No. 100925

IN THE SUPREME COURT OF ILLINOIS

DONNA M. KINKEL, Plaintiff-Appellee, v. CINGULAR WIRELESS LLC, Defendant-Appellant.	On Appeal from the Illinois Appellate Court, Fifth District, No. 5-03-0774 (Leave to Appeal granted Sept. 29, 2005) There Heard on Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois Hon. Phillip J. Kardis, Circuit Judge No. 02-L-1087

REPLY BRIEF OF APPELLANT CINGULAR WIRELESS LLC

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Although Kinkel raises a number of arguments in an effort to justify the Fifth District's decision, at bottom she asks this Court to exalt solicitude for class actions over the federal (and Illinois) policy favoring traditional—which is to say individual—arbitral dispute resolution. But as the First District pointed out in *Rosen*, that is a choice for Congress, not the courts, to make. Because conditioning the enforceability of arbitration provisions on the absence of a requirement that arbitration be conducted in the traditional way—*i.e.*, on an individual basis—would strongly deter companies from including arbitration provisions in their contracts with consumers, the Fifth District's approach threatens to frustrate the policy choice that Congress made. It accordingly is invalid under both Illinois unconscionability law and the Supremacy Clause of the U.S. Constitution.

I. There Is Nothing Procedurally Unconscionable About The Class-Arbitration Waiver In The Parties' Arbitration Agreement.

Kinkel does not dispute that she signed a wireless service agreement with Cingular. Nor does she deny that she specifically initialed a provision on the front page of that contract stressing that the contract contained a number of terms and conditions, printed on the reverse side of that page, and thereby acknowledged that she had read those terms and conditions. Nor does she deny that the first paragraph of that reverse side specifically adverted to—and only to—the fact that the contract included a provision mandating that all disputes between the parties be resolved via arbitration. Notwithstanding ***all*** of these facts, Kinkel continues to defend the Fifth District's determination that the arbitration provision is procedurally unconscionable. But there is nothing procedurally unconscionable about either the arbitration provision as a whole or the waiver of class-wide arbitra-

tion contained therein.[1]

In particular, Kinkel cannot point to a ***single*** Illinois decision (other than the Fifth District's) in which a court has held a contract like the one at issue in this case to be procedurally unconscionable. She focuses primarily on this Court's new decision in *Razor*, 2006 WL 240746, to support her claim of procedural unconscionability. *See* Kinkel Br. 11-12. But far from helping her, *Razor* in fact undermines Kinkel's argument.

In *Razor*, this Court explained that procedural unconscionability cannot be demonstrated "dispositive[ly]" merely because a contract is on a preprinted form, limits the drafter's liability, is between parties with disparate bargaining power, or contains a combination of these factors. *Id*. Rather, the Court focused on the fact that in that case there was no evidence that the challenged contractual term—a disclaimer of consequential damages—"was present within the written contract" provided to the plaintiff at the time of contract formation. *Id.* at *13. The Court noted that the clause was included in a separate warranty booklet provided ***at a later date*** and that "the contract does mention provisions on the back of the page," but stressed that "the back of the page does not appear in the record before [the Court]" and that the "plaintiff testified without contradiction that she never saw any part of the written warranty, much less the disclaimer of consequential

[1] Kinkel does not deny that this Court's review is *de novo* and that the lower courts' procedural-unconscionability determinations are due no deference. *See* Cingular Br. 16; Kinkel Br. 10. Although the appellate court held, and in our opening brief we asserted, that a plaintiff must demonstrate ***both*** procedural ***and*** substantive unconscionability in order to escape a contractual obligation (*see* A7; Cingular Br. 17), this Court has since held that either type of unconscionability alone might, at least in some instances, suffice to render a contract unenforceable. *See Razor v. Hyundai Motor Am.*, __ Ill.2d __, __ N.E.2d __, 2006 WL 240746, at *12 (Feb. 2, 2006). But as we discuss in the text, Kinkel cannot demonstrate either form of unconscionability, let alone a sufficient combination of the two to render the class-arbitration waiver unenforceable.

damages, until she looked in her owner's manual after she had signed the contract and driven the car off the lot." *Id.* Thus, this Court's holding in *Razor* was as follows:

> Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it. Surely, whatever other context there might be in which a contractual provision would be found to be procedurally unconscionable, that label must apply to a situation such as the case at bar ***where plaintiff has testified that she never saw the clause and defendants produced no evidence that the clause is present or even referred to in the written contract which plaintiff signed***.

Id. (emphasis added).

Here, by contrast, the arbitration provision ***is*** in the record (*see* R. C38), that provision was provided to Kinkel at the time she entered into the contract, and Kinkel signed an acknowledgment specifically attesting that she had read the terms and conditions of the contract (including that provision). Thus, this case is distinguishable from *Razor* and in no way involves "a term [that] is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it" (*Razor*, 2006 WL 240746, at *13). Instead, this case is governed by the well-established rule that "[f]ailure to read a [contract] before signing it is normally no excuse for a party who signs it." *State Bank of Geneva v. Sorenson*, 167 Ill. App. 3d 674, 681, 521 N.E.2d 587, 592 (2d Dist. 1988); *see also*, *e.g.*, *Miller v. Wines*, 197 Ill. App. 3d 447, 452, 554 N.E.2d 784, 787 (4th Dist. 1990) ("A party who has had an opportunity to read a contract before signing, but signs before reading, cannot later plead lack of understanding or that the contract misled him.") (citing *In re Marriage of Kloster*, 127 Ill. App. 3d 583, 585, 469 N.E.2d 381 (2d Dist. 1984)); *Breckenridge v. Cambridge Homes, Inc.*, 246 Ill. App. 3d 810, 819, 616 N.E.2d 615, 620 (2d Dist. 1993) (same).

