

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
-Putative Cross-Appellants

vs.

CINGULAR WIRELESS LLC AND PACIFIC BELL WIRELESS, LLC,

Defendants-Appellants
-Putative Cross-Respondents.

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

BRIEF OF THE APPELLANTS

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BRIEF OF THE APPELLANTS

Appellants Cingular Wireless LLC and Pacific Bell Wireless, LLC (collectively “Cingular”) respectfully request that this Court reverse the superior court’s Order refusing to compel plaintiffs to arbitrate their claims, and remand for consideration of issues left unresolved by that court.¹

STATEMENT OF THE CASE

This appeal arises out of three consolidated lawsuits in which plaintiffs challenge the termination-fee provisions of Cingular’s wireless service agreements along with certain features of Cingular’s handsets. Among other relief, plaintiffs seek injunctions and restitution pursuant to the Consumer Legal Remedies Act (“CLRA”), Civ. Code §§ 1750 *et seq.*, and the Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200 *et seq.* The three consolidated lawsuits against Cingular are part of a Judicial Council Coordinated Proceeding involving claims against several wireless carriers.

In November 2003, Cingular moved to compel arbitration of all claims against it and to stay proceedings pending arbitration. The trial court issued an order denying Cingular’s motion on January 20, 2004. Cingular filed a notice of appeal on February 3, 2004. *See* Code Civ. Proc. § 1294(a) (permitting immediate appeal from denial of motions to compel arbitration).

¹ Defendant Pacific Bell Wireless, LLC provides wireless phone service in California under the trade name “Cingular Wireless.” Pacific Bell Wireless, LLC was mistakenly sued as “Pacific Bell Mobile Services” in *Parrish*, one of the three actions consolidated in this proceeding, and as “Pacific Telesis Mobile Services, LLC” in *Mendoza*, another of the three actions consolidated in this proceeding. Defendant Cingular Wireless LLC is an indirect parent of Pacific Bell Wireless, LLC.

STATEMENT OF FACTS

A. The *Marlowe* Complaint.

On or about July 23, 2003, eight plaintiffs filed a purported representative action against Cingular and five other wireless telephone carriers, asserting claims for injunctive relief and restitution pursuant to the CLRA, the UCL, and Civil Code § 1671(d). According to the Complaint, plaintiffs James Bethea, Gerry Robertson, Ramzy Ayyad, and Wendy Lowinger (collectively, the “*Marlowe* plaintiffs”) are or were once customers of Cingular. Among other things, the *Marlowe* plaintiffs allege that, within the past four years, they each have been subscribers to Cingular’s wireless service pursuant to contracts with Cingular, which set forth the terms and conditions of Cingular’s provision of wireless services to its customers. The *Marlowe* plaintiffs attached a copy of these contractual terms and conditions to their Complaint. *See Marlowe* Complaint ¶¶ 2, 15-18; *id.* Exh. D (App. 9, 13, 23-50). They challenge the legality of the provision in the Agreement that requires them to pay an “early cancellation” fee if they terminate their contracts before completing the agreed service commitment period under those contracts. *Id.* ¶¶ 2, 41.

B. The *Parrish* Complaint.

On or about July 10, 2003, plaintiff Rita Parrish filed a purported representative action against Cingular and Pacific Bell Mobile Services (collectively, “Cingular”), asserting claims for injunctive relief and restitution pursuant to the UCL and Civil Code § 1671(d). Like the plaintiffs in *Marlowe*, Parrish challenges the legality of Cingular’s imposition of an “early termination fee/cancellation fee” contained in what she refers to as Cingular’s “Customer Service Agreement” or “CSA” (*see Parrish* Complaint ¶¶ 13-16, 19-27 (App. 3-4, 4-6)). According to the

complaint, Parrish “is not a subscriber to wireless service” from Cingular. *Id.* ¶ 4. In her briefing to the trial court, she confirmed that she has never received wireless service from Cingular. *See* App. 347-48.

C. The *Mendoza* Complaint.

On or about August 28, 2003, plaintiff Astrid Mendoza filed a purported representative action against Cingular and Pacific Telesis Mobile Services LLC (collectively, “Cingular”), asserting claims for injunctive relief, restitution, and disgorgement pursuant to the UCL, Civil Code § 1671(d), and common law. According to her complaint, Mendoza “entered into a 12-month service contract to receive cell phone service from Cingular” on or about January 12, 2002, and remains a Cingular subscriber. *Mendoza* Complaint ¶ 7 (App. 59-60). Like the plaintiffs in the other two cases, she challenges the legality of the so-called “termination penalty” contained in her “service contract” with Cingular (*id.* ¶¶ 13-17, 40-54). She also challenges the legality of “the practice of programming handsets with SOC locks, band order locks, and SIM locks” (*id.* ¶ 2), which, she alleges, “disable [these handsets] from operating with any cellular/PCS network other than the network of Cingular.” *Id.* ¶ 18; *see also id.* ¶¶ 18-31, 55-59. Finally, Mendoza’s complaint acknowledges that her Agreement with Cingular contains a provision requiring disputes to be arbitrated rather than brought in court (*id.* ¶ 62), but asserts that this provision is procedurally and substantively unconscionable. *Id.* ¶¶ 64-67.

