiff “*knew* the price” of the challenged package insurance and “*knew*” that he could forgo the insurance or “us[e] another shipper,” whereas here Campbell and Giannoit claim that they were unaware of the arbitration agreement. RB 18-19 (emphasis added). But neither law nor logic supports a distinction predicated on a plaintiff’s subjective (and indeed, self-serving) declaration. Rather, as we pointed out in our opening brief (at 17), the law is clear that Campbell and Giannoit are presumed to have read their contracts. Indeed,

³ They also do not take issue with our argument that cellular service is not a necessity of life, and thus does not entail the kind of “pressure” or “compulsion” that forces a customer to agree to unwanted terms without shopping around. See *Morris*, 128 Cal.App.4th at 1320; see also AOB 17–19.

Giannoit specifically acknowledged by his signature that he had read and understood the arbitration provision. AA 235.

As for *Crippen*, plaintiffs assert that it is concerned only with the parties' relative bargaining power and the nature of the form used. See RB 19-20. They ignore that the Fifth District 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.

c. Plaintiffs Cannot Claim That They Were Unfairly Surprised By Their Arbitration Agreements.

Plaintiffs seek to portray the arbitration provision in Giannoit's contracts as "buried" or "hidden" (RB 15, 16) and contend that their agreements to arbitrate are unenforceable as a result. These claims miss the mark both factually and legally.

First, as we showed in our opening brief (at 19–21), Cingular's arbitration provision was accorded special prominence in Giannoit's agreement. Among other things:

- the front page of Giannoit's agreement twice referred to the arbitration provision;
- the first paragraph of the Terms and Conditions on the reverse side of the agreement again notified Giannoit of the arbitration provision; and
- Giannoit signed the contract immediately below an acknowledgment that he had read and understood the arbitration provision.

See AOB 20.⁴ For very similar reasons, the United States Court of Appeals for the Fifth Circuit rejected a procedural unconscionability attack on a prior version of Cingular’s arbitration provision. See *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC* (5th Cir. 2004) 379 F.3d 159, 172 fn.14 (observing that “the first paragraph of the Cingular contract specifically advertises to the arbitration clause, the only provision given such prominent billing”).⁵

⁴ Plaintiffs characterize as a factual “finding” (RB 15) the superior court’s holding that Cingular’s arbitration provision was “buried” in the contract (AA 811) in an effort to insulate the court’s determination from *de novo* review. See RB 15 (asserting that “substantial evidence” test applies). But there is *no* underlying factual dispute warranting such deference. Rather, the question is a legal one: whether the superior court properly applied the law of unconscionability to the undisputed facts. Accordingly, “the usual deference that would apply to the review of a trial court’s ruling based on its superior ability to resolve *factual* questions (*e.g.*, the credibility of witnesses appearing before it) is unwarranted,” and review is “*de novo*.” *In re Zepeda* (Cal. Ct. App. 2006) 47 Cal.Rptr.3d 172, 175 (emphasis in original); see also *NORCAL Mut. Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71–72 (reviewing the denial of a petition to compel arbitration *de novo* because the dispute to be resolved was the legal significance of certain facts, not a dispute over what those facts were).

⁵ Plaintiffs do not dispute that the arbitration provision contained in *Campbell’s* original wireless service agreement with Cingular’s predecessor was fully disclosed. They do argue that Campbell was surprised by the manner in which Cingular’s revised arbitration provision was extended to him in mid-2003. See RB 17. But that claim of surprise is irrelevant to Campbell’s obligation to arbitrate. Whether Campbell’s arbitration agreement is procedurally unconscionable turns on the manner in which that obligation became part of Campbell’s contract—which was when he first initiated service with Cingular’s predecessor. AOB 5–6. In any event, the 2003 modification was uniformly favorable to Campbell, because it extended to him the consumer-friendly features of Cingular’s revised arbitration provision, including the ability to arbitrate at no cost. Cf. *Badie v. Bank of Am.* (1998) 67 Cal.App.4th 779, 791-803 (holding that there is no unfair surprise when a business invokes a change-in-terms provision to alter

(cont’d)

Plaintiffs ignore these facts and fail to distinguish *Iberia*. Moreover, they inaccurately characterize the location of the arbitration provision in Giannoit’s contract. The Cingular agreement that Giannoit signed appears on a *single* page with a front and reverse side (AA 109, 235–37)—not, as plaintiffs claim (RB 20), in the middle of a four-page document.⁶

Plaintiffs’ remaining procedural-unconscionability arguments are also meritless. Each of them must fail because the FAA preempts “condition[ing] the enforceability of arbitration provisions on compliance with a special notice requirement not applicable to contracts generally.” *Doctor’s Assocs., Inc. v. Casarotto* (1996) 517 U.S. 681, 687.