The remainder of Kinkel's procedural-unconscionability arguments are equally unpersuasive. Kinkel characterizes our argument as being that the mere fact that she had "ready access" to the arbitration provision (and the class-action waiver contained therein) is sufficient to rebut a claim of procedural unconscionability. *See* Kinkel Br. 13. But that was not, in fact, our argument. Rather, we noted that, given that she acknowledged having read the terms and conditions of her contract, Kinkel could not find support for her procedural-unconscionability argument in *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403 (1st Dist. 1980), or other cases. *See* Cingular Br. 20-21. Kinkel again relies on *Frank's* (*see* Kinkel Br. 13, 15), but she still cannot explain how its holding (*i.e.,* that it is procedurally unconscionable to bind a party to a clause on the reverse side of a contract ***when the provision cross-referencing that reverse side was crossed out***) supports finding procedural unconscionability in this case, in which Kinkel ***specifically acknowledged*** reading the terms and conditions on the reverse side of the contract. *See* Cingular Br. 20-21.[2]

[2] Plaintiff asserts that several out-of-state cases stand for the proposition that a signed acknowledgment that a party has read a contract does not prevent a finding of procedural unconscionability (*see* Kinkel Br. 14–15), but in fact none does. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005), held instead that ***all*** contracts of adhesion are *a fortiori* procedurally unconscionable under California law. That is not the law in Illinois. *In re Knepp*, 229 B.R. 821 (Bankr. N.D. Ala. 1999), addressed Alabama law, which does not differentiate procedural from substantive unconscionability (*see id.* at 837), and in any event never even mentioned in its discussion of unconscionability whether the plaintiff had signed the contract at issue. Finally, plaintiff's discussion of *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), confuses procedural and substantive unconscionability. The court in that case held merely that a specific one-sided arbitration provision (promulgated by Centennial Wireless, not Cingular) was overly one-sided and hence ***substantively*** unconscionable. *See id.* at 169. In fact, as noted below, the *Iberia* court expressly rejected an argument that Cingular's arbitration provision is procedurally unconscionable. *See* page 5, *infra*.

Finally, Kinkel's repeated focus on the font size of her contract provides no basis for finding the class-arbitration waiver to be procedurally unconscionable. As the Fifth Circuit explained in *Iberia*, the arbitration provision in Cingular's wireless service agreement is ***more prominent*** than other clauses in that contract; "the first paragraph of the Cingular contract specifically adverts to the arbitration clause, the only provision given such prominent billing." 379 F.3d at 172 n.14. Thus, a rule holding the arbitration provision to be procedurally unconscionable either would single out arbitration for extra scrutiny, and thus be preempted by the FAA (*see id.* at 172), or would render form contracts drafted in relatively small font sizes voidable at will, thus wreaking havoc with a huge number of contracts in this state (*see* Cingular Br. 22). And in any event, Kinkel's assertion that the contract is so small as to be hidden from her is belied by the evidence; although the font size is undeniably smaller than is customary in legal briefs, it is roughly equivalent to that used in many newspapers, and is entirely legible to anyone who chooses to take the time to read it. That Kinkel evidently did not choose to do so is no cause to exempt her from her contractual obligations. *See*, *e.g.*, *Miller*, 197 Ill. App. 3d at 452, 554 N.E.2d at 787 ("A party who has had an opportunity to read a contract before signing * * * cannot later plead lack of understanding or that the contract misled him.").

In short, Cingular's arbitration provision (and the class waiver that is part of it) is not procedurally unconscionable at all, much less sufficiently so to warrant refusing to enforce it.

II. The Class-Arbitration Waiver In The Parties' Arbitration Agreement Is Not Substantively Unconscionable.

Kinkel essentially ignores the high standard for substantive unconscionability under

Illinois law—that the contract must be "***grossly***" (*Basselen v. General Motors Corp.*, 341 Ill. App. 3d 278, 288, 792 N.E.2d 498, 507 (2d Dist. 2003) (emphasis added)) or "***inordinately*** one-sided" (*Razor*, 2006 WL 240746, at *12 (emphasis added)), such that "***only one under delusion*** would make it and only one unfair and dishonest would accept it." *In re Estate of Croake*, 218 Ill. App. 3d 124, 127, 578 N.E.2d 567, 569 (1st Dist. 1991) (emphasis added). Given this standard, Kinkel's argument that the class-arbitration waiver in her contract is substantively unconscionable—regardless of whether this Court gives effect to Cingular's offer to allow Kinkel to arbitrate under the exceptionally consumer-friendly terms of its 2003 arbitration provision—is baseless.

A. The Fifth District erred by refusing to give effect to Cingular's across-the-board offer to bear all the costs of arbitration and to reimburse successful claimants for their attorneys' fees.

As we explained in our opening brief (at 24), the Appellate Court's refusal to consider the consumer-friendly features of Cingular's revised arbitration provision when determining whether it is unconscionable to require Kinkel to arbitrate on an individual basis rests on a clear error of fact. Contrary to the Fifth District's belief, Cingular has made the consumer-friendly features of its July 2003 arbitration provision available to all former customers, not just Kinkel. Kinkel acknowledges that (*see* Kinkel Br. 32; A14–A15), but nonetheless urges the Court "not [to] reward Cingular's litigation strategy of amending the Arbitration Provision on the courthouse steps in an attempt to avoid a finding of unconscionability" (Kinkel Br. 30). However, her efforts to persuade the Court to blind itself to her entitlement to arbitrate for free and to receive an award of attorneys' fees in a broader range of circumstances than if she were in court falls far short.

To begin with, she ignores entirely this Court's holding in *Razor* that "[t]he unconscionability determination is ***not*** restricted to the facts and circumstances in existence at the time the contract was entered into." 2006 WL 240746, at *11 (emphasis added). That holding strongly supports the First District's decision to consider the defendant's one-time offer to pay the full cost of arbitration in *Rosen* and even more strongly dictates consideration of Cingular's across-the-board policy of making the features of its revised arbitration provision available to ***all*** former customers.

