

No. 06-55086

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

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CHARLES FORD; DEBRA SZALANSKI; CAROL FOX DE STEFANO;  
DAVID HASLET; GERALD SCHUCK, individually, an on behalf of other  
persons similarly situated and the general public,  
*Plaintiffs – Appellees,*

v.

VERISIGN, INC.; JAMSTER!; JAMBA!; T-MOBILE USA, INC.,  
*Defendants,*

and

AT&T WIRELESS SERVICES, INC.; CINGULAR WIRELESS LLC; NEW  
CINGULAR WIRELESS SERVICES, INC.,  
*Defendants – Appellants.*

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Appeal From an Order of the United States District Court  
for the Southern District of California, No. CV-05-00819-JTM

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**REPLY FOR THE APPELLANTS**

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## TABLE OF CONTENTS

	<b>Page</b>
I. THE CLASS WAIVER IN PLAINTIFFS’ ARBITRATION PROVISIONS IS NOT UNCONSCIONABLE.....	2
A. Plaintiffs Have Not Established Procedural Unconscionability. ....	2
1. Plaintiffs’ Arbitration Agreements Were Not Oppressive Because Plaintiffs Had Meaningful Alternatives. ....	2
2. The District Court Correctly Found That Plaintiffs Failed To Establish The “Surprise” Element Of Procedural Unconscionability. ....	9
B. Cingular’s Arbitration Provision Is Not Substantively Unconscionable. ....	13
II. IF CONSTRUED TO RENDER THE CLASS WAIVER IN CINGULAR’S ARBITRATION PROVISION UNENFORCEABLE, <i>DISCOVER BANK</i> IS PREEMPTED BY THE FAA. ....	15
III. PLAINTIFFS’ CLAIMS FOR PUBLIC INJUNCTIVE RELIEF ARE ARBITRABLE .....	18
CONCLUSION.....	22

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Adobe Sys., Inc. v. Stargate Software Inc.</i> , 216 F. Supp. 2d 1051 (N.D. Cal. 2002).....	12
<i>Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.</i> , 75 F.3d 1401 (9th Cir. 1996).....	8
<i>Armendariz v. Found. Health Psychcare Servs., Inc.</i> , 6 P.3d 669 (Cal. 2000).....	6
<i>Arriaga v. Cross Country Bank</i> , 163 F. Supp. 2d 1189 (S.D. Cal. 2001) .....	21
<i>Bischoff v. DirecTV, Inc.</i> , 180 F. Supp. 2d 1097 (C.D. Cal. 2002).....	12
<i>Bonito Boats v. Thunder Craft Boats</i> , 489 U.S. 141 (1989).....	17
<i>Broughton v. Cigna Healthplans</i> , 988 P.2d 67 (Cal. 1999).....	18, 19, 20, 21
<i>Buckeye Check Cashing v. Cardegna</i> , 126 S. Ct. 1204 (2006).....	20
<i>Chandler v. AT&amp;T Wireless Servs., Inc.</i> , 358 F. Supp. 2d 701 (S.D. Ill. 2005).....	12
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	20
<i>Credit Suisse First Boston Corp. v. Grunwald</i> , 400 F.3d 1119 (9th Cir. 2005) .....	17
<i>Crippen v. Central Valley RV Outlet, Inc.</i> , 124 Cal. App. 4th 1159 (2004).....	8
<i>Cruz v. PacifiCare Health Systems, Inc.</i> , 66 P.3d 1157 (Cal. 2003).....	18, 19, 21
<i>Discover Bank v. Superior Court</i> , 113 P.3d 1100 (Cal. 2005).....	4, 13, 15, 16
<i>Dean Witter Reynolds, Inc. v. Superior Court</i> , 211 Cal. App. 3d 758 (1989) .....	3
<i>Doctor’s Assocs., Inc. v. Casarotto</i> , 517 U.S. 681 (1996).....	10

