

No. 08-15962

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

JONATHAN C. KALTWASSER,
Plaintiff – Appellee,

v.

CINGULAR WIRELESS LLC, a Delaware Corporation,
Defendant – Appellant.

Appeal From an Order of the United States District Court
for the Northern District of California, No. C 07-04486 SBA

OPENING BRIEF OF CINGULAR WIRELESS LLC

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CORPORATE DISCLOSURE STATEMENT

Cingular Wireless LLC, which was renamed AT&T Mobility LLC in January 2007, has no parent company. Its members are all privately held companies that are wholly-owned subsidiaries of AT&T Inc., which is the only publicly held company with a 10 percent or greater ownership stake in AT&T Mobility LLC.

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JURISDICTIONAL STATEMENT

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2)(A). There is diversity of citizenship because plaintiff-appellee Jonathan C. Kaltwasser is a Virginia citizen and all of the members of the putative class are California citizens, while defendant-appellant Cingular Wireless LLC (“Cingular”), which is now known as AT&T Mobility LLC (“ATTM”), is a limited liability company of Delaware, Georgia, and Texas citizenship.¹

The amount-in-controversy requirement is satisfied because Kaltwasser alleges in his complaint that the aggregate claims of members of the putative class exceed the sum or value of \$5,000,000, exclusive of interests and costs. ER291.

The district court issued its order denying ATTM’s motion to compel arbitration on April 11, 2008. ER1. ATTM filed a notice of appeal on April 14, 2008. ER38. This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B), which authorizes an immediate appeal from the denial of a motion to compel arbitration.

ISSUES PRESENTED

While Kaltwasser, a longtime Virginia resident, was living in California to attend school, he activated wireless service with ATTM (then Cingular) by agreeing to its standard wireless service agreement. That agreement includes an

¹ ATTM has five members: two Delaware corporations with principal places of business in Georgia, a Delaware corporation with its principal place of business in Texas, a Georgia corporation with its principal place of business in Georgia, and a Delaware limited liability company whose sole member is a Delaware corporation with its principal place of business in Texas.

arbitration provision that requires the parties to pursue their disputes in individual arbitration or small claims court. The agreement also includes a provision that authorizes ATTM to change the terms of service upon written notice, subject to certain limitations and customer rights. In addition, the agreement contains a choice-of-law provision that specifies that “[t]he law of the state of [the customer’s] billing address shall govern this Agreement except to the extent that such law is preempted by or is inconsistent with applicable federal law.” ER175.

After Kaltwasser returned to Virginia and changed his billing address to Virginia, ATTM sent him a revised arbitration provision. Under the revised provision, the customer may choose whether arbitration will be conducted in person (in the county of his or her billing address), by telephone, or by mail, and ATTM must pay all arbitration costs. In addition, if the arbitrator awards a customer more than ATTM had offered to settle the claim, ATTM must pay the customer a minimum of \$7,500, plus double attorneys’ fees.

The district court denied ATTM’s motion to compel arbitration, holding first that California, not Virginia, law applies; second that, under California law, ATTM’s revision of Kaltwasser’s arbitration provision is ineffective; and third that the original arbitration provision is unconscionable.

ATTM’s appeal presents the following issues:

- (1) Whether Virginia law, rather than California law, governs this dispute.

(2) Whether, under California law, ATTM's revision of Kaltwasser's arbitration provision is ineffective even though the changes are authorized by the "change-in-terms" provision in his agreement and make the arbitration provision more favorable to him.

(3) Whether the revised arbitration provision is enforceable under California law.

(4) If not, whether California law is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16.

STATEMENT OF THE CASE

Kaltwasser filed this putative class action against ATTM (then Cingular) in the United States District Court for the Northern District of California. ER289. ATTM moved to compel arbitration under 9 U.S.C. § 4. ER287. The district court denied ATTM's motion. ER1.

STATEMENT OF FACTS

A. Kaltwasser's Service Agreement.

ATTM is a wireless service provider that was known as Cingular until January 2007. ER156. Kaltwasser has been a resident of Norfolk, Virginia since 1999. ER87. Between April 2004 and October 2006, however, Kaltwasser attended naval postgraduate school in Monterey, California. ER87, 96. While there, in August 2004, Kaltwasser subscribed to wireless service from ATTM on

two lines, and in July 2006 entered into new service agreements in order to obtain new cell phones. ER157–58.

Kaltwasser’s service agreements each incorporate a Terms of Service booklet that Kaltwasser received with each cell phone. ER158. Those booklets contain a provision stating that “Cingular and you * * * agree to arbitrate all disputes and claims * * * arising out of or relating to this Agreement, or to any prior or written agreement, for Equipment or services between Cingular and you.” ER174, 194. The provision requires the parties to pursue their disputes in individual arbitration or small claims court. ER175, 195. The booklets also specify that “[t]he law of the state of your billing address shall govern this Agreement except to the extent that such law is preempted by or inconsistent with applicable federal law.” ER175, 196.

In addition, the booklets contain a change-in-terms provision, which authorizes ATTM to “change any terms” in the contract, provided that ATTM notifies the customer of the change “either in [his] monthly bill or separately.” ER172, 189–90.² The arbitration provision specifies, however that, if ATTM “makes any change to th[e] arbitration provision,” the customer “may reject any

² The change-in-terms provision also states that, if ATTM “increase[s] the price of any of the services to which [the customer] subscribes” or “materially decrease[s] the geographical area in which [the customer’s] airtime rate applies,” the customer “may terminate this agreement without paying an early termination fee” within 30 days. ER172, 190 (capitalization omitted).

such change and require [ATTM] to adhere to the language in [the customer's original arbitration] provision.” ER175, 196.

B. ATTM's Revised Arbitration Provision.

In December 2006, ATTM (then Cingular) mailed a new arbitration provision to all of its customers, including Kaltwasser (ER159), who by that time had returned to Norfolk, Virginia (ER87). The revised provision requires that “**all disputes and claims between**” Kaltwasser and ATTM be pursued in arbitration or small claims court. ER201 (emphasis in original). Like Kaltwasser's previous arbitration provisions, the revised provision specifies that arbitration must be conducted on an individual rather than class-wide basis. ER205.

ATTM promulgated the revised provision in response to criticisms of the arbitration provision that was included in Kaltwasser's original agreement and similar arbitration provisions of other companies. In revising the provision, ATTM consulted with Richard Nagareda, a law professor at Vanderbilt University whose scholarship focuses on aggregate dispute resolution. ER140–43. In a declaration filed in this case, Professor Nagareda observed that he has “never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims” on an individual basis. ER143.

The revised provision includes the following pro-consumer features (ER207–09):

- **Potential for \$7,500 premium award:** If the arbitrator awards a California customer relief that is greater than ATTM’s “written settlement offer made before an arbitrator was selected” but less than \$7,500, ATTM will pay the customer \$7,500 rather than the smaller arbitral award;³
- **Double attorneys’ fees:** If the arbitrator awards the customer more than ATTM’s written settlement offer, then ATTM will “pay [the customer’s] attorney, if any, twice the amount of attorneys’ fees, and reimburse any expenses, that [the] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration”;⁴
- **Cost-free arbitration:** “[ATTM] will pay all [American Arbitration Association (“AAA”)] filing, administration and arbitrator fees” unless the arbitrator determines that the claim “is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))”;⁵
- **ATTM disclaims right to seek attorneys’ fees:** “Although under some laws [ATTM] may have a right to an award of attorneys’ fees and expenses if it prevails in an arbitration, [ATTM] agrees that it will not seek such an award [from the customer]”;
- **Small claims court option:** Either party may bring a claim in small claims court;
- **No confidentiality requirement:** The parties need not keep the arbitration confidential;
- **Full remedies available:** The arbitrator can award the same remedies to

³ The amount of the minimum payment varies from state to state because it is tied to the jurisdictional maximum of the customer’s local small claims court. ER208. In California, the jurisdictional limit for small claims court is \$7,500. *See* Cal. Code Civ. Proc. § 116.221.

⁴ This attorney premium “supplements any right to attorneys’ fees and expenses [that the customer] may have under applicable law.” ER209. Thus, if the condition for obtaining the premium is not satisfied, the customer is entitled to an attorneys’ fee award to the same extent as if the claim had been brought in court.

⁵ If an arbitrator concludes that a consumer’s claim is frivolous, the AAA’s consumer arbitration rules would cap a consumer’s arbitration costs at \$125. ER251.

individual consumers (including punitive damages and injunctions) that a court could award;

- **Flexible consumer procedures:** Arbitration will be conducted under the AAA's Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer-Related Disputes, which the AAA designed with consumers in mind;
- **Conveniently located hearing:** Arbitration will take place "in the county * * * of [the customer's] billing address"; and
- **Choice of in-person, telephonic, or no hearing:** For claims of \$10,000 or less, customers have the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a hearing by telephone, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."⁶

C. **ATTM's Dispute-Resolution Process In Practice.**

A formal arbitration proceeding between ATTM and one of its customers (or an action in small claims court) is the last step of the dispute-resolution process. Indeed, that step is rarely taken because most disputes are resolved when the customer contacts ATTM's customer care department. ER160. ATTM's arbitration provision contributes to this early resolution of disputes: Because it obligates ATTM to pay the full cost of arbitration and may require ATTM to pay the customer \$7,500 and double attorneys' fees, ATTM's customer service representatives have a strong incentive to accommodate any reasonable request. Thus, as ATTM demonstrated in its submission to the district court, between June

⁶ For claims exceeding \$10,000, a hearing would be held unless both parties agreed to forgo it. ER250.

