

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

REPLY BRIEF OF APPELLANT CINGULAR WIRELESS LLC

Gary J. Russo
PERRET, DOISE A.P.L.C.
Suite 1200
600 Jefferson Street
Lafayette, LA 70502
(337) 262-9000

Evan M. Tager
David M. Gossett
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Seamus C. Duffy
William M. Connolly
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215) 988-2440

Counsel for Appellant Cingular Wireless LLC

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INTRODUCTION

As we demonstrated in our opening brief, the district court's refusal to enforce plaintiffs' arbitration agreements was fundamentally inconsistent with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and must be reversed. Plaintiffs have not even *attempted* to defend the district court's ruling on either of the two principal grounds on which it was based — that the arbitration agreements were non-mutual and therefore did not constitute valid contracts, and that plaintiffs never in fact validly consented to arbitrate their disputes with Cingular. Instead, plaintiffs rely solely on the argument that the arbitration agreements are unconscionable for various reasons. But that argument, even if based on an accurate interpretation of Louisiana law (which it is not), is contaminated with the sort of arbitration-specific analysis that the FAA expressly precludes, and thus must be rejected as a matter of *federal* law.

Under the FAA, "States 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. 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 Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). In other words, 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., Inc. 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.*

The district court’s ruling was based on precisely the sort of analysis that the Supreme Court forbade in *Allied-Bruce* and *Casarotto*. So too are plaintiffs’ arguments in their brief, as are the handful of decisions — such as *Sutton’s Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 776 So. 2d 589 (La. Ct. App. 2000), *Simpson v. Grimes*, 849 So. 2d 740 (La. Ct. App. 2003), and *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 124 S. Ct. 53 (2003) — on which plaintiffs repeatedly rely. Although plaintiffs acknowledge in passing that Louisiana law cannot single out an agreement to arbitrate for stricter scrutiny than would apply to any other agreement (*see* Plaintiffs’ Br. 8), that is precisely what they then proceed to attempt to convince this Court to do.

Thus, while castigating us for questioning *Sutton’s Steel* and *Simpson* as interpretations of Louisiana law (*see* Plaintiffs’ Br. 18 & n.15), plaintiffs never in fact engage our argument that, because those decisions single out arbitration clauses as being especially problematic, they are based on the type of analysis precluded under the FAA. Whether Louisiana law inappropriately singles out arbitra-

tion for disfavored treatment is a matter of federal law, as to which this Court owes no deference to the state courts of Louisiana. *See, e.g., Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995) (“It is beyond cavil that we are not bound by a state court’s interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question.”). So, for example, even if the *Simpson* court were correct that under Louisiana law a generic change-in-terms provision in a contract invalidates an arbitration provision in that contract — despite not invalidating the contract as a whole — the FAA would preempt that aspect of Louisiana law, and would require the courts to enforce the arbitration provision. *See* page 10, *infra*; *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984).

In other words, we do not dispute the basic legal proposition underlying much of plaintiffs’ brief: Louisiana may refuse to enforce a contract — including an agreement to arbitrate a dispute — based on generally applicable principles of the state’s “unconscionability” law. *See* Plaintiffs’ Br. 9 & n.7. That commonplace is of no help to plaintiffs, however, because what they actually seek is the application of a different, stricter unconscionability analysis to an agreement to arbitrate than would apply to other contractual provisions.¹ Once that gerrymandered

¹ Plaintiffs’ assertion that they are not in fact asking this Court to hold arbitration agreements to a stricter standard, because those agreements are “*the only*

approach is rejected, it is evident that the arbitration agreements at issue in this case must be enforced.

I. PLAINTIFFS DO NOT DEFEND EITHER OF THE DISTRICT COURT’S TWO PRINCIPAL GROUNDS FOR REFUSING TO ENFORCE CINGULAR’S ARBITRATION PROVISION.

The most remarkable aspect of plaintiffs’ brief is its abandonment of the district court’s two principal reasons for refusing to enforce Cingular’s arbitration provisions. The district court’s primary ground for refusing to enforce those provisions was its belief that they afford Cingular the right to bring litigation in courts of general jurisdiction while providing no similar option for Cingular’s customers, and hence lack “balance.” *See* Tr. 28, 83-85, 90-91; Cingular Br. 10-12, 23-25. As we demonstrated in our opening brief, this core underlying assumption was clearly erroneous as a factual matter; the arbitration provisions allow either party to bring a claim in small claims court, but preclude either party from bringing an action in a court of general jurisdiction.²

clause[s] that Plaintiffs have attacked” (Plaintiffs’ Br. 13 (emphasis in original)) misses the point. Under the FAA, an arbitration provision contained in a contract may be found to be unconscionable only if a similar attack on another clause with similar features would also be successful. *See Allied-Bruce*, 513 U.S. at 281. Plaintiffs point to no case or code provision outside the arbitration context that applies the grounds used by the district court to invalidate contractual terms that are unrelated to arbitration.

