

No. A105518

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE**

RITA PARRISH, JERILYN MARLOWE, *et al.*,

Plaintiffs-Respondents

vs.

CINGULAR WIRELESS LLC AND PACIFIC BELL WIRELESS, LLC,

Defendants-Appellants

From the Order of the Alameda Superior Court
Case No. JCCP 4332
Honorable Ronald M. Sabraw

REPLY BRIEF OF THE APPELLANTS

Of Counsel

Seamus C. Duffy
William M. Connolly
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
Telephone: (215) 988-2700
Facsimile: (215) 988-2757

Evan M. Tager
David M. Gossett
MAYER, BROWN, ROWE & MAW
LLP
1909 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

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
Tel: (650) 331-2000
Fax: (650) 331-2060

DRINKER BIDDLE & REATH LLP
Amor A. Esteban (SBN 117244)
333 South Grand Avenue
Wells Fargo Building
Los Angeles, CA 90071
Tel: (213) 253-2335
Fax: (213) 253-2301

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

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Plaintiffs' arguments against arbitrating this dispute are permeated with the type of anti-arbitration bias that both the U.S. Supreme Court and the California Supreme Court have long forbidden the courts to indulge. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25 (declaring that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *Cruz v. Pacifi-Care Health Sys., Inc.* (2003) 30 Cal.4th 303, 338 (same). Plaintiffs' efforts to nullify the arbitration clauses to which Cingular's customers agreed cannot survive analysis of the undistorted facts through the lens of the controlling law, which "favor[s] arbitration" rather than disparaging it.

Plaintiffs misstate the facts and overlook the latest and most precisely relevant authority in contending that Cingular's arbitration provisions are unconscionable. Because those provisions barely register on the spectrum of procedural unconscionability, only the strongest showing of substantive unconscionability could preclude their enforcement. Yet plaintiffs' substantive unconscionability arguments are entirely meritless. Since we filed our opening brief, the U.S. Court of Appeals for the Fifth Circuit has held that a *Cingular* arbitration provision that is materially identical to the superseded arbitration provision was not unconscionable, rejecting the very arguments advanced by plaintiffs here. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC* (5th Cir. 2004) 379 F.3d 159. *A fortiori*, under the Fifth Circuit's analysis there can be nothing unconscionable about the even more consumer-friendly July 2003 arbitration provision, either.

Indeed, the July 2003 arbitration provision was specifically designed to address the concerns courts had raised about other arbitration provisions in consumer contracts. *See* AOB5-6. As a result, that provision guarantees

that consumers will be able to obtain effective relief for their claims, even though it precludes them from proceeding on a class-wide basis. *See* pp. 6-18, *infra*. And plaintiffs' assertion that this provision contains an unconscionable fee-splitting requirement is predicated upon a deliberate elision of key language that requires customers to bear some costs of arbitration *only* if the arbitrator determines their claims to be patently frivolous under the standards of Federal Rule of Civil Procedure 11(b). *See* pp. 19-21, *infra*.

Plaintiffs' attacks on the superseded arbitration provision are moot because Cingular has represented that all former customers may avail themselves of the consumer-friendly features of the July 2003 provision. *See* pp. 22-25, *infra*. Even if this Court were to decide, however, in conflict with *Iberia*, that one or more of the superseded features of the predecessor provision were unconscionable (*but see* pp. 25-32, *infra*), the appropriate remedy would be to sever any unconscionable term in order to effectuate the FAA's strong preference for enforcing arbitration agreements. *See* pp. 32-33, *infra*.

Finally, plaintiffs' throw-away argument that plaintiff Parrish is entitled to pursue her representative action in court because she "is not now and has never been a Cingular customer" (RB35) is entirely without merit. Parrish stands in the shoes of the Cingular customers on whose behalf she purports to sue, each of whom is subject to an obligation to arbitrate any dispute arising out of or relating to the Wireless Service Agreement. Thus, she has no more right to pursue a claim in a court of general jurisdiction than they do. *See* pp 33-39, *infra*.

A. Both Arbitration Provisions Are On The Low End Of The Spectrum Of Procedural Unconscionability And Therefore Cannot Be Invalidated Unless They Rise High On The Spectrum Of Substantive Unconscionability.

Cingular and plaintiffs are on common ground in two respects. First, we agree that under California law Cingular’s revised arbitration provision and the provision it superseded are deemed to be procedurally unconscionable because they are form agreements that were presented on a take-it-or-leave-it basis. Second, we agree that, if that is the only thing that makes those provisions procedurally unconscionable, then, under California’s “sliding scale” approach, this Court must enforce them unless it concludes that they rise high on the spectrum of substantive unconscionability. At this point, Cingular parts company with plaintiffs. As we explained in our opening brief, there is no other respect in which either the superseded provision or the revised provision is procedurally unconscionable. *See* AOB14-16. Plaintiffs’ contrary assertion that each relevant iteration of Cingular’s arbitration provision suffers from additional indicia of procedural unconscionability is predicated upon factual distortion.

To begin with, plaintiffs’ assertion that Cingular’s “Original Arbitration Agreement is buried in fine print on the back side of Cingular’s Wireless Service Agreement” (RB16) is belied by the document itself. The WSA contains an express cross-reference to the arbitration provision on the *front* of the Agreement, immediately above the place where the customer is required to sign that Agreement to initiate service. *See* AOB4-5; AA389. Furthermore, the *very first paragraph* on the back of the WSA refers to—and only to—the arbitration provision contained on that page. *See* AOB5; AA390. The U.S. Court of Appeals for the Fifth Circuit recently found this fact to be significant in rejecting the contention that the type size of a mate-

rially identical version of Cingular’s arbitration provision rendered it unconscionable. *Iberia*, 379 F.3d at 172 fn.14.¹

Plaintiffs are on no sounder footing in maintaining that “few customers would ever read or notice” the revised arbitration provision merely because it was communicated to customers “as an insert to their July, 2003 bill” (RB16). Not only did plaintiffs adduce no *evidence* to support this speculation, but the superior court expressly rejected it, indicating that “[t]he July 2003 billing insert does not appear to suffer from procedural unconscionability” and that the court was “not aware of any law stating [that] changes to standardized consumer agreements are unconscionable because they arrive in billing inserts” (AA404).² Indeed, as review of the bill insert confirms, Cingular went to great lengths to ensure that customers *would* read the revised arbitration provision, specifying in a banner heading across the top in large-print, bold-face, capitalized letters: “**IMPORTANT INFORMATION CONCERNING YOUR CONTRACT**” and, following a brief explanation, including a second heading of equal prominence: “**AR-**

¹ The Fifth Circuit also correctly pointed out that “[t]he FAA prohibits states from passing statutes that require arbitration clauses to be displayed with special prominence, and courts cannot use unconscionability doctrines to achieve the same result.” *Id.* at 172 (citing *Doctor’s Assocs., Inc. v. Casarotto* (1996) 517 U.S. 681, 686-88).

² There is, of course, case law holding that a business may not unilaterally add a *new* provision to a contract without the consent of the consumer. *See Szetela v. Discover Bank* (2004) 97 Cal.App.4th 1094, 1096-97, *cert. den.* (2003) 537 U.S. 1226); *Badie v. Bank of Am.* (1998) 67 Cal.App.4th 779, 791-92. Plaintiffs do not suggest, however, that Cingular’s July 2003 bill insert imposed arbitration on customers who previously were not subject to it. To the contrary, they acknowledge that Cingular merely “modified its arbitration provision by sending a bill stuffer to then-current Cingular subscribers.” RB6.

BITRATION,” before setting forth the actual terms of the revised provision (AA101 (emphasis in original)). It is hard to imagine how Cingular could have made the revised arbitration provision any more conspicuous, and plaintiffs provide no clues.

Finally, plaintiffs’ assertion that, “[f]or new customers, the Amended Arbitration Agreement is on page 25 of Cingular’s lengthy Wireless Service Agreement” (RB16-17) is flatly incorrect. As we explained in our opening brief (at 4 fn.2), the *online* version of the Terms & Conditions—to which plaintiffs refer here, and which the plaintiffs in *Marlowe* attached to their Complaint—is merely a *reproduction* of the Terms & Conditions on the back of any given customer’s *one-page*, double-sided, 8½x14 contract. This is true both for customers who signed up for service before July 2003—such as the plaintiffs in *Marlowe* and *Mendoza*—and for customers who signed up for service after July 2003.

