

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

JENNIFER L. LASTER; ANDREW THOMPSON; ELIZABETH VOORHIES, on behalf
of themselves and all others similarly situated, and
on behalf of the general public,
Plaintiffs – Appellees,

v.

T-MOBILE USA, INC., a Delaware corporation; OMNIPOINT COMMUNICATIONS,
INC., a Delaware corporation dba T Mobile; VERIZON COMMUNICATIONS, INC., a
Delaware corporation; CELLCO PARTNERSHIP, a Delaware corporation, dba Verizon
Wireless; VERIZON WIRELESS (VAW) LLC, a Delaware limited liability company,
dba Verizon Wireless; AIRTOUCH CELLULAR, a Delaware limited liability company,
dba Verizon Wireless; GO WIRELESS, a California corporation,
Defendants,

and

CINGULAR WIRELESS LLC, a Delaware limited liability company; NEW
CINGULAR WIRELESS PCS, LLC, dba Cingular Wireless,
Defendants – Appellants.

Appeal From an Order of the United States District Court
for the Southern District of California, No. CV-05-01167-DMS

BRIEF FOR THE APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Cingular Wireless LLC has no parent company. Cingular Wireless LLC is indirectly owned by AT&T Inc. (the result of the acquisition of AT&T Corp. by SBC Communications, Inc.) and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC. New Cingular Wireless, Inc. is a wholly owned subsidiary of Cingular Wireless LLC.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION.....	1
ISSUE PRESENTED	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	8
STANDARD OF REVIEW	11
ARGUMENT	11
I. THE DISTRICT COURT ERRED IN STRIKING DOWN CINGULAR’S CONSUMER-FRIENDLY ARBITRATION PROVISION UNDER CALIFORNIA UNCONSCIONABILITY LAW.	11
A. The arbitration agreement between Voorhies and Cingular is not procedurally unconscionable.....	13
1. A non-negotiable form contract is not <i>per se</i> procedurally unconscionable under California law	13
2. Providing a contract in two separate documents does not constitute “surprise,” especially when the customer is an attorney.....	18
B. The prohibition against class-wide arbitration in Voorhies’ arbitration provision is not substantively unconscionable.	20
II. AS INTERPRETED BY THE DISTRICT COURT, <i>DISCOVER</i> <i>BANK</i> IS PREEMPTED BY THE FAA.....	26
CONCLUSION.....	33

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995)	27
<i>American Software, Inc. v. Ali</i> , 46 Cal. App. 4th 1386 (1996).....	19
<i>Armendariz v. Found. Health Psychcare Servs., Inc.</i> , 6 P.3d 669 (Cal. 2000)	11, 12
<i>AutoNation USA Corp. v. Leroy</i> , 105 S.W.3d 190 (Tex. Ct. App. 2003).....	20
<i>Best & Co. v. Maxwell</i> , 311 U.S. 454 (1940)	32
<i>Billups v. Bankfirst</i> , 294 F. Supp. 2d 1265 (M.D. Ala. 2003)	20
<i>Blitz v. AT&T Wireless Servs., Inc.</i> , No. 054-00281 (Mo. Cir. Ct. Nov. 28, 2005)	5
<i>Bradley v. Harris Research, Inc.</i> , 275 F.3d 884 (9th Cir. 2001)	11
<i>Brown v. Dillard’s, Inc.</i> , 430 F.3d 1004 (9th Cir. 2005).....	11
<i>Brown v. KFC Nat’l Mgmt. Co.</i> , 921 P.2d 146 (Haw. 1996)	20
<i>Caley v. Gulfstream Aerospace Corp.</i> , 428 F.3d 1359 (11th Cir. 2005), <i>pet. for cert. pending</i> , No. 05-959 (filed Jan. 30, 2006)	20, 33
<i>California Grocers Ass’n v. Bank of Am.</i> , 22 Cal. App. 4th 205 (1994).....	13
<i>Carbajal v. H&R Block Tax Servs., Inc.</i> , 372 F.3d 903 (7th Cir. 2004).....	15
<i>Coast Plaza Doctors Hosp. v. Blue Cross</i> , 83 Cal. App. 4th 677 (2000).....	12
<i>Copeland v. Katz</i> , 2005 WL 3163296 (E.D. Mich. Nov. 28, 2005)	20

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Crippen v. Cent. Valley RV Outlet, Inc.</i> , 124 Cal. App. 4th 1159 (2004).....	13, 18
<i>Dambrosio v. Comcast Corp.</i> , 2005 WL 3543794 (E.D. Pa. Dec. 27, 2005).....	20
<i>Dean Witter Reynolds, Inc. v. Superior Court</i> , 211 Cal. App. 3d 758 (1989).....	13
<i>Discover Bank v. Superior Court</i> , 113 P.3d 1100 (Cal. 2005).....	<i>passim</i>
<i>Edwards v. Blockbuster, Inc.</i> , 400 F. Supp. 2d 1305 (E.D. Okla. 2005).....	20
<i>FDIC v. McSweeney</i> , 976 F.2d 532 (9th Cir. 1992).....	17
<i>Forness v. Cross County Bank, Inc.</i> , 2006 WL 726233 (S.D. Ill. Mar. 20, 2006).....	20
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000).....	27
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	33
<i>Gras v. Assocs. First Capital Corp.</i> , 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001).....	20
<i>Herbert v. Lankershim</i> , 71 P.2d 220 (Cal. 1937).....	12
<i>Hubbert v. Dell Corp.</i> , 835 N.E.2d 113 (Ill. App. Ct. 2005).....	20
<i>Hutcherson v. Sears Roebuck & Co.</i> , 793 N.E.2d 886 (Ill. App. Ct. 2003).....	20
<i>Iberia Credit Bureau Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004).....	33
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 361 F. Supp. 2d 237 (S.D.N.Y. 2005).....	20
<i>In re Watts</i> , 298 F.3d 1077 (9th Cir. 2002).....	17, 18

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Jenkins v. First Am. Cash Advance of Ga., LLC</i> , 400 F.3d 868 (11th Cir. 2005), <i>cert. denied</i> , 126 S. Ct. 1457 (2006).....	20
<i>Jones v. Citigroup, Inc.</i> , 135 Cal. App. 4th 1491 (2006).....	11, 16, 18, 20
<i>Jones v. Genus Credit Mgmt. Corp.</i> , 353 F. Supp. 2d 598 (D. Md. 2005).....	20
<i>Laster v. T-Mobile USA, Inc.</i> , 407 F. Supp. 2d 1181 (S.D. Cal. 2005)	<i>passim</i>
<i>Lawrence v. Household Bank (SB), N.A.</i> , 343 F. Supp. 2d 1101 (M.D. Ala. 2004).....	20
<i>Livadas v. Bradshaw</i> , 512 U.S. 107 (1994).....	31
<i>Lloyd v. MBNA Am. Bank, N.A.</i> , 27 F. App’x 82 (3d Cir. 2002).....	20
<i>Lomax v. Woodmen of the World Life Ins. Soc’y</i> , 228 F. Supp. 2d 1360 (N.D. Ga. 2002)	20
<i>Lux v. Good Guys</i> , 2005 WL 1713421 (C.D. Cal. July 11, 2005).....	20
<i>Mago v. Shearson Lehman Hutton Inc.</i> , 956 F.2d 932 (9th Cir. 1992)	11
<i>Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.</i> , 89 Cal. App. 4th 1042 (2001).....	12
<i>Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	27
<i>Morris v. Redwood Empire Bancorp</i> , 128 Cal. App. 4th 1305 (2005).....	13, 14, 18
<i>O’Quin v. Verizon Wireless</i> , 256 F. Supp. 2d 512 (M.D. La. 2003)	20
<i>Owen ex rel. Owen v. United States</i> , 713 F.2d 1461 (9th Cir. 1983)	17