² We also explained why, even if the agreements had been “non-mutual” in the manner assumed by the district court, they would nonetheless have been enforceable under generally applicable principles of Louisiana contract law. *See*

In response, *plaintiffs do not dispute that Cingular's arbitration provision is fully mutual*. Cf. Plaintiffs' Br. 34-36 (raising non-mutuality as an argument only against defendant Centennial). Thus, plaintiffs have *conceded* that the district court's primary ground for refusing to compel arbitration — both as an independent reason to question the arbitration agreement, and indirectly as a lens through which to analyze plaintiffs' other arguments for why arbitration might be inappropriate — had no basis in fact or law. See, e.g., *In re Municipal Bond Reporting Antitrust Litig.*, 672 F.2d 436, 439 n.6 (5th Cir. 1982) (“matter is considered waived” where party's brief contains no argument on it).

Similarly, in the district court plaintiffs argued — and the district court found — that plaintiffs either had not “consent[ed] to — or [lacked] knowledge of the terms of arbitration.” Tr. 85. In so arguing, plaintiffs relied heavily on the affidavit of a former Cingular employee, Judy Briscoe. See Cingular Br. 14. But as we showed in our opening brief, there is no dispute that the plaintiffs each received and signed their Agreement with Cingular, that each specifically signed an acknowledgment that he or she had read and understood the Terms and Conditions containing the arbitration provision, and that under Louisiana law those signed acknowledgments constitute conclusive proof that plaintiffs were aware of and consented to the arbitration provision. See Cingular Br. 29-34. We also explained that

Cingular Br. 25-28.

the Briscoe affidavit is irrelevant to this litigation, because the question whether Briscoe was aware of the arbitration provisions has no bearing on the question whether *plaintiffs* were aware of that provision.

Again, plaintiffs make no response whatsoever, neither mentioning the Briscoe affidavit in the argument section of their brief nor asserting that they did not validly consent to the arbitration provision. Among other things, this implicit concession that they read and understood the arbitration provision (or must be held to have done so as a matter of law) dooms plaintiffs' argument that the arbitration provision's type size was unconscionably small. *See* Section II.D, *infra*.

Having conceded that the district court made two fundamental errors in analyzing the enforceability of their arbitration agreements with Cingular, plaintiffs nonetheless raise a hodgepodge of arguments for why, despite their knowledge and consent to the arbitration provision, that provision should be held to be unenforceable. As we show below (*see* Section II, *infra*), those arguments are meritless.

II. CINGULAR'S ARBITRATION PROVISION IS NOT UNCONSCIONABLE.

Having abandoned the district court's two primary grounds for refusing to enforce the arbitration provisions, plaintiffs are left arguing that those provisions are unconscionable under Louisiana law, and therefore unenforceable. With respect to Cingular, plaintiffs raise four grounds for finding the contract to be unconscionable — including one that even the district court rejected.

Before turning to the specifics of plaintiffs' unconscionability arguments, we first address two overarching points that plaintiffs have raised in making these arguments. First, with the self-evident objective of justifying their (and the district court's) heavy reliance on the Ninth Circuit's decision in *Ting*, plaintiffs assert that Louisiana's law of unconscionability is similar to California's law of unconscionability. As we demonstrated in our opening brief (at 26-27, 31-34, 37-38, 46-47), however, to the extent that *Ting* constitutes an accurate understanding of California law, generally applicable principles of Louisiana contract law (expressed in such cases as *Martin-Parry Corp. v. New Orleans Fire Detection Serv.*, 60 So. 2d 83 (La. 1952); *McGoldrick v. Lou Ana Foods, Inc.*, 649 So. 2d 455 (La. Ct. App. 1994); *Ladybug Shops, Inc. v. American District Telegraph Co.*, 374 So. 2d 183 (La. Ct. App. 1979); and *Jayco Sales & Service, Inc. v. Smith*, 303 So. 2d 554 (La. Ct. App. 1974)) are to the contrary. Moreover, even if there were some basis for concluding that Louisiana's law is the same as California law and even if such a conclusion would dictate a holding that Cingular's arbitration agreement is unconscionable under Louisiana law, the question then becomes whether that law arose to govern contracts generally or instead is an arbitration-specific creation that is preempted by the FAA. That, of course, is a question of federal law as to which plaintiffs' effort to piggyback on California law is irrelevant.