In short, the record conclusively establishes that, unlike in the cases upon which plaintiffs rely, the various versions of Cingular’s arbitration provision have never been “hidden in [a] prolix printed form” (RB17 (quoting *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532)). Accordingly, those provisions barely register on the spectrum of procedural unconscionability.³

³ Although plaintiffs make no affirmative argument based on it, they do cite *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, as holding that “an arbitration agreement was procedurally unconscionable for failing to attach the rules governing arbitration to the pre-printed contract.” RB17. In *Harper*, the rules in question purported to limit the amount of damages a consumer could recover. 113 Cal.App.4th at 1405-06. Here, although Cingular does not append the AAA rules to its Wireless Service Agreements, those rules are purely procedural in nature and do not purport to limit damages or remedies in any way. As such, they are equivalent to the Code of
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B. The July 2003 Arbitration Provision Is Not Substantively Unconscionable.

Plaintiffs raise only two substantive challenges to the enforceability of the July 2003 Arbitration Provision. The first argument—that the clause prohibiting arbitrators from conducting class or representative actions is substantively unconscionable—is baseless. *See* pp 6-18, *infra*. The second argument—that the costs of arbitration under this provision are excessive—is equally unfounded. *See* pp 19-21, *infra*. In fact, in making this argument plaintiffs neglect to mention that the superior court expressly rejected it. *See* AA404.

1. The Clause Prohibiting Arbitrators From Conducting Class And Representative Actions Is Not Substantively Unconscionable.

After we filed our opening brief in this case—but almost a month before plaintiffs responded—yet another federal court of appeals joined the vast majority of courts in holding that there is nothing unconscionable about an arbitration agreement that specifies that arbitration must proceed on an individual basis. *See Iberia*, 379 F.3d at 174-75. This time, however, the ruling involved a *Cingular* arbitration provision that is materially iden-

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Civil Procedure and the Federal Rules of Civil Procedure. Neither *Harper* nor any other California case or statute specifies that contracts must attach procedural rules of this sort. Accordingly, the FAA prohibits the invalidation of an arbitration provision for failure to attach the AAA rules. *Perry v. Thomas* (1987) 482 U.S. 483, 492 fn.9 (“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).

tical to the superseded arbitration provision that plaintiffs here contend is unconscionable. *A fortiori*, under the Fifth Circuit’s analysis there can be nothing unconscionable about the July 2003 arbitration provision, which, in an effort to make arbitration less expensive, more convenient, and generally more desirable for Cingular’s customers, eliminates all of the features of the superseded provision that plaintiffs attack here—except for the prohibition against class or representative actions.

The Fifth Circuit’s reasoning in *Iberia* applies fully under California law. Like plaintiffs here (RB19), the plaintiffs in *Iberia* argued that Cingular’s “bar on collective proceedings has the effect of immunizing [it] from low-value claims, no matter how meritorious those claims might be. * * * The arbitration clause is therefore not so much an alternative method of dispute resolution as it is a system for avoiding liability altogether.” 379 F.3d at 174. Rejecting this argument and holding that the arbitration provision was not unconscionable, the Fifth Circuit explained that its “calculus * * * must take into account that both federal and [state] policy favor arbitration as a method of dispute resolution.” *Id.* “[T]he fact that certain litigation devices [such as class proceedings] may not be available in an arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.” *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 31).

Plaintiffs ignore *Iberia* and the abundant case law that we cited in our opening brief (*see* AOB21-23). Instead, they cite a handful of easily distinguishable or plainly irrelevant cases, and rely on broad generalizations about the importance of class actions that do not bear on the question before this Court.

a. The Case Law Plaintiffs Cite Does Not Demonstrate That There Is Anything Unconscionable About This *Specific* Class-Action Waiver.

i. As we explained in our opening brief (at 17-18), Cingular's July 2003 arbitration provision differs from the arbitration provision at issue in *Szetela* in that it was drafted specifically to make it inexpensive and convenient for Cingular's customers to obtain relief even for very small claims against Cingular. *See* AOB17-19. In particular, under this provision Cingular will generally bear *all* costs of arbitration, and will even reimburse its customers for their attorneys' fees if the arbitrator awards them the amount of their claims or more. *See id.* at 6, 17. Furthermore, Cingular's arbitration provision affords its customers the opportunity to pursue their claims in small claims court in addition to proceeding in arbitration. *See id.* at 4, 18.

Given these distinguishing features of Cingular's arbitration provision, *Szetela* does not support holding the class-action waiver in Cingular's July 2003 arbitration provision to be unenforceable. *See* AOB17-19.⁴ And

⁴ Plaintiffs rely on *Szetela* for the proposition that Cingular's arbitration provision is also unenforceable because "Cingular does not even attempt to argue that the class and representative claim waiver has any element of mutuality" (RB20). But that was not the principal basis of the court's holding in *Szetela*, which instead was that the specific arbitration clause at issue in that case was a "'get out of jail free' card" (97 Cal.App.4th at 1101). As we explained in our opening brief (AOB17-19), that concern does not exist in this case.

In any event, plaintiffs cite no authority for the proposition that there is an across-the-board requirement that every sub-provision of a contract be mutual in its practical effects, or even that there is any across-the-board requirement that each sub-provision in every contract be mutual at all. Thus, to the extent *Szetela* purports to hold that a class action prohibition is unenforceable because, as a practical matter, businesses rarely bring class ac-

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although plaintiffs cite a handful of cases besides *Szetela* that have refused to enforce other specific arbitration provisions (*see* RB20-21), all of these cases, except one that is currently on appeal, involved provisions that required consumers to bear substantial arbitral costs or dramatically limited their remedies (or both), making individual arbitration unrealistic.⁵ In fact,

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tions against their customers, that holding is preempted by the FAA. *See Oblix, Inc. v. Winiacki* (7th Cir. 2004) 374 F.3d 488, 492 (“If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 of the Federal Arbitration Act.”).

⁵ *See Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1177-78 (in addition to class-action waiver, arbitration provision provided that employee must bear one half of the costs of arbitration and that the arbitrator could require the employee to reimburse the employer for the entire costs of arbitration should his claim be denied), *cert. den.* (2004) 124 S.Ct. 1169; *Ting v. AT&T* (9th Cir.) 319 F.3d 1126, 1151 (customer was required to split arbitrator’s fees), *cert. den.* (2003) 124 S.Ct. 53; *Luna v. Household Fin. Corp. III* (W.D. Wash. 2002) 236 F.Supp.2d 1166, 1182 (customer had to bear costs of arbitration that “likely would exceed the cost of a court proceeding by at least a factor of ten”); *Comb v. Paypal Inc.* (N.D. Cal. 2002) 218 F.Supp.2d 1165, 1176 (customers were required to split costs of arbitration, which were likely to exceed \$5,000); *ACORN v. Household Int’l, Inc.* (N.D. Cal. 2002) 211 F.Supp.2d 1160, 1172-74 (customer had to bear costs of arbitration that “would be approximately ten times the cost of bringing a similar action in State court”); *Leonard v. Terminix Int’l Co.* (Ala. 2002) 854 So.2d 529, 536-37 (arbitration provision mandated a procedure involving costs to the consumer that were “so great in comparison to the potential recovery that the injured person is effectively precluded from a remedy”); *State ex rel. Dunlap v. Berger* (W. Va. 2002) 567 S.E.2d 265, 279-81 (arbitration provision required parties to share costs of arbitration and precluded the award of punitive damages); *Powertel, Inc. v. Bexley* (Fla. App. 1999) 743 So.2d 570, 576 (arbitration provision precluded punitive damages and other statutorily mandated remedies); *In re Knepp* (N.D. Ala. 1999) 229 B.R. 821, 838, 842 (arbitration provision required debtor “to pay initial fees for arbitration ranging from \$500.00 to \$7,000.00 and daily costs of hundreds of dollars when the court system will provide the