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Parker v. McCaw</i> , 125 Cal. App. 4th 1494 (2005).....	20
<i>Perdue v. Crocker Nat’l Bank</i> , 702 P.2d 503 (Cal. 1985).....	20
<i>Pick v. Discover Fin. Servs., Inc.</i> , 2001 U.S. Dist. LEXIS 15777 (D. Del. Sept. 28, 2001).....	20
<i>Provencher v. Dell, Inc.</i> , 409 F. Supp. 2d 1196 (C.D. Cal. 2006).....	20, 26
<i>Pyburn v. Bill Heard Chevrolet</i> , 63 S.W.3d 351 (Tenn. Ct. App. 2001)	32
<i>Rains v. Found. Health Sys. Life & Health</i> , 23 P.3d 1249 (Colo. Ct. App. 2001).....	20
<i>Republic Bank v. Marine Nat’l Bank</i> , 45 Cal. App. 4th 919 (1996).....	19
<i>Rodriguez de Quijas v. Shearson/Am. Express, Inc.</i> , 490 U.S. 477 (1989).....	31
<i>Rosen v. SCIL, LLC</i> , 799 N.E.2d 488 (Ill. App. Ct. 2003)	20
<i>Schultz v. AT&T Wireless Servs., Inc.</i> , 376 F. Supp. 2d 685 (N.D. W. Va. 2005).....	32
<i>Snowden v. Checkpoint Check Cashing</i> , 290 F.3d 631 (4th Cir. 2002)	20
<i>Stenzel v. Dell, Inc.</i> , 870 A.2d 133 (Me. 2005)	20
<i>Stephan v. Dowdle</i> , 733 F.2d 642 (9th Cir. 1984).....	17
<i>Stirlen v. Supercuts, Inc.</i> , 51 Cal. App. 4th 1519 (1997).....	11
<i>Strand v. U.S. Bank Nat’l Ass’n ND</i> , 693 N.W.2d 918 (N.D. 2005)	20
<i>Swanson v. Hempstead</i> , 64 Cal. App. 2d 681 (1944)	13

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Taylor v. First N. Am. Nat’l Bank</i> , 325 F. Supp. 2d 1304 (M.D. Ala. 2004).....	20
<i>Ting v. AT&T</i> , 319 F.3d 1126 (9th Cir. 2003)	<i>passim</i>
<i>Trend Homes, Inc. v. Superior Court</i> , 131 Cal. App. 4th 950 (2005).....	14, 15, 18
<i>Tsadilas v. Providian Nat’l Bank</i> , 786 N.Y.S.2d 478 (N.Y. App. Div. 2004)	20
<i>United States v. Locke</i> , 529 U.S. 89 (2000).....	26
<i>Vigil v. Sears Nat’l Bank</i> , 205 F. Supp. 2d 566 (E.D. La. 2002).....	20
<i>Walther v. Sovereign Bank</i> , 872 A.2d 735 (Md. 2005)	20
<i>Wayne v. Staples, Inc.</i> , 135 Cal. App. 4th 466 (2006).....	13
<i>Wilko v. Swan</i> , 346 U.S. 427 (1953).....	31
<i>Wilson v. Mike Steven Motors, Inc.</i> , 111 P.3d 1076 (Kan. Ct. App. 2005)	20
<i>Zawikowski v. Beneficial Nat’l Bank</i> , 1999 U.S. Dist. LEXIS 514 (N.D. Ill. Jan. 11, 1999)	20
 Statutes and Rules	
9 U.S.C. § 3	1, 2
9 U.S.C. § 4	1, 2
9 U.S.C. §§ 3-4.....	6
9 U.S.C. § 10	31
9 U.S.C. § 16(a)(1)(A)	1
9 U.S.C. § 16(a)(1)(B)	1

TABLE OF AUTHORITIES—Continued

	Page(s)
28 U.S.C. § 1332(d)	1, 2
28 U.S.C. §§ 1711, <i>et seq.</i>	6
Cal. Civ. Code § 1670.5, Legis. Com. cmt. 1	19
Fed. R. App. P. 4(a)(1)(A)	1
Fed. R. Civ. P. 11	4, 23
Fed. R. Civ. P. 11(c)(2).....	5
Fed. R. Civ. P. 23	30
Fed. R. Civ. P. 23(f).....	28
 Miscellaneous	
Elizabeth P. Allor, Note, <i>Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts</i> , 71 Cal. L. Rev. 1239 (1983).....	29
<i>American Arbitration Association Policy on Class Arbitrations</i> (July 14, 2005), available at http://www.adr.org/Classarbitrationpolicy	30
Lindsay R. Androski, Comment, <i>A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses</i> , 2003 U. Chi. Legal F. 631.....	29
Jonathan Bunch, <i>To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration</i> , 2004 J. Disp. Resol. 259	29
John J.A. Burke, <i>Contract as a Commodity: A Nonfiction Approach</i> , 24 Seton Hall Legis. J. 285 (2000)	15

TABLE OF AUTHORITIES—Continued

	Page(s)
H.R. Rep. No. 97-542 (1982).....	27
http://cingular.com/disputeresolution	5
<i>Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. (1924)</i>	27
Ira Rheingold, <i>Proposed Revisions to NACA [National Association of Consumer Advocates] Guidelines for Litigation and Settling Consumer Class Actions</i> (Oct. 2005), 1533 PLI/Corp. 491 (2006).....	30
Jean R. Sternlight, <i>As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?</i> , 42 Wm. & Mary L. Rev. 1 (2000)	29
1 <i>Story’s Equity Jurisprudence</i> (14th ed. 1918)	13
<i>Supplementary Procedures for Consumer-Related Disputes, available at http://www.adr.org/sp.asp?id=22014</i>	5
Jack Wilson, “ <i>No-Class-Action Arbitration Clauses,</i> ” <i>State- Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action</i> , 23 Quinnipiac L. Rev. 737 (2004)	29, 31

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1332(d). Diversity of citizenship is satisfied because Elizabeth Voorhies alleges that she is a resident of the State of California and Cingular Wireless LLC is a Delaware limited liability company with its principal place of business in Atlanta, Georgia. The amount-in-controversy is satisfied because, to the best of Cingular's knowledge and belief based on business volumes, the aggregate claims of individual members of the putative class exceed the sum or value of \$5,000,000, exclusive of interest and costs.