D. The Arbitration Provisions.

As the plaintiffs in each of these three cases acknowledge in their complaints, Cingular provides wireless telephone service pursuant to contract. Specifically, Cingular enters into a “Wireless Service Agreement” with each of its customers. *See, e.g.,* App. 388-91. None of the plaintiffs

has denied that Cingular's Wireless Service Agreements contain an arbitration provision. That arbitration provision, as it existed at the time the *Marlowe* and *Mendoza* plaintiffs entered into their Agreements with Cingular, provides in pertinent part:

ARBITRATION Please read this paragraph carefully * * * CINGULAR and you shall negotiate in good faith to settle any dispute or claim arising from or relating to this Agreement. If CINGULAR and you do not reach agreement [on a dispute] * * *, instead of suing in court, CINGULAR and you agree to arbitrate any and all disputes and claims (including but not limited to claims based on or arising from an alleged tort) arising out of or relating to this Agreement, or to any prior agreement for products or service between you and CINGULAR or any of your or CINGULAR's affiliates or predecessors in interest. * * * CINGULAR and you acknowledge that this agreement evidences a transaction in interstate commerce and that the Federal Arbitration Act shall govern the interpretation and enforcement of, and proceedings pursuant to, this or a prior agreement.

See App. 391; *see also* App. 47-48. The arbitration provision also allows either the customer or Cingular to bring an action in small claims court as an alternative to arbitrating. *See* App. 391; *see also* App. 50.²

The Agreement focuses the customer's attention on the existence of an arbitration provision early and often. First, at the bottom of the front of

² The plaintiffs in *Marlowe* printed a copy of the terms and conditions applicable to their contracts from Cingular's web site, and attached that copy to their complaint. *See* App. 24-53. At the hearing on the motion to compel arbitration, Cingular introduced into the record an exemplar of the actual contract that the *Marlowe* and *Mendoza* plaintiffs signed, which consists of one double-sided 8½x14 sheet of paper. *See* App. 388-91. The arbitration provision in the printed contract is identical to that in the attachment to the *Marlowe* complaint; therefore, in the remainder of this brief we will cite only to the actual sample contract.

the two-sided document, directly above a line provided for the customer's signature, the Agreement states: "I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT AND THE TERMS AND CONDITIONS, (including changes to Terms and Rates, Limitation of Liability and Arbitration)." App. 389.

Second, the very first paragraph of the Terms and Conditions contained on the reverse side of the Agreement specifies: "IMPORTANT NOTICE: THIS AGREEMENT CONTAINS MANDATORY ARBITRATION AND OTHER IMPORTANT PROVISIONS LIMITING THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE. PLEASE REFER TO THE SECTION ENTITLED 'ARBITRATION' FOR DETAILS." App. 390.

In July 2003, pursuant to a provision in the Agreement that authorizes Cingular to change the terms and conditions upon written notice to its customers, Cingular sent to all of its then-current subscribers — which, according to the complaints, included plaintiffs Mendoza and Ayyad — an improved, consumer-friendly arbitration provision that became effective immediately upon receipt. *See* App. 101-02. During the proceedings below, Cingular committed to making the revised provision available to the other plaintiffs as well.³

The revised arbitration provision contains several features that are designed to make arbitration less expensive and more convenient for

³ As Cingular's counsel informed the superior court, it is Cingular's practice to make the consumer-friendly features of the revised provision available to any former customer who desires to avail himself or herself of them. R.T. 66; *see also* App. 84.

Cingular's customers and to address criticisms that had been leveled against the predecessor provision. In particular, the revised provision:

- specifies that Cingular will pay “all [American Arbitration Association (“AAA”)] filing, administration and arbitrator fees,” unless the claim or the relief sought is found to be improper, as measured by the standards set forth in Fed. R. Civ. P. 11(b) — in which event payment of costs will be governed by the AAA’s standard rules for consumer arbitrations;
- obliges Cingular to “reimburse [the customer] for [her] reasonable attorneys’ fees and expenses incurred for the arbitration” if arbitrator awards the customer the amount of her claim or more;
- provides that arbitration shall take place “in the county * * * of [the customer’s] billing address”;
- specifies that arbitration will be conducted pursuant to the AAA’s “Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer Related Disputes” — rather than pursuant to the “Wireless Industry Association” (“WIA”) rules specified in the earlier arbitration provision — in order to address the concern that WIA panels might be unduly favorable to members of the telecommunications industry;
- deletes the prior version’s prohibition against punitive damages;
- deletes the prior version’s requirement that the existence, content, and results of any arbitration be kept confidential; and
- authorizes customers to reject any future changes in the arbitration provision (other than a change in Cingular’s address).