Second, plaintiffs repeatedly assert that under Louisiana law a contract is interpreted against the party that drafted it. *See* LA. CIV. CODE. art. 2056; Plaintiffs’ Br. 5, 11-12, 40. As the Louisiana Court of Appeal has explained, however, even “[w]hen the contract is a standard form contract, a provision in a contract should be interpreted against the party who furnished its text ***only in cases of doubt that cannot be otherwise resolved.***” *McGoldrick*, 649 So. 2d at 458 (citing LA. CIV. CODE art. 2056) (emphasis added); *Miguez & Leckband v. Holston’s Ambulance Serv., Inc.*, 614 So. 2d 150, 153 (La. Ct. App. 1993).³ Here, there is no dispute as

³ Plaintiffs attempt to evade the devastating force of *McGoldrick* by pointing out that the Louisiana Court of Appeal affirmed a trial court finding in that case that the form contract at issue was not a contract of adhesion. Plaintiffs’ Br. 13 n.12. As the opinion makes clear, however, the issue there was whether the entire contract could be avoided on the ground that the non-drafting party had not “‘actually consented to the terms.’” 649 So. 2d at 460 (quoting *Golz v. Children’s Bureau of New Orleans, Inc.*, 326 So. 2d 865, 869 (La. 1976)). Among other things, the court considered the facts that the standard form contract at issue was only three pages long, that the particular term in dispute was in the same size lettering as the rest of the agreement, and that the party contesting the agreement had signed it and was sufficiently sophisticated to be expected to understand what he had signed. *Id.* Here too, the agreement was short (only two legal-sized pages), the arbitration provision was in the same size print as the rest of the agreement, and plaintiffs each specifically acknowledged reading and understanding the terms and conditions. Moreover, plaintiffs adduced no evidence that they were illiterate, uneducated, or otherwise could be expected to be unable to understand what they had signed. Accordingly, the holding that the contract in *McGoldrick* was not unenforceable is fatal to their arguments.

to the *meaning* of the contracts between Cingular and plaintiffs; the dispute is only about whether that contract is enforceable.⁴

Turning to the specifics of plaintiffs' four unconscionability challenges, three are arguments that we have already addressed at length in our opening brief. In response to our arguments, plaintiffs basically just reiterate that *Ting* and *Sutton's Steel* support the district court's ruling. That we do not dispute — but we already demonstrated at length in our opening brief why those decisions, and others like them, are based on an unacceptable interpretation of the FAA. The fourth unconscionability argument that plaintiffs now make — that the font size in which the arbitration provision was presented was too small — was *rejected* by the district court. *See* Cingular Br. 15 n.12. It is also inconsistent with plaintiffs' signed acknowledgment that they read and agreed to the terms and conditions, including the arbitration provision (*see* Cingular Br. 7-8), and with plaintiffs' implicit acknowledgment that under Louisiana law they are therefore conclusively presumed to have understood and accepted that provision (*see* pages 5-6, *supra*). In any event, as we show below, that argument, too, fails as a matter of Louisiana law.

⁴ The fact that under Louisiana law (as elsewhere) good faith governs all aspects of the performance of a contract (*see* Plaintiffs' Br. 6, 12, 25, 30; LA. CIV. CODE art. 1983) is equally irrelevant. The issue before this Court has nothing to do with Cingular's performance of its contractual obligations; rather, it has to do with whether plaintiffs' refusal to comply with *their* contractual obligation to arbitrate is excusable on the ground that Cingular's arbitration provision is unconscionable.

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

In our opening brief, we explained why the existence of the change-in-terms provision in the Wireless Service Agreements does not render the separate arbitration provision unconscionable. *See* Cingular Br. 35-40. There is no question that the parties to this litigation have entered into valid contracts — and plaintiffs do not contend otherwise. Plaintiffs’ argument therefore entails using one generally applicable term of that *otherwise-valid contract* to attack a single provision in that contract — the arbitration provision. That, however, is precisely the type of arbitration-specific attack that is forbidden by the FAA. *See, e.g., Allied-Bruce*, 513 U.S. at 281.

Plaintiffs’ response merely replays arguments that we addressed in our opening brief. Thus, plaintiffs spend two-and-a-half pages discussing *Simpson v. Grimes*, 849 So. 2d 740 (La. Ct. App. 2003), which, as we explained, is utterly inconsistent with the FAA. The decision inappropriately struck down an arbitration provision because of a generally applicable change-in-terms provision in the same agreement — without identifying any Louisiana law indicating that the presence of a change-in-terms provision renders an entire contract voidable at the will of the non-drafting party. *See* Cingular Br. 39. We also explained in our opening brief that *Simpson*, a decision from the Louisiana Court of Appeal, is affirmatively inconsistent with controlling Louisiana law as expressed by the Louisiana Supreme

Court — under which the consideration and mutuality of a contract must be considered as a whole, rather than piecemeal. *See* Cingular Br. 26-27, 37. Ostrich-like, plaintiffs ignore both points.⁵