As we pointed out in our opening brief (at 24), *Ellman v. Ianni*, 21 Ill. App. 2d 353, 157 N.E.2d 807 (2d Dist. 1959), also strongly supports our position. Kinkel's effort to distinguish *Ellman* is misguided. In *Ellman*, the court explained that "a condition or provision of a contract may, generally, be waived by the party thereto who is entitled to receive the benefit of the condition." *Id.* at 361, 157 N.E.2d at 812. Under this well-established rule, Cingular is entitled to waive the cost-allocation provisions in the original arbitration provision, which would otherwise benefit it by saving it $125 per arbitration. Although, as Kinkel stresses, the court in *Ellman* held that the specific provision at issue in that case was not waivable, that in no way affects the analysis in this case.

Ellman involved a suit by two subcontractors to collect money owed to them by both the general contractor and the owner of the property on which the parties had constructed a building. The contract between the general contractor and the owner contained a waiver of the statutory mechanics' lien, which applied to any claims either by the general contractor or by any subcontractors. The court found that this lien-waiver was valid under Illinois law because it was appropriately filed with the Recorder of Deeds. In the

course of the litigation, the owner of the property waived its right to enforce the contractual lien-waiver. The court nevertheless held that the owner's waiver was not valid ***as to claims by the subcontractors against the general contractor***. The court explained that the lien-waiver fell within an exception to the general rule that a contract term may be waived "by the party [to the contract] who is entitled to receive the benefit of the condition" (*id.*) because in this instance the lien-waiver was "of ***mutual*** benefit" to ***both*** parties to the contract—the property owner and the general contractor. *Id.* at 362 (emphasis added). Thus, the owner could not waive that provision as to claims against the general contractor. That exception to the general rule is self-evidently inapplicable here.

Unable to find support in Illinois, Kinkel invokes *Morrison v. Circuit City Stores, Inc*., 317 F.3d 646 (6th Cir. 2003) (en banc) and several similar out-of-state cases that have refused to accept offers to bear the costs of arbitration. *See* Kinkel Br. 31-32. But each of these cases involved an offer to bear the costs of arbitration made in the course of litigation and solely with respect to the ***specific plaintiff*** in that litigation. Here, by contrast, Cingular's offer to Kinkel paralleled the change that was made to the contracts of all then-existing customers. In addition, Cingular represented repeatedly in open court that all former customers also could take advantage of the features of the revised arbitration provision and then backed up that representation by posting it on its website. *See* Cingular Br. 13-14. Cingular has thus addressed the Sixth Circuit's concern in *Morrison* (317 F.3d at 676–77) that other potential litigants would not know of the defendant's offer. But in any event, Kinkel has no response to our point (Cingular Br. 25) that the strong federal policy favoring arbitration mandates that offers to pay the costs of arbitra-

tion should be credited when considering whether an arbitration provision is enforceable ***even if*** that offer is made solely to the named plaintiff. Nor does she offer any response to the numerous cases we cited in our opening brief that have accepted this proposition.

For all of these reasons, the Appellate Court erred by refusing to take into account the consumer-friendly features of Cingular's revised arbitration provision when analyzing whether the class-arbitration waiver is substantively unconscionable.

B. When the consumer-friendly features of Cingular's revised arbitration provision are taken into account, it is manifest that requiring claims to be arbitrated on an individual basis is not substantively unconscionable.

As we explained in our opening brief (at 26-34), particularly when the consumer-friendly features of the revised arbitration provision are taken into account, there can be no serious question that the class-arbitration waiver is not "grossly one-sided" and that a person would not have to be acting under a delusion in order to agree to it. Kinkel devotes little effort to responding to our arguments. The few points she does make should not detain this Court for long.

First, Kinkel asserts that Cingular's customers generally lack knowledge that they have a claim against the company and that this information gap "provides a significant barrier" to claimants obtaining relief notwithstanding that they can arbitrate for free. *See* Kinkel Br. 33. But there is no evidence to support her premise. Indeed, her own lawsuit would appear to disprove it. Furthermore, given the widespread availability of attorneys' fees under Cingular's revised arbitration provision, attorneys will have an incentive to pursue claims against the company, and to assist customers in identifying valid claims.[3]

[3] Recall that, under Cingular's revised arbitration provision, a customer who receives the full amount of her demand would be entitled to an award of attorneys' fees even if the

This is especially true given the fact that there is no requirement under the revised arbitration provision that arbitrations be kept confidential (*see* Cingular Br. 14 n.1). Thus, an enterprising member of the plaintiffs' bar should have little difficulty identifying potential claims and then advertising for clients as lawyers so commonly do today.[4]

Kinkel also argues that, because of the opportunity costs involved, "potential plaintiffs * * * are unlikely to pursue an individual arbitration." Kinkel. Br. 34. That too is speculation that is unsupported by record evidence. Indeed, publicly available data disprove it. Specifically, a (non-exhaustive) report on the AAA's web site lists 37 arbitrations of various kinds against Cingular that were resolved between January 1, 2003 and March 31, 2006. See http://www.adr.org/CCPQ106.pdf (pages 237-241). And as we discussed in our opening brief (at 32-34), Cingular customers may bring claims in small claims court as well as in arbitration. In addition, Cingular's arbitration provision requires customers to give Cingular notice of their claims at least 30 days in advance of filing an arbitration demand. *See* R. C49. The self-evident point of that requirement is to

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cause of action is not one that otherwise would support such an award. Hence, if a customer were overcharged by, say, $100, a lawyer could bring a run-of-the-mill breach-of-contract claim for that amount and potentially receive an award of attorneys' fees of several thousand dollars, something that could never happen if the case were brought in court. While attorneys who specialize in bringing class actions likely would have no interest in such a case, there undoubtedly are numerous attorneys in this state who would.