E. Cingular’s Motion To Compel Arbitration.

On November 4, 2003, Cingular filed a motion to compel arbitration of plaintiffs’ claims and to stay this litigation pending arbitration.

Plaintiffs opposed the motion on several grounds. Plaintiff Parrish argued that she should not be forced to arbitrate her claims because she never personally had a contract with Cingular (and is instead suing only in a representative capacity under the UCL). *See* App. 347-48. All the

plaintiffs also asserted that Cingular's original and revised arbitration provisions are unconscionable. In particular, they argued that (1) the provision prohibiting arbitrators from conducting class or representative actions is substantively unconscionable, (2) the procedural rules governing any eventual arbitration are biased, (3) the allocation of fees and costs under the superseded arbitration provision is substantively unconscionable, (4) the confidentiality requirement in the superseded arbitration provision is substantively unconscionable, and (5) both the original provision and the revised provision are procedurally unconscionable. *See App. 338-47.*

F. The Superior Court's Ruling.

After holding oral argument, the superior court rejected most of plaintiffs' arguments. In particular, the court agreed that, because all of Cingular's actual customers receive cellular service pursuant to contracts that include arbitration provisions, a plaintiff who does not have a contract with Cingular — but instead is suing only in a representative capacity in the stead of Cingular's customers — is nonetheless subject to the arbitration provision contained in Cingular's contracts. *See App. 393-97.* As the court explained, "claims for monetary relief by the general public are really in the interest of the injured members of the general public and [therefore] must be submitted to arbitration if the arbitration agreement is enforceable against those injured persons." *Id.* at 397.

The court also expressly rejected, albeit in what it characterized as dictum, plaintiffs' arguments that the cost of arbitrating renders the July

2003 provision unconscionable (App. 404), and that the rules governing arbitration under that provision would unfairly advantage Cingular (*id.*).⁴

The court nonetheless held that Cingular’s July 2003 arbitration provision is unenforceable, solely because of the prohibition against class and representative actions. *See* App. 403 (“Absent the representative and class action waiver, the Cingular arbitration clause in the July 2003 billing insert does not appear to be substantively unconscionable.”). The entirety of the court’s reasoning is as follows:

Cingular[’s] arbitration clauses contain a waiver of the right to pursue a representative or class action. These clauses are unconscionable under *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101. *See also Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1175-1176. * * * [T]he California Supreme Court may be addressing whether to uphold or overrule the holding of *Szetela* [in *Discover Bank v. Superior Court* (Cal. 2003) 65 P.3d 1285]. Under the present state of law, however, *Szetela* is controlling.

App. 402-03; *see also id.* at 399.⁵ This appeal followed.

⁴ The superior court declined to decide whether plaintiffs’ attacks on the superseded arbitration provision have any continued relevance “in light of Cingular’s offer to resolve all arbitrations under the terms of the July 2003 billing insert.” *See* App. 404.

⁵ As the superior court explained (App. 398), the California Supreme Court has held that claims for permanent injunctive relief under the CLRA and UCL are non-arbitrable, notwithstanding the FAA. *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 (CLRA); *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal.4th 303 (UCL). We submit that *Broughton* and *Cruz* are irreconcilable with binding U.S. Supreme Court precedent. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32 (holding that ADEA claims seeking broad equitable relief can be arbitrated because “arbitrators do have the power to fashion equitable relief”); *see generally Perry v. Thomas* (1987) 482 U.S. 483, 492 n.9 (“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].”);

(cont’d)

SUMMARY OF ARGUMENT

The superior court found Cingular’s arbitration provision to be unenforceable for one reason and one reason only: the court believed that the Fourth District’s decision in *Szetela* established an across-the-board rule that class action prohibitions in arbitration provisions are unconscionable. The superior court was mistaken in several respects.

In the first place, though acknowledging that California law requires both procedural and substantive unconscionability before a contractual provision will be deemed unenforceable, the superior court failed to use California’s “sliding scale” approach for determining the degree of unconscionability necessary for a finding of invalidity. Under that approach, a contractual term that is on the low end of the spectrum of procedural unconscionability must rise high on the spectrum of substantive unconscionability in order to be invalidated. By contrast with the agreement in *Szetela*, the only feature of Cingular’s Wireless Service Agreement that might result in labeling it procedurally unconscionable is the fact that it is a form agreement. There is no evidence that Cingular’s

(... cont’d)

Southland Corp. v. Keating (1984) 465 U.S. 1, 10 (Section 2 of the FAA “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration”). Nevertheless, we acknowledge that this Court, like the superior court, is bound to follow them until such time as either the U.S. Supreme Court or the California Supreme Court overturns them. In the meantime, the same decisions make clear — and the Superior Court implicitly acknowledged (App. 398) — that plaintiffs’ claims for disgorgement and restitution are arbitrable and that courts should stay litigation of claims for injunctive relief pending arbitration of related claims for monetary damage. See *Cruz*, 30 Cal.4th at 317-20; *Broughton*, 21 Cal.4th at 1084-86.

customers were coerced into signing it or that the arbitration provision was concealed from them; to the contrary, the Agreement twice conspicuously calls the reader's attention to the existence of an arbitration provision. Because the Wireless Service Agreement barely registers on the scale of procedural unconscionability, Cingular's arbitration provision (unlike the one at issue in *Szetela*) must be enforced unless it is *severely* substantively unconscionable.