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Cingular’s July 2003 arbitration provision was specifically drafted to address the concerns raised in those cases.

ii. Plaintiffs *entirely ignore* our primary ground for distinguishing this arbitration provision from the ones at issue in *Szetela* and plaintiffs’ other cases: that Cingular’s obligation to pay all the costs of arbitration, and to reimburse its customers for their attorneys’ fees if the arbitrator awards them the amount of their claims or more, eliminates the concern underlying *Szetela* that an arbitration provision might have the effect of being “a “get out of jail free” card” (RB19 (quoting *Szetela*, 97 Cal.App.4th at 1101)). See AOB17-18. This undisputed distinction suffices to render Cingular’s arbitration provision enforceable as drafted, especially given the heightened burden a plaintiff faces in attempting to prove that any arbitration provision is unconscionable (see *Iberia*, 379 F.3d at 174), which is all the greater here

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same dispute resolution with the same degree of or even greater expertise for free” and precluded the award of attorneys’ fees); *Bailey v. Ameriquest Mortgage Co.* (D. Minn. Jan 23, 2003) 2002 WL 100391, *5-*7 (arbitration provision precluding FLSA collective actions was unenforceable in light of “venue and other provisions” in the arbitration agreement, including one that required the plaintiffs to share the costs of arbitration). Plaintiffs fail to disclose that *Bailey* was *reversed* on appeal and that the plaintiffs in that case were ordered to arbitrate notwithstanding the prohibition of collective actions. See *Bailey v. Ameriquest Mortgage Co.* (8th Cir. 2003) 346 F.3d 821.

Although *Kinkel v. Cingular Wireless LLC*—which plaintiffs discuss at RB21—involved an arbitration provision materially identical to the superseded arbitration provision in this case, that trial court decision, which conflicts with several Illinois appellate decisions (e.g., *Rosen v. SCIL, LLC* (Ill. App. 2003) 343 Ill.App.3d 1075, 1084-85, *appeal den.* (Ill. 2004) 207 Ill.2d 627; *Hutcherson v. Sears Roebuck & Co.* (Ill. App. 2003) 342 Ill.App.3d 109, *appeal den.* (Ill. 2003) 205 Ill.2d 582), is currently on appeal to the Illinois Court of Appeals for the Fifth District (No. 5-03-0774).

under California’s “sliding scale” approach because Cingular’s arbitration provision falls so low on the spectrum of procedural unconscionability (*see* pp 3-5, *supra*).

iii. Plaintiffs do challenge our second ground for distinguishing the July 2003 arbitration provision from *Szetela*—the fact that Cingular’s arbitration provision allows claims to be pursued in small claims court—on the ground that this alternative forum is not an effective route for them to obtain relief for their claims. *See* RB22-23. Plaintiffs’ counsel may well feel this way—because small claims court is not a good venue for the generation of attorneys’ fees—but the suggestion that small claims court is an inadequate venue for the vindication of small claims is antithetical to California law and policy, not to mention common sense.

For starters, plaintiffs are simply wrong in asserting that the only case we cited in support of this point “is from a Louisiana appellate court” (RB22 fn.3). Rather, we also cited *California* case law for the proposition that small claims court exists “to make it possible for plaintiffs with meritorious claims for small amounts of money * * * to bring th[o]se claims to court.” *See* AOB18 (quoting *San Francisco v. Small Claims Ct.* (1983) 141 Cal.App.3d 470, 474). Moreover, those two cases are not alone in noting the effectiveness of small claims courts for resolving small claims. Indeed, since we filed our opening brief, the Fifth Circuit expressly relied on the fact that Cingular’s superseded arbitration provision allowed customers to choose small claims court in holding that the class action prohibition in the superseded provision was not unconscionable. *See Iberia*, 379 F.3d at 175 fn.19.

Furthermore, the fact that small claims court has limits on discovery and the use of legal counsel (RB22) is part of the *point* of small claims

court, not something to view with suspicion. *See Small Claims Ct.*, 141 Cal.App.3d at 476.⁶ Like arbitration, the purpose of small claims court is to resolve small claims “expeditiously, inexpensively, and fairly.” Code Civ. Proc. § 116.120(b). The limitations on discovery and appearance of counsel are part of the reason why small claims court can fulfill this goal. As the Fifth Circuit explained in upholding Cingular’s superseded arbitration provision against similar arguments, “the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.” *Iberia*, 379 F.3d at 174 (quoting *Gilmer*, 500 U.S. at 31). The same is true of small claims court.

Finally, rather than being “complex” (RB22), plaintiffs’ claims are quite simple to understand, and can easily be resolved in a small claims court action. Each plaintiff seeks reimbursement for an early termination fee of less than \$200, and some of the plaintiffs seek reimbursement for the cost of their cell phones—exactly the sorts of disputes for which small claims court was created. The fact that plaintiffs’ attorneys believe that “‘few consumers will go to the time and trouble of suing in small claims court’” over this claim (RB22 (quoting *Szetela*, 97 Cal.App.4th at 1101)) is

⁶ In actuality, litigants in small claims court are allowed to retain counsel (*see* Code Civ. Proc. § 116.530(c)); it is only their appearance in court that is forbidden (*id.* § 116.530(a)). However, litigants will rarely feel the need to retain counsel in small claims court because under California law “individual assistance shall be made available to advise small claim litigants * * * **without charge.**” Code Civ. Proc. § 116.260 (emphasis added); *see also Small Claims Ct.*, 141 Cal.App.3d at 480.

irrelevant, except insofar as it is evidence that the claims being brought are, in the eyes of most of Cingular’s customers, entirely baseless.

Thus, because Cingular’s arbitration provision fully allows for the cost-effective vindication of small claims, that provision is not substantively unconscionable at all, much less egregiously so, which is what would be required to invalidate it under California’s sliding scale approach (*see* pp. 3-5, *supra*).

b. Class Actions Are Not So “Fundamental To the Protection of Consumers” That A Voluntary Agreement To Resolve Disputes Only Via Individual Arbitration Or An Action In Small Claims Court Is Unenforceable Under California Law.

Plaintiffs’ exhaustive recitation of case law characterizing class actions as an important route to vindicate the rights of consumers (RB23-25) stems from an evident misunderstanding of our purpose in discussing the history of class actions (*see* AOB19-21). We do not deny that, in appropriate cases, class actions can be useful or important. Our point in discussing the history of class actions was simply that this procedural device is not so *fundamental* to the California legal system that a voluntary agreement to resolve disputes in other ways must be unconscionable. Indeed, despite their panegyric on the virtues of the class action, plaintiffs do not deny that “California has no *generally applicable* prohibition against waivers of class actions” (AOB24 (emphasis added)), a fact that confirms our point that this relatively modern procedure is not so entrenched as to be unwaivable. *Cf. Iberia*, 379 F.3d at 174-75 (observing that Louisiana’s requirement that certain statutory claims be pursued only on an individual basis “does significantly diminish the plaintiffs’ argument that prohibiting class proceedings in consumer litigation is unconscionable under Louisiana law”).

More generally, plaintiffs miss the critical point that class actions are only *one* of a *number* of routes that exist for the effective and expeditious vindication of small claims. There are at least three *other* obvious routes for a consumer to obtain relief for a relatively small claim: an action in small claims court; an individual arbitration; or a complaint to the state attorney general. See *Iberia*, 379 F.3d at 175 (that Louisiana’s attorney general is empowered “to pursue restitutionary relief on behalf of a class of aggrieved consumers” under that State’s consumer protection statute “further tends to show that [Cingular’s] arbitration clause does not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability”).