The unarticulated rationale underlying plaintiffs’ argument — that Cingular might someday use the change-in-terms provision to escape from its commitment to arbitrate (*see* Plaintiffs’ Br. 19, 22) — is a convenient figment of their imagination that cannot suffice to render illusory the parties’ agreement to arbitrate all disputes between them. There is no evidence *whatsoever* that Cingular has any intention to use the change-in-terms provision for the purpose of exempting itself from the duty to arbitrate. If Cingular *were* to use the change-in-terms provision for this purpose, moreover, that might supply a ground for claiming in a subsequent case that the obligation on the part of customers to arbitrate their claims is illusory.⁶

⁵ Plaintiffs do stop long enough to criticize our reliance on *Stadtlander v. Ryan’s Family Steakhouses, Inc.*, 794 So. 2d 881 (La. Ct. App. 2001). As we indicated in our opening brief, *Stadtlander* implicitly rejected the argument raised by the dissent there — and subsequently accepted by a different Court of Appeal in *Simpson* — that a generally applicable change-in-terms provision could render an arbitration provision within the same contract unconscionable. It is self-evident from *Stadtlander*’s lengthy discussion of the “overwhelming state and federal policy favoring arbitration” (*id.* at 889), that the majority fully considered and rejected this arbitration-specific attack.

⁶ As we discussed in our opening brief, Cingular’s change-in-terms provision obligates it to provide its customers with notice of any impending change. *See* Cingular Br. 38 n.17. Therefore, Cingular cannot use the change-in-terms provision to escape its obligation to arbitrate in a pending case. As we explained, that important feature of its change-in-terms provision serves to distinguish this case

But under the FAA the mere *possibility* that a change-in-terms provision applicable to all terms in the contract might at some indeterminate point in the future be invoked as authority for removing the arbitration provision from the contract is not a valid basis for declaring the arbitration provision — and only the arbitration provision — illusory in advance of any such hypothetical change.

In any event, as we explained in our opening brief (Cingular Br. 39-40), even if plaintiffs’ argument had merit, the proper course of action is to sever the change-in-terms provision (*i.e.*, the feature of the contract that supposedly renders Cingular’s obligation to arbitrate illusory), not invalidate the arbitration provision. *See Starke Taylor & Sons, Inc. v. Riverside Plantation*, 301 So. 2d 676, 680 (La. Ct. App. 1974) (“Where the enforceable provisions of a contract can be severed from the unenforceable provisions, the courts should, in order to avoid inequities, sever the enforceable from the unenforceable portions, rather than declare the entire contract void.”) (citations omitted). Plaintiffs’ argument that severance is inappropriate (Plaintiffs’ Br. 40-42) completely ignores the fact that the change-in-terms provision is not part of the arbitration provision.

from *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). *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003) (*en banc*); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1214 (E.D. Okla. 2003).

B. The Bar On Class Actions Is Not Unconscionable.

We explained in our opening brief why the provision in plaintiffs' agreements prohibiting any arbitration between the parties from proceeding on a class-wide basis is in no way problematic. The Supreme Court has strongly suggested as much (*see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)), and numerous courts have so held (*see Cingular Br. 41-42*).⁷ This is so because the right to proceed via class action is "merely a procedural one * * * that may be waived." *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

Plaintiffs' primary response is that class actions allow consumers to vindicate "negative value" claims. *See* Plaintiffs' Br. 25-27. However, **none** of the Louisiana cases that plaintiffs cite for that legal bromide — *McCastle v. Rollins Environmental Services of Louisiana, Inc.* 456 So. 2d 612 (La. 1984); *Williams v. State*, 350 So. 2d 131 (La. 1977); *Clark v. Trus Joint MacMillian*, 836 So. 2d 454 (La. Ct. App. 2002), writ denied, 841 So. 2d 793 (La. 2003); *Guillory v. Union Pacific Corp.*, 817 So. 2d 1234 (La. Ct. App. 2002), writ denied, 824 So. 2d 575 (La. 2002); *Duhé v. Texaco, Inc.*, 779 So. 2d 1070 (La. Ct. App. 2001); and *Andry v. Murphy Oil, U.S.A., Inc.*, 710 So. 2d 1126 (La. Ct. App. 1998) — has **anything** to do with the question at issue here: whether plaintiffs can contractually waive their

⁷ To this list could be added *Rosen v. SCIL, LLC*, __ N.E.2d __, 2003 WL 22304820 (Ill. App. Ct. Oct. 8, 2003).

right to proceed by class action. The only relevant language on that point in any of these decisions is the Louisiana Court of Appeal’s recognition that “[a] class action is no more than a procedural device; it confers no substantive rights.” *Andry*, 710 So. 2d at 1128-29.

In any event, plaintiffs refuse to confront the fact that arbitration is *also* a route for consumers to obtain relief for small claims, as is small claims court, and that both of these options *are* authorized under the parties’ contracts.⁸ In fact, the Louisiana Court of Appeal has recognized that in at least some instances small claims court is a *better* option than a class action for the resolution of small claims, because “[c]ertification of * * * a class [can] promote complicated lengthy legal embattlement.” *Pulver v. 1st Lake Props., Inc.*, 681 So. 2d 965, 970 (La. Ct. App. 1996). As the court explained, small claims court allows parties to resolve disputes “expeditiously and with minimum costs and fees.” *Id.* Thus, that the parties agreed to foreclose one method for potentially resolving small claims — class actions — does not mean that those claims will go unaddressed.