In fact, Cingular's arbitration provision is not substantively unconscionable *at all*. The premise of the Fourth District's finding of substantive unconscionability in *Szetela* was that the class action prohibition *in that case* had the effect of making it impossible for the defendant's customers to vindicate their small claims. That rationale is inapplicable here because Cingular's arbitration provision obliges Cingular to pay the full cost of arbitrating any claim that is not frivolous and, in addition, to reimburse its customers for their reasonable attorneys' fees if the arbitrator awards them the amount of their demand or more. In addition, Cingular's arbitration provision authorizes customers to bring claims in small claims court, which is a well-recognized means for vindicating small claims. Accordingly, unlike in *Szetela*, Cingular's customers are perfectly able to obtain redress without the need for a class action.

Moreover, the superior court was mistaken in assuming that the class action is so fundamental to the vindication of small claims that it cannot be waived. This procedure is one of recent vintage: class actions for money damages were not even allowed in the federal courts until 1966 and in California until a year later. It cannot be that a procedure that was eschewed for the overwhelming majority of our nation's (and state's)

history is, at the same time, so essential that a contractual prohibition of it is per se unconscionable. Yet that is the upshot of the superior court's interpretation of *Szetela*.

No doubt for this reason, the vast majority of courts throughout the country to consider the issue have held that it is not unconscionable to prohibit class arbitration. Indeed, although the California Supreme Court may squarely resolve the issue in a case now pending before it, that Court already has suggested that the unavailability of class-wide procedures does not preclude compelling arbitration of claims for monetary relief under the UCL.

Quite apart from whether *Szetela* constitutes an across-the-board ruling that arbitration provisions that prohibit class actions are unconscionable, under the FAA that is an impermissible basis for invalidating an arbitration provision unless extant California law provides that the presence of a class action prohibition is a ground for invalidating *any* contract. Because there is no such California law, the FAA precludes California courts from invalidating arbitration provisions on this basis.

Finally, even if California did have a pre-existing, across-the-board rule that any contract containing a class action prohibition is unenforceable, application of such a rule to invalidate an arbitration provision would be preempted by the FAA because the kinds of time-consuming procedural safeguards attendant to class actions are utterly irreconcilable with the streamlined nature of arbitration.

For all of these reasons, the superior court erred in holding Cingular's arbitration provision to be unenforceable merely because it prohibits class actions.

STANDARD OF REVIEW

Because no material facts are in dispute, this Court reviews the enforceability of the arbitration clause de novo. *See, e.g., NORCAL Mut. Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71. Plaintiffs, as the party opposing arbitration, have the burden of proving that the arbitration provision is unconscionable. *See Engalla v. Permanente Med. Group, Inc.* (1997) 15 Cal.4th 951, 972.

ARGUMENT

Congress enacted the FAA in 1925 to “reverse the longstanding judicial hostility to arbitration agreements * * *[,] to place [these] agreements upon the same footing as other contracts * * * [and to] ‘manifest a liberal federal policy favoring arbitration agreements.’” *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 288-89 (internal quotation marks and citation omitted); *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”).⁶

Accordingly, Section 2 of the FAA “withdrew the power of the states to require a judicial forum for the resolution of claims which the

⁶ The FAA “provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4.” *Moses H. Cone*, 460 U.S. at 22. California has a comprehensive statutory regime comparable in many respects to the FAA. *See* Code Civ. Proc. §§ 1281.2, 1281.4. It also has a similar policy favoring the private arbitration of disputes. *See, e.g., Rosenthal v. Great Western Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 406; *Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1431; *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 687.

contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10; *see also Rosenthal v. Great Western Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 405 (“Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”) (internal quotation marks and citation omitted). The one exception to this rule is that courts may refuse to compel arbitration and stay the judicial proceedings if “the agreement to arbitrate * * * is revocable ‘upon such grounds as exist at law or in equity for the revocation of *any* contract.’” *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2) (emphasis added).