2006 and June 2007, ATTM's representatives dispensed over \$1 billion in credits for customer concerns and complaints. ER161.

A customer who is dissatisfied with the resolution offered by the customer care department can take the next step—as required by ATTM's arbitration provision—of providing ATTM's legal department with notice of the dispute. ER161. That is as simple as sending a letter to ATTM or filling out and mailing a one-page Notice of Dispute form that ATTM has posted on its web site at <http://www.att.com/arbitration-forms>. ER160–61.

ATTM's legal department generally responds to a notice of dispute with a written settlement offer. ER161. As with ATTM's customer service representatives, the goal of ATTM's legal department is to resolve any colorable claim quickly and to the customer's satisfaction, without the need for a customer to initiate arbitration proceedings. *Id.*

If the dispute cannot be resolved within 30 days, the customer may begin the arbitration process. ER208. To do so, the customer need only fill out a one-page Demand for Arbitration form and send copies to the AAA and to ATTM. Customers may obtain a copy of the form from the AAA's web site or use a simplified form that ATTM has posted on its web site, at <http://www.att.com/arbitration-forms>. ER160. To further assist its customers, ATTM's web site includes a layperson's guide on how to arbitrate a claim (at <http://www.att.com/arbitration-information>). ER159–60.

Many ATTM customers have found individual arbitration to be a viable dispute resolution mechanism. In the eight months before ATTM moved to compel arbitration in this case, ATTM received over 450 notices of dispute or demands for arbitration. ER161. Moreover, in 2005 and 2006, about 850 customers exercised their right under ATTM's arbitration provision to sue ATTM in their local small claims court. ER162.

D. Kaltwasser Files A Putative Class Action Against ATTM.

In January 2007—after ATTM had mailed Kaltwasser the revised arbitration provision—Kaltwasser filed a putative class action against ATTM. ER289. In his lawsuit, Kaltwasser challenges the accuracy of statements by ATTM that it has the fewest “dropped calls” of any carrier. ER290. Kaltwasser alleged that these statements violated California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*), False Advertising Law (*id.* §§ 17500 *et seq.*), and Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*), and constituted breach of contract and unjust enrichment. *Id.* On behalf of a putative class of ATTM customers in California, Kaltwasser demanded damages, restitution, injunctive relief, and attorneys' fees. ER300, 307–08.

E. The District Court Denies ATTM's Motion To Compel Arbitration.

ATTM responded to the complaint by moving to compel arbitration under Kaltwasser's revised arbitration agreement. ER287. The district court denied the

motion. First, the court held that California, rather than Virginia, law applied. The court interpreted the choice-of-law provision in Kaltwasser's contract as selecting California law. ER6 n.4. In the alternative, the court held that any choice of Virginia law would be unenforceable because Virginia lacks "a substantial relationship to the parties or their transactions" and "the application of Virginia law would contravene directly California's strong public policy" against class-arbitration waivers. ER5-6.

Applying California law, the court held that ATTM's December 2006 revision to the arbitration agreement with Kaltwasser was ineffective for two reasons. First, the court stated that it is "procedurally unconscionable" to revise a contract without providing a "means of rejecting the modified terms, other than canceling service." ER7 n.5. Second, the court held that "a revised contract is merely an offer and does not bind the parties until it is accepted." *Id.* (internal quotation marks omitted).

The court then held that Kaltwasser's original arbitration agreement is unconscionable under California law. The court held that the provision is procedurally unconscionable because it was part of a form contract that ATTM "presented * * * to Kaltwasser in a take-it-or-leave-it format." ER7. And the court determined that the provision is substantively unconscionable because the lack of class-wide relief caused the provision to "operate to insulate [ATTM] from liability

that otherwise would be imposed under California law.” ER8 (internal quotation marks omitted).

STANDARD OF REVIEW

“The validity * * * of an arbitration clause [is] reviewed de novo.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc). This Court also reviews de novo the district court’s interpretation of contract provisions, application of conflict-of-law rules, and determination whether a contract modification is enforceable. *Trustees of S. Cal. IBEW-NECA Pension Trust Fund v. Flores*, 519 F.3d 1045, 1047 (9th Cir. 2008) (contract interpretation); *Douglas v. U.S. Dist. Ct.*, 495 F.3d 1062, 1066–67 (9th Cir. 2007) (contract modification), *cert. denied sub nom. Talk Am., Inc. v. Douglas*, 128 S. Ct. 1472 (2008); *United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1080 (9th Cir. 2004) (conflict-of-law rules).

SUMMARY OF ARGUMENT

When Kaltwasser activated wireless service with ATTM, he agreed to bring claims in individual arbitration or small claims court and that the law of his “billing address” would govern his contract. Under the law of Virginia—where Kaltwasser lived and received his bills when he filed this lawsuit—agreements to arbitrate on an individual basis are fully enforceable.

The district court nonetheless denied ATTM’s motion to compel arbitration, reasoning that California, rather than Virginia, law applies; that ATTM’s revision

to Kaltwasser's arbitration agreement is ineffective under California law; and that, under California law, Kaltwasser's original arbitration agreement is unconscionable. Although the district court may have been right that Kaltwasser's original agreement is unenforceable under California law, it erred in concluding that California law applies and that the revised agreement is ineffective. If this Court agrees with us on either of these points, reversal is required. There is no question that *both* versions of the arbitration provision are enforceable under Virginia law. Moreover, the revised provision is fully enforceable under California law, and any contrary interpretation of California law would be preempted by the Federal Arbitration Act.

1. To begin with, Virginia law, not California law, governs this dispute. The district court held that the phrase "your billing address" in the choice-of-law provision must refer to the California billing address that Kaltwasser used when he signed up for ATTM service in 2004, rather than the Virginia address where he lived and received his bills when he filed this lawsuit in 2007. Otherwise, the court reasoned, customers could change the applicable law by moving to another state. But few customers would rearrange their lives merely to alter the choice of law in a consumer dispute. Moreover, that is a risk that ATTM elected to bear in order to ensure that all customers in a given state are subject to the same law. On the other side of the coin, the court completely overlooked the reasonable expectations of consumers that they will be subject to the law of the place they live when they file

suit (or, more appropriately, pursue arbitration) rather than that of a place they may have left years earlier.

The district court also failed to consider the fact that the term “your billing address” is used in both the choice-of-law provision and the arbitration provision. The latter uses the term to fix the location of arbitration proceedings. In that context, it is obvious that “your billing address” means “your *current* billing address” because it makes little sense (and might be unconscionable) to require customers who have moved from one state to another to return to their old home to arbitrate their disputes. Given that the meaning of “your billing address” as used in the arbitration provision is perfectly clear, principles of contract interpretation dictate that this term be given the same meaning in the choice-of-law provision. Moreover, it makes perfect sense for an arbitrator located in the county of the customer’s billing address to apply local law, because the arbitrator is more likely to be familiar with—and hence properly apply—that law.

The district court also held that California’s conflict-of-law principles preclude application of Virginia law. In the court’s view, the parties lacked a relationship with Virginia sufficient to justify choosing that law, and applying Virginia law would violate fundamental California policy against enforcing arbitration provisions that prohibit class-wide adjudication. But California’s conflict-of-law principles provide that it is *always* reasonable to choose the law of any state in which a party resides or the contract is performed. Here, of course,

Kaltwasser lives and receives wireless service in Virginia. For the same reason, no California policy would be offended by applying Virginia law to Kaltwasser, a resident of Virginia. California's interest is in policing the contracts of its own residents, not in imposing its views of consumer protection on other states. Indeed, Virginia has a materially greater interest in determining the arbitrability of its residents' disputes—a factor that the district court completely ignored.

2. Even if the district court was correct in applying California law, it was wrong in refusing to compel arbitration under that law. The district court's ruling in this regard was predicated on its erroneous belief that ATTM's revision to Kaltwasser's contract is ineffective because Kaltwasser did not affirmatively accept it. But California enforces change-in-terms provisions like the one in Kaltwasser's service agreement, so long as the modifications are within the contemplation of the parties and are reasonable. Both conditions are satisfied here: Kaltwasser's service agreement already contained an arbitration provision that prohibited class arbitration, and the December 2006 revisions to that provision were entirely in Kaltwasser's favor.

The revised arbitration provision, which the district court never analyzed, is fully enforceable. Under California law, the party claiming unconscionability must show that the contractual term is both procedurally and substantively unconscionable and must make up for a weak showing on one element with a strong showing on the other.