This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(A) and (B) over the denial of appellants' motion to compel arbitration and stay litigation pursuant to 9 U.S.C. §§ 3 and 4. On November 30, 2005, the district court denied appellants' motion to compel arbitration and stay litigation. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005). On December 21, 2005, Cingular Wireless LLC and New Cingular Wireless PCS, LLC, dba Cingular Wireless (collectively "Cingular") filed a timely notice of appeal under Fed. R. App. P. 4(a)(1)(A). Excerpts of Record ("ER") 114-15.

ISSUE PRESENTED

Whether the district court erred in refusing to compel arbitration and stay litigation.

STATEMENT OF THE CASE

Despite her contractual obligation to arbitrate her dispute with Cingular, named plaintiff Elizabeth Voorhies filed this putative class action against Cingular in California superior court.¹ Cingular and its co-defendants removed the case to federal court, invoking the court's jurisdiction under 28 U.S.C. § 1332(d). Cingular then moved to compel arbitration and stay the litigation pursuant to 9 U.S.C. §§ 3 and 4. The district court denied Cingular's motion, holding that Cingular's arbitration clause is unconscionable and thus unenforceable. Cingular timely appealed.

On March 14, 2006, the district court granted Cingular's motion to stay proceedings in the district court pending the outcome of Cingular's appeal from the denial of its motion to compel arbitration and stay litigation and administratively closed the case "until completion of Defendants' appeals." ER120.

On April 3, 2006, this Court consolidated Cingular's appeal with an appeal filed by T-Mobile.²

¹ Only one of the named plaintiffs-appellees, Elizabeth Voorhies, has alleged claims against Cingular. The other named plaintiffs have alleged claims against other wireless service providers.

² Cingular did not receive the order consolidating the appeals until April 5, 2006, three business days before the due date of this brief. By that time, this brief was essentially complete. Upon receiving the Court's consolidation order, Cingular's counsel conferred with T-Mobile's counsel (who had not yet received it). They agreed that it would be difficult, if not impossible, to produce a single brief addressing all of the arguments each defendant desires to raise within the

STATEMENT OF FACTS

Elizabeth Voorhies is a member of the California Bar and is employed by the California Attorney General's Office.³ She subscribed to wireless service with Cingular by means of a Wireless Service Agreement ("Agreement") that states: "This Agreement includes all the provisions of Cingular's current terms of service form * * *, incorporated herein by reference, including a binding arbitration clause * * *," and affirms: "I agree to all of these contract provisions." The Agreement concludes with the acknowledgement: "I HAVE READ, UNDERSTAND, AND AGREE TO BE BOUND BY THIS AGREEMENT WITH ITS TERMS OF SERVICE * * * (including * * * Arbitration)." ER23.

Voorhies' terms of service prominently call attention to the arbitration provision stating, in the first paragraph: "PLEASE READ THIS AGREEMENT CAREFULLY TO ENSURE THAT YOU UNDERSTAND EACH PROVISION.

14,000 word limitation and in the short amount of time remaining before the due date. Although Circuit Rule 28-4 contemplates that parties to a consolidated appeal may receive an additional 21 days and an enlargement of 1,400 words by filing a notice, the Rule further specifies that the notice must be filed at least seven calendar days before the original due date. Because the order was not received until five calendar days prior to the due date, defendants were precluded under Rule 28-4 from giving the required notice. Accordingly, defendants agreed to submit the separate briefs that they had already prepared.

³ Compare ER93 (phone number (619) 645-3080 provided for Elizabeth Shabatay Voorhies on State Bar of California Attorney Search website) with ER23 (work phone number (619) 645-3080 provided for Elizabeth Voorhies on Cingular Wireless Service Agreement).

This Agreement requires the use of arbitration to resolve disputes and also limits the remedies available to you in the event of a dispute.” ER26. The arbitration provision itself further highlights its importance: “ARBITRATION Please read this carefully. It affects your rights.” ER35. In relevant part, the arbitration provision states:

Cingular and you * * * agree to arbitrate all disputes and claims (including ones that already are the subject of litigation) arising out of or relating to this Agreement, or to any prior oral or written agreement, for Equipment or services between Cingular and you.

Id. The arbitration provision allows customers to pursue disputes in small claims court, but, if they prefer to arbitrate, requires that they do so on an individual basis. ER35, 37. Each party to the Agreement must provide the other with notice of the intent to arbitrate before commencing arbitration proceedings. ER35-36.

Cingular’s arbitration provision is designed to make arbitration free, convenient, and attractive to Cingular’s customers. Among other things, the provision specifies that Cingular will pay “all AAA [American Arbitration Association] filing, administration and arbitrator fees,” unless the arbitrator finds the claim or the relief sought to violate the substantive standards of Fed. R. Civ. P. 11.⁴ Cingular’s arbitration provision also obliges Cingular to “reimburse [the

⁴ If the arbitrator does find the claim to violate Rule 11(b), the customer still need not pay more than \$125 under Cingular’s arbitration provision because that is the maximum that a consumer ever has to pay under the rules of the American Arbitration Association. *See Supplementary Procedures for Consumer-Related*

customer] for [his or her] reasonable attorneys' fees and expenses incurred for the arbitration" if the arbitrator awards the customer the amount of his or her demand or more (whether or not the claim would otherwise support an award of attorneys' fees).⁵ In addition, the provision does not require that the arbitration be kept confidential, does not prohibit punitive damages, and specifies that arbitration will be conducted in the county of the customer's billing address. ER36-37. Voorhies agreed to the terms of the Agreement by means of electronic signature. *Laster*, 407 F. Supp. 2d at 1185.

In May 2005, Voorhies filed suit in the Superior Court of San Diego County, alleging that Cingular engaged in false advertising and committed an unfair business act or practice by charging her and other consumers sales tax on wireless telecommunications devices that were advertised either as free or at a discounted

Disputes (capping fees for claims that do not exceed \$10,000), available at <http://www.adr.org/sp.asp?id=22014>. This amount is dwarfed by a litigant's potential exposure for filing a frivolous claim in court: a fine, plus full costs and attorneys' fees. See Fed. R. Civ. P. 11(c)(2) ("A sanction imposed for violation of this rule * * * may consist of * * * an order to pay a penalty into court, or * * * directing payment to the movant or some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.").