Furthermore, as we discussed in our opening brief (at 47-48), Cingular’s commitment to pay the full costs of arbitration and, in addition, to reimburse plaintiffs for their reasonable attorneys’ fees in the event the arbitrator awards them the

⁸ We address plaintiffs’ attack on the small-claims-court option in Section II.E below.

amount they seek or more avoids the problems identified in cases such as *Ting* and *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100-1101, 118 Cal. Rptr. 2d 862 (2002), *cert. denied*, 537 U.S. 1226 (2003).⁹ Accordingly, ***even if*** *Ting* and *Szetela* were valid expressions of the law as applied to the particular arbitration agreements at issue in those cases — which they are not — those cases do not justify striking down Cingular’s arbitration provision under the materially different circumstances of this case. Plaintiffs make no response to this argument.¹⁰

⁹ Plaintiffs do not take issue with the district court’s holding that Cingular’s offer to pay the full costs of arbitration and to pay attorneys’ fees if plaintiffs prevail in arbitration is valid and enforceable (Tr. 88). Nor do they address or rebut the cases we cited for the proposition that offers of this sort moot claims that arbitration is too expensive. *See* Cingular Br. 54 n. 18.

¹⁰ Without any basis in the record, plaintiffs assert that Cingular’s offer to pay the full costs of arbitration and to reimburse them for their attorneys’ fees should they prevail in arbitration are “one-time concessions” made as part of an effort to avoid “accountability” and “live to raise [its] unconscionable clauses in another day in another venue.” Plaintiffs’ Br. 31. This argument borders on deliberate deception. Although it is not in the record because it post-dated the district court’s ruling, in July 2003 each of the plaintiffs (along with millions of other Cingular subscribers) received notification that Cingular had revised its arbitration provision for all customers. The revised provision commits Cingular to paying the full costs of arbitration unless the customer’s claim is found to be frivolous and to paying reasonable attorneys’ fees in the event the arbitrator awards them the amount they seek or more. It also deletes the requirement that the arbitral proceedings be kept confidential. In pointing this out, we are not asking the Court to supplement the record or to take judicial notice of the fact that Cingular has adopted these changes for all customers. Instead, our purpose is simply to illustrate why plaintiffs’ unsupported factual assertion should be given no credence.

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

As we explained in our opening brief, the Supreme Court’s decision in *Gilmer* strongly suggests that there is nothing unconscionable about a confidentiality provision in an arbitration clause. *See* Cingular Br. 50-51. In fact, confidentiality is one of the traditional hallmarks of arbitration. Confidentiality benefits consumers because, for example, any arbitral decision adverse to them could not be shared with lenders or credit-reporting agencies. It also streamlines the process of arbitration by avoiding excessive court-like procedures that would defeat the very goal of arbitration.

In response, plaintiffs argue that, “though facially neutral, confidentiality provisions favor companies over individuals. * * * [I]f * * * Cingular [is] successful in imposing [its] gag order[], both current and future plaintiffs will be unable to mitigate the advantages the compan[y] hold[s] by being [a] repeat player[] and accumulating a wealth of knowledge as individual cases against [it] proceed.” Plaintiffs’ Br. 31-32.

But as we explained in our opening brief, the confidentiality provision in the parties’ arbitration agreement does not preclude public access to information about plaintiffs’ claims. First, plaintiffs have the right to proceed in small claims court, where all records are public. Plaintiffs have not even *attempted* to defend the district court’s musing that the confidentiality provision might be interpreted to apply

in small claims court as well as in arbitral proceedings. *See* Cingular Br. 53; Tr. 86.¹¹ Second, plaintiffs do not dispute that the Louisiana attorney general could bring litigation under the Louisiana Unfair Trade Practices Act raising claims identical to those they have raised. *See* Cingular Br. 51; LA. REV. STAT. ANN. § 51:1407. Third, plaintiffs acknowledge that not all cellular providers in Louisiana require their customers to enter arbitration agreements. *See* Plaintiffs’ Br. 1. Thus, another plaintiff could challenge the same types of “rounding up” policies as those at issue in this litigation, and, assuming the language used in the two providers’ contracts is comparable, the precedent from that litigation could be cited in future arbitral proceedings between Cingular and its customers.

Finally, as we explained in our opening brief, even if the confidentiality provision were found to be problematic, that provision should be severed (*see* Cingular Br. 53-54), or this Court should accept Cingular’s offer to waive its enforcement (*see id.* at 54 n.18). Plaintiffs’ argument that this Court should not sever the provision (Plaintiffs’ Br. 40-42) is unpersuasive; this is the *only* aspect of the arbitration provision that Cingular has suggested could be severed,¹² and thus this case

¹¹ As we discuss below (at Section II.E), small claims court is a very real option for plaintiffs seeking resolution of disputes with Cingular.

