

No. 03-30613

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IBERIA CREDIT BUREAU, INC., *et al.*,

Plaintiffs-Appellees,

v.

CINGULAR WIRELESS LLC, *et al.*,

Defendants-Appellants.

On Appeal From the United States District Court
for the Western District of Louisiana, No. 6:01CV2148

BRIEF OF APPELLANT CINGULAR WIRELESS LLC

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SEPTEMBER 25, 2003

AMENDED CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. **Cingular Wireless LLC, formerly known as Bellsouth Mobility, LLC, defendant/appellant;**
2. **Gary J. Russo and the law firm of Perret Doise, A.P.L.C., Edward H. Bergin, Genevieve Hartel Salassi, Matthew T. Brown, and the law firm of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., Evan M. Tager, Stephanie A. Martz, David M. Gossett, and the law firm of Mayer, Brown, Rowe & Maw LLP, and Seamus C. Duffy, William M. Connolly, Christopher M. Arfaa, and the law firm of Drinker Biddle & Reath, LLP, attorneys for Cingular Wireless LLC and Bellsouth Mobility, LLC;**
3. **Sprint Spectrum, L.P., defendant/appellant;**
4. **John F. Olinde, Corinne Ann Morrison, Charles P. Blanchard, Douglas L. Grundmeyer, and the law firm of Chaffe, McCall, Phillips, Toler & Sarpy, L.L.P., attorneys for Sprint Spectrum, L.P.;**
5. **Centennial Beauregard Cellular, LLC (f/k/a Iberia Cellular Telephone Company, LLC), d/b/a Centennial Wireless, defendant/appellant;**
6. **Mark A. Balkin, Joseph C. Chautin, III, and the law firm of Hardy, Carey & Chautin, L.L.P., attorneys for Centennial Beauregard Cellular, LLC (f/k/a Iberia Cellular Telephone Company, LLC), d/b/a Centennial Wireless;**
7. **Iberia Credit Bureau, Inc., d/b/a Information Services, Wardell X. Gerhardt, Al Theriot Construction, Inc., Alfred J. Theriot, Constance White Louviere, Claudia Victoria Fontonet, Elliott Joliet, Charles V. Landry, and Iberia Parish Sheriff, Sid Hebert, on behalf of the Iberia Parish Sheriff's Department, plaintiffs/appellees;**
8. **Elizabeth Cary Dougherty and the Gautier Law Firm, Theodore M. Haik, Jr. and the law firm of Haik, Minville & Grubbs, L.L.P., Joseph R. Joy, III and the law offices of Joseph Joy & Associates, J. Robert Davis, Kenneth S. Wall and the law offices of Robert Davis, L.L.P., and Calvin C.**

Fayard, Jr. and the law offices of Calvin C. Fayard, A.P.C., attorneys for plaintiffs/appellees;

9. **Telecorp Communications Inc., a/k/a SunCom**, defendant in the district court but not a party to these appeals;

10. **Joseph E. LeBlanc, Jr., Elizabeth S. Wheeler, and the law firm of King, LeBlanc & Bland, L.L.P.**, attorneys for Telecorp Communications Inc., a/k/a SunCom;

11. **The State of Louisiana, ex rel. Honorable Richard P. Ieyoub, Attorney General**, intervenor in the district court but not a party to these appeals; and

12. **Kristi M. Garcia and Isabel Wingerter**, attorneys for The State of Louisiana, ex rel. Honorable Richard P. Ieyoub, Attorney General.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.4, appellant hereby requests that the Court hear oral argument in this case. Evincing an obvious disdain for arbitration, the district court refused to enforce arbitration agreements governed by the Federal Arbitration Act. Given the Supreme Court's repeated pronouncement that arbitration agreements — rather than being disfavored — are presumptively valid and enforceable, and given the significance that this decision could have for future cases in the Fifth Circuit, oral argument is warranted.

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JURISDICTIONAL STATEMENT

This case was originally filed in the 16th Judicial Court of the State of Louisiana, Iberia Parish, on September 11, 2001 (*see* R. 1),¹ and was first served on the defendants on September 18, 2001 (*see* R. 25). Plaintiffs, nine cellular telephone customers, sued their four out-of-state wireless service providers — including appellant Cingular Wireless LLC (“Cingular”), formerly known as BellSouth Mobility — as well as three Louisiana agents of those four primary defendants. The litigation was removed to the Western District of Louisiana on October 17, 2001, pursuant to 28 U.S.C. §§ 1332, 1441(b), and 1446. *See* R. 15. The district court denied plaintiffs’ motion to remand in open court on May 23, 2002, and issued a written ruling confirming that order on June 28, 2002. *See* R. 323. The district court found that there was complete diversity of citizenship — because the plaintiffs had fraudulently joined as defendants the Louisiana agents of the four out-of-state wireless service providers — and that the amount-in-controversy requirement was satisfied because of plaintiffs’ request for attorneys’ fees. *See id.*

Each of the three named plaintiffs-appellees who sued Cingular had entered into a contract with Cingular that included a provision requiring that all disputes

¹ We cite to items in the Record on Appeal as “R. ___”; items in the “Supplemental Record on Appeal” as S.R. ___; and items included in the Record Excerpts as “R.E. tab ___,” except for the transcript of the district court’s May 23, 2003 hearing, which is tab 5 in the Record Excerpts but which we cite as Tr. ___.

arising out of the contact be resolved by arbitration or by litigation in small claims court. Accordingly, Cingular moved to compel arbitration with those plaintiffs pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.* On May 23, 2003, the district court denied that motion on various grounds. *See* R.E. tab 3, Tr. 81-91.² The court issued a brief written order memorializing that ruling on May 27, 2003. *See* R.E. tab 4. On June 16, 2003, Cingular timely filed a notice of appeal pursuant to 9 U.S.C. § 16(a), which authorizes the appeal as-of-right of any order denying a motion to compel arbitration pursuant to the FAA. *See* R.E. tab 2.

STATEMENT OF ISSUES PRESENTED

Each plaintiff’s contract with Cingular explicitly incorporates “Terms and Conditions” including a provision requiring that all disputes between plaintiffs and Cingular be arbitrated, except that either party may instead avail itself of small claims court. Plaintiffs each signed those contracts directly underneath an acknowledgment that they had read and understood the incorporated terms. Cingular’s appeal from the district court’s order refusing to compel plaintiffs to arbitrate their claims raises the following questions:

1. Whether the district court erred in refusing to enforce Cingular’s arbitration provision on the ground that it purportedly requires claims against Cingular

² The district court also denied motions to compel arbitration filed by Sprint and Centennial with respect to the plaintiffs who were their customers.

to be arbitrated, while allowing Cingular to pursue claims against its customers in court.

2. Whether the district court erred in relying on the affidavit of a former Cingular employee — who did not claim to have had any contact with the three named plaintiffs, but asserted that she generally had no knowledge of the arbitration provision in Cingular’s Agreements and had not explained it to customers — as a basis for holding that, notwithstanding the plaintiffs’ signed acknowledgements, the plaintiffs could not have consented to the arbitration provision.

3. Whether the district court erred in holding that the arbitration provision was unconscionable, because (i) Cingular’s Agreements contain a provision that allows Cingular to change the terms of the Agreements following notice to the customer; (ii) the arbitration provision prohibits arbitrators from conducting class-wide proceedings; and (iii) the arbitration provision provides that arbitration proceedings must be kept confidential.

STATEMENT OF THE CASE

On September 11, 2001, plaintiffs Iberia Credit Bureau, Inc. (“Iberia”), Wardell X. Gerhardt, and Constance White Louviere filed a complaint in the 16th Judicial Court of the State of Louisiana, Iberia Parish, alleging that Cingular breached its contracts with them and violated the Louisiana Unfair Trade Practices Act (“LUTPA”), La. Stat. § 51:1401 *et seq.*, by “rounding up” the last partial min-

ute of airtime that a customer spends on each call to the next whole minute increment — purportedly without disclosing this practice. *See* R. 1. Other named plaintiffs sued their cellular carriers, Iberia Cellular Telephone Co., LLC (now known as Centennial Beauregard Wireless, LLC (“Centennial”)), Sprint Communications Co., LP (“Sprint”), and Telecorp Communications, Inc. The plaintiffs also sued three local agents of these carriers, Magic Video, Inc.; J’s Cellular and Beepers, LLC; and Wireless Communications, Inc. *See id.*

The case was removed to the Western District of Louisiana on October 17, 2001, pursuant to 28 U.S.C. §§ 1332, 1441(b), and 1446. *See* R. 15. On April 21, 2003, after the district court denied a motion to remand — and dismissed all claims against the local agents on the ground of fraudulent joinder — Cingular filed a Motion to Compel Arbitration and Stay Litigation with respect to the three named plaintiffs who are its customers. *See* R. 780. Sprint and Centennial filed similar motions with respect to the plaintiffs who are their customers.³ On May 23, 2003, at the conclusion of a hearing on those motions, the district court denied the motions from the bench (*see* R.E. tab 3 at R. 1114; Tr. 81-91); the court issued a formal order memorializing that decision on May 27, 2003. *See* R.E. tab 4.