Kaltwasser established only the minimal degree of procedural unconscionability associated with having to agree to a form contract. No other indicium of oppression or surprise is present. Cell phone service is not a necessity, and Kaltwasser was free to obtain it from another provider or to dispense with it altogether. Moreover, his service agreements emphasized the arbitration provision. Accordingly, Kaltwasser must establish extreme substantive unconscionability in order to invalidate ATTM's revised arbitration provision.

Kaltwasser cannot do so. It is true that this Court refused to enforce the arbitration provision in Kaltwasser's original agreement, holding that class waivers are unconscionable "when the potential for individual *gain* is small." *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986 (9th Cir. 2007) (emphasis in original). The revised provision, however, responds to that concern. If the arbitrator awards the customer more than ATTM offered to settle the claim, the customer's minimum recovery is \$7,500 and double attorneys' fees. ATTM also must pay the full cost of arbitration. And the customer has the sole discretion to choose between an in-person arbitration (in the county of his or her billing address), arbitrating by telephone, or submitting the matter for decision on the papers. Together these path-breaking features of ATTM's arbitration provision provide powerful incentives for consumers to pursue their disputes with ATTM in individual arbitration, and for ATTM to resolve those disputes to the customers'

satisfaction. The existence of these incentives precludes a finding of unconscionability under California's generally applicable contract principles.

Indeed, the FAA would preempt any contrary interpretation of California law. Under California's generally applicable unconscionability standard, only contractual terms that shock the conscience are unenforceable. Yet there is nothing conscience-shocking about trading the little-used right to bring a class action for lower-priced wireless service and a subsidized means of resolving individual disputes—especially because the vast majority of disputes could never be brought as a class action in the first place and thus would be infeasible to pursue in court. Accordingly, it would require distorting or displacing California's generally applicable standard in order to declare ATTM's revised arbitration provision unconscionable. Doing so, however, is expressly precluded by Section 2 of the FAA.

Moreover, requiring companies to remove class waivers from their arbitration provisions as a condition of enforcing those provisions would directly conflict with the FAA's purpose of fostering agreements to arbitrate. Class arbitration eliminates the efficiencies of individual arbitration while multiplying its risks exponentially, without the safety valve of judicial review. The inevitable consequence is that businesses will stop agreeing to arbitrate in their consumer contracts. Nothing could more clearly frustrate the purpose of the FAA.

ARGUMENT

The FAA provides that written agreements to arbitrate disputes “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Congress enacted the FAA to “reverse the longstanding judicial hostility to arbitration agreements,” to “place [these] agreements upon the same footing as other contracts,” and “to manifest a liberal federal policy favoring arbitration agreements.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted). Accordingly, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The district court should have compelled arbitration. It is true that unconscionable arbitration agreements, like other kinds of unconscionable contracts, need not be enforced. But as we explain in Part I, the district court erred in applying California’s rather than Virginia’s law of unconscionability. And as we explain in Part II, even if California law were applicable, the district court erred in refusing to enforce ATTM’s revised arbitration provision: The revised arbitration provision is not unconscionable under California law, and any contrary interpretation would be preempted by the FAA.

I. VIRGINIA LAW GOVERNS THE ENFORCEABILITY OF KALTWASSER'S AGREEMENT TO ARBITRATE.

Kaltwasser's choice-of-law provision selects "[t]he law of the state of [Kaltwasser's] billing address." ER197. When Kaltwasser filed this lawsuit, his billing address was located in Norfolk, Virginia. ER87, 291.

As the district court recognized, Virginia law would require the enforcement of Kaltwasser's arbitration agreement. ER5–6. The Virginia Supreme Court has explained that only contractual provisions that so "shock the conscience" that "no man in his senses and not under a delusion would make" and "no fair man would accept" are unconscionable. *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992) (internal quotation marks omitted). Kaltwasser cannot meet this standard by challenging the prohibition of class arbitration because "[c]lass actions are not generally allowed in Virginia." *Almeter v. Va. Dep't of Taxation*, 2000 WL 1687589, at *1 n.1 (Va. Cir. Ct. Nov. 6, 2000); *see also Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002); AM. BAR ASS'N, SECTION OF LITIG., SURVEY OF STATE CLASS ACTION LAW 2007–2008 711 (Dennis K. Egan *et al.* eds. 2007). Because Kaltwasser could not bring a class action in a Virginia court, Virginia law could not logically deem it unconscionable to require individual arbitration. *See, e.g., Gay v. CreditInform*, 511 F.3d 369, 392 (3d Cir. 2007) (agreement "to arbitrate disputes on an individual basis" does not "constitute an unconscionable bargain" under Virginia law); *accord Iberia Credit Bureau, Inc.*

v. Cingular Wireless LLC, 379 F.3d 159, 174–75 (5th Cir. 2004) (rejecting unconscionability challenge to earlier version of ATTM’s arbitration provision because Louisiana statute “does not permit individuals to bring class actions”).

The district court held, however, that California, rather than Virginia, law governs Kaltwasser’s contract. The court interpreted the contract’s selection of the law of Kaltwasser’s “billing address” to refer to California law because Kaltwasser lived in California when he entered into his service agreement. ER6 n.4. The court also held that California’s choice-of-law rules precluded the application of Virginia law because Virginia lacks “a substantial relationship to the parties or their transactions,” and applying “Virginia law would contravene directly California’s strong public policy” against class-arbitration waivers. ER5–6. Each of these conclusions is mistaken.

A. The Term “Your Billing Address” In the Choice-Of-Law Provision Means “Your Billing Address At The Time Of The Dispute.”

The district court construed the phrase “your billing address” in the choice-of-law provision as “refer[ring] to Kaltwasser’s billing address at the time he entered into the contract”—*i.e.*, California—because, in the court’s view, interpreting the phrase to refer to a customer’s current billing address (Virginia) “would allow for the clause to be changeable at will by a customer simply by changing his or her address.” ER6 n.4. The court’s reading is untenable.

Under California law, courts interpret contracts by “look[ing] to the reasonable expectation of the parties at the time of contract.” *Kashmiri v. Regents of the Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 652 (Ct. App. 2007); accord Cal. Civ. Code § 1636. Construing the term “your billing address” to refer to a customer’s *current* billing address when the adversary process begins (rather than to the customer’s *initial* billing address) aligns with the reasonable expectations of ATTM and its customers alike.

Consumers surely expect that their disputes will be governed by the law of the state where they live and receive service at the time of the dispute—not that of a state they may have left months or years earlier. And ATTM has the same expectation. Indeed, if affirmed, the district court’s interpretation would present ATTM with an administrative nightmare: No decisions could be made on a city-wide or state-wide basis, as ATTM’s relationship with each customer would be governed by the potentially different laws of the state of that customer’s original activation. Given how mobile our society has become, to construe ATTM’s choice-of-law provision as a contractual requirement to apply to each customer in a state the laws of the state in which that customer first contracted for service would be to embrace the sort of “absurd conclusion[.]” that California law eschews. *Transamerica Ins. Co. v. Sayble*, 239 Cal. Rptr. 201, 203 (Ct. App. 1987); accord Cal. Civ. Code § 1638.

The district court’s interpretation also runs afoul of “the rule of contract

interpretation that the same word used in an instrument is generally given the same meaning” throughout the instrument. *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 84 P.3d 385, 393 (Cal. 2004); *see also Caminetti v. Pac. Mut. Life Ins. Co.*, 139 P.2d 908, 915 (Cal. 1943) (same). Kaltwasser’s service agreement uses the term “your billing address” in both the choice-of-law and arbitration provisions. The latter states that “all hearings conducted as part of the arbitration shall take place in the county (or parish) *of your billing address.*” ER195 (emphasis added). The purpose of guaranteeing that arbitration will take place near the customer’s “billing address” is to ensure that the location is convenient for the customer. That purpose would be frustrated unless the reference to the customer’s “billing address” is construed to mean the customer’s *current* billing address at the time an arbitration is filed. Otherwise, customers might have to return to states where they previously lived and to arbitrate their disputes there, which likely would be inconvenient and possibly even unconscionable.

Because there can be no doubt what the phrase “your billing address” means when used in the arbitration provision, basic contract-interpretation principles dictate that it be given the same meaning in the choice-of-law provision. Indeed, doing so makes perfect sense because locally based arbitrators are likely to be more familiar with local law and hence more likely to produce a fair and legally accurate result.

As its sole basis for rejecting ATTM’s interpretation, the district court stated

that, if “billing address” were understood to mean the customer’s address at the time of the dispute, customers would change their billing addresses in order to take advantage of more favorable law. ER6 n.4. But given the costs involved, the odds of a customer moving across the country (or choosing a distant billing address) in order to engage in forum-shopping are small. Even if a few individuals would do so, the vast majority of ATTM’s customers would reasonably expect that the law that governs a particular dispute would correspond with the state where the arbitration will take place. Accordingly, the district court erred in holding that the law of California, not Virginia, applies here.

B. The Contractual Selection Of Virginia Law In A Contract With A Virginia Resident Is Enforceable Under California Law.

In the alternative, the district court held that California’s conflict-of-law principles preclude application of Virginia law. The court was mistaken.