First, plaintiffs argue that the type size of Cingular’s arbitration provision is too small and that the front of Giannoit’s arbitration agreement contains only “two passing references to arbitration.” RB 15–16. But they fail to recognize that the arbitration provision is exactly the same size as the remainder of the Terms and Conditions and that no other provision receives multiple billing on the signature page. To require that Cingular’s arbitration provision be *more* prominent than its surrounding terms would flatly violate the FAA. See *Doctor’s Assocs.*, 517 U.S. at 687; see also *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 585 (“font and point size, notification, and warning requirements” could not “be judicially construed to in-

(... cont’d)

an existing term of the contract; and that as long as the change is reasonable, it will be enforced).

⁶ Because the contract was printed on legal-sized paper, we reproduced the reverse side of the contract (the Terms and Conditions page) as two letter-sized pages in the appendix to comply with Rules of Court 5.1(d)(1) and 9(a). See AA 236–37.

validate the arbitration clause at issue without violating the [FAA]” because they applied “*only to arbitration clauses*”) (emphasis in original).⁷

Second, plaintiffs object that customers typically did not receive and accept their agreements “until after they had already picked out the cellular telephone and cellular service package that they wanted to purchase.” RB 17. Unsurprisingly, they cite no authority to support their insinuation that this common way of doing business is somehow unfair. Indeed, under the principle advocated by plaintiff—if made generally applicable to all contracts—no warranty, return policy, or any other contractual term that is presented after a price term (the most salient term of any contract) would be valid.

Third, plaintiffs complain that Cingular did not “instruct its salespeople to inform customers” about the arbitration provision or the class waiver. RB 16. Once again, no general principle of contract law requires

⁷ Plaintiffs cite two cases to support their contention that the type size of Cingular’s arbitration provision renders it unenforceable (see RB 15), but neither case is applicable here. This Court’s holding in *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081 that judicial-reference provisions in a contract are required to be especially prominent has no bearing on this case because there is no federal statute preempting the application of special notice requirements to judicial-reference provisions. Moreover, unlike here, the condemned judicial-reference provision in *Pardee* was not mentioned until the “fifteenth paragraph,” was misleadingly captioned, and was written in hard-to-read “single-spaced capital letters.” *Id.* at 1089–90. In *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, the court found an arbitration provision on the back of the lease to involve “surprise,” but there was no indication that the signature page referenced the provision. *Id.* at 89. Moreover, insofar as the court imposed a heightened conspicuousness requirement in that case, its decision runs afoul of the FAA (see *Doctor’s Assocs.*, 517 U.S. at 687) and accordingly should not be followed.

oral recitation of the terms of a contract. To the contrary, “[c]ashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff * * * had to read [a] four-page statement of terms * * *, the droning voice would anesthetize rather than enlighten many potential buyers.” *Hill v. Gateway 2000, Inc.* (7th Cir. 1997) 105 F.3d 1147, 1149.⁸

* * * * *

When, as here, there is only “a low level of procedural unconscionability,” the plaintiff must demonstrate “a *high* level of substantive unconscionability” to avoid the contract. *Woodside Homes, Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 730 (emphasis in original). The class waiver in Cingular’s arbitration provision does not entail any substantive unconscionability, much less a high level.

⁸ Plaintiffs also argue that Cingular’s arbitration provision is unenforceable because Cingular does not attach the rules of the American Arbitration Association to each of its contracts. See RB 17 fn.2. Yet—unsurprisingly—no generally applicable contract-law principle requires parties to a contract to attach the procedural rules of the relevant dispute-resolution forum. If there were such a requirement, most contracts would be a couple of pounds heavier because they would need to be accompanied by the California Code of Civil Procedure and the Federal Rules of Civil Procedure.

Harper v. Ultimo (2003) 113 Cal.App.4th 1402, which plaintiffs cite (at RB 17 fn.2), does not support this unwieldy principle. There, the court held that the failure to attach the relevant arbitration rules was unconscionable because those rules imposed *substantive* limits on liability, including a prohibition of punitive damages and a \$2,500 cap on compensatory damages. *Id.* at 1406–10. The AAA rules impose no such limits.