³ Because its contracts do not include an arbitration provision, the fourth defendant, Telecorp, did not move to compel arbitration as to its customers, and is not involved in this appeal.

On June 16, 2003, Cingular timely filed a Notice of Appeal under 9 U.S.C. § 16(a). *See* R.E. tab 2. Centennial and Sprint filed Notices of Appeal on June 18 and 19, 2003, respectively. *See* R. 1183, R. 1188. Briefing in the three appeals is proceeding in tandem, but the cases have not otherwise been consolidated. On June 17, 2003, the district court entered an order staying all proceedings before it pending the resolution of these appeals. *See* R. 1182.

STATEMENT OF FACTS

A. Plaintiffs' Agreements With Cingular

In order to obtain cellular telephone service, each of the three named plaintiffs-appellees entered into one or more contracts with Cingular. Specifically, plaintiff Iberia entered into a “Wireless Service Agreement” (“Agreement”) with Cingular on February 21, 2001, and a second such Agreement (for a new telephone) on December 26, 2001; plaintiff Louviere entered into an Agreement with Cingular on June 19, 2001; and plaintiff Gerhardt entered into an Agreement with Cingular on January 7, 2003. *See* R.E. tabs 11-14.⁴

Each of these Agreements explicitly incorporated by reference a set of “Terms and Conditions” as part of that contract. Those “Terms and Conditions”

⁴ Gerhardt is Iberia’s principal, and signed the agreements between Cingular and Iberia on Iberia’s behalf.

are in all relevant respects identical, and each includes an arbitration provision.⁵

The main section of that provision states:

INDEPENDENT ARBITRATION * * * 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 United States Arbitration Act and Federal Arbitration Law shall govern the interpretation and enforcement of, and proceedings pursuant to, this or a prior agreement.

See R.E. tabs 9, 10. Subsidiary portions of the arbitration provision specify that (i) the parties agree that in an arbitral proceeding the arbitrator would not have the authority to “order consolidation or class arbitration”; (ii) no party to an arbitration

⁵ For plaintiff Louviere and for one of plaintiff Iberia's Agreements, those Terms and Conditions were contained in a pamphlet that accompanied the Agreement. *See* R.E. tabs 12, 13. For plaintiff Gerhardt and for plaintiff Iberia's other Agreement, those Terms and Conditions were printed on the back of the Agreement. *See* R.E. tabs 11, 14. The pamphlet is included as R.E. tab 9, and the back of those contracts is included as R.E. tab 10.

When plaintiff Louviere entered into her Agreement, she evidently received an earlier, superseded version of the Terms and Conditions along with the later version that the other plaintiffs received. She has admitted, however, that the later version is the applicable one. *See* R.E. tab 6, at ¶ 10 (“Plaintiff Louviere's June 19, 2001 service agreement expressly incorporated by reference ‘Terms and Conditions version number #CW202004’ (‘Form CW202004’) and in her June 19, 2001 service agreement, Plaintiff Louviere accepted the terms and conditions contained in Form CW202004 and acknowledged receipt of a copy of Form CW202004”); R.E. tab 7, at ¶ 10 (“Admitted although executed under adhesionary terms and conditions”).

would be permitted to “disclose the existence, content, or results of any arbitration”; and (iii) “[n]otwithstanding” the arbitration provision, “either party [to the Agreement] may bring an action in small claims court.” *Id.*

Besides the arbitration provision, two other provisions in the “Terms and Conditions” are relevant to this litigation. The first of these provisions states that “CINGULAR may * * * change any terms [or] conditions * * * regarding your service at any time. * * * CINGULAR will provide you with notice of such changes * * * either in your monthly bill or separately.” *Id.* This provision further specifies that if “Cingular increases your rates, fees or charges, it shall disclose the change at least one billing cycle in advance and you may terminate this agreement without paying a termination fee.” *Id.* (capitalization omitted). The other relevant provision specifies that “[i]f any provision of this Agreement is found to be unenforceable by a court or agency of competent jurisdiction, the remaining provisions will remain in full force and effect.” *Id.*

Each plaintiff acknowledged receiving, understanding, and agreeing to all of these terms. Specifically, above the space for the customer to sign each Agreement is the following acknowledgment: “I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT **AND THE TERMS AND CONDITIONS** AND THE PLAN PROVISIONS AND CONDITIONS. I AGREE TO BE BOUND THEREBY.” *See* R.E. tabs 11-14 (emphasis added). Each plaintiff

signed the Agreements under this acknowledgment. *See id.* Furthermore, during the course of the proceedings in the district court, each plaintiff again admitted to having received and agreed to these Terms and Conditions. *See* R.E. tab 6, at ¶¶ 10, 28, 34, 37; R.E. tab 7, at ¶¶ 10, 28, 34, 37.

B. Plaintiffs’ Lawsuit And Cingular’s Motion To Compel Arbitration.

Despite the arbitration provision, plaintiffs filed suit against Cingular, three other cellular carriers, and their local agents in state court, alleging that the defendants breached their contracts with their customers and violated the LUTPA by billing airtime in whole minute increments, including “rounding up” every fraction of the last minute to the nearest minute increment.⁶ Each plaintiff sued only the carrier that provided that plaintiff’s cellular telephone service; thus, this lawsuit is in essence four unrelated cases against four distinct defendants.⁷ The case was re-

⁶ The plaintiffs filed an original and five amending complaints. (The complaints are mislabeled “First Amending Complaint” through “Fourth Amending Complaint” because there are two “First Amending” complaints.) The plaintiffs’ first three complaints explain that plaintiffs would not “seek[] recovery of damages pursuant to any contract that contains an arbitration clause.” *See* R. 4, R. 113, R. 334-35. The fourth complaint did not contain this provision. *See* D. Ct. Docket No. 164. Although the fifth complaint resurrected the provision (*see* S.R. 253-54, the sixth and final complaint dropped it again. *See* R. 618.

⁷ For that reason, defendants moved to sever. *See, e.g.*, S.R. 224 (Cingular’s Motion To Sever). The district court denied the motions without prejudice to refile at a later date. *See* Tr. 55.

moved to federal court, which dismissed the local agents on the basis of fraudulent joinder.

Thereafter, Cingular filed a motion to compel arbitration and stay litigation with respect to the three plaintiffs who were its customers. *See* R.E. tab 8; R. 780.⁸ Cingular argued that the arbitration provision in each of the Agreements clearly encompassed the present dispute, and that the FAA therefore required that plaintiffs be compelled to arbitrate. In the memorandum supporting the motion, Cingular committed to reimbursing the plaintiffs for all fees charged by the American Arbitration Association — the neutral arbitration organization designated in the Terms and Conditions. It also committed to reimbursing the plaintiffs for their reasonable attorneys' fees and costs in the event the arbitrator were to award them the amount they demand or more. *See* R.E. tab 8, at R. 788.

In response, plaintiffs did not deny either that the FAA applies to their Agreements or that the arbitration provision in the Agreements encompasses their claims. Instead, they argued that Cingular's motion to compel was doomed by a Louisiana Court of Appeal decision, *Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 776 So. 2d 589 (La. Ct. App. 2000), which held that an arbitration provision in a BellSouth agreement was unconscionable because it required cus-

⁸ Sprint and Centennial also moved to compel arbitration under the specific arbitration provisions included in their contracts.

tomers to arbitrate their claims against BellSouth, while allowing BellSouth to go to court to recover debts owed by its customers. Although Cingular's arbitration provision contains no similar incongruity, plaintiffs argued that *Sutton's Steel* was dispositive. In addition, they contended that certain features of the Agreement rendered the arbitration provisions unconscionable and thus unenforceable.

C. The District Court's Ruling Denying Cingular's Motion To Compel Arbitration

After briefing and oral argument, the district court ruled from the bench that Cingular's arbitration provision is unenforceable.⁹ Although the court later issued an order memorializing that ruling, the order is perfunctory, and therefore the court's rationales for refusing to enforce the arbitration provision must be gleaned from the transcript of the hearing. A review of that transcript reveals the following bases for the court's ruling:

1. Supposed lack of mutuality of the obligation to arbitrate and overall lack of "balance" in the contract

Early in the hearing, the district court asked Cingular's counsel whether Cingular's Terms and Conditions allowed Cingular, but not its customers, to go to court. The court reasoned that the arbitration option was inherently inferior to bringing an action in court and expressed concern that the customer would be giv-

⁹ The district court addressed the three defendants' arbitration motions simultaneously, despite the fact that each defendant's arbitration provision is different and thus raises distinct issues.

ing up “all legal rights to pursue claims,” while the company would “have the right to go to a court of law.” Tr. 28.¹⁰ In the court’s view, the lack of a mutual obligation to arbitrate must be considered as evidence of the customers’ lack of “bargaining power” and provides the “context” for analyzing other terms, such as the agreement to forgo class claims and the type size of the arbitration provisions. *Id.* at 83-85, 90-91.