In determining whether to enforce choice-of-law provisions, “California courts apply the principles set forth in Restatement section 187, which reflect a strong policy favoring enforcement of such provisions.” *Nedlloyd Lines B.V. v. Super. Ct.*, 834 P.2d 1148, 1151–52 (Cal. 1992) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971)); *see also Washington Mut. Bank v. Super. Ct.*, 15 P.3d 1071, 1079 (Cal. 2001) (“*Nedlloyd*’s analysis is properly applied in the context of consumer adhesion contracts”); *Discover Bank v. Super. Ct.*, 36 Cal. Rptr. 3d 456, 458 (Ct. App. 2005) (“*Discover Bank II*”) (same). Under those

principles, if “the chosen state has a substantial relationship to the parties or their transaction,” or “a reasonable basis otherwise exists for the choice of law, the parties’ [contractual] choice generally will be enforced.” *Washington Mut. Bank*, 15 P.3d at 1079. If there is a “substantial relationship” or other “reasonable basis” for selecting non-California law, then the proponent of California law must “establish *both* that the chosen law is contrary to a fundamental policy of California and that California has a materially greater interest in the determination of the particular issue.” *Id.* (emphasis added).

1. Virginia Has A Substantial Relationship To The Parties, And The Parties Had A Reasonable Basis For Selecting Virginia Law, Because Kaltwasser Lives And Receives Wireless Service In Virginia.

The district court held that Virginia lacks a “significant relationship to the parties or their transactions” because Virginia “is not the state in which the contract was formed, nor is it the state under whose laws the dispute arises.” ER5. That holding is in direct conflict with the California Supreme Court’s decision in *Nedlloyd* and this Court’s decision in *ABF Capital Corp. v. Osley*, 414 F.3d 1061 (9th Cir. 2005). In *Nedlloyd*, the California Supreme Court upheld the parties’ Hong Kong choice-of-law provision because two of the nine parties to the contract were from Hong Kong, even though there was no evidence that the contract had been formed in Hong Kong and the plaintiff had sued under California law. 834 P.2d at 1149–50, 1153. As the court explained, so long as “one of the parties [to

the contract] resides in the chosen state, the parties have a reasonable basis for their choice.” *Id.* at 1153 (internal quotation marks omitted). Similarly, in *ABF Capital* this Court explained that, under California’s conflict-of-law rules, “[a] substantial relationship exists where one of the parties is domiciled or incorporated in the chosen state.” 414 F.3d at 1065; *see also Expansion Pointe Props. Ltd. P’ship v. Procopio, Cory, Hargreaves & Savitch, LLP*, 61 Cal. Rptr. 3d 166, 179 (Ct. App. 2007) (“The substantial relationship and reasonable basis tests are met when one of the parties is domiciled in the chosen state.”). Here, it is undisputed that Kaltwasser lives in Virginia. Indeed, when the district court issued its order, Kaltwasser had lived there for six and a half of the previous nine years. ER87.

Moreover, Virginia is the place of performance of both parties’ obligations under the contract: ATTM provides Kaltwasser wireless service in Virginia, and Kaltwasser pays his bills from there. ER59–68, 72–81. Under the Restatement approach (which California has adopted), the “substantial relationship” requirement is satisfied when, as here, the chosen state is “where performance by one of the parties is to take place.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f.

The substantial-relationship test sets a low bar for choice-of-law provisions. As the Restatement explains, “[s]ituations” in which this requirement is not met “do not arise in practice” because “[c]ontracts are entered into for serious purposes and rarely, if ever, will the parties choose a law without good reason for doing so.”

Id. ATTM and Kaltwasser had a good reason for choosing the law of the state of Kaltwasser’s billing address because, for the vast majority of customers, the state of the customer’s billing address is where the customer lives or works. Most customers likely expect that their local law would govern their dispute. *See id.* § 6(2)(d) (“the protection of justified expectations” is a factor that guides choice-of-law analysis).⁷

2. California Does Not Have A Fundamental Policy Of Prohibiting Residents Of Other States From Agreeing To Arbitrate Disputes On An Individual Basis.

The district court also erred in holding that the application of Virginia law would violate a fundamental California policy against contracts that require disputes to be arbitrated on an individual basis. Several district judges in California have rejected this expansive view of California policy. *See, e.g., Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018, 1024 (2007), *reconsideration denied*, 533 F. Supp. 2d 1012, 1036 (N.D. Cal. 2008); *Lux v. Good Guys, Inc.*, 2006 WL 357820, at *1 (C.D. Cal. Feb. 8, 2006); *Ramirez v. Cintas Corp.*, 2005 WL 2894628, at *5 (N.D. Cal. Nov. 2, 2005). As one court explained, *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), cannot be read “to hold California

⁷ ATTM’s consumer-focused choice-of-law provision compares favorably with other companies’ provisions that select the pro-business law of the drafting company’s home state for all customer disputes. *See, e.g., Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018, 1022–25 (N.D. Cal. 2007) (considering enforceability of choice-of-law provision selecting Texas law rather than the law of the state of the customer’s residence).

precludes all waivers of classwide arbitration when the California Supreme Court explicitly stated that it did ‘not hold all class action waivers are necessarily unconscionable.’” *Ramirez*, 2005 WL 2894628, at *5 (quoting *Discover Bank*, 113 P.3d at 1110).

To be sure, other California state and federal courts have held—in the context of the specific provisions before them—that California had a fundamental policy interest in prohibiting application of a class-arbitration waiver to the named plaintiff or plaintiffs. *See, e.g., Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 730 (Ct. App. 2005); *Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1353, 1360–61 (N.D. Cal. 2007); *Ostreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1066–68 (N.D. Cal. 2007); *Brazil v. Dell Inc.*, 2007 WL 2255296, at *1 (N.D. Cal. Aug. 3, 2007). But those cases differ substantially from this one.

First, all but one of them involved plaintiffs who were California residents.⁸ By contrast, Kaltwasser lives in Virginia. California has no interest—much less a fundamental one—in ensuring that *nonresidents* such as Kaltwasser can bring class actions under California law. To the contrary, the California Supreme Court has confirmed that “an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may * * * result in the exclusion of *nonresident*

⁸ The one exception is *Van Slyke*, which involved three named plaintiffs, one of whom was from California. While the other two named plaintiffs were residents of Arkansas and Ohio (503 F. Supp. 2d at 1356), the court did not consider the residence of those plaintiffs in analyzing the issue (*see id.* at 1360–62).

consumers from a California-based class action.” *Washington Mut. Bank*, 15 P.3d at 1080 (emphasis added). And even those cases holding that California has declared a fundamental policy against contractual prohibitions of class arbitration have uniformly explained that such a policy is intended to protect *California residents*. See *Klussman*, 36 Cal. Rptr. 3d at 741 (recognizing “California’s fundamental public policy interest in protecting *its residents*”) (emphasis added); *Van Slyke*, 503 F. Supp. 2d at 1361 (“the fundamental public policy * * * identified here is California’s interest in affording *its citizens* effective consumer class-action remedies”).

Second, even if California had a fundamental interest in protecting nonresidents like Kaltwasser simply because they once lived in California, that interest is not implicated here. As Judge Hamilton of the Northern District of California has aptly noted, “the California Supreme Court [has] made it clear that there is *no* blanket policy in California against class action waivers in the consumer context.” *Omstead*, 473 F. Supp. 2d at 1024 (emphasis in original). At most, there is “a *limited* policy against class action waivers” (*id.* (emphasis added)) that applies only when such waivers “operate effectively as exculpatory contract clauses” and therefore are unconscionable under California law (*Discover Bank*, 113 P.3d at 1108). Because, as we later explain (at pages 35–44, *infra*), Kaltwasser’s arbitration agreement is not unconscionable under California law,

applying Virginia law to enforce that agreement would not intrude upon any fundamental California policies.

3. California Does Not Have A Materially Greater Interest Than Virginia In Policing The Contracts Of A Virginia Resident.

Even if the district court were correct that applying Virginia law would violate a fundamental California policy, it erred in failing to consider the second half of the Restatement test. As the California Supreme Court has held, “[i]f * * * there is a fundamental conflict with California law, the court *must then determine* whether California has a ‘materially greater interest than the chosen state in the determination of the particular issue.’” *Washington Mut. Bank*, 15 P.3d at 1078 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (emphasis added)). Otherwise, “no party to a contract in any of the 50 states could be certain that his bargain would be enforceable. If minimum contact with California existed, a party could be made to answer a complaint filed in California,” and “every allocation of risk between the contracting parties would have to withstand scrutiny under the public policy dictates of California.” *S.A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co.*, 641 F.2d 746, 752 (9th Cir. 1981); *see also Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 82–83 (Ct. App. 1998) (describing *S.A. Empresa* as a “comprehensive statement of the California choice of laws principles” that “met with the approval of [the California] Supreme Court” in “*Nedlloyd*”).