[4] The availability of costs and attorneys' fees also differentiates this case from *Kristian v. Comcast Corp.*, __ F.3d __, 2006 WL 1028758 (1st Cir. Apr. 20, 2006), which Kinkel has submitted as supplemental authority. The *Kristian* court specifically distinguished some of the numerous cases that have enforced class-arbitration waivers, such as *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), on the basis that in those cases "attorney's fees and costs were * * * recoverable by the plaintiffs," whereas the arbitration clause in *Kristian* did not allow for their recovery. 2006 WL 1028758, at *26. Here, as in *Johnson* and the other cases that the *Kristian* court sought to distinguish, Cingular is responsible for all the costs of arbitration, and petitioners, if successful, will be entitled to their reasonable attorneys' fees. For this reason, *Kristian* is inapposite.

enable Cingular to resolve claims without the need for arbitration.[5] Although the record does not contain evidence as to the number of claims filed against Cingular in small claims court or the number of claims that are resolved after the customer sends Cingular a notice of intent to arbitrate,[6] it is common sense that small claims court exists because people with small claims find it worth their time to use it, and the same logic applies to Cingular's informal dispute resolution mechanism. Certainly, there is no basis in the record for assuming otherwise.

Finally, Kinkel's argument that, "[i]f the amended arbitration provision (including the offer to pay [arbitration costs and attorneys' fees]) were truly 'consumer-friendly' as Cingular asserts, then consumers would avail themselves of the process and Cingular would end up paying many multiples of the $150 Early Termination Fee it is seeking to protect" (Kinkel Br. 34) puts the cart before the horse; this would be true only ***if*** the ETF were in fact unlawful—which, as we will demonstrate at the appropriate time, it is not.[7]

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[5] Because Cingular has agreed to pay all the costs of arbitration, it would cost Cingular at least ***$1700*** in fees whenever an arbitration goes to a one-day hearing—$750 in administrative fees, a $200 case-service fee, and $750 in arbitrator fees. *See* AAA, *Supplementary Procedures for Consumer-Related Disputes*, Section C-8 (*available at* www.adr.org). The customer would pay nothing. Thus, the amount Cingular would have to pay in arbitration fees alone could in many instances vastly exceed the amount of the customer's claim, giving Cingular an extraordinarily strong incentive to resolve claims before the customer formally files an arbitration.

[6] Cingular has introduced evidence of the number of claims filed against it in small claims court, the number of cases it has resolved in arbitration, and the number of cases it has resolved after receiving a notice of intent to arbitrate in a number of other cases, including *Rel v. Cingular Wireless LLC*, No. A112893 (Cal. Ct. App.), *Randolph v. AT&T Wireless Servs., Inc.*, No. A112342 (Cal. Ct. App.), and *Campbell v. Pacific Bell Wireless, LLC* (*In re Cingular Cases*), No. D047603 (Cal. Ct. App.).

[7] This contention also assumes, mistakenly, that there are rafts of customers who believe that the ETF is unlawful. We submit that Kinkel is the unusual customer and that most customers fully appreciate that the ETF serves to ensure that wireless carriers are

In sum, Cingular is not asking for "virtual immunity" from suit (Kinkel Br. 35 (quoting *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76, 84 (Cal. 2005))), but is instead defending a dispute-resolution system that is in the best interest of ***both*** Cingular ***and*** its customers—albeit one that may not be in the best interest of the class-action-plaintiffs' bar. Indeed, as a comparative matter, a consumer who pursues an individual arbitration against Cingular will invariably recover more money in arbitration than he or she could as a member of a class. That is because class actions routinely settle for much less than 100 cents on the dollar—often only pennies (or vouchers for goods or services worth pennies) on the dollar—and the class counsel's fees often come out of the settlement. See, *e.g.*, Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 168 (1997); Koniak & Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1051–89 (1996). Under these circumstances, it cannot be unconscionable (at least not under Illinois' high standard for substantive unconscionability) to require customers to arbitrate their claims on an individual basis.

C. Even if the Court declines to consider the consumer-friendly features of Cingular's revised arbitration provision, the class-arbitration waiver is not substantively unconscionable.

As we discussed in our opening brief, even if the Court concludes that the fact that Kinkel is entitled to arbitrate under the consumer-friendly features of Cingular's revised arbitration provision is irrelevant, the requirement that Kinkel arbitrate on an individual basis is not substantively unconscionable under Illinois law: Even if Cingular had never revised its arbitration provision (or never made the revised provision available to Kinkel),

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able to recover the cost of the free or heavily discounted phones that are the quid pro quo for entering into a wireless service agreement with a term commitment.

the cost to Kinkel of arbitrating her claim would be no more than $125; she would be entitled to an award of attorneys' fees in the arbitration insofar as such an award is required under the Illinois Consumer Fraud and Deceptive Practices Act; and she would be entitled to bring an appropriate matter in small claims court instead of in arbitration. *See* Cingular Br. 35–36. Given these facts, the class-arbitration waiver does not run afoul of Illinois' stringent standard for substantive unconscionability.

1. Kinkel's focus on whether the class-arbitration waiver is "one-sided," and her related reliance on *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. App. 2002), for the proposition that the class waiver is substantively unconscionable because Cingular is unlikely to bring a class action against its customers (Kinkel Br. 17–19), are misplaced.