Counsel for Cingular informed the court that Cingular’s arbitration provision, unlike the arbitration agreement at issue in *Sutton’s Steel*, requires both Cingular and its customers either to arbitrate or to proceed in small claims court. *See* Tr. 29. The court responded, “I don’t think so” (*id.*), and proceeded to read aloud portions of Cingular’s Terms and Conditions, none of which purported to authorize Cingular to sue in a court of general jurisdiction. *See id.* at 30-32. After doing so, the court said: “So you are telling me that any dispute arising between your customer and Cingular goes to arbitration.” *Id.* at 33. Counsel responded, “[u]nless it can go to small claims court if somebody likes to do that.” *Id.*

¹⁰ This was not the only time that the court expressed hostility to arbitration. *See, e.g.*, Tr. 34-35 (court’s expression of disbelief that “the liberality in enforcing arbitration agreements extends to allowing, in effect, courts with jurisdiction to be deprived of deciding such an important issue [as] preemption”); *id.* at 44 (“if some claims are not arbitrable and some are, then what are we actually accomplishing here?”).

Despite having received the assurance of Cingular’s counsel that there was nothing in the Agreements that would allow Cingular to evade arbitration and sue in court, and despite having been pointed to nothing by plaintiffs’ counsel that would support such an interpretation of the Agreements, the court nonetheless held that Cingular’s arbitration provisions applied differently to plaintiffs than to Cingular: “[D]espite what [Cingular] has said, the consumer’s rights are limited to, as far as enforcing the terms and conditions of the contract, * * * either small claims court or arbitration, but yet the companies here are entitled to enforce the terms and conditions of the contract * * * [including] perhaps the most important term, the failing to pay the monthly bill, * * * [in] a court of law.” Tr. 84.¹¹

This supposed non-mutuality, the court concluded, rendered Cingular’s arbitration provision unconscionable. The court held that Louisiana law requires “balance” between Cingular and its customers in order for an arbitration provision to be enforceable. Tr. 83. According to the court, “because the consumer gives up practically all rights, and Sprint, Cingular, and Centennial here retains [sic] a right to go to a court of law to enforce a term or condition of the contract for failing to pay the most important thing that they want to get from any consumer and that’s the monthly bill. That’s unconscionable.” *Id.* at 85.

¹¹ Here, as elsewhere, the district court failed adequately to focus on the specifics of each individual defendant’s contracts.

The court also used this perceived non-mutuality as a lens through which to look at all other aspects of the arbitration provision. Thus, the court ruled that, taking into account “the context in which * * * the terms and conditions * * * are employed and the manner in which those terms and conditions are sought to be enforced” (*id.* at 83), the arbitration provision was unenforceable because, in agreeing to arbitrate, “the consumer gives up practically all rights,” while the company could still go to court. *Id.* at 85. Similarly, after discussing aspects of the arbitration provision — such as the manner in which it was presented to the customer, its font size, and the class action provision — the court reasoned that the perceived failure of the company to bind itself to arbitration “simply puts all benefit to the company and none to the consumer or party that enters into the purchase of these phones.” *Id.* at 90-91.

2. Supposed absence of valid consent

The district court rejected plaintiffs’ argument that an arbitration agreement needs to be separately signed by the parties to be valid and enforceable. Tr. 6. However, the court held that the presence of the customers’ signatures on otherwise valid contracts was not enough to determine whether those customers had validly consented to the arbitration provision included in those contracts. Rather, according to the court, “[t]he question becomes is it an agreement because plaintiffs

contend that they * * * weren't aware of [the arbitration provision], or that there was some deceptive practice regarding that among other things.” Tr. 6.

On the basis of the affidavit of Judy Smith Briscoe, a former Cingular employee who never had any contact with any of the named plaintiffs, the court found that the plaintiffs lacked “consent to — or knowledge of the terms of arbitration.” Tr. 85. Although the affidavit averred that Briscoe performed marketing for Cingular and BellSouth, it neither asserted that she had been involved in the sale of cellular service to any of the three plaintiffs, nor stated more generally that her job responsibilities entailed reviewing Agreements with prospective customers. The affidavit merely claimed that Briscoe was “familiar with the contracts for wireless phone service provided to [Cingular’s] customers” and that she “was never aware that any BellSouth Mobility/Cingular wireless phone service contract had an arbitration clause in it.” R.E. tab 15, at R. 901. Despite the evident lack of connection between this affidavit and the instant litigation, the district court found Briscoe’s affidavit to be relevant to the question whether plaintiffs consented to arbitration because “I take [Briscoe’s managerial marketing position to] include sales, even if she never did make a sale herself” (Tr. 84). Thus, even though the plaintiffs have admitted that they received and agreed to the Terms and Conditions of their Agreements (*see* pages 7-8, *supra*), the court held that they had not known about or consented to the arbitration provision included within those Agreements (Tr. 85).

3. Specific features of Cingular’s Agreements found to be unconscionable

Finally, the court found three specific features of Cingular’s Agreements to be problematic. The court suggested that, while these terms individually might not be sufficient to render the arbitration provision unconscionable, together they “are in my view unconscionable and simply puts [sic] all benefit to the company and none to the consumer or party that enters into the purchase of these phones.” Tr. 90-91.¹² The three specific provisions found problematic by the court were the following:

a. The change-in-terms provision

Without citing any Louisiana case law addressing the fairness of a change-in-terms provision in a standard form contract, the district court held that the change-in-terms provision in Cingular’s Agreements, which authorizes Cingular to modify those Agreements after providing “notice of such changes * * * either in [the customer’s] monthly bill or separately” (*see* R.E. tabs 9, 10), helped render the

¹² The court rejected two other unconscionability arguments; it noted the “difficulty” it had reading the text of the defendants’ contracts — because of the size of the type face used — but explained that this issue was not “determinative” of its ruling and suggested that it pertained only to “Sprint and Centennial.” *See* Tr. 85. The court also found plaintiffs’ challenge to the allocation of arbitration costs contained in Cingular’s arbitration provision to be moot (*see id.* at 88), because Cingular had agreed to bear those costs (*see* page 9, *supra*).

arbitration provision unenforceable.¹³ Although the court noted that the presence of such a provision “standing alone” would not “necessarily lead[] to a death knell” for the arbitration provision (Tr. 88), it explained that “I think you’ve got to consider everything else” about the arbitration provision that the court had found objectionable. *Id.* Here, according to the court, the change-in-terms provision reinforced the notion that the customers’ “bargaining power or their benefits from this clause is much greater than the benefits from — that’s going to the other side. There’s no balance here.” Tr. 83. “This idea that the company can change the terms and conditions of the arbitration agreement or any other terms and conditions also calls into question the idea of, again, adhesionary issues.” *Id.* at 88; *see also id.* at 48 (the ability to change the terms of a contract “sounds pretty one-sided to me”).

b. The waiver of class-action relief

Despite acknowledging that another federal district court, applying Louisiana law, had held that there is nothing unconscionable about waiving the right to seek class-wide relief (*see* Tr. 28; *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 519 (M.D. La. 2003)), the district court found the provision precluding arbitrators from “order[ing] consolidation or class arbitration” (*see* page 6, *supra*) to be

¹³ The court did not discuss whether the invalidation of the change-in-terms provision, which applies to all portions of Cingular’s Agreements, not merely the arbitration provision, necessarily rendered those contracts void in their entirety.

unconscionable. According to the court, this provision is unconscionable because Cingular is “not giving anything up” (Tr. 28), and because when combined with the contractual provision requiring all parties to keep the arbitration proceedings confidential, “giv[ing] up * * * your right to a class action, including your right * * * to confidentiality * * * takes away from the whole purpose of arbitration or litigation in any fashion,” which is “the value of precedent” (*id.* at 85-86). Thus, rather than following *O’Quin* — which had analyzed **Louisiana** law, and had held that the right to bring a class action in Louisiana could permissibly be waived in a consumer-protection based class action because “Louisiana’s legislature * * * has expressly excluded the option of bringing a class action to plaintiffs seeking to recover under Louisiana’s Unfair Trade Practices Act” (256 F. Supp. 2d at 519) — the district court instead followed a Ninth Circuit case, *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *pet. for cert. pending*, No. 02-1521, 71 U.S.L.W. 3680 (filed Apr. 16, 2003), which had held that under **California** law it is unconscionable to require a consumer to waive his or her right to pursue a class action.

c. The mutual obligation to keep arbitration proceedings confidential

Finally, the court ruled that it was unconscionable to require that arbitration proceedings be kept confidential. *See* Tr. 86 (“I think it’s unconscionable to absolutely say that in all situations you cannot discuss this.”). The court held this provision to be unconscionable because the agreement also precludes class relief (*see*

id.), and because confidentiality must be maintained in an “absolute” manner rather than on a “case-by-case basis” (*id.* at 86-87).