Kaltwasser did not and could not show that California has a materially greater interest in determining the enforceability of his arbitration agreement. Although Kaltwasser accepted his service agreement in California, he lives in Virginia, and both parties are performing their contractual obligations there. It is difficult to imagine that California has a greater interest in policing the contracts of a Virginia resident than does Virginia itself. As the California's Second District Court of Appeal has held in enforcing a Delaware choice-of-law provision, "[a]lthough California does have a strong interest in protecting its consumers, * * * California has no greater interest in protecting other states' consumers than other states have in protecting California's." *Discover Bank II*, 36 Cal. Rptr. 3d at 462.

* * * * *

In sum, the district court erred in applying California, rather than Virginia, law to Kaltwasser's challenge to his arbitration agreement. Because there can be no serious doubt that both versions of ATTM's arbitration provision are enforceable under Virginia law, the Court should reverse the order of the district court with instructions to compel arbitration.

II. EVEN IF CALIFORNIA LAW WERE APPLICABLE, THE COURT ERRED IN REFUSING TO COMPEL ARBITRATION.

Even if the district court were correct in applying California law, it erred in refusing to compel arbitration. The district court's ruling was predicated on its holding that the December 2006 revision to Kaltwasser's arbitration agreement

was ineffective. As we discuss in Section A below, that holding was wrong as a matter of California law. And as we discuss in Section B, the revised provision is fully enforceable under California law, and any contrary conclusion would be preempted by the FAA.

A. The District Court Erred In Declaring ATTM’s Revision Of The Arbitration Provision Ineffective.

The district court held that the December 2006 revision to Kaltwasser’s arbitration provision was ineffective for two reasons. First, it ruled that revising a contract without providing a “means of rejecting the modified terms, other than canceling service” is “procedurally unconscionable” under *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002). Second, it invoked the principle that “a revised contract is merely an offer and does not bind the parties until it is accepted.” ER7 n.5 (quoting *Douglas*, 495 F.3d at 1066). Both reasons miss the mark.

To begin with, the December 2006 revision was not merely an offer to amend Kaltwasser’s original arbitration provision. Rather, it was an exercise of ATTM’s right under the change-in-terms provision in Kaltwasser’s July 2006 service agreements, which provides that ATTM “may change any terms, conditions, rates, fees, expenses, or charges regarding [Kaltwasser’s] service at any time,” subject to his rights to terminate service without penalty if ATTM raises his rates or shrinks his service area, and to require ATTM to arbitrate under the terms

of original arbitration provision. ER189–90, 196. Although this Court in *Douglas* accurately described the default rule that “a party can’t unilaterally change the terms of a contract * * * because a revised contract is merely an offer and does not bind the parties until it is accepted” (495 F.3d at 1066), parties may contract around that rule by agreeing to allow one party to make future modifications to contractual terms. As the California Court of Appeal has explained, modifications made pursuant to such change-in-terms provisions are enforceable so long as they are “clearly related to a matter addressed in the original contract” and are “reasonable.” *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 281, 285 (Ct. App. 1998).⁹ Those requirements are met here: The December 2006 modifications “clearly related to” the original arbitration provision in Kaltwasser’s service agreement and are “reasonable” because they are entirely to Kaltwasser’s benefit.

Similarly, the California Supreme Court has held that a provision in a bank’s contract with its depositors that stated that deposits were ““subject to * * * the

⁹ The principle that parties may agree to change-in-terms provisions is recognized nationwide. For example, the North Carolina Court of Appeals has explained that companies may “rely upon ‘Change of Terms’ provisions in their adhesion contracts insofar as the new or modified terms relate to subjects already addressed in some fashion in the original agreements.” *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 433 (N.C. Ct. App. 2004); *accord, e.g., Iberia*, 379 F.3d at 173–74 (same under Louisiana law); *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 193–94 (E.D.N.Y. 2004) (Virginia law); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001) (Ohio law), *aff’d*, 34 F. App’x 964 (5th Cir. 2002); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 899–900 (Ill. App. Ct. 2003) (Arizona law); *Discover Bank v. Shea*, 827 A.2d 358, 360–62 (N.J. Super. Ct. 2001) (New Jersey law).

Bank's present and future rules, regulations, practices and charges'" was a contractually enforceable means of assessing a \$6 fee for bounced checks. *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503, 508, 510 (Cal. 1985). As the court explained, "a contracting party's discretionary power to vary the price or other performance does not render the agreement illusory if the party's *actual* exercise of that power is reasonable." *Id.* at 510 (internal quotation marks omitted; emphasis in original). It is difficult to imagine any more "reasonable" exercise of a contractual power to modify a contractual term than ATTM's revision of its arbitration provision to make arbitration *more favorable* for its customers.

The district court's reliance on *Szetela* (rather than *Badie* and *Perdue*) was misplaced. In *Szetela*, a bank *added* an arbitration provision to the contracts of its cardholders by including the provision in a bill insert. 118 Cal. Rptr. 2d at 864. It told its customers that they would be deemed to accept the provision unless they paid off their balances and closed their accounts. *Id.* Here, by contrast, the December 2006 revision was made to an *existing* arbitration provision, and the revisions were favorable to Kaltwasser and ATTM's other customers. *See* pages 4–7, *supra*.

In addition, the district court's premise—that Kaltwasser's only means of rejecting the provision was to cancel service (ER7 n.5)—is incorrect. Kaltwasser's original arbitration provision gave him the right to reject modifications and "require Cingular to adhere to the language in this [*i.e.*, the original] provision."

ER196. Thus, the concern of the *Szetela* court that the company would use its change-in-terms provision to spring onerous new contract terms on its customers is wholly inapplicable here.¹⁰

B. ATTM’s Revised Arbitration Provision Is Fully Enforceable.

Although the district court never reached the issue because it confined its analysis to Kaltwasser’s original arbitration provision, ATTM’s revised arbitration provision is fully enforceable under California law. Moreover, any interpretation of California law to the contrary would be preempted by the FAA.

1. The Revised Provision Is Not Unconscionable Under California Law.

Under California law, the party seeking to avoid enforcement of a contractual term—*i.e.*, Kaltwasser—has the burden of proving both procedural and substantive unconscionability. *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000); *Engalla v. Permanente Med. Group, Inc.*,

¹⁰ During the proceedings below, Kaltwasser purported to exercise this contractual right to reject the revised provision. ER110. But that does not enable him to escape arbitration. Under the original provision, the consequence of rejecting the new provision is that he and ATTM must “adhere to”—*i.e.*, arbitrate under—the previous version. The contract does not give Kaltwasser a right to reject the new provision in order to attack the old one. The Supreme Court has indicated that parties cannot avoid arbitration based on the contention “that they agreed to arbitrate future disputes * * * in reliance on [an earlier case] holding that such agreements would be held unenforceable by the courts.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989). By the same token, customers who reject changes that were designed to create adequate incentives to arbitrate on an individual basis cannot avoid arbitration because of the absence of such incentives from their original agreements.

938 P.2d 903, 915–16 (Cal. 1997). Procedural unconscionability involves “oppression” or “surprise” in the making of the agreement (*Armendariz*, 6 P.3d at 690), while substantive unconscionability focuses on whether the contractual term in question is so “overly harsh” or “one-sided” (*id.*) as to “shock the conscience.” *Belton v. Comcast Cable Holdings, LLC*, 60 Cal. Rptr. 3d 631, 649–50 (Ct. App. 2007); *Aron v. U-Haul Co.*, 49 Cal. Rptr. 3d 555, 564 (Ct. App. 2006). Put another way, the bargain that the term represents must be one that “no man in his senses, and not under delusion, would make on the one hand, and [that] no honest and fair man would accept on the other.” *Herbert v. Lankershim*, 71 P.2d 220, 257 (Cal. 1937) (quoting *Odell v. Moss*, 62 P. 555, 557 (Cal. 1900) (quoting in turn 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 244 (14th ed. 1918)); *see also Cal. Grocers Ass’n, Inc. v. Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994).

In performing the unconscionability inquiry, California courts employ a “sliding scale”: “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Armendariz*, 6 P.3d at 690. In other words, if “the procedural unconscionability, although extant, [is] not great,” the party attacking the term must prove “a greater degree of substantive unfairness.” *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 107 Cal.

Rptr. 2d 645, 656–57 (Ct. App. 2001). Under California’s sliding-scale approach, ATTM’s revised arbitration provision is fully enforceable.

a. The manner in which Kaltwasser agreed to arbitrate involves at most a minimal degree of procedural unconscionability.