2. Cingular’s Arbitration Provision Is Not Substantively Unconscionable.

Cingular’s arbitration provision is not substantively unconscionable because it does not so “shock the conscience” that “no man in his senses, and not under delusion, would make [it] on the one hand, and [that] no honest and fair man would accept on the other.” *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 484 (internal quotation marks omitted); see also *California Grocers Ass’n v. Bank of Am.* (1994) 22 Cal.App.4th 205, 214; *Swanson v. Hempstead* (1944) 64 Cal.App.2d 681, 688. Though plaintiffs deride that generally applicable standard as too old—“from the early 1900’s” (RB 23)—*California Grocers* makes clear that it retains currency, as do decisions from over a dozen other states.⁹ Though we agree with plaintiffs that, in evaluating claims of substantive unconscionability, courts have also examined whether contractual provisions are “overly harsh” (see *id.*), that formulation provides little guidance because it is inherently vague. Trying

⁹ See, e.g., *Bland v. Health Care and Ret. Corp. of Am.* (Fla. Dist. Ct. App. 2006) 927 So.2d 252, 256; *Walther v. Sovereign Bank* (Md. 2005) 872 A.2d 735, 744; *Norwest Fin. Miss., Inc. v. McDonald* (Miss. 2005) 905 So. 2d 1187, 1193; *Lovey v. Regence BlueShield* (Idaho 2003) 72 P.3d 877, 882; *Conseco Fin. Serv. Corp. v. Wilder* (Ky. Ct. App. 2001) 47 S.W.3d 335, 341-42; *Smith v. Mitsubishi Motors Credit of Am., Inc.* (Conn. 1998) 721 A.2d 1187, 1190; *Pinnacle Computer Servs., Inc. v. Ameritech Publ’g, Inc.* (Ind. Ct. App. 1994) 642 N.E.2d 1011, 1017; *Iberlin v. TCI Cablevision, Inc.* (Wyo. 1993) 855 P.2d 716, 728; *Mgmt. Enters., Inc. v. Thorncroft Co.* (Va. 1992) 416 S.E.2d 229, 231; *Waters v. Min Ltd.* (Mass. 1992) 587 N.E.2d 231, 234; *Lakeside Boating & Bathing, Inc. v. State* (Iowa 1987) 402 N.W.2d 419, 422; *Soc’y of Lloyd’s v. Reinhart* (10th Cir. 2005) 402 F.3d 982, 997 (applying New Mexico law); *Siebert v. Amateur Athletic Union of the United States, Inc.* (D. Minn. 2006) 422 F.Supp.2d 1033, 1041 (applying Minnesota law); *Provencher*, 409 F.Supp.2d at 1204 (applying Texas law); *Truesdell v. State Farm Fire & Cas. Co.* (N.D. Okla. 1997) 960 F.Supp. 1511, 1516 (applying Oklahoma law).

to decide whether a provision is “overly harsh” is akin to trying to decide whether a person is “overly tall.”

Under either standard, however, it is clear that the limited holding in *Discover* does not render Campbell’s and Giannoit’s arbitration agreements unconscionable. The size of plaintiffs’ claims—up to \$2,000 in damages—is certainly not so “small” that a reasonable person would be unwilling to pursue it under Cingular’s cost-free arbitration procedures. Hence, *Discover*’s concern with arbitration provisions that “insulate” companies from liability for small claims (36 Cal.4th at 161) does not apply.

Plaintiffs respond by speculating that their claims might be for a somewhat lesser amount (RB 21 & fn.3)—but do not disclose what that lower amount might be. And they contend that even claims in the range of “\$500 to \$1,500” would be “not sufficient to motivate individuals to bring meritorious claims.” RB 21–22. Finally, they assert that Cingular’s class arbitration waiver would be unconscionable in cases brought by *other* customers, and try to anchor their claims here to other cases not before the Court. RB 20–21. All of those contentions are misguided.¹⁰

¹⁰ Plaintiffs also contend in passing that their arbitration agreements are substantively unconscionable because Cingular “would never sue its customers in a class action,” making the agreement to arbitrate on an individual basis “one-sided[.]” RB 22. But the California Supreme Court made clear in *Discover* that not “all class action waivers are necessarily unconscionable” (36 Cal.4th at 162) 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 161). Accordingly, that Cingular—like all businesses—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. Moreover, it is not, and could not be, a general rule of contract law that obligations applying only to one contractual party are void for lack of

(cont’d)

a. *Discover* Is Inapplicable Because Campbell And Giannoit Are Not Seeking A *Small* Amount Of Damages.