Although a contract that purported to bar a consumer from pursuing *all four* of these forms of relief very well might be unconscionable (even if it still authorized individual litigation in a court of general jurisdiction), a voluntary contractual agreement to bar just one of these—in particular, to bar class actions or class arbitration—is not. As one federal court recently observed, “[a] court must be wary of finding a contract unconscionable where the plaintiff is left with some place to go because denial of a specific remedy or forum is substantively different from denial of any means of enforcement whatsoever.” *Taylor v. First N. Am. Nat’l Bank* (M.D. Ala. 2004) 325 F.Supp.2d 1304, 1321 (quoting *Roberson v. Money Tree of Alabama, Inc.* (M.D. Ala. 1997) 954 F.Supp. 1519, 1526).⁷

⁷ See also Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*: *Green Tree Fin. Corp. v. Bazzle* 2004 J. Disp. Resol. 259, 274 (“Although the possibility of leaving individual consumers without any avenue to pursue relief is not by any means a favored outcome, to employ a procedural device which ne-
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Finally, plaintiffs are inappropriately attempting to broaden this Court's focus from the only relevant question: whether *they* can vindicate *their* claims in a cost-effective manner under the July 2003 arbitration clause. Concerns about vindicating the rights of individuals with small claims who have not themselves filed a lawsuit are beside the point. So too are generic assertions that class actions benefit the court system as a whole (RB19). What matters in determining whether the contract that a *specific plaintiff* signed is substantively unconscionable is whether its provisions are "overly harsh" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114) *to him or her*. See, e.g., *Green Tree Fin. Corp.—Ala. v. Randolph* (2000) 531 U.S. 79, 90-92; *Carter v. Countrywide Credit Indus., Inc.* (5th Cir. 2004) 362 F.3d 294, 300 fn.3 ("what is at issue here is whether *these* plaintiffs will be required to pay prohibitive arbitration fees and costs if they are forced to proceed to arbitration") (emphasis in original). Because Cingular has made arbitration less costly than litigation *for the specific plaintiffs before this Court* (as well as for anyone else desiring to pursue arbitration), requiring these plaintiffs to arbitrate their claims plainly is not "overly harsh" to them.

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gates the very advantages of arbitration as an alternative form of dispute resolution is equally unfavorable. In light of the alternatives available even in the absence of class-wide arbitration, such as small claims court or individual arbitration, it should not be said that plaintiffs would be left without alternatives, especially because these alternatives may not necessitate the hiring of costly legal counsel.").

c. The Federal Arbitration Act Would Preempt Any State-Law Rule Making It Unconscionable To Agree To Arbitrate All Disputes On An Individual Basis.

As we explained in our opening brief (AOB24-26), even if California had a generally applicable rule that class-action waivers are unconscionable, as applied to arbitration provisions, such a rule would be preempted by the FAA. Plaintiffs acknowledge (as they must), that the FAA preempts any state-law rule that is in “actual conflict” with “the purposes and objectives of Congress in enacting the FAA.” RB25 (internal quotation marks omitted). But they claim that “a decision that class and representative claim prohibitions like the one in Cingular’s arbitration agreements are unconscionable under California contract law would not conflict with the purposes of the FAA and could not therefore be preempted” because, under the savings clause in Section 2 of the FAA, “a party may challenge an arbitration agreement based on any generally applicable state law contract defense including * * * unconscionability.” RB25-26. This argument suffers from multiple fallacies.

To begin with, as the Fifth Circuit explained in *Iberia*, “[t]hat a [court] employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.” 379 F.3d at 167. For example, because “[t]he FAA prohibits states from passing statutes that require arbitration clauses to be displayed with special prominence” (*id.* at 172 (citing *Doctor’s Assocs., Inc. v. Casarotto* (1996) 517 U.S. 681, 686-88)), “courts cannot use unconscionability doctrines to achieve the same result.” *Id.* (cit-

ing *Perry*, 482 U.S. at 492 fn.9). In other words, the mere invocation of “unconscionability” does not provide a talisman that prevents the FAA from preempting any effort to thwart arbitration. As indicated above, plaintiffs do not and cannot establish that California actually has an across-the-board rule that waivers of the right to bring class actions are unconscionable. Because there is no such rule, their argument fails on its own terms.

Moreover, with this statute as with any other, if state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” that state law is preempted *even if* it could be said to be based on neutral principles of contract law and hence to come within the FAA’s savings clause. *Geier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, 873). That would be the case, for example, if a state had an across-the-board rule restricting the enforcement of waivers of the right to a jury trial. The case law is legion that the FAA requires enforcement of arbitration provisions notwithstanding the fact that arbitration necessarily entails waiving the right to a jury trial.⁸ The same is true of procedures, like class actions, that cannot be reconciled with the objectives of arbitration.

Plaintiffs *do not dispute* that class proceedings are entirely inconsistent with the very theory of arbitration. *See* AOB24-26.⁹ Thus, a state law

⁸ *E.g.*, *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1117 fn.7, 1127-28; *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1109 (quoting *Madden v. Kaiser Found. Hosps.* (1976) 17 Cal.3d 699, 714); *Syndor v. Conseco Fin. Servicing Corp.* (4th Cir. 2001) 252 F.3d 302, 307.

⁹ *See also* Bunch, *To Be Announced*, 2004 J. Disp. Resol. at 272 (“[W]hen class-wide arbitration is chosen as the means to resolve many similar claims, the many benefits of the arbitration process are lost in favor of a procedural device which brings the burdens of litigation into the arbitral forum. It is somewhat ironic that the greatest advantages of arbitration (cont’d)

that arbitration clauses must allow class proceedings is in essence a ruling that arbitration is bad. Given the strong federal policy favoring the arbitration of disputes, any such law would be preempted by the FAA. *See, e.g., Iberia*, 379 F.3d at 175-76 (rejecting unconscionability challenge to confidentiality provision in arbitration clause because “the plaintiffs’ attack on the confidentiality provision is, in part, an attack on the character of arbitration itself”).

* * * * *

In sum, the prohibition against class actions in *Cingular’s* arbitration provision is not substantively unconscionable under California law, much less sufficiently so to warrant refusing to enforce it under the “sliding scale” approach. But even if California law were otherwise, it would be preempted by the FAA. Accordingly, the arbitration provision—including the prohibition on class actions—must be enforced.¹⁰

2. The July 2003 Arbitration Provision Does Not Impose Unconscionable Costs Or Fees On Plaintiffs.

Plaintiffs’ second substantive attack on the revised arbitration provision is the assertion that it contains an unconscionable fee-splitting provision. *See* RB29-30. This argument—which the superior court rejected (*see* AA404)—is, at best, disingenuous.

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are in many instances the greatest disadvantages of litigation, yet class-wide arbitration * * * lessens the distinction between the two processes.”).

¹⁰ We agree with plaintiffs that the class-action waiver contained in the July 2003 arbitration provision is not severable and that, as a result, were this Court to reject Cingular’s argument and hold this provision to be unconscionable that ruling would render the entire arbitration provision unenforceable. *See* RB34.

Plaintiffs acknowledge that, under the terms of the revised arbitration agreement, Cingular has offered to pay all costs of arbitration up front. They assert, however, that the agreement requires Cingular's customers to repay those costs if the arbitrator finds the customers' claims to be "improper or not warranted." RB30 (quoting AA102).

Plaintiffs, however, have "pepper[ed] their quotation[] with the tell-tale ellipses that invite critical readers to check what has been omitted." Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism* (2000) 76 Chi.-Kent L. Rev. 103, 161. What the revised arbitration provision *in fact* provides is that the customer must repay such fees only if the arbitrator finds that a claim "is improper or not warranted, *as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)*," at which point "the payment of all such fees shall be governed by the AAA rules." See AA102 (emphasis added).

"Rule 11 sanctions are appropriate 'only in the "*exceptional circumstance*" where a claim or motion is *patently unmeritorious* or *frivolous*.'" *In re Cendant Corp. Derivative Action Litig.* (D.N.J. 2000) 96 F.Supp.2d 403,405 (quoting *Ford Motor Co. v. Summit Motor Prods. Inc.* (3d Cir.1991) 930 F.2d 277, 289-90) (emphasis added).¹¹ Thus, under the July 2003 arbitration provision, Cingular will bear all the costs of arbitration except in those rare instances when a customer has filed a truly frivolous

¹¹ See also, e.g., *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.* (9th Cir. 1992) 982 F.2d 363, 370 ("Rule 11 sanctions are 'reserve[d] . . . for the rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose.'") (quoting *Operating Eng'rs. Pension Trust v. A-C Co.* (9th Cir. 1988) 859 F.2d 1336, 1344).

claim—at which point, under the AAA rules, the customer might be required to pay one half of the forum costs.