As the district court implicitly recognized, the confidentiality provision applies by its terms only to arbitrations, not to actions brought in small claims court. *See* page 7, *supra*. However, the court rejected Cingular’s argument that a party wishing to avoid the confidentiality requirement could simply bring a case in small claims court, speculating that “I can imagine that if someone goes to small claims court, * * * that they are going to be faced with probably some argument * * * saying that, well, look, there is a confidentiality agreement here, and it should be applied even to that small claims action.” Tr. 86.

* * *

After the district court denied Cingular’s motion to compel arbitration on the foregoing bases, Cingular appealed that ruling to this Court.

SUMMARY OF ARGUMENT

Hostility to arbitration is alive and well in the Western District of Louisiana. Rather than applying well established principles under the FAA, which authorizes courts to decline to enforce arbitration agreements only “upon such grounds as exist at law or in equity for the revocation of *any* contract” (9 U.S.C. § 2) (emphasis added) , the district court manufactured facts and *ad hoc* rules of Louisiana law to

deny Cingular its contractual right to insist that plaintiffs arbitrate their claims against it.

In particular, the district court's primary basis for its decision — its determination that the arbitration agreement allows Cingular to bring litigation in courts of general jurisdiction, while Cingular's customers may not — has no support whatsoever. But even if that were an accurate interpretation of the contract, under generally applicable Louisiana contract law individual provisions of a contract need not be "mutual," and thus the arbitration provision would still be enforceable. The court accordingly violated the FAA in striking down the arbitration provision on the basis of an arbitration-specific rule of law.

Similarly, there is no basis for the district court's apparent conclusion that a contractual provision must be pointed out and explained to a contracting party in order for that party to be deemed to have validly consented to that term. Nor did the district court seriously believe that such a rule exists; rather, it created this rule specifically for arbitration provisions, again in violation of the FAA.

Finally, none of the three features of Cingular's Agreement that the district court found problematic warrants the court's refusal to enforce plaintiffs' agreements to arbitrate their claims. The district court's determination that the general change-in-terms provision in plaintiffs' Agreements undermines *just* the arbitration provision is again the type of arbitration-specific ruling that the FAA bars. Simi-

larly, Louisiana has no generally applicable rule prohibiting the waiver of class actions. Accordingly, the district court was not at liberty to strike down the arbitration provision on the ground that it precludes class-wide relief. Finally, the court's refusal to enforce the arbitration provision merely because it mandates that arbitrations be kept confidential was based on nothing more than the impermissible hostility towards arbitration that permeates every aspect of the district court's decision.

STANDARD OF REVIEW

This court reviews the denial of a motion to compel arbitration *de novo*. See *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 536 (5th Cir. 2003); *Webb v. Investacorp*, 89 F.3d 252, 257 (5th Cir. 1996); *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1264 (5th Cir. 1994).

ARGUMENT

In enacting the FAA, Congress “declared a national policy favoring arbitration and 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.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The Act’s “basic purpose” is to “put arbitration provisions on the ‘same footing’ as a contract’s other terms.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Accordingly, Section 2 of the

FAA “embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’” *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting 9 U.S.C. § 2)). Unless that savings clause applies, “[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*.” *Id.* at 492 n.9 (emphasis in original).

Thus, section 2 of the FAA carves out a *limited* role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state-law grounds “*if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.*” *Perry*, 482 U.S. at 493 n.9 (emphasis in original). However, “[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.” *Id.* “Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot.” *Id.*

In sum, as the Supreme Court has ruled:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.

Allied-Bruce, 513 U.S. at 281.

Thus, a decision that refuses to enforce an otherwise valid arbitration provision under the FAA must be based on a general, neutral principle that “arose to govern” all contractual terms, rather than one created on the spot as a pretext for defeating arbitration. *See Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 n.3 (1996). A court may not “train[] on and uphold[] a * * * precise, arbitration-specific limitation” that would not apply to other contractual terms under relevant state law. *Id.*

None of the grounds offered by the district court for refusing to enforce the arbitration provisions is valid under this principle. First, there is no factual basis whatsoever for the district court’s finding of non-mutuality, but even if there had been there is no general principle of Louisiana contract law requiring every individual contractual obligation to fall equally on both parties. Second, there is no basis in either Louisiana law or federal law for the district court’s apparent conclusion that a contractual provision must be pointed out and explained to a contracting party in order for that party to be deemed to have validly consented to that contractual provision. Third, it is only by singling out arbitration for disfavored treatment that the district court could find any particular feature of Cingular’s Agreements to be unconscionable. That, of course, is forbidden under the FAA.

The district court’s ruling is one of a number of recent decisions that purport to apply general contract law, but in fact make up principles of contract law on an *ad hoc* basis in order to strike down arbitration provisions. *Sutton’s Steel*, 776 So. 2d 589 — on which the district court heavily relied, and which we address at pages 25-28, *infra* — is another example. *See also, e.g., Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100-1101, 118 Cal. Rptr. 2d 862 (2002) (holding provision in arbitration agreement barring class-wide arbitration to be unconscionable under California law), cert denied, 123 S. Ct. 1258 (2003). When the kinds of *ad hoc* principles these courts have devised are rejected — as the FAA requires them to be — it is obvious that Cingular’s arbitration provision is fully enforceable and that the district court plainly erred in refusing to order plaintiffs to arbitrate their claims.

I. THE DISTRICT COURT’S PRINCIPAL GROUND FOR REFUSING TO ENFORCE CINGULAR’S ARBITRATION PROVISION — THE PERCEIVED NON-MUTUALITY OF THE OBLIGATION TO ARBITRATE — IS BOTH FACTUALLY AND LEGALLY UNSUPPORTABLE.

A. Cingular’s Arbitration Provision Is Unambiguously Mutual.

The district court’s principal ground for invalidating Cingular’s arbitration provision was its perception that the Agreements afforded Cingular the right to bring litigation in courts of general jurisdiction, while providing no similar option for Cingular’s customers. *See* pages 10-12, *supra*. But the Agreements at issue

clearly provide that “CINGULAR and [the customer] agree to arbitrate *any and all disputes and claims*,” except that “*either party* may bring an action in small claims court.” See R.E. tabs 9, 10 (emphasis added). Simply put, nothing in the Agreements entitles Cingular to bring litigation in any court but small claims court, which the consumer may also do. The district court’s finding to the contrary is inexplicable.

The court’s factual error heavily colored its evaluation of all other aspects of the arbitration provision. Based on this erroneous finding, the court repeatedly referred to the lack of “balance” between Cingular and its customers. See, e.g., Tr. 62, 83. For example, the court held that the customers could not, as a matter of law, consent to arbitration unless the arbitration provision was orally explained to them, given that the provision allowed Cingular “to go to a court of law to enforce a term or condition of the contract” while “the consumer gives up practically all rights.” *Id.* at 85. When discussing its reasons for deeming the confidentiality provision to be invalid, the court reiterated: “You know, again, the consumer gives up everything, and the company here is entitled to collect on the debt in a court of law, not arbitration, not small claims court.” *Id.* at 87. When explaining its reasons for holding that the class action waiver in the arbitration provision is unconscionable, the court again adverted to “the provision that entitles the companies here to, you know, go and collect on their debt apart from arbitration in a court of

law.” *Id.* at 88. Finally, the court summarized its ruling by saying that all three defendants’ arbitration provisions “are in my view unconscionable and simply puts [sic] all the benefit to the company and none to the consumer or party that enters into the purchase of these phones.” *Id.* at 91.

Accordingly, this clear factual error not only vitiates the district court’s central ground for invalidating the arbitration provision, but also severely undermines the remainder of the court’s analysis.

B. Even If The Arbitration Provision Were Non-Mutual, The District Court Erred In Not Enforcing It.

Even if there were some basis for deeming Cingular’s arbitration provision “non-mutual,” the district court, like the court in *Sutton’s Steel*, erred in considering this perceived non-mutuality to be a valid ground for invalidating the arbitration provision.