⁵ If the plaintiff receives less than the amount demanded, the arbitrator would be entitled to award attorneys' fees to the same extent as if the case had been brought in court. ER22; see also <http://cingular.com/disputeresolution> (same); *Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281, slip. op. at 2 (Mo. Cir. Ct. Nov. 28, 2005) (attached as Addendum 1) (observing that Cingular's arbitration provision "does not restrict the award of attorneys' fees if such fees are available under applicable federal or state law").

price. The case was removed to the United States District Court for the Southern District of California pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711, *et seq.* On September 23, 2005, Cingular moved the district court to compel arbitration and stay litigation pursuant to Sections 3 and 4 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 3-4. Voorhies opposed the motion, arguing that, because Cingular’s arbitration provision prohibits class arbitration, it is unconscionable under the California Supreme Court’s decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

On November 20, 2005, the district court denied Cingular’s motion holding Cingular’s arbitration provision unconscionable and thus unenforceable. *Laster*, 407 F. Supp. 2d at 1191-92. Relying upon this Court’s decision in *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003), the district court found Cingular’s contract to be procedurally unconscionable because it was a “*non-negotiable* form contract[.]” *Id.* at 1188 (emphasis in original). The court made no mention of the fact that Voorhies is an attorney in the California Attorney General’s Office. Moreover, it made no difference, the court held, that Voorhies was provided “with both Cingular’s Service Agreement (which specifically references arbitration) and its terms of Service *at the time* she purchased the phone,” allowing Voorhies to “elect to ‘leave it’ and go with a competitor.” *Id.* at 1189 (emphasis in original). As the district court saw it, because Voorhies “had no real opportunity to ‘negotiate’ the

arbitration provision,” it was procedurally unconscionable. *Id.* The court also found that Voorhies’ agreement with Cingular entailed “a modicum of surprise” because, though referenced in the Service Agreement, the arbitration provision was supplied to Voorhies (contemporaneously) in a separate booklet. *Id.*

The district court next held Cingular’s arbitration provision to be substantively unconscionable, reasoning that *Discover Bank* required it to consider only whether “(1) the class action waiver is contained in a consumer contract of adhesion, in which small amounts of damages are at issue; and (2) it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” *Laster*, 407 F. Supp. 2d at 1190. The court found the first factor to be satisfied because Cingular’s contracts are “non-negotiable” and plaintiffs’ claims involve only the small amounts of sales tax allegedly paid on the retail value of a cell phone. *Id.* The second factor is satisfied, according to the district court, because plaintiffs allege that Cingular’s “practice of advertising ‘free’ or substantially discounted phones, while charging consumers sales tax on the full retail value of the phone, constitutes a scheme to mislead consumers.” *Id.* at 1191.

The court rejected Cingular’s argument that the FAA expressly preempts any attempt to use *Discover Bank* to invalidate arbitration clauses by selectively rewriting California’s law of unconscionability. *Id.* at 1192. The court did not

address Cingular's argument that conditioning enforcement of an arbitration provision on the availability of class-wide arbitration frustrates the purpose of the FAA and hence is preempted under the doctrine of conflict preemption.

SUMMARY OF ARGUMENT

This case involves an arbitration provision that was expressly designed to make individual arbitration inexpensive and convenient, entered into by a lawyer who works in the California Attorney General's office. Nevertheless, the district court concluded that the arbitration provision is unenforceable under California unconscionability law solely because it prevents customers from pursuing claims on a class-wide basis. That holding is erroneous for several reasons.

1. Under California unconscionability law, a court may declare a contractual provision to be unenforceable only if that provision is both procedurally and substantively unconscionable. Laster proved neither.

Ignoring the significant fact that Laster herself is a lawyer, the district court found Laster's agreement with Cingular to be procedurally unconscionable because it is a non-negotiable form contract and because the arbitration provision was provided in a separate document. But the California Court of Appeal repeatedly has recognized in recent years that the fact that a contract is non-negotiable does not render it procedurally unconscionable when there are market alternatives to the provision at issue. That condition is satisfied here because Cingular introduced

evidence that, at the time Laster entered into her agreement with Cingular, two cellular carriers that provide service in California did not include arbitration provisions in their customer agreements. Nor does the fact that the arbitration provision was provided in a separate document support the district court's finding of procedural unconscionability. No California case holds that a contract must be contained within a single stand-alone document in order for it not to be procedurally unconscionable. When, as here, the agreement incorporates by reference the separate document, there can be no contention that the customer was "surprised" by the terms in that separate document especially when the customer is an attorney.

The district court also was mistaken in concluding that Cingular's arbitration provision is procedurally unconscionable merely because it requires that arbitration be conducted on an individual, non-class basis. Although the California Supreme Court held in *Discover Bank* that class waivers are substantively unconscionable when they have the effect of insulating the defendant from liability for fraudulent or willful misconduct, *Cingular's* arbitration provision does not have that effect. That is because Cingular has gone out of its way to ensure that individual arbitration is a realistic means of obtaining redress for small claims by agreeing to pay the full cost of arbitrating any non-frivolous claim and to reimburse prevailing customers for their reasonable attorneys' fees even for claims that would not

otherwise support a fee award. To hold an arbitration provision like this one to be unconscionable is to turn *Discover Bank* into an across-the-board prohibition against class waivers in consumer contracts.

2. If this Court nonetheless concludes that *Discover Bank* creates a blanket rule under which even Cingular's arbitration provision cannot survive, then *Discover Bank* is preempted by the FAA. That is because conditioning the enforceability of arbitration provisions on the defendant's amenability to class-wide arbitration drastically alters the risk-benefit calculus in a way that is certain to result in the wholesale abandonment of arbitration in consumer contracts. To begin with, the superimposition of class-action procedures onto arbitration inevitably converts arbitration into litigation, eliminating all of the cost-savings and efficiencies associated with conventional, individual arbitration. Meanwhile, the stakes of a class arbitration are hundreds of thousands if not millions of times the stakes in an individual arbitration. Finally, the narrow standard of review that was developed for individual arbitration ("manifest disregard of the law") would continue to apply, preventing the kind of expansive review of class certification and merits determinations that is available in court. Under these circumstances, few companies would be likely to retain an arbitration provision in their consumer contracts. Because nothing could more thoroughly frustrate the pro-arbitration

policy and purposes of the FAA, the district court's interpretation of *Discover Bank* is preempted.

STANDARD OF REVIEW

The district court's denial of a motion to compel arbitration and stay litigation is reviewed *de novo*. See *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1009 (9th Cir. 2005) (motion to compel); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (motions to stay and compel). Factual findings underlying the district court's decision are reviewed for clear error. See *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 888 (9th Cir. 2001).

ARGUMENT

I. The District Court Erred In Striking Down Cingular's Consumer-Friendly Arbitration Provision Under California Unconscionability Law.

Under California law, a contractual provision must be *both* procedurally *and* substantively unconscionable in order to be unenforceable. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1533 (1997). Thus, if this Court concludes that Voorhies failed to prove procedural unconscionability, there is no need to reach the question whether the class waiver in Cingular's arbitration provision is substantively unconscionable. See *Jones v. Citigroup, Inc.*, 135 Cal. App. 4th 1491, 1499 (2006) (rejecting unconscionability challenge to arbitration provision

without analyzing its class waiver for substantive unconscionability because agreement was not procedurally unconscionable).