That plaintiffs might bear some risk of having to pay a portion of the arbitral fees if they file a patently frivolous claim cannot be a ground on which to refuse to enforce the arbitration agreement. *Exactly* the same possibility exists in litigation in either state court (*see* Code Civ. Proc. § 128.7(c), (d)) or federal court (*see* Fed. R. Civ. Proc. 11(b)). Therefore, there can be nothing unconscionable about this allocation of costs.

Furthermore, the three cases on which plaintiffs rely for this argument—*Armendariz*, 24 Cal.4th 83; *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165; and *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167 (*see* RB30)—all arise in the employer-employee context. As this Court has explained, although California law strictly limits the types of arbitration costs that can be imposed in employment agreements, the rules governing the arbitral costs that can be imposed in other forms of contracts, including consumer contracts, are significantly less restrictive. *See Gutierrez v. Autowest, Inc.* (2004) 114 Cal.App.4th 77, 97-99. Outside the employment context, the party seeking to avoid arbitration must make a case-specific showing that arbitration under the particular clause at issue will be beyond the particular plaintiff’s ability to pay. *See id.* Plaintiffs have made no effort to meet this burden.¹²

¹² Plaintiffs also badly misrepresent the holding in *Armendariz*. In discussing instances in which an employee was responsible *ex ante* for part or all of the fees for arbitration, the *Armendariz* court held that this arrangement is problematic because it “poses a significant risk that employees will have to bear large costs to vindicate their statutory right . . . and therefore chills the exercise of that right.” 24 Cal.4th at 110 (quoted at RB12). This holding does not generalize to the situation in which “the consumer is re-
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Thus, the mere fact that Cingular’s revised arbitration provision requires customers who pursue patently frivolous claims to pay some of the costs of arbitration (just as they would have to do in court) is no reason to deem that provision to be substantively unconscionable.

C. The Superseded Arbitration Provision Is Irrelevant To This Proceeding, But In Any Event No Aspect Of It Is Substantively Unconscionable.

Plaintiffs raise a number of challenges to Cingular’s superseded arbitration provision, as well. This Court need not address these arguments because Cingular has represented that the consumer-friendly features of the July 2003 provision are available to all past, present, and future customers. In any event, plaintiffs’ specific challenges to this provision are meritless.¹³ In fact, the U.S. Court of Appeals for the Fifth Circuit recently held that *a materially identical version of this arbitration provision* was fully en-

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quired to reimburse [the company] if the arbitrator finds that the claim is ‘improper or not warranted’” (RB12)—let alone to one in which reimbursement of arbitral costs is called for only if the claims were frivolous. Rather, the *Armendariz* court stressed that an “arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.” *Id.* at 110-111 (emphasis in original). As we explained above (at p. 20), courts can and do require consumers to bear the costs of litigation if their claims are found to be frivolous.

¹³ Our explanation of why the class-action waiver in the revised arbitration provision is valid (*see* pp. 6-19, *supra*) proves also that the class-action waiver in the superseded arbitration provision is valid. A ruling that either class-action waiver is invalid would conflict with the purposes of the FAA and thus would be preempted. Furthermore, arbitration under either provision is easy and affordable (*see* pp. 8-11, *supra*; p. 26, *infra*), and both provisions allow consumers to bring actions in small claims court. *See* pp. 11-12, *supra*; *Iberia*, 379 F.3d at 174-75.

forceable, rejecting a host of unconscionability challenges to it. *See Iberia*, 379 F.3d at 172-76. Even if there were merit to plaintiffs' challenges, however, the appropriate remedy would be to sever any problematic feature of the arbitration provision and then require plaintiffs to arbitrate.

1. This Court Need Not Address Plaintiffs' Attacks On The Superseded Arbitration Provision Because Cingular Has Represented That The Consumer-Friendly Features Of The July 2003 Provision Are Available To All Past, Present, And Future Customers.

As we discussed in our opening brief (at 5), in July 2003 Cingular amended its arbitration provision for *all* then-current (and future) customers, to make arbitration even more consumer friendly than it was under its earlier arbitration provision. Since that time, Cingular has repeatedly and publicly committed to making the pro-consumer features of its revised arbitration provision available not only to current customers but also to *former* customers who otherwise would be subject to a predecessor version.

This willingness to allow even former customers to rely on the July 2003 provision's consumer-friendly features moots any challenge to any specific aspect of Cingular's superseded arbitration provision that has been superseded by the July 2003 provision—including the superseded provision's allocation of the costs of arbitration, confidentiality requirement, and designation of arbitration organization. There is no reason for this Court to engage in a detailed analysis of the conscionability of the superseded provision after Cingular has represented that the consumer-friendly features of the July 2003 provision are available to all past, present, and future customers.

As numerous courts have held, defendants must be allowed to waive potentially problematic aspects of an arbitration provision in order to effec-

tuate the pro-arbitration policies embodied in the FAA.¹⁴ *A fortiori*, a defendant that has revised its arbitration provision for all current and future customers should not be forced to defend the superseded provision against attacks by former customers who it has represented may take advantage of the revised provision.

¹⁴ See, e.g., *Carter*, 362 F.3d at 300 (“[plaintiff’s] prohibitive costs argument has been mooted by [defendant’s] representation to the district court that it would pay all arbitration costs”); *Livingston v. Assocs. Fin., Inc.* (7th Cir. 2003) 339 F.3d 553, 557 (“the fact that [the defendant] agreed to pay *all* costs associated with arbitration forecloses the possibility that the [plaintiffs] could endure any prohibitive costs in the arbitration process”) (emphasis in original); *Large v. Conseco Fin. Servicing Corp.* (1st Cir. 2002) 292 F.3d 49, 56-57 (“Conseco’s offer to pay the costs of arbitration and to hold the arbitration in the Larges’ home state of Rhode Island mooted the issue of arbitration costs.”); *Blair v. Scott Specialty Gases* (3d Cir. 2002) 283 F.3d 595, 610 (“Scott should also be given the opportunity to meet its burden to prove that arbitration will not be prohibitively expensive, or as has been suggested in other cases, offer to pay all of the arbitrator’s fees.”); *Phillips v. Assocs. Home Equity Servs., Inc.* (N.D. Ill. 2001) 179 F.Supp.2d 840, 847 (stating that the court would reconsider its conclusion that costs of arbitration rendered arbitral provision unconscionable if defendants agreed to pay those costs); *Nelson v. Insignia/ESG, Inc.* (D.D.C. 2002) 215 F.Supp.2d 143, 157 (“the defendant’s offer to pay all fees and expenses of arbitration effectively obviated any concerns the plaintiff may have raised regarding her ability to vindicate her claims in an arbitral forum because of the fee-splitting provision in the arbitration agreement”); *Nur v. K.F.C., USA, Inc.* (D.D.C. 2001) 142 F.Supp.2d 48, 52 (argument that failure to address costs of arbitration invalidated arbitration agreement deemed moot because defendant had offered to pay those costs); *Baughner v. Dekko Heating Techs.* (N.D. Ind. 2002) 202 F.Supp.2d 847, 850 (“the Defendant also has the option of avoiding additional discovery and possible nullification of the arbitration agreement by offering to pay the costs and fees associated with arbitration”); *First Family Fin. Servs., Inc. v. Sanford* (N.D. Miss. 2002) 203 F.Supp.2d 662, 667 (“[plaintiff’s] argument concerning arbitration costs is without merit and does not provide a basis upon which he may avoid arbitration” where defendant was obliged to “pay any arbitration filing fee and the arbitrator’s fees and expenses in connection with the arbitration of [plaintiff’s] claims”).

Plaintiffs' argument that *Armendariz* dictates that Cingular must defend the terms of the superseded arbitration provision (RB14 fn.1) is misguided. In that case, the defendant had not modified its arbitration provision with respect to *all* customers to remove terms deemed to be unconscionable; it merely argued that it should be allowed to waive a challenged term for purposes of the particular litigation. *See* 24 Cal.4th at 125. By contrast, Cingular's offer to allow former customers to avail themselves of the July 2003 provision is not a *post hoc* litigating position, but rather is part of an across-the-board practice. In such circumstances, there is no reason in law or logic to allow plaintiffs to attack the old provision after they have been offered use of the new one. Indeed, to allow plaintiffs to evade arbitration on this ground would be to evidence the kind of hostility to arbitration that the FAA was enacted to overcome. *See Gilmer*, 500 U.S. at 24 (purpose of the FAA was to "reverse * * * judicial hostility to arbitration").