The superior court treated *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, *cert. denied* (2003) 537 U.S. 1226, as an across-the-board holding that class-action prohibitions are *per se* unconscionable and hence provide a valid basis under the FAA for refusing to enforce an arbitration provision containing such a prohibition. As we now discuss, the proposition that the mere presence of a class-action prohibition is sufficient to render an arbitration provision unenforceable is inconsistent with California unconscionability law; moreover, even if California law were construed to treat every prohibition against class actions in a consumer arbitration agreement as being unenforceable, that law would be preempted by the FAA.⁷

⁷ As noted above (at note 4), the superior court has not resolved whether Cingular’s offer to make the terms of the July 2003 arbitration provision available to former customers moots plaintiffs’ attack on the superseded provision. That issue should be left to the superior court on remand.

A. The July 2003 Arbitration Provision Is On The Low End Of The Spectrum Of Procedural Unconscionability And Therefore Cannot Be Invalidated Unless It Rises High On The Spectrum Of Substantive Unconscionability.

It is black-letter law in California that a contractual provision must be *both* procedurally and substantively unconscionable in order to be unenforceable. *Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 114; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1533; App. 398. Procedural unconscionability involves the manner in which the agreement came into existence, focusing on whether there has been “oppression” or “surprise.” *Armendariz*, 24 Cal.4th at 114 (internal quotation marks omitted). Substantive unconscionability, by contrast, focuses on whether the term in question is “overly harsh” or “one-sided.” *Id.* (internal quotation marks omitted). In determining whether any particular provision is unenforceable, the courts of this state employ a “sliding scale”: “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Id.*; *see also* App. 398.

Here, Cingular’s Wireless Service Agreement is a form contract, something that California courts have equated with procedural unconscionability. However, that feature (which is shared by 99% of all contracts in this country (Burke, *Contract as a Commodity: A Nonfiction Approach* (2000) 24 Seton Hall Legis. J. 285, 290)) serves only to put the Agreement on the lowest end of the spectrum of procedural unconscionability. Something more — like the “oppressive” conduct involved in *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174-75 — is needed to move a form contract up the spectrum and thereby reduce

the degree of substantive unconscionability needed to justify refusing to enforce it. *See Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819 (“To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.”) (citation and internal quotation marks omitted).

But in this case there is nothing more. Cingular did not threaten plaintiffs or otherwise coerce them into signing their Agreements, the way the employer did in *Mercurio* (*see* 96 Cal.App.4th at 172-73, 174-75). Rather, in order to receive cellular service from Cingular, plaintiffs **voluntarily** signed a Wireless Service Agreement containing an arbitration provision.

There also is no evidence that Cingular concealed the arbitration provision from plaintiffs. To the contrary, the Wireless Service Agreement upon which they predicate their claims prominently adverts to the existence of an arbitration provision both directly above the space provided for the customer to sign the Agreement and at the very outset of the Terms and Conditions. *See* pages 4-5, *supra*. Accordingly, there can be no contention that the arbitration provision was “hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms” (*Stirlen*, 51 Cal.App.4th at 1532).

Finally — as the superior court held (App. 404) — there was nothing procedurally unconscionable about the way in which Cingular notified its customers of the improved, consumer-friendly arbitration provision in July 2003. In general, “changes to standardized consumer agreements are [not] unconscionable because they arrive in billing inserts.” *Id.* Indeed, it is well established in California that, although a company may not unilaterally add

a provision to a contract, it is entitled to invoke a change-in-terms provision to amend an existing term of the contract. *See Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 791 (distinguishing between addition of arbitration provision to contract not previously including one and alteration of existing contract, because “a modification made ‘in accordance with the terms of the contract’ means, at least in part, a modification whose general subject matter was anticipated when the contract was entered into”); *Szetela* 97 Cal.App.4th at 1096-97, 1100. Cingular did just that by revising its existing arbitration agreement to make it more consumer-friendly.

In short, the *only* thing about the Wireless Service Agreement that conceivably might bring it within the realm of procedural unconscionability is the fact that it is a form contract. Accordingly, under California’s sliding scale approach, the arbitration provision must rise high on the spectrum of substantive unconscionability in order for it to be struck down.

B. The July 2003 Arbitration Provision’s Clause Prohibiting Arbitrators From Conducting Class And Representative Actions Is Not Substantively Unconscionable.

1. Under California law, a contractual term must “shock the conscience” in order to be found substantively unconscionable. *See Coast Plaza Doctors Hosp. v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 689; *see also Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.* (2001) 89 Cal.App.4th 1042, 1055-56 (refusing to invalidate indemnity provision in adhesive contract because it was not “so unreasonable, unjustified, or one-sided as to shock the conscience”).

Without addressing this high standard, the superior court concluded that it had no choice but to strike down Cingular’s arbitration provision under *Szetela*. In *Szetela*, the Fourth District held that the particular

arbitration provision before it (which prohibited class actions) was substantively unconscionable because, in the absence of a class action, the costs of arbitration will “seriously jeopardize[] customers’ consumer rights by prohibiting any effective means of litigating [an entity’s] business practices.” *Szetela*, 97 Cal.App.4th at 1101.