In determining whether any particular provision is unenforceable, 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 (internal quotation marks omitted). In other words, if “the procedural unconscionability, although extant, [is] not great,” “a greater degree of substantive unfairness” is necessary before a contractual provision can be struck down as unconscionable. *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 89 Cal. App. 4th 1042, 1056 (2001).

Procedural unconscionability involves the manner in which the agreement came into existence, focusing on whether there has been “oppression” or “surprise.” *Armendariz*, 6 P.3d at 690 (internal quotation marks omitted). Substantive unconscionability, by contrast, focuses on whether the term in question is so “overly harsh” or “one-sided” (*id.*) as to “shock the conscience.” *Coast Plaza Doctors Hosp. v. Blue Cross*, 83 Cal. App. 4th 677, 689 (2000). Put another way, the provision 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) (emphasis added)

(quoting 1 *Story's Equity Jurisprudence* § 244 (14th ed. 1918)); *California Grocers Ass'n v. Bank of Am.*, 22 Cal. App. 4th 205, 214 (1994); *see also Swanson v. Hempstead*, 64 Cal. App. 2d 681, 688 (1944) (“the authorities are agreed” on this point).

A. The arbitration agreement between Voorhies and Cingular is not procedurally unconscionable.

1. A non-negotiable form contract is not *per se* procedurally unconscionable under California law.

Under current California law, “there is no general rule that a form contract used by a party for many transactions is procedurally unconscionable.” *Crippen v. Cent. Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1165 (2004). The California Court of Appeal recently explained:

There can be no “oppression” establishing procedural unconscionability, even assuming unequal bargaining power and an adhesion contract, when the customer has meaningful choices: “[A]ny claim of ‘oppression’ may be defeated if the complaining party has reasonably available sources of supply from which to obtain desired goods or services free of the terms claimed to be unconscionable.”

Wayne v. Staples, Inc., 135 Cal. App. 4th 466, 482 (2006) (quoting *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 768 (1989)); *see also Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1319 (2005) (“recognition of [an] agreement as an adhesion contract heralds the beginning, not the end, of [the] inquiry”).

Voorhies, upon whom the burden rests to prove unconscionability, offers no evidence of oppression other than her assertion that Cingular had greater bargaining power and used a standard form contract. Cingular, on the other hand, provided evidence that at least two wireless service carriers that offer service in California—Virgin Mobile and TracFone—provide cellular service without requiring arbitration at all. ER77-89. Hence, Voorhies cannot claim to have lacked “reasonable market alternatives” at the time she entered into her arbitration agreement with Cingular.

But even if no wireless company offered service without requiring customers to agree to arbitrate on an individual basis, that would not justify a finding of procedural unconscionability. Because wireless phone service is not a necessity of life, oppression is not inherent in a take-it-or-leave-it contract for its sale. *See Morris*, 128 Cal. App. 4th at 1319-20.⁶ In the absence of the kind of urgency that might attend a transaction for medical services or some similar necessity, the mere use of a non-negotiable form contract is “an inevitable fact of

⁶ Another California appellate court recently reached this precise conclusion in the context of a contract for the purchase of a home—a far weightier matter than the decision about initiating cell phone service. As that court explained, the purchase of a home “does not involve the same concerns [another] court had about hospital admissions which compelled it to find the arbitration provision should have been explained—while home buying may be stressful, it is not a traumatic experience like being admitted to the hospital, and no one is directing a home buyer to purchase a particular home like a doctor directs a patient to a particular hospital.” *Trend Homes, Inc. v. Superior Court*, 131 Cal. App. 4th 950, 960 (2005).

life for all citizens.” *Id.* at 1317 n.5 (citation omitted); *see also Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (“[f]orms reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices”). Hence, the mere fact that Voorhies’ arbitration agreement was part of a non-negotiable form contract—a fact common to 99% of all contracts in this country (*see* John J.A. Burke, *Contract as a Commodity: A Nonfiction Approach*, 24 Seton Hall Legis. J. 285, 290 (2000))—does not render it procedurally unconscionable.

In *Discover Bank*, the California Supreme Court took account of the fact that the arbitration provision was part of an adhesion contract in its explanation of why the class waiver was **substantively** unconscionable. *See* 113 P.3d at 1108. But its finding of procedural unconscionability was firmly tethered to the fact that the arbitration provision was imposed on an existing customer by means of an “amendment to its cardholder agreement in the form of a ‘bill stuffer’ that [the customer] would be deemed to accept if he did not close his account.” *Id.* at 1108. By contrast, Voorhies agreed to arbitrate disputes with Cingular Wireless when she first initiated service. At that time, Voorhies had neither invested in a telephone nor become reliant upon the telephone number obtained when she entered into her Agreement. That is a far cry from being told in the middle of a relationship that

she could remain as a customer only by accepting an obligation to arbitrate disputes.

That Voorhies' agreement to arbitrate is not procedurally unconscionable follows inexorably from *Jones v. Citigroup, Inc.*, *supra*. *Jones*, like *Discover Bank*, involved a credit-card issuer's midstream addition of an arbitration requirement via a bill insert. The California Court of Appeal held that the arbitration provision was not procedurally unconscionable, however, because the credit-card issuer allowed cardholders to reject the arbitration provision and continue to use their cards until the end of their membership year or the expiration date on their card (after which their membership would be terminated). 135 Cal. App. 4th at 1498. If it is not procedurally unconscionable to require a cardholder to choose between agreeing to arbitration and terminating her contractual relationship at the end of her membership year, it cannot be unconscionable to present a wireless service purchaser with the choice between agreeing to arbitration and not becoming a customer in the first place.

In addition to *Discover Bank*, the district court cited a Ninth Circuit case involving an agreement akin to the bill-insert found unconscionable in *Discover Bank*. See *Laster*, 407 F. Supp. 2d at 1188 (citing *Ting*, 319 F.3d at 1148-49). In *Ting*, mandatory detariffing forced AT&T to enter into individual contracts with its existing residential customers. *Ting*, 319 F.3d at 1132, 1134. To do so, AT&T

sent Customer Service Agreements (“CSA”) either with the monthly bill or in a separate envelope. *Id.* at 1134. Customers who were unwilling to accept the terms of the CSA were forced to call and cancel their service. *Id.* In explaining why the agreement was procedurally unconscionable, the Court noted that “AT&T mailed the CSA in an envelope that few customers realized contained a contract, and offered its terms on a take-it-or-leave-it basis.” *Id.* at 1149. Voorhies faced no similar disruption of service if she rejected the terms of Cingular’s agreement and surely cannot claim that she was unaware that she was entering into a contract with Cingular at the time she subscribed to wireless service.