2. The Allocation Of Costs And Fees In The Superseded Arbitration Provision Is Not Unconscionable.

Even if plaintiffs here were subject to the superseded cost-allocation provision, that provision is not unconscionable. Both the United States Supreme Court and this Court have rejected the argument that imposing some of the costs of arbitration on the consumer makes individual consumer arbitration agreements inherently unconscionable. *See Randolph*, 531 U.S. at 91-92; *Gutierrez*, 114 Cal.App.4th at 97. As this Court recently explained, "[t]he determination that arbitral fees in consumer cases are unreasonable should be made on a case-by-case basis, with the consumer carrying the burden of proof." *Gutierrez*, 114 Cal.App.4th at 97. The answer to that question will vary depending on the claimant's circumstances, the institu-

tional rules governing the arbitration, and the provisions of the applicable agreement.¹⁵

Here, plaintiffs have misstated the cost-allocation rules that would apply to an arbitration under the superseded arbitration provision. *See* RB29. The WIA rules are explicit that, for claims that are less than \$1000—such as plaintiffs’—there is no hearing fee and typically no fee for an arbitrator to serve for a one-day arbitration—the normal maximum length for such a hearing. *See* AA120, 123.¹⁶ That there would be a filing fee of \$150 (*see id.* at 107) and that plaintiffs would be responsible for their own attorneys’ fees (*see id.* at 117) do not differentiate arbitration from liti-

¹⁵ Although plaintiffs ask this Court to overrule *Gutierrez*’s holding that a challenge to the costs of arbitration in the consumer context must proceed on a case-by-case basis (*see* RB27 fn.5), there is no reason to do so. That holding is entirely consistent with the California Supreme Court’s decision in *Armendariz*. As the *Armendariz* court explained, employment contracts are different because “the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.” *Armendariz*, 24 Cal. 4th at 115. In those circumstances, courts “must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.” *Id.* Similar concerns do not apply to most contracts between businesses and consumers, where alternative options abound and there is no overarching public policy forbidding waiver of or procedural limitations on claims, as there was in *Armendariz*.

¹⁶ In fact, for claims of less than \$2000, arbitrations under the WIA are presumptively decided without *any* hearing (*see* R. F-2 (AA118)), and thus without any cost for such a hearing. Either party can ask for a hearing, however, no matter how small the claim is. *See id.* If a party requests a hearing on a claim for less than \$2000, the rules provide that “[g]enerally, hearings shall not exceed, in cumulative total, one (1) day” (R. F-12 (AA119), although the arbitrator can schedule a second day of hearings (*id.*). The rules specify that for claims of less than \$1000 there is customarily no fee to have an arbitrator hold a one-day hearing. R. F-15 (AA120).

gation; plaintiffs would have to pay attorneys to handle their cases in court, and the WIA filing fee is commensurate with court filing fees. Thus, arbitration would be no more expensive than litigation.

Neither *Gutierrez* nor *Comb v. Paypal Inc.* (N.D. Cal. 2002) 218 F.Supp.2d 1165, on which plaintiffs rely (*see* RB28-29), supports a finding that the costs borne by consumers under Cingular's superseded arbitration provision are in any way unconscionable. Most important, the costs at issue in those two cases—\$8000 in *Gutierrez* (114 Cal.App.4th at 90) and at least \$5000 in *Comb* (218 F.Supp.2d at 1176)—dwarf the \$150 cost at issue here. Furthermore, in this case plaintiffs never even attempted to make the necessary case-specific showing that the costs of arbitrating under Cingular's superseded arbitration provision would be overly burdensome *to them*. Compare *Comb*, 218 F.Supp.2d at 1176 (plaintiffs “submit[ted] declarations stating that such arbitration would be cost-prohibitive for them”); *Gutierrez*, 114 Cal.App.4th at 97 (consumers bear burden of proving that costs are unreasonable to them). Thus, plaintiffs have not demonstrated that there is anything unconscionable about the costs that they would have to bear to arbitrate these specific disputes under the superseded arbitration provision.

Finally, even were this Court to decide that the fee-allocation provision in the superseded arbitration provision were unconscionable, the appropriate course of action would be to sever that provision in order to effectuate the FAA's strong preference for enforcing arbitration agreements—a course of action that is especially appropriate in view of the fact that Cingular has revised the arbitration provision in precisely that way. *See* pp 32-33, *infra*.

3. Cingular Has Eliminated The Confidentiality Provision That Was In The Superseded Arbitration Provision, Which, In Any Event, Is Not Unconscionable.

Plaintiffs' challenge to the confidentiality provision in the superseded arbitration provision (*see* RB31-32) is equally unavailing. In making this argument plaintiffs rely on *Ting*, which held that a confidentiality provision is problematic when it prevents potential plaintiffs from knowing of prior decisions and from obtaining information about the defendants' practices through prior litigation. *See* RB31. There is no way to reconcile the holding of *Ting* with the FAA, and thus this Court should reject plaintiffs' argument as a matter of law. But even if this Court were to accept the proposition that in some cases a confidentiality requirement could be unconscionable, the specific concerns raised in *Ting* do not exist in this case. Thus, the confidentiality provision in the superseded arbitration provision is not unconscionable.

1. The holding in *Ting* is based not on any particular problem with a confidentiality provision in an arbitration agreement, but instead on that court's bias against arbitration agreements more generally. As one commentator recently explained, "[t]he fact that [some] judges find confidentiality requirements to be harsh, oppressive, and ultimately unenforceable in the context of arbitration agreements [even though they are] perfectly acceptable in the context of settlement agreements * * * suggests a bias against arbitration." Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability* (2004) 52 *Buff. L. Rev.* 185, 220.

This is so because, as the Fifth Circuit recently stressed—in holding that the same confidentiality provision that plaintiffs challenge here is *not*

unconscionable—an attack on a confidentiality provision in an arbitration clause is “an attack on the character of arbitration itself.” *Iberia*, 379 F.3d at 175. As the court explained, “[i]f every arbitration were required to produce a publicly available, ‘precedential’ decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery * * *, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding.” *Id.* at 175-176. That, of course, would undermine the purpose of arbitration in the first place: “[P]art of the point of arbitration is that one ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” *Id.* at 176 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628). Consumers would bear the cost of grafting onto arbitration “all of the procedural accoutrements that accompany a judicial proceeding” (*Iberia*, 379 F.3d at 176) through higher prices. *See Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 594 (explaining that limiting circumstances in which cruise line may be sued leads to reduced fares for passengers).¹⁷

¹⁷ The *Iberia* court also noted that confidentiality can “be desirable *to customers* in some circumstances.” *Iberia*, 379 F.3d at 175 (citing *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1st Cir. 1999) 170 F.3d 1, 8 fn.4) (emphasis added). For example, if Cingular were to bring an arbitration against a customer for non-payment, the confidentiality requirement would protect the customer from public embarrassment and preclude information about the facts or outcome from being shared with lenders and other potential creditors. Indeed, it was precisely because of concern for the privacy of consumers that the AAA adopted confidentiality provisions in its Consumer Due Process Protocol. *See* Principle 12(2), available at <http://www.adr.org>. This further undermines the proposition that the inclusion of a *bilateral* confidentiality requirement in an arbitration

(cont’d)

Thus, any state-law rule that a confidentiality requirement in an arbitration provision is unconscionable would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA and therefore would be preempted under the Supremacy Clause of Article VI of the U.S. Constitution. *United States v. Locke* (2000) 529 U.S. 89, 109 (internal quotation marks and citation omitted); accord *Dowhal v. Smithkline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923; *Iberia*, 379 F.3d at 167.