The rule announced in *Discover* invalidates only those class waivers that operate to “insulate a party from liability that otherwise would be imposed under California law” (36 Cal.4th at 161). In *Discover* itself, which involved a claim for \$29 (*id.* at 152), the California Supreme Court believed that the amount was too “small” to warrant pursuing the claim on an individual basis. *Id.* at 156–57, 161. See also *Aral v. Earthlink, Inc.* (2005) 134 Cal.App.4th 544, 557, 561 (treating claims “of \$40 to \$50” as “small” under *Discover*). But that is not the case here because both Campbell’s and Giannoit’s claims—if meritorious—approach \$2,000. AOB 25 (reporting Giannoit’s estimate of his maximum damages); *id.* at 25 fn.24 (calculating Campbell’s claimed damages). These claims are not “small” under *Discover* because no reasonable consumer would believe that claims of that size are too inconsequential to pursue. See *Provencher*, 409 F.Supp.2d at 1202 (holding that consumer claim for about \$1,600 “do[es] not involve a small amount of money” under *Discover*).

Perhaps recognizing this, plaintiffs backpedal from Giannoit’s earlier estimate of his claims (see AA 248) and now hypothesize that they may recover less than their “maximum amount of recovery.” RB 21 fn.3. But plaintiffs decline to specify what lesser amount they would likely recover, and their speculation that they may recover less than their demand cannot

(... cont’d)

mutuality. So long as other provisions provide consideration, a one-sided obligation generally is valid. No different rule may apply to arbitration clauses.

satisfy their burden of demonstrating that their claims are “small” under *Discover*. See *Crippen*, 124 Cal.App.4th at 1165 (“Plaintiff’s burden was to prove both procedural and substantive unconscionability.”).

More importantly, whether a claim is “small” under *Discover* requires reference to the cost of pursuing the claim under a given arbitration provision. The lower the economic barrier to pursuing a claim, the lower the threshold is for when a claim is no longer “small”—*i.e.*, when the claim is large enough to provide a consumer with a sufficient inducement to pursue it on an individual basis. As we explained in our opening brief (at 26–30), Cingular’s arbitration provision removes any possible obstacle to obtaining redress for even the smallest claims. Under Cingular’s provision, customers pay nothing to arbitrate, and they may recover their attorneys’ fees to a greater extent than they could in court. Thus, for a Cingular customer’s claim to be “small” under *Discover*, it must be very small indeed. And Campbell’s and Giannoit’s claims—even if they are worth somewhat less than the maximum recovery—are still likely to be worth many times more than the claim at issue in *Discover*.

Plaintiffs obtain no help by citing cases in which class actions were deemed to be superior to individual *litigation* for statutory-damage claims ranging from \$500 to \$1,500. None of plaintiffs’ cases addresses whether a claim of that amount can be realistically vindicated in an individual arbitration; much less one conducted under the terms of Cingular’s consumer-friendly arbitration provision. Indeed, one case that plaintiffs cite, *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.* (Ariz. Ct. App. 2002) 50 P.3d 844, surely would have come out the other way had the court been comparing class actions to arbitration under Cingular’s provision. In the course of holding that individual litigation was prohibitively

expensive because the Telephone Consumer Protection Act (“TCPA”) (47 U.S.C. § 227) did not provide for “attorneys’ fees or costs,” the court observed that “[t]he availability of attorneys’ fees makes the pursuit of individual claims more economically feasible, thereby diminishing any need for class action.” *Id.* at 851.¹¹ Under Cingular’s provision, attorneys’ fees are available to a greater extent than they would be in court. See AOB 27–28.

Moreover, while plaintiffs cite a handful of cases in which courts have indicated that class certification may be appropriate for claims under the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692o) and the Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*) (see RB 21–22), the majority of courts have concluded that claims under these statutes are suitable for individual arbitration. See, *e.g.*, *Snowden v. Checkpoint Check Cashing* (4th Cir. 2002) 290 F.3d 631, 638–39; *Randolph v. Green Tree Fin. Corp.—Alabama* (11th Cir. 2001) 244 F.3d 814, 816–19; *Bowen v. First Family Fin. Servs., Inc.* (11th Cir. 2000) 233 F.3d 1331, 1337–38; *Johnson v. West Suburban Bank* (3d Cir. 2000) 225 F.3d 366, 373–75.