For starters, *Szetela*'s use of the term "one-sided" is aberrational. Most courts do not strike down contractual provisions merely because they are more favorable to one party than the other. To the contrary, the overwhelming majority of courts have rejected the notion that each term of a contract must be fully mutual. Instead, they require simply that the contract be supported by consideration. *See*, *e.g.*, *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004) ("That Oblix did not promise to arbitrate all of its potential claims is neither here nor there. Winiecki does not deny that the arbitration clause is supported by consideration—her salary. Oblix paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution.").[8] Illinois is among

[8] *See also Fazio v. Lehman Bros. Inc.*, 340 F.3d 386 (6th Cir. 2003); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451–52 (2d Cir. 1995); *Ramirez v. Cintas Corp.*, 2005 WL 658984, at *7 (N.D. Cal. Mar. 22, 2005); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 658 (S.D. Miss.

the states that have rejected the requirement of term-by-term bilaterality. *See McInerney v. Charter Golf, Inc.*, 176 Ill.2d 482, 488, 680 N.E.2d 1347, 1351 (1997) ("where there is any other consideration for the contract mutuality of obligation is not essential") (quoting *Armstrong Paint & Varnish Works v. Continental Can Co.,* 301 Ill. 102, 108, 133 N.E. 711, 714 (1922)). When courts in Illinois and most other states use the term "one-sided," they do so merely as a synonym for other articulations of the unconscionability standard, such as "shocks the conscience" or "no man not acting under delusion." Accordingly, they strike down contracts as being "grossly one-sided" only when enforcement of the disputed contractual provision would effect patent inequity as between the parties.

Moreover, the aspect of *Szetela* upon which Kinkel relies is no longer good law even in California. *Szetela*'s condemnation of class-arbitration waivers would apply to all such waivers in contracts between businesses and their customers. But the California Supreme Court has subsequently held that class waivers are unconscionable only "under some circumstances," specifically when they serve to insulate a business from liability for violating the law. *Discover Bank*, 30 Cal. Rptr. 3d at 79. While we in no way endorse the California Supreme Court's decision (and indeed submit that it is preempted by the FAA), it does implicitly reject the notion that class waivers are per se unconscionable merely because businesses are unlikely to bring class actions against their customers.

In any event, Kinkel is mistaken in assuming that a class waiver is one-sided merely because businesses are unlikely to bring class actions against their customers. Class-

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2000); *Walther v. Sovereign Bank*, 872 A.2d 735, 747 (Md. 2005); *Zuver v. Airtouch Comm'ns, Inc.*, 103 P.3d 753, 766–67 (Wash. 2004); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342 (Ky. App. 2001); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1255 (Colo. App. 2001); *In re Ball*, 665 N.Y.S.2d 444, 446 (1997).

arbitration waivers benefit consumers because they result in a lower price for the goods or services being offered. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers); *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) ("arbitration offers cost-saving benefits to telecommunication providers and these benefits are reflected in a lower cost of doing business that in competition are passed along to customers") (citation and internal quotation marks omitted); Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 94 (arguing that class arbitration makes consumers worse off by increasing the cost of doing business and, as a result, raising prices for consumers). This is especially true because many companies may choose to eliminate arbitration provisions altogether rather than be subjected to the burdens and risk of class-wide arbitration. *See* Cingular Br. 44.

Finally, but by no means least important, plaintiff's attack on the class-arbitration waiver in this case on the ground that businesses generally do not bring class actions against their customers is in essence an attack on arbitration itself. Although in the last few years a small number of arbitrations have proceeded on a class-wide basis, historically arbitration has been understood to be an individual proceeding.[9] Thus, one academic reported in 2000 that, despite her "extensive efforts" to locate attorneys who had participated in class arbitrations, she "found just a handful," indicating to her that "very few arbitrations have been handled as class actions." Sternlight, *As Mandatory Binding*

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[9] Recall that class actions for damages did not even exist until the late 1960s, forty years after enactment of the FAA. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–15 (1997).

Arbitration Meets the Class Action, Will the Class Action Survive?, 42 WM. & MARY L. REV. 1, 38-41 & n.148 (2000). Indeed, it was not until the summer of 2003 that the major arbitration service providers first prescribed rules to conduct class arbitrations. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 186–87 & n.3 (2006); *see also* AAA, American Arbitration Association Policy on Class Actions (July 14, 2005), at http://www.adr.org/classarbitrationpolicy ("On October 8, 2003, * * * the [AAA] issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations."). Prior to that time, class arbitrations were more rumor than reality. Thus, any argument that would require conditioning the enforceability of an arbitration provision on the absence of a class waiver is basically an attack on one of the defining features of arbitration. Whether framed in terms of "one-sidedness" or otherwise, such an argument plainly violates the FAA. *See* Cingular Br. 37, 44-45.

2. Kinkel's assertion that the Fifth District's decision is consistent with *Rosen v. SCIL, LLC*, 343 Ill. App. 3d 1075, 799 N.E.2d 488 (1st Dist. 2003), *appeal denied*, 207 Ill. 2d 627, 807 N.E.2d 982 (2004), and *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 793 N.E.2d 886 (1st Dist.), *appeal denied*, 205 Ill.2d 582, 803 N.E.2d 482 (2003), and that under the holdings in those cases the class-action waiver here would not be enforceable (Kinkel Br. 20–22), is clearly wrong. Kinkel does not deny that in those cases the First District ***rejected*** unconscionability challenges to class-arbitration waivers. Moreover, as we explained in our opening brief, under Cingular's now-superseded arbitration provision a consumer's costs to arbitrate a claim of less than $10,000 would be limited to $125. *See* Cingular Br. 34–36. Thus, Cingular's original arbitration provision

was if anything ***more*** consumer-friendly than the one at issue in *Rosen*, under which the defendant agreed merely to "***advance***" the costs of arbitration ***beyond*** an initial $125 fee, which would always remain the responsibility of the consumer. *See Rosen*, 343 Ill. App. 3d at 1085, 799 N.E.2d at 496; Kinkel Br. 21. Accordingly, *Rosen* and *Hutcherson* strongly suggest that, even disregarding Cingular's offer to make its 2003 arbitration provision available to Kinkel, the requirement that Kinkel arbitrate on an individual basis is not unconscionable. *See* Cingular Br. 27, 35–36.