As discussed above, under the FAA only state-law principles that arose to govern all contractual provisions, not those that sprang into existence only after an arbitration provision was put in issue, may be the basis for invalidating an agreement to arbitrate. Until *Sutton’s Steel*, no court had ever found Louisiana law to require equal and mutual obligations as to *each individual term* of a contract. Rather, the *Sutton’s Steel* court invented this “non-mutuality” rule for purposes of the case before it — and the district court in this case blindly accepted that arbitration-specific creation.

For “non-mutuality” to be a valid defense to arbitration under Section 2 of the FAA, however, Louisiana would have to have had *extant* law requiring that each party to every contract be identically bound as to each and every provision of the contract. Of course, Louisiana had no such “neutral principle” of contract law either before or after *Sutton’s Steel* — because, obviously, the principle is nonsensical rather than neutral. In fact, there is no support for the proposition that Louisiana law requires every contract to be mutual, let alone that each independent provision of a contract must be mutual. As the Louisiana Supreme Court held long ago, “inducements” to contract — additional terms that exist over and above the basic promise that is the purpose of the contract — “cannot be divided into various incidental covenants and sustained only on a finding of a reciprocal consideration for each stipulation. Unless covenants of that nature are considered as being merely part of the moving causes or inducements for making the contract almost none of today’s complicated agreements * * * could stand the test of mutuality * * *.” *Long v. Foster & Assocs., Inc.*, 136 So. 2d 48, 52 (La. 1961); *see also Seals v. Calcasieu Parish Voluntary Council on Aging, Inc.*, 758 So. 2d 286, 293 (La. Ct. App. 2000); *Caddo Parish Sch. Bd. v. Cotton Baking Co.*, 342 So. 2d 1196, 1198 (La. Ct. App. 1977).

In fact, Louisiana law *specifically prohibits* the parsing of a unified contract into separate pieces as to each of which equivalent obligations are required. In

overruling an earlier decision holding non-compete agreements to be invalid based on lack of mutuality, the Louisiana Supreme Court explained that the prior ruling “was erroneous as it effected a division of the contract into two parts, one valid and the other invalid, and completely overlooked the obvious fact that the promise not to compete with plaintiff was an integral part of the original bargain, without which defendant might not have obtained the position.” *Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 60 So. 2d 83, 86 (La. 1952).

This generally applicable principle that mutuality is not required for each and every term in a contract, so long as the contract as a whole is supported by consideration, should have caused the court of appeal in *Sutton’s Steel* — and the district court here — to enforce the arbitration provisions before them. Indeed, when confronted with similar arguments, numerous courts throughout the country have held that an arbitration clause that is contained in a consumer contract “need not be supported by equivalent obligations” in order to be enforceable. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) (collecting state and federal cases); *see also Fazio v. Lehman Bros. Inc.*, 340 F.3d 386 (6th Cir. 2003); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002); *Pridgen v. Green Tree Fin. Serv. Corp.*, 88 F. Supp. 2d 655, 658 (S.D. Miss. 2000); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W. 3d 335, 342 (Ky. App. 2001); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001); *cf.*

Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 636-37 (7th Cir. 1999) (upholding arbitration agreement because plaintiff promised to arbitrate all future disputes in exchange for company's promise to employ her). *Harris* is illustrative. Though confronted with an arbitration provision that, like the one in *Sutton's Steel*, reserved the company's right to go to court against the consumer in certain limited situations, the Third Circuit held that the provision must be enforced, explaining: "Modern contract law largely has dispensed with the requirement of reciprocal promises * * * provided that a contract is supported by sufficient consideration." See 183 F.3d at 180.

The district court's oft-repeated view that plaintiffs obtained no benefit from their contracts with Cingular because of the supposed non-mutuality of Cingular's arbitration provision turns back the clock to the days before the FAA was enacted, when courts were free to refuse to enforce arbitration agreements at will. But, as the Supreme Court held in *Perry*, under the FAA courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot." 482 U.S. at 493 n.9. Thus, given generally applicable Louisiana law, *even if* the arbitration provision in the Agreements were non-mutual — which it is not — the district court's ruling that Cingular's agreement therefore is unconscionable must be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS HAD NOT CONSENTED TO ARBITRATE THESE DISPUTES.

The district court held that plaintiffs had not “consent[ed] to — or [lacked] knowledge of the terms of arbitration.” Tr. 85. The court’s reasoning is somewhat obscure, but seems to be as follows: Because Judy Briscoe, a former Cingular employee who had done marketing for Cingular but had no contact with the plaintiffs, stated that she was “never aware” of an arbitration provision in Cingular’s Wireless Service Agreements, plaintiffs, in turn, must have been unaware of the arbitration terms, and could not validly have consented to arbitrate because the arbitration provision was not specially pointed out to them. *See* Tr. 26, 85. This ruling is erroneous for two reasons. First, because all three plaintiffs signed an acknowledgment that they read and understood the “Terms and Conditions” of the Agreements, Briscoe’s assertion about her own knowledge is irrelevant. Second, the district court’s contrary conclusion that Briscoe’s general assertions about unfamiliarity with the arbitration provision preclude enforcement of the provision is an arbitration-specific ruling that is impermissible under Section 2 of the FAA.

A. The District Court’s Finding That Plaintiffs Had Not Consented To Arbitrate These Disputes Is Squarely Refuted By The Record.

As we discussed above, all three plaintiffs in this case specifically admitted that they had read and understood the “Terms and Conditions” of the Agreements, which include the arbitration provision. Not only did they sign those Agreements

directly under an all-capital-letter acknowledgement, but during the course of this lawsuit each has again admitted as much. *See* pages 7-8, *supra*. Counsel for Cingular reminded the district court of these facts during the course of the hearing on the motion to compel arbitration. *See* Tr. 23, 79-80.¹⁴

Instead of addressing these acknowledgments, the court focused exclusively on the Briscoe affidavit. That affidavit, however, is simply irrelevant. Even if *everything* in the affidavit were true, and even if the district court were correct in presuming that Briscoe's marketing position "includes sales, even if she never did make a sale herself" (Tr. 84), nothing in the affidavit establishes that the three plaintiffs, despite their signed acknowledgments and subsequent judicial admissions, failed to consent to arbitrate.¹⁵ Thus, the district court's contrary conclusion is clearly erroneous.

¹⁴ During the course of briefing on the motion to compel arbitration plaintiffs submitted affidavits from Louviere and Gerhardt, asserting that no one had orally "explained" the arbitration provisions to them. The district court did not rely on this testimony in making its ruling. In any event, as we discuss below (at 31), this purported fact is irrelevant under Louisiana law.

¹⁵ The affidavit is in any event internally inconsistent, in that Briscoe claims familiarity with Cingular's Agreements but denies knowing that those Agreements include the arbitration provision that is clearly contained within them. *See* R.E. tab 15, at R. 901.

B. By Signing The Acknowledgments, Plaintiffs Are Conclusively Presumed Under Louisiana Law To Have Consented To The Arbitration Provision.

By signing the acknowledgment that they had read and understood the Agreements and the Terms and Conditions incorporated into those Agreements, plaintiffs are conclusively presumed to have consented to those contracts — including the provision requiring disputes to be arbitrated. “It is well settled in Louisiana law that knowledge of the content of an instrument is presumed if a signature is present on that instrument. A party cannot avoid an obligation merely by contending that he had not read it or did not understand it.” *Ladybug Shops, Inc. v. Am. Dist. Tel. Co.*, 374 So. 2d 183, 185-86 (La. Ct. App. 1979). “The law does not compel people to read or to inform themselves of the contents of an instrument which they may choose to sign, but it holds them to the consequences, in the same manner and to the same extent as though they had exercised those rights.” *McGoldrick v. Lou Ana Foods, Inc.*, 649 So. 2d 455, 460 (La. Ct. App. 1994). *See also Bud Fin. Co. v. Gilardi*, 330 So. 2d 622, 624 (La. Ct. App. 1976) (“One cannot avoid an obligation merely by contending that he had not read it, or that it was not read and explained to him, or that he did not understand its provisions.”).

The district court’s apparent belief that plaintiffs should not be held to have consented to the arbitration provision — because it was on the back of the Agreement or in the separate Terms and Conditions pamphlet — ignores established

Louisiana case law. It is undisputed that those Terms and Conditions were explicitly incorporated by reference on the front of the Agreement. *See* pages 5-6, *supra*; R.E. tabs 11-14. Thus, this case is indistinguishable from *Jayco Sales & Service, Inc. v. Smith*, 303 So. 2d 554 (La. Ct. App. 1974). In *Jayco*, the plaintiff rented the defendant various construction equipment, which was damaged while in the possession of the defendant. The defendant-lessee contended that it should not be held to indemnity and insurance clauses printed on the back of the rental agreement, but the court rejected this argument out of hand, stating:

[A] person signing a written document is presumed to know its content and cannot avoid the obligations contained therein by claiming that he did not read the instrument; and where attention is drawn to terms on the reverse of the form, those provisions are likewise binding on the parties. On the front of the agreement appears the wording ‘AND ON THE BACK HEREOF,’ giving reference to the stipulation that the defendant-lessee is subject to the terms and conditions written on both sides of the instrument. Defendant’s agent signed the rental agreement * * * and, therefore, the agreement becomes the law of the case.