Plaintiffs point to the “barrage of motions that Cingular has filed in this action” (RB 22) as evidence that individual arbitration would be cumbersome. But this argument actually highlights an important difference between class litigation and individual arbitration. When defending against a class action—which involves vastly magnified stakes and complicated pro-

¹¹ Contrary to plaintiffs’ insinuation (RB 22), the Second District did not hold in *Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4th 886 that actions under the TPCA for \$500 or \$1,500 are too small to be brought individually. Rather, the Second District ruled only that the TCPA “does not foreclose class actions” and indeed acknowledged that “that does not mean that every TCPA action should proceed as one.” *Id.* at 925.

cedures—it is not surprising that Cingular, like most defendants, will make detailed arguments and engage in extensive motions practice. Cf. Cal. Rule of Court 1800(c)(6) (recognizing that class actions are provisionally complex). By contrast, individual arbitration under Cingular’s arbitration provision is not a “scorched earth” (RB 22–23) battle. Quite the opposite: by assuming the responsibility to pay all of the costs of arbitration, Cingular has created incentives for itself to resolve disputes quickly and amicably. See AOB 28–29.

b. Cingular’s Arbitration Provision Does Not Function As An Exculpatory Clause.

Perhaps recognizing that *their* claims cannot be considered “small” under *Discover*, Campbell and Giannoit take the fallback position that, even if their claims are not “small,” the claims of *other* customers may be small (RB 21), and attempt to anchor their unconscionability arguments to the hypothetical claims of these other customers. RB 21. That attempt is improper because it is well established that the unconscionability inquiry is focused on the “*needs of the particular case.*” *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1390 (citing Civ. Code § 1670.5, Legis. Com. comment 1) (emphasis added).

But even if this Court were to consider plaintiffs’ attempt to avoid their arbitration agreements by hitching their unconscionability arguments to other people’s claims, Cingular’s arbitration provision is not substantively unconscionable as to them either. Cingular’s arbitration provision does not “insulate [Cingular] from liability” (36 Cal.4th at 161) because the provision includes features that adequately substitute for the class-action mechanism and ensure that customers find arbitration to be a realistic

means of resolving claims smaller than those brought by Campbell and Giannoit. See *Shroyer*, slip op. at 4–5.

Plaintiffs contend erroneously that *Discover* “has already rejected” the argument that “a company’s agreement to pay attorneys’ fees and costs * * * adequate[ly] substitutes for class actions.” RB 24. The *Discover* Court explained that it did not believe the “*unsupported* assertions” of other courts that the “*potential* availability” of “attorney fees * * * ameliorates the problem posed by * * * class action waivers” like the one in *Discover Bank’s* arbitration provision. 36 Cal.4th at 162 (emphasis added). But 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 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.” 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).

Furthermore, the “assertions” that *Discover* rejected were “unsupported”; in contrast, Cingular presented uncontradicted evidence that its customers could feasibly vindicate disputes, including information demonstrating that many customers—some represented by counsel—have brought small claims against Cingular in arbitration and in small claims court. See AOB 30 (citing record evidence).

Indeed, as a comparative matter, a customer who wishes to pursue a claim against Cingular would fare better in individual arbitration than in class-action litigation along *any* dimension of comparison. Though plaintiffs imply that class actions allow consumers to obtain make-whole awards

without cost, the reality is that customers who choose to become putative class representatives face a far worse incentive structure than they would in individual arbitration under Cingular's arbitration provision.

First, the customer's costs would be much lower in arbitration than in litigation. While customers may arbitrate for free under Cingular's arbitration provision and obtain attorneys' fees when they prevail, putative class representatives receive neither benefit. In court, they would be responsible for paying substantial filing fees that exceed—by orders of magnitude—the small sum that they personally could recover. For example, the filing fee for cases seeking damages in excess of \$25,000, as a class action almost certainly would be, is \$320. Gov't Code § 70611. Because it is a class action, the class representative might also have to pay a \$550 complex case fee. *Id.* § 70616(a). And if the case were to proceed to even a one-day trial, he would owe other fees, such as jury fees (\$150) and court reporter fees (\$440). Code Civ. Proc. § 631(b); Gov't Code § 68086(a). Moreover, the class representative must bear his own attorneys' fees if the claim is one, such as breach of contract, that does not provide for fee-shifting. Even if an attorney agrees to take the case on contingency, the fee would come out of any settlement, leaving both the class representative and the absent class members with a reduced recovery.