**TABLE OF AUTHORITIES**  
(Continued)

<b>Cases</b>	<b>Page(s)</b>
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982) .....	17
<i>Flores v. Transamerica HomeFirst, Inc.</i> , 93 Cal. App. 4th 846 (2001) .....	5, 6
<i>Fonte v. AT&amp;T Wireless Servs., Inc.</i> , 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005) .....	12
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991) .....	19
<i>Gonzales v. Raich</i> , 125 S. Ct. 2195 (2005) .....	19
<i>Green Tree Fin. Corp.-Ala. v. Randolph</i> , 531 U.S. 79 (2000) .....	20
<i>Greenhaw v. Lubbock County Beverage Ass’n</i> , 721 F.2d 1019 (5th Cir. 1983) .....	14
<i>Ingle v. Circuit City Stores, Inc.</i> , 328 F.3d 1165 (9th Cir. 2003) .....	12, 21
<i>Keating v. Superior Court</i> , 645 P.2d 1192 (Cal. 1982) .....	19
<i>Kinney v. United HealthCare Servs., Inc.</i> , 70 Cal. App. 4th 1322 (1999) .....	4, 5, 11
<i>Laster v. T-Mobile USA, Inc.</i> , 407 F. Supp. 2d 1181 (S.D. Cal. 2005) .....	3
<i>Lozano v. AT&amp;T Wireless</i> , 216 F. Supp. 2d 1071 (C.D. Cal. 2002) .....	12
<i>Mitchell v. Am. Fair Credit Assoc., Inc.</i> , 99 Cal. App. 4th 1345 (2002) .....	12
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985) .....	21
<i>Morris v. Redwood Empire Bancorp</i> , 128 Cal. App. 4th 1304 (2005) .....	6, 7
<i>Neal v. State Farm Insurance Co.</i> , 188 Cal. App. 2d 690 (1961) .....	6

**TABLE OF AUTHORITIES**  
(Continued)

<b>Cases</b>	<b>Page(s)</b>
<i>New York State Conf. of Blue Cross &amp; Blue Shield Plans v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995).....	17
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987) .....	20
<i>Schultz v. AT&amp;T Wireless Servs., Inc.</i> , 376 F. Supp. 2d 685 (N.D. W. Va. 2005) .....	12
<i>Shroyer v. New Cingular Wireless Servs., Inc.</i> , No. CV 06-1792-R (C.D. Cal. May 30, 2006) .....	3, 9
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	19, 20
<i>Stirlen v. Supercuts, Inc.</i> , 51 Cal. App. 4th 1519 (1997).....	6
<i>Szetela v. Discover Bank</i> , 97 Cal. App. 4th 1094 (2002) .....	4, 5, 8
<i>Taniguchi v. Schultz</i> , 303 F.3d 950 (9th Cir. 2002).....	18
<i>Ting v. AT&amp;T</i> , 319 F.3d 1126 (9th Cir. 2003) .....	2, 3
<i>United States v. Smith</i> , 390 F.3d 661 (9th Cir. 2004).....	1
<i>United States v. Vought</i> , 69 F.3d 1498 (9th Cir. 1995) .....	18
<i>Wayne v. Staples, Inc.</i> , 135 Cal. App. 4th 466 (2006).....	7
<b>Statutes</b>	
9 U.S.C. § 2 .....	15
Cal. Bus. & Prof. Code § 17200, <i>et seq.</i> .....	18
Cal. Bus. & Prof. Code § 17500, <i>et seq.</i> .....	18

**TABLE OF AUTHORITIES**  
(Continued)

<b>Other Authorities</b>	<b>Page(s)</b>
AAA, <i>Consumer Due Process Protocol</i> , <a href="http://www.adr.org/sp.asp?id=22019">http://www.adr.org/sp.asp?id=22019</a> .....	15
Stephen A. Broome, <i>An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the Federal Arbitration Act</i> , 2 Hastings Bus. L.J. ____ (forthcoming 2006).....	16
Deborah R. Hensler et al., <i>Class Action Dilemmas: Pursuing Public Goals for Private Gain</i> (RAND Inst. For Civ. Justice 2000), <a href="http://www.rand.org/pubs/monograph_reports/MR969/index.html">http://www.rand.org/pubs/monograph_reports/MR969/index.html</a> .....	14
Gail Hillebrand & Daniel Torrence, <i>Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits</i> , 28 Santa Clara L. Rev. 747 (1988).....	14
Jennifer Daw Holloway, <i>Prepaid Wireless Has Clear Benefits—Even If You Have a Good Credit History</i> , Consumer Action News, Fall 2005, <a href="http://www.consumer-action.org/downloads/english/Fall_2005.pdf">http://www.consumer-action.org/downloads/english/Fall_2005.pdf</a> .....	9
Thomas A. Manakides, Note, <i>Arbitration of “Public Injunctions” : Clash Between State Statutory Remedies and the Federal Arbitration Act</i> , 76 S. Cal. L. Rev. 433 (2003).....	22
Martin H. Redish, <i>Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals</i> , 2003 U. Chi. Legal Forum 71 .....	14