¹² The only other portion of the contract that we acknowledge could be severed is the change-in-terms provision, which, as we explained above (at 12), is not part of the arbitration provision.

is far removed from *ACORN v. Household International, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002), in which the defendant sought to have numerous aspects of its arbitration clause severed. In any event, severance is a matter of state law, and *ACORN* is therefore irrelevant. As we discussed, *Louisiana* law generally requires a court to sever invalid provisions of a contract and to enforce valid ones. *See Starke Taylor & Sons*, 301 So. 2d at 680.

D. The Size Of The Print Of Cingular’s Arbitration Clause Does Not Render It Unconscionable.

Plaintiffs’ argument that they should not be bound by the arbitration clause because of “the font comprising [the] arbitration agreements” between Cingular and them (Plaintiffs’ Br. 34) is frivolous. It merits mention at the outset that, to the extent plaintiffs are correct that Louisiana law “mirrors” California law (Plaintiffs’ Br. 14), their argument about the size of the print gets them nowhere unless they *also* can persuade the Court that the arbitration provision is substantively unconscionable. Under California law, “a contract or clause is unenforceable if it is *both* procedurally and substantively unconscionable” (*id.* (quoting *Ting*, 319 F.3d at 1148-49) (emphasis added)), and the font size in which a contractual term appears is relevant only to *procedural* unconscionability (*see Szetela*, 97 Cal. App. 4th at 1099). As we already have explained, there is nothing substantively unconscionable about Cingular’s arbitration provision. Accordingly, under plaintiffs’ view of Louisiana law, the Court need not even address the font size issue.

In any event, there is no procedural unconscionability here. As we discussed at length in our opening brief (at 29-35), plaintiffs signed an acknowledgment that they read and understood the Terms and Conditions of their contracts — including the arbitration provision — and, having done so, are conclusively presumed under Louisiana law to have in fact agreed to that provision. *See, e.g., McGoldrick*, 649 So. 2d at 460 (“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.”); *Jayco*, 303 So. 2d at 556. Plaintiffs have not denied that they read and signed the agreements. *See* pages 5-6, *supra*.

Significantly, the cases plaintiffs cite affirmatively undermine their argument. In two of their cases, courts *rejected* claims that an arbitration provision’s type size was unconscionably small, deeming it dispositive that the arbitration provision was in no smaller print than the rest of the contract. *See Reimonenq v. Foti*, 72 F.3d 472, 477 (5th Cir. 1996); *McGoldrick*, 649 So. 2d at 460. The arbitration provision at issue here is not only printed in the same font size as the other Terms and Conditions in the plaintiffs’ Wireless Service Agreements (*see* R.E. tabs 9, 10), but is in fact the *only* provision in those Terms and Conditions that is specifi-

cally adverted to in the opening paragraph of the Terms and Conditions.¹³ Thus, it cannot be argued that the arbitration provision was somehow slipped in to the middle of the contract; it was instead prominently displayed. And while the court in *Sutton's Steel* arguably did find fault with the type size of the arbitration provision at issue in that case, that clearly was not the principal basis for its ruling. *See* 776 So. 2d at 596-97 (finding “substance of the arbitration provision” to be “unduly burdensome and extremely harsh”). Moreover, as pointed out above, Cingular’s Agreement begins with a capitalized notification that it contains an arbitration provision. By contrast, there is no indication in *Sutton's Steel* that the Bell South Mobility contract at issue there had a prominent admonition of this sort (much less that the court considered it in its discussion of the font size).

In the end, however, all of this is beside the point. The basic assumption underlying plaintiffs’ argument here — which equally infects the decisions in *Sutton's Steel* and *Posadas v. The Pool Depot, Inc.*, __ So. 2d __, 2003 WL 21480587 (La. Ct. App. June 27, 2003), *writ denied*, 857 So. 2d 502 (La. 2003) — is that a court can selectively strike the arbitration provision from an otherwise-valid contract where it *and all other provisions of the contract* are printed in a small font

¹³ *See* R.E. tabs 9, 10 (“IMPORTANT NOTICE: THIS AGREEMENT CONTAINS MANDATORY ARBITRATION AND OTHER IMPORTANT PROVISIONS LIMITING THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE. PLEASE REFER TO THE SECTION ENTITLED ‘ARBITRATION’ FOR DETAILS.”).

size. That, however, is precisely what the FAA bars. Under the FAA, a court cannot “train[] on and uphold[] a * * * precise, arbitration-specific limitation” that would not apply to other contractual terms under relevant state law. *Casarotto*, 517 U.S. at 687 n.3; *see also Allied-Bruce*, 513 U.S. at 281. Because plaintiffs can point to no Louisiana case holding that the use of small type renders the entire contract voidable at the option of the non-drafting party, they cannot invoke this ground for invalidating the arbitration provision alone.