Second, customers who choose individual arbitration enjoy the “simplicity, informality, and expedition” (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628) of the arbitration process in general and Cingular's consumer-friendly terms in particular. Customers who provide Cingular with notice of their disputes before beginning an arbitral proceeding (as they are required to do under their contracts) often obtain expeditious redress for their complaints through informal dispute

resolution processes without the need for arbitration. In many cases, Cingular will resolve the dispute upon receiving the notice, after the customer has spent only a few hours, if that. Even if a resolution is not reached at that point, 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., at <http://www.adr.org/sp.asp?id=22019>. A desk arbitration or telephonic hearing might take no longer than it takes for a class member to research his or her records and submit a claim (but potentially could have materially greater rewards).

Customers who elect to bring a class action, by contrast, must invest a substantially greater amount of time in vindicating their claim. Working with a lawyer, filling out affidavits, being deposed, and attending the class certification hearing would doubtless entail many days of missed work—and that lost time may stretch into weeks should the case actually proceed to trial. Even if the proper comparison were to the absent class members, the amount of a customer’s time and effort pursuing arbitration under Cingular’s provision is comparable to the time and effort it would take to obtain the necessary information and fill out the paperwork necessary to submit a claim. See, e.g., Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL FORUM 71, 103 (observing that class members often may “recover their awards only upon the filing of complex claim forms”).

Third, while customers who prevail in individual arbitration receive make-whole awards (including reimbursement for attorneys’ fees), putative class representatives would likely recover only a fraction of their claims because class actions routinely settle for much less than 100 cents on the dol-

lar—often only pennies (or vouchers for goods or services worth pennies) on the dollar—and the class counsel’s fees (which routinely approach 30 or 40 percent) often come out of the pockets of the class members.¹² Empirical data also suggest that customers are more likely to prevail in arbitration than in litigation. Studies of employment disputes during the 1990s found that plaintiffs prevailed in 63% of arbitrations but only 43% of court actions, that median damage awards were similar in arbitration and litigation, and that plaintiffs who arbitrated succeeded in finding attorneys to represent them in cases involving much smaller claims than plaintiffs who sued.¹³ And while unsuccessful litigants are often disillusioned by the judicial system, a study of parties involved in NASD securities arbitrations found that—win or lose—over 93% of the participants agreed that their claims were handled “fairly and without bias.”¹⁴

Finally, not only does Cingular’s arbitration provision eliminate customers’ disincentives to seek redress for small claims, the costs it commits Cingular to bear also affirmatively prevent Cingular from using the class waiver to “exculpate” itself from liability for violations of California law. As we explained in our opening brief (at 29 fn.29), the bare minimum in

¹² See Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 911; Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff* (1997) 60 L. & CONTEMP. PROBS. 167, 168; Koniak & Cohen, *Under Cloak of Settlement* (1996) 82 VA. L. REV. 1051, 1051–89.

¹³ Maltby, *Employment Arbitration and Workplace Justice* (2003) 38 U.S.F. L. Rev. 105, 108–17.

¹⁴ Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* (Aug. 1999), at 20, available at http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf.

arbitration costs that Cingular must pay if it resists rather than resolves a claim, and the dispute proceeds to an in-person hearing, is *\$1,700*—an amount that often substantially exceeds the amount in dispute. Cingular has created for itself a powerful economic incentive to resolve customers' colorable claims without the need for arbitration. Of course, the constraint imposed by a competitive market such as the market for wireless services provides a much larger incentive to remedy customers' legitimate grievances. If Cingular does not satisfactorily resolve its customers' disputes, customers will switch to rival wireless service providers—the worst possible outcome for a consumer business.

There is no reason to suppose that bestowing upon customers the right to bring a class action would have a greater effect on Cingular's incentives. A customer who is unwilling to take the time to pursue a cost-free arbitration is unlikely to take the time to file a claim after a class action has settled. Studies of class-action settlements show that, when the amount that a consumer can expect to receive is small, the percentage of class members who submit claim forms is low. See, *e.g.*, Tharin & Blockovich, *Coupons and the Class Action Fairness Act* (2005) 18 GEO. J. LEGAL ETHICS 1443, 1445–46 (noting that redemption rate of class-action coupons ranges from one to three percent); Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation* (2002) 49 U.C.L.A. L. REV. 991, 1035 (reporting study of ten consumer class-action settlements in which redemption rates varied from 3 to 13.1 percent). The reason is not hard to discern: generally, these cases are settled for pennies on the dollar (if that), 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, at <http://www.sprintclassactionsettlement.com/Benefits.htm>.