Plaintiffs' brief leaves the salient points of this appeal untouched. Plaintiffs cannot distinguish the cases holding that, under California law, a non-negotiable contract is procedurally unconscionable only if there are no market alternatives. Plaintiffs' substantive unconscionability argument appears to be predicated on the belief that California has created an inalterable right of consumers to do *nothing* when a small-dollar dispute arises in the expectation that someone else will file a class action. But there is no right to sit idly by when informal resolution is as accessible as Cingular has made it. Even if participating in an arbitration may be slightly more time consuming than filing a class-action claim form, in return Cingular customers can gain more complete relief in a fraction of the time it would take to litigate a class action. Finally, plaintiffs never address our conflict preemption argument, merely repeating the district court's mistaken view that the Federal Arbitration Act preempts only state-law rules that facially discriminate against arbitration. Cingular's arbitration clause is fully enforceable, and plaintiffs should be compelled to honor their obligations to arbitrate individually under it.<sup>1</sup>

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<sup>1</sup> Plaintiffs misleadingly imply in their brief that named plaintiff Carol Fox DeStefano has asserted claims against Cingular. *See* Brief of Appellees ("Br.") 3. In the district court, however, plaintiffs maintained that "[t]he allegations in the First Amended Complaint regarding Plaintiff Carol Fox De Stefano are against T-Mobile, not Cingular." ER352 (pleading identified in district court docket entry 60, at 4). Plaintiffs thus waived any claims DeStefano may have against Cingular. *See United States v. Smith*, 390 F.3d 661, 666 (9th Cir. 2004) (litigant bound by counsel's statement).

**I. THE CLASS WAIVER IN PLAINTIFFS' ARBITRATION PROVISIONS IS NOT UNCONSCIONABLE.**

**A. Plaintiffs Have Not Established Procedural Unconscionability.**

**1. Plaintiffs' Arbitration Agreements Were Not Oppressive Because Plaintiffs Had Meaningful Alternatives.**

Plaintiffs insist that all non-negotiable form contracts used between parties of unequal bargaining power are oppressive and hence procedurally unconscionable. But they cannot and do not distinguish the contrary California authority. They rely principally on this Court's decision in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003). As we explained in our opening brief (at 15 n.4), however, *Ting's* procedural-unconscionability holding was not based solely or even predominantly on the fact that AT&T's arbitration provision was contained in a non-negotiable form contract. To the contrary, this Court emphasized that the arbitration provision had been imposed on existing customers in a bill insert and that AT&T "intentionally dissuaded its own customers from seeking" other options by telling them that "all other major long distance carriers have included an arbitration provision in their services agreement." *Ting*, 319 F.3d at 1149. Moreover, as we also pointed out (Brief of Appellants ("Opening Br.") 14-15), *Ting* pre-dates several of the California cases on which we rely and therefore, to the extent it is inconsistent with them, no longer is a binding interpretation of

California law.<sup>2</sup> Although plaintiffs’ cramped reading of *Ting* may have been adopted by at least one other district judge in California in reviewing Cingular’s class waiver (Br. 10-11), another district court in California has reached the opposite conclusion. *Compare Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005) (holding Cingular’s class waiver unconscionable), *appeal pending* (Nos. 06-55008, 06-55010) *with* Order Compelling Arbitration and Dismissing the Action Without Prejudice, *Shroyer v. New Cingular Wireless Servs., Inc.*, No. CV 06-1792-R (C.D. Cal. May 30, 2006) (“*Shroyer* Order”) (enforcing Cingular’s class waiver) (attached as Addendum I), *appeal pending* (No. 06-\_\_\_).

The California state court cases plaintiffs marshal (Br. 12-13) do not support their view that non-negotiable form contracts between parties of unequal bargaining power are *per se* “oppressive.” All find procedural unconscionability based on facts not present here or acknowledge—either explicitly or implicitly—our point that realistic market alternatives preclude a finding of “oppression.”

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<sup>2</sup> We never “acknowledge[d] that [our] position is contrary to the views already expressed by the Ninth Circuit and other courts,” as plaintiffs claim (Br. 11). To the contrary, we argued that *Ting* was distinguishable. *See* Opening Br. 14-17. Plaintiffs’ interpretation of *Ting* is *undermined* rather than aided (Br. 15 n.4) by the pre-*Ting* holding in *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 768 (1989) that “oppression” is lacking when, as here, a customer has meaningful choices. But even if plaintiffs are correct that *Ting* adopted a more restrictive reading of California law, it nevertheless remains true that later decisions of the California courts clarifying state law must be followed in lieu of a prior panel decision that is out-of-step with current state law. *See* Opening Br. 16-17 n.6.