Id. at 556 (citation omitted). Here, given that plaintiffs each signed an acknowledgment referencing the Terms and Conditions of the contract, they too must be held to the clauses incorporated by reference — including the arbitration provision.

Rather than applying this law, the district court seems to have believed that plaintiffs should be held to an agreement to arbitrate only if that contractual provision is specifically pointed out and explained to them. *See* Tr. 86. Simply put, this is not the law of Louisiana. As *Jayco*, *Ladybug Shops*, and *McGoldrick* demon-

strate, Louisiana law does not recognize a rule that one party must orally explain the contents of an agreement to the other for the contract to be enforceable.

In fact, the district court surely could not believe that there is any such *generally applicable* rule. If the drafter of a contract were required to point out each clause of every contract in order to prevent those clauses from being voidable at the will of the non-drafting party, commerce would screech to a halt. Instead, the district court clearly singled out arbitration clauses in consumer agreements as requiring a heightened standard of consent, based on its belief that such clauses are inherently unfair “because the consumer gives up practically all rights * * *.” Tr. 85. In so doing, the district court again violated section 2 of the FAA by invoking grounds other than ones that “exist at law or in equity for the revocation of *any* contract.” 9 U.S.C. § 2 (emphasis added).

Although the court referred in passing to Louisiana law governing contracts of adhesion (*see* Tr. 82, 88), it did not actually apply contract-of-adhesion law as developed by Louisiana courts in a variety of contexts *outside* of arbitration. Instead, the court zeroed in on the alleged unfairness of arbitration *qua* arbitration, especially in the context of form contracts. *Compare* Tr. 82, 88 with *McGoldrick*, 649 So. 2d at 460 (party to an adhesion contract must be held responsible for understanding the terms of the contract); *Jayco*, 303 So. 2d at 556 (holding plaintiff to terms contained in standard form contract because “a person signing a written

document is presumed to know its content and cannot avoid the obligations contained therein by claiming that he did not read the instrument”). This is exactly what section 2 of the FAA prohibits. In an analogous context, the Supreme Court struck down a provision of California franchise law that made arbitration clauses in franchise agreements unenforceable, explaining that “the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity ‘for the revocation of *any* contract,’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.” *See Southland*, 465 U.S. at 16 n.11 (quoting 9 U.S.C. § 2) (emphasis in *Southland*). Substitute the words “consumer contracts” or “contracts of adhesion” for “contracts subject to the California Franchise Investment Law,” and the instant case is indistinguishable from *Southland*.

Because there is no basis in Louisiana law for requiring that every term in every contract be specifically pointed out, explained, and understood, the inescapable conclusion is that the district court found plaintiffs’ consent to be inadequate out of impermissible hostility to arbitration. *See Allied-Bruce*, 513 U.S. at 281 (“What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”). Therefore, *even if* plaintiffs were not in fact aware of the agreement to arbitrate contained in the contracts they signed — a conclusion that the record does

not support — because Louisiana law “holds them to the consequences” of those agreements (*McGoldrick*, 649 So. 2d at 460), the district court’s conclusion that plaintiffs did not validly consent to arbitrate their disputes must be reversed.

III. THE DISTRICT COURT ERRED IN HOLDING THREE SPECIFIC TERMS OF THE WIRELESS SERVICE AGREEMENTS TO BE UNCONSCIONABLE.

Finally, none of the contractual provisions on which the district court focused — alone or in combination — justifies its decision not to enforce the plaintiffs’ agreements to arbitrate these disputes.

A. The Change-In-Terms Provision Provides No Basis For Finding The Arbitration Provision To Be Unenforceable.

The district court’s holding that the change-in-terms provision contained in the Agreements renders the separate arbitration provision unenforceable was based on the court’s disdain for arbitration, and cannot stand. When properly analyzed, this provision is completely unproblematic under Louisiana law.

1. The change-in-terms provision in plaintiffs’ Agreements is *not* part of the arbitration provision; rather, it is a separate, general term that applies to the entirety of those contracts. Nevertheless, in deeming the change-in-terms provision objectionable, the district court invalidated only the arbitration provision, not the entire Agreement. The district court did not find — nor have plaintiffs alleged — that Cingular ever in fact changed the arbitration provision to plaintiffs’ detriment. Rather, the court concluded that the mere *existence* of this provision rendered the

separate arbitration provision unconscionable, explaining that “[t]his idea that the company can change the terms and conditions of the arbitration agreement or any other terms and conditions also calls into question the idea of, again, adhesionary issues.” Tr. 88; *see also id.* at 48 (the ability to change the terms of a contract “sounds pretty one-sided to me”).

However, neither plaintiffs nor the district court disputed the existence of a contract *generally*. To the contrary, by bring claims for breach of contract, plaintiffs are seeking to enforce provisions of their Agreements (or, more accurately, their idiosyncratic interpretation of those provisions) *despite* the change-in-terms provision, while at the same time arguing that the arbitration provision may not be enforced *because of* the change-in-terms provision. This is precisely the sort of arbitration-specific approach that the FAA bars. It is well established that “[s]tates may not * * * decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.” *Allied-Bruce*, 513 U.S. at 281. In other words, a court may not “train[] on and uphold[] a * * * precise, arbitration-specific limitation” that would not apply to other contractual terms under relevant state law. *Doctor’s Assocs.*, 517 U.S. at 687 n.3.¹⁶

¹⁶ To the extent plaintiffs’ attack on the change-in-terms provision could be deemed to be a challenge to the validity of the Agreement as a whole, plaintiffs must raise such a challenge in arbitration, not before a court. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

The district court's ruling would be arbitration-neutral only if there were extant Louisiana case law holding that signatories to form contracts could use the existence of a change-in-terms provision to void the entire contract — or any portion of that contract — at any time. For example, Louisiana law would have to permit a consumer to avoid the early termination fee in Cingular's contracts merely because those contracts contain a change-in-terms provision — without regard to whether Cingular ever invoked the change-in-terms provision to add or alter the termination fee. That anarchic approach is not the law in Louisiana, or anywhere else for that matter.

Instead, under generally applicable Louisiana law it is clear that the Agreements as a whole are valid, enforceable contracts despite the change-in-terms provision. As we discussed above (at 26-27), under Louisiana law *contracts must be examined for consideration as a whole, not piecemeal*. Thus, Louisiana courts have upheld numerous contractual provisions that gave one party unilateral rights. *See, e.g., Long*, 136 So. 2d at 52 (upholding one party's unilateral ability to cancel a contract); *Martin-Parry*, 60 So. 2d at 86 (upholding one party's unilateral right to enforce a non-compete agreement); *Seals*, 758 So. 2d at 293 (upholding one party's unilateral right to cancel employment for any reason); *Shepard v. Phycor of Ruston, Inc.*, 711 So. 2d 288 (La. Ct. App. 1997) (same); *Caddo*, 342 So. 2d 1196 (same regarding contract for purchase of flour).

Here, Cingular has provided consideration in the Agreements; it is obligated under the Agreements to provide plaintiffs with cellular service, and has consistently done so. Furthermore, Cingular is obligated *by the change-in-terms provision itself* to provide its customers with notice before making any changes to those contracts, and, in the case of major changes, to offer plaintiffs the right to cancel those contracts without penalty rather than to accept the alteration. *See* page 7, *supra*. Thus, the contracts plainly are not illusory, and under generally applicable Louisiana law must be enforced. Because the district court instead focused specifically on the enforceability of the arbitration provision, the court ran afoul of the FAA.