3. Kinkel's effort to distinguish the vast array of cases that have upheld class waivers against substantive unconscionability challenges (Kinkel Br. 19–20, 25–28; Cingular Br. 28–29) is similarly unpersuasive.

To begin with, we never claimed that the plaintiff in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), had brought his claims on behalf of a potential class. *Cf.* Kinkel Br. 20. It nonetheless remains the case, as we explained, that the plaintiff in *Gilmer* challenged his arbitration agreement on the ground that it did not provide for class-wide arbitration, and that the Supreme Court gave that argument short shrift. *See* Cingular Br. 27; *Gilmer*, 500 U.S. at 32.

The distinctions Kinkel draws between this case and the remaining precedent on which we relied also miss the boat; they ignore both the actual terms of Cingular's superseded arbitration provision and controlling Illinois law.

For example, Kinkel distinguishes *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005), *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), *Gras v. Associates First Capital Corp.*, 786 A.2d 886 (N.J.

App. Div. 2001), and other cases on the ground that the arbitration provisions in those cases provided for fee awards if required by state law. *See* Kinkel Br. 26. But so too did Cingular's original arbitration provision. *See* Cingular Br. 35; R. C38.

Similarly, Kinkel stresses that the arbitration agreement in *Copeland v. Katz*, 2005 WL 3163296 (E.D. Mich. Nov. 28, 2005), required the defendant to "pay costs of first day of arbitration." *See* Kinkel Br. 26. But this again ignores the fact that, in cases involving claims of less than $10,000, Cingular was required to bear ***all*** the costs of arbitration after an initial $125 under its superseded arbitration provision (*see* Cingular Br. 13, 35; R. C191), even if that arbitration lasted more than one day.

Kinkel's attempt to distinguish *Iberia* is equally flawed. She claims that *Iberia*—which involved ***precisely*** the same arbitration provision as the one at issue here—is distinguishable because the Fifth Circuit observed there that Louisiana does not authorize claims under its Unfair Trade Practices Act ("LUTPA") to be brought as class actions. *See* Kinkel Br. 27. The Fifth Circuit did mention that as ***one*** reason for not finding class waivers to be unconscionable under Louisiana law. But it ***first*** rejected the unconscionability argument because of the incompatibility of class actions and arbitration, stating: "As the Supreme Court has explained, the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia*, 379 F.3d at 174 (quoting *Gilmer*, 500 U.S. at 31). Moreover, the court went on to explain that, even though consumers could not pursue a class action,

> LUTPA [permits] the state attorney general to sue on behalf of the state and its consumers and to pursue restitutionary relief on behalf of a class of aggrieved consumers. This further tends to show that the arbitration clause does not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability.

Id. at 175. The same is true in Illinois. *See* 815 ILCS 505/3, 505/7.

Finally, Kinkel's observation that a number of courts have upheld class-arbitration waivers but at the same time have noted that the enforceability of class-arbitration waivers is an appropriate question for the legislature (*see* Kinkel Br. 27–28) is no distinction at all. It is of course the case that Congress could modify the FAA to preclude class-arbitration waivers; that is precisely our point and the point of the cases Kinkel seeks to dismiss. Unless and until Congress does amend the FAA, however, it is the duty of the courts to give Congress's policy judgment favoring the arbitration of disputes precedence over any competing policy favoring class actions.

4. As we explained in our opening brief, the fact that Cingular's now-superseded arbitration provision allowed the parties to bring appropriate cases in small claims court also helps defeat Kinkel's argument that she cannot reasonably pursue small claims and therefore must be allowed to arbitrate on a class-wide basis. *See* Cingular Br. 32–34. Kinkel's response (*see* Kinkel Br. 28) wholly fails to engage this argument. The fact that *Pulver v. 1st Lake Props., Inc.*, 681 So.2d 965 (La. App. 1996), did not involve an arbitration provision has no bearing on that decision's observation that in many instances small claims court is a better option than class adjudication for resolving small claims. *See id.* at 970; Cingular Br. 33. Similarly, Kinkel's effort to explain away the Eleventh Circuit's discussion of the virtues of small claims court in *Jenkins* (*see* 400 F.3d at 878–

80; Cingular Br. 33–34) misses the point. That court stressed—and noted that the AAA also had stressed—the fact that access to small-claims court helps customers resolve small claims expeditiously and effectively. *See* 400 F.3d at 879. Thus, the fact that Cingular's arbitration provision authorizes customers to proceed in small claims court is still another reason why Kinkel is mistaken in asserting that, absent recourse to class-wide adjudication, she will be unable to vindicate her claims.

5. Kinkel relies on a number of cases that have held class-arbitration waivers to be unenforceable. *See* Kinkel Br. 22–25. But we have already explained why many of those cases are distinguishable (*see*, *e.g.*, Cingular Br. 30 n.4); the remainder are simply unpersuasive.

For example, Kinkel correctly observes that in *Leonard v. Terminix International Co.*, 854 So. 2d 529 (Ala. 2002), the Alabama Supreme Court struck down a class-arbitration waiver because the cost of arbitrating the plaintiffs' claims exceeded the plaintiffs' potential recovery. *See* Kinkel Br. 23. But as we discussed in our opening brief (Cingular Br. 30 n.4), and as Kinkel concedes (Kinkel Br. 23 n.5), numerous federal district courts in Alabama have since distinguished *Leonard* and enforced class-arbitration waivers under Alabama law when the cost of arbitrating was modest and the arbitration provision did not preclude the arbitrator from awarding statutory attorneys' fees or otherwise limit the types of damages that could be awarded. *See*, *e.g.*, *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003) ("The costs of arbitrating the Leonards' claim (at least [$1,100]) exceeded the dollar value of their claim (less than [$500]), which effectively made arbitration an illusory forum for vindicating their substantive rights."); Cin-

gular Br. 30 n.4. Kinkel's unsupported assertion aside (*see* Kinkel Br. 23 n.5), here, as in the seven Alabama district court cases, an arbitrator could award attorneys' fees (and punitive damages) if state law so required. *See* page 18, *supra*. Accordingly, *Leonard* lends no support to Kinkel's cause.