Even if *Ting* were properly construed as holding that *all* non-negotiable form contracts are procedurally unconscionable, that holding would not bind this Court because subsequent California case law establishes that California rejects that rule. An interpretation of California law by a panel of this Court is “only binding in the absence of any subsequent indication from the California courts that [the] interpretation was incorrect.” *In re Watts*, 298 F.3d 1077, 1083 (9th Cir. 2002) (quoting *Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464-65 (9th Cir. 1983)).⁷ When later decisions of the California Court of Appeal conflict with a

⁷ See *Stephan v. Dowdle*, 733 F.2d 642, 642 (9th Cir. 1984) (concluding that an earlier panel decision was “no longer binding * * * and must be overruled” because the Arizona Court of Appeals had subsequently interpreted the relevant Arizona statute to the contrary); see also *FDIC v. McSweeney*, 976 F.2d 532, 535-36 (9th Cir. 1992) (examining intervening California appellate and supreme court

panel’s decision on California state law, the later decisions must be followed “absent convincing evidence that the California Supreme Court would reject the interpretation” of the lower California courts. *In re Watts*, 298 F.3d at 1082. As noted, subsequent decisions of the California Court of Appeal expressly reject the district court’s blanket rule. Under these circumstances, *Jones*, *Wayne*, *Trend Homes*, *Morris*, and *Crippen*—all decided after *Ting*—provide the best indication of California law on procedural unconscionability.

2. Providing a contract in two separate documents does not constitute “surprise,” especially when the customer is an attorney.

The district court concluded that Voorhies had established a “modicum of surprise” because her agreement “fails to mention the terms of arbitration or its classwide arbitration bar” (*Laster*, 407 F. Supp. 2d at 1189), which instead were provided to her contemporaneously in a separate booklet. There is no basis for that ruling in California law. Voorhies’ Agreement states that it “includes all the provisions of Cingular’s current terms of service * * *, [i]ncorporated herein by reference.” ER23. The term “incorporation by reference” indicates “the inclusion, within a body of a document, of text which, although physically separate from the document, becomes as much a *part* of the document as if it had been typed in

opinions in deciding whether current state law was at odds with a prior panel decision).

directly.” *Republic Bank v. Marine Nat’l Bank*, 45 Cal. App. 4th 919, 922 (1996) (emphasis in original).

The district court cited no case holding that there is anything “surpris[ing]” about the incorporation of another document by reference, especially when, as here, the contract itself expressly refers not just to the separate terms and conditions, but also (twice!) to the specific term—the arbitration provision—to which the plaintiff objects. *See* ER23. We are aware of none.

Moreover, even if it were theoretically possible to establish “surprise” when a contract unambiguously incorporates another document by reference, surely Voorhies can’t do so here. She is an attorney with the California Attorney General’s office who cannot plausibly assert unfamiliarity with the structure of typical form contracts. *See* ER93 (Voorhies’ bar membership and employment information). Unconscionability is assessed according to the circumstances of the particular case. *See American Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1390 (1996) (California Legislature’s expectation that unconscionability will be decided “in the light of the general background and the needs of the *particular case*”) (quoting Cal. Civ. Code § 1670.5, Legis. Com. cmt. 1) (emphasis added). A familiarity with contracts and their importance undercuts a plaintiff’s claim of procedural responsibility. *Id.* at 1391 (noting plaintiff’s experience as a salesperson in finding that she “was aware of her obligations under the contract

and that she voluntarily agreed to assume them”); *see also Perdue v. Crocker Nat’l Bank*, 702 P.2d 503, 513 (Cal. 1985) (en banc) (procedural unconscionability may turn on the plaintiff’s “lack of sophistication”); *Parker v. McCaw*, 125 Cal. App. 4th 1494, 1507 (2005) (noting plaintiff’s status as an attorney in finding unconscionability rules inapplicable).

* * * *

In sum, Voorhies established neither oppression nor surprise and the district court therefore erred in finding her agreement with Cingular to be procedurally unconscionable. And because there is no procedural unconscionability, California law requires enforcement of Voorhies’ agreement without regard to whether the class waiver in that agreement is substantively unconscionable. *See Jones*, 135 Cal. App. 4th at 1499.

B. The prohibition against class-wide arbitration in Voorhies’ arbitration provision is not substantively unconscionable.

The overwhelming majority rule around the country is that arbitration provisions that prohibit class-wide arbitration are not unconscionable.⁸ Though

⁸ *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law), *pet. for cert. pending*, No. 05-959 (filed Jan. 30, 2006); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (Georgia law), *cert. denied*, 126 S. Ct. 1457 (2006); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (Maryland law); *Lloyd v. MBNA Am. Bank, N.A.*, 27 F. App’x 82, 84 (3d Cir. 2002) (Delaware law); *Forness v. Cross County Bank, Inc.*, 2006 WL 726233, at *2 (S.D. Ill. Mar. 20, 2006) (Delaware law); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1204-06 (C.D.

most courts have so held categorically, several have confined their holding to circumstances in which the consumer is not required to pay greater costs than he or

Cal. 2006) (Texas law); *Dambrosio v. Comcast Corp.*, 2005 WL 3543794, at *14-*16 (E.D. Pa. Dec. 27, 2005) (Pennsylvania and Illinois law); *Copeland v. Katz*, 2005 WL 3163296, at *4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) (Oklahoma law); *Lux v. Good Guys*, 2005 WL 1713421 (C.D. Cal. July 11, 2005) (Nevada law); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 & n.11 (S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005) (Maryland law); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004) (Alabama law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (Alabama law); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004) (Alabama law); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, at *15 (D. Del. Sept. 28, 2001) (Delaware law); *Zawikowski v. Beneficial Nat'l Bank*, 1999 U.S. Dist. LEXIS 514, at *5 (N.D. Ill. Jan. 11, 1999) (Illinois law); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-67 & n.23 (Haw. 1996) (Hawaii law); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494-95, (Ill. App. Ct. 2003) (Illinois law); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894-96 (Ill. App. Ct. 2003) (Arizona law); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 125-26 (Ill. App. Ct. 2005) (Texas law); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at *7 (Kan. Ct. App. 2005) (Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-43 (Md. 2005) (Maryland law); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001) (New Jersey law); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (New York law); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-27 (N.D. 2005) (North Dakota law); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (Texas law). *But see Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (affirming conclusion that class waiver was unconscionable). Because this Court was merely attempting to predict the views of the California Supreme Court, *Ting* is no longer relevant.

she would have to bear in court and the arbitrator is not prohibited from awarding a prevailing plaintiff his or her attorneys' fees under applicable fee-shifting statutes. Here, both of these conditions are satisfied. Indeed, in order to ensure that customers find arbitration to be a realistic means of resolving disputes, Cingular has gone two steps beyond what any of the cited decisions has required, specifying in its arbitration provision that it will (i) pay the *full* cost of arbitrating any dispute that is not frivolous or brought for an improper purpose, and (ii) reimburse customers for their reasonable attorneys' fees if the arbitrator awards them the amount of their demand or more—even if their claim would not otherwise qualify for a fee award under governing law.