E. The Small-Claims-Court Provision, Although Unnecessary For The Arbitration Provision To Be Enforceable, Provides Cingular’s Consumers With A Real Alternative To Arbitration.

Plaintiffs repeatedly disparage the efficacy and fairness of small claims court as an alternative means of resolving customer claims against Cingular. *See* Plaintiffs’ Br. 33 n.33, 36-38. Contrary to plaintiffs’ sweeping indictment, however, small claims courts are in fact well suited to provide relief *particularly* in cases like this one, where the costs of bringing suit in another forum might exceed the value of a plaintiff’s claim. In fact, both Congress and the courts have recognized that, as its name suggests, small claims court can be a useful forum for small claims, even if those claims are complex — as plaintiffs assert their claims to be. But *even if* this Court were to conclude that small claims court is not a viable route for resolving plaintiffs’ claims, that would not be a ground on which to refuse to enforce plaintiffs’ agreements to arbitrate their disputes with Cingular. As we

showed above, there is nothing unconscionable about the arbitration provision itself, and thus no reason not to enforce it regardless of this Court's view of the utility of the small-claims-court alternative.¹⁴

Plaintiffs invoke a variety of features unique to small claims court to argue that those courts are “ill-equipped to manage [the instant] dispute[s].” Plaintiffs’ Br. 37. But the very same features that plaintiffs now contend to be short-comings of small claims court, such as limited discovery, are in fact some of its greatest strengths. Small claims courts exist to provide accessible, speedy, and inexpensive determinations of suits in a manner understandable to lay people.¹⁵ For that reason, in Louisiana small claims courts, the “technical rules of evidence are relaxed, and all relevant evidence is admissible, including hearsay.” LA. REV. STAT. ANN. § 13:5203(A). The court is not “bound by * * * rules governing practice, procedure, pleading, or evidence” and is mandated to “do substantial justice between the parties according to the rules of substantive law.” *Id.* § 13:5203(B). Indeed, “it is the duty of the judge to * * * develop all of the facts necessary and relevant to an

¹⁴ Given that there are filing fees in small claims court (albeit modest ones) and that Cingular has committed to paying the full costs of arbitration so long as the customer's claim is not frivolous, proceeding via arbitration would be even cheaper than proceeding in small claims court.

¹⁵ See generally James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 U. D.C. L. REV. 177, 177 (2000) (“Small claims courts simplify legal procedures, resolve disputes quickly and are much less expensive for the parties.”).

impartial determination of the case,” which includes “rais[ing] defenses or claims of which the parties may be unaware.” *Id.* § 13:5208(A).¹⁶ Finally, the small claims court can limit the role of attorneys (*id.*), and thereby neutralize the advantage of an “industrial Goliath,” as plaintiffs dub Cingular (Plaintiffs’ Br. 38).

By limiting discovery, relaxing the rules of evidence and procedure, and assisting litigants when necessary, small claims courts are able to fulfill their mission. Thus, while plaintiffs assert that the procedures of small claims courts limit their ability to present their case, those procedures are what allow small claims courts to remain accessible and fair, and to provide justice to all citizens. In any event, because small claims courts are well-suited — and, indeed, designed — to hear claims involving small amounts of damages brought by individual consumers, they provide plaintiffs here with an adequate forum in which to vindicate their rights.

Similarly, the fact that plaintiffs characterize their claims as complex does not render the small-claims-court option inadequate. For example, in *San Francisco v. Small Claims Div., Mun. Court*, 190 Cal. Rptr. 340 (Cal. Ct. App. 1983), a California appellate court held that a small claims court could hear a number of

¹⁶ See Russell Engler, *And Justice for All — Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2016-17, 2021 (1999) (favorably comparing judges in small claims courts to other forums because of the “level of assistance” such judges provide unrepresented litigants).

consolidated claims against the city, each alleging that noise from the airport constituted a nuisance that caused each claimant \$750 in damages. *Id.* at 341-42. Rejecting the city’s assertion that the legislature “never intended ‘complex’ cases to be heard in small claims court” (*id.* at 342), the court held that, despite the fact that “many procedural devices and protections available in [the] superior court are not available in small claims court” (*id.* at 344), the actions could properly be heard in small claims court. Indeed, the very purpose of small claims courts is “to make it possible for plaintiffs with meritorious claims for small amounts of money * * * to bring th[o]se claims to court without spending more money on attorney’s fees and court expenses than the claims were worth.” *Id.* at 342. *See also Pulver*, 681 So. 2d at 970 (small claims court provided more efficient and economical means to resolve tenants’ suit against landlord than class action).