The California Supreme Court’s decision in *Discover Bank v. Superior Court* does contain some preliminary boilerplate to the effect that “[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion” (113 P.3d 1100, 1108 (Cal. 2005)), but the court had no occasion to address the effect of a showing that the plaintiff could have obtained comparable goods or services from another source without having to accept the disputed contractual provision. That is because the actual basis for the court’s finding of procedural unconscionability was that Discover Bank had imposed its arbitration provision on *existing customers*, giving them no option other than to accept the provision or immediately close their accounts and stop using their credit cards. *Id.* That is a far cry from presenting a *potential* customer like Szalanski, Shuck, and Haslet with a take-it-or-leave-it contract at the outset of the relationship when the customer has the option of obtaining similar service without having to accept the disputed term.<sup>3</sup> *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (2002), and *Kinney v. United HealthCare Servs., Inc.*, 70 Cal. App. 4th 1322 (1999) (cited at Br. 12-13), are inapposite for the same reason. In *Szetela*, the arbitration provision was introduced as a “bill stuffer” that provided “the necessary

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<sup>3</sup> Plaintiffs point out that Szalanski received Cingular’s revised arbitration provision—which was more consumer-friendly than her original arbitration provision—as an insert in her monthly bill. Br. 4. Plaintiffs do not argue that notifying her of improved terms in this way was “oppressive,” although they later insinuate that it implicates the “surprise” element of procedural unconscionability, a point we address below (at pages 9-12).

element of procedural unconscionability” (97 Cal. App. 4th at 1100), and in *Kinney*, the arbitration provision was imposed as a condition of continued employment five years after the plaintiff was hired (*Kinney*, 70 Cal. App. 4th at 1325).<sup>4</sup>

To be sure, one of plaintiffs’ cases begins its discussion of procedural unconscionability by inquiring whether the contract was “one of adhesion,” defined as “a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it” (*Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000)), and a second case states that “[a] finding of a contract of adhesion is essentially a finding of procedural unconscionability” (*Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001)). In both cases, however, the courts considered whether the plaintiffs had no realistic option other than to agree to arbitration. In *Armendariz*, the California Supreme Court found oppression inherent “in the case of preemployment arbitration contracts, [where] the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement

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<sup>4</sup> Plaintiffs erroneously assert that *Szetela* holds that “[t]he availability of similar goods and services \* \* \* has been expressly rejected as a relevant fact to unconscionability.” Br. 11 n.7. To the contrary, *Szetela* states that “[t]he availability of similar goods or services elsewhere *may* be relevant to whether the contract is one of adhesion,” although it is not always “the deciding factor” in the procedural unconscionability analysis. 97 Cal. App. 4th at 1100 (emphasis added).

stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.” 6 P.3d at 690. In *Flores*, the First District of the California Court of Appeal concluded that the “facts indicate that the arbitration agreement was imposed upon plaintiffs on a ‘take it or leave it’ basis” based on the fact that the plaintiffs were told that the defendant “was the only company in California offering reverse mortgages, thereby indicating that plaintiffs had no real choice of alternate lenders.” 93 Cal. App 4th at 853-54. The Fourth District of the Court of Appeal recently explained that, even though a non-negotiable form contract signed by an unsophisticated plaintiff is “an adhesion contract as defined in *Armendariz*,” this “heralds the beginning, not the end, of [the] inquiry into its enforceability” because “[o]ppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives.” *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1319-20 (2005).<sup>5</sup>

Plaintiffs insist that *Morris* pertains only to claims involving a “merchant/business” (Br. 15), but the opinion makes no such distinction. Nor does

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<sup>5</sup> As for plaintiffs’ other cases (Br. 12-13), *Neal v. State Farm Insurance Co.*, 188 Cal. App. 2d 690, 694-95 (1961) does not even mention unconscionability and finds a non-negotiable form contract “adhesive” only for purposes of triggering an obligation to resolve any ambiguity in the contract against its drafter, and in *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997), no evidence of market alternatives was before the court, so the issue presented here was never reached.