The district court found neither of these features of Cingular's arbitration provision to be relevant. It instead interpreted *Discover Bank* to create a categorical rule that no class waiver can be upheld (no matter how consumer-friendly the arbitration provision otherwise may be) so long as the class waiver is contained in a non-negotiable form contract, the claims are small, and the plaintiff has alleged "fraud," broadly defined to include any alleged "scheme to mislead consumers." *Laster*, 407 F. Supp. 2d at 1191. That is not a valid construction of *Discover Bank*. Although the California Supreme Court did hold in *Discover Bank* that a class waiver in a consumer arbitration provision in "some" circumstances may be unconscionable, at the same time it emphasized that it was "*not* hold[ing]

that *all* class action waivers are necessarily unconscionable.” 113 P.3d at 1110 (emphasis added). To distinguish between valid and invalid class waivers, the *Discover Bank* court focused on whether the challenged class waiver serves “to insulate a party from liability that otherwise would be imposed under California law” and “becomes *in practice* the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’” *Id.* at 1109, 1110 (quoting Civ. Code § 1668) (emphasis added; alteration in original).

Cingular’s arbitration provision does not run afoul of that standard. By contrast with the fee-sharing provision in Discover Bank’s arbitration clause, Cingular’s arbitration provision obligates it to pay the *full cost* of arbitration so long as the claim is not unwarranted or improper (as measured by the standards articulated in Rule 11(b) of the Federal Rules of Civil Procedure). This distinction makes a world of difference. Under Discover Bank’s arbitration clause, it would cost between \$100 and \$125 for an individual credit-card customer to arbitrate a \$29 late-fee claim.⁹ In other words, a Discover Bank customer would face a significant net loss—between \$71 and \$96—to pursue his or her individual claim in arbitration. Under those circumstances, the California Supreme Court held that

⁹ Discover Bank’s arbitration provision states that the claimant has the option to choose arbitration before JAMS/Endispute or the National Arbitration Forum (“NAF”). *See* ER48 (Discover Bank’s arbitration provision). JAMS sets the cost of consumer arbitration at \$125. *See* ER50. To pursue a “participatory” hearing before NAF, a consumer with a claim under \$2,500 must pay \$100 (a \$25 filing fee, plus half of the \$150 hearing fee). *See* ER54.

individual consumers would be deterred from vindicating their rights through arbitration. 113 P.3d at 1108.

By contrast, under Cingular's arbitration provision, Voorhies would pay nothing to arbitrate individually. Moreover, Cingular's arbitration provision affirmatively obliges Cingular to reimburse customers for their reasonable attorneys' fees if the arbitrator awards them the amount of their demands or more—even if the customers would not otherwise be entitled to a fee award under applicable state or federal law. At the same time, the provision does not limit the authority of the arbitrator to award fees to customers who receive less than their demands if there is a statutory basis for doing so. *See* note 5, *supra*. Hence, even someone with a breach-of-contract claim for a few dollars would receive attorneys' fees if she were to win that amount or more in arbitration. And someone with a small statutory claim could receive attorneys' fees even if the arbitrator awards less than the full amount of the claim.

Indeed, customers who provide Cingular with notice of their disputes before beginning an arbitral proceeding (as Cingular's arbitration provision requires) often may obtain even more expeditious redress for their complaints through informal dispute resolution processes without the need for arbitration. *See* ER21, 36. Under such circumstances, Cingular's arbitration provision does not deter customers from resolving disputes involving small-dollar claims and hence is *not*

an “exculpatory” clause that “operate[s] to insulate [Cingular] from liability.” *Discover Bank*, 113 P.3d at 1109. It therefore is not substantively unconscionable under *Discover Bank*.

The district court dismissed these arguments merely by reference to *Discover Bank*’s statement that “the **potential availability** of attorney fees” does not “ameliorate[] the problem posed by such class action waivers [because t]here is no indication . . . attorney fees are an adequate substitute for the class action or [class] arbitration mechanism.” *Laster*, 407 F. Supp. 2d at 1191 (citing *Discover Bank*, 113 P.3d 1109-10) (emphasis added).¹⁰ As noted, Cingular’s arbitration provision offers far more than the **possibility** of attorneys’ fees. Cingular **guarantees** payment of a customer’s reasonable attorneys’ fees if the arbitrator awards her the amount of her claim or more—even for claims that would not otherwise support an award of attorneys’ fees. Such a fee award would not be deducted from her other relief, as is almost always the case in a class-action settlement. In sum, far from offering “unsupported assertions” of “an adequate substitute for the class action * * * mechanism” (*Discover Bank*, 113 P.3d at 1110), Cingular has demonstrated that it provides customers with rapid and

¹⁰ The district court also suggested—without expressly holding—that **all** class waivers in consumer contracts are unconscionably one-sided because businesses generally do not bring class actions against their customers. *Laster*, 407 F. Supp. 2d at 1191 n.2. That rationale cannot be squared with *Discover Bank*’s unequivocal statement that only “some” class waivers are unconscionable.

efficient dispute resolution in many ways *superior* to the class action device that is particularly ill-suited to providing swift and complete relief to individuals with small claims. As another federal district court within this Circuit recently observed in upholding a class waiver that is *less* consumer-friendly than Cingular's, "[i]n contrast to the arbitration provision and class action waiver involved in *Discover Bank*, the parties' arbitration provision and class action waiver here do not exempt [the company] from the consequences of its alleged wrongdoing." *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1203 (C.D. Cal. 2006).

II. As Interpreted By The District Court, *Discover Bank* Is Preempted By The FAA.

If this Court concludes that *Discover Bank* broadly prohibits the inclusion of class-action waivers in consumer arbitration provisions, no matter how consumer-friendly those provisions may otherwise be, that across-the-board ban would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" in enacting the FAA and therefore would be preempted under the Supremacy Clause. *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted).¹¹

¹¹ Cingular argued in the district court that *either* express preemption *or* conflict preemption would prevent the court's adoption of a sweeping interpretation of *Discover Bank* that would invalidate Cingular's arbitration provision. The district court responded exclusively to Cingular's express preemption argument, holding that *Discover Bank* established a "generally applicable contract defense[]" that falls within the savings clause in Section 2 of

Congress enacted the FAA because “arbitration saves time, saves trouble, saves money.” *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce). Arbitration usually is “cheaper and faster than litigation,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling.” H.R. Rep. No. 97-542, at 13 (1982). The U.S. Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Class action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the hallmark of arbitration. While the average length of an AAA arbitration from filing to award is less than six months (*see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-81 (1995)), class actions can take years. These complex matters invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including depositions of all class

the FAA. *Laster*, 407 F. Supp. 2d at 1192 (citing *Ting* for the same proposition). Cingular’s conflict preemption challenge to the district court’s broad reading of *Discover Bank* does not depend upon the express preemption language in Section 2. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (express preemption provision does not “bar the ordinary working of conflict pre-emption principles”).

representatives (and often other witnesses) for purposes of determining such statutory 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; and very often (v) an interlocutory appeal initiated by the losing party pursuant to Fed. R. Civ. P. 23(f).

If, after all of that, a class is certified, there would have to be 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, there would need to be 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—one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses.