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. And even if this Court were to conclude that individual arbitration and class actions are equivalent—or that class actions are marginally superior—that would not render it shocking to the conscience to require customers to agree to individual arbitration in order to receive cellular service.

B. The FAA Would Preempt Any Holding That Cingular's Arbitration Provision Is Unconscionable.

As we explained in our opening brief (at 32–38) and as a federal district court in California recently held, any determination that Cingular's uniquely consumer-friendly arbitration provision is unconscionable—even if based on a valid interpretation of *Discover*—would run afoul of the FAA. *Shroyer*, slip op. at 5–6. Plaintiffs respond that Section 2 of the FAA permits “generally applicable contract defenses, such as * * * unconscionability, [to] be applied to invalidate arbitration agreements.” RB 26 (quoting *Doctor's Assocs.*, 517 U.S. at 687). That is true—but misses our point. The only way the superior court could have concluded that Cingular's no-cost arbitration provision is substantively unconscionable was by *deviating* from California's generally applicable standard for substantive unconscion-

ability—that a contract must so “shock the conscience” that “no man in his senses and not under delusion” would agree to it. By doing so, the court applied a less rigorous unconscionability standard to Cingular’s arbitration provision, thus violating Section 2’s requirement that arbitration provisions not be treated less favorably than other contractual provisions.

Plaintiffs further contend that *Discover* forecloses our preemption argument. RB 26. We have conceded that one of our preemption arguments was rejected in *Discover*, and accordingly raised it only to preserve the issue.¹⁵ *Discover* did not address the express preemption argument we made in our opening brief (at 32-37), however, nor could it have done so: Our contention that the superior court distorted the generally applicable unconscionability standard to invalidate *Cingular’s* arbitration provision turns on the uniquely customer-friendly features of that provision—which, of course, was not presented to the *Discover* Court. Accordingly, this Court is fully authorized to resolve it in the first instance.¹⁶ Plaintiffs tellingly leave it entirely unrebutted.

¹⁵ As we explained in our opening brief (at 37–38), as construed by the superior court, *Discover* is impliedly preempted because it is sure to have the effect of deterring companies from entering into arbitration provisions, a result that conflicts with the policy and purposes of the FAA.

¹⁶ Plaintiffs also urge this Court to ignore Cingular’s preemption argument by claiming that the United States Supreme Court has rejected it. RB 26–27. That is inaccurate: this express preemption argument was not raised in Cingular’s petitions for certiorari. Moreover, it is well established that the denial of certiorari “carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review.” *Maryland v. Baltimore Radio Show* (1950) 338 U.S. 912, 919 (Frankfurter, J., respecting denial of certiorari).

II. GIANNOIT'S AND CAMPBELL'S CLAIMS UNDER THE UCL ARE ARBITRABLE.

Campbell and Giannoit do not dispute that, as we explained in our opening brief (at 39–41), Proposition 64 has rendered their claims under the UCL fully arbitrable.¹⁷ Accordingly, all of plaintiffs' claims except for Campbell's claim for public injunctive relief under the CLRA should be severed and sent to arbitration. *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1088. In the meantime, Campbell's public-injunction claim under the CLRA should be stayed. *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal.4th 303, 320.

CONCLUSION

The Court should reverse the order of the superior court and remand with instructions to compel arbitration of all of Giannoit's and Campbell's claims other than Campbell's CLRA claim for public injunctive relief. The Court should stay litigation of that claim pending arbitration of the balance of plaintiffs' other claims.

Date: September 6, 2006

Respectfully submitted,

MAYER, BROWN, ROWE & MAW LLP
Donald M. Falk
John Nadolenco

By: Donald M. Falk/L#12
Donald M. Falk
Attorney for Appellant

¹⁷ Since we filed our opening brief, the California Supreme Court has held that Proposition 64 applies to cases pending on the date of its enactment. *Californians For Disability Rights v. Mervyn's, LLC* (2006) 46 Cal.Rptr.3d 57, 60.