Kinkel's reliance on *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), is similarly misplaced. To begin with, that case involved an arbitration provision that precluded the arbitrator from awarding punitive damages and other forms of relief. *See id.* at 277–78. Accordingly, *Berger* is inapposite here because unlike Kinkel the plaintiff there could not obtain full relief in individual arbitration. Moreover, Kinkel simply ignores that the U.S. District Court for the Northern District of West Virginia recently refused to follow *Berger* on the ground that its unconscionability analysis is preempted by the FAA. *See Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005); Cingular Br. 30 n.4.

Kinkel is on even shakier ground in relying on *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005). The *Whitney* court specifically distinguished the Fifth Circuit's decision in *Iberia*—upholding the ***precise*** arbitration provision at issue here—on the ground that "the record established that the plaintiff's rights could be vindicated through arbitration under the contractual provisions and factual circumstances involved ***in that case***." 173 S.W.3d at 313 & n.10 (citing *Iberia*, 379 F.3d 174–75) (emphasis added); *see also Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip op. at 4–5 (Mo. Cir. Ct. Nov. 28, 2005) (SA4–5) (distinguishing *Whitney* and holding that the class waiver in Cingular's revised arbitration provision is not unconscionable). *Whitney* disap-

proved Alltel's arbitration provision because it not only had a class waiver, but also imposed "prohibitively expensive" costs of arbitration on the customer and deprived the arbitrator of the "power or authority" to award attorneys' fees and incidental, consequential, punitive, or exemplary damages. *Id*. at 314, 313, 304; *see also Blitz*, slip op. at 4 (SA4). These additional factors are not present here.[10]

Finally, to the extent that a handful of cases (most from California) may have refused to enforce class-arbitration waivers in contracts that are equivalent to the one at issue in this case, these outlier cases are simply unpersuasive, and Kinkel provides no reason why this Court should rely on them rather than on the overwhelming majority of cases that have upheld class-arbitration waivers. *See* Cingular Br. 28-30.[11]

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[10] *Kristian*, which Kinkel submitted as supplemental authority, is not an unconscionability case at all. More importantly, the *Kristian* court emphasized that, because of their "sheer complexity," the antitrust claims at issue in that case were "vastly different" from the claims in many cases upholding class-arbitration waivers. 2006 WL 1028758, at *27. In fact, the court noted that the uncontroverted evidence was that "the expert fees [in *Kristian*] are estimated to be in the hundreds of thousands of dollars; and attorney's fees could reach into the millions of dollars." *Id.* at *24. The court acknowledged that this renders the claims in *Kristian* unique: "[t]he complexity of an antitrust case generally, and the complexity and cost required to prosecute a case against Comcast specifically, undermine [the many other courts'] rationales for supporting a bar to class arbitration." *Id.* at *28. Here, there is no basis for supposing that Kinkel's claim is any more complex than the typical case resolved by AAA arbitrators, much less that she would need the services of expensive expert witnesses to pursue it.

[11] Kinkel also cites a number of cases for the proposition that "class actions have been consistently recognized in protecting the rights of the individual consumer." Kinkel Br. 25. We do not deny that, in appropriate cases, class actions can be useful or important. *But cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries."). But class actions are only ***one*** of ***a number*** of routes that exist for the effective and expeditious vindication of small claims. Arbitration, too, is a well-established route for the vindication of small claims—as is small claims court. Indeed, despite her panegyric on the virtues of the class action, Kinkel can point to no authority

III. The Fifth District's Holding That The Class-Arbitration Waiver In The Parties' Arbitration Agreement Is Unconscionable Is Preempted By The FAA.

As we explained in our opening brief (at 36–45), the Fifth District's unconscionability holding is preempted by the FAA, for two distinct reasons: (i) it violates Section 2 of the FAA because it is not based on a generally applicable rule of state law, and (ii) it frustrates the purposes of that federal statute, thus resulting in "conflict preemption."

Despite spending several pages reiterating basic preemption law (*see* Kinkel Br. 36–38), Kinkel ignores our conflict preemption argument entirely. Although she does attempt to rebut our Section 2 preemption argument, her argument on this point is again non-responsive. In particular, we do not deny that the lower court was correct in ***addressing*** Kinkel's unconscionability argument (*see* Kinkel Br. 37). Rather, our point is that federal law precluded the lower court from ***holding*** that the parties' arbitration agreement, including the class-arbitration waiver contained in that agreement, is unconscionable.

In particular, Kinkel's objection notwithstanding, there is no question that the Fifth District opinion "'conditions' the enforcement of an arbitration provision"—at least in the consumer context—"on the availability of class-wide arbitration" (Kinkel Br. 38 (quoting Cingular Br. 41, 44)). It is true, as Kinkel argues (Kinkel Br. 39), that the lower court ***also*** found the arbitration prohibition to be procedurally unconscionable (a holding that as we discuss above is wrong and was itself based on inappropriate anti-arbitration

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except the decision below that supports the proposition that Illinois has a generally applicable prohibition against waivers of class actions. Thus, the fact that class actions may at times be appropriate in no way implies that parties should be required to conduct arbitrations on a class-wide basis, especially because the net result would be to undermine entirely the reasons arbitration is favored in the first place. *See* Cingular Br. 41–44.

animus), but that in no way undermines the fact that a primary focus of the Fifth District's opinion was its analysis of substantive unconscionability. (Indeed, we do not take Kinkel to be arguing that the entirety of her contract is voidable at will because of procedural unconscionability.)