Under this Court’s interpretation of California law, the manner in which Kaltwasser agreed to arbitration involves a *modest* degree of procedural unconscionability. Although Kaltwasser readily could have obtained wireless service elsewhere, this Court held in *Shroyer* that “a contract may be procedurally unconscionable under California law when the party with substantially greater bargaining power presents a ‘take-it-or-leave-it’ contract to a customer—even if the customer has a meaningful choice as to service providers.” 498 F.3d at 985 (internal quotation marks omitted).¹¹ As the California Court of Appeal has made

¹¹ Although the panel in the present case is bound by this aspect of *Shroyer*, we submit that the *Shroyer* court erred in “follow[ing] the [California] courts that reject the notion that the existence of ‘marketplace alternatives’ bars a finding of procedural unconscionability,” instead of following the conflicting line of California cases that hold that there can be no procedural unconscionability when the customer has alternatives to contracting with the defendant. 498 F.3d at 985. The two competing lines of published decisions reveal an unmistakable pattern. The cases finding procedural unconscionability all involve arbitration provisions. *See Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 353–56 (Ct. App. 2007), *cert. denied*, 128 S. Ct. 2501 (2008); *Szetela*, 118 Cal. Rptr. 2d at 867; *Villa Milano Homeowners Ass’n v. Il Davorge*, 102 Cal. Rptr. 2d 1, 5–6 (Ct. App. 2000). The decisions that do not all involve other types of contractual provisions. *See Belton*, 60 Cal. Rptr. 3d at 650 (requirement that cable music subscribers receive basic cable television); *Wayne v. Staples, Inc.*, 37 Cal. Rptr. 3d 544, 556 (Ct. App. 2006) (declared-value insurance for package shipping); *Aron*, 49 Cal. Rptr. 3d at 564 (rental truck refueling policy); *Morris v. Redwood Empire*

clear, however, the non-negotiable nature of an agreement suffices only to establish “a minimal degree of procedural unconscionability.” *Gatton*, 61 Cal. Rptr. 3d at 356.

Beyond this use of a standard form contract, the district court did not find—and Kaltwasser did not establish—any other indicium of procedural unconscionability. To begin with, a cell phone plainly is a “nonessential recreational” good, and Kaltwasser “always ha[d] the option of simply forgoing” wireless service. *Belton*, 60 Cal. Rptr. 3d at 650–51 (cable music service is non-essential); *see also Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1202 (C.D. Cal. 2006) (personal computers are non-essential); *cf. Riensche v. Cingular Wireless LLC*, 2007 WL 3407137, at *8 (W.D. Wash. Nov. 9, 2007) (“telephone service, particularly cellular service, is not a necessity”). Thus, the circumstances were not such that Kaltwasser felt pressured into accepting a term that he otherwise would have rejected.

Nor can Kaltwasser claim to have been surprised by the arbitration provision. The top of the first page of each of his Terms of Service booklets states in boldface that “**This Agreement requires the use of arbitration to resolve**

Bancorp, 27 Cal. Rptr. 3d 797, 807 (Ct. App. 2005) (termination fee); *Dean Witter Reynolds, Inc. v. Super. Ct.*, 259 Cal. Rptr. 789, 795 (Ct. App. 1989) (termination and annual fee). Because the conflict hinges on whether an arbitration provision is at issue, reliance on the arbitration-specific rule violates the FAA’s requirement that state unconscionability law cannot single out arbitration for suspect status. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

disputes,” and the arbitration provision itself is set off from other provisions and marked “**ARBITRATION Please read this carefully. It affects your rights.**” ER170, 174, 185, 194 (emphasis in original). Kaltwasser had ample opportunity to peruse his Terms of Service booklets. When he first activated service, he had 15 days to cancel without penalty if he wished to reject ATTM’s terms of service. ER166, 168. And when he renewed service in July 2006, he had 30 days to cancel. ER178, 181.

In short, the fact that ATTM’s arbitration provision is contained in a form contract implicates, at most, only minimal procedural unconscionability. Accordingly, under California’s sliding-scale approach, Kaltwasser must “make a *strong showing* of substantive unconscionability to render [his] arbitration provision unenforceable.” *Gatton*, 61 Cal. Rptr. 3d at 356 (emphasis added). As we next explain, Kaltwasser failed to meet that high standard.

b. ATTM’s arbitration provision is not substantively unconscionable at all, much less extremely so.

In *Discover Bank*, the California Supreme Court held that a credit-card issuer’s arbitration provision—one that was far less favorable to consumers than ATTM’s current provision—was substantively unconscionable because its class waiver effectively “*insulate[d] the company from liability*” for the \$29 claims at issue in that case. 113 P.3d at 1109 (emphasis added). The court explained that class actions “overcome the problem that small recoveries do not provide the

incentive for any individual to bring a solo action prosecuting his or her rights” by “aggregating the relatively paltry recoveries into something worth someone’s (usually an attorney’s) labor.” *Id.* at 1105–06 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)). But the court made clear that it was not holding “that *all* class action waivers are necessarily unconscionable.” *Id.* at 1110 (emphasis added). Rather, whether such a provision is substantively unconscionable turns on a case-by-case analysis of whether the plaintiff may feasibly vindicate “small” claims without using the class-action mechanism and, conversely, whether the class waiver threatens to insulate the company from liability for cheating its customers. *Id.*

In *Shroyer*, this Court held that the version of ATTM’s arbitration provision in Kaltwasser’s July 2006 service agreement was substantively unconscionable under *Discover Bank*. 498 F.3d at 986–87. As interpreted by this Court, that version specified that ATTM (then Cingular) would pay the full cost of arbitration and, in addition, would pay the plaintiff’s attorneys’ fees if the arbitrator awarded the plaintiff the amount of his or her demand or more. *Id.* at 986. The *Shroyer* Court held that those features were insufficient to render the class waiver enforceable under *Discover Bank* because “when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation,” even if they would not “experience a net loss (including attorneys’ fees and costs).” *Id.* (emphasis in original).

ATTM's revised arbitration provision resolves these concerns. As noted above (at pages 6–7), ATTM has built the necessary “individual gain” into its arbitration provision by providing that any California customer who obtains an arbitral award in excess of ATTM's settlement offer will receive at least **\$7,500**, plus **double** attorneys' fees. These amounts far exceed the level of damages that Congress and the California Legislature have deemed sufficient to encourage individuals and their counsel to pursue statutory claims.¹² Even the prospect of recovering \$7,500 alone would be enough to make pursuing a claim worthwhile for Kaltwasser, as real-world evidence confirms: Each year, Californians file hundreds of thousands of small claims court actions even though California law caps damages in such cases at \$7,500.¹³

¹² ER156 (citing \$500 statutory damages provision in Telephone Consumer Protection Act and \$1,000 statutory damages provision in Cable Act); 15 U.S.C. § 1681n(a) (statutory damages of between \$100 and \$1,000 under Fair Credit Reporting Act); Cal. Civ. Code § 54.3(a) (\$1,000 statutory damages under Disabled Persons Act). These legislative determinations of the amount needed to encourage vindication of statutory rights are entitled to great (if not dispositive) weight. *See Santisas v. Goodin*, 951 P.2d 399, 413 (Cal. 1998) (noting court's “reluctan[ce] to declare contractual provisions void or unenforceable on public policy grounds without firm legislative guidance”); *People v. Mun. Ct.*, 574 P.2d 425, 427 (Cal. 1978) (the courts' “common law powers * * * should never be exercised in such a manner as to * * * frustrate legitimate legislative policy”) (internal quotation marks omitted).

¹³ *See* Cal. Code Civ. Proc. § 116.221; *see also* Judicial Council of California, *2007 Court Statistics Report: Statewide Caseload Trends 1996–1997 through 2005–2006* 46, available at <http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf>.

The premiums available under ATTM's revised arbitration provision also substantially exceed the typical incentive payments awarded to class representatives as part of court-approved settlement agreements.¹⁴ Thus, Kaltwasser actually is better off in individual arbitration than as a putative class representative in court. Not only does arbitration take much less time than judicial dispute resolution,¹⁵ but consumers typically prevail more often in arbitration than in litigation. For example, recent statistics compiled by the AAA show that consumers prevail in almost half (48 percent) of the approximately 40 percent of arbitrations that are not settled or withdrawn.¹⁶ AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, available at [http://](http://www.adr.org/si.asp?id=5027)

¹⁴ See Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1333 & tbl. 5 (2006) (finding median incentive award for class representatives in consumer and consumer credit cases to be \$2,089 and \$1,045, respectively).

¹⁵ Consumer arbitrations administered by the AAA proceed to an award in an average of four to six months. AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, available at <http://www.adr.org/si.asp?id=5027>. By contrast, federal civil cases average 23.2 months before reaching trial. *United States District Court—Judicial Caseload Profile* (2007), available at <http://www.uscourts.gov/cgi-bin/cmsd2006.pl>. And contract suits in state courts average 25 months before reaching a verdict. Bureau of Justice Statistics, *Contract Trials and Verdicts in Large Counties, 2001*, at 2 (Jan. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctv1c01.pdf>. Of course, class actions take even longer to reach a final resolution.

¹⁶ Presumably, a substantial percentage of settlements in consumer-initiated arbitrations benefit the consumer.

www.adr.org/si.asp?id=5027.¹⁷ By contrast, in court, virtually all consumer actions that are not settled or withdrawn are dismissed, with only 1.3 percent of federal civil cases ever even reaching trial, much less a verdict for the plaintiff.¹⁸

Moreover, the effort required to pursue a claim is substantially lower in arbitration than in litigation. Customers like Kaltwasser are likely to obtain a successful resolution of their claims with little effort—perhaps only a few hours—simply by providing ATTM with notice of their dispute. That is because the terms of the arbitration provision create strong incentives for ATTM to resolve claims to its customers' satisfaction so that it can avoid the risk of having to pay the premiums and the substantial costs of arbitration.¹⁹ And if Kaltwasser were dissatisfied with ATTM's settlement offer, he could arbitrate conveniently by telephone or by mail (a particularly useful option for servicemen like him). *See* page 7, *supra*. In contrast, by bringing a class action, Kaltwasser would have to

¹⁷ Studies show that employees enjoy a similar advantage in AAA arbitrations. *See* Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004) (employees were almost 20 percent more likely to win employment cases in AAA arbitrations than in court), at http://www.workrights.org/current/cd_arbitration.html; *see also* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J. 56, 56–58 (Nov. 2003–Jan. 2004) (securities industry employees were 12 percent more likely to win in arbitration than in federal district court).