*Morris*'s grant of leave to amend the complaint (Br. 15) undermine its holding, as leave was granted only "to plead facts demonstrating unconscionability *in accordance with the principles discussed*" in the opinion (*Morris*, 128 Cal. App. at 1320 (emphasis added)), including the principle that "the 'oppression' factor of the procedural element of unconscionability may be defeated, if the complaining party has a meaningful choice." *Id.*

Plaintiffs suggest that the court in *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 480 (2006), gave no weight to the fact that competitors of the defendant offered service without the challenged provision and that, instead, all that mattered was that the defendant itself did not uniformly require customers to accept the challenged term. Br. 14. But the court mentioned both alternatives without favoring one over the other. *See* 135 Cal. App. 4th at 480 .

Plaintiffs recognize that the finding of no procedural unconscionability in *Crippen v. Central Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1164 (2004), resulted from a failure to show "unequal bargaining strength" and a "lack of meaningful choices" as well as a non-negotiable contract (Br. 15). They nonetheless suggest that *Crippen* accepts that non-negotiability alone can suffice to make a contract procedurally unconscionable. The court expressly held otherwise, declaring that "there is no general rule that a form contract used by a party for

many transactions is procedurally unconscionable.” 124 Cal. App. 4th at 1165 (quoting *Szetela*, 97 Cal. App. 4th at 1100).

In the end, plaintiffs can only quibble with the weight of the unrebutted evidence that they could have obtained cellular service from other carriers without agreeing to arbitrate on an individual basis. Br. 14 n.9. But *plaintiffs* have the burden of proving unconscionability and hence the burden of proving that they lacked adequate alternatives. Even if Cingular had the burden, however, Cingular’s evidence demonstrates that plaintiffs had other options for wireless service available to them if they did not want to agree to arbitrate on an individual basis. To begin with, plaintiffs do not dispute that, in addition to the two “pay-as-you-go” carriers that didn’t require arbitration at all, Sprint, which offered the same kind of service as Cingular and AWS, did not have a class-action waiver in its arbitration provision during the time plaintiffs contracted with Cingular and AWS. ER232-95. Even ignoring Sprint (as plaintiffs do) there is no substance to plaintiffs’ assertion that the “pay-as-you-go” service offered by Virgin Mobile and TracFone is not “similar” to the service they obtained from Cingular or AWS. It is well established that the service need not be identical, so long as it is a reasonable substitute.<sup>6</sup> In any event, Virgin Mobile’s “Auto Top-Up” service offered payment

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<sup>6</sup> See, e.g., *Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1413 (9th Cir. 1996) (“The fact that a buyer or seller is the only source not of a particular product or service but of a particular price advantage is

and service arrangements that are virtually indistinguishable from the service for which plaintiffs contracted by automatically refilling the prepaid account over time. ER308. *See generally* Jennifer Daw Holloway, *Prepaid Wireless Has Clear Benefits—Even If You Have a Good Credit History*, Consumer Action News, Fall 2005, at 1, [http://www.consumer-action.org/downloads/english/Fall\\_2005.pdf](http://www.consumer-action.org/downloads/english/Fall_2005.pdf) (study of wireless plans concluding that “prepaid wireless is a viable option to postpaid plans in terms of price and services”).

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

**2. The District Court Correctly Found That Plaintiffs Failed To Establish The “Surprise” Element Of Procedural Unconscionability.**

Without citing a single case, plaintiffs dispute the district court’s finding that the “surprise” aspect of procedural unconscionability is not present here. With respect to Szalanski, plaintiffs assert that Cingular’s arbitration provision was “set forth on the reverse side” of the contract, that it had “terms appear[ing] in small type” which “were included along with a slew of other provisions,” and that

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an insufficient argument for unconscionability where alternative sources for the product or service exist.”).

“revisions [to the arbitration provision] were included in “a bill stuffer.” Br. 17. With respect to Shuck and Haslet, plaintiffs contend that “AT&T customers would not have been aware of the arbitration agreement at the time they signed up for service” and instead “[d]iscovery would have been made only later when they found the Welcome Guide in the box containing their telephone—and even then, not until they got to the final pages of the booklet.” *Id.* As the district court correctly found, none of these assertions is valid.

First, California has no generally applicable rule of contract law specifying that all material terms must be located on the front of a double-sided contract, must be in a specific font size, or must somehow be made to stand out from surrounding terms. Indeed, any such rule would be absurd because so many contractual terms might be material to one party or the other. And it is by now well settled that courts may not require *special* notice of an arbitration provision. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts Montana statute requiring that arbitration provision be more conspicuous than other provisions).