Furthermore, that analysis plainly violates Section 2. Although the Fifth District held that "a limitation on class actions in consumer actions such as this [would] be substantively unconscionable ***even in the absence of an arbitration provision***" (Kinkel Br. 39 (citing A15) (emphasis added)), Kinkel does not contest our point that there is no prior authority for this statement and that "no state can apply to arbitration (when governed by the Federal Arbitration Act) any ***novel*** rule." *Oblix*, 374 F.3d at 492 (emphasis added). As we explained in our opening brief (at 38), Congress's rationale for authorizing contract-law exceptions to the general rule that arbitration provisions are enforceable—that there can be no impermissible animosity toward arbitration when a court is merely applying an ***extant,*** generally applicable contract-law defense—loses all force when, as here, a court creates a new rule of unconscionability in the context of an attack on an arbitration provision.

Finally, the fact that the appellate court did not "nullify either party's obligation to arbitrate [this] dispute" (Kinkel Br. 40), does nothing to decrease the significance of what the Fifth District did do: it nullified the parties' obligation to arbitrate this dispute in the traditional way that arbitrations have always been conducted—on an individual basis. As we explained in our opening brief (at 44), any rule that mandates that arbitrations be conducted on a class-wide basis will be the death knell for arbitration; thus, nothing could

more plainly conflict with Congress's purpose in enacting the FAA. The lower court's decision therefore cannot stand.

IV. The Fifth District Erred By Severing The Class-Arbitration Waiver.

Neglecting to acknowledge the fact that she herself argued in both the trial court and the Fifth District that the class-arbitration waiver was ***not*** severable from the remainder of the parties' arbitration clause (see R. C65-C67, A40-A41), Kinkel now contends that the Fifth District correctly severed the class-arbitration waiver and ordered the parties to arbitrate on a class-wide basis. Not so.

For starters, it is black-letter law that a party may not argue one thing in the lower courts and then reverse its position and argue precisely the opposite thing at a later stage of the same litigation. *See Bilut v. Northwestern University*, 296 Ill. App. 3d 42, 47-48, 692 N.E.2d 1327, 1331-32 (1st Dist. 1998) ("Inasmuch as a party on appeal is bound by her statements, including the statements of her attorney, made in the circuit court, plaintiff is now estopped from presenting argument contrary to her prior statements."); *In re Marriage of Drewitch*, 263 Ill. App. 3d 1088, 1094, 636 N.E.2d 1052, 1057 (1st Dist. 1994) ("Unquestionably, a party on appeal is bound by her statements, including the statements of her attorney, made in the trial court."); *see also People v. Johnson*, 334 Ill. App. 3d 666, 680, 778 N.E.2d 772, 784 (4th Dist. 2002) ("A party forfeits [his] right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding. * * * Defendant is thus estopped from raising the foundation argument on appeal because is it inconsistent with the strategy pursued at trial.") (internal quotation marks omitted). Thus, Kinkel is estopped from making this argument.

In any event, it is well established that the mere existence of a severability provision is not determinative of whether a court should sever any specific clause. Rather, in instances in which a provision is "central" to a contract, courts will decline to sever that provision notwithstanding the existence of a severability provision. *See*, *e.g.*, 15 SAMUEL WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 45:5 (Richard A. Lord ed., 4th ed. 1999) (citing authority that language employed by the parties must be construed in light of the facts and circumstances). Here, the class-arbitration waiver is central to the parties' dispute-resolution provision. *See* Cingular Br. 46. In fact, as Kinkel herself concedes, the revised arbitration provision specifically provides that the class-arbitration-waiver clause—and only that clause—is not severable from the remainder of the arbitration provision. *See* Kinkel Br. 43 n.7; R. C50.[12]

Finally, Kinkel's assertion that class-wide proceedings are ***not*** inherently inconsistent with the streamlined nature of arbitration is belied by the evidence. Although it is true that a number of courts have held that class-arbitration waivers are unconscionable or have adverted to the possibility of class arbitrations (*see* Kinkel Br. 41–42), these courts have in large part not in fact ordered the parties to arbitrate on a class-wide basis. For example, the California Supreme Court noted in the *Discover Bank* case that "in the event

[12] We acknowledge that *Kristian*, the case Kinkel cites as supplemental authority, held that a class waiver was severable when, as here, the contract contained a general severability provision and also provided that the class waiver was enforceable except where prohibited by law. We submit that the *Kristian* court failed to consider adequately the fact that a class arbitration is the functional equivalent of a judicial class action without effective judicial review (which is problematic not just for defendants, but also for absent class members). Because there is absolutely no value to the parties whatever to proceeding with an arbitral class action, the First Circuit's conclusion that the parties intended the class waiver to be severable is misguided.

a classwide arbitration [were] compelled [by the trial court on remand], Discover Bank may waive the arbitration agreement and have the matter brought in court." 30 Cal. Rptr. 3d at 95 n.8. More importantly, the mere fact that the AAA has set up rules to govern class-wide arbitrations (*see* Kinkel Br. 42), or that the parties to the *Zobrist* matter are now engaged in what may become a class-wide arbitration (*id.*), in no way undermines our point that class-wide arbitration would provide none of the benefits of traditional individual arbitration, would subject defendants to the potential for basically unreviewable class-wide awards, and will lead companies to avoid consumer arbitration altogether. *See* Cingular Br. 42-45. Thus, it is plain that the class-arbitration waiver is and always has been central to the arbitration provision contained in Cingular's consumer contracts and therefore may not be severed.[13]

CONCLUSION

The Court should reverse the decision of the Appellate Court and hold that the class-arbitration waiver in the parties' arbitration agreement is enforceable.

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Respectfully submitted,

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[13] Kinkel's assertion that the choice is "between one large, class arbitral award and virtually no individual arbitrations" (Kinkel Br. 43) is unsupported by record evidence. *See* page 10-11, *supra*.