¹⁸ Admin. Office of U.S. Courts, *2006 Judicial Facts and Figures* tbl. 4.10, at <http://www.uscourts.gov/judicialfactsfigures/2006/Table410.pdf>.

¹⁹ If a customer selects an in-person hearing, ATTM must pay at least \$1,700 in arbitration costs: \$750 in administrative fees, a \$200 case service fee, and \$750 in arbitrator fees. ER251–52.

invest much more time to pursue his claim. Working with a lawyer, filling out affidavits, being deposed, and attending the class certification hearing would doubtless entail many days of missed work (assuming that the Navy would even permit it)—and that lost time may stretch into weeks should the case actually proceed to trial.

Moreover, while the interests of absent class members are logically irrelevant to the unconscionability inquiry, there is no reason to think that they would receive greater relief in a class action than in individual arbitration.²⁰ About four-fifths of putative class actions are not certified. Thomas W. Willging & Shannon R. Wheatmann, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 635–36 (2006). In such cases, members of the putative class generally get nothing. Of the 20 percent of putative class actions that are certified, the overwhelming majority settle. *Id.* at 638. And in those cases, class counsel’s fees often eat up much of the settlement, leaving absent class members to receive pennies on the dollar for their claims.²¹

²⁰ Under California law, as elsewhere, a contractual term is unconscionable only if the party challenging that term can show that enforcing it under the specific circumstances of the case would shock the conscience, not simply that applying the term to other, imagined persons under other, “hypothetical situation[s]” might be “unconscionable.” *West v. Henderson*, 278 Cal. Rptr. 570, 576 (Ct. App. 1991).

²¹ See, e.g., John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 911; Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 168 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1053–89 (1996).

Unsurprisingly, studies of consumer class action settlements show that very few consumers bother to file a claim when the amount that they would receive is small.²² Indeed, in several recent cases, far fewer than one percent of the absent class members submitted claims.²³ This phenomenon caused Congress to find that “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed.” Class Action Fairness Act of 2005, PUB. L. NO. 109-2 § 2(a)(3), 119 Stat. 4. Here again, customers who invoke ATTM’s dispute resolution process will surely do better than they would as members of a putative class action.

²² See, e.g., James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445–46 (2005) (noting that the redemption rate of class action coupons ranges from one to three percent); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1035 (2002) (reporting a study of ten consumer class action settlements in which the redemption rates varied from 3 to 13.1 percent); Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 753 (1988) (discussing three settlements in which the claims rates were 3, 10.5, and 18 percent).

²³ See, e.g., *Palamara v. Kings Family Rests.*, 2008 WL 1818453, at *2 (W.D. Pa. Apr. 22, 2008) (“approximately 165 class members” out of 291,000 “had obtained a voucher” under the settlement, yielding a take rate of under 0.06 percent); *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, at *2 (N.D. Cal. Jan. 18, 2008) (“less than one percent of the class chose to participate in the settlement”); *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct. May 7, 2007) (“only 337 valid claims were filed out of a possible class of 1,500,000,” yielding a take rate of just over 0.02 percent), *rev’d*, 2008 WL 2726628 (N.C. Ct. App. July 15, 2008); see also, e.g., *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 649–50 (7th Cir. 2006) (only a “paltry three percent” of class members had filed claims under the settlement).

In short, ATTM’s current arbitration provision resolves the concerns identified with the provisions in *Discover Bank* and *Shroyer* by providing affirmative inducements to customers and their attorneys to pursue individual claims. Accordingly, taking into account the (at most) modest level of procedural unconscionability, Kaltwasser has failed to show that ATTM’s revised arbitration provision rises sufficiently high on the spectrum of substantive unconscionability to warrant refusing to enforce it.

2. The FAA Would Preempt Any Holding That ATTM’s Arbitration Provision Is Unenforceable Under California Law.

If this Court were to conclude that ATTM’s class-arbitration prohibition is unconscionable under California law, so construed California law would be preempted by the FAA, under both the express- and conflict-preemption doctrines.

a. To find ATTM’s arbitration provision unconscionable would require deviating from California’s generally applicable unconscionability doctrine in a manner that is expressly precluded by the FAA.

Section 2 of the FAA specifies that arbitration provisions “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.” 9 U.S.C. § 2 (emphasis added). As the Supreme Court has recently reiterated, Section 2 forbids states from “impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally.” *Preston v. Ferrer*, 128 S. Ct. 978, 985 (2008). Accordingly,

a court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable * * *.” *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *see also Iberia*, 379 F.3d at 167 (Section 2 preempts even “general principle[s] of contract law, such as unconscionability” if “those general doctrines” are “employ[ed] * * * in ways that subject arbitration clauses to special scrutiny”). As this Court has recognized, this principle means that a law that applies only to “a limited set of transactions * * * is not a law of ‘general applicability’” and therefore is preempted by Section 2. *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). Section 2’s requirement that arbitration provisions be enforced “save upon such grounds as exist at law or in equity for the revocation of *any* contract” precludes invoking California unconscionability law to invalidate ATTM’s uniquely pro-consumer arbitration provision.

As discussed above, under California’s generally applicable unconscionability principles, a contractual term is substantively unconscionable only if it so “shock[s] the conscience” (*Belton*, 60 Cal. Rptr. 3d at 650) that a person would have to be “under delusion” (*Herbert*, 71 P.2d at 257) to agree to it. In *Shroyer*, this Court held that “[t]he rule announced in *Discover Bank* is simply a refinement of the unconscionability analysis applicable to contracts generally in California.” 498 F.3d at 987. We respectfully disagree with that conclusion. But even if the holdings in *Discover Bank* and *Shroyer* entailed a mere “refinement” of California’s generally-applicable “shock the conscience” standard, the same could

not be said of any holding that ATTM's *current* arbitration provision, with its unprecedented opportunities for "individual gain" (*Shroyer*, 498 F.3d at 986 (emphasis omitted)), is unconscionable.

The trade-off that ATTM's customers make in accepting ATTM's revised arbitration provision is hardly an unreasonable one, much less "delusional" or conscience-shocking. First, without arbitration—and in particular, without the inducements to pursue individual claims under ATTM's provision—ATTM's customers would be left without any realistic means to pursue the vast majority of their disputes, which are individualized and not susceptible to class-wide adjudication. As the Supreme Court has observed, without enforceable arbitration agreements, "the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). As we explain below (at pages 53–54), neither ATTM nor any other rational business would provide subsidized individual arbitration to its customers if class arbitration must also be made available.

Second, all of ATTM's customers, including the millions who never have a dispute of any kind, benefit from ATTM's arbitration provision in the form of lower prices for wireless services. As the Seventh Circuit has explained, "arbitration offers cost-saving benefits * * * and these benefits are reflected in a

lower cost of doing business that in competition are passed along to customers.” *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks omitted); *see also* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–56 (2006) (arbitration “lower[s] [businesses’] dispute-resolution costs,” and this “benefit to business is also a benefit to consumers” because “whatever lowers costs to businesses tends over time to lower prices to consumers”). If ATTM’s arbitration provision is not enforced, those cost savings will be lost.

Accordingly, to hold that ATTM’s exceptionally pro-consumer arbitration “shock[s] the conscience” would require a total distortion of that standard—one that would afford courts an open-ended means for striking down virtually any contractual provision that they think (in hindsight) has turned out to be unfair to one of the contracting parties. That is manifestly not California law—at least not with respect to any contractual provisions other than ones agreeing to resolve disputes on an individual basis. As the California Court of Appeal has observed, “with a concept as nebulous as ‘unconscionability,’ it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable.” *Koehl v. Verio, Inc.*, 48 Cal. Rptr. 3d 749, 769 (Ct. App. 2006)

(internal quotation marks omitted) (quoting *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 480 (Ct. App. 1996)).

In short, to deem ATTM’s current arbitration provision to be substantively unconscionable merely because it incorporates a traditional characteristic of arbitration—the lack of class relief—is to condemn the provision on the impermissible ground that traditional, individual arbitration is a second-class form of adjudication. *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (“The cry of ‘unconscionable!’ just repackages the tired assertion that arbitration should be disparaged as second-class adjudication. It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms.”). Because it would take far more than a mere “refinement” of California’s “shock the conscience” standard to justify invalidating ATTM’s current arbitration provision, *Shroyer*’s holding that Section 2 of the FAA does not preempt California law is inapplicable in *this* case. The Court is free to—and should—hold that Section 2 requires rejection of any argument that ATTM’s new provision is substantively unconscionable.