In any event, Szalanski’s agreement with Cingular *is* more prominent than most other provisions in the agreement. As the district court found, “[t]he first paragraph of Cingular’s terms and conditions gives the consumer notice that the terms contain a mandatory arbitration provision” and that “[t]he arbitration

provisions are not buried in the terms and conditions of the \* \* \* Cingular contracts.” ER332; *see also* Opening Br. 2-3 (describing the manner in which the arbitration provision was brought to consumers’ attention).

That Cingular notified customers of the revised arbitration provision in a bill insert does not support plaintiffs’ claim of “surprise” either. Because the requirement that customers arbitrate on an individual basis appears in their original contracts, the only relevant question here is whether “surprise” was inherent in the formation of Szalanski’s original contract. *See Kinney*, 70 Cal. App. 4th at 1329 (procedural unconscionability “concerns the manner in which the contract was negotiated and the circumstances of the parties *at that time*”) (emphasis added).

Plaintiffs’ contention that Shuck and Haslet were “surprise[d]” is premised on the assumption that they accepted AWS’s agreement by “sign[ing] up” *before* receiving a copy of the terms and conditions of service. Br. 17. To the contrary, Shuck and Haslet accepted the AWS agreement, including the arbitration provision, only *after* they received AWS’s terms and conditions of service in the box with their new phones and thereafter either used the service or paid a bill. ER 34-35. In addition, as plaintiffs concede (Br. 18), even after accepting their agreements, plaintiffs could have cancelled their service without penalty during a buyer’s remorse period.

In California, a consumer may be deemed to have accepted an agreement when he or she “receives notification” of its terms, “is provided an opportunity to accept or reject” them, and “accepts \* \* \* according to the instructions provided.” *Mitchell v. Am. Fair Credit Assoc., Inc.*, 99 Cal. App. 4th 1345, 1351 (2002). Shuck and Haslet had ample time to review the terms and conditions, decide whether they objected to any of them, and cancel service without penalty. Another district court in this Circuit has expressly held that similar AWS “Terms and Conditions” located in a “Welcome Guide” included in the box with a wireless phone were binding on the purchaser. *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1073-74 (C.D. Cal. 2002), *overruled in part on other grounds by Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 n.14 (9th Cir. 2003).<sup>7</sup> That decision is clearly correct. To hold otherwise is to treat every one of the terms and

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<sup>7</sup> Unsurprisingly, the few other published decisions to consider AWS Welcome Guides have also found that the terms and conditions were binding even though they were packed with the phone. *See Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691-92 (N.D. W.Va. 2005); *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 703-05 (S.D. Ill. 2005); *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1026-27 (Fla. Dist. Ct. App. 2005). *See also Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1103-06 (C.D. Cal. 2002) (enforcing satellite television services agreement including arbitration provision sent to customer in first bill in part because customer could cancel service upon receiving the agreement); *Adobe Sys., Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051, 1060 (N.D. Cal. 2002) (holding that software purchaser was bound by the terms and conditions contained in an End User License Agreement packaged inside software box in part because “the end user is given the opportunity to return the package if he or she is not in agreement with the terms of the contract”).

conditions as suspect merely because the Welcome Guide was inside the box instead of outside it.

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

In response to our explanation of the unique features of Cingular's arbitration provision that make arbitration cost-free and encourage rapid resolution of small individual disputes, plaintiffs assert that requiring individual arbitration nevertheless exculpates Cingular because customers predictably would not be willing to invest the "time and effort" necessary to redress their particular grievances individually. Br. 17-21. For support, plaintiffs quote the observation in *Discover Bank* that individual actions are "often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action." Br. 19 (quoting *Discover Bank*, 113 P.3d at 1105). But no similar barrier to recovery is presented by Cingular's cost-free arbitration provision, under which customers pay nothing to arbitrate non-frivolous claims, have no limitations on the damages they can receive, and are entitled to an award of attorneys' fees if they receive the amount of their demand or more.