2. Even if some confidentiality provisions could be said to be unconscionable, the confidentiality requirement in Cingular’s superseded arbitration provision does not raise the same concerns as the clause at issue in *Ting*, and thus is not unconscionable. The superseded arbitration provision, like the revised arbitration provision, authorized plaintiffs to proceed in small claims court as well as via arbitration (*see* AA390), and the confidentiality provision does not apply to small claims court proceedings. Thus, any plaintiff who desires a public hearing can obtain that hearing by proceeding in small claims court. Furthermore, the record of those public proceedings provides access to information from prior cases to consumers who choose to proceed in arbitration.

(... cont’d)

provision is unconscionable. *See also Parilla v. IAP Worldwide Servs., VI, Inc.* (3d Cir. 2004) 368 F.3d 269, 280 (holding confidentiality provision in arbitration agreement not to be unconscionable because “[e]ach side has the same rights and restraints under those provisions and there is nothing inherent in confidentiality itself that favors or burdens one party *vis-a-vis* the other in the dispute resolution process”).

Thus, plaintiffs' attack on the confidentiality provision in the superseded arbitration provision is meritless.

4. The Superseded Arbitration Provision Does Not Fail To Guarantee A Neutral Arbitrator.

Plaintiffs object to the superseded arbitration provision on the ground that Cingular will have an unfair "repeat player" advantage because, under the WIA rules, a limited number of telecommunications specialists are authorized to arbitrate disputes. *See* RB32-33. That argument has no merit and in any event is premature. It is well established that "bias in the arbitration process should be remedied by challenging the arbitration award" in court. *Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 438-40 (summarizing cases under federal law, California law, and other states' laws).

Furthermore, numerous courts have questioned the premise underlying plaintiffs' analysis. For example, the California Supreme Court has cautioned that, although there is some risk of "repeat player" effects in arbitration, that possibility should not be overstated. "[T]here are sufficient institutional safeguards, such as scrutiny by the plaintiff's bar and appointing agencies like the AAA, to protect against corrupt arbitrators." *Armendariz*, 24 Cal.4th at 111.

Similarly, although the D.C. Circuit has recognized the *possibility* of a "repeat player" effect (*see Cole v. Burns Int'l Security Servs.* (D.C. Cir. 1997) 105 F.3d 1465, 1477), it has concluded that such an effect is unlikely in practice:

[T]here are several protections against the possibility of arbitrators systematically favoring employers because employers are the source of future business. For one thing, it is unlikely that such corruption would escape the scrutiny of plaintiffs' lawyers or appointing agencies like AAA. Corrupt arbitrators

will not survive long in the business. In addition, wise employers and their representatives should see no benefit in currying the favor of corrupt arbitrators, because this will simply invite increased judicial review of arbitral judgments. Finally, if the arbitrators who are assigned to hear and decide statutory claims adhere to the professional and ethical standards set by arbitrators in the context of collective bargaining, there is little reason for concern.

Id. at 1485.

Finally, the Second District, too, has explained that it is “not prepared to say without more evidence [that] the ‘repeat player effect’ is enough to render an arbitration agreement unconscionable.” *Mercurio*, 96 Cal.App.4th at 179. Although the *Mercurio* court did find the specific arbitration agreement at issue in that case to be unconscionable, it did so for two reasons not present here—that the arbitration provision was non-mutual (*id.*) and that the employee had no say in the choice of arbitrator (*id.* at 179 fn.23 (“Unlike plaintiff in the present case, the employees in *Armen-dariz* and the patient in *Engalla* were permitted to participate in the selection of their arbitrators.”)). Under the WIA rules, Cingular and any customers who for whatever reason choose not to avail themselves of the July 2003 provision would have identical rights in selecting or rejecting arbitrators from the Telecommunications Panel. *See* AA118. Therefore, under *Mercurio*, any hypothetical “repeat player” effect is not sufficient to render the superseded provision unconscionable.

5. Any Problematic Aspect Of The Superseded Arbitration Provision Is Severable.

Even were this Court to decide that the fee-allocation provision, the confidentiality provision, or the arbitrator-selection provision in the superseded arbitration agreement were unconscionable, the appropriate course of action would be to sever any unconscionable provision in order to effectu-

ate the FAA's strong preference for enforcing arbitration agreements. *See Spinetti v. Serv. Corp. Int'l* (3d Cir. 2003) 324 F.3d 212, 219 (severing portion of agreement governing costs and holding that the FAA requires courts to enforce valid provisions of arbitration agreements); *Morrison v. Circuit City Stores, Inc.* (6th Cir. 2003) 317 F.3d 646, 674-75, 677-78 (en banc) (same); *Gannon v. Circuit City Stores, Inc.* (8th Cir. 2001) 262 F.3d 677, 681 (same); *Gooden v. Village Green Mgmt. Co.* (D. Minn. Nov. 15, 2002) 2002 WL 31557689 (same). This is especially true in this case because severing these provisions would simply effectuate what Cingular has already **committed** to do: make the consumer-friendly features of the July 2003 provision available to all past, present, and future customers, including these plaintiffs.

Plaintiffs' argument that this Court should not sever any provision that it finds to be unconscionable (*see* RB33-34) is unpersuasive. We agree with plaintiffs that the prohibition against class-wide arbitration is not severable. The other provisions plaintiffs challenge, however, are tangential aspects of the superseded arbitration provision. Thus, neither of the two cases on which plaintiffs rely precludes severance here. *Armendariz* stressed that courts should sever unconscionable provisions of a contract unless those provisions "permeate[]" the contract. *See* 24 Cal.4th at 124. Similarly, *ACORN v. Household International, Inc.* (N.D. Cal. 2002) 211 F.Supp.2d 1160, involved what was deemed to be an unconscionable class-action waiver. *See id.* at 1171. Thus, it also provides no support for the contention that the other provisions challenged by plaintiffs are sufficiently central to be unseverable.

D. Plaintiff Parrish Is Bound By The Arbitration Provisions Contained In Cingular’s Wireless Service Agreements.

The superior court considered and rejected plaintiff Parrish’s argument that she is free to pursue her representative action in court because she “is not now and has never been a Cingular customer” (RB35). *See* AA393-97. Without so much as mentioning the superior court’s holding or citing any case law whatsoever, plaintiffs—in a six-line paragraph—ask this Court to overturn that decision. Because they cite no legal authority, plaintiffs have waived this argument. *See, e.g., Mansell v. Board of Admin.* (1994) 30 Cal.App.4th 539, 545; *People v. Stanley* (1995) 10 Cal.4th 764, 793. In any event, the argument has no merit.

The enforcement of arbitration agreements is not—and as a matter of public policy cannot be—strictly limited to signatories of those agreements. As a UCL representative, Parrish stands in the shoes of the Cingular customers on whose behalf she purports to sue, each of whom necessarily is subject to an obligation to arbitrate any disputes arising out of or relating to the Wireless Agreement. To allow Parrish (or more accurately her lawyers) to litigate a representative action on behalf of millions of individuals who have agreed to arbitrate their claims would frustrate the contractual expectations of Cingular and its customers, and would undermine the powerful federal policy favoring arbitration. Both that federal policy and California case law require the Court to affirm the superior court’s holding that Parrish is precluded from invoking its jurisdiction every bit as much as the customers whom she purports to represent.

1. The California Supreme Court has already determined that a plaintiff may not avoid his or her contractual obligation to arbitrate by filing a UCL representative claim. *See Cruz*, 30 Cal.4th at 318, 320. Because

the plaintiff in *Cruz* **had** signed the relevant arbitration agreement, the Supreme Court did not need to reach the precise question presented by plaintiffs' argument. *See id.* at 320 fn.7. Nevertheless, the *ratio decidendi* of the decision in *Cruz* compels the conclusion that, when presented with the issue, the Court will extend it to the circumstances of this case.

Relying on “the United States Supreme Court’s strong presumption in favor of enforcing arbitration agreements,” the Court in *Cruz* rejected the notion that “a party to an arbitration agreement [may] evade its contractual obligation to settle its own restitutionary claims through arbitration merely by acting as a representative on behalf of others similarly situated.” *Id.* at 320 (footnote omitted). The concern about the use of UCL representative actions to evade a valid obligation to arbitrate is multiplied geometrically when, as here, the plaintiff herself has **no** contractual obligation to arbitrate, but everyone she purports to represent does. Indeed, the Court’s holding in *Cruz* would become a dead letter (and the policy favoring enforcement of arbitration provisions would be utterly frustrated) if signatories to arbitration agreements could escape it simply by enlisting a nonsignatory to file suit on their behalf. It is, therefore, exceedingly unlikely that the California Supreme Court would eviscerate its own decision in this way.