Whether conducted by a court or by an arbitrator, all of the procedures necessary to the fair administration of a class action make arbitration more expensive and more time consuming—and, in the process, eradicate the distinction

between arbitration and litigation.¹² In fact, some commentators believe that “class arbitration may actually prove *more* burdensome than class litigation.” Jack Wilson, “*No-Class-Action Arbitration Clauses*,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 *Quinnipiac L. Rev.* 737, 774 (2004) (emphasis added); *see also* Lindsay R. Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 *U. Chi. Legal F.* 631, 649 (hybrid class arbitration “subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration”).

The procedures for class arbitrations promulgated by the AAA bear this out. Those rules require the arbitrator to make a written “class determination award”

¹² See Jonathan Bunch, *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 (“[W]hen class-wide arbitration is chosen as the means to resolve many similar claims, the many benefits of the arbitration process are lost in favor of a procedural device which brings the burdens of litigation into the arbitral forum. It is somewhat ironic that the greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration * * * lessens the distinction between the two processes.”); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *Wm. & Mary L. Rev.* 1, 44-45 (2000) (“[S]everal attorneys who have actually participated in classwide arbitrations have found that the procedure, at least as used to date, differs very little from litigation and thus offers few, if any, advantages.”); Elizabeth P. Allor, Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 *Cal. L. Rev.* 1239, 1253 (1983) (“[W]hen conducted on a classwide basis, arbitration is unlikely to remain inexpensive and efficient.”).

addressing a lengthy list of criteria equivalent to those identified in Federal Rule of Civil Procedure 23, provide for a proceeding in court to confirm or vacate that award, provide for the arbitrator to preside over the notification of class members, and then anticipate full-blown proceedings on the merits and a carefully reasoned “final award” once the class determination award becomes final and class members have been given notice and an opportunity to opt out. Like a federal court, the arbitrator also is given strict standards for reviewing and approving any settlement once a class has been certified. *See* AAA, *American Arbitration Association Policy on Class Arbitrations* (July 14, 2005), available at <http://www.adr.org/Classarbitrationpolicy>. In short, the process is every bit as burdensome as a judicial class action. *See also* Ira Rheingold, *Proposed Revisions to NACA [National Association of Consumer Advocates] Guidelines for Litigation and Settling Consumer Class Actions* (Oct. 2005), 1533 PLI/Corp. 491, 560 (2006) (“If consumer class actions are to be held in arbitration, then absent class members must receive the same due process and procedural protections as they would in court before they can be bound by a judgment.”).

Not only would engrafting time-consuming and expensive class-action procedures onto an arbitral proceeding essentially eliminate the distinction between arbitration and litigation, but it also presents businesses with a “worst-of-all-worlds” scenario. While the stakes would be increased exponentially over an

individual arbitration, any class-wide arbitral award would remain reviewable only for fraud, bias, or “manifest disregard” of the law. *See* 9 U.S.C. § 10; *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)).

In such circumstances, few businesses would be willing to roll the dice by including an arbitration provision in their consumer contracts; “[c]lass arbitration just seems to present too many risks.” Wilson, *supra*, 23 Quinnipiac L. Rev. at 778. As the distinction between litigation and arbitration erodes, businesses will stop including arbitration provisions in their contracts in the first place, concluding “that the known, class litigation, is preferable to unknown, class arbitration.” *Id.* Thus, the consequence of conditioning the enforcement of consumer arbitration provisions on the business subjecting itself to class-wide arbitration would not be fairer or more efficient arbitration—but rather *more litigation* and *less arbitration*. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA. Accordingly, *Discover Bank* is impliedly preempted by the FAA.¹³

¹³ Indeed, although the California Supreme Court claimed that the rule it articulated in *Discover Bank* “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements” (113 P.3d at 1112), in practical effect it discriminates against arbitration. Because class procedures destroy the benefits of arbitration while unacceptably increasing the risks, virtually all consumer arbitration agreements either expressly or implicitly prohibit class arbitration. By

Several courts around the country have expressly or implicitly held that the FAA preempts state-law rules superimposing class actions on arbitration. For example, the Tennessee Court of Appeals has expressly held that, regardless of any state-law concern about “the unavailability of class action relief,” “the Supremacy Clause of the Federal Constitution * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action.” *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001). Similarly, a federal district court in West Virginia recently rejected the state supreme court’s holding that arbitration provisions containing class waivers are unconscionable when the damages sought are small, finding that holding to be preempted by the FAA. *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005).

Moreover, two federal courts of appeals, while not using the term “preemption,” have expressed the view that a state-law rule conditioning the enforceability of an arbitration provision on the availability of class-wide arbitration is incompatible with the objectives of arbitration. Most significantly, the Fifth Circuit rejected a claim that the class-arbitration prohibition in Cingular’s

contrast, very few contracts that do not require arbitration prohibit judicial class actions. In substance then, *Discover Bank* disproportionately burdens arbitration and hence violates Section 2 of the FAA. *Cf. Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) (“The commerce clause forbids discrimination, whether forthright or ingenious.”).

original arbitration provision was unconscionable, explaining that “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 Credit Bureau Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)); *see also id.* at 176 (for parties to demand “all of the procedural accoutrements that accompany a judicial proceeding” would undermine “the point of arbitration”). More recently, the Eleventh Circuit explained that a prohibition of class arbitration is “consistent with the goals of ‘simplicity, informality, and expedition’ touted by the Supreme Court in *Gilmer*.” *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (quoting *Gilmer*, 500 U.S. at 31), *pet. for cert. pending*, No. 05-959 (filed Jan. 30, 2006). To say that a prohibition of class arbitration is consistent with the goals of the FAA is the same thing as saying that a state-law rule that bans such provisions, despite the parties’ agreement to them, is inconsistent with the goals of the FAA and hence is preempted.

CONCLUSION

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

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Cingular are aware of the following related cases:

Laster v. T-Mobile USA, Inc., No. 06-55010: T-Mobile's appeal arising out of the same case in the district court.

Cervantes v. Pacific Bell Wireless LLC, No. 06-55162: Cingular's appeal from the denial of its motion to compel arbitration and stay litigation that raises closely-related issues.

Ford v. AT&T Wireless, No. 06-55086: Cingular's appeal from the denial of its motion to compel arbitration and stay litigation that raises closely-related issues.

Ford v. T-Mobile USA, Inc., No. 06-55082: T-Mobile's appeal arising out of the same case in the district court as No. 06-55086.

Ford v. VeriSign, Inc., No. 06-55118: VeriSign's appeal arising out of the same case in the district court as No. 06-55086.

Lozano v. AT&T Wireless Servs., Inc., No. 03-56677: Appeal from the denial of a motion to compel arbitration that raises closely-related issues.

DATED: April 7, 2005

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

I certify that:

X. 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 8,349 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, or is
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DATED: April 7, 2006

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Addendum 1

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2006, I filed the original and copies of the foregoing brief and Excerpts of Record with the Clerk of the Court by third-party commercial carrier for delivery within 3 calendar days, and I served two copies of the foregoing brief and one copy of the Excerpts of Record by third-party commercial carrier for delivery within 3 calendar days on the parties herein, at the following addresses:

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