Plaintiffs' speculation that many customers would be unwilling to devote the time and effort to pursuing an individual arbitration ignores the realities of class actions. In a class action, absent class members cannot simply sit back, do nothing, and wait for a check to arrive in the mail. Instead, once a class action is

settled (as they almost invariably are), class members are often required to fill out a claim form, requiring them to do a thorough search of their records years after the underlying events took place. See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal Forum 71, 103 (“in many situations individual plaintiffs are able to recover their awards only upon the filing of complex claim forms”). There is no reason to suppose that a customer who is unwilling to take the time to pursue a cost-free arbitration would be any more willing to take the time to file a claim after a class action has settled. Indeed, many class members decline to research their records and fill out the necessary forms in order to receive a small recovery.<sup>8</sup>

At the same time, plaintiffs mistakenly assume that pursuing an individual arbitration would be prohibitively time-consuming. The relevant AAA rules allow

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<sup>8</sup> See, e.g., Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 753 (1988) (discussing three settlements in which claim rates were 3%, 10.5%, and 18%); Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, executive summary, at 19-20 (RAND Inst. for Civ. Justice 2000), available at [http://www.rand.org/pubs/monograph\\_reports/MR969/index.html](http://www.rand.org/pubs/monograph_reports/MR969/index.html) (study of six consumer class actions finding that “class members claimed one-third or less of the funds set aside for compensation” in three cases, less than half the funds were claimed in a fourth, and all of the funds were claimed in a fifth case only because the settlement required dispersion of all funds, even though only 20-30% of class members filed and more than 40% of their claims were rejected due to insufficient documentation); *Greenhaw v. Lubbock County Beverage Ass’n*, 721 F.2d 1019, 1031-32 (5th Cir. 1983) (class members claimed only \$17,482 of a \$2,000,000 class recovery).

for a brief in-person hearing, a telephonic hearing, or a “desk” arbitration based on the submission of documents alone. *See* AAA, *Consumer Due Process Protocol*, Principle 12(1) & cmt., *available at* <http://www.adr.org/sp.asp?id=22019>. A desk arbitration or telephonic hearing might take no longer than it takes for a class member to research his or her records and submit a claim (but potentially could have materially greater rewards). In sum, far from exculpating Cingular from liability, Cingular’s arbitration provision offers customers relief that in many ways is *superior* to that available through class actions.

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

In response to our preemption argument, plaintiffs merely defend a proposition that we never contested—that courts may refuse to enforce an arbitration provision “upon [such] grounds as exist at law or in equity for the revocation of any contract” (Br. 22 (quoting 9 U.S.C. § 2) (emphasis removed)).<sup>9</sup>

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<sup>9</sup> We *do* dispute, however, that the California courts, in holding class waivers unconscionable, have truly applied a “generally applicable state law contract defense.” Although *Discover Bank*, on its face, bars class waivers in both litigation and arbitration, the overwhelming majority of class waivers are contained in arbitration provisions. *See* Opening Br. 28 n.12. That is because class actions are inherently inconsistent with arbitration: to superimpose class-action procedures onto arbitration is to convert arbitration into litigation. The California Supreme Court’s heavy reliance upon “public policy” favoring class lawsuits over individual arbitration (*e.g.*, 113 P.3d at 1105-08, 1112, 1115-16) amounts to an assertion of state judicial veto power over the FAA. The California courts have often distorted state unconscionability law in order to thwart arbitration agreements, and the

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

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

But the risk-benefit calculus changes dramatically if the business must bear the risk of a class arbitration as the price of admission. A class arbitration would eliminate all of the cost savings and efficiencies of individual arbitration. At the same time, the stakes would be multiplied exponentially. Yet the arbitrator's decision would remain reviewable only under the very narrow standard of review

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California Supreme Court's decision in *Discover Bank* is merely the latest example of that practice. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Judiciary Is Circumventing the Federal Arbitration Act*, 2 Hastings Bus. L.J. \_\_\_ (forthcoming 2006) (attached as Addendum II) (unconscionability found in 47% of arbitration cases as compared with 11% of non-arbitration cases in which issue was presented in California Court of Appeal in past two decades). Hence, the California Supreme Court's rule is even-handed only in the most trivial sense; in purpose and practical effect, it discriminates against arbitration.

set forth in the FAA. Under those circumstances, very few companies would be willing to include arbitration provisions in their agreements with customers. Because this outcome is inconsistent with the central purpose of the FAA, which is to encourage arbitration, it is preempted.

In an analogous context, this Court recently held that California state ethics standards are impliedly preempted by the Securities and Exchange Act of 1934 (“Exchange Act”). *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1135 (9th Cir. 2005). The Court reasoned that imposition of those state standards on NASD arbitrators would frustrate the purpose of the Exchange Act by “making arbitration more costly for investors and employees,” potentially “deter[ing] well-qualified individuals from serving as NASD arbitrators,” and increasing the “complexity, cost, and uncertainty” of arbitration. *Id.*<sup>10</sup> Plaintiffs give no reason why the same federal doctrine of conflict preemption would not apply here to prevent *Discover Bank* from frustrating the purposes of the FAA.