Congress, too, has recognized the importance of small claims court to remedy violations of complex federal statutes where — like the alleged violations here — those claims might be worth only a small amount to individual plaintiffs. When Congress passed the Telephone Consumer Protection Act (“TCPA”), it included a private right of action for consumers, which it hoped would encourage suits brought in small claims court. *See ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d

513, 515 (3d Cir. 1998).¹⁷ “Although actual monetary losses from telemarketing abuses [were] likely to be minimal, this private enforcement provision put[] teeth into the statute by * * * allowing consumers to bring actions on their own.” *Id.* Thus, Congress not only entrusted small claims courts with the power to enforce the TCPA, but in fact saw them as integral to the statute’s enforcement scheme.

Finally, although plaintiffs suggest that they would be at a disadvantage in small claims court because there is no requirement that the judge be a lawyer (Plaintiffs’ Br. 37, 38 & n.38), they provide no empirical support for that contention. As long as plaintiffs have invited us into the realm of speculation, we submit that, if anything, the use of non-lawyers to decide small claims would tend to benefit consumers who are resisting legal defenses, like preemption, because a non-lawyer is more apt to ignore such doctrines in favor of personal notions of fairness.¹⁸

¹⁷ The sponsor of the TCPA, which authorized a private right of action in state court to sue telemarketers, sung the praises of small claims court: “***[I]t is my hope that the States will make it as easy as possible for consumers to bring such actions, preferably in small claims court.*** * * * Small claims court or a similar court would allow the consumer to appear before the court without an attorney. * * * [I]t would defeat the purposes of the bill if the attorneys’ costs to consumers of bringing an action were greater than the potential damages.” *ErieNet*, 156 F.3d at 515 (quoting 137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991 (statement of Sen. Hollings))) (emphasis added). *See also Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 513 (5th Cir. 1997) (quoting Sen. Hollings’ statement).

¹⁸ Although one would not know it from reading plaintiffs’ brief, Louisiana is not unique in allowing non-lawyers to serve as judges on small claims court. As of

In sum, because the Wireless Service Agreements authorize the parties to those contracts to pursue their disputes in either arbitration or small claims court, those contracts provide not one but two different routes by which Cingular's customers can have their disputes with Cingular resolved in an easy, cost-effective manner. There is no need to allow plaintiffs to evade their contractual forum-selection agreement so that they can bring a class action in a court of general jurisdiction.

1991, "more than forty [states] allow[ed] some form of nonlawyer judge" in limited jurisdiction courts including small claims courts. See Julia Lamber & Mary Lee Luskin, *City And Town Courts: Mapping Their Dimensions*, 67 IND. L. J. 59, 59 (1991). It would be bold indeed to deem the systems of that many states to be fundamentally inadequate to adjudicate customer claims of the sort at issue here merely because those claims potentially may be decided by a non-lawyer.

CONCLUSION

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

Respectfully Submitted.

Gary J. Russo
PERRET, DOISE A.P.L.C.
Suite 1200
600 Jefferson Street
Lafayette, LA 70502
(337) 262-9000

Evan M. Tager
David M. Gossett
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Seamus C. Duffy
William M. Connolly
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215) 988-2440

Counsel for Appellant Cingular Wireless LLC

DECEMBER 8, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 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:

Elizabeth Cary Dougherty, Esq.
Gauthier Law Firm
3500 N. Hullen Street
Metairie, LA 70002

Theodore M. Haik, Jr., Esq.
Haik, Minville & Grubbs, L.L.P.
1017 E. Dale Street
New Iberia, LA 70502-1040

J. Robert Davis, Esq.
Kenneth S. Wall, Esq.
Law Offices of Robert Davis, L.L.P.
440 Louisiana, Suite 1600
Houston, TX 77002

Joseph R. Joy, III, Esq.
Law Offices of Joseph Joy & Associates
214 Jefferson Street
Lafayette, LA 70502

Attorneys for Plaintiffs/Appellees

Mark A. Balkin, Esq.
Joseph C. Chautin, III, Esq.
Hardy, Carey & Chautin, L.L.P.
110 Veterans Memorial Boulevard
Suite 300
Metairie, LA 70005

*Attorneys for Defendant/Appellant,
Centennial Beauregard Cellular, LLC
(f/k/a Iberia Cellular Telephone Company, L.L.C.),
d/b/a Centennial Wireless*

John F. Olinde, Esq.
Corinne Ann Morrison, Esq.
Douglas L. Grundmeyer, Esq.
Charles P. Blanchard, Esq.
Chaffe, McCall, Phillips,
Toler & Sarpy, L.L.P.
2300 Energy Centre,
1100 Poydras Street
New Orleans, LA 70163-2300

*Attorneys for Defendant/Appellant,
Sprint Spectrum, L.P.*

David M. Gossett
Mayer, Brown, Rowe & Maw, LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

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 6,732 words, which is fewer than the number specified in Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

David M. Gossett