2. The two cases plaintiffs cited below — *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002), and *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) — suffer from the same flaw as the district court’s decision: both focus specifically on arbitration provisions, rather than on the effect of a change-in-terms provision on contracts as a whole.¹⁷

¹⁷ In any event, the change-in-terms provisions in those cases, unlike Cingular’s, did not specify that the defendants would give notice to their customers before making any change. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003) (*en banc*) (enforcing arbitration agreement because “unlike in *Floss*, in this case Circuit City had the authority to alter the agreement on only one day of each year and had to provide its employees with thirty days’ notice before doing so”); *Stadtlander v. Ryan’s Family Steakhouses, Inc.*, 794 So. 2d 881 (La. Ct. App. 2001) (enforcing the same arbitration agreement as the one at issue in

Although the Louisiana court of appeals, in a divided decision, recently refused to enforce an agreement to arbitrate because of a change-in-terms provision (see *Simpson v. Grimes*, 849 So. 2d 740, 748 (La. Ct. App. 2003)), that decision also suffers from the same flaw as the district court’s decision in this case. The court reasoned that, “[b]y retaining the right to modify at will any and all provisions of the agreement in question, [the defendant] allows itself an escape hatch from its promise to be * * * bound to arbitrate all disputes arising between the parties.” *Id.* In other words, the court inappropriately focused specifically on the enforceability of the arbitration provision, rather than applying generally applicable Louisiana law regarding consideration and mutuality. Therefore, this holding must be rejected under section 2 of the FAA as an *ad hoc*, arbitration-specific decision. See *id.* at 754-55 (Amy, J, dissenting). In any event, *Simpson* is not an accurate articulation of Louisiana law, which is better exemplified by *Stadtlander*. There, the Louisiana Court of Appeals enforced an arbitration agreement over the dissent’s objection that the contract included a change-in-terms provision. See 794 So. 2d at 893 (Peatross, J., dissenting).

3. Even if there were something problematic about the change-in-terms provision in the Agreements, the district court erred by not severing *that* provision

Floss under Louisiana law); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1214 (E.D. Okla. 2003) (arbitration agreement that provides for notice of change in terms is valid and distinguishable from provision invalidated in *Dumais*).

and enforcing the arbitration provision as drafted. As discussed above (*see* page 7, *supra*), the Agreements contain a severance clause. Furthermore, in order to preserve the intent of the parties, Louisiana law generally requires a court to sever invalid provisions of a contract and enforce valid ones. *See, e.g., Starke Taylor & Sons, Inc. v. Riverside Plantation*, 301 So. 2d 676 (La. Ct. App. 1974). The Agreement’s arbitration provision plainly is more important than its change-in-terms provision; it is the **only** provision specifically highlighted in the introductory paragraph of the “Terms and Conditions.” *See* R.E. tabs 9, 10. Thus, the only explanation for the district court’s decision to refuse to enforce the arbitration provision instead of striking the change-in-terms provision is that the court was inappropriately biased against arbitration.

B. The Bar On Class Actions Is Not Unconscionable.

The district court also erred in holding that the clause barring arbitrators from “order[ing] consolidation or class arbitration” (*see* page 6, *supra*) is unconscionable.

1. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court strongly suggested that it is not unconscionable to bar class actions in arbitration agreements governed by the FAA. The plaintiff in *Gilmer* argued that disputes under the Age Discrimination in Employment Act (“ADEA”) should not be subject to arbitration because, *inter alia*, arbitration procedures “do not pro-

vide for * * * class actions.” *Id.* at 32. The Court rejected this challenge, 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).

Since *Gilmer*, numerous 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.*, 55 F.3d 269, 276-277 (7th Cir. 1995). 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*, 225 F.3d 366, 369 (3d Cir. 2000).

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 enforceable unless the legislature expressly intended to create a non-waivable right to bring a class action suit. *See, e.g., Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003);

Johnson, 225 F.3d at 369; *Champ*, 55 F.3d at 276-277; *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-819 (11th Cir. 2001); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (E.D. La. Feb. 7, 2003); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1076-1077 (C.D. Cal. 2002); *Vigil v. Sears Nat'l Bank*, 2002 WL 987412, at *4 (E.D. La. May 10, 2002); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001); *Zawikowski v. Beneficial Nat'l Bank*, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-167 n.23 (Haw. 1996); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1270-1271 (Wash. Ct. App. 2001); *cf. Burden v. Check Into Cash of Ky., L.L.C.*, 267 F.3d 483, 492-93 (6th Cir. 2001) (remanding case to district court to decide unconscionability challenge to arbitration agreement, but noting that class action waiver was likely valid under existing law), cert. denied, 535 U.S. 970 (2002).

No Louisiana appellate court has held that contractual waivers of class actions are per se unconscionable. Nor, given the vast majority of courts that have approved of such waivers, is there any reason to believe that the Louisiana courts

would find such agreements to be problematic. Thus, the district court erred by manufacturing this novel rule of Louisiana law. Furthermore, because the district court created this new rule *specifically in the arbitration context*, *ipso facto* it violated Section 2 of the FAA. *See Perry*, 482 U.S. at 493 n.9 (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*”) (emphasis in original).

2. That the right to bring a class action cannot be so fundamental as to make it unwaivable is clear from the history of this procedural device. The modern class action is “something out of the ordinary, an essentially new turn in legal events.” Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977). Although legal historians at one time viewed the modern class action as a descendant of representative actions in seventeenth-century English chancery, more recent research shows those representative actions to have been more like “archaic remnants of a medieval social and litigative structure” than forerunners of the modern class action. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 136 (1987). “Seventeenth-century group litigation is not about the legal rights of aggregated individuals but about the residual incidents of status flowing from membership in agricultural communities poised at the edge of a market econ-

omy.” *Id.* Notably, “none” of those group cases involved “actions for money damages.” *Id.* at 135. Even today, damages are not available in representative actions in England except in limited circumstances. *See* Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT’L L. 249, 253 (2001).

In the United States, what we now think of as class actions did not exist until relatively recently. The United States Supreme Court’s initial rules of practice for federal courts of equity, 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.*, 527 U.S. 815, 832 (1999); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 97 (J. Gould 10th rev. ed. 1892). 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.*, 208 U.S. 38, 58-59 (1908); *Christopher v. Brusselback*, 302 U.S. 500, 505 (1938). 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 Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 381 (1967).

“[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*, 521 U.S. 591, 613 (1997)). 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 Louisiana state courts are of even more recent vintage. Class actions have no historic roots in civil law. See Stephen H. Kupperman & David G. Radlauer, *Louisiana Class Actions*, 74 TUL. L. REV. 2047, 2050 (2000). Although the Louisiana judiciary first recognized the possibility of a representative action in 1927, it was only in 1960 that the Louisiana legislature adopted any rules for class actions, which were “far more restrictive than [their] Federal Rules counterpart.” Donald C. Massey *et al.*, *Curtailing the Tidal Surge: Current Reforms in Louisiana Class Action Law*, 44 LOY. L. REV. 7, 32 (1998). It was only in **1997** that the state adopted class action rules approximating the liberality of the 1966 Federal Rules. See Kupperman & Radlauer, 74 TUL. L. REV. at 2051-2053.

For most of their histories, then, neither the American legal system in general, nor Louisiana’s legal system in particular, provided for class-wide resolution of individual claims, and 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 *essential* to prevent dispute resolution procedures from being unconscionable, even if it is a *desirable* litigation option in certain circumstances.

3. According to the district court, the class-action waiver is unconscionable because Cingular is not “giving anything up” in exchange for it. *See* Tr. at 28, 86. This “bilaterality” argument derives almost exclusively from *Ting*, 319 F.3d 1126, in which the Ninth Circuit purported to apply *California* law to hold that, because AT&T was unlikely to bring a class action against its customers, the class action waiver in its service agreement lacks mutuality and is therefore void. *See* 319 F.3d at 1150. But even if *Ting* correctly interpreted California law, there are at least two reasons why, under *Louisiana* law, there is nothing problematic about the class-action waiver at issue in this case.

First, under Louisiana law *no* arbitral class-action waiver is invalid, so long as the contract in which it is contained, as a whole, is supported by adequate consideration. “Bilaterality” is simply another word for mutuality, and, as we discussed above, Louisiana contract law does not require mutuality at all, much less mutuality of specific contractual terms. *See* pages 26-27, *supra*. The vast majority

of courts have held, as the Sixth Circuit recently explained, that “mutuality is not a requirement of a valid arbitration clause if the underlying contract is supported by consideration.” *Fazio*, 340 F.3d at 397.

Second, even if this Court were to adopt *Ting* and find that in the abstract a class-action waiver could be unconscionable under Louisiana law, that would not be a sufficient basis for invalidating the *specific* class-action waiver involved here. Although *Ting* itself provides barely any explanation for its holding, the California case on which the Ninth Circuit principally relied reasoned that class actions are essential to ensure that consumers have a means of pursuing claims that are small in relation to litigation costs. *See Szetela*, 97 Cal. App. 4th at 1101 (cited in *Ting*, 319 F.3d at 1150). That concern has no place in this case. As the district court itself recognized (*see* Tr. 26, 70, 88), Cingular has offered to pay the full cost of arbitration, and to reimburse plaintiffs for their attorneys’ fees in the event the arbitrator awards them the amount they seek or more. *See* page 9, *supra*. Thus, it is not impractical in the slightest for plaintiffs to seek to vindicate their rights in arbitration. In fact, if they prevail, arbitration will prove to be significantly less expensive for them than prosecuting a class action would have been. Moreover, Cingular’s arbitration provision does not limit plaintiffs or other customers only to arbitration; it also affords them the opportunity to pursue their claims in small claims court. Such a forum is speedy, simple, and inexpensive and therefore, like arbitra-

tion, is a fully adequate means for plaintiffs to resolve their disputes with Cingular. *Cf. Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894-96 (Ill. App. Ct. 2003) (rejecting unconscionability challenge to class action ban where, as here, contract allowed either party to proceed in small-claims court and defendant had offered to pay costs of arbitration).