CERTIFICATE OF WORD COUNT
(California Rule of Court 14(c)(1))

According to the word-count facility in Microsoft Word 2002, this brief, including footnotes but excluding those portions excludable pursuant to Rule 14(c)(3), is 6,894 words long, and therefore complies with the 14,000-word limit contained in Rule 14(c)(1).

Donald M. Falk/LHR

Donald M. Falk
Attorney for Appellant

**CERTIFICATE OF SERVICE
D047603**

I, Kristine Surzynski, declare as follows:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action: my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On September 6, 2006, I served the foregoing document(s) described as:

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Via Overnight Delivery

Daniel A. Osborn
Beatie & Osborn LLP
521 Fifth Avenue, 34th Floor
New York, NY 10175

Attorney for Plaintiff James Giannoit

Via Overnight Delivery

Jordan L. Lurie
Weiss & Yourman
10940 Wilshire Boulevard, Suite 2300
Los Angeles, CA 90024

*Attorney for Plaintiffs
J. Marvin Campbell and FTCR*

Via Overnight Delivery

Hallen D. Rosner
Alan M. Mansfield
Rosner, Law & Mansfield
10085 Carroll Canyon Road, First Floor
San Diego, CA 92131

*Attorneys for Plaintiff
Utility Consumer Action Network*

Via Overnight Delivery

Eduard Korsinsky
Zimmerman, Levi & Korsinsky, LLP
39 Broadway, Suite 1440
New York, NY 10006

Attorney for Plaintiff James Giannoit

Via Overnight Delivery

Harvey Rosenfeld
1750 Ocean Park Boulevard, Suite 200
Santa Monica, CA 90405

*Attorney for Plaintiffs
J. Marvin Campbell and FTCR*

Via U.S. Mail

Mark E. Hellenkamp
Morris, Polich & Purdy, LLP
501 West Broadway, Suite 500
San Diego, A 92101

*Attorneys for Defendants
Pacific Bell Wireless LLC and
Cingular Wireless LLC*

Via U.S. Mail

Siobhan A. Cullen
Drinker Biddle & Reath LLP
550 West C Street, Suite 2050
San Diego, CA 92101

Attorney for Defendants
**Pacific Bell Wireless, LLC and
Cingular Wireless LLC**

Via U.S. Mail

Seamus C. Duffy
Susan M. Roach
Drinker Biddle & Reath LLP
One Logan Square
18th and Cherry Street
Philadelphia, PA 19103-6996

Attorneys for Defendants
**Pacific Bell Wireless, LLC and
Cingular Wireless LLC**

Via U.S. Mail

Gary Brenner
Law Office of Gary Brenner
110 West "C" Street, Suite 1905
San Diego, CA 92101

Attorney for Defendant
The Mobile Solution Corporation

Via U.S. Mail

County of San Diego District Attorney
Hall of Justice
330 W. Broadway
San Diego, CA 92101

Via U.S. Mail

Honorable Jeffrey B. Barton
San Diego County Superior Court
Hall of Justice
330 W. Broadway
San Diego, CA 92101

Via U.S. Mail

Michael J. Stortz
Jennifer L. Pfeiffer
Drinker Biddle & Reath LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235

Attorneys for Defendants
**Pacific Bell Wireless LLC and
Cingular Wireless LLC**

Via U.S. Mail

Robert L. Shipley
Robert L. Shipley, P.C.
5857 Owens Avenue, Suite 200
Carlsbad, CA 92008

Attorney for Defendant
Mobile Systems Wireless, Inc.

Via U.S. Mail

Richard J. Nikas
Adam A. Burton
Burton, Nikas, Samini & Ghaderi, LLP
555 Anton Boulevard, 12th Floor
Costa Mesa, CA 92626

Attorneys for Defendant
GSM Wireless

Via U.S. Mail

Ronald A. Reiter
Supervising Deputy Attorney General
Office of the Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Via U.S. Mail

California Supreme Court (5 copies)
350 McAllister Street
San Francisco, CA 94102

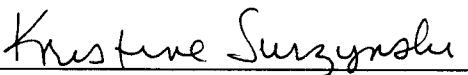
Via U.S. Mail

Administrative Office of the Court
Attn: Carlotta Tillman
455 Golden Gate Avenue, 6th Floor
San Francisco, CA 94102

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2006, at Palo Alto, California.


Kristine Surzynski
Kristine Surzynski