The California Supreme Court may in the near future determine whether *Szetela* was correctly decided. *See Discover Bank v. Superior Court* (Cal. 2003) 65 P.3d 1285 (granting review of a decision, formerly published at 105 Cal.App.4th 326, that concluded that *Szetela* was wrongly decided). But even if *Szetela* remains good law, Cingular’s revised arbitration provision directly addresses the concern expressed in *Szetela* in two different ways, making that case’s holding inapplicable here. First, Cingular has eliminated any financial disincentive to bringing small claims by specifying in the July 2003 arbitration provision that it will pay the full cost of arbitration so long as the claim is not frivolous and, in addition, will reimburse customers for their reasonable attorneys’ fees in the event that the arbitrator awards them the amount of their demands or more. *See page 6, supra*. Confronted with precisely the same situation, a federal district court recently rejected an unconscionability attack on a class action prohibition, explaining:

[Plaintiff’s] argument is based on the erroneous assumption that her costs and attorney’s fees will be paid from her damage award. This is simply not the case. If the Plaintiff’s claim is successful, [Defendant] will pay the Plaintiff’s attorneys’ fees and costs; the Plaintiff will not have to forego [sic] any of her damages in order to compensate her lawyers. * * * Although the Plaintiff and her lawyers may be unwilling to litigate this case due to the fact that it may not provide them with enough financial incentive to justify their efforts, this court cannot conclude that either the Plaintiff or

her attorneys are so lacking in economic incentive to warrant a finding that [Defendant's] class action prohibition is unconscionable.

Billups v. Bankfirst (M.D. Ala. 2003) 294 F.Supp.2d 1265, 1274.⁸

Second, Cingular's arbitration provision does not limit customers only to arbitration; it also affords them the opportunity to pursue their claims in small claims court. *See* page 4, *supra*; App. 101. That alternate forum is speedy, simple, and inexpensive — and therefore is a fully adequate means for Cingular's customers to obtain redress for any valid claims they may have without the need for a class action. It has long been recognized in this state that the very purpose of small claims courts is “to make it possible for plaintiffs with meritorious claims for small amounts of money * * * to bring th[o]se claims to court without spending more money on attorney's fees and court expenses than the claims [a]re worth.” *San Francisco v. Small Claims Div., Mun. Court* (1983) 141 Cal.App.3d 470, 474. Indeed, as one court elsewhere has recognized, small claims court is often a *better* option than a class action for the resolution of small claims because “[c]ertification of * * * a class [can] promote complicated lengthy legal embattlement,” while small claims court allows parties to resolve disputes “expeditiously and with minimum costs and fees.” *See Pulver v. 1st Lake Props., Inc.* (La. App. 1996) 681 So.2d 965, 970.

⁸ In *Billups*, the defendant would have been obligated to pay attorneys' fees under a fee-shifting statute in the event the plaintiff prevailed. Here, Cingular is contractually obligated to pay attorneys' fees in the event the plaintiffs receive the amount of their claims or more. There is no analytical difference, however, between a statutory obligation to pay attorneys' fees and a contractual obligation to pay those fees.

In sum, the superior court erred in following *Szetela* without any analysis of the distinctions between the two cases. The Fourth District’s holding that the class action prohibition at issue in *Szetela* was substantively unconscionable is inapplicable here, as this case involves a materially different arbitration provision that was specifically designed to address the concerns raised in that case.

2. Even if the superior court were correct in construing *Szetela* as holding that class action prohibitions are categorically unconscionable, the premise of such a holding — that class actions are so fundamental to the vindication of small claims as to be unwaivable — cannot be squared with the fact that for the vast majority of the history of this nation and this state class actions for money damages did not even exist.

The United States Supreme Court’s initial “Rules of Practice for the Courts of Equity of the United States,” promulgated in 1822, did not contain *any* provisions for class actions. *See* 20 U.S. (7 Wheat.) xvii-xxi (1822). In practice, representative suits were available only as a limited exception to the “necessary parties” rule in equity and could not be relied on to bind absent parties. *See Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 832; Story, *Commentaries on Equity Pleadings* (Gould 10th rev. ed. 1892) § 97. These limitations largely remained after the Supreme Court provided for “group representative litigation” in Equity Rule 48 (42 U.S. (1 How.) xli, lvi (1843)), followed by “Representatives of Class” in Equity Rule 38 (226 U.S. 630, 659 (1913)). *See Wabash R.R. v. Adelbert Coll.* (1908) 208 U.S. 38, 58-59; *Christopher v. Brusselback* (1938) 302 U.S. 500, 505. Even the original version of Federal Rule of Civil Procedure 23, promulgated in 1937, did little to promote the use of class actions, in part because the circumstances in which absent parties would be bound by a

class action ruling remained unclear. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)* (1967) 81 Harv. L. Rev. 356, 381.