4. In any event, *Ting* is based on a fundamentally flawed understanding of the FAA. The fact that a prohibition on class arbitration cannot render an arbitration provision unenforceable flows from the very reasons for allowing arbitration in the first place.

Section 2 of the FAA makes 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,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling.” H.R. REP. NO. 97-542, at 13 (1982). More recently, Congress reaffirmed its view that arbitration helps avoid the “delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation.” Y2K Act of 1999, Pub. L. No. 106-37

§ 2(a)(3)(B)(iv), 106 Stat. 185. The U.S. Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985). It cannot be inherently unfair or unconscionable to preclude use of a procedural device that would destroy these arbitral benefits. Yet that is precisely what would result from adopting the district court’s view that an arbitration agreement that does not allow for class action procedures is unenforceable.

Arbitration is “a less expensive alternative to litigation” (*Allied-Bruce*, 513 U.S. at 280-281), in large part because it resolves disputes more quickly. In contrast to the “law’s delay” (WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1), the average length of an AAA arbitration from filing to award is less than six months. *Allied-Bruce*, 513 U.S. at 280 (citing AAA Amicus Brief). Arbitration expedites dispute resolution and otherwise reduces costs by eliminating or significantly reducing pre-hearing motion practice and discovery, and by severely limiting the bases for appeal.

In contrast, class actions take years. Certification of a class requires notice to potential class members and inquiry into such issues as the adequacy of the purported representatives, conflicts within the proposed class, the commonality of issues of fact and law, and manageability. Moreover, the certification process would be far from the only source of costly delays. Confronted with the threat of an eight

or nine-digit class-wide judgment, defendants would surely demand — and have a due process right to — the procedural safeguards attendant to traditional litigation, such as discovery, dispositive motions, and more expansive appellate review. All of these procedures, of course, make arbitration more expensive and more time consuming. And as arbitration becomes more like litigation, there ultimately will be little point in opting for arbitration in the first place. Thus, the result of affirming the district court’s decision would not be fairer or more efficient arbitration — but rather *more litigation* and *less arbitration*. Given the “national policy favoring arbitration” (*Southland*, 465 U.S. at 10), it is therefore unsurprising that so many courts have found there to be nothing unconscionable about a class-action waiver in an arbitration agreement.

C. The Agreement To Keep Arbitral Proceedings Confidential Is Valid And Enforceable.

Finally, the district court’s decision that the confidentiality requirement contained in the arbitration provision is unconscionable was based on impermissible hostility towards arbitration. According to the court, the confidentiality requirement is problematic because, in light of the waiver of class relief, plaintiffs would unfairly be deprived of “the whole purpose of arbitration or litigation,” which is “the value of precedent.” Tr. 86. This analysis has no basis in fact or law.

First, *Gilmer* demonstrates that the “value of precedent” is an insufficient reason to invalidate a confidentiality agreement. In *Gilmer*, the Supreme Court

held that a confidentiality requirement did not render an arbitration provision unenforceable, despite the fact that the lawsuit at issue was brought to enforce the important federal policies contained in the ADEA. As the Court explained, even if some litigation were precluded by arbitration agreements, individuals who have not entered such agreements are still able to litigate their similar claims. *See* 500 U.S. at 32. Furthermore, any objection to confidentiality requirements in arbitration agreements would “apply equally to settlements of ADEA claims, which * * * are clearly allowed.” *Id.*

The same reasoning applies here. Just because plaintiffs have signed arbitration agreements does not mean that the “rounding-up” policies about which they complain will never be subject to litigation in a court of general jurisdiction. Customers who have not agreed to arbitrate disputes with their cellular carriers could sue to challenge such policies, as could the Louisiana attorney general — who is statutorily authorized to enforce the LUTPA, the statute under which plaintiffs bring some of their claims. *See* La Stat. § 51:1407. And, as we discuss below (at 52-53), plaintiffs themselves could bring this case in small claims court.

Second, confidentiality is normally considered to be a *benefit* of arbitration, and in fact a *neutral* benefit that both parties entering into a contract may desire. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n.4 (1st Cir. 1999) (“Each side may * * * prefer arbitration because of the confidential-

ity * * * that comes with arbitration.”). For that very reason, the American Arbitration Association has adopted confidentiality provisions in its Consumer Due Process Protocol. See Principle 12(2), available at http://www.adr.org/index2.1.jsp?JSPssid=15769&JSPsrc=upload/LIVESITE/Rules_Procedures/Protocols/.../Resources/EduResources/consumer_protocol.html.

Here, the confidentiality provision provides obvious benefits to Cingular’s customers. For example, if Cingular were to bring an arbitration against a customer for non-payment, Cingular could not share any information about the case with any other person, including lenders and other potential creditors. More broadly, the more arbitration comes to resemble litigation, the more costly it becomes for both parties. If arbitrators became free to issue “precedent,” protracted negotiations would likely ensue over whether to include other court-like procedures, such as three-member panels, lengthy discovery periods, and heightened judicial review standards. Consumers would bear the ultimate burden of these protracted negotiations and arbitration proceedings through higher prices. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting circumstances in which cruise line may be sued leads to reduced fares for passengers).

Third, because consumers are free under Cingular’s Agreements to go to small claims court, the confidentiality provision does not deny plaintiffs the oppor-

tunity to be heard in a public forum. The district court's speculation that Cingular might argue in small claims court that the confidentiality requirement applies in small claims court (Tr. 86) is belied by the placement of that requirement within the arbitration provision, and self-evidently is the product of a desire to find a way to invalidate the arbitration provision. The very purpose of the FAA was to "reverse * * * judicial hostility to arbitration" (*Gilmer*, 500 U.S. at 24), and it therefore is well established that "all doubts concerning the arbitrability of claims should be resolved *in favor* of arbitration." *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) (emphasis added); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability").

Finally, even if the district court were correct in holding the confidentiality provision to be unconscionable, it should have severed the provision and enforced the remainder of the contract. *See* pages 39-40, *supra*. Given the fact that the Agreements authorize the parties to bring claims in small claims court (where confidentiality is not required), it is evident that the parties did not view the confidentiality requirement to be central to their contract. *Cf. Ortiz v. Winona Mem'l Hosp.*, 2003 WL 21696524, at *3 (S.D. Ind. June 4, 2003) ("Even if the confidenti-

ality rules [in an arbitration agreement] were considered unconscionable * * *, and this court does not find that they are, it seems that the confidentiality rules would be collateral to the main purpose of the arbitration agreements and, thus, severable from the agreements.”¹⁸

* * *

Rather than implementing the “national policy favoring arbitration” (*Southland*, 465 U.S. at 10), the district court repeatedly demonstrated its disdain for voluntary arbitration agreements. Its decision not to enforce the parties’ agreement to arbitrate this dispute cannot withstand review.

¹⁸ In the event this Court concludes that the confidentiality provision is unconscionable — and further that Louisiana law does not permit it to be severed — Cingular hereby offers to waive its enforcement. Federal courts have routinely held that parties are entitled to waive specific provisions of an arbitration agreement that have been attacked in order to salvage the broader agreement. *See, e.g., Livingston*, 339 F.3d at 557; *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) (“Conseco’s offer to pay the costs of arbitration and to hold the arbitration in the Larges’ home state of Rhode Island mooted the issue of arbitration costs.”); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002); *Nelson v. Insignia/ESG, Inc.*, 215 F. Supp. 2d 143, 157 (D.D.C. 2002); *Baughner v. Dekko Heating Techs.*, 202 F. Supp. 2d 847, 850 (N.D. Ind. 2002); *Nur v. K.F.C., USA, Inc.*, 142 F. Supp. 2d 48, 52 (D.D.C. 2001).

CONCLUSION

This Court should reverse the district court's order, and remand with instructions to compel individual arbitration of each plaintiff's claims and stay litigation pending those individual arbitrations.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2003, I served two bound copies of the foregoing brief, as well as one copy of that brief in PDF format on a 3.5" floppy diskette, by overnight delivery on the parties herein, at the following addresses:

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CERTIFICATE OF COMPLIANCE

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 13,340 words, which is fewer than the number specified in Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

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