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<sup>10</sup> See also *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (federal law’s promise of flexibility to ERISA plans preempts “state law [that] might produce \* \* \* acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage”); *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 157 (1989) (Florida protection of unpatentable inventions was preempted because it “could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years”); *Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982) (Illinois regulation of tender offers was preempted by more expeditious federal securities disclosure requirements in part because “Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay”).

### **III. PLAINTIFFS' CLAIMS FOR PUBLIC INJUNCTIVE RELIEF ARE ARBITRABLE.**

Inserted at the end of their discussion of substantive unconscionability, plaintiffs state, without explanation, that claims for “injunctive relief \* \* \* are not arbitrable under any circumstances.” Br. 21 (citing to *Broughton v. Cigna Healthplans*, 988 P.2d 67 (Cal. 1999)). They appear to be raising—for the first time on appeal—the argument that claims for public injunctive relief under California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (“UCL”) and Consumer Legal Remedies Act, Cal. Civ. Code § 17500, *et seq.* (“CLRA”) are non-arbitrable. Plaintiffs have waived these arguments by not raising them before the district court (*see Taniguchi v. Schultz*, 303 F.3d 950, 959 (9th Cir. 2002) (outlining waiver rule)), and by offering the Court little hint of what they intend to argue even at this late date (*see United States v. Vought*, 69 F.3d 1498, 1501 (9th Cir. 1995) (declining to consider assertion made without “any argument on the issue”).

Even if the Court were to consider it, however, plaintiffs’ contention is misguided. In *Broughton*, the California Supreme Court declared CLRA claims for public injunctions to be non-arbitrable. In *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003), the court extended that holding to UCL claims for public injunctions. The court reasoned in both cases that arbitration is incompatible with the pursuit of public injunctions.

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

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

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

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

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

More recently, the Court explained that the arbitrability of claims depends on “whether *Congress* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (emphasis added). The following year, the Court refused to include California’s Fair Employment and Housing Act under *Gilmer*’s “inherent conflict” exception, thus rejecting the very reasoning applied by the California Supreme Court in *Broughton*. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-24 (2001) (“[T]he argument here is that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here.”); *see also Buckeye Check Cashing v. Cardegna*, 126 S. Ct. 1204, 1209 (2006) (*Southland* “rejected the proposition that the enforceability

of the arbitration agreement turned on the state legislature’s judgment concerning the forum for enforcement of the state-law cause of action”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 623 n.10 (1985) (“the Federal Arbitration Act ‘withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration’”) (citation omitted).

In part because *Broughton* and *Cruz* are far out of step with U.S. Supreme Court case law, few if any courts have followed them. To the contrary, one district court in this Circuit has expressly held that the FAA preempts *Broughton*. See *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1198-99 (S.D. Cal. 2001) (“If it were enough for a state legislature to declare, through the nature of the remedies it offers in a statute, that it did not wish to have certain claims subjected to arbitration, states would essentially be allowed to undercut the FAA in an area in which Congress is supreme (i.e., interstate commerce).”), *overruled on other grounds by Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).

Commentators have come to the same conclusion. See, e.g., Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 416 (2004) (“*Broughton* and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date. The difference between the federal and state source of rights is not mere

happenstance, but is the centerpiece of federal preemption doctrine under the Supremacy Clause.”); Thomas A. Manakides, Note, *Arbitration of “Public Injunctions”*: Clash Between State Statutory Remedies and the Federal Arbitration Act, 76 S. Cal. L. Rev. 433, 481 (2003) (“A state legislature cannot prevent a valid arbitration clause from being enforced, even if this results in the arbitration of a ‘public injunction.’ The U.S. Supreme Court has held that only Congress and not state legislatures can prevent the enforcement of arbitration clauses.”).

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

### CONCLUSION

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

DATED: July 14, 2006

Respectfully submitted,

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

I certify that:

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

Proportionately spaced, has a typeface of 14 points or more and contains 5,595 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

**or is**

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

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

This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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  3. *Briefs in Capital Cases*

This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

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4. Amicus Briefs

- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, or is
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- Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

DATED: July 14, 2006

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

# **Addendum II**

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of July, 2006, I filed the original and 15 copies of the foregoing brief with the Clerk of the Court by third-party commercial carrier for delivery within 3 calendar days, and I served two copies of the foregoing brief by third-party commercial carrier for delivery within 3 calendar days on the parties herein, at the following addresses:

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