“[M]odern class action practice emerged in the 1966 revision of Rule 23” (*Ortiz*, 527 U.S. at 833), which gave federal-court class actions their “current shape” (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 613). Revised Rule 23’s “most adventuresome innovation” was its authorization of “class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.” *Id.* at 614.

Class actions in California state courts are of equally recent vintage. Although Code of Civil Procedure section 382 authorized limited class actions as early as 1872 (*see Hefferman v. Bennett & Armour* (1952) 110 Cal.App.2d 564, 590), for most of the first century afterward the “common relief” doctrine inhibited the availability of class actions for damages in California state courts. *See* 4 Witkin, *California Procedure* (4th ed. 1997) §§ 274-75, at 356-59. For practical purposes, damages class actions in California state courts were limited to “common fund” situations. Note, *Class Action and Interpleader: California Procedure and the Federal Rules: Class Actions* (1953) 6 Stan. L. Rev. 120, 123-133.

Not until 1967 did the California Supreme Court squarely reject common relief as a prerequisite to class certification (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707-708), opening the door to class representation of disparate plaintiffs with minor economic injuries. *See* Berk, *Daar v. Yellow Cab Co.: The Advent of the Consumer Class Action in California* (1976) 10 U.S.F. L. Rev. 651, 664. And only in 1970 did the Legislature enact the CLRA, which specifies that claims under it may be

prosecuted as class actions (*see* Civ. Code §§ 1752, 1781). *See generally* *Richmond v. Dart Indus.* (1981) 29 Cal.3d 462, 469. Even after the CLRA's enactment, damages class actions took years to evolve to their modern form. *See, e.g.,* Cooper, Comment, *Determining the Propriety of Small Claims Class Actions* (1978) 66 Cal. L. Rev. 215 (criticizing the general unavailability in California state courts of class actions for damages where individual claims are small). And while in the early 1970s the California Supreme Court instructed California trial courts to apply Federal Rule of Civil Procedure 23 by analogy to cases where parties sought class certification (*see Vasquez v. Superior Court* (1971) 4 Cal.3d 800), it was only on January 1, 2002, that state-wide rules for class actions went into effect. *See* Cal. R. Ct. 1850-1861.

For most of their histories, then, neither the American legal system in general, nor California's legal system in particular, provided for class-wide resolution of individual claims. Class actions for damages of the type so prevalent today took shape no more than 37 years ago. Such a recent innovation can hardly be deemed so fundamental as to make a contractual waiver of it categorically unconscionable, especially when, as here, every effort has been made to ensure that there is no financial disincentive to the pursuit of small claims.

3. It is thus not surprising that many courts have either expressly held or strongly implied that there is nothing unconscionable about prohibiting class actions in arbitral proceedings. For example, the U.S. Supreme Court broached the issue in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20. The plaintiff there contended that disputes under the Age Discrimination in Employment Act ("ADEA") should not be subject to arbitration because, among other things, arbitration procedures

“do not provide for * * * class actions.” *Id.* at 32. The Supreme Court rejected that argument, explaining that, “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” *Id.* (internal quotation marks and citation omitted; alteration in original).

For its part, the California Supreme Court has not yet expressly resolved the issue, though it may do so in the *Discover Bank* case now pending before it. The Court has, however, already strongly suggested that an arbitration agreement is enforceable even if it prohibits class actions. In *Cruz*, the Court held that, although claims for injunctive relief under the UCL are non-arbitrable, claims for unjust enrichment, restitution, and disgorgement *can* be arbitrated. In that connection, it observed (quoting *Gilmer*):

The unavailability of classwide arbitration would not alter our conclusion in the present case. As the Supreme Court has stated in rejecting the argument that the unavailability of classwide relief is grounds for not enforcing an arbitration agreement: “Even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that a statute provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”

30 Cal.4th at 319 n.5 (internal quotation marks, brackets, and citation omitted).

Numerous other courts have upheld arbitration provisions that included a prohibition on class actions. As the Seventh Circuit has explained, “[w]hen contracting parties stipulate that disputes will be

submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. * * * One of those * * * is the possibility of pursuing a class action.” *Champ v. Siegel Trading Co.* (7th Cir. 1995) 55 F.3d 269, 276-77. This is perfectly acceptable because the right to a class action is “merely a procedural one, * * * that may be waived.” *Johnson v. W. Suburban Bank* (3d Cir. 2000) 225 F.3d 366, 369.⁹

4. Putting aside the abundant case law holding that prohibitions against class actions do not render arbitration provisions unconscionable,