2. Although no published California decision has yet addressed the precise question raised by plaintiffs' argument, the answer to that question is readily suggested by cases involving the enforceability of contractual forum selection clauses against nonparties to the contract. Because “[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause” (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 519), these decisions apply here. *See also Madden v. Kaiser Found. Hosps.* (1976) 17 Cal.3d 699, 714 (“When parties agree to submit

their disputes to arbitration they select a forum that is alternative to, and independent of, the judicial [forum] * * *.”).

California courts have repeatedly acknowledged that “[f]orum selection clauses play an important role in both national and international commerce.” *Lu v. Dryclean-U.S.A. of Cal., Inc.* (1992) 11 Cal.App.4th 1490, 1493; *see also Wimsatt v. Beverly Hills Weight Loss Clinics Int’l, Inc.* (1995) 32 Cal.App.4th 1511, 1523. That being so, the enforcement of such clauses is not limited by privity of contract. Rather, forum selection clauses are enforceable against individuals who are not parties to the contract so long as they are “closely related” to that contract. *See Lu*, 11 Cal.App.4th at 1494; *Bugna v. Fike* (2000) 80 Cal.App.4th 229, 235-36. As Division Four has explained, it simply “makes sense” for such closely related non-parties to be bound by a forum selection clause contained in the contract that is the source of their causes of action. *Bugna*, 80 Cal.App.4th at 235.

3. A UCL representative plaintiff could hardly be more “closely related” to a contract that constitutes the exclusive basis for his or her action. Indeed, the Second District has recently held that a UCL representative action brought by a plaintiff who was not a party to the pertinent contract was governed by the contractual forum selection clause entered into by the customers whom the plaintiff purported to be representing. *See Net2Phone, Inc. v. Superior Ct.* (2003) 109 Cal.App.4th 583, 588-90.

The plaintiff in *Net2Phone*, a group called Consumer Cause, Inc., filed a representative action on behalf of Net2Phone customers. 109 Cal.App.4th at 586. Although Net2Phone customers had agreed to contracts that contained forum selection clauses, Consumer Cause was not a customer. *Id.* at 586-87. Accordingly, Consumer Cause argued that it

should not be bound by the forum selection clause in Net2Phone's contract. *Id.* at 587.

Rejecting Consumer Cause's argument, the Court of Appeal observed that a plaintiff who "sue[s] in a representative capacity challenging certain contractual terms" is essentially "purport[ing] to assert the rights of those who are parties to the contract." 109 Cal.App.4th at 589. Because a UCL representative thus "stands in the shoes of those whom it purports to represent," the court reasoned that it is "'closely related' to the contractual relationship." *Id.* Indeed, the court explained, Consumer Cause's argument that it should not be bound by the contractual obligations of the consumers it sought to represent was affirmatively "inconsistent with its position as a representative plaintiff." *Id.* Accordingly, the court held that Consumer Cause was bound by the forum selection clause in the contracts of the Net2Phone customers it purported to represent. *Id.*; *see also* 11 Witkin Summary of Cal. Law (9th ed. 2004 Supp.) Equity, § 95A(4) ("[A] private plaintiff who has suffered no injury and who files a representative UCL action is bound by a forum selection clause, just as the defendant's consumers would be had they filed the action themselves.").

In holding that Consumer Cause was bound by the forum selection clause contained in the contracts of the consumers it sought to represent, the Court of Appeal focused on the consequences of the opposite position. "Were we to hold otherwise," the court observed, "a plaintiff could avoid a valid forum selection clause simply by having a representative nonparty file the action." 109 Cal.App.4th at 589.

Like the representative plaintiff in *Net2Phone*, Parrish is serving *exclusively* as a surrogate for individuals who have entered into contractual relationships with Cingular. Accordingly, because Parrish "stands in the

shoes of” the Cingular customers she purports to represent, she cannot “avoid [the] valid forum selection clause” they each entered into any more than they can. *Net2Phone*, 109 Cal.App.4th at 589.

4. While few California cases have dealt specifically with arbitral forum selection clauses, courts have not limited enforcement of arbitration agreements to contracting parties. Summarizing several cases, Division Two has explained that arbitration clauses may bind nonsignatories whenever there exists “an agency or similar relationship between the non-signatory and one of the parties to the arbitration agreement.” *NORCAL Mut. Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 76. The surrogate relationship created by a UCL representative action fits comfortably within this category.

Indeed, in view of the holding in *Net2Phone* that representative plaintiffs are bound by the forum-selection clauses in the contracts of the individuals they purport to represent, to refuse to apply that principle in the context of an arbitration provision would violate the FAA. As the U.S. Supreme Court has explained, “[a] state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with * * * § 2 [of the FAA].” *Perry*, 482 U.S. at 492 fn.9. *See also Iberia*, 379 F.3d at 167 (“Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.”).

5. Moreover, refusing to countenance Parrish’s attempted end-run around Cingular’s arbitration agreements with its customers vindicates the policies favoring enforcement of both forum selection clauses in general (*see Scherk*, 417 U.S. at 518-19) and arbitration clauses in particular (*see Moses H. Cone*, 460 U.S. at 24-25). As the court in *Net2Phone* recognized,

exempting UCL representative plaintiffs from the forum agreed to by those they purport to represent would vitiate countless perfectly valid forum selection clauses. 109 Cal.App.4th at 589. Enterprising attorneys likewise could circumvent enforceable arbitration clauses simply by having a non-signatory act as a UCL representative plaintiff. *See id.*; *Lu*, 11 Cal.App.4th at 1494. Creating such a massive loophole in every contract that provides for an arbitral forum would strike at the core of the “liberal federal policy favoring arbitration agreements” (*Rosenthal v. Great Western Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 405).¹⁸ Accordingly, plaintiffs’ argument should be rejected as contrary to both California and federal law.

¹⁸ The U.S. Supreme Court’s holding in *Equal Employment Opportunity Commission v. Waffle House, Inc.* (2002) 534 U.S. 279, that the EEOC was not bound by an employee’s agreement to arbitrate his disputes with his employer does not compel a contrary conclusion. Unlike the present case, in which Parrish is suing *only* on behalf of a group of individuals contractually obligated to arbitrate their disputes, a government agency like the EEOC “does not stand in the employee’s shoes” or act as “a proxy for the employee,” but sues in its own right to exercise its law-enforcement responsibilities. *Id.* at 297-98. Accordingly, “[t]he filing of a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant” to whether a forum selection clause (such as an arbitration clause) found in the underlying contracts should be enforced. *Net2Phone*, 109 Cal.App.4th at 587. Moreover, if nonsignatories were allowed to pursue representative actions notwithstanding the arbitration agreements of the individuals they purport to represent, there would be a dramatic rather than a “negligible effect on the federal policy favoring arbitration” (*Waffle House*, 534 U.S. at 29), because *any* individual subject to a contractual obligation to arbitrate “could avoid [that obligation] simply by having a representative nonparty file the action.” *Net2Phone*, 109 Cal.App.4th at 589.

CONCLUSION

For the foregoing reasons, this Court should reverse the superior court's order denying Cingular's motion to compel arbitration and stay litigation.

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Respectfully submitted,

DRINKER BIDDLE & REATH LLP
Amor A. Esteban

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

By: _____
Donald M. Falk
Attorneys for Appellant

Of Counsel

Seamus C. Duffy
William M. Connolly
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
Telephone: (215) 988-2700
Facsimile: (215) 988-2757

Evan M. Tager
David M. Gossett
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

RULE 14(C)(1) CERTIFICATE

According to the word-count facility in Microsoft Word 2000, this brief, including footnotes but excluding those portions excludable pursuant to Rule 14(c)(3), is 11,558 words long, and therefore complies with the 14,000-word limit contained in Rule 14(c)(1).

Donald M. Falk
Attorney for Appellants