***b.* Any holding that precludes the enforcement of agreements to arbitrate disputes individually would conflict with the objectives of the FAA and be preempted on that ground as well.**

In addition, if California law were interpreted to preclude ATTM from requiring individual arbitration notwithstanding ATTM’s efforts to make

individual arbitration a realistic alternative for its customers, that law would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA and thus would be preempted under the doctrine of conflict preemption. *United States v. Locke*, 529 U.S. 89, 109 (2000) (quotation marks omitted). When federal law encourages private parties to engage in or refrain from a certain activity, as the FAA does in declaring a “liberal federal policy favoring arbitration agreements” (*Moses H. Cone*, 460 U.S. at 24), state laws producing contrary incentives must yield.²⁴

We recognize that this Court rejected a similar argument in *Shroyer*, concluding that Congress did not intend the FAA to “encourage individual arbitration and disfavor class arbitration.” 498 F.3d at 990. But *Preston* supersedes *Shroyer*’s reasoning on this point—reasoning that would equally exclude from preemption a state requirement that all arbitrations fully conform to the rules of civil procedure. *Preston* makes clear that even a state-law rule that

²⁴ See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157, (1989) (state-law protection of unpatentable inventions was preempted because it “could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years”); *Edgar v. MITE Corp.*, 457 U.S. 624, 635 (1982) (holding that federal securities laws preempt state tender offer regulation, which gave “incumbent management * * * a powerful tool to combat tender offers,” because “[t]hese consequences are precisely what Congress determined should be avoided”); see also *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (ERISA, which has the purpose of promoting regulated plans’ flexibility in providing coverage, would preempt a state law that “produce[s] such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage”).

applies equally to arbitration and litigation is preempted if it conflicts with a “prime objective” of the FAA.²⁵

In *Preston*, the Supreme Court held that the FAA preempted a provision of California’s Talent Agencies Act “grant[ing] the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate”—in that case, whether a person is a “talent agent” for purposes of that law. 128 S. Ct. at 982, 984–85. In an effort to salvage the California statute, the respondent contended that the Talent Agencies Act was “compatible with the FAA because” it was no more than an exhaustion requirement—*i.e.*, it “merely postpones arbitration until after the Labor Commissioner has exercised her primary jurisdiction.” *Id.* at 985. The respondent contended that, because the statute allowed for a *de novo* appeal of the Labor Commissioner’s decision to California superior court, “either party could move to compel arbitration.” *Id.* Accordingly, he argued that the delay imposed by “[r]equiring initial reference of the parties’ dispute to the Labor Commissioner” (*id.* at 986) would apply equally to litigation *and* arbitration, and that such equal treatment was consistent with the FAA.

The Supreme Court disagreed. It explained that “[a] prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious

²⁵ This Court is bound to follow *Preston* rather than *Shroyer*, as a court of appeals decision is abrogated whenever a Supreme Court decision “undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable,” even if “the issues” in the two cases are not “identical.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

results.’” *Id.* at 986 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)). It then reasoned that this objective “would be frustrated” by the California Talent Agencies Act because “[r]equiring initial reference of the parties’ dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy.” *Id.*

Similar reasoning applies here. There can be no doubt that engrafting class proceedings onto arbitration would “hinder speedy resolution of the controversy” (*id.*) between Kaltwasser and ATTM: Superimposing class-action procedures on arbitration “brings the burdens of litigation into the arbitral forum” and “lessens the distinction between the two processes.” Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 272. Indeed, resolving this case as a class arbitration would take years.

The procedures for class arbitrations promulgated by the AAA parrot the Federal Rules of Civil Procedure—with the exception that they provide that, once the arbitrator issues a “class determination award,” the parties may move to vacate or confirm that interim award in the district court. *See generally* AAA, *American Arbitration Association Policy on Class Arbitration*, at <http://www.adr.org/Classarbitrationpolicy>. Hence, just as in court, a class arbitration would entail (i) substantial discovery for purposes of determining such prerequisites as typicality

and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; (v) cross-motions to confirm and vacate in the district court; and possibly (vi) an interlocutory appeal. If, after all of that, a class is certified, the AAA rules require full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would then begin and likely continue for years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, due process would necessitate another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide trial.

In short, this process is every bit as burdensome as a judicial class action and precludes “effectively ‘streamlined proceedings and expeditious results’” (*Preston*, 128 S. Ct. at 986) (quoting *Mitsubishi*, 473 U.S. at 633) at least as much as the initial-reference requirement invalidated in *Preston*.²⁶ Indeed, conditioning the

²⁶ Of course, parties may *agree* to arbitrate under such cumbersome and self-defeating procedures without running afoul of the FAA. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) (remanding for arbitrator to decide whether an arbitration provision that was not “completely obvious” on the point implicitly authorized class-wide arbitration); *Shroyer*, 498 F.3d at 992. “[T]he FAA lets *parties* tailor some, even many features of arbitration by contract * * *.” *Hall St. Assocs., Inc. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (emphasis added). Under *Preston*, however, neither courts nor state legislatures may impose

enforceability of arbitration agreements on the availability of class arbitration would do more than “hinder” arbitration’s “speedy resolution” (*Preston*, 128 S. Ct. at 986): Such a requirement would force companies to abandon arbitration altogether.

When a business decides whether to include an arbitration provision in its agreements with its customers, it must consider the advantages and disadvantages of doing so. The advantages of arbitration are that it “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). The risk is that the arbitrator will render an erroneous—yet unreviewable—decision. As the Tenth Circuit has observed, the standard for vacating an arbitral award is “among the narrowest known to law.” *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Such awards may be vacated only for fraud, bias, or “manifest disregard” of the law. *See* 9 U.S.C. § 10; *Hall St.*, 128 S. Ct. at 1403–04. Many businesses are willing to take that risk in an individual arbitration because of the cost savings and their desire for a less adversarial method of resolving disputes with customers.

procedural requirements that impede the swift and efficient use of arbitration when the parties’ agreement precludes those very impediments in language that *is* “completely obvious” (*Bazzle*, 539 U.S. at 451) as the individual-arbitration requirement is here.

That calculus changes dramatically, however, if the arbitration provision must allow for class-wide arbitration. As noted above, in a class arbitration the efficiencies of individual arbitration are lost. Moreover, the stakes of a class arbitration are exponentially higher than those of an individual arbitration. No business could afford to subject itself to the risk that an arbitrator subject to only very limited judicial review would render a massive class award. As one Supreme Court Justice has put it, “[y]ou might not want to put your company’s entire future in the hands of one arbitrator.” Tr. of Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1989562, at *29.

The inevitable consequence is that businesses will stop including arbitration provisions in their contracts with their customers and employees—two categories that each represent a large proportion of all contracts. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA to “achieve ‘streamlined procedures and expeditious results.’” *Preston*, 128 S. Ct. at 986 (quoting *Mitsubishi*, 473 U.S. at 633). Accordingly, under *Preston*, any state-law rule requiring the availability of class arbitration is preempted by the FAA. *See also Gay*, 511 F.3d at 395 (Pennsylvania rule that arbitration provisions that prohibit class arbitration are unconscionable “interfere[s] with the appropriate application of the FAA”); *accord Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005); *Blitz v. AT&T Wireless Servs., Inc.*, 2005

WL 6177327 (Mo. Cir. Ct. Nov. 28, 2005); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001).²⁷

²⁷ The *Shroyer* Court rejected this argument because, in its view, ATTM was required to show affirmatively that businesses were already abandoning arbitration in order for conflict preemption to apply. 498 F.3d at 993. To the contrary, courts necessarily engage in a predictive exercise when determining whether a state law will operate to frustrate the purposes and goals of Congress. For example, in *Bonito Boats* the Supreme Court found conflict preemption where state law “could pose a substantial threat to the patent system’s ability to accomplish its mission of promoting progress in the useful arts,” and refused to dismiss the conflict as a “hypothetical * * * possibility.” 489 U.S. at 161. In any event, at least one major company—Comcast—has abandoned arbitration in its contracts with its California customers. See <http://www.comcast.net/terms/subscriber/>.

CONCLUSION

The Court should reverse the order of the district court.

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August 13, 2008

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 08-15612

I certify that:

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

Proportionately spaced, has a typeface of 14 points or more and contains 13,894 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

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DATED: August 13, 2008

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STATEMENT OF RELATED CASES

Counsel for ATTM is aware of one related case pending in this Court: *Stiener v. Apple Computer Inc.*, No. 08-15612. *Stiener* is an appeal from the denial of ATTM's motion to compel arbitration under the same arbitration provision involved in this case, and therefore raises closely related issues.

Addendum

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of August 2008, I deposited the original and 15 copies of the foregoing brief and 5 copies of the Excerpts of Record with a third-party commercial carrier for overnight delivery to the Clerk of the Court, and I served copies of the foregoing brief and one copy of the Excerpts of Record by third-party commercial carrier for overnight delivery on the parties herein, at each of the following addresses:

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