⁹ In fact, every federal appellate court to address the issue, except the Ninth Circuit, as well as the substantial majority of other federal and state courts, have held that arbitration provisions barring class arbitration are fully enforceable. *See, e.g., Carter v. Countrywide Credit Indus., Inc.* (5th Cir. 2004) 362 F.3d 294, 298; *Livingston v. Assocs. Fin., Inc.* (7th Cir. 2003) 339 F.3d 553, 559 (court is “obliged to enforce the type of arbitration to which [the] parties agreed, which does not include arbitration on a class basis”) (internal quotations omitted); *Johnson*, 225 F.3d at 369; *Champ*, 55 F.3d at 276-277; *Adkins v. Labor Ready, Inc.* (4th Cir. 2002) 303 F.3d 496, 502; *Lloyd v. MBNA Am. Bank, N.A.* (3d Cir. 2002) 27 Fed. Appx. 82, 84; *Randolph v. Green Tree Fin. Corp.* (11th Cir. 2001) 244 F.3d 814, 818-19; *O’Quin v. Verizon Wireless* (M.D. La. 2003) 256 F. Supp. 2d 512, 517; *Lomax v. Woodmen of the World Life Ins. Soc’y* (N.D. Ga. 2002) 228 F. Supp. 2d 1360, 1365; *Rains v. Found. Health Sys. Life & Health* (Colo. Ct. App. 2001) 23 P.3d 1249, 1253; *Brown v. KFC Nat’l Mgmt. Co.* (Haw. 1996) 921 P.2d 146, 166-67 n.23; *AutoNation USA Corp. v. Leroy* (Tex. App. 2003) 105 S.W.3d 190, 200; *Stein v. Geonerco, Inc.* (Wash. Ct. App. 2001) 17 P.3d 1266, 1270-71; *cf. Burden v. Check Into Cash of Ky., L.L.C.* (6th Cir. 2001) 267 F.3d 483, 492-93 (remanding case to district court to decide unconscionability challenge to arbitration agreement, but noting that class action waiver was likely valid under existing law). *But see Ting v. AT&T* (9th Cir.) 319 F.3d 1126, 1150 (finding class action prohibition in arbitration provision that did not provide an alternative means for vindicating small claims unconscionable under California law), *cert. denied* (2003) 124 S.Ct. 53.

Section 2 of the FAA specifies that “[a]n 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.” *Perry*, 482 U.S. at 492 n.9 (citation omitted; emphasis in original) (quoting 9 U.S.C. § 2). Thus, agreements to arbitrate may be invalidated on state-law grounds only “*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Id.* (emphasis in original). California has no generally applicable prohibition against waivers of class actions — only a statutory proscription against waiving CLRA class actions — much less a rule that such a waiver is grounds “for the revocation of any contract” containing it. Accordingly, the Superior Court erred in holding that the existence of a prohibition against class actions is a valid basis for declaring the arbitration provision to be unenforceable.

5. Even if California did have an across-the-board rule that the presence of a class action waiver is grounds for revoking *any* contract containing it, such a rule 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.

Section 2 of the FAA declares pre-dispute arbitration agreements “valid, irrevocable, and enforceable” because, as one of its framers

explained, “arbitration saves time, saves trouble, saves money.” *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 7 (1924), statement of Charles Bernheimer, N.Y. Chamber of Commerce. Congress later elaborated, noting that arbitration usually is “cheaper and faster than litigation,” “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling.” H.R. Rep. No. 97-542 (1982) at 13. The U.S. Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628; *see also Engalla*, 15 Cal.4th at 978 (“The speed and economy of arbitration, in contrast to the expense and delay of a jury trial, could prove helpful to all parties * * *.”) (citation and internal quotation marks omitted).

Class action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the hallmark of arbitration. While the average length of an AAA arbitration from filing to award is less than six months (*Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 280-81), class actions take years. Class actions invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including depositions of all class representatives (and often other witnesses) for purposes of determining such statutory prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and very often (v) a writ proceeding initiated by the losing party.

If, after all of that, a class is certified, there would have to be full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would then commence and likely continue for months, if not years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be a fairness hearing, complete with extensive briefing by both sides, as well as by any objectors. And if the defendant chooses not to settle, there would need to be a trial — one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses. Finally, no defendant of sound mind would agree to subject itself to a class-wide arbitration unless post-judgment review of arbitration awards were far more searching than is now the norm.

All of these procedures, of course, make arbitration more expensive and more time consuming — and, in the process, eradicate the distinction between arbitration and litigation. Nothing could more clearly conflict with the objectives of the FAA. Accordingly, the doctrine of conflict preemption precludes any state rule requiring the injection of class action procedures into the arbitration process.

* * * * *

In sum, the prohibition against class actions in Cingular's arbitration provision is not substantively unconscionable at all, much less sufficiently so to warrant refusing to enforce the arbitration provision.

CONCLUSION

For the foregoing reasons, this Court should reverse the superior court's order denying Cingular's motion to compel arbitration and stay litigation, and remand for consideration of issues left unresolved by that court.

Dated: June 16, 2004

Respectfully submitted,

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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 7512 words long, and therefore complies with the 14,000-word limit contained in Rule 14